ISLAMABAD LAW REVIEW

Vol 7 Issue 1

Jan - June 2023

A Journal of the Faculty of Shariah and Law

International Islamic University, Islamabad

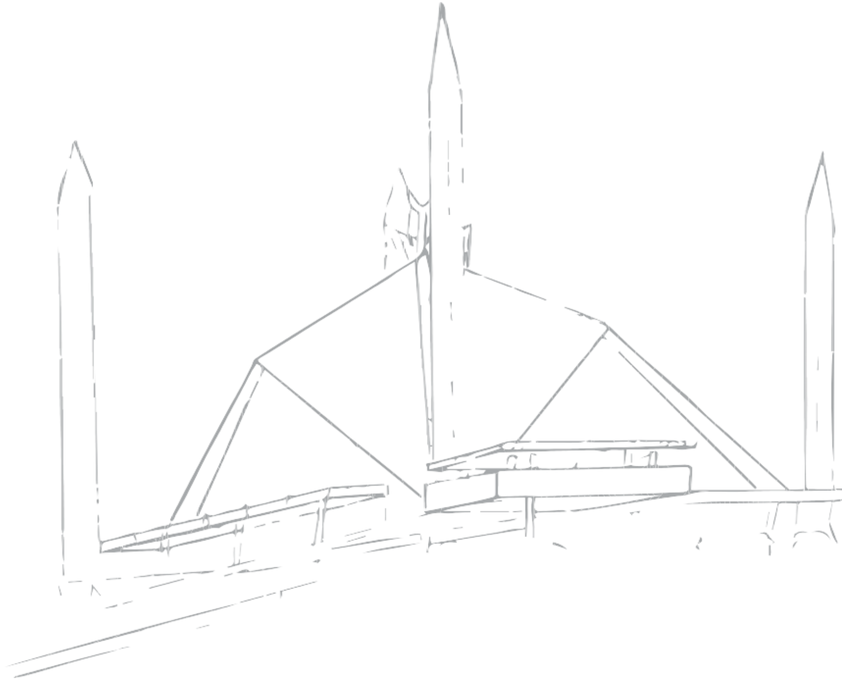
ISSN 1992-5018

ISLAMABAD

LAW REVIEW

Biannual Research Journal of Faculty of Sharīʿah & Law, International Islamic University, Islamabad

Volume 7, Issue 1, Jan-June 2023



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International Islamic University

ISLAMABAD

LAW REVIEW

Volume 7

Issue 1 (Jan-June 2023)

FACULTY OF SHARĪʿAH & LAW
INTERNATIONAL ISLAMIC UNIVERSITY
SECTOR H-10, ISLAMABAD

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Islamabad Law Review Vol. 7, Issue 1, 2023

Role of Shell Companies in Money Laundering Schemes: Identifying and Mitigating Legal and Technical Challenges for Banks in Pakistan

Aamir Khan [*]
Dr. Naureen Akhtar[**]

Abstract

The integrity of the financial system is significantly jeopardized by money laundering both in Pakistan and abroad. Shell companies are non-trading corporations without a physical location, ongoing business activities, or staff members. While they are often established for legitimate reasons, such as holding assets or managing investments, their lack of transparency and complex ownership structures make them vulnerable to exploitation for money laundering purposes. This article explores the role of shell companies in money laundering and provides insights into how banks in Pakistan can identify and mitigate the associated risks to ensure compliance with anti-money laundering (AML) regulations. It investigates how shell companies engages in money laundering schemes by exploiting loopholes in the legal frameworks in developing countries like Pakistan where banking institutions have weaker compliance rates with the regulatory frameworks. To address this issue, a qualitative doctrinal research methodology, based on documentary analysis is employed. Accordingly, this paper critically examines the national statutes, regulations, and policies in Pakistan, and other existing data relating to role of shell companies in money laundering schemes. The analysis concludes that by adopting a proactive and collaborative approach, banks and regulatory authorities in Pakistan can effectively combat financial crimes and threats posed by the shell companies to safeguard the integrity of the financial system.

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Key Words: Money Laundering; Shell Companies; Anti-Money Laundering Compliance; and Anti-Money Laundering Regulations

1. Introduction

Criminals, particularly money launderers who wish to create the idea that their money came from legal sources, sometimes use shell companies, which are also popularly referred to as ghost corporations and during the course of the last several years, companies and government agencies have made measures to cut down on crimes of this nature.[1] A corporation is considered to be a "shell" if it does not have any employees, assets used in operations, or physical premises. These businesses are purposefully set up to disguise ownership information from other companies, law enforcement, and the general public, enabling fraudsters to conceal illicit cash, get around AML requirements, and evade paying taxes. While there may be legitimate justifications for setting up a shell company, such as a startup using it as a means of raising capital, most of the time, they are utilized for illegal activities.[2] Shell companies, with their opaque structures, can be pivotal facilitators of money laundering schemes.

Money laundering and shell corporations are related concepts. On behalf of their consumers, shell companies accept financial payments. Simply said, it indicates that large sums of cash are laundered and deposited into their business account. Then, using fake invoices, the shell company transfers the money to money-launderers' accounts and eventually legitimizes the funds. Such businesses are typically established in nations with laxer legal systems or less restrictive jurisdiction. Additionally, shell companies frequently handle a large number of transactions, maintaining

[1] Milind Tiwari, Adrian Gepp and Kuldeep Kumar, "A Review of Money Laundering Literature: The State of Research in Key Areas," *Pacific Accounting Review* 32, no. 2 (2020): 278, doi:10.1108/PAR.06-2019-0065.

[2] Brigitte Unger and Elena Madalina Busuioc, *The Scale and Impacts of Money Laundering*, (UK: Edward Elgar Publishing., 2007), 47.

anonymity which makes it challenging for law enforcement bodies to identify the real source of the money. Due to their secretive regulations that provide advantages to foreign investors to lure capital, the United Kingdom and various other European nations, including Luxembourg, Austria, Denmark, Sweden, Switzerland, the Netherlands, Jersey, Ireland, and Germany, are said to be the best locations for shell companies. For instance, Germany does not tax the overseas revenue of companies that are not residents. Similar to this, Ireland provides reduced tax rates on investments to multinational corporations.[3]

Numerous leaks have revealed the names of wealthy Pakistanis, including politicians, former military personnel, judges, and government officials who owned shell companies to conceal their wealth. In 2016, the Panama Papers were made public, and they exposed the extent to which shell businesses were being utilized all across the world to launder money. Leaked documents revealed that shell companies were established in a number of low-regulatory jurisdictions, such as the British Virgin Islands and the Cayman Islands, with many of these enterprises linked to well-known politicians and their families. Shell companies pose a serious threat to anti-money laundering efforts.[4] Due to the leak, international tax authorities were able to collect about $500 million and pursue several criminal cases against the involved businesses and individuals. Some estimates place the annual cost of the United States' use of shell corporations at around $70 billion. Businesses must be aware of the AML risk that shell

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[3] Ping He, "A Typological Study on Money Laundering," *Journal of Money Laundering Control* 13, no. 1 (2010): 23, DOI: 10.1108/13685201011010182.

[4] Nicholas Vail, "Cracking Shells: The Panama Papers & Looking to The European Union's Anti-Money Laundering Directive as a Framework for Implementing a Multilateral Agreement to Combat the Harmful Effects of Shell Companies," *Texas A&M Law Review* 5, no. 1 (2018): 133, doi:10.37419/ LR.5.I1.4.

companies provide and spot customers trying to use them to launder money given the gravity of the danger to the legitimate financial system.[5]

In Pakistan, getting information on beneficial ownership was historically the biggest obstacle, making it impossible to conclude even a single inquiry. However, each state is now required to disclose information about beneficial ownership under an amendment to Financial Action Task Force (FATF) Recommendation 24.[6] Accordingly, Pakistan is also under an obligation to take essential measures and collaborate closely with the international community to align its anti-money laundering and counterterrorism financing (AML/TF) regime with best practices throughout the world.[7]

Therefore, the primary aim of this research is to determine role of shell companies in money laundering schemes as well as the legal and technical challenges Pakistani banks encounter in recognizing and combating such financial crimes. The paper also seeks to investigate feasible plans of action and answers that can lessen these challenges and maintain the credibility of Pakistan's financial system. By fulfilling these objectives, this research aspires to help readers gain a better knowledge of Pakistani banks' potential and problems in the fight against money laundering and terrorist funding.

2. Role of Shell Companies in Money Laundering Schemes

By creating a shroud of anonymity that makes it challenging to identify the genuine beneficiaries of illegal activities, shell corporations play a crucial

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[5] "Shell Companies and Money Laundering," | Comply Advantage accessed April 29, 2023. https://complyadvantage.com/insights/shell-companies-money-laundering/.

[6] “Financial Action Task Force (FATF) Recommendation” (2012), rec. 24.

[7] Financial Action Task Force, "Guidance on Beneficial Ownership of Legal Persons." Home, Accessed April 29, 2023. https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html.

part in money laundering operations. Numerous tactics are employed for this purpose, most common among those are discussed below.

2.1. Offshore Accounts and Transfer of Funds

Criminals can transfer illicit funds across borders undetected by creating bank accounts in the names of fictitious companies. The genuine identities of the people participating in the money laundering process can be concealed via the employment of shell corporations. Criminals can keep some anonymity and evade discovery by forming a shell corporation in a country with loose corporate transparency rules. In offshore countries with high levels of secrecy and little oversight, many shell businesses are registered. These places make it simpler for criminals to create and run shell businesses, transfer funds across accounts, and avoid being caught by the police.[8]

Offshore accounts are financial accounts that a person or business opens in another nation. These accounts can be used for unlawful acts like money laundering or tax evasion, although they are frequently used for legal objectives like foreign commercial transactions or tax optimization. Transferring money between offshore accounts is one method that might be utilized for unethical purposes using offshore accounts. Through a series of transactions that are designed to conceal the true origin of the cash, money can be moved from one offshore account to another. The final objective is to give the impression that the money is genuine. It is feasible to stay out of paying taxes if one uses accounts in foreign countries. It is possible for an individual or a firm to avoid paying taxes in their home country by moving money to an offshore account in a nation that has low or no taxes, then opening the account in that country. Offshore accounts can also be used to

[8] Jason C Sharman. "Shopping for Anonymous Shell Companies: An Audit Study of Anonymity and Crime in the International Financial System," *Journal of Economic Perspectives* 24, no. 4 (2010): 138, doi:10.1257/jep.24.4.127.

conceal the proceeds of illicit activity. For instance, a drug dealer may move money earned from the sale of narcotics to an offshore account so that it may be kept there and out of the reach of police authorities.[9]

The Panama Papers case is one such instance involving offshore accounts in Pakistan.[10] Several prominent Pakistanis, including the then-Prime Minister Nawaz Sharif and his family, were found to have set up offshore companies and accounts in tax havens to hold their wealth.[11] It was revealed through a massive document leak from the Panamanian law firm Mossack Fonseca in 2016. Opposition parties in Pakistan claimed that the Sharif family had used these offshore accounts to engage in money laundering and corruption. The Pakistani Supreme Court took note of the situation and opened an investigation. According to the investigation, the Sharif family established offshore businesses in the British Virgin Islands and sent these businesses millions of dollars from Pakistan. These offshore accounts are thought to have been used to launder money that was allegedly gained via corruption and bribes from numerous government contracts.[12]

Similar to this, the Axact affair involved allegations that a Pakistani IT firm by the name of Axact ran a bogus diploma mill and used offshore accounts in Dubai and the US to launder millions of dollars. Several people, including the CEO of Axact, were apprehended and found guilty in the case.[13] Another instance is the Bahria Town case, which involves

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[9] María-Jesús Segovia-Vargas, "Detection of Shell Companies in Financial Institutions Using Dynamic Social Network," *Expert Systems with Applications 207* (2022): 9. doi.org/10.1016/j.eswa.2022.117981.

[10] Imran Khan versus Muhammad Nawaz Sharif, PLD 265 (Supreme Court 2017).

[11] Syed Abdul Siraj, and Anbreen Waheed, "Framing of Panama Leaks in Pakistan's Leading Newspapers," *Pakistan Journal of Criminology* 11, no. 1 (2019): 84-100. DOI:10.17051/ilkonline.2021.05.778.

[12] Zahra Dsouza, "The Panama Papers Verdict and Political Accountability in Pakistan," South Asia@LSE, Accessed May 02, 2023. https://blogs.lse.ac.uk/southasia/2017/05/09/the-panama-papers-verdict-and-political-accountability-in-pakistan/.

[13] Nasir Sultan, Norazida Mohamed, Muhammad Adnan Bashir, and Muhammad Farhan Bashir, "The Anti-Money Laundering and Counter Financing of Terrorism Policy

accusations of corruption and money laundering against the CEO of the Pakistani real estate firm Bahria Town. The CEO was accused of establishing offshore businesses and accounts in Dubai and the British Virgin Islands in order to launder funds earned via bribery and corruption. The CEO agreed to pay a fine and give the Pakistani government ownership of some of his assets as part of the settlement of the lawsuit.[14]

The researcher analyses offshore accounts may be utilized to aid illicit operations in a number of different ways. Governments and law enforcement organizations frequently demand increased openness in international financial transactions, including the disclosure of offshore accounts and the flow of money between them, in order to prevent illegal crimes. In order to properly investigate and punish people who participate in unlawful operations involving offshore accounts and the movement of cash, law enforcement authorities must cooperate internationally.

2.2. Concealment of Ownership of Assets

Shell corporations may be an important strategy for hiding asset ownership. Criminals might lessen their chance of being caught by concealing their ownership and control of assets by utilizing nominees or bearer shares. These corporations can be established in jurisdictions with liberal corporate disclosure rules or tax restrictions, allowing people or entities to disguise their true ownership of assets. These companies exist solely on paper and have no actual commercial activity. Holding assets like real estate or financial accounts in the name of the fake business rather than the real owner is one method shell businesses may be used to hide ownership of

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in Pakistan: Is it Truly Combating or Just a High-Level Desk Work Bureaucracy?" *Journal of Public Affairs* 22, no. 4 (2022): e2731, doi.org/10.1002/pa.2731.

[14] Federal Investigation Agency & others. Versus Axact (Pvt) Ltd, PLD 854 (Sindh High Court 2015).

assets. Because of this, it is challenging for law enforcement officials or other interested parties to determine who really owns the assets.[15]

Through the use of nominee directors or shareholders, shell companies can also be used to hide the ownership of assets. In this case, a nominee director or shareholder who has been chosen to serve on behalf of the real owner of the assets may own or control the shell corporation. By doing this, the real owner may continue to control the assets while maintaining their anonymity. The real ownership of assets can also be masked via the use of shell companies in conjunction with other financial arrangements, such as trusts. The employment of many shell companies in a convoluted web of corporate structures can sometimes make it even harder to determine who really owns the assets.[16]

In the Omni Group case, it was claimed that the Pakistani conglomerate's owners had used offshore companies and accounts in Dubai and the UK to launder billions of rupees. According to reports, the money was collected through fraud and bribes from several government contracts. In order to hide the real owner of the assets at issue, a sophisticated network of shell corporations and other financial structures were utilized in the case.[17]

This article asserts that for law enforcement organizations and governments all around the world, the use of shell companies to hide asset ownership presents a serious difficulty. The disclosure of beneficial ownership information as well as the implementation of measures to track

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[15] Bonnie Buchanan, "Money Laundering—A Global Obstacle," *Research in International Business and Finance 18*, no. 1 (2004): 121, doi: 10.1016/j.ribaf.2004.02.001.

[16] Graham Stack, "Baltic Shells: On the Mechanics of Trade-Based Money-Laundering in The Former Soviet Space, " *Journal of Money Laundering Control* 18, no. 1 (2015): 93, DOI: 10.1108/JMLC-10-2013-0040.

[17] Shamrez Ali, Sundus Waqar, and Muhammad Haris, "The Nexus between Political & Institutional Corruption Events with the Stock Market: A Study of Pakistan," *Journal of Finance and Economics Research* 4, no. 1 (2019): 69, DOI: 10.20547/jfer1904105.

and report unusual financial activities are just a few of the steps that governments and law enforcement organizations have taken to increase transparency and accountability in financial deals in order to combat this problem.

2.3. Invoice Fraud

For items or services that were never delivered, false invoices might be made using shell companies. Criminals might pass off the transit of illegal cash as legitimate company costs by exaggerating the value of these transactions or just making them up. Invoice fraud can also be carried out through shell corporations. This kind of fraud entails a shell firm producing phoney invoices that are then presented to another corporation for payment. The shell corporation may present as a reliable vendor or supplier, but in reality, it is merely there to make false invoices and has no actual business activities.[18]

The company that gets the fraudulent invoices could not recognize them as such and would pay them without checking them, which would result in a loss of money. Due to the fact that the invoices may seem genuine and may be processed alongside authentic invoices, this form of fraud might be challenging to spot. Fraudulent invoices can be used to dodge taxes, launder money, or steal money from businesses. In rare circumstances, it may be possible to further hide the real ownership of the companies involved by employing many shell corporations in a convoluted network of corporate structures.[19]

Corporations frequently engage in these kinds of operations in Pakistan. In the instance of M/s TMC (Pvt.) Ltd., it was claimed that the CEO of the Pakistani security services provider utilized a network of front

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[18] J. D., Agarwal and Aman Agarwal, "Money Laundering: The Real Estate Bubble," *Finance India* 22, no. 1 (2008): 57, doi.org/10.2139/ssrn.3768297.

[19] Jason Sharman, "Tackling Shell Companies: Limiting the Opportunities to Hide Proceeds of Corruption," *U4 Brief 2012*, no. 10 (2012).

businesses to perpetrate invoicing fraud. According to reports, the CEO prepared fictitious invoices for security services that were never rendered and presented them to several businesses for payment. The monies were subsequently moved to the shell companies under the CEO's and his cohorts' control. The CEO and many of his associates were arrested and found guilty when the Federal inquiry Agency (FIA) discovered the scam and began an inquiry. The episode brought to light the hazards of invoicing fraud in Pakistan as well as the utilization of shell organizations in such schemes, as well as the significance of solid internal controls and meticulous due diligence procedures.[20]

The former chief executive officer of the Pakistani brokerage firm KASB Securities is accused of invoicing fraud by creating a shell company in a case that has made headlines. It has come to light that the CEO is the one who submitted a fake invoice to KASB Securities for payment, claiming to have rendered services that were never done. After the CEO's shell company, which was controlled by the CEO, received the funds, they were transferred there. These examples serve to underscore the critical need for increased transparency in the ownership of companies and the actions of financial institutions in Pakistan.[21]

3. Identifying Legal and Technical Challenges for Banks in Pakistan

3.1. Legal Challenges

Banks in Pakistan that work with shell companies face a number of challenges. In order to safeguard banking institutions and their legitimate customers, it is crucial to recognize challenges including legal ambiguities

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[20] Aamir Khan, and Naureen Akhtar, "Legal, Administrative and Judicial Framework in Pakistan to Combat Tax Evasion and Money Laundering: An Analytical Study," *Review of Politics and Public Policy in Emerging Economies 3*, no. 1 (2021): 74, doi.org/10.26710/rope. v3i1.1761.

[21] Dawn News, "Ex-Director Laundered Money through KASB Bank: BIPL," *Dawn,* May 04, 2023. https://www.dawn.com/news/1222913.

and technical difficulties. As shell companies are used for hiding the true owners and beneficiaries of the offshore accounts and assets, therefore, it is essential to analyzed the law relating to the concealment of ownership.

3.1.1. Companies Act, 2017

The Companies Act, 2017 in Pakistan ushered in a wide array of reforms meant to streamline corporate governance, enhance transparency, and ensure a robust regulatory framework for corporate entities operating in the country. One such salient feature of the Act is the emphasis on the disclosure of beneficial ownership. Companies are required under Section 453 of the Companies Act of 2017 to provide information about their beneficial owners. According to the provision, each company is required to keep a register of who really owns its shares in compliance with the regulations established by Pakistan's Securities and Exchange Commission (SECP).[22] The names and other information about the company's beneficial owners, such as their national identity card or passport numbers, as well as the kind and degree of their beneficial ownership of the company's shares, must be included in the register.[23]

The Companies Act, 2017 of Pakistan has instituted penalties for non-compliance with the beneficial ownership disclosure requirements. Specifically, under Section 452 (2), a person who either fails to provide the required beneficial ownership information or provides false data faces consequences as the company will not register a transfer of shares in their name.[24] In further strictness, Section 452 (3) states that non-disclosure or false information provision regarding one's status as a beneficial owner is a punishable offense.[25] Upon conviction, this can lead to a fine up to PKR 1

[22] "The State Bank of Pakistan Act," Pub. L. No. XXXIII (1956), sec. 17.

[23] Munir Ahmad Zia, Rana Zamin Abbas, and Noman Arshed, "Money Laundering and Terror Financing: Issues and Challenges in Pakistan," *Journal of Money Laundering Control* 25, no. 1 (2022): 193, doi.org/10.1108/JMLC-11-2020-0126.

[24] "Companies Act," Act No. XIX (2017), sec. 453 (2).

[25] Ibid, sec. 452 (3).

million. Companies too are held accountable. As per Section 452 (4), companies that don't maintain, update, or provide accurate beneficial ownership details, or officers of such companies, are subjected to a level 2 penalty on the standard scale.[26] Furthermore, Section 453 imposes a daily fine of PKR 10,000 on any substantial shareholder or officer of a listed company who neglects to provide the company with the necessary notice about their beneficial ownership status within the given time frame.[27] These stringent measures underscore the Act's commitment to enhancing corporate transparency and accountability. Nevertheless, the true effectiveness of these provisions rests on their consistent enforcement, particularly by key regulatory bodies like the Securities and Exchange Commission of Pakistan (SECP).

The Companies Act of 2017 includes a provision for beneficial ownership declarations, which is a step in the direction of more accountability and transparency in company ownership; nonetheless, there are significant considerations that could restrict the effectiveness of this provision. One of the issues is that the Act excludes from the definition of beneficial ownership anyone who directly or indirectly possesses or control more than 10% of the company's shares or voting rights. This is a concern for several reasons.[28] This might mean that other persons or groups with the potential to have a significant effect on the way the company is managed, such as those in crucial management roles or those with the authority to control the firm through contracts, are excluded. People or groups may try to disguise their true ownership or control of the company by abusing this restriction and using it to their advantage.[29]

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[26] "Companies Act," Act No. XIX (2017), sec. 452 (4).

[27] Ibid, sec. 453.

[28] Afrasiab Ahmed Rana, "Scope and Objective of IOSCO Principles and Effectiveness in Pakistan," *Available at SSRN* 3683464 (2020).

[29] Adeel Mukhtar, "Money laundering, Terror Financing and FATF: Implications for Pakistan" *Journal of Current Affairs* 3, no. 1 (2018): 55.

In instances in which there are grounds for suspecting that money laundering, fraud, or other criminal acts are being engaged in, the Securities and Exchange Commission of Pakistan (SECP) has been granted the authority to investigate a company's ownership, control, or beneficial ownership of the business in question. Section 552 of the Companies Act of 2017 is where you'll find this newfound authority. This clause is connected with the measures to counter financing of terrorism (CFT) and anti-money laundering (AML), which brings Pakistan's regulatory system into accordance with global norms.[30] The provision places a focus on taking a proactive approach to combating unlawful activities, such as the misuse of shell corporations for nefarious purposes, by providing the SECP with the ability to promptly evaluate organizations that are suspected of being involved in financial crime. This exploitation of shell corporations for nefarious purposes is one example of an illegal activity. The introduction of such a provision lends assistance to Pakistan's efforts to clamp down on financial crimes by giving regulatory authorities the ability to take swift and decisive action against anybody who may be involved in money laundering or other illicit financial practices. This can help Pakistan better combat financial crimes. Another benefit is the provision's ability to operate as a disincentive against the use of businesses for illegal purposes. For anyone considering using shell firms for illicit purposes, just being aware that the SECP has the power to examine ownership structures and carry out in-depth investigations serves as a deterrent.[31] This deterrent impact can help reduce the frequency of such behaviors and encourage more ethical and proper business behavior.[32]

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[30] "Companies Act," Act No. XIX (2017), sec. 552.

[31] Fatima Wahla, "Theory and Practice of Corporate Governance: An Analysis of the Agency Problems in Pakistan," *LUMS LJ 5* (2018): 19.

[32] Yaseen Ullah, "Corporate Governance and Firm Financial Performance: Empirical Evidence from Pakistan Stock Exchange" *International Journal of Management Research and Emerging Sciences* 12, no. 1 (2022): 823, DOI:10.2139/ssrn.2551636.

Financial irregularities can be addressed through the use of Section 552 of the Companies Act of 2017, but this provision also creates a number of issues that must be properly explored. Finding a middle ground between putting an end to illegal actions and ensuring that due process is followed is a necessary first step.[33] The SECP must have the capacity to conduct investigations, but it is equally crucial that this authority be employed in line with the safeguards established by law to avoid the abuse of power. To keep investigations honest and reliable, it is critical that due process rights be protected. The rule's subjective "reasonable grounds" provision might lead to confusion. Without a precise definition, there might be arguments about whether or not the inquiry requirement has been met, leading to potential legal ambiguities and complications. Concerns over personal privacy remain a major drawback. Even if the goal of the law is to prevent financial irregularities, investigations may nonetheless infringe the private rights of individuals and corporations. Striking a balance between the need for efficient inquiry and robust privacy protection protections is crucial to ensuring that legitimate rights are not infringed upon unduly.[34]

A further issue is that the Act does not include provisions for the verification of the information that is submitted to the register of beneficial ownership. Because of this, it may become easy for individuals or groups to register information that is false or deceptive and to conceal their true ownership or control of the organization. In addition, the Act does not demand the publication of information regarding beneficial ownership of partnerships or any other information regarding unincorporated entities. Because of this, it would be feasible for individuals or groups to conceal the assets over which they have ownership or control by making use of these

[33] "Companies Act," Act No. XIX (2017), sec. 552.

[34] Kashif Arif, Che Ruhana Isa, and Mohd Zulkhairi bin Mustapha, "A Review of the Corporate Governance Structure of Pakistan," *JISR Management and Social Sciences & Economics* 21, no. 2 (2023): 42, DOI:10.31384/jisrmsse/2023.21.2.3.

arrangements. The last point, but certainly not the least, is that the incapacity of the regulatory authorities to enforce compliance with the regulation may possibly hamper the efficacy of the disclosure duty.[35]

The researcher contends that though the provision for beneficial ownership declaration that was included in the Companies Act, 2017, is a step in the right direction towards increased accountability and transparency in corporate ownership in Pakistan, there are certain concerns that need to be overcome in order to ensure that the provision would be effective.

3.1.2. Anti-Money Laundering Act, 2010

Banks in Pakistan confront many of the same regulatory hurdles with shell companies as their international peers, notably with regards to meeting anti-money laundering (AML) requirements. Pakistan approved the Anti-Money Laundering Act (AMLA) in 2010 with the goal of ending money laundering and increasing financial sector transparency. However, the financial industry may have difficulties in implementing and staying in compliance with this regulation.[36]

The lack of a definition or mechanism for identifying a "Shell Company" under the Anti-Money Laundering Act of 2010 is a significant issue. Although the term is often used derogatorily to denote companies without significant assets or ongoing commercial activity, this is not always the case. Legitimate businesses may also have very limited or no activity for a variety of reasons. It might be confusing for financial institutions to tell the two apart. Defining and identifying shell companies in a financial and regulatory setting is difficult. Even though many terms in finance have established definitions, the term "Shell Company" is still up for discussion

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[35] Qamar Uz Zaman, Kinza Aish, Waheed Akhter, and Syed Anees Haidder Zaidi, "Exploring the Role of Corruption and Money Laundering (ML) On Banking Profitability and Stability: A Study of Pakistan and Malaysia," *Journal of Money Laundering Control* 24, no. 3 (2021): 534, doi:10.1108/JMLC.07-2020-0082.

[36] “Anti-Money Laundering Act,” Act No. VII (2010).

in a number of legal systems. Inconsistencies in how these things are seen and handled are often the result of a lack of a shared understanding. Another issue that adds difficulty is distinguishing between legitimate and malicious software programs. Criminal activities including fraud, tax evasion, and money laundering may find shell firms to be particularly useful covert operations. While shell companies have legitimate uses including holding assets, facilitating mergers, and piloting new company ideas, they may also be exploited for illegal purposes.[37]

The public's perspective and the consequences for regulation are likewise impacted by these issues. Banks run the risk of serious regulatory punishment if they unwittingly work with criminal shell companies. Overidentification, on the other side, might lead to false positives and turn off real businesses. Since shell businesses have such a bad connotation, even unintended links can do substantial damage to a bank's reputation, making this balancing act all the more challenging. Essentially, banks have to strike a balance between fostering genuine business connections and guarding against threats. This uncertainty about "shell company" need both precise regulatory guidance and stringent due diligence checks.[38]

Secondly, the issue of doing adequate investigation and verifying the identities of customers is an essential component of the contemporary banking system, particularly when considering the role of shell companies. As part of the regulatory criteria that must be met, financial institutions such as banks are expected to comply with the Know Your Customer and Customer Due Diligence processes. The goal of these standards is to put a halt to unlawful activities like money laundering, sponsoring terrorism, and

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[37] Irfan Hassan Jaffery, and Riffat Abdul Latif Mughal, "Money-Laundering Risk and Preventive Measures in Pakistan," *Journal of Money Laundering Control* 23, no. 3 (2020): 708. DOI:10.1108/JMLC.02-2020-0016.

[38] Nasir Sultan, Norazida Mohamed, and Dildar Hussain, "Tax Amnesty Schemes, Anti-Money Laundering Regulations and Customer Due Diligence by Financial Institutes: An Evaluation of the Implementation Issues in Pakistan," *Qualitative Research in Financial Markets* 15, no. 3 (2023): 548, DOI:10.1108/QRFM.02-2022-0022.

others by requiring banks to verify the identities of the customers they do business with. [39]According to Section 5 of the Anti-Money Laundering Act of 2010, all banks and money changers are required to preserve records of their customers' transactions and report any suspicious activity to the Financial Monitoring Unit (FMU) of the State Bank of Pakistan.[40] The law also requires non-financial businesses and professions, such solicitors, accountants, and real estate agents, to do client due diligence and report suspicious transactions to the FMU.

Despite the fact that this provision is a step in the right direction towards preventing money laundering and the financing of terrorism, there are some issues that could put a damper on its effectiveness. One issue is that the Act does not provide sufficient clarity about the characteristics of effective consumer due diligence methods. Because of this, the regulation can be applied inconsistently by different types of financial institutions, which would make it much simpler for criminals to take advantage of vulnerabilities in the system.[41] Uncertainty over the point at which the FMU is notified of potentially suspicious transactions is another issue that must be addressed. Because they might attract the attention of regulators, financial institutions might be hesitant to report transactions that are less significant than the threshold. As a consequence of this, potentially suspicious transactions may not be reported, which makes it much easier for criminals to engage in unlawful behaviour. In addition, the Act does not levy any penalties or other punishments against financial institutions that

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[39] Amir Alam, Imran Ahmad Sajid, and Sajjad Hussain, "Money Laundering as an Organized Crime: The Legal and Institutional Measures for Controlling Money Laundering in Pakistan," *Journal of Social Sciences Review* 2, no. 1 (2022): 15 DOI: https://doi.org/10.54183/jssr.v2i1.29.

[40] "Anti-Money Laundering Act," Act No. VII (2010), sec. 5.

[41] Naureen Akhtar, Aamir Khan, and Mohsin Raza, "Technological Advancements and Legal Challenges to Combat Money Laundering: Evidence from Pakistan," *Pakistan Journal of Humanities and Social Sciences* 11, no. 1 (2023): 478, doi: https://doi.org/10.52131/pjhss.2023.1101.0365.

are due to comply with the obligations of Section 5 for continued monitoring, client due diligence, and reporting. It is possible that the provisions of the Act will have less of an impact because there are no mechanisms available to enforce them.[42]

One key example is the Panama Papers. This major international scandal revolved around the leak of 11.5 million files from the database of the world's fourth-largest offshore law firm, Mossack Fonseca. The documents revealed detailed information on more than 214,000 offshore companies, including the identities of shareholders and directors. The scandal highlighted the challenges banks face in identifying the real owners behind shell companies.[43] Over two hundred Pakistanis have been discovered as having offshore enterprises as a result of the Panama Papers. These Pakistanis include businessmen, media outlets, judges (one of whom is currently serving and one of whom has retired), and, most controversially, politicians and their families.[44]

In addition, Section 6 stipulates that specified non-financial companies and professions, such as attorneys, accountants, real estate agents, and dealers in precious metals and stones, comply with the requirements for customer due diligence and report suspicious transactions to the FMU. This includes the businesses and professions that deal in precious metals and stones.[45]

Nevertheless, there are a few concerns that require the attention of legislative bodies. Due to a lack of resources and the ability to do so, the regulatory authorities are unable to ensure that the provisions of the Act are adhered to, which is one of the problems. As a result, the law could not be

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[42] Muhammad Qadeer, Shabnam Gul, and M. F. Asghar, "Money Laundering and Power Politics in Pakistan," *Global Legal* (2021): 47. Doi;10.31703/glsr.2022 (VII-I).

[43] Ibid.

[44] Najma Minhas, "The Panama Papers and Pakistan: Beyond Nawaz Sharif," *The Diplomat*, May 05, 2023. https://thediplomat.com/2016/04/the-panama-papers-and-pakistan-beyond-nawaz-sharif/.

[45] “Anti-Money Laundering Act,” Act No. VII (2010), sec. 6.

applied properly, which might make it simpler for people or organizations to participate in money-laundering or terrorist funding operations. Additionally, it's possible that not all instances of money laundering or terrorist financing will be caught by the Act's requirements for customer due diligence and reporting of suspicious transactions. For the purpose of concealing their illegal activities, criminals may employ sophisticated techniques, making it challenging for financial institutions and other businesses to identify suspicious transactions. In other cases, businesses could be reluctant to disclose suspicious transactions out of concern for their reputation or for losing revenue. Under reporting of unusual transactions might happen as a result, which would make the requirements of the Act less effective.[46]

The researcher states that despite the fact that the Anti-Money Laundering Act of 2010 provides a legislative framework for the prevention of money laundering and the funding of terrorist organizations in Pakistan, there are several difficulties that need to be rectified in order to guarantee that the law is effective. In this context, "issues" refers to things like increasing the capacity and resources of regulatory bodies, improving the effectiveness of customer due diligence and reporting requirements, and addressing the reluctance of companies to disclose suspicious transactions.

3.1.3. Benami Transactions (Prohibition) Act, 2017

Benami Transactions (Prohibition) Act of 2017 is another significant piece of legislation in this area. Benami transactions, which occur when property is owned by one person, but another person pays the consideration for the property, are forbidden by law in Pakistan. According to the Act, a "benami transaction" is any transaction in which property is given to or retained by

[46] Amir Alam, Imran Ahmad Sajid, and Sajjad Hussain, "Money Laundering as an Organized Crime: The Legal and Institutional Measures for Controlling Money Laundering in Pakistan," *Journal of Social Sciences Review* 2, no. 1 (2022): 16. DOI: https://doi.org/10.54183/jssr.v2i1.29.

a person while another person provides or pays the consideration for the property. The Act stipulates that a variety of parties, such as banks, other financial institutions, and officers of the Federal Board of Revenue, are obligated to report information on benami transactions to the appropriate government authorities.[47]

According to Section 2, a "benami transaction" is one in which a person possesses property or transfers property to another person while another person supplies or makes payment for the property. This type of transaction is illegal in the United States. The term "beneficial owner" is defined as the person who pays the consideration for the property, and the term "*benamidar*" is defined as the person in whose name the property is retained or transferred. Both of these terms are defined under the clause. Despite the fact that the term "benami transaction" and other related terms are defined in Section 2 of Pakistan's Benami Transactions (Prohibition) Act, 2017, there are some issues that could compromise the efficacy of the law.[48] A significant source of worry is the possibility that individuals or businesses would employ complex methods in order to conceal the beneficial ownership of property in order to get around the limits imposed by the Act. Because individuals can conceal their ownership of property by using trusts or other legal arrangements, benami transactions can be difficult to identify and prosecute.

Another problem is that the Act does not specify how much evidence must be shown to prove beneficial ownership. Proving that a transaction contains benami places the burden of proof on the prosecution, which may be challenging if there is inadequate evidence or if the real owner of the property is being concealed. Furthermore, assets held in the name of a

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[47] Aamir Khan, and Naureen Akhtar, "A Critical Appraisal of Tax Evasion as Predicate Offence for Money Laundering," *Pakistan Journal of Multidisciplinary Innovation* 1, no. 1 (2022): 42, doi: https://doi.org/10.59075/pjmi.v1i1.32.

[48] “Pakistan's Benami Transactions (Prohibition) Act,” Act No. V (2017), sec. 2.

benamidar who a party to the benami transaction is not cannot be seized under the Act. People who have done nothing wrong could lose their possessions as a result of the actions of others.[49]

The researcher observes that even if "benami transaction" and associated phrases are defined in Section 2 of Pakistan's Benami Transactions (Prohibition) Act, 2017, there are some concerns that need to be handled in order to guarantee that the Act is functional.[50] These challenges include eliminating the possibility for the requirements of the Act to be circumvented, providing more clarity about who bears the burden of proof when showing beneficial ownership, and ensuring that the provisions of the Act do not have an unjust impact on innocent parties.

In addition, Section 3 of the Act details the fines and seizure of assets that are to be enforced in the case of benami transactions, which are explicitly forbidden by the Act. Penalties for engaging in a benami transaction or aiding and abetting another to engage in a benami transaction, include up to seven years in prison and a fine of up to twenty-five percent of the fair market value of the benami property. Benami transactions might be difficult to detect and prove, which is an issue. When individuals or businesses employ sophisticated methods to conceal their ownership of property, it can be challenging to establish beneficial ownership and prove that a transaction is benami. There is also the possibility that the provisions of the Act will be abused for malicious reasons, which is another problem. If the Act were to be exploited to target political opponents or settle grudges, its efficacy in banning benami transactions may be compromised.[51]

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[49] Muhammad Subtain Raza, Qi Zhan, and Sana Rubab, "Role of Money Mules in Money Laundering and Financial Crimes a Discussion through Case Studies," *Journal of Financial Crime* 27, no. 3 (2020): 923. doi:10.1108/jfc.04-2020-0051.

[50] "Pakistan's Benami Transactions (Prohibition) Act," Act No. V (2017), sec. 2.

[51] Imran Ali, "Anti-Money Laundering Act 2010: A Critical Analysis," *LUMS LJ 5* (2018): 127.

The use of front companies to launder money is a significant challenge for financial institutions in Pakistan. If the real owners of assets cannot be positively recognized, then financial institutions in Pakistan may have a difficult time complying with the requirements of the Companies Act of 2017,[52] the Anti-Money Laundering Act,[53] and the Benami Transactions (Prohibition) Act of 2017.[54] Additionally, it might be challenging for banks in Pakistan to comply with the regulatory requirements specified in the Companies Act of 2017.[55] Companies are required to reveal the identity of any persons or organizations that possess, either directly or indirectly, more than 10% of the company's shares or voting rights, in accordance with the Companies Act of 2017. This obligation applies to companies, both public and private. However, using shell companies can make it difficult to determine who actually owns what. This is because the true beneficial owners of assets may be obscured by complex ownership structures. It is possible that this will make it more difficult to recover stuff that has been stolen.

In a manner that is analogous to this, the Anti-Money Laundering Act of 2010 mandates that banks and other financial institutions must keep records of the transactions that are carried out by their customers and must notify the Financial Monitoring Unit (FMU) of the State Bank of Pakistan of any activity that may raise suspicions. In addition, this law mandates that financial institutions must report any activity that may raise concerns to the Federal Bureau of Investigation.[56] This is due to the fact that the ownership of assets can be concealed through the use of sophisticated ownership structures. The Benami Transactions (Prohibition) Act, 2017, also prohibits the use of shell corporations for the purpose of money laundering; however,

[52] “Companies Act,” Act No. XIX (2017).
[53] “Anti-Money Laundering Act,” Act No. VII (2010).
[54] “Pakistan's Benami Transactions (Prohibition) Act,” Act No. V (2017).
[55] “Companies Act,” Act No. XIX (2017).
[56] “Anti-Money Laundering Act,” Act No. VII (2010).

its effectiveness may be limited due to the difficulties associated with detecting and proving benami transactions, as well as a lack of resources and the competence of regulatory bodies to execute the law.

3.2. Technical Challenges

The use of shell companies to launder money in Pakistan presents a number of technological issues for the country's banking system.

3.2.1. Identifying the True Beneficial Owners

One of the primary challenges is that it may be extremely challenging to identify the true beneficial owners of assets that are held through shell companies. Shell companies sometimes employ convoluted ownership arrangements that make it hard to identify the true owners and controllers of the business. Due diligence obligations under the 2010 Anti-Money Laundering Act and reporting suspicious transactions to regulatory authorities may become challenging for banks as a result.

The beneficial owners of assets may be determined using a variety of techniques, however there are certain difficulties and restrictions with these techniques. The intricacy of corporate ownership systems is one difficulty. Shell businesses frequently disguise the beneficial owners of assets by using complicated ownership arrangements, which can make it challenging for banks to undertake thorough customer due diligence and locate beneficial owners. Banks may need to make investments in cutting-edge technical solutions and skills in order to analyze vast volumes of data and find patterns of behavior that might be signs of money laundering or financing for terrorism. The use of front businesses to hide the real beneficial owners of the assets is one illustration of how intricate the ownership structure of the shell companies employed in this case was. To hide the ownership of a sugar mill, for instance, Lucky International was utilized as a front business. Tariq Sultan was said to be the real beneficial

owner of Lucky International, however it was later discovered that Tariq Sultan was really a front for a politician with connections to the Omni Group.[57]

The lack of openness in some countries is another problem. Beneficial owners may reside in nations without open ownership laws or with laws that exempt businesses from disclosing information about their beneficial owners. Because of this, it may be challenging for banks to locate and confirm the beneficial owners of assets held through shell companies in certain countries. The British Virgin Islands (BVI) are one example of an offshore tax haven. The BVI offers a high level of secrecy and anonymity for beneficial owners and has a large number of offshore companies established there. Because of this, it is challenging for banks and regulatory agencies to determine who really owns assets held by companies with BVI registrations. Similar to this, it was discovered that a number of well-known people and organizations utilized offshore tax havens, such Panama and the Seychelles, to hide the ownership of assets and evade paying taxes. It was challenging for regulatory authorities to spot and stop money laundering and terrorist financing operations in these jurisdictions due to the absence of openness and disclosure requirements.[58]

Banks may also incur time and expense in determining the beneficial owners of assets held by shell companies. Investigations into clients' ownership structures may involve extensive resources, including as specialized people, modern technology, and access to third-party vendors of services, which may not be accessible to all banks or be within their budgets. Axact, a business that was said to be offering phoney credentials

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[57] Irfan Hassan Jaffery, and Riffat Abdul Latif Mughal, "Money-Laundering Risk and Preventive Measures in Pakistan," *Journal of Money Laundering Control* 23, no. 3 (2020): 709, doi:10.1108/JMLC.02-2020-0016.

[58] Syed Sheheryar Ali Kazmi, and Muhammad Hashim, "E-Banking in Pakistan: Issues and Challenges," *International Journal of Academic Research in Business and Social Sciences* 5, no. 3 (2015): 50. doi:10.6007/IJARBSS/v5-i3/1498.

and degrees online, was the subject of an inquiry by Pakistan's Federal inquiry Agency (FIA) in 2015. According to the inquiry, Axact built up a network of fictitious institutions and universities and used a sophisticated web of shell companies to launder millions of dollars.[59]

To locate the beneficial owners of the assets held by the shell companies utilized in the fraud, the investigation into Axact required tremendous resources and knowledge. Over 330 shell companies had to have their ownership structures tracked down, and the people and organizations behind them had to be found. In order to track the flow of money across borders, it was necessary to conduct in-depth investigations into the bank accounts and financial dealings of the shell companies and their owners. This collaboration with foreign authorities also needed in-depth research.[60]

The researcher analyses despite the fact that finding the real beneficial owners of assets held by shell companies is essential for preventing money laundering and terrorist financing, these efforts face a number of obstacles. Banks, regulatory agencies, and other stakeholders will need to work together to make investments in cutting-edge technical solutions, increase the transparency of business ownership structures, and set up efficient channels for information exchange and privacy protection in order to address these difficulties.

3.2.2. Lack of Access to Information and Tracking and Monitoring Issues

Additionally, because transactions and assets are frequently moved between various nations and jurisdictions, the use of shell companies for money

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[59] Abdullahi Y Shehu, "The Asian Alternative Remittance Systems and Money Laundering," *Journal of Money Laundering Control* 7, no. 2 (2004): 176, doi: org/10.1108/13685200410809896.

[60] Muhammad Usman Kemal, "Anti-Money Laundering Regulations and Its Effectiveness," *Journal of Money Laundering Control* 17, no. 4 (2014): 416-427. doi:10.1108/JMLC.06-2013-0022.

laundering is frequently a global problem. This can make it challenging for banks in Pakistan to follow and keep tabs on these transactions, particularly if they lack access to data and information from other nations.[61] One challenge is getting information, especially when the beneficial owners are in another country. If banks are based in nations without transparent ownership regimes or that do not compel corporations to disclose information about beneficial owners, they may not have access to information about the beneficial owners of assets held via shell companies. Due to this, it may be challenging for banks to adhere to legal requirements for anti-money laundering and counter-terrorist financing. Monitoring and keeping track of money transactions is another challenge. Transactions must be tracked and monitored by banks in order to spot suspicious behavior and alert regulatory authorities. The employment of sophisticated money laundering methods, such as layering and structuring, however, can occasionally make it challenging to identify the source and final destination of cash. Banks may find it challenging to detect and stop money laundering and terrorist funding operations as a result.[62]

To locate the beneficial owners of the assets held by the shell companies utilized in the fraud, the investigation into Axact required tremendous resources and knowledge. Over 330 shell companies had to have their ownership structures tracked down, and the people and organizations behind them had to be found. In order to track the flow of money across borders, it was necessary to conduct in-depth investigations into the bank accounts and financial dealings of the shell companies and

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[61] Syed Azhar Hussain Shah, Syed Akhter Hussain Shah, and Sajawal Khan, "Governance of Money Laundering: An Application of The Principal-Agent Model," *The Pakistan Development Review* (2006): 1121, doi: https://doi.org/10.30541/v45i4IIpp.

[62] Ibid.

their owners. This collaboration with foreign authorities also needed in-depth research.[63]

Although some of the beneficial owners were based in other countries, like the United Arab Emirates (UAE), where they had established offshore businesses and bank accounts, this complicated the investigation. Due to the strong bank secrecy regulations in the UAE, it can be challenging to learn who the real owners are of the assets that corporations and bank accounts there hold. The investigators found it challenging to locate the genuine beneficial owners of the assets housed by the shell companies and follow the flow of money because they lacked access to information from the UAE authorities. As a result, the inquiry was delayed, and it was made clear how difficult it may be for banks and regulatory agencies in Pakistan to determine the true owners of assets held through shell companies if those owners are situated in nations with stringent bank secrecy laws and regulations.[64]

3.2.3. Lack of Use of Technology

Another difficulty Pakistani banks encounter in identifying and blocking money laundering and terrorist financing operations is the lack of technological adoption. Lack of contemporary technology infrastructure and instruments for financial transaction monitoring is one issue. The manual techniques used by many banks in Pakistan to monitor financial transactions can be time-consuming and error-prone. This can make it

[63] Bala Shanmugam, "Hawala and Money Laundering: A Malaysian Perspective," *Journal of Money Laundering Control* 8, no. 1 (2005): 39, doi.org/10.1108/13685200510621118.

[64] Shamshad Akhtar, "Pakistan: Changing Risk Management Paradigm–Perspective of The Regulator," *In ACCA Conference-CFOs: The Opportunities and Challenges Ahead, Karachi*, (2007): 8, doi.org/10.3390/ijfs8030042.

challenging for banks to spot suspicious behavior and promptly and effectively report it to regulatory authorities.[65]

Lack of funding for cutting-edge analytical tools and technologies like artificial intelligence (AI) and machine learning (ML) is another issue. Banks may use these technologies to analyze massive volumes of data and spot trends and abnormalities that could be signs of money laundering or terrorism funding. However, these technologies are still not widely used in Pakistan, and many banks might not have the funds or the know-how to put them into practice.[66]

Additionally, because cryptocurrencies and other digital assets are decentralized and challenging to monitor, their use poses a significant challenge for banks in Pakistan. Banks might not have the technological resources and instruments required to identify and monitor transactions involving digital assets, making it challenging to stop money laundering and the funding of terrorism. The State Bank of Pakistan (SBP) has released recommendations for banks and other financial institutions on the usage of cryptocurrencies in order to solve this issue. According to the instructions, banks must undertake more due diligence on clients who engage in cryptocurrency transactions and notify the SBP's Financial Monitoring Unit (FMU) of any suspect activities.[67]

Banks and regulatory bodies in Pakistan may not be able to adequately monitor cryptocurrency transactions due to a lack of technological infrastructure and experience. The necessity for staff education and training, as well as investments in cutting-edge technology

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[65] Saad Siddique Bajwa, "A Comparative Analysis of Anti-Money Laundering Law in the United Kingdom and Pakistan," *Available at SSRN 2372983* (2013). doi:10.2139/ssrn.2372983.

[66] Ibid.

[67] Zaheer Iqbal Cheema, and Muhammad Arshad Cheema, "Anti-Money Laundering Regime in Pakistan; Deficiencies and a Way Forward," *Law and Policy Review* 1, no. 2 (2022). DOI: https://doi.org/10.32350/lpr.12.01.

infrastructure and tools, is made clear by this. These things will enable the staff members recognize and stop financial crimes using cryptocurrency.

4. Mitigating Legal and Technical Challenges for Banks in Pakistan

The legal and regulatory environment may be strengthened in Pakistan by the regulatory authorities to increase business ownership structure transparency and stop the use of shell companies for money laundering and terrorism funding. This might involve amending already-existing rules and regulations or enacting new ones that mandate that businesses reveal information about their beneficial owners and set up serious consequences for violations. To monitor financial transactions and spot suspicious behaviour in real-time, banks and regulatory agencies can invest in cutting-edge technical solutions like artificial intelligence and machine learning. This might entail collaborating with tech companies or forming internal teams to create and apply cutting-edge analytical tools and technologies.

In order to meet the issues posed by shell businesses, the banks should also concentrate on developing the skills and capabilities of their personnel. To assist its personnel in identifying and preventing financial crimes, banks and regulatory bodies can train them and enhance their capability. This might entail giving staff-members access to information and tools to assist them carry out their responsibilities efficiently, as well as educating and training them on the most recent trends and methods for money laundering and terrorist funding. In order to spot and stop money laundering and terrorist financing operations that may entail cross-border transactions, banks and regulatory agencies can also collaborate internationally and share information. This might entail exchanging information and intelligence on shady activity with other regulatory bodies and law enforcement organizations.

Banks in Pakistan must overcome both legal and technological obstacles, which calls for a thorough and coordinated strategy involving

many different parties. Banks and regulatory agencies in Pakistan may successfully combat financial crimes and protect the integrity of the financial system by taking a proactive and cooperative approach.

5. Conclusion

In conclusion, the integrity of Pakistan's financial system is seriously threatened by the use of shell corporations in money-laundering activities. Banks in Pakistan are faced with substantial obstacles including money laundering and financing terrorism. It is challenging for banks to recognize and stop financial crimes because of the use of shell companies, invoicing fraud, and other complex methods. Legal and technological barriers, such as informational gaps, challenges with tracking and monitoring, a lack of openness in some nations, and a refusal to employ technology, further complicate the situation. In order to find a solution to these problems, banks in Pakistan need to implement a comprehensive and well-coordinated plan that involves a number of parties, including regulatory bodies, IT companies, and other stakeholders. By implementing strategies such as tightening the legal and regulatory framework, investing in technological solutions at the cutting edge, building capacity and training programs, cooperating internationally and sharing information, and launching public awareness campaigns, financial institutions are able to identify and stop activities related to money laundering and the financing of terrorist organizations. By taking a proactive and collaborative approach, banks in Pakistan have a better chance of protecting the interests of their customers and other stakeholders, as well as keeping the integrity of the country's financial system intact.

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The Illusory Implantation of Treaties: Critical Reflections on Giving Effect to Treaties in Pakistan

Sana Khan*

Abstract

Pakistan has ratified several international treaties and brought them into domestic law. However, many of these treaties have not been incorporated into the domestic laws with true letter and spirit. The relevant domestic authorities are not truly empowered, or no procedures have been created for the proper and effective implementation of many treaties. Additionally, the legislature and the judiciary have not developed a methodology to interpret treaty-based legislation following the treaty standards or in concurrence with the treaty norms. Instead, the domestic effect of treaties is limited by the interpretation of treaty-based legislation under domestic standards. Effectively, the system is based upon an illusion of rights in the absence of a comprehensive system. Through a doctrinal and comparative research methodology, this paper argues that when treaties are ratified and brought into domestic legislation, they must set up a system of honoring the commitments in a meaningful manner rather than fulfill a political slogan and false appearance or a facade. The paper suggests that Pakistan can learn from other countries where a proper mechanism is enshrined for the implantation of treaties.

Keywords: Treaties, International law, Human Rights, UK, Comparative Law, Interpretation, Doctrine of Compatibility, India, Investment Laws, BITs.

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1. Introduction

This essay makes an effort to comprehend how Pakistani international law has evolved. It is crucial to realize that international law is a system of cooperation and coordination among States based on consent. The implementation of international law into domestic law has thus far been a haphazard and unorganized endeavor. Under international treaty law, the legal duty arises at the execution of the ratification instrument. Not all treaties would indeed require domestic implementation, but some do, like the core International human rights treaties.[1] There is no specific provision in the Vienna Convention on the Laws of Treaties 1969 (VCLT) requiring the domestic implementation of treaties. The basic rule remaining in place is that States are free to determine how they meet their treaty obligations.[2] International law leaves it to the domestic legal order to determine how it gives effect its treaty obligations in the domestic legal arena.[3] The only international law requirement is that treaties are to be performed in good faith.[4]

A treaty's incorporation into national law is not generally required unless it is specified in the treaty itself. We must first make a distinction between states where an international treaty applies directly as domestic law, or a "monistic state," where the treaty has direct effect under national law, and states where a treaty only applies domestically to the extent that it has been implemented as national law, or a "dualistic state," as noted by Nyazee,

[1] "Pakistan's Domestic Implementation of Its International Human Rights Obligations - Summary of Findings" (Ministry of Planning, Development & Special Development, 2017), https://www.pc.gov.pk/uploads/report/Domestic.pdf.

[2] Mario Mendez, "The Legal Effects of Treaties in Domestic Legal Orders and the Role of Domestic Courts", in *The Legal Effects of EU Agreements* (Oxford, 2013; online edn, Oxford Academic, 23 May 2013) https://doi.org/10.1093/acprof:oso/9780199606610.003.0002, 1-60

[3] Ibid.

[4] "Vienna Convention on the Law of Treaties" (1969), art. 26.

> There are different theories about the coexistence of international law with municipal law. The oldest, perhaps worn out, theory is that of Dualism, which regards the two law systems as separate. The other view, upheld by Hans Kelsen and Hersch Lauterpacht, is called Monism, which views municipal law as a subset of international law. A third theory is that of Monism Naturalism, which considers municipal law to be subservient to international law and international law subservient to natural law. The fourth theory is that of Coordinationsim, which maintains that municipal courts are generally obliged to make municipal law conform to the requirements of international law.[5]

There are two ways to implement a treaty through legislation:

1. When a national law is passed to implement a treaty as national law, this is known as incorporation.
2. Transformation, or the conversion of a treaty's provision into one or more national laws that adhere to the state's legal history and cultures.[6]

The only thing that matters is how the manner in which the agreement is put into practice and likewise, what level of national law it shall take effect as a subject of domestic law. It has no bearing on the State's responsibility to respect and uphold the terms of the treaty under international law. Due to this, it is crucial that governments carefully review their domestic laws before ratifying a treaty to ensure that they do not clash with it. Additionally, it is crucial that new laws or revisions to existing ones be passed

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[5] Imran Ahsan Khan Nyazee. "Islamic Law and Human Rights," *Islamabad Law Review*1, no. 1 & 2 (2003): 58, https://ssrn.com/abstract=2407010.

[6] Mario Mendez, "The Legal Effects of Treaties in Domestic Legal Orders and the Role of Domestic Courts," in *The Legal Effects of EU Agreements*, ed. Mario Mendez (Oxford University Press, 2013), 1–60, doi:10.1093/acprof:oso/9780199606610.003.0002.

concurrently with the treaty's entry into effect. Even if a treaty has not been adopted, its content may nonetheless be respected in everyday life due to the evolving customary international law. A State's preference for one legal method over another must be considered.

Treaties may serve as a roadmap for how States Parties must implement them domestically. A treaty may specify precise requirements or provide general direction on the actions to be taken. It should be noted in this regard that signing and then ratifying a treaty constitutes the first step in becoming a party to it. Even though, as previously indicated, it is often ratification that binds the state to the obligation under the treaty, signing the treaty nonetheless has some legal ramifications. Under the VCLT, a state that has signed a treaty subject to ratification is obliged to refrain from acts that would "defeat the object and purpose of the treaty".[7] Even while it is not legally bound by the terms of a treaty until it has been ratified, a state that has signed one might be considered to be expected to remain loyal to it. In monistic governments, the international treaty will typically take precedence over domestic law if there is a disagreement between the state's obligations under the two.

This is not as obvious in a dualistic system. In such a situation, the court may hold that the international treat duty only applies insofar as it has been incorporated into or otherwise transformed into national law. If there is an obvious conflict between a national law or a treaty commitment, the national court may decide to follow the national law even when they are aware that doing so may indicate that the treaty obligation of the state is broken. In such a situation, it will up to the legislator to act and address the issue to prevent the conflicting issues.

Pakistan has ratified several international treaties and brought them into domestic law. However, many of these treaties have not been

[7] Vienna Convention on the Law of Treaties, art. 19.

incorporated into the domestic laws with true letter and spirit. The relevant domestic authorities are not truly empowered, or no procedures have been created for the proper and effective implementation of many treaties. Additionally, the legislature and the judiciary have not developed a methodology to interpret treaty-based legislation under the treaty standards or in concurrence with the treaty norms. Instead, the domestic effect of treaties is limited by the interpretation of treaty-based legislation following domestic standards. Effectively, the system is based upon an illusion of rights in the absence of a comprehensive system. This paper argues that when treaties are ratified and brought into domestic legislation, they must set up a system of honoring the commitments in a meaningful manner rather than fulfill a political slogan and false appearance or a facade. The paper suggests that Pakistan can learn from other countries where a proper mechanism is enshrined for the implantation of treaties.

Unfortunately, how international law is often used in Pakistan is very disturbing and confused. International law is already accused of its hegemonic attitude[8]. According to Shah, in a nation like Pakistan where there is no political stability, the branches of government's arbitrary interpretation of international law exacerbate confusion and disorder in the daily lives of Pakistanis,

> Pakistan binds itself to certain international obligations unnecessarily. A related query is whether Pakistan enters into international treaties exclusively for what it perceives as beneficial political and economic considerations without making the necessary legal assessments and without

[8] Heike Krieger, “Populist Governments and International Law,” *European Journal of International Law* 30, no. 3 (2019): 978, doi:10.2139/ssrn.3339338.

> adequately deliberating on the state's ability to implement the obligations that it is assuming.[9]

Unfortunately, a country that strongly relies on international investment and trade regulations and has an import-driven economy that has had significant difficulties in its interaction with the rest of the world does not have a well-defined function in international law.[10] The country's branches of government have an ambiguous and capricious approach toward international law, as is demonstrated by the country's current economic problems. The implementation of international law in Pakistan affects a variety of areas, including trade, commerce, security, and most significantly, human rights. Consequently, we must give serious consideration to the idea of incorporating international agreements with care and thoroughness.[11]

Given that we live in a globalized society, international law has become more convincing and pervasive in Pakistan. According to Mehboob, it becomes very difficult for Pakistan to evade the mandatory nature of international law once it has been adopted by other States in order to thrive economically and culturally,

> Pakistan has also not been immune to this global trend. Over the years, Pakistan has signed hundreds of bilateral treaties, accords, and agreements with about 100 countries. There are about 60 multilateral treaties and conventions signed with

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[9] Sikander Ahmed Shah, "Reactive Pakistan," *Dawn,* May 29, 2014, https://www.dawn.com/news/1109254/reactive-pakistan.

[10] Ahmer Bilal Soofi, "China or the US?," *Dawn.Com*, May 6, 2023, https://www.dawn.com/news/1751210.

[11] Ali Nawaz Khan and Dr. Hafiz Aziz ur Rehman, "Legal Framework of Foreign Investment in Pakistan: An Appraisal of Protectionist Approach," *Pakistan Social Sciences Review* 4, no. IV (2020): 171–185, https://doi.org/10.35484/pssr.2020(4-iv)12.

various international entities mostly under the UN and its various agencies.[12]

International law instruments are becoming more compelling in the modern world especially the evolving role of the customary international law. Due to the dynamic nature and proliferation of instruments and customary international law, even the argument for a rigorous interpretation of state sovereignty is losing ground[13] such as Pakistan's Financial Action Task Force (FATF) responsibilities[14], the Generalized System Preference Plus schemes (GSP Plus) for trade incentives to Pakistan from the EU member states have made the ratification of international human rights conventions legally binding by making it more lucrative for a State like Pakistan to sign and ratify these treaties without actually recognizing them in their true letter and spirit.[15]

Therefore, it might be inferred that perhaps the State of Pakistan entered its international law commitment hastily without carefully reviewing all of the specifics, which was perceived as a conflict between international and domestic law principles. For instance, the second portion of this article's assessment of the repercussions of the Treaties' unintended implementation in Pakistan in-depth examines the Reko Diq case before the Supreme Court of Pakistan, where Pakistan is still feeling the effects of breaking its responsibility under international law.[16]

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[12]Ahmed Bilal Mehboob, "International Obligations," *Dawn*, July 18, 2021, https://www.dawn.com/news/1635700.

[13]Aleksi Pursiainen, "The FATF and Evolution of Counterterrorism Asset Freez Laws in the Nordic Countries: We Fought the Soft Law and the Soft Law Won," in *International Actors and the Formation of Laws*, ed. Katja Karjalainen, Iina Tornberg, and Aleksi Pursiainen (Springer Nature, 2022), 135.

[14] "FATF and Pakistan: Exploring Pakistan's Journey through the Grey-List" (Research Society of International Law (RSIL)), https://rsilpak.org/fatf/.

[15] "EU Links GSP Plus Status to Human Rights," *The Express Tribune*, May 31, 2022, https://tribune.com.pk/story/2359204/eu-links-gsp-plus-status-to-human-rights.

[16] Amber Darr, "Long Read: The Reko Diq 'Fiasco' in Perspective: Pakistan's Experience of International Investment Arbitration," *South Asia@LSE*, August 14, 2019, https://blogs.lse.ac.uk/southasia/2019/08/14/long-read-the-reko-diq-fiasco-in-perspective-pakistans-experience-of-international-investment-arbitration/.

When Pakistan signed a multilateral international human rights treaty, this situation became more complicated and difficult, and incorporating it into domestic law became more interesting politically because it occasionally could touch Pakistan's socio-religious sensibilities and vitiate the very object and purpose of that treaty as the commitments made by Pakistan are only either a pleasing attempt to appease its international pressure or to gain some financial benefit. International law treaties are viewed as political negotiating chips in a country like Pakistan where neither the Critical Legal Studies approach nor the so-called Third World approach to International Law (TWAIL) exist as noted by Azeem in his book ‘Law, State and Inequality in Pakistan: Explaining the Rise of the Judiciary’:

> This book shows imperialist center-periphery dependency relations are not located outside but has been internal to the state and society of Pakistan in the form of a hegemonic class of which the military is also a part. Therefore, legally backed but despotic regime changes in Pakistan were not debated at WTO forums. Legal amendments, repeals, and enactments, which are blunted at the implementation stage are supposed to be corrected by the judiciary through ‘good governance’ interventions. Latin American countries, only due to rising working-class politics, resisted international law regimes in a way never possible in Pakistan, but also as not anticipated by TWAIL.[17]

To avoid these confrontational attitudes towards international law in Pakistan. This paper concludes that there is a legislative vagueness to fill that gap and vacuum in Pakistan. The first part of the paper discusses the

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[17] Muhammad Azeem, *Law, State and Inequality in Pakistan: Explaining the Rise of the Judiciary* (Springer Singapore, 2017), 273-274.

mechanism adopted by Pakistan judicially and legislatively for the implantation of treaties in Pakistan, the second part critically analyze and evaluate the consequences of that treaty implantations methods, and the third part suggest that Pakistan can adopt the mechanism that is adopted by the India and UK for the implementation of treaties. The fourth part is the conclusion that the Legal and Judicial instruments like the declaration of incompatibility and clearly stated method of interpretations and compatibility can add seriousness to the illusory treaty implementation in Pakistan as noted by Siddique:

> A proclivity for offering facile solutions devoid of any empirical and sociological understanding of context to the complex issue of economic, political, and consequent legal disempowerment, can also therefore jeopardize the meaningfulness of these approaches.[18]

Without seriously filling in these legislative gaps, Pakistan's implementation of treaties will remain hazy and dependent on the whims and desires of its international players, which will not help or resolve the disastrous situation involving the illusory implantation of international law in Pakistan.

2. The Constitutional Framework for the Implantation of Treaties in Pakistan

2.1 The Power of Executive Regarding International Law

Pakistan has embraced and upheld the dualist nation's rules in practice. The acceptance of specific legislation, which implicitly includes the adoption of international accords and treaties, is discussed in Article 268(7) of the Pakistani Constitution of 1973:

[18] Osama Siddique, *Pakistan's Experience with Formal Law: An Alien Justice* (Cambridge University Press, 2013), 243.

> All laws (including Ordinances, Orders-in-Council, Orders, rules, bylaws, regulations and Letters Patent constituting a High Court, and notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having extraterritorial validity…[19]

The executive has the authority to enact laws that are mentioned in the Federal Legislative list that specifically mention international law.[20] Moreover, in accordance with the Constitution of Pakistan 1973, treaty making powers are vested in the executive domain. Despite the fact that Article 268 (7) does not precisely mention international law in the list of existing laws, yet its inclusion is strongly implied.[21] This power of executive is mentioned in Article 97[22] and 142 (a).[23] Although provincial governments now have the authority to sign international agreements alongside the federal government, they are not aware of their obligation under international law.[24]

The Pakistan Parliament has made an effort to introduce legislations in the Parliament in an effort to democratize the country's treaty making process and avoid the executive's branch soul authority. 'The National

[19] "The Constitution of Pakistan," (1973) (Updated 2010).

[20] Items three and thirty-two of the Fourth Schedule Federal Legislative List are as follows: 3. External affairs; the implementing of treaties and agreements, including educational and cultural pacts and agreements, with other countries; extradition, including the surrender of criminals and accused persons to Governments outside Pakistan; 32. International treaties, conventions and agreements and international arbitration. Ibid.

[21] *International Law Bench Book for Pakistan* (Research Society of International Law (RSIL), 2019): 22, https://rsilpak.org/wp-content/uploads/2019/01/international-law-benchbook-for-the-judiciary-in-pakistan.pdf.

[22] "Subject to the Constitution, the executive authority of the Federation shall extend to the matters with respect to which Majlis-e-Shoora (Parliament) has power to make law, including exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan." The Constitution of Pakistan, art. 97.

[23] "Parliament has the exclusive power to make laws with respect to any matter on the Federal Legislative." The Constitution of Pakistan, art. 142 (a).

[24]Ahmer Bilal Soofi, "Treaty Cells in Provinces" *Dawn.com*, November 2, 2014, http://www.dawn.com/news/1142071.

Commission for International Law and Commitments Bill, 2016'[25] and 'The Ratification of Foreign Agreements by Parliament Bill,2018'[26] were introduced as legislation, but sadly the Senate committee rejected both of them.[27]

Because they are seen as an infringement on the executive's powers, these bills are rejected. Well, if we quickly examine the consideration of such legislation, we find that the Pakistani Parliament is quite reticent to recognize the value and necessity of treaty-making in Pakistan. This legislation also made reference to Pakistan's international law-making process and emphasized that treaty-making is solely the responsibility of the executive and should not be governed by any legislative procedure since it could be hampered or delayed. The constitution of Pakistan also mentions the treaty-making process, and it was declared that only in the circumstances listed below could treaties pertaining to domestic law be approved by Parliament:

Pakistan legislation would be required to give effect to a treaty in the following cases:

a) Where the treaty provides for a payment of money to a foreign country/body from the Federal Consolidated Fund (Article 79).

[25] "The National Commission for International Law and Commitments Bill, 2016," Report of the Standing Committee of Law and Justice, 2016, https://senate.gov.pk/uploads/documents/1484911372_659.pdf.

[26] "The Ratification of Foreign Agreements by Parliament Bill, 2018," Report of the Standing Committee of Law and Justice, 2018, https://senate.gov.pk/uploads/documents/1584089438_807.pdf.

[27] The bill was opposed by both ministries, calling it a mere duplication of the existing mechanism of oversight of the treaties that have already signed by Pakistan. "Government Bill Seeking Unlimited Pecuniary Jurisdiction for Judges Rejected," *Brecorder*, December 20, 2016, http://www.brecorder.com/news/4461587.

b) Where the treaty affects the justiciable right of a citizen of Pakistan.

c) Where it requires taking of private property (Article 23) and life or liberty (Article 9) or the imposition of a tax which can be done by legislation (Article 77)[28]

Therefore, the committee took a very narrow view of the scope of the implantation of treaties in Pakistan,[29] the reluctance of the Parliament of Pakistan to adopt a proper mechanism for the adoption of treaties in Pakistan[30] has been very vague and its insistence on not changing its method is even more alarming as in the globalized world that we are living it is very difficult to avoid the growing landscape of international law as noted here by Mehboob:

> There are two important points which the ruling coalition and parliament need to give serious consideration to when dealing with legislation in general and legislation relating to international treaties in particular. Delay in drafting the necessary legislation and passing it through parliament is not only detrimental to the public interest, but it also damages our international standing.[31]

The multiple issues with Pakistan's implementation of international law in today's increasingly complex, globalized world are not addressed by merely claiming that Pakistan adheres to the dualistic model of international law and only executive oversight of international treaties are enough.

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[28] "The Ratification of Foreign Agreements by Parliament Bill, 2018."

[29] Ahmad Ghouri. "Democratizing Foreign Policy: Parliamentary Oversight of Treaty Ratification in Pakistan," *Statute Law Review* 42, no. 2 (2021): 137-155, doi:http://dx.doi.org/10.1093/slr/hmz023.

[30] Another Bill presented in the National Assembly of Pakistan was also pending "The Ratification of International Treaties Act, 2013" Published in the Official Gazette of Pakistan Bill No: 45 of 2013, https://na.gov.pk/uploads/documents/1391684102_283.pdf.

[31] Ahmed Bilal Mehboob, "International Obligations," *Dawn.Com*, July 18, 2021, <https://www.dawn.com/news/1635700>.

2.2 The Role of the Judiciary

The Supreme Court of Pakistan has also upheld regarding the status of international law that it is under the domain of the federal executive as noted:

> An international agreement between the nations if signed by any country is always subject to ratifications, but it can be enforced as a law only when legislation is made by the country through its Legislature. Without framing a law in terms of the international agreement the covenants of such agreement cannot be implemented as a law nor do they bind down any party.[32]

In another case, the Supreme Court also upheld the same principle for the application of international law in Pakistan:

> The Supreme Court held that the Federal Government has the power to "exercise executive authority" to ratify a treaty, but not the power to legislate, a role that remains firmly with the Parliament.[33]

The judiciary in Pakistan has been very liberally referencing and applying the provisions of international law conventions. The Courts in their different judgments have referenced the provision of Multilateral International Human Rights Law Conventions that Pakistan has yet not ratified for example the Convention on the Enforced Disappearance.[34] The courts have also a reference to the Geneva Conventions for the minimum protection

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[32] Ms. Shehla Zia and Others v. WAPDA, PLD 693 (Supreme Court of Pakistan 1994), 710.

[33] Societe General De Surveillance S.A. v. Pakistan, SCMR 1694 (Supreme Court of Pakistan 2002).

[34] Mahera Sajid v. Station House Officer, Police Station Shalimar & 6 Others (W. P. No.2974/2016), CLC 1858 (Islamabad High Court 2018). See also "Pakistan: Ratify Treaty on Enforced Disappearance," *Human Rights Watch*, August 28, 2013, https://www.hrw.org/news/2013/08/28/pakistan-ratify-treaty-enforced-disappearance.

available in the military courts ratified by Pakistan but not incorporated in the Domestic law.[35]

To sum up, the judiciary in Pakistan has taken a very lax approach to the interpretation and application of international law, and we can draw the conclusion that its primary responsibility is to interpret the law. However, there is currently no clear law stating the clear guidelines for the judiciary that how the interpretation of international law in Pakistan shall be conducted, which has been the root cause of Pakistan's confused or illusory understanding of international law.[36]

3. Critical Evaluation and Impact of the Unplanned Implantation of the Treaties in Pakistan

In Pakistan, the legislature has been reluctant to pass legislation that would expand its authority to implement treaties, as was already mentioned, and the judiciary has applied international law with a great deal of latitude but without any clear-cut guidelines in the absence of any explicit regulations. According to the RSIL study, which was previously highlighted, Pakistan's judiciary must adhere to international law even in the absence of local legislation.[37]

This has led to a decision that has called into question the legitimacy of the rule of law in Pakistan, since flagrantly disobeying international obligations can have negative effects on Pakistan's economy, as was the case in the Reko Diq case.[38] That case proved unfavorable for the economic aspects of Pakistan. The action taken by the Supreme Court in that case was taken in good faith to rectify corruption and fraud. It was a deal between the Baluchistan government and Tethyan Copper Company Pty Limited

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[35] District Bar Association, Rawalpindi and Others v. Federation of Pakistan and Others, PLD 401 (Supreme Court of Pakistan 2015).

[36] *International Law Bench Book for Pakistan* (RSIL, 2019).

[37] Ibid.

[38] Maulana Abdul Haque Baloch v. Government of Baluchistan, PLD 641 (Supreme Court of Pakistan 2013). Also known as the Reko Diq Case.

(TCC)[39] which sued Pakistan in the International Centre for Settlement of Investment Dispute (ICSID) for the execution of mining project in that area but it does disregard Pakistan's International commitments[40] where Pakistan had to face serious consequences[41] for violating its international obligation.

This forces Pakistan to rethink and critically assess its treaty-making process in order to prevent needless international conflicts and to effectively coordinate with international law by better comprehending it through a rigorous legislative process.[42]

The second case also demonstrates the illusory implementation of treaties that is in the case of the Convention against Torture (CAT) and International Convention on Civil and Political Rights (ICCPR) in Pakistan where both the treaties have been ratified by Pakistan[43] but their

[39] "In 2013, the Supreme Court mentioned in its decision that TCC attempted to take undue advantage of the political instability of the time. The foreign companies, through CHEJVA, Addendum No1, and other agreements, preyed upon the huge gaps in understanding on the part of the Balochistan government of large-scale mineral extraction and were in a distinct position to manipulate and dominate. And similar tricks are played once again to strip Balochistan of its ownership rights and due benefits from one of the world's largest copper-gold deposits. In the 2013 decision, the Supreme Court repeatedly lamented the Balochistan government's 'inefficiency' and 'haste' in disposing of a multi-billion-dollar project without exploring the best possible deals in the public interest." Sanaullah Baloch, "The Reko Diq Matter," *The News*, December 20, 2021, https://www.thenews.com.pk/print/918148-the-reko-diq-matter.

[40] Muhammad Mumtaz Ali Khan, Ikram Ullah and Aisha Tariq, "Assumption of Jurisdiction by Pakistani Supreme Court in Reko Diq Case: Another Violation of International Investment Law," *Journal of Business and Social Review in Emerging Economies* 7, no. 3 (2021): 649-657, https://doi.org/10.26710/jbsee.v7i3.1862.

[41] "Agreement was suspended in 2011 due to a dispute over the legality of its licensing process. As a result, the International Court of Arbitration levelled $6.4bn award on the government of Pakistan while at the same time the London Court of Arbitration was also imposing another $4bn fine on Pakistan." Syed Irfan Raza, "Pakistan Signs Deal to Avoid $11bn Penalty in Reko Diq Case," *Dawn.com*, March 21, 2022, https://www.dawn.com/news/1681071.

[42] Ahmer Bilal Soofi, "Sanctity of Contracts", *Dawn.Com*, May 12, 2023, https://www.dawn.com/news/1752510.

[43] Pakistan Ratified ICCPR and CAT on 23 June 2010, https://mofa.gov.pk/mous-agreements/#:~:text=to%20that%20Convention.,Geneva%2C%206%20September%201952.,the%20Execution%20of%20the%20Convention.

consequences are not well thought and that resulted in the confused understanding of international law in Pakistan.

The Senate passed the Torture, Custodial Death, and Custodial Rape (Prevention and Punishment) Bill, but it has not yet been signed into law since it is incompatible with the geopolitical conditions that exist in Pakistan today, where a culture of impunity is pervasive. It is worrying for the implementation of international treaties in Pakistan that the Parliament is reluctant to make the CAT clause justiciable in Pakistani courts.[44]

The incorporation of the ICCPR into Pakistani domestic law suffered the same fate. Pakistan's reservations are not accepted by the human rights committee because Pakistan has not yet been able to adequately explain why only Muslims are allowed to hold the positions of Prime Minister or President in this nation.[45] The reserving country claims that these reservations are contrary to the treaty's object and purpose specifically Article 25 of the ICCPR.[46] The Western countries have objected to this reservation. For example, the objection filed by Belgium states that:

> The reservations implement the Covenant's provisions contingent upon their compatibility with the Islamic Sharia and/or legislation in force in Pakistan. This creates uncertainty as to which of its obligations under the Covenant

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[44] "Pakistan: Make Torture a Crime," *Human Rights Watch*, August 23, 2022, https://www.hrw.org/news/2022/08/23/pakistan-make-torture-crime. See also "Criminalising Torture in Pakistan: The Need for an Effective Legal Framework," *Justice Project Pakistan JPP*, accessed September 8, 2023, https://jpp.org.pk/report/criminalising-torture-in-pakistan-the-need-for-an-effective-legal-framework/.

[45] Sana Khan, "Implementation of International Human Rights in Pakistan: Finding a Balance between Western Conceptions and Islamic Law," *Manchester Journal of Transnational Islamic Law & Practice* 17 no. 1 (2021): 170, SSRN: https://ssrn.com/abstract=3949782.

[46] Article 25 of the ICCPR states that: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country." ICCPR, art. 25.

Pakistan intends to observe and raises doubts as to Pakistan's respect for the object and purpose of the Covenant." The Human Rights Committee of the ICCPR has also regretted in its concluding observation that Pakistan has yet not removed this reservation for the better implementation of the human rights covenant in Pakistan.[47]

The most important lesson Pakistan should have taken away from breaching its BIT with Australia at the ICSID forum was the need for utmost vigilance when it came to the signing and ratification of the agreement. Sadly, Pakistan has not yet used this lesson in light of its growing involvement with the China-Pakistan Economic Corridor (CPEC) legislation, which could jeopardize Pakistan's responsibility to keep its GSP Plus status.[48]

All of these instances show that Pakistan does ratify a number of international treaties without fully appreciating the implications of its obligations under those treaties. The international community has less faith in Pakistan because of the vague, ambiguous, and haphazard execution of treaties. The people of Pakistan have suffered because of the careless application of treaties in that country.

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[47] United Nation Treaty Collection on International Covenant on Civil and Political Rights, Other Western countries also made the same reservations that Islamic Sharia Law is incompatible with modern human rights law https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec.

[48] "Pakistan Should Leverage CPEC, GSP Plus to Attract Investment," *The Express Tribune*, March 18, 2019), https://tribune.com.pk/story/1931608/pakistan-leverage-cpec-gsp-plus-attract-investment. See Also Siegfried O. Wolf, "The GSP+ Conundrum and the CPEC's Impact on EU-Pakistan Economic and Trade Relations," in *The China-Pakistan Economic Corridor of the Belt and Road Initiative: Concept, Context and Assessment* (Cham: Springer International Publishing, 2020), 243–60, doi:10.1007/978-3-030-16198-9_7.

4. Methods Adopted by India and the UK for the Implantation of Treaties

First, consider the case of India, where the constitutional clause is much clearer than that of Pakistan. When the Indian Constitution specifies in Article 253 of the Indian Constitution the implementation of an international agreement:

> The parliament has the sole right to make laws for the whole or any part of the territory of India with the motive of executing an international treaty, agreement or convention with other countries or any decision made at any association or conference.[49]

The Indian Constitution is also quite plain and clear on the role of Parliament in the legislation of foreign treaties for their implementation. Even so, it is often hotly challenged, as in the Azadi Bachao case,[50] where the petitioner accused the executive of allegedly engaging in treaty shopping in one of its Bilateral Investment Treaties (BITs) that India signed with Mauritius. It is significant to note that the Supreme Court of India refrained from interfering with executive matters and did not challenge the authority of the parliament to enact treaties.[51] Here it is worth quoting the recommendations of the Report of the People's Commission on the Patent Laws for India January 2003. The following are the recommendations:

> a. whilst the treaty-making power (Article 73 read with List I entries 13 and 14) vest in the union and require legislation to translate the treaty into the validity of enforceable law

[49] "The Constitution of India," (1950), art. 253 on Legislation for giving effect to international agreements.

[50] Union of India and Anr v. Azadi Bachao Andolan and Anr (The Supereme Court of India) decided on 7 October, 2003.

[51] Anjana Haines, "The MLI Wipes Out Indian Jurisprudence on Treaty Shopping," *International Tax Review*, April 9, 2020, https://www.internationaltaxreview.com/article/2a6a5kj0p2b6ojikoo6ps/the-mli-wipes-out-indian-jurisprudence-on-treaty-shopping.

(Article 253) the treaty-making power cannot be seen as a law unto itself but must operate within the discipline of the Constitution. This is all the more important because the world is being increasingly governed by treaties, which are being enforced through their mechanisms, and by intense social, economic, and political pressures.

b. the discipline of the constitution requires that the Union government which is the exclusive repository of the treaty-making power, cannot and should not enter into treaties that undermine the Constitution.

c. Procedurally, before a treaty (especially a multilateral treaty) is signed it is imperative that it should be a (i) place for discussion before a parliament with full particulars (ii) place within a public domain for discussion (iii) circulated to the states for their opinion and discussion and (iv) not confirmed until and unless the discussion is over. This exercise necessarily needs to be repeated as further issues arise in respect of any one treaty.

d. parliament needs to set up special treaties committee which earmarks the treaty for consideration and ensures that the public, federal, and parliamentary process is complied with especially listing areas for confirmatory procedures.

e. there is nothing in the Constitution which forbids the process is regulated by statutes which should be enacted.[52]

It is interesting to note that this situation exists despite a clear directive in the Indian constitution addressing the country's treaty-making provisions. In order to avoid any anomalies and the perception of treaty shopping,

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[52] Shiva Kant Jha., *Judicial Role in Globalised Economy: With a Focus on Tax Treaties (Pax Mercatus)*, (India: Wadhwa and Company Nagpur, 2005) 353-354.

which can weaken a nation's sovereignty and its citizen's fundamental rights, the recommendation still emphasized that treaty-making powers should be considered in Parliament through appropriate legislation as noted by Ranjan:

> International law-making is often critiqued for the democratic deficit. In India, the executive has the power to ratify international treaties without much parliamentary scrutiny. Arguably, judicially incorporating international law without parliamentary scrutiny legitimizes such a democratic deficit. Accordingly, judicial incorporation of international law is questioned because it amounts to the judiciary riding roughshod over the parliament.[53]

The discussion given above implied that implementing treaties, even in India, should be done thoughtfully and in a manner consistent with the country's constitutional ideals and standards, necessitating democratic and legislative scrutiny.

Pakistan should adopt the clause in the Indian constitution that addresses the function of international law. The UK is the other country that Pakistan can consult for advice. Pakistan's legal system must alter, and pertinent legislation needs to be framed in order to give clear advice on the function of treaties in the domestic legal system and to define the function of customary international law in Pakistan as noted by Shah:

> Pakistan has inherited dualism from the UK and has been following it since 1947. Like the UK, treaties need to be transformed into the Pakistani legal system for having the

[53] Prabhash Ranjan, “The Supreme Court of India and International Law: A Topsy-Turvy Journey from Dualism to Monism,” *Liverpool Law Review* 43. no. 3 (2022): 30, http://dx.doi.org/10.2139/ssrn.4210902.

> force of law in Pakistan. In the UK, however, the ratification process is given constitutional cover through the Constitutional Reform and Governance Act 2010, whereas the Pakistani constitution is silent on ratification. The practice, however, is that treaties are ratified by the Executive, i.e., the government of Pakistan as treaties and related matters are on the Federal Legislative List. The forms of incorporating treaties in the Pakistani legal system bear resemblance to the British patterns, e.g., copying out provisions and attaching them to schedules of statutes and indirect incorporation. The UK's position on customary international law is clearer, whereas Pakistan's position is not… In Pakistan, some judgments of the senior courts provide encouraging signs where courts have followed the British practice, but it is piecemeal and inconsistent.[54]

The UK Constitutional Reform and Governance Act 2010 in its Part 2 regarding the Ratification of Treaties in its Section 20[55] and 21[56] discuss the role of Parliament for the Ratification of Treaties. The UK Human Rights Act 1998[57] on the legislative and judicial functions in putting into effect the European Convention on Human Rights (ECHR)[58] is very extensive. The sections pertaining to the Statement of Incompatibility and Interpretation of

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[54] Niaz A. Shah, "The Application of Human Rights Treaties in Dualist Muslim States: The Practice of Pakistan" *Human Rights Quarterly* 257, no. 44 (2022): 257–85, http://dx.doi.org/10.1353/hrq.2022.0020.

[55] "UK Constitutional Reform and Governance Act," (2010) sec. 20 on Treaties to be laid before Parliament before ratification. https://www.legislation.gov.uk/ukpga/2010/25/contents.

[56] Ibid. sec. 21 on Extension of 21 sitting day period.

[57] "The Human Rights Act," (1998) sec 3. Interpretation of legislation: So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. Section 4. Declaration of incompatibility applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

[58] "Convention for the Protection of Human Rights and Fundamental Freedoms" (European Convention on Human Rights, as amended) (ECHR)," (1950).

Legislation, discuss the role of the legislature in establishing treaty rights by giving them legal effect in domestic legislation, respectively. In those areas, there has also been a thorough discussion of the judiciary's function in upholding the ECHR. They have adopted legislative tools to diligently incorporate international obligations.

As international law requires more than just signature and ratification, Pakistan should be more receptive to learning from other nations' experiences and examples of how to implement treaties. Whether it is the BIT or a multilateral human rights convention, Pakistan cannot ignore the influential role of the treaty-making power in the globalized world. For a country to successfully implement a treaty that is significant for its citizens, the role of the parliament and judiciary is extremely important. This significant process, which lacks legitimacy, consistency, and sustainability, can become even more convoluted and difficult due to legislative and judicial ambiguity.

5. Conclusion

Up to this moment, Pakistan's implementation of the treaty has been a very gradual process that has been governed by the Constitution's broad interpretation of the Executive power. International law has now influenced every aspect of Pakistani law, including its criminal, civil, trade, and investment standards. The article argues that even if one disagrees with international law, still cannot ignore it. Due diligence is therefore necessary, as there are clear roles for the executive, judicial, and legislative branches; disregarding this law is detrimental for Pakistan.

The monist/dualist debate is utterly irrelevant to Pakistan's implementation of international law. In order to avoid any form of incoherence, illegitimacy, or sustainability, the implementation of treaties in Pakistan must be done effectively through a judicial and legislative document that clearly specifies roles from the explicitly defined law and the

growing acceptance of international law as the customary international law as practice by the judiciary in Pakistan. Pakistan cannot choose not to follow international law because it is a poor economic and political entity. As was already established, overseas entities played a significant role in our commerce and investment.

The above-mentioned countries have passed treaty implementation laws outlining the functions of respective legislatures and judiciaries, including India and the UK. The rules themselves cannot escape the complexity of international law, but they will provide a clear solution and a sustainable way to eliminate its complexity and incompatibility in Pakistan. The BIT that India joined resulted in a judicial challenge, as we saw in the case of India where the international law is still under executive domain, so the constitutional clarity and legislation won't fully eliminate challenges, but it will create a more democratic way to settle the dispute between the conflicting objectives of international law. The role of the judiciary and parliament will increase, thus enhancing the democratic nature of Pakistan's treaty-making process. The creation of international treaties is sometimes criticized for lacking democracy.

Pakistan must immediately enact legislation that will enable the monitoring of treaty implementation there. Through the submission of laws, Pakistan has endeavored to properly implement treaties, but the Parliament has been reluctant to take on this important task, harming Pakistan's sovereignty, and domestic socio-religious and political sensibilities.

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Islamabad Law Review Vol. 7, Issue 1, 2023

The Interlink between Environmental Justice and Climate Change under National, International, and Islamic Law

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Abstract

The notion of environmental justice suggests that every community enjoys the right to equitable treatment, equal opportunity for involvement, and equal safeguards in the development, adoption, and execution of environmental rules and laws. Islamic law also has the idea of environmental justice ingrained into it. However, present-day everyone's physical and mental health is at risk from climate change, while economically and socially disadvantaged population is at more risk than others. The predicted effects of global warming on the well-being and health of people have begun to appear in some cases. The Constitutional law in Pakistan does not explicitly recognize one's right to the environment. However, in Supreme Court decisions, the basic right to life guaranteed by Article 9 of the Constitution of Pakistan, 1973 has been expanded to include the pursuit of environmental justice. In addition, the Pakistan Climate Change Act, 2017 was published for the first time in 2017. This article explores aspects concerning environmental justice, and offers remedies from an Islamic viewpoint. It concludes that the government and the populace should take proactive measures to mitigate climate change by using the International Bill of Rights and the Islamic Law by inculcating the Prophet's (PBUH) *Sīrah*.

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Keywords: Environmental justice, Climate change, Seerah, and environmental justice.

1. Introduction

The ongoing shift in weather patterns as well as temperatures is referred to as climate change. These modifications might sometimes result from biological activities, like fluctuations in the solar cycle. However, since the middle of the nineteenth century, human activity particularly through the combustion of fossil fuels like coal, oil, and gas has been the primary source of climate change.[1] Climate justice has now been conceived in large part as a result of the environmental justice movement, which is a major operational discourse in the field of environmental politics.[2] Everyone's mental and physical health, as well as their access to nutritious nourishment, clean water, and a place to live, is at risk due to climate change, but those who are economically and socially disadvantaged are most at risk.[3] These individuals are more likely to confront other challenges like poor health, nutritional deficiencies, and language barriers because they frequently lack the means to plan for it or recover completely from climate-related hardships and because they inordinately live and work in regions that are more vulnerable to specific climate-related disasters.[4]

The basic right of every person to a healthy and clean environment lies at the heart of environmental justice. On a local, national, and international level, this right is frequently denied to those who are most at risk and have the least resources. The poorest members of society are

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[1] "What is Climate Change?," *United Nations*, accessed March 17, 2022, https://www.un.org/en/climatechange/what-is-climate-change.

[2] David Schlosberg and Lisette B. Collins, "From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice," *WIREs Climate Change* 5, no. 3 (2014): 359, doi:10.1002/wcc.275.

[3] Renee Cho, "Why Climate Change Is an Environmental Justice Issue-Climate Week NYC," *State of the Planet*, September 22, 2020, https://news.climate.columbia.edu/2020/09/22/climate-change-environmental-justice/.

[4] "Environmental Justice and Climate Change - SciLine," *SciLine*, January 27, 2021, https://www.sciline.org/climate/climate-change/environmental-justice/.

frequently disproportionately impacted, whether it is due to exposure to air pollution or floods, the placement of hazardous facilities, or just not having access to the environment. According to Islamic doctrines, all living things, not just humans, have a right to the environment's basic elements of soil, water, fire, wood, and light. Islam has placed a great emphasis on the protection of the ecosystem and its contents are necessary.[5] Hence in light of Islamic teachings and global laws, this study draws attention to environmental justice and its effects, as they deal with climate change within the context of Pakistan.

2. The Role of International Law in Environmental Protection

Over the past few decades, despite intensified diplomatic efforts the government has united in their commitments to limit climate change. However, if this warming continues unchecked, the world may soon experience catastrophic repercussions of changing climate, including, elevated sea levels, unparalleled droughts, floods, and widespread animal extinctions. States have taken several actions to reduce the effects of climate change through numerous conventions, protocols, and accords, keeping in consideration the alarmingly fast prevalence of climate change and the growing amount of carbon di oxide (CO_2) in the atmosphere.[6] The international instruments that are essential for reducing the impacts of climate change are discussed below:

2.1. The United Nations Framework Convention on Climate Change

The UNFCCC, 1922 is the first multilateral forum for international collaboration between national governments on the issue of greenhouse

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[5] Labeeb Bsoul et al., "Islam's Perspective on Environmental Sustainability: A Conceptual Analysis," *Social Sciences* 11, no. 6 (June 2022): 228, doi:10.3390/socsci11060228.

[6] "Global Climate Agreements: Successes and Failures | Council on Foreign Relations," *Council on Foreign Relations*, accessed September 14, 2023, https://www.cfr.org/backgrounder/paris-global-climate-change-agreements.

gases (GHG) induced climate change. The UNFCCC consists of 197 parties as of January 1, 2020, including the United States which have ratified, acknowledged, or acceded to the international agreements. The goal of the UNFCCC is to "stabilize the level of GHG in the environment at the amount that will hinder harmful human intervention with the earth's climate, in a period that will allow biodiversity to properly adjust and enable SDG" and binding the parties to act "based on equity and adhering to their respective talents and common but distinct tasks". The UNFCCC also aims that the developed States should take the initiative in putting an end to climate change.[7]

According to the UNFCCC, States that rely more heavily on natural resources for their daily needs are more susceptible to the dire consequences of climate change. Additionally, these communities frequently have the least ability to respond to natural disasters like hurricanes, landslides, floods, and droughts. The UNFCCC also highlights that the preponderance of women in this category and their unequal representation and participation in decision-making, which exacerbates disparities frequently precludes women from fully contributing to the policy creation and execution related to climate.[8]

2.2 Kyoto Protocol

The worldwide level of GHG emissions kept increasing even after the UNFCCC was adopted in 1992. It became increasingly clear that the only way to persuade corporate communities and people to take action on climate change would be for industrialized States to make firm and legally binding commitments to decrease emissions. The UNFCCCC members started

[7] Jane A. Leggett, "The United Nation Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement: A Summary," Congressional Research Service (USA, 2020), https://crsreports.congress.gov/product/pdf/R/R46204.

[8] Justice Ayesha A. Malik, *The Handbook on Environmental Law* (Pakistan: Punjab Judicial Academy, 2016), 92.

deliberating on a protocol, or an international agreement related to the existing treaty, as a result, the Kyoto Protocol was ratified in 1977.[9]

Furthermore, the developed nations of the world were given enforceable goals for minimizing their GHG emissions to be achieved during the commitment period 2008-2012 by the Kyoto Protocol. This agreement specified three methods for achieving the emission-reduction objectives, with the choice to apply any of them. The Clean Development Mechanism (CDM), one of the Protocol's essential instruments for emissions reductions, requires industrialized countries to build projects to cut GHG emissions to satisfy their pledges.[10]

A large section of the global carbon trading scheme will be disrupted if the Kyoto Protocol is not extended, hence the UNFCCC parties, NGOs, and global warming campaigners have been working tirelessly to prolong it. As a result, member States of UNFCCCC and the Protocol decided to begin a second period of 8 years, 2013-2020, with the main goal of lowering GHG emissions by at least 18 per cent beneath the levels of 1990, at the UN Climate Change Conference in Doha, Qatar.[11]

2.3. Paris Agreement

At the 21st UNFCCC (COP21) in Paris on December 12, 2015, parties to the UNFCC reached a new global agreement after nearly 17 years of impasse. In the context of SDG and the step to end poverty, the treaty seeks to improve the international response to the challenge of climate change.[12] Parties aim to promote adaptation to climate impacts and build resilience, keep global temperature rise beneath 2°C, make efforts towards a 1.5°C

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[9] Vikash Ramiah and Greg N. Gregoriou, *Handbook on Environmental and Sustainable Finance* (Dubai: Elsevier Inc Research Gate 2016), 479.

[10] Ibid.

[11] Ibid.

[12] Marie-Claire Cordonier Segger, "Advancing the Paris Agreement on Climate Change for Sustainable Development," *Cambridge Journal of International and Comparative Law* 5, no. 2 (2016): 202.

limit, and utilize financial flows for development that are low in GHG emissions and climate-resilient.[13]

Moreover, the Agreement seeks to enhance international efforts to the dire consequences of climate change. The international regime interactively evolved over decades as nations struggled to build an adequate international framework for cooperation while also attempting to domestic climate concerns.[14] In essence, this agreement defines an essential triangle of commitments:

1. For climate mitigation as well as adaptation, nations must implement domestically decided, quantified, and progressive measures.
2. These initiatives are prompted by modifications in finance flows and associated transfer of technology, improvement of capacity, education, and various other cooperative efforts.
3. Public engagement, peer review, routine stock takes, accessibility, and reporting are some of the methods used to accomplish enforcement.[15]

The Paris Agreement also aims to improve how the UNFCCC is put into practice, which stipulates that the ultimate goal is to stabilize the concentration of GHG in the environment at an extent that would avoid hazardous human interference with the environment within a timeframe that would allow the environment to naturally shift, guarantee that the production of food is not compromised, and to allow economic growth to continue in an orderly and secure way. The UNFCCC's performance in carrying out its task is also improved by the Paris Agreement.[16]

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[13] "Paris Agreement," (2015), art 2.
[14] Segger, "Advancing the Paris Agreement," 202.
[15] Ibid.
[16] Ibid.

2.4 The Vienna Convention for the Protection of Ozone Layer

To preserve the environment for both current and future generations, convention emphasizes the necessity to conserve the O_3 layer. The Convention was ratified on March 22, 1985, and it became effective in 1988.[17] Following scientific concerns that the ozone layer's depletion was a threat to both human health and the environment; the Convention established the fundamentals for ozone layer depletion. The primary aim of the Convention was to foster global collaboration.[18]

However, according to some scientists, the causes of the depletion are that ozone absorbs solar energy and ozone is a GHG. As a result, there is a close connection between ozone layer depletion and climate change leading to skin cancer, eye damage, and local and systemic immune suppression, and eye damage are the dangers linked with ozone layer depletion. In addition to the climate change problem, the environmental problems linked to ozone layer depletion include changes in land productivity and effects on plants and animals.[19] So the State parties are required to take the necessary precautions to safeguard human health and the environment against harmful effects caused by human actions that deplete the ozone layer. For effective implementation member States are required to adopt legislative and administrative measures based on pertinent

[17] Malik, *The Handbook on Environmental Law,* 92.

[18] "Vienna Convention on the Protection of the Ozone Layer and the Montreal Protocol on Substances That Deplete the Ozone Layer," *Sustainable Development Knowledge Platform*, accessed September 14, 2023, https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=2716&menu=3170.

[19] Aliaksandr Krasouski and Siarhei Zenchanka, "Ozone Layer Depletion, Climate Change, Risks and Adaptation," in *Theory and Practice of Climate Adaptation*, ed. Fátima Alves, Walter Leal Filho, and Ulisses Azeiteiro, Climate Change Management (Cham: Springer International Publishing, 2018), 137–50, doi:10.1007/978-3-319-72874-2_8.

scientific and technical considerations and collaborate on systematic observation, research, and information exchange.[20]

2.5 Montreal Protocol

The manufacturing and consumption of 100 synthetic chemicals that are designated as Ozone Depleting Substances (ODS) are governed by the international environmental agreement known as the Montreal Protocol. The production, utilization, and emissions of ODS have been successfully decreased on a global scale. ODS and chlorofluorocarbons (hence referred to as CFCs) have a part in the radiative forcing of climate change in addition to being GHGs. The principal reasons behind the ozone layer's observed thinning are now universally acknowledged to be CFCs and other ODSs. As a result, the Montreal Protocol offered a framework for reducing and eventually eliminating ODS production and consumption worldwide. The production, use, emission, and atmospheric concentrations of CFCs, methyl chloroform, and numerous other ODSs have significantly decreased as a result of the Montreal Protocol and there is growing evidence that stratospheric ozone is recovering.[21]

Additionally, the parties to this agreement must carry out specific obligations related to the elimination of different ODS groups, laws governing trade, each year's data reporting, and national licensing structure for ODS import and export regulation, among other things. Both developed and developing States have obligations that are equal but distinct, but most importantly, both groups of countries have actual, legally binding commitments that are time-bound and specific. All of these initiatives appear to be crucial in reducing the effects of climate change.[22]

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[20] Edith Brown Weiss, "The Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer" (United Nations, 2009), https://legal.un.org/avl/pdf/ha/vcpol/vcpol_e.pdf.

[21] Guus JM Velders et al., "The Importance of the Montreal Protocol in Protecting Climate," *Proceedings of the National Academy of Sciences* 104, no. 12 (2007): 4814–19.

[22] Ibid.

2.6 6th Assessment Report of the UN Inter-governmental Panel on Climate Change (IPCC)

An overview of the present state of knowledge about climate change has been delivered in the IPCC Sixth Assessment Report, which was published in March 2023 and highlights new findings from the previously published assessment report. The aforementioned report relies on the findings of the three working groups of the IPCC.[23]

Following are the findings of the IPCC report:

A. There is no doubt that human action has contributed to the warming of the atmosphere, seas, and land. Extensive and sudden changes have occurred in the biosphere, cryosphere, atmosphere, and ocean. Therefore, the paper stresses that human behavior can still have a significant impact on how the climate will develop in the future, particularly by reducing emissions to net zero.

B. Human-induced climate change has already had an influence on weather and climatic extremes on every continent. Numerous changes have been noticed since the fifth assessment report.

C. Several human and natural systems will face more serious consequences if temporary climate change exceeds 1.5°C and the same will be disastrous to more than 3 billion people who live in places highly vulnerable to climate change.[24]

D. Major changes are needed to reduce GHG emissions across the whole energy sector. These changes include a significant decrease in the total use of fossil fuels, the deployment of low-emission energy sources, a change to alternate energy carriers, and increased energy efficiency and conservation.

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[23] Sophie Boehm and Clea Schumer, "Top Findings from the IPCC Climate Change Report 2023," *World Resources Institute*, March 20, 2023, https://www.wri.org/insights/2023-ipcc-ar6-synthesis-report-climate-change-findings.

[24] Ibid.

E. According to reports effects of climate change, in a future where the temperature exceeds 1.5°C, can soon transition from an environmental issue to an economic hazard. For instance, if a protracted drought leads to a lost harvest, supply chains will be less available, and prices will increase. Climate change's effects can also heighten risks, erode society's capacity to withstand pandemics or conflicts, or even trigger climate tipping points like the demise of coral reefs or the melting of ice sheets covering green land.

F. Resilience can be effectively increased through adaptation strategies, however scaling up solutions requires greater funding. It is estimated by IPCC that it would cost about $400 Billion to make changes to agriculture, forestry, and other land uses essential to limit GHG emissions.[25]

2.7 Ethical Principles of Climate Change

The UNESCO Proclamation of Ethical Guidelines in Connection to Climate Change emphasizes UNESCO Member States' grave concern that climate change may cause ethically unacceptable harm and injustice. This Declaration lays forth a brief list of universally agreed-upon ethical standards that should drive decision-making and strategy-making at all levels, as well as assist people in combating climate change. This UNESCO Declaration's ethical counsel is intended to supplement governments' existing multilateral initiatives, such as negotiated obligations under the UNFCCC and scientific assessments established by the IPCC.[26]

The new Declaration emphasizes that harm reduction is a key ethical principle in climate change. To comply with it, States shall work to anticipate, avoid, or lessen damage from global warming, as well as the

[25] Ibid.

[26] "Declaration of Ethical Principles about Climate Change," *UNESCO*, accessed April 11, 2023, https://en.unesco.org/themes/ethics-science-and-technology/ethical-principles.

environmental mitigation and adaptation measures and actions, wherever it may emerge. One of the other ethical standards is only concerned with scientific knowledge and honesty in decision-making. According to it, decisions ought to be founded on and guided by the greatest knowledge available from the scientific and social sciences. It goes on to say that states should make efforts to defend and sustain science's independence and the validity of the scientific process. Cooperation, sustainability, justice and fairness, and a cautious approach are among the other ethical concepts listed. This proclamation draws on UNESCO's past work on ethical standards in climate change.[27]

3. Human Rights and Climate Change

A major worldwide concern is climate change which needs a solution, as the UN Human Rights Council underscored in its Resolution 26/27. The Council requested international cooperation to accomplish the goals established by UNFCCC.[28] Human rights are adversely impacted by climate change. As per the IPCC and the Council of Human Rights, specifically in their resolution 41/21, climate change affects, among many other things, the legal guarantees for life, awareness, development, wellness, food, water, sanitation, adequate housing, and a variety of cultural rights.[29] It might be difficult to put them all here, though.

3.1 Right to Life

The Universal Declaration of Human Rights (hereafter referred to as UDHR) declares that everyone has the right to life, freedom, and personal security. As per provisions of the International Covenant on Civil and

[27] Ibid.

[28] Ron Dudai, Climate Change and Human Rights Practice: Observations on and Around the Report of the Office of the High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights," *Journal of Human Rights Practice* 1, no. 2 (2009): 294, http://dx.doi.org/10.1093/jhuman/hup009.

[29] Ibid.

Political Rights (hereafter referred to as the ICCPR), every individual has the inherent right to life. This implies that the States should at the very least take effective precautions against foreseen and avoidable loss of life.[30]

In light of worldwide climate change, severe weather conditions could pose the most glaring and dramatic threat to the exercise of one's right to life, but these threats are by no means the only ones. Climate change deaths are a result of many variables, including drought, rising temperatures, the expansion of infectious diseases, and many more.[31]

3.2 Right to Self-Determination

Article 1 of the UN Charter mandates adherence to the fundamental right of individuals to self-determination. Per Common Article 1 of the international agreements, ICCPR, and ICESCR, everyone is entitled to the above-said right. This right is protected under Article 3 of the UNDRIP. This entails pursuing their political, social, and cultural development as well as exercising their right to personal freedom. Important elements of one's right to self-determination include the obligation of States to support its realization, particularly for those living beyond their borders, and the right of individuals to not have their means of livelihood taken from them.[32]

The IPCC cites some issues related to climate change on tiny islands, including rising sea levels, tropical and extratropical cyclones, increasing air and sea surface temperature, altering patterns of rainfall, and diminished ecosystem services. This has an impact on the right to self-determination since citizens of small island states and indigenous communities struggle to uphold their freedom to dwell on their ancestral

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[30] "Frequently Asked Questions on Human Rights and Climate Change" (New York & Geneva: United Nations Human Rights Office for the High Commissioner, 2021), https://resourcecentre.savethechildren.net/document/frequently-asked-questions-human-rights-and-climate-change/.

[31]Dudai, "Climate Change and Human Rights Practice," 295.

[32]"Frequently Asked Questions on Human Rights and Climate Change." 5.

territories and autonomously seek their own economic, social, and cultural growth.[33]

3.3 Right to Development

The UN Charter's Article 55 mandates that States shall support conditions that foster social and economic growth. According to ICCPR and ICESCR, all peoples have the right to "freely choose their political framework and voluntarily pursue their economic, social, and cultural development." The Proclamation on the inalienable right to development offers a comprehensive framework for pursuing the three UN Charter tenets peace, security, and human rights. It outlines that a complete person and individuals are required to participate in economic, cultural, social, and political growth to contribute to and benefit from the full realization of all fundamental freedoms and human rights.[34] Hence, states should, in particular, act both individually and together to ensure that everyone can benefit from economic, social, cultural, and political progress. People's ability to exercise their right to development is imperiled by climate change.

3.4 Right to Health

The ICESCR and the UDHR both state that everyone has the right to health. According to the Covenant, state parties are required to take action to fully realize the right, including all efforts required to improve industrial and environmental hygiene in all of its forms. The Office of the High Commissioner for Human Rights (OHCHR) examined the connection between climate change and everyone's fundamental right to the best possible degree of bodily and mental health, and concluded that there were significant implications for the right to health. Research by the UNFCCC secretariat found that it affects health in three distinct ways: directly through

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[33] Ibid.
[34] Ibid., 6.

climatic elements such as heat waves and thunderstorms, indirectly via systems of nature like illness vectors, and through channels regulated by human systems, such as undernutrition. Future health indicators like fresh air, healthy drinking water, enough food, and adequate housing are already being impacted by climate change.[35]

3.5 Right to Food

This right is recognized in both the ICESCR and the UDHR. As per Article 11 of the ICESCR, every person has a fundamental right to be free from hunger, and States are urged to take necessary national and international action "to guarantee a balanced share of world food supply around need." The basic right to nutrition must be recognized, protected, promoted, and upheld by States just like all other human rights. The States' dedication to using all available resources will enable the right to nourishment and all other rights specified in the ICESCR to be gradually realized.[36]

According to the IPCC, climate change imperils food security, endangering the realization of one's right to food. The World Bank estimates that a 2°C rise in the average worldwide temperature may cause between one hundred million and four hundred million more people to be in danger of starving as well as almost 3 million additional deaths due to malnutrition each year.[37]

3.6 Rights to Water and Sanitation

The Committee on IESCR defined the right to sufficient, secure, pleasant, readily available, and reasonably affordable water for household and personal consumption in its general statement. State parties must take specific actions to guarantee that all people have access to water. In its

[35] Ibid., 8.
[36] Ibid., 10.
[37] Ibid.

resolution 64/292, the General Assembly recognized that access to sanitary facilities and clean water is necessary for the realization of all other rights.[38]

Since climate change reduces the predictability of water supply and increases the likelihood of floods, which have the potential to destroy water points, sanitize facilities, and pollute water supplies, the effects of global warming are frequently felt via water. Climate change already influences the quality, quantity, and accessibility of water for basic human requirements, putting the enjoyment of the right to water and sanitation in danger. According to the World Bank, if global temperatures rise by 2°C, one to two billion people may no longer have access to enough water.[39]

4. Natural Catastrophes Demanding Climate Change Response

4.1 Cyclone Idai and Kenneth

The central part of Mozambique, which is bordered by the area of the southwest Indian Ocean where powerful cyclones are located, has seen the most severe climate dangers. When it made landfall in March 2019, Cyclone Idai was the most powerful tropical cyclone ever seen in the southern hemisphere. Its strong winds contributed to massive floods and a high number of casualties. In addition to killing over 1,000 people in Zimbabwe, Malawi, and Mozambique, Cyclone Idai uprooted millions of people from their homes and left them without access to food or other necessities. Terrible landslides destroyed homes, as well as land, crops, and infrastructure. Six weeks later, tropical storm Kenneth made landfall in parts of Northern Mozambique where none had been seen since the satellite era.[40]

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[38] Ibid., 12.

[39] Ibid.

[40] Alberto Charrua, Rajchandar Padmanaban, Pedro Cabra, Salomao Banderia and Maria M. Romeiras, "Impacts of the Tropical Cyclone Idai in Mozambique: A multi-temporal Landsat Satellite Imaginary Analysis," *Remote Sensing* 13, no 2 (2021): 389.

4.2 Australian Wildfires

More than 17 million acres of land were burned by bushfires that raced over Australia between July 2019 and February 2020. The Australian Capital Territory, New South Wales, Queensland, South Australia, Victoria, and Western Australian inhabitants were the most severely impacted by the fire in November as its size quickly increased. Long-lasting drought, sweltering heat, and powerful winds fed them. Smoke caused problems for more than 50% of Australia's adult population, killed or forced to flee billions of animals, and claimed the lives of 33 humans.[41]

An additional 64,579 persons were compelled to leave their houses in reaction to the flames and register with the Australian Red Cross. Nearly 8,100 individuals may have to relocate permanently as a result of the destruction of more than 3100 dwellings. Though government organizations, fire departments, and humanitarian organizations have been praised for their efforts in fighting the fires and meeting the needs of those displaced, displacement has continued to have an impact on living conditions, disrupting livelihoods, education, security, and health of people forced to leave their homes frequently with serious financial ramifications.[42]

4.3 East Africa Drought

There are two main rainy seasons in East Africa each year. However, due to failing of rainy seasons in considerable parts in 2021 and 2020 there was a significant precipitation shortfall from the end of 2020 to November 2021. Only a few isolated regions in 2021 experienced precipitations that were higher than normal, which lowered the gap just a little. However, to fully recover, even more precipitation over larger areas would have been

[41] Md Kamrul Haque, Md Abdul Kalam Azad and Tareq Ahmed, "Wildfire in Australia during 2019-2020, Its Impacts on Health, Biodiversity and Environment with Some Proposal for Risk Management: A Review," *Journal on Environmental Protection* 12, no. 6 (2021): 391.

[42] Ibid.

required. Significant and growing precipitation at the end of 2021 has exacerbated the already dire consequences.[43]

Somalia, the coastal area of Kenya and Tanzania and Central Eastern Ethiopia are all experiencing a protracted drought. Moreover, ongoing drought conditions are causing a severe soil moisture deficit and are having an impact on the agricultural industry and rising wildfire risk. Between July 2020 and June 2022, Somalia experienced a severe deficit (20% according to the CHIRPS dataset, and 45% according to the ECMWF ERA5 reanalysis). Due to persistent wars, widespread poverty, and food insecurity, the region is particularly exposed to drought and other natural calamities in general and has a limited capacity to cope. A total of 70 million people in East Africa are in a certain level of danger from drought. According to UN-OCHA, 7 million individuals in Ethiopia, 4 million people in Kenya, and 5 million people in South Sudan need humanitarian aid. 6.1 million People in Somalia were affected by the drought as of May 2022.[44]

5. Climate Change in Pakistan

Due to its unique geographic and climatic characteristics, Pakistan is particularly susceptible to the impacts of climate change. Despite being close to the Arabian Sea, Pakistan's southern part is made up of very barren deserts, whereas its northern region is home to more than 5,000 glaciers. Due to Pakistan's economy's reliance on climate-sensitive sectors like agriculture and forestry, which causes the dread of floods in its low-lying, heavily populated coastal regions, climate change has had a major detrimental effect on Pakistan. Pakistan's annual mean surface temperature has been continuously increasing since the turn of the 20th century. A rise

[43] Gebremedhin Gebremeskel Haile, Qiuhong Tang, Siao Sun, Zhongwei Huang, Xuejun Zhang and Xingcai Liu, "Droughts in East Africa: Causes, Impacts and Res," *Earth Science Review* 193, no 2 (2019): 314.

[44] Ibid.

in temperature of 0.6 to 1.0°C has been observed in arid highlands, hyper-arid plains, and desert coastal regions. Baluchistan's humidity is down 5%, but solar radiation in the state's southern half is up 0.5–0.7%.[45]

Furthermore, it is ironic that Pakistan ranks 135th regarding global GHG per capita emissions while ranking 16th in terms of climate change sensitivity. Especially in the past 20 years, as global air temperatures have dramatically increased Pakistan's precipitation and heat regimes have changed. Because of this, Pakistan's hydrological cycle has undergone noticeable changes, including variations in seasonal rainfall, agricultural patterns, droughts, water accessibility times, the frequency and severity of heat waves, and precipitation-related natural disasters.[46]

5.1 Challenges and Adverse Impacts Faced by Pakistan Due to Climate Change

Some of the challenges Pakistan is experiencing are the following:

a. Heat exhaustion and other negative effects of climate change lead to lower agricultural and livestock yields.
b. Due to more evaporation at higher temperatures, there will be a greater need for irrigation water but less water is available.
c. Changes in river flows spurred on by melting glaciers and various precipitation patterns cause uncertainty regarding the timely supply of irrigation water.
d. Unusual and irregular rainfall patterns, which are particularly detrimental to agriculture that depends on rain.
e. The abundance of insects, maladies, and pests, particularly in warm, humid climates and after flooding and severe rain, degradation of

[45] Anjum Bari Farooqi, Azmat Hayat Khan and Hazrat Mir, "Climate Change Perspective in Pakistan," *Pakistan Journal of Meteorology* 2, no 3 (2005): 13 and 14.
[46] Ghulam Rasul et al., "Climate Change in Pakistan Focused on Sindh Province" (Islamabad: Pakistan Meteorlogical Department, December 1, 2012), 131, doi:10.13140/2.1.2170.6560.

grasslands, and deterioration of previously cultivated land areas, including those impacted by erosion from water, erosion by winds, water logging, salt, etc.

f. Pakistan would see the loss of its tropical forests, which are a source of fuel and food for the locals as well as the habitat for 90% of Pakistan's main exports. Rice and other climate-sensitive grains, cereals, vegetables, and wildlife are particularly noteworthy.
g. The production of agriculture is expected to be harmed by high temperatures, extreme drought, flooding, and deteriorating soil. Pakistan's food security would be in danger as a result.
h. Heat-related and infectious viruses like malaria and dengue would be more likely to occur in areas with high temperatures and rain.
i. The expected climate change is likely to have a significant impact on the availability of fresh water.
j. The dry and semi-arid regions may face severe water stress.
k. Three consecutive, severe floods have plagued Pakistan's agriculture industry, disrupting both the State's general economy and the agriculture sector. The State's single largest industry, agriculture, accounts for 21% of all national income; its share has declined over time and it employs 45% of the labour force. Nearly 70% of people live in rural areas and the majority of them are reliant on the agriculture industry.[47]
l. The rise in CO_2 caused by the burning of fossil fuels, and the emission of aerosols emission from various resources will ultimately lead to the decline of the ozone layer.[48]

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[47]Shah Fahad and Jiamgling Wang, "Climate change, Vulnerability and its Impacts in Rural Pakistan: A Review," *Environ Sci Pollut Res* 27, no. 2 (2020): 1334.

[48] Muhammad Naeem Javed and Abdul Majid Khan, "Climate Change in South Asia and It Impacts on Pakistan: Causes, Threats and Measures," *Pakistan Journal of Social Sciences* 39, no. 4 (2019): 1571.

5.2 Pakistan Flood 2022

Catastrophic floods occur in 2022 in Pakistan. The main factors were increased precipitation and glacier melting brought on by climate change. The flood covered one-third of the nation. 1700 people have perished in Pakistan as a result of protracted and heavy monsoon rains, while landslides and flash floods have wrecked roads, bridges, and buildings. People were cut off from aid in numerous villages. The floods have affected more than 33 million people, according to the Pakistani government, prompting the State to proclaim a state of emergency. Millions of people had to flee their houses and are now either homeless or staying in shelters. They hardly ever have access to clean water. Their crops were damaged, food was in short supply and starvation was imminent. The floods in August 2022 were preceded by a severe heat wave in May 2022 and have disproportionately affected the southern province of the country. Estimated economic losses exceed $30 billion. Despite the several months after the disaster, things are still tense since much of southern Pakistan is still under water. Standing water is already a breeding ground for infectious diseases. Typhoid, cholera, malaria, and diarrhea are all spreading and putting more lives at peril. The floods show how urgent it is to solve climate change. Pakistan is one of those countries most severely impacted by climate-related extreme weather, despite producing less than 1% of the global GHG emissions.[49]

6. Legal Framework for Environment in Pakistan

6.1 Constitution of the Islamic Republic of Pakistan

The Constitution does not expressly define any philosophy or policy concerning the privileges and obligations of the state and its inhabitants regarding the environment. It does not explicitly mention the right to the

[49] J. S. Nanditha et al., "The Pakistan Flood of August 2022: Causes and Implications," *Earth's Future* 11, no. 3 (2023): 1, doi:10.1029/2022EF003230.

environment, but thanks to the Supreme Court's (SC) decisions, the fundamental right to life guaranteed by Article 9(52) has been expanded to include the pursuit of environmental justice. Such as in Shehla Zia v. WAPDA, the Supreme Court upheld the right to life to include the right to a healthy environment, free from pollution. Although SC has made a lot of decisions regarding the fundamental right to life which expands its scope and covers all the elements of environmental justice, it is pertinent to mention here that the laws are more binding than judgments. Thus, we need to take proper steps to add the right to the environment as one of the Fundamental rights in the constitution of Pakistan.[50]

6.2 Pakistan Environmental Protection Act, 1997(PEPA, 1997)

The Pakistan Environmental Protection Ordinance, of 1983 was the result of Federal government legislation on environmental and ecological issues; however, it was never put into effect and was later repealed by the PEPA, 1997 now called PEPA, 2012. Following the aforementioned Act, the Federal Government established the Environmental Protection Council to approve Pakistan's National policies regarding the environment and state quality criteria for the environment prepared by the Environmental Protection Agency.[51]

6.3 Pakistan Climate Change Act, 2017 (PCCA)

On April 3, 2017, the Assembly adopted PCCA bills addressing climate change. This legislation will support the provinces in their efforts to adopt and combat climate change the Pakistan Climate Change Council, authority, and fund were established by the Act.[52]

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[50] Shehla Zia v. WAPDA Pakistan Legal Decisions, PLD 693 (Supreme Court 1994).

[51] Inayat Ullah Khan and Asif Yaseen, "Implementation of Climate Change Convention in Pakistan," *The Dialogue* XII, no. 4 (2017): 347.

[52] Javed and Majid Khan, "Climate Change in South Asia and It Impacts on Pakistan," 1576.

6.4 The 2005 National Environmental Policy

It provides a framework for Pakistan's Climatic issues, such as water pollution, seawater contamination, air smog, deforestation, and natural disasters. To better the quality of life for citizens through SDG, it objects to maintaining and rebuilding Pakistan's surroundings.[53]

6.5 Climate Change Task Force (TFCC)

To control the State's GHG emissions, improve forestry, economic development, food security, and water safety, and construct new climate-related institutes, the Pakistan Planning Commission established a TFCC in October 2008. It also focuses on enhancing the capabilities of the current institute for reducing climate change.[54]

6.6 Implementation of National Climate Change Policy (NCCP)

The primary goal of NCCP, 2012 is to assist the socially vulnerable sector and guide Pakistan towards climate-spirited progress, with a particular emphasis on Integrated Water Resource Management (IWRM) from Climate Change Viewpoint.[55]

6.7 Ministry of Climate Change

To deal with issues relating to environmental pollution, ecology, and international environmental accords, the Ministry of Environment was originally founded in 1975. The said Ministry was abolished after the passage of the 18th amendment and the Ministry of Planning then oversees matters on environmental issues. In October 2011, the minister of Disaster management was established by the Federal Government and was empowered to handle environmental matters. Finally, the Ministry of Disaster Management was abolished and the Ministry of Climate Change

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[53] Ibid.
[54] Ibid.
[55] Ibid.

was given the portfolio of the Ministry of Disaster Management in April 2012.[56] The following are the issues that are delegated to the Ministry of Climate Change:

a. Compliance with requirements imposed by several multilateral environmental conventions, protocols, and accords.
b. National Environmental Quality Standards Determination.
c. Encouraging nationwide acceptance of environmental norms, regulations, and strategies.
d. Conducting surveys and providing environmental databases in response to multilateral environmental agreements.
e. Implementation of the climate change convention in Pakistan, as well as monitoring, coordinating, and implementing environment and climate change agreements and conventions in Pakistan.
f. Addressing issues covered by PEPA, 1997
g. Creation of national action plans and strategies to fulfil environmental duties on a global scale.[57]

6.8 Pakistan Climate Change Council

The council was established under section 3[58] of the Act. Section 4[59] of the Act highlights the Function of the council which includes overseeing the CCA's enforcement. Additionally, it has the power to decide how to achieve the Sustainable Development Goals (SDG) of the UN, setting policies for environmental protection, and taking into account the National Climate Change Report. Pakistan is a party to several international agreements.[60]

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[56] Khan and Yaseen, "Implementation of Climate Change Convention in Pakistan," 353.

[57]Ibid.

[58] Pakistan Climate Change Act," Pub.L. No. X (2017), sec. 3.

[59] Pakistan Climate Change Act," Pub.L. No. X (2017), sec. 4.

[60] Sarim Jamal, "Examining the Pakistan Climate Change Act 2017 in Contest of the Contemporary International Legal Regime" *LUMS Law Journal* 5 (2020): 108.

6.9 Pakistan Climate Change Authority

The authority is created according to section 5(2)[61] with the aim of corporate organization, with the ability to be sued, pursue a *suo moto* action, acquire assets, borrow money, and engage in contacts as necessary. The creation of authority makes it clear that it is in charge of preventing and mitigating climate-related calamities.[62]

6.10 Pakistan Climate Change Fund

To give PCCA a financial foundation upon which to operate, section 12[63] authorizes the creation of a fund specifically related to climate change. According to section 12(2)[64] "donation, endowment, grant and gifts" may be used as a pool from which the fund might draw funding. The link between sections 12(b)[65] and 10(2)(b)[66] which demands approval from senior government official before accepting any kind of foreign-based aid from organization and states, is a crucial issue to be taken into account.[67]

6.11 National Climate Change Policy, 2021

The updated Pakistan's NCCP, 2021 recognized the government flagship "Ten Billion Tree Tsunami Plan", along with the Prime Minister's "Urban Forest Project", "Clean Green Pakistan Campaign" and "Protected Areas and National Park Initiatives". The last two projects aim to increase protected areas to at least 15% of Pakistan's area by 2030. Also, the significant focus of the policy is the Ecosystem Restoration Initiative (ESRI).[68]

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[61] "Pakistan Climate Change Act," Pub.L. No. X (2017), sec 5(2).
[62] Jamal, "Examining the Pakistan Climate Change Act 2017," 108.
[63] Pakistan Climate Change Act," Pub.L. No. X (2017), sec 12.
[64] Ibid, sec 12(2).
[65] Ibid, sec 12(b).
[66] Ibid, sec 10(2)(b).
[67] Jamal, "Examining the Pakistan Climate Change Act 2017," 108.
[68]"Pakistan National Climate Change Policy" (Islamabad: Ministry of Climate Change, GOP, 2021). https://mocc.gov.pk/SiteImage/Policy/NCCP%20Report.pdf.

The policy outlines the necessary adaptation steps and highlights the various sectors' vulnerabilities to climate change. The policy also deals with problems in many sectors, including water, agriculture, forestry, coastal regions, biodiversity, and fragile ecosystems. Being a responsible member of the International Community Pakistan is also prioritizing climate change mitigation in the energy and transportation sectors. Furthermore, the policy has included suitable measures for disaster pre-readiness, capacity building, institutional strengthening, technology transfer, and international cooperation as significant elements.[69]

6.12 National Security Policy of Pakistan 2022-2026

The issues Pakistan is presently experiencing or will experience in the future as a result of climate change are addressed under the NCCP. Pakistan's initiatives to combat climate change have received international recognition. Pakistan has established a separate ministry of climate change, launched a campaign to plant 10 billion trees, and committed to reducing predicted emissions by 50% by 2030, subject to international grants. Additional efforts are being made to avoid, minimize, adapt, and mitigate the adverse impacts of climate change on the economy, environment, health, and well-being of people through transforming water management, increasing water storage capacity, institutional capacity building, research, and development.[70]

6.13 Measures to Mitigate Climate Change Effects

The Pakistani government is acting in response to the issue to lessen the adverse effects of global warming. The government recently took the following actions:

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[69]Ibid.

[70] "National Security Policy of Pakistan 2022-2026," (Islamabad: National Security Division, 2022), https://onsa.gov.pk/assets/documents/polisy.pdf.

a. By integrating adaptation and mitigation through ecologically focused projects, the government has started the ESRI to help Pakistan make the transition to an environmentally resilient nation. They include conserving biodiversity, improving the policy environment in consistency with Pakistan's Nationally Determined Contribution (NDC), and achieving Land Degradation Neutrality (LDN). The main aim behind the initiative is to create an independent and transparent financial mechanism in Pakistan called the Eco-system Restoration Fund (ESRF).
b. The Clean Green Pakistan Movement (CGMP) and resource mobilization for the Strategy Unit on Water, Sanitation, and Hygiene (WASH) are among the SDGs that the MoCC is promoting in partnership with important stakeholders and pertinent provincial agencies to inspire a nationwide movement for a clean, green environment.
c. Ten Billion Tree Tsunami Program (TBTTP) aims to alleviate the negative consequences of climate change.
d. Pakistan's National Drought Plan is being created to assist the country in creating its national action plans to increase its drought resilience. The Global Mechanism Team of the UN Convention to Prevent Desertification has chosen a national consultant for Pakistan to create a thorough national action plan for this aim.[71]

The Ministry of Climate Change's significant Initiatives are listed below:

e. The Pakistani delegation at COP-25 was successful in securing six positions on various committees under the UNFCCC, demonstrating confidence in Pakistan's commitment to climate negotiations.

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[71] "Pakistan Economic Survey 2019-2020," Islamabad: Finance Division, 2020), https://www.finance.gov.pk/survey/chapter_20/16_Climate_Change.

f. The NDC cooperation is assisting Pakistan in formulating its development strategy for climate resilience.
g. The NCEC, or National Commission on the Establishment of the Carbon Market, has been formed.
h. To lessen the negative environmental consequences of vehicle carbon emissions and the associated expenses, the Pakistani government has established the National Electricity Vehicle Policy, which calls for a shift to electric vehicles of 30% by 2030. In addition, construction on Karachi's first "zero emissions" metro line has started.
i. The "A Clean-Green Cities Index" has been launched in 20 cities to encourage greater hygiene and handling of waste. The decision to ban the use of single-use plastic has also been made in Pakistan.[72]

7. Islam and Climate Change

The Islamic way of life encourages total ecological balance and defends the rights of all living things. Humans lost sight of these rights and the duties they bear as the Earth's guardians along the road, upsetting the delicate balance of this equilibrium. A severe and unavoidable result of this neglect is climate change.[73] Islam teaches its believers to protect the environment. Muslims believe that God will hold mankind accountable for their actions and that they should act like the globe's *Khalifah* or guardians. Muslims are taught that God created the earth and the sky before he created everything else. Protecting God's most prized creation, the planet is considered more Islamic than anything else.[74]

[72] Ibid.
[73] Ibrahim Ozdemir, "What Does Islam Say about Climate Change and Climate Action?," *Aljazeera*, August 12, 2020, https://www.aljazeera.com/opinions/2020/8/12/what-does-islam-say-about-climate-change-and-climate-action.
[74] Ibid.

7.1 Importance of Taking Action on Climate Change

The extent of the harm that people are doing to the environment has become critical. According to Islamic law, minimizing harm should come first. Safeguarding the environment and taking action to lessen or even halt the effects of climate change should be a key concern for Muslims, organizations, and governments. Islamic law distinguishes between two types of duties: *fard-al'ayn* (personal responsibility) and *fard-al'kifaya* (shared duty). The latter states that if a certain Muslim group fulfils the requirement, the rest of the Muslims are exempt from it. Both *fard-al'ayn* and *fard-al'kifaya* may be seen in environmental activism.[75]

The Islamic idea of *jihad* also covers the prospect of environmental protection from an activist standpoint, particularly for single Muslim and Muslim groups. *Jihad* is a key overarching concept in the Islamic theological context. It relates to every personal challenge one faces to succeed. If fighting destructive forces for a good result and purpose is one aspect of *jihad*, then environmental activism is a form of *jihad*. According to Islamic beliefs, peaceful activism undertaken with true intentions against entities and powers that could cause environmental harm is a sort of righteous *jihad* that will reap rewards from God in the hereafter. Every Muslim has a personal responsibility to protect the environment because the harm to the planet is getting worse and current levels of action are doing little to improve the situation. Governments of Muslim-majority nations also have a responsibility because their cultural and economic practices significantly affect their carbon footprint.[76]

It should be emphasized that Hazrat Abu Bakr gave considerable importance to the preservation of the environment, especially under the

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[75] The Conservation, "Why Taking Action on Climate Change is an Islamic Obligation," accessed September 17, 2022, https://theconversation.com/why-taking-action-on-climate-change-is-an-islamic-obligation-171111.

[76] Ibid.

trying circumstances of battle. This concern was sparked by the awareness that God Himself imposed a high value upon such flora and animals, making it evident that conservation measures should be taken. IHL emphasizes protecting nature during armed conflicts, which is not surprising given that traditionally its devastation has been viewed as an undervalued sign of war.[77]

7.2 Some Relevant Qurʾānic Verses and *Aḥādīth* on Climate Change

The Qurʾān is the greatest environmental manual for Muslims. Muslims diligently read this divine text for spirituality since it is thought to be a magnificent revelation with exceptional concepts. Given that Muslims believe God created everything, they hold that faith and belief in the environment are equally important as having faith in mankind and God. Thus, the Qurʾān does not merely equate kindness to animals and plants with believing in One God. The natural world is praised in the Qurʾān as an earthly paradise, a reflection of the verdant forest of Paradise overhead. Some of the most effective climate-conscious teachings derived through the verses of Qurʾān as well as from the *aḥādīth* are discussed below:[78]

There is one *ḥadīth* according to which one day, Saad ibn Abi Waqas (RA) was making *wudu* when the Prophet (PBUH) passed by. The Prophet (PBUH) questioned him as to what is this wastage to which he responded with a question as to whether there is wastage in *wudu* too. Prophet (PBUH) replied that yes, it is waste even if you're beside a flowing river.[79] This

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[77] "The Surprising Influence of Hazrat Abu Bakr's Will on Modern IHL Protections" *Dlpforum,* accessed February 3, 2023, https://www.dlpforum.org/2023/02/03/the-surprising-influence-of-hazrat-abu-bakrs-will-on-modern-ihl-protections/.

[78] "The Eco Muslim: 10 Qurʾān Verses on The Environment and Do-Able Action Plans," *Greenfitree* accessed September 17, 2022, https://greenfitree.org/2013/06/17/10-Qurʾān-verses-on-the-environment-and-do-able-action-plans/.

[79] Imam Muhammad bin Yazid Ibn Majah al-Qazvini, "The Book of Purification and Its Sunnah - Chapter: Concerning Moderation in Ablution and Avoiding Extravagance, Ḥadīth 425," in *Sunan Ibn Majah*, accessed May 17, 2023, https://sunnah.com/ibnmajah:425.

Ḥadīth serves as a prime example of the necessity of avoiding resource waste, even in the absence of an apparent shortage. In simple words, not wasting things ought to be something that Muslims naturally do. This is particularly significant when we take into account the number of people who lack access to safe, clean water worldwide and the effects that the changing climate is having on these areas.[80]

يَٰبَنِيٓ ءَادَمَ خُذُواْ زِينَتَكُمۡ عِندَ كُلِّ مَسۡجِدٖ وَكُلُواْ وَٱشۡرَبُواْ وَلَا تُسۡرِفُوٓاْۚ إِنَّهُۥ لَا يُحِبُّ ٱلۡمُسۡرِفِينَ[81]

> O children of Adam! Dress cleanly and beautifully for every act of worship, and without making unlawful the things God has made lawful to you eat and drink, but do not be wasteful by over-eating or consuming in unnecessary ways: indeed, He does not love the wasteful.[82]

The Qurʾān serves as a reminder of our obligations to one another and the planet's rich resources. In the above-mentioned verse, the Qurʾān indicates for us to drink and eat but to not waste anything since God cannot possibly love the lavish or wasteful. We behave extravagantly and unjustly toward the riches Allah (SWT) has given us when we squander food and water, buy plastics and clothes items, and then toss them out of hand. According to another source, the Prophet (SAW) said that until there is a benefit for doing so, no man will cultivate a crop or plant a grain that birds, animals, or people

[80]Maria Zafar, "6 Climate Lessons from the Qurʾān and Ḥadīth," accessed September 17, 2022, https://www.islamic-relief.org.uk/6-climate-lessons-from-the-Qurʾān-and-Ḥadīth.

[81] Qurʾān, 7:31.

[82]"The Holy Qurʾān (Translation by Ali Unal)," accessed April 12, 2023, https://mQurʾān.org/content/view/985/4/.

will eat. Being environmentally conscious and living sustainably affects more than simply the environment. Additionally, it is moral and ethical.[83]

Prophet Muhammad (SAW) historically laid the foundation for what it is to live purposefully and effectively. For the sake of wildlife protection, hunting was not permitted. Even in times of conflict and devastation, it was prohibited to cut down trees and destroy crops. He urged people to treat their animals, who served as the primary form of transportation at the time, with kindness by giving them rest and refraining from overloading them with provisions. Islamic law imposes several moral requirements on the slaughter of animals for food to reduce waste, foster environmental awareness, and foster compassion for all of Allah's creatures (SWT).[84]

مَا مِن دَآبَّةٍ فِى ٱلْأَرْضِ وَلَا طَـٰٓئِرٍ يَطِيرُ بِجَنَاحَيْهِ إِلَّآ أُمَمٌ أَمْثَالُكُمۚ مَّا فَرَّطْنَا فِى ٱلْ
كِتَـٰبِ مِن شَىْءٍۚ ثُمَّ إِلَىٰ رَبِّهِمْ يُحْشَرُونَ[85]

> There is no animal that crawls on the earth, no bird that flies with its two wings but are communities like you. We have neglected nothing in the Book (of decree). Then to their Lord will they all be mustered.[86]

Furthermore, as evident from the above verse, it is mentioned in the Qurʾān that neither an animal nor a being that flies on its wings inhabits the ground, but they live in communities just like humans and that in the end, everyone will be brought to their Lord. This Qurʾānic verse illustrates the privileges of animals. It recognizes the value of their position in the world. Additionally, it serves as a harsh warning that just as mankind has

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[83] The Zahra Foundation, "Climate Change: An Islamic Responsibility to Care for the Planet," accessed September 17, 2022, https://zahrafoundation.ca/blog/climate-change-an-islamic-responsibility-to-care-for-the-planet/.

[84]Ibid.

[85] Qurʾān, 6:38.

[86]Islamicstudies, "Towards Understanding the Qurʾān," accessed April 12, 2022, https://www.islamicstudies.info/tafheem.php?sura=6&verse=31&to=40#:~:text=(6%3A38)%20There%20is,will%20they%20all%20be%20mustered.&text=(6%3A39)%20Those%20who,and%20blunder%20about%20in%20darkness.

communities, networks, and roots on earth, so do animals. As Muslims, we must keep this in mind and exercise compassion when treating other living things.[87]

7.3 Islamic Declaration on Climate Change

The Islamic Declaration on Climate Change, which exhorts countries to reduce GHG emissions and switch to 100% renewable energy, was approved by Islamic academics from throughout the world. This declaration lays forth some requests for global leaders and the corporate community and reasons why Muslims need to be responsible environmental advocates. First, the proclamation urges decision-makers to reach a fair and legally binding accord while drafting the entire climate agreement that will be adopted in Paris. The agreement should specify specific goals and mechanisms to track them. Furthermore, developed nations and oil-producing governments should engage in a green economy, stop making immoral environmental profits, and wipe out their carbon dioxide emissions by the middle of the decade.[88]

Second, the declaration calls on citizens and political leaders from all nations to acknowledge that an unrestricted economy is not an option and to commit to a zero-emissions plan and 100% renewable energy as soon as possible. A strong priority should also be given to adaptation, specifically for highly endangered groups. Prominently, the corporate world is urged to play a more active role in reducing its carbon footprint, confess to using only renewable energy sources and no emissions, switch investments to renewable energy sources, incorporate more sustainability initiatives, and help with the divestiture from fossil fuels.

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[87]Maria Zafar, "6 Climate Lessons from The Qurʾān and Ḥadīth," accessed September 17, 2022, https://www.islamic-relief.org.uk/6-climate-lessons-from-the-Qurʾān-and-Ḥadīth/.

[88]Environment Ecology, "Islam, Faith and Climate Change", accessed September 17, 2022, http://environment-ecology.com/religion-and-ecology/740-islam-faith-and-climate-change.html.

Last but not least, the declaration makes a call to action for all Muslims, no matter where they may be, supported by verses from the Holy Qurʾān. According to the proclamation, mankind is currently accountable for wasting treasures given by Allah, and that care toward creation is a key component of the Islamic religion.[89]

7.4 Significance of the Islamic Declaration on Climate Change

The significance of this declaration is that it is a significant illustration of how religion can inform and reshape sustainability discussion. Islam has always been the driving force behind civilization. The declaration may aid in directing Islam's moral and spiritual might toward the goal of creating a low-emission, climate-resilient future.[90]

7.5 Muslim's Perception of Climate Change

In terms of their resources, geography, ecology, and economic development, States with a majority of Muslims differ greatly. However, a large number of Muslim-populated areas are extremely affected by climate change. For instance, the Middle East and North Africa's arid or semiarid environment makes the area susceptible to increasing heat stress and decreasing fresh water supplies. Most Muslims consider climate change to be a significant societal concern. Some academics, however, contend that persistent economic difficulties in nations with a majority of Muslims influence local populations to place a higher priority on economic growth and poverty reduction than on reducing climate change. Muslims put climate change above other environmental issues. The manners in which

[89]Ibid.

[90]Odeh Al-Jayyousi, "The Islamic Discourse on Climate Change," *Ecomena,* accessed September 17, 2022, https://www.ecomena.org/islamic-discourse-climate-change/.

Muslims understand climate change also range from place to region, in addition to geographical variations in concern about it.[91]

Various interpretations are there for climate change. The first interpretation, which considers human activity as the primary driver of ongoing climate change, is in line with the majority of scientific viewpoints. As a result, some Muslim environmentalists point to the current economic structure as the primary cause of the issue. This viewpoint contends that the spread of this damaging economic structure into Muslim-majority nations has resulted in the loss of Islamic principles and values in those nations diverging from the correct path such as consuming things in moderation results in actions that are destructive to the environment. Those who believe that climate change is God's retribution, on the other hand, blame human immorality for environmental destruction. According to this viewpoint, God responds to the immoral actions of local communities or political leaders with various types of environmental destruction or calamities. Examples of such evil activities include stealing, lying, greed, and injustice.[92]

8. Comparative Analysis of International, National, and Islamic Law on Climate Change

Issues	**International Laws**	**Pakistani Laws**	**Islamic Laws**
Greengages Emission	1. The UNFCCC 2. The KYOTO Protocol 3. Paris Agreement	1. PEPA, 2017 2. Climate Change Task Force 3. Ministry of Climate Change 4. Pakistan Environmental	1. Qurʾānic Verses regarding pollution, environment, and water. 2. Ḥadīth

[91]"Muslims and climate change: How Islam, Muslim organizations, and religious leaders influence climate change perceptions and mitigation activities," *Wires Online Library,* accessed September 17, 2022, https://wires.onlinelibrary.wiley.com/doi/full/10.1002/wcc.702.

[92] Ibid.

	4. Sixth Assessment Report of UN IPCC	Protection Act, 2012. 5. The 2005 National Environmental Policy. 6. National Climate Change Policy, 2021. 7. National Security Policy of Pakistan, 2022-2026	3. Islamic Declaration on Climate Change
Ozone Layer Depletion	1. The Vienna Convention for the Protection of Ozone Layer 2. The Montreal Protocol	1. The Ministry of Climate Change is working on making Policies to protect the Stratospheric Ozone depletion. 2. National Ozone Unit in the Ministry of Environment.	1. The Qurʾān directs us to preserve the ozone layer. 2. Under the Islamic Declaration on Climate Change, all Muslims are obligated under Islamic law to cut GHG emissions
Climate Change as a Threat to Humanity	1. ICCPR 2. ICESCR 3. UDHR	1. Art 9 of the Constitution of Pakistan, 1973. 2. Implementation of National Climate Change Policy, 2021 3. National Security Policy, 2022-2026	1. The Islamic Declaration on Climate Change directs to reach a just and legally binding decision while drafting the entire climate agreement

The security, ecology, and economics of the Nations need to be given more thought because climate change is one of the biggest concerns to civilization. All States have a right to equitable treatment, equal

involvement, and equal protection against climate change, according to environmental justice. However, not all States are treated equally and some States are vulnerable to climate despite making less of a contribution to it. The unbalanced weather on Earth puts the viability of the planet's ecosystems, the long-term survival of mankind, and the equilibrium of the world's economy in danger. Although the earth's temperature has been gradually changing for millennia, the GHG problem has gotten worse over the past two centuries and now poses a threat to bring about global warming on a scale that has never been seen before. However, if this risk keeps increasing, the world may soon experience catastrophic repercussions of climate change.

Keeping in view the worrisome increasing rate of climate change and the rising level of carbon dioxide in the atmosphere, States have taken numerous actions on national and international levels aimed at stabilizing the atmospheric concentration of GHG, halting further temperature increases, decreasing ozone-depleting substance production, use, and emission. Additionally, climate change as a threat to humanity is linked to human rights. Moreover, an ethical problem with climate change exists. Responses to climate change that are not carefully considered, with ethical considerations in mind, can destroy whole communities, create new patterns of injustice and misdistribution, and make individuals who have already been driven away by other artificial political and ideological challenges even more vulnerable. If inaction could have catastrophic consequences, inadequate reactions to climate change could have the same consequences.

Last but not least it is pertinent to note here that Islam which is a complete code of life promotes complete ecological harmony and upholds the rights of all living things. Islam insists on environmental preservation in its believers. Muslims believe that Allah will hold them accountable for

their actions and that it is the primary responsibility of Muslims, organizations, and the government to halt climate change. The analysis concludes that although the effects of climate change are irreversible, further effects can be averted with human assistance.

9. Recommendations

1. The developing countries of Asia, such as Pakistan, where the effects of global warming are projected to be encountered most severely because of resource and infrastructure barriers, must create and carry out gradual adaptations and policies to emphasize the importance of taking climate change into account while planning, designing, and executing development activities. The government needs to take a proactive role by eliminating inconsistent and ineffective methods of planning, enacting, and carrying out policies.
2. A nationwide climate change policy should be developed using legislation outlining the duties assigned to the federation, provinces, and the public and commercial sectors.
3. Local citizens should come forward with their knowledge of the climate to better assist in the creation of policies for mitigation and adaptation.
4. Reservoirs should be built in the higher Indus catchments to control the distribution of water across the Indus Delta and lessen flood losses.
5. Reducing our dependence on petroleum and coal and switching from burning fossil fuels to CO_2-free alternative power providers like solar and hydropower will help avert climate change.
6. By halting deforestation, carbon dioxide emissions would be reduced and wildlife would be preserved. To reduce the global level of carbon dioxide, extensive tree planting ought to be done. Population management should be taken into consideration as a long-term solution to the climate change issue since all greenhouse gases are produced by human activity.

7. Encouraging the growth of science and technology in important areas related to climate change.
8. Good governance is at the heart of the problem; all conceivable solutions are only feasible if the government frames and designs implementable and competent decision-making. Policy tackling adjustment and prevention should be prioritized and executed in text and spirit.
9. Following COVID-19, people must adapt their lifestyles since excessive car usage and high-speed economic activity might lead to another calamity in the shape of a climatic explosion.

10. Conclusion

States are keeping up their efforts to slow down climate change since it endangers individuals' mental and physical well-being and has a terrible effect on the state's economy. States have implemented many conventions, protocols, and agreements to halt climate change worldwide in light of the alarming rapid rate of climate change. However, Pakistan's constitution empowered it with the authority to ratify and implement the UNFCCC, Kyoto Protocol, and the Paris Agreement to minimize climate change. Additionally, as an Islamic state, Pakistan is also obligated to protect the Earth while acting as its guardian and custodian as their primary goal. Through climate justice, the rights of people and development are interrelated to create a human-centered policy that shares the costs and benefits of combating climate change evenly and fairly. The goal of the climate justice movement, a subset of the environmental justice movement, is to promote an equitable distribution of resources to address the disproportionate consequences of climate change on vulnerable people.

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Islamabad Law Review Vol. 7, Issue 1, 2023

Jurisdiction of Anti-terrorism Courts in Pakistan: Conflict of Design-Based Approach and Cumulative Effect-Based Approach

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Abstract

This paper delves into the persistent challenge faced by the Supreme Court of Pakistan from 1998 to 2020 - its inability to establish a definitive demarcation between the jurisdiction of anti-terrorism and ordinary court cases. A significant focal point is the interpretive struggle surrounding the definition of terrorism, as stipulated in section 6 of the Anti-Terrorism Act, 1997. This interpretation has given rise to two fundamental categories of approaches- the *actus reus*-based and *mens rea*-based approaches. The former approach emphasizes the tangible effects of an alleged terrorist act, focusing on its external manifestations and consequences. Conversely, the latter approach delves into the intentions, motives, and mental state of the perpetrator when assessing the gravity of the offence. Various approaches taken by the Supreme Court of Pakistan in deciding the jurisdiction of anti-terrorism courts have engendered multifaceted issues across the stages of investigation, remand, bail, trial, and appeal. This complexity is compounded by the distinct procedural framework of Anti-Terrorism courts in comparison to regular courts. Furthermore, the intricate matter of overlapping offences adds another layer of complexity to the existing predicament. Whether Article 23 of the Anti-Terrorism Act adequately addresses the prevailing concerns and a comparison with international approaches to terrorism-related cases. Notably, this paper identifies the coexistence of two contrasting approaches within the Supreme Court's jurisprudence in Anti-Terrorism cases, revealing the intricate dynamics that contribute to the ongoing jurisdictional predicament.

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Keywords: Anti-Terrorism Act, jurisdiction, *Actus Reus, Mens-rea*, Terrorism, Ordinary court cases, Design-based approach, Sectarian Violence, overlapping offences.

1. Introduction

The overall administration of criminal justice in Pakistan revolves around various legal instruments, including the Pakistan Penal Code 1860 (PPC), Criminal Procedure Code 1898 (Cr. PC), Qanoon Shahadat Order 1984 (QSO), Police Order 2002, Police Rules 1934, and High Court Rules and Orders. The criminal justice system in Pakistan operates based on both procedural and substantive laws, each holding its significance in society. The PPC serves as a general substantive law, while the Cr.PC functions as a general procedural law. In terms of differentiating between procedural and substantive law, Salmond has expounded on their significant distinctions. The procedural law governs the process of litigation while all the residue is substantive law.[1] Procedural laws are remedial statutes and for the effective implementation of substantive laws, there is a need for effective procedural laws.[2]

Anti-Terrorism Act (ATA) 1997, is another legislation to combat acts of terrorism in Pakistan. It is a combination of both substantive as well as of procedural laws. It provides not only penal provisions but also carries procedural provisions. Pakistan introduced numerous enactments of this kind, since 1949. The first phase dealt with insurgencies and political violence and different statutes like 'The West Punjab Safety Act of 1949, and Public Representative Officer (Disqualification Act), of 1949, the Security of Pakistan Act, of 1952, along the West Pakistan Maintenance

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[1] John Salmond, Salmond on Jurisprudence. (London: Sweet & Maxwell Press, 1966), 128.

[2] Lever, Jeremy. "Why Procedure Is More Important than Substantive Law." The International and Comparative Law Quarterly, vol. 48, no. 2, (Cambridge University Press, 1999), 2.

of Public Order, Ordinance1960, were promulgated by the government. In the second phase, "The Suppression of Terrorist Activities (Special Courts) Act" of 1975 was promulgated for speedy trial. The second Phase was focused on dealing with sectarianism in Pakistan. In 1997, the Suppression Act was replaced by ATA, 1997.

The new legislation is ambiguous on the jurisdiction of anti-terrorism courts, eventually requiring a clear interpretation from judicial machinery. However, from 1998 to 2020, the Supreme Court of Pakistan was unable to draw a clear-cut distinction between the jurisdiction of anti-terrorism and ordinary court cases. The definition of terrorism and interpretation of section 6 of the ATA, divided it into two basic categories including *actus-reus* and *mens-rea*-based approaches. *Actus reus*-based or effect-based approach means that the commission of the offence was of such a nature that caused an immediate sense of fear and insecurity among the public regardless of any motive or design. On the other hand, the design-based approach means that the commission of the offence was designed in such a manner as to cause fear and insecurity among the public. Various approaches taken by the Supreme Court of Pakistan in deciding the jurisdiction of anti-terrorism courts have engendered multifaceted issues across the stages of investigation, remand, bail, trial, and appeal. This complexity is compounded by the distinct procedural framework of Anti-Terrorism courts in comparison to regular courts. Furthermore, the intricate matter of overlapping offences adds another layer of complexity to the existing predicament. This paper analyzes whether Article 23 of the ATA adequately addresses the prevailing concerns in comparison with international approaches to terrorism-related cases.

2. Jurisdiction of Anti-Terrorism Courts in Pakistani Jurisprudence

We come across varying numbers of approaches of the Supreme Court of Pakistan while deciding the jurisdiction of anti-terrorism courts. Eventually,

it gives rise to multiple problems at various stages including, investigation, remand, bail, trial and appeal because the entire procedure is different from ordinary courts. Moreover, the issue of overlapping of offences is a serious issue. As mentioned earlier, two different approaches of the Supreme Court are existing in ATA cases. These approaches are analyzed in this study phase-wise; accordingly, three prominent phases are discussed. The first phase, which occurred between 1997 and 2001, marked the initial development of anti-terrorism laws. At that time, the legislation lacked a clear and explicit definition of terrorism, but subsequent amendments addressed this gap. In the second phase, spanning from 2002 to 2007, a theory based on the effects or consequences of terrorism was adopted. The Supreme Court of Pakistan played a crucial role in interpreting the definition of terrorism during this period. The focus was on assessing the impact and aftermath of the criminal act, particularly whether it instilled fear and insecurity among the population or not. The third phase, spanning from 2011 to 2020, was the most pivotal stage. It involved a contentious struggle among Supreme Court judges to determine the jurisdiction of Anti-Terrorism Courts (ATC). Eventually, amendments were made to in ATA,1997 to combat hard-core terrorist activities. A detailed analysis of these phases is given below.

2.1 First Phase- Initial Development of Anti-Terrorism Laws and Supreme Court's Adoption of a Consequential Perspective

Initially from 1997 to 2001, after the ATA, 1997 was enacted, courts relied on a sole criterion to determine territorial jurisdiction: that whether the offence was listed within the provisions of the legislation or not. The Lahore High Court Lahore while deciding Writ Petition No; 2103/1997 titled Nasreen v. ASJ Attock, held that the scheduled offences are triable by

Special Court.[3] The Supreme Court of Pakistan in Mehram Ali and others v. Federation of Pakistan and others[4] held that;

> However, it may be observed that the offences mentioned in the Schedule should have nexus with the object of the Act and the offences covered by sections 6, 7 and 8 thereof. It may be stated that section 6 defines terrorist acts, section 7 provides punishment for such acts, and section 8 prohibits acts intended or likely to stir up sectarian hatred mentioned in clauses (a) to (d) thereof. If an offence included in the Schedule has no nexus with the above sections, in that event notification including such an offence to that extent will be ultra vires. It will suffice to observe that if a Government servant or any other employee of the Government functionaries is murdered because he belongs to the above service and there was no enmity or plausible reason for the commission of the above offence, such a killing is an act of terrorism within the ambit of the Act and can lawfully be included in the Schedule, *but if the murder is committed solely on account of personal enmity, such murder will have*

[3] Nasreen v. ASJ Attock: PLD 1998 Lahore 275
[4] Mehram Ali and others v. Federation of Pakistan and others: PLD 1998 SC 1445.

> *no nexus with the above provisions of the Act and will not be triable under the Act.*[5] [emphasis in italics mine]

This petition was decided in 1998, The moot question arises What was the law of Section 6 of ATA, 1997 at that time? It is reproduced here as under:

> Whoever, to strike terror in the people, or any section of the people, or to alienate any section of the people or to adversely affect harmony among sections of the people, does any act or thing by using bombs, dynamite or other explosive or inflammable substances, …..[6]

All the offences mentioned in the schedule were triable under ATA,1997, in addition to the offences mentioned in seton 8 to 11 X dealing with the acts of hate speech, sectarian hatred, lynching, and proscribed organization. The offences mentioned in the schedule were offences of a serious nature and almost similar to the schedule given in The Suppression of Terrorist Activities Act,1975. Thus, during the infancy of this enactment from 1997 to 2000, there was only one criterion, that is, whether the offence was falling in the schedule of enactment coupled with causing an element of fear and terror among the society.

In 1998, the Mehram Ali case brought major developments not only in the prevailing enactment but also left a forceful impact on the next

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[5] Ibid.
[6] The Anti -terrorism Act 1997, sec 6.

legislation on terrorism. In the Mehram Ali case, the Supreme Court of Pakistan raised the question of nexus with Section 6 of the Anti-terrorism Act, 1997. Despite the case being a simple bomb blast, the court ruled that the offences mentioned in the Schedule should be connected to the objectives of the Act and the offences covered by Section 6. The key criterion to determine terrorism was the creation of fear and insecurity among the public or specific sections of society, as well as the disruption of peace and tranquillity among different segments of the Public. The legislation at the time did not mention intent, as the case did not involve personal enmity. However, these incidental remarks by the court that if the murder is done merely because of personal animosity and hostility, such a murder will have no nexus with the ATA's above-mentioned provisions and will not be triable under the same Act.[7] These remarks unintentionally opened the door for future legislative developments in Pakistan, leading to unforeseen consequences. Then, from 1998 to 2000, subordinate courts started to observe the principle laid down by the Supreme Court of Pakistan. In the year 2000 Supreme Court of Pakistan in "Jamat-i-Islami Pakistan through Syed Munawar Hassan, Secretary-General v Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs"[8] held that; "to make an act punishable under the Act, it must be shown that the act bears

[7] Mehram Ali and others v. Federation of Pakistan and others: PLD 1998 SC 1445.

[8]Munawar Hassan, Secretary-General v Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs PLD 2000 SC 111.

nexus to sections 6, 7 and 8 of the Act."[9] To the extent of section 6 after amendment in 1999 through the Anti-terrorism ordinance section 6 defines terrorist acts as

> …the effect of his actions was key to determining the nature of the act whether it will strike terror or create a sense of fear and insecurity in the people, or in the section of the people, this act may be caused by Physical act or by using explosive substances which may be bombs, dynamite or other or inflammable, or any other notified firearms weapons, even it includes the use of poisons or noxious gases and any chemicals, which may cause, or be likely to cause, the death or injury to, person, or property through destruction of property ...[10]

Thus, in the year 1999, clauses b, c, and d were inserted in section 6 of ATA but the word 'effect' was introduced with the condition precedent that it should strike terror or create fear and insecurity among the people. Although these provisions were inserted in 1999 in the ATA, 1997.

In the year 2001, a case titled Ch. Bashir v. Naveed Iqbal[11] was brought before the Supreme Court of Pakistan wherein the complainant Bashir reported the incident of burning of his daughter by the accused Naveed Iqbal in which it was held that "if the effect of act of accused caused terror or

[9]Ibid.
[10] Anti-terrorism (second Amendment) ordinance, 1999 (Ordinance No. Xlll of 1999).
[11] "Ch. Bashir Ahmad v. Naveed Iqbal and 7 others, PLD 2001 SC 52".

create a sense of fear and insecurity then it is case of ATC and in this case no person has seen this act and act was not conducted at public place so not case of ATC."[12] In both above-mentioned cases there was no question on the effect but the 'range of effect' was in question. Similarly, in another case titled Muhammad Ajmal v. The State.[13] The Supreme Court of Pakistan held that this action had created an element of fear and insecurity among the people. Although this action was based upon the personal vendetta of the accused and the other party its effect caused an element of fear and insecurity among the people. Similarly, in 2002, the Supreme Court of Pakistan again in a case titled Muhammad Mushtaq v. Muhammad Ashiq and others[14] held: "a criminal conduct that is aimed to cause fear or uneasiness or insecurity in the minds of the general public, disrupting the normal pace of life and society's tranquillity, may be classified as a terrorist attack."[15]

The word designed was used in this case however it was used to strengthen the effect of the case although it was murder of personal vendetta. Similarly, in many other cases in which the Supreme Court of Pakistan adopted the same parameter including Shahsawar v. State[16], The

[12] Ibid.
[13]"Muhammad Ajmal v. The State; 2000 SCMR 1682"
[14] Muhammad Mushtaq v. Muhammad Ashiq and others: PLD 2002 SC 841;
[15] Ibid
[16]Shahsawar v. State:2000 SCMR 1331

State v. Javed Ahmed Siddiqui,[17] and Solat Ali Khan v. The State,[18] even convicted the accused in section 7 of anti-terrorism cases.

In the year 2001, a newly amended ordinance replaced the term 'terrorist act' with the new term 'Terrorism' the same is reproduced as under:

> "(1) In this Act "terrorism" means the use or threat of action where, (a) the action falls within the meaning of subsection (2), and (b) the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society; or (c) the use or threat is made to advance a religious, sectarian or ethnic cause. (2) An "action" shall fall within the meaning of subsection (1), if it: ....[19]

Although the Word design was inserted Supreme Court of Pakistan observed the cumulative effect of the act. Similarly, in the case titled "Mumtaz Ali Khan Rajban and another v Federation of Pakistan and others"[20] and Mst. Raheela Nasreen v The State and another"[21], the supreme court adopted the cumulative effect approach and even in the dacoity case titled Muhammad Amin v The State*;* in which the Accused caused murder during a dacoity, it was held regarding the application of terrorism in this case "because the murder was committed at the time of dacoity and it was daylight occurrence and brutal murder through firearm shots so it is a case of terrorism.[22]

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[17]The State v. Javed Ahmed Siddiqui, 2001 SCMR 612
[18]Solat Ali Khan v. The State: 2001 SCMR 2005
[19]Anti-Terrorism (Amendment) Ordinance, 2001 (Ordinance No. XXXIX of 2001)".
[20] Mumtaz Ali Khan Rajban and another v. Federation of Pakistan and others; PLD 2001 SC 169
[21]Mst. Raheela Nasreen v. The State and another; 2002 SCMR 908"
[22] Ibid

In the year 2002 The Supreme Court of Pakistan while deciding the case "Zia Ullah v Special Judge, Anti-Terrorist Court, Faisalabad and 7 others"[23] in which an advocate who was in uniform and was going to court was murdered due to personal enmity. The Court decided that it was a case of terrorism. It was observed that:

> ...We do not have the slightest doubt while holding that the alleged occurrence must have caused fear, panic and wave of sensation and thus the matter squarely falls within the ambit and jurisdiction of the Special Court. The gravity of the offence could not be diminished or minimized merely on the ground that the alleged murder was not committed exactly within the Court premises

2.2 Second Phase - While the legislation incorporated the term "designed," the Supreme Court embraced a consequential approach

In 2002, The Supreme Court of Pakistan adopted the same theory in some other cases and convicted the accused in Muhammad Ashfaq v. The State, Fayyaz Hussain Shah v. The State[24] and Amjad Javed v. The State; [25]and Shahzad Alias Shaddu v. The State[26], Year 2003 in another case Naeem Akhtar v. The State**.** [27]In this case mother of the accused was a patient of the doctor, The accused was dissatisfied with her treatment and the accused not only abducted the doctor but also caused his murder and court held that it would be a direct source of creating panic and terror in the medical profession"[28] Year 2003 the supreme court introduced term Actual Terror

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[23] Zia Ullah v. Special Judge, Anti-Terrorist Court, Faisalabad and 7 others ;2002 SCMR 1225

[24] Fayyaz Hussain Shah v. The State; 2002 SCMR 1848.

[25] Amjad Javed v. The State; 2002 SCMR 1247.

[26] Shahzad Alias Shaddu v. The State; 2002 SCMR 1009.

[27] Naeem Akhtar v. The State; PLD 2003 SC 396.

[28] Ibid.

and in Muhammad Amjad v The State[29] accused abducted young Barrister for ransom and subsequently he was murdered in this occurrence, in this case the Supreme Court of Pakistan held that:

> Even if by an act of terrorism actual terror is not created, yet, the above-quoted subsection (b) of section 6(1) of the Anti-Terrorism Act, 1997 will be applicable if it was likely to do any harm contemplated in the said subsection. It is the cumulative effect of all the attending circumstances which provide tangible guidelines to determine the applicability or otherwise of said subsection.[30]

Year 2003 another case titled 'Mst. Najam-un-Nisa v Judge, Special Court[31]' constituted under Anti-Terrorism Act, 1997 Mr Justice Tanvir Ahmed Khan and Mr Justice Khalil-ur-Rehman Ramday, observing the application of ATA, in this case, accused slaughtered seven persons at night time in a house and question before the court was whether ATA was applicable or not it was held that act was not of such nature which creates any terror any other element of horror in the section of the people secondly, act was in furtherance of a private enmity. The year 2004, was an interesting year regarding the development of case laws on this issue when the Supreme Court of Pakistan in a case titled Muhammad Farooq v Ibrar and 5 others[32] defined the basic object of the Anti-terrorism Act 1997 although it was based upon the previous enmity but court held that The basic object to promulgate Anti-Terrorism Act, 1997 was to control the acts of terrorism, sectarian violence and other heinous offences as defined in section 6 of the Act and their speedy trials."[33]

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[29] Muhammad Amjad v. The State: PLD 2003 SC 704.

[30] Ibid.

[31] Mst. Najam-un-Nisa v. Judge, Special Court constituted under Anti-Terrorism Act, 1997; 2003 SCMR 1323.

[32] Muhammad Farooq v. Ibrar and 5 others; PLD 2004 SC 917.

[33] Ibid.

In a year, 2005 decided by The Supreme Court of Pakistan titled Mirza Shaukat Baig and others v Shahid Jamil and others[34] Honorable Chief Justice of Pakistan, Nazim Hussain Siddiqui, held:

> Where a criminal act is designed to create a sense of fear or insecurity in the mind of the general public that can only be adjudged by keeping in view the impact of the alleged offence and manner of the commission of the alleged offence" … it is to be noted that at this point the concept of terrorism is concerned there is no big substantial and fundamental change between both enactments" both Suppression of Terrorism Activities (Special Courts) Act (XV of 1975) as well as Anti-Terrorism Act (XXVII of 1997) except a minor changes having no bearing on the meaning and scope of terrorism.

The word designed was used in this case however it was used to strengthen the effect of the case although it was murder of personal vendetta. In the year 2004 designed base basic Judgment was given by the High Court, in a case titled "Basharat Ali v. Judge, ATC[35] in which a Bench comprising of Mr Justice Asif Saeed and Justice M. Shahid, This fact of the case four persons were murdered along with eight injured persons in village Behroopgarh situated in District Gujranwala in an assault carried out by one group of due to the previous enmity, the question was whether it was an offence of ATA or not, An application under section 23 of the ATA was submitted by the accused party before the learned Court for transfer of this case to an ordinary court with the argument that the case has no element of terrorism as it is defined in its section 6 however the application was

[34] Mirza Shaukat Baig and others v. Shahid Jamil and others; PLD 2005 SC 530.

[35] Basharat Ali v. Special Judge, Anti-Terrorism Court-II, Gujranwala and 2 others; PLD 2004 Lahore 199

dismissed by the lower court and same has been assailed by the petitioner before High Court**.**

> The intention of the accused party did not depict or manifest any `design' or `purpose' as contemplated by the provisions of section 6(1)(b) or (c) of the Anti-Terrorism Act, 1997 and, thus, the *actus reus* attributed to it was not accompanied by the necessary *mens rea* to brand its actions as terrorism triable exclusively by a Special Court constituted under the Anti-Terrorism Act, 1997.[36]

At this stage, the Lahore High Court diverted principles of the Supreme Court laid down in the above cases mentioned in Phase Two from 2002 to 2007, Despite this different approach of the Lahore High Court Lahore the Supreme Court of Pakistan was following the principle of fear and insecurity due to effect of action as given in Naeem Akhtar v. The State and others,[37] M Amjad v. The State,[38] Mst. Najam-un-Nisa v. Judge, ATC[39] Abdul Ghafoor v. Muhammad Saleem,[40] M Farooq v. Ibrar[41], Azizullah and another v. The State and another[42], Mirza Shaukat Baig and others v. Shahid Jamil and others[43], Zahid Imran and others v. The State and others but in the year 2007 Supreme Court of Pakistan, in case Fazal Dad v. Ghulam Muhammad[44] very first time relied upon judgement of Lahore High Court Lahore, Basharat Ali v. Special Judge, ATC[45] the Supreme court of Pakistan giving reference of Bashir case and ignoring principles laid down by apex

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[36] Ibid.
[37] Naeem Akhtar v. The State and others; PLD 2003 SC 396.
[38] M Amjad v. The State; PLD 2003 SC 704.
[39] Mst. Najam-un-Nisa v. Judge; ATC 2003 SCMR 1323.
[40] Abdul Ghafoor v. Muhammad Saleem; 2003 SCMR 1934.
[41] M Farooq v. Ibrar: PLD 2004 SC 917.
[42] Azizullah and another v. The State and another; 2005 SCMR 802.
[43] Mirza Shaukat Baig and others v Shahid Jamil and others; PLD 2005 SC 530.
[44] Fazal Dad v. Ghulam Muhammad: PLD 2007 SC 571.
[45] Basharat Ali v. Special Judge, ATC PLD 2004 Lahore 199.

court in Naeem Akhtar and others v. The State and others"[46] Sh. Muhammad Amjad v The State[47] Mst. Najam-un-Nisa v. Judge, Special Court constituted under Anti-Terrorism Act, 1997[48] Abdul Ghafoor Bhatti v Muhammad Saleem and others[49] Muhammad Farooq v. Ibrar and 5 others[50], Azizullah and another v. The State and another[51], Mirza Shaukat Baig and others v. Shahid Jamil and others[52], so in the year 2007 Supreme Court of Pakistan also convicted accused in Ranjha v. State: 2007 SCMR 455 (a case of murder of Four persons on previous enmity) Fateh Muhammad v. State: 2007 SCMR 1819 (a case of Murder of wife case of personal vendetta and Ghulam Husain Soomro v. The State: PLD 2007 SC 71 (a case of ransom) based on consequences-based theory although these cases were of personal vendetta.

In year 2008 two cases came to surface on this core issue first was Muhammad Idrees and Others v The State[53], the court after observation there was no element of fear and insecurity in public nor any section because the occurrence took place at night on a bank of canal and same was not be termed as a public at large. Similarly, in the Tariq Mahmood v State,[54] this case accused who were armed with deadly weapons like rifles, repeaters, 12-bore guns and rifles resembling Kalashnikovs due to the firing of the respondent-accused Shahid Mahmood lost their lives while Sardar Asghar and Azram P.Ws. received injuries on the complainant side. Ghazanfar Shah, a passerby also received injuries.

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[46] Naeem Akhtar and others v. The State and others PLD 2003 SC 396.
[47] Sh. Muhammad Amjad v. The State PLD 2003 SC 704.
[48] Mst. Najam-un-Nisa v. Judge, Special Court 2003 SCMR 1323.
[49] Abdul Ghafoor Bhatti v. Muhammad Saleem and others 2003 SCMR 1934.
[50] Muhammad Farooq v. Ibrar and 5 others PLD 2004 SC 917.
[51] Azizullah and another v. The State and another 2005 SCMR 802.
[52] Mirza Shaukat Baig and others v. Shahid Jamil and others PLD 2005 SC 530.
[53] Muhammad Idrees and others v. The State: 2008 SCMR 1544.
[54] Tariq Mahmood v. State 2008 SCMR 1631.

> In our opinion, …. The terrorist or the sectarian killers do not have any personal grudge or motive against the innocent victims. The instant case is distinguishable as admittedly a feud existed between the parties over a piece of land before the occurrence.[55]

2.3 Third Phase - The Supreme Court's Approach: Oscillating Between Consequential and Design-Based Perspectives

From year 2007 to 2011 Supreme Court held the principle that terrorist acts should be designed with the object of causing fear and insecurity among a large section of people. but in Supreme Court of Pakistan also convicted the accused in Ranjha v. State: 2007 SCMR 455 (a case of murder of Four persons on previous enmity) Fateh Muhammad v. State: 2007 SCMR 1819 (a case of Murder of wife case of personal vendetta and Ghulam Husain Soomro v. The State: PLD 2007 SC 71 (a case of ransom) and Abdul Rehman v. State: 2010 SCMR 1758 based on consequences-based theory although cases were of personal vendetta but accused were convicted. So, this tenure was based upon a designed approach and held that whether act was designed in the light of sections 6(2)(b) and 6(2)(c) of the anti-terrorism Act,1997. However, in 2010 and 2011 Supreme Court Pakistan also convicted the accused based on consequences and effect-based theory in Abdul Rehman v. State: 2010 SCMR 1758 and in State V. Abdul Khaliq; PLD 2011 SC 554; Khan Muhammad v. state: 2011 SCMR 705, Junaid Rehman v. State: PLD 2011 SC 1135. So, we can see different approaches of the Supreme Court of Pakistan.

But the year 2012 to 2014 law of the land was laid down in light of the cases Nazeer Ahmed v. Nooruddin,2012 SCMR 517 and Shahid Zafar v. The State**,** Supreme Court of Pakistan again adopted the approach of the cumulative effect of action whether it is creating an element of fear and

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[55]Ibid.

insecurity. The Supreme Court held in another case Shahid Zafar and 3 others v The State "We are quite clear in our minds that such a gruesome murder at the hands of a law enforcing agency would certainly create a sense of terror, insecurity and panic in the minds and hearts of those who were available at the scene and the entire public who had watched this DVD on air."[56] So in this, there was no motive or any design on the part of the accused person but the cumulative effect of action was a falling case in the ambit of terrorism. Other cases in which convictions were given based on consequences of effect were Zeeshan Afzal Alias Shani v. State; 2013 SCMR 1602 Hakim Khan v. State; 2013 SCMR 777, Hamid Mahmood v. State; 2013 SCMR 1314, Muhammad Nawaz v. State; PLD 2014 SC 383, Shahid Zafar v. State: PLD 2014 SC 809, Zafar Iqbal v. State PLD 2015 SC 307, Abdul Haq v. State;2015 SCMR 1326, Nasir Mehmood v. State; 2015 SCMR 423, Dadullah v. State; 2015 SCMR 856.

Significantly, in the year 2016 lot of developments were made by the court while observing Malik Muhammad Mumtaz Qadri v The State and others, Khuda-e-Noor v.State, and Sagheer v. The State, Shaukat Ali v. Haji Jan Muhammad were decided by the supreme court of Pakistan on the basis designed based approach and while in Kashif Ali v. The Judge, PLD 2016 SC951 and Shahbaz Khan @ Tippu v. Special Judge ATC, (PLD 2016 SC 1) and Kashif Ali v. Judge ATC (PLD 2016 SC 951) court adopted effect-based approach or the cumulative effect of action approach. The supreme court also stated in the Province of Punjab through the Secretary Punjab Public Prosecution Department and another v The State PLD 2018 SC 178 that "The preamble of the Act, 1997 indicates that the Act, 1997 was promulgated for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences. So, in the cases of terrorism, the mens-rea should be with an object to accomplish the act of terrorism and carrying out

[56]Shahid Zafar and 3 others v. The State (PLD 2014 SC 809).

terrorist activities to overawe the state, the state institutions, and the public at large, destruction of public and private properties, assault the law enforcing agency and even at the public at large in sectarian matters. The ultimate object and purpose of such an act is to terrorize society but in ordinary crimes committed due to personal vendetta or enmity, such elements are always missing so the crime committed only due to personal revenge cannot be dragged into the fold of terrorism and terrorist activities."[57]

The Supreme Court of Pakistan, led by Chief Justice Mr Asif Saeed Khosa, recently delivered a judgment in the Ghulam Hussin case. The court analyzed various judgments of the Supreme Court of Pakistan and concluded that actions under the Anti-terrorism Act should be closely linked to its intended objective. Chief Justice Asif Saeed Khosa, who authored the judgment, presided over a larger bench of seven judges. The bench deliberated on terrorism cases and discussed the jurisdiction of such cases. It is worth noting that Chief Justice Khosa had previously expressed his views on a similar subject in the case of "Basharat Ali v. Special Judge, Anti-Terrorism Court II, Gujranwala, PLD 2004 Lah 199 Although he discussed judgements from 1998 to 2018 along with the legal provision and make his opinion that act of terrorism when it has nexus with object mentioned in 6(1)(b) and 6(1)(c) that is action should be designed in such manner that it causes an element of fear and insecurity, among the Public, the court also discussed element of *men's rea* as guilty mind and *actus-reus* as a guilty act to constitute an offence. In this judgement court is focusing on the *mens-rea-based* approach rather than its effect-based approach. Scheduled offences should not be treated as ATA offences, ATC court will conduct a trial of these offences as heinous offences and penalise these offences under

[57] Province of Punjab through Secretary Punjab Public Prosecution Department and another v The State PLD 2018 SC 178.

ordinary law. The court also recommends proper. In Ganda Singh cases in district Kasur, 17 sodomy cases were tried under ordinary laws while 14 cases were tried under ATC courts. Recently Jahangir Khan v. Khalid Latif was a case of Kidnapping or abduction for ransom, accused who disguised in police uniforms ostensibly not only arrested and handcuffed the respondent, but they kidnapped the person and his wife however they were rescued by Highway Patrolling Police, accused moved an application for transfer of case which was dismissed then he approached High Court and the high court decided that let the trial court to decide the fate of case after recording statements of the prosecution witnesses and supreme Court hold that "View taken by the High Court did not suffer from any jurisdictional error or flaw and, thus, called for no interference" so again there was question what was need of section 23 if High Court and Supreme Court are not deciding fate of case. Thus, the cases mentioned above clearly indicate that our superior courts are unable to provide a uniform interpretation of the definition of terrorism.

3. Conclusion

Since the evolution of Anti-terrorism, the challenge of defining and adjudicating terrorism-related cases in Pakistan went through distinct phases that shaped the legal landscape and jurisdictional boundaries of Anti-Terrorism Courts (ATCs). The initial phase was characterized by the introduction of anti-terrorism laws without a precise definition of terrorism. The legislative framework lacked clarity in its terminology. This period marked the nascent stage of anti-terrorism legislation in Pakistan. initially, the approach shifted towards focusing on the effects or consequences of terrorist acts. The Supreme Court of Pakistan emerged as a key player in interpreting the definition of terrorism. The emphasis was placed on evaluating the impact of terrorist acts, particularly in terms of inducing fear and insecurity among the population. So, in the year 1999, clauses b, c, and

d were inserted in section 6 of ATA but the word 'effect' was introduced with condition precedent that it should strike terror or create fear and insecurity among the people. Although these provisions were inserted in 1999 in the ATA, 1997. In the year 2001, a new amended ordinance replaced the term 'terrorist act' with the new term 'Terrorism' Although the Word designed was inserted the Supreme Court was observing whether the element of striking terror or creating fear and insecurity among the people while deciding the jurisdiction of ATA. This period was marked by an attempt to bring more specificity to the understanding of terrorism through its observable outcomes. From 2011-2020 there was a critical juncture in the evolution of the jurisdictional predicament. Amendments were introduced to the ATA 1997 during this phase, to combat hardcore terrorism. However, these amendments brought about divisions in the interpretation of the definition of terrorism within the Pakistani legal system. The struggle among Supreme Court judges to determine the jurisdiction of ATCs reached a contentious point during this phase. This period saw the culmination of different approaches to interpreting the definition of terrorism, contributing to a complex and multifaceted legal landscape. Throughout these phases, the Supreme Court of Pakistan, legislative amendments, and shifting interpretive paradigms played crucial roles in shaping the jurisdictional boundaries and defining the scope of ATCs. The evolution of the legal understanding of terrorism in Pakistan is marked by an intricate interplay of legal developments, judicial decisions, and legislative changes, culminating in the ongoing struggle to establish a clear and consistent demarcation between terrorism-related cases and ordinary criminal cases. As Pakistan's legal system continues to grapple with these challenges, Further examination and potential reforms are imperative to establish cohesiveness and efficacy in tackling terrorism within the nation's legal framework. More advanced nations have already

incorporated the terms "domestic" and "international" terrorism to effectively tackle this challenge. Moreover, once a situation is classified as terrorism by the state, there should be no necessity for the introduction of mechanisms to transfer cases. The jurisdiction of Anti-Terrorism Act (ATA) courts encompasses the handling of cases that would otherwise fall under the jurisdiction of regular courts. Hence, the present juncture is suitable for contemplating the removal of Section 23 from the ATA.

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Legal Regime Governing Bottled Drinking Water Companies in Pakistan: An Analysis in the Light of International Standards

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Rubab Bhatti**

Abstract

Pakistani legislation is inadequate on bottled drinking water companies, which makes it difficult to hold such companies accountable for losses incurred due to the provision of unsafe drinking water. This research aims to highlight the shortcomings in Pakistani legislation regarding clean drinking water. It focuses on the need to analyze local standards in comparison with international standards, which provide relevant standards as well as the accountability procedure on bottled water companies. The significant issues for inquiry include; how the incorporation of international standards for drinking water in Pakistani legislation would ensure the quality of bottled water? What steps need to be taken to make Pakistani law compatible with international standards? The qualitative research methodology is adopted for this research. Main findings suggest, hurdles in combating the clean drinking water issues include the feeble mechanism of finding the real source of water which causes waterborne diseases and the weak governmental regulations on water distribution systems. Developing countries require introducing proper legislation to cover all drinking water issues based on the international legislative framework. The research concludes that the legal framework for the protection of consumer rights is already available in Pakistan, but the right to clean and safe drinking water still needs to be acknowledged. The government needs to take concrete steps to prohibit corporations from misusing underground water sources and from affecting public health by ensuring the implementation of national and international drinking water quality standards.

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Key Words: clean drinking water; Pakistan Standard and Quality Control Authority (PSQCA); Pakistan Council for Research in Water Resources (PCRWR); World Health Organization (WHO) Guidelines.

1. Introduction

The most essential thing for the continuity of human life is water, particularly fresh potable water. It is not a never-ending resource and if proper conservation efforts are not made then the vital supply of water may be exhausted. Many different benefits are derived from water preservation efforts like it carries economic benefits, and energy and equipment are also conserved due to these efforts.[1] Conservation also protects and maintains the continuity of life on earth, which is not possible to maintain if the adequate water supply is disturbed and not protected.[2] A large majority of the population around the world has been forced to buy bottled water instead of utilizing tap water and water from other sources, because of the poor quality of drinking water provided by these sources. A rapid increase has been observed in the growth rate of the bottled water industry worldwide in the last few years because of the changed preferences of people to buy bottled water as a healthy option and avoid using contaminated and unclean water.[3]

The bottling of natural mineral water was started in Europe and it was first presented for sale by the holy well bottling plant[4] of the United Kingdom in 1622. After Second World War, bottled water was extensively distributed as a beverage in cafes, restaurants and grocery stores. It was considered a medical remedy due to its healing and therapeutic effects and was sold as a medicine till the 1900s. The beverage companies cleverly sold

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[1]John Csiszar, "The Importance of Saving Water," *Sciencing,* December 05, 2018, https://sciencing.com/list-jersey-state-natural-resources-7572666.html.

[2] Ibid.

[3]Adam Hurly, "A Brief History of Bottled Water," *the kitchn*, May 01, 2019, https://www.thekitchn.com/a-brief-history-of-bottled-water-228642.

[4] Ibid.

their products by emotionally playing with consumers' fear of illness from contaminated tap water.[5]

Nowadays, branded bottled water is widely available in different packaging and formats, as an expedient and healthy beverage. The global trends on drinking water shortage show, that about 44 per cent of the Pakistani population has no access to safe, healthy and affordable water for daily use. However, Pakistani consumers have turned to bottled water as a healthy alternative for their well-being than drinking contaminated tap water. However, in reality, bottled water is an expensive and (sometimes) unhealthy alternative because of sporadic testing and inspection of contaminants and processing plants.[6]

The beverage industry especially the bottled water market has shown rapid growth globally over the past few years, and despite its high prices, it is increasing by an average of 7 % each year. The trends for the consumption of bottled drinking water in Pakistan show 40 % of its annual growth rate, with its consumption of 33 million liters per annum since 1999. However, this growth rate reaches an extent of 140% in 2000, with the introduction of Nestlé's Pure Life business in Pakistan. There are about 20 to 30 registered companies engaged in the bottled water business during the year, but during summers this number increases to 70, witnessing the growing bottled water business across the country.[7]

The major reason for preferring bottled drinking water over tap water is the confidence in the quality and purity of drinking branded water, unfortunately in Pakistan the purpose of bottled water is totally neglected by the companies and provides the quality cheaper than untreated tap water. The authorities really need to bind the companies for proper monitoring and

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[5] Ibid.
[6] "Pakistan Bottled Water Market," *Interested things*, August 23, 2013, http://snnword.blogspot.com/2013/08/pakistan-bottled-water-market_8831.html.
[7] Ibid.

testing of bottled water, like in Europe; the quality of bottled mineral water is regularly tested, both by independent labs and by the company's internal services.[8] The bottled water industry could be made effective and more operational by introducing proper legislation and by adopting international standards for quality testing of bottled water and by holding the companies accountable for not complying with the national standards for the production and maintenance of bottled water.

2. Problems Faced Globally Due to Unclean Bottled Water

A major role in human life progression is played by water, but with advancements water becomes polluted and contains various physical, biological and chemical impurities.[9] Bottled water is generally considered safe and suitable because it was assumed that it was properly filtered and healthy without any impurity, but actually, this assumption comes with different environmental and health problems. Air pollution and plastic pollution from chemicals used for plastic bottle production, marine life is badly affected by useless plastic bottles and garbage dumps filled with empty bottles cause numerous diseases.[10] Though the world is facing serious issues regarding the provision of safe drinking water but it has been a challenge, particularly in developing countries. Safe and healthy water means that it must be free of microorganisms, toxic chemicals and radiological hazards.[11] Microbial contamination like the presence of viral, bacterial or protozoan agents leads to an outbreak of diarrheal diseases, similarly, water contaminated with toxic substances like arsenic, cyanide, lead etc. have serious health consequences for consumers. Large portions of

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[8] Ibid.

[9] M.K. Daud, Muhammad Nafees, Shafqat Ali and others, "Drinking Water Quality Status and Contamination in Pakistan," *Bio Med Research International* 2017 (2017): 1-18. https://doi.org/10.1155/2017/7908183.

[10] Mark Acosta, "The Problem with Bottled Water" *Environment Today Magazine*, accessed April 20, 2023, available at https://www.ets.org/s/research/pdf/.

[11] Ibid.

the population around the world have no access to clean water resources; it becomes a lavishness which is not reachable by many people. The absence of safe and clean drinking water causes about 80 % of diseases and deaths in developing countries.[12]

Plastic bottles are typically made from crude oil and it releases pollutants such as nickel, benzene, and ethylene oxide during production, which badly harms the environment and air which a person breathe.[13] The source water for bottled water and kitchen tap water are usually the same but bottled water is less synchronized and monitored than the municipal water supplies. The reason is that most of the beverage companies who treat and test the water they sell, often adopt inferior quality standards for drinking water for removing the contaminants which damage public health.[14] Conventional water bottles are made of plastic, a material that generates pollution at every step from production to disposal. Many plastics contain chemicals that leach out into our water, and food and ultimately accumulate into our biological systems. Research based on finding the level of microplastic particles in bottled water reveals that a single liter of bottled water contains thousands of microplastic particles. Moreover, these microplastic particles contain toxic chemicals that can harmfully impact human health, wildlife and natural environment.[15] All the problems faced due to contaminated bottled drinking water will affect Human Health and cause a number of different diseases. To secure human health there is a dire need to replace these plastic bottles and ensure an uninterrupted provision of clean and healthy drinking water.

[12] Ibid.

[13] Ibid.

[14] Marina Martinez, "Bottled Water: Unhealthy, Dirty and Costly," *Medium*, November 23, 2018, https://marinatmartinez.medium.com/bottled-water-unhealthy-dirty-and-costly-6fb7eb608da2.

[15] Ibid.

3. An Overview of the Legal Regime of Bottled Water Companies in Pakistan

3.1. The Constitution of Pakistan

Water as a basic human right has not been particularly acknowledged rather it is covered under the chapter of fundamental rights in the constitution of Pakistan 1973, which states that "no person shall be deprived of life or liberty saves in accordance with law".[16] The 'right to life' as interpreted by courts that humans require some basic necessity to live, and water is one of them for living a healthy life. The scope of the word 'life' used in the article is not limited rather it includes each and every right necessary for the existence of life. The constitution guarantees the dignity of man under article 14 and the right to life in article 9, if read together it leads to the question that whether the dignity of man is secured if his right to life is below the necessity line without proper food, clean water, clothing, shelter, education, health care, clean atmosphere and unpolluted environment. The Supreme Court held that the right to life includes the right to have unpolluted water is the right of every person wherever he may live.[17] When this right is provided by the Constitution it automatically makes the state responsible to fulfill the basic needs of citizens and provide them with clean drinking water.[18] In Shehla Zia vs. WAPDA, the Supreme Court held that Article 9 includes the right to a clean and healthy environment.[19]

The right to clean drinking water and proper use of water sources has also been recognized by Sindh High Court in one of the cases and said that, "No

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[16] Constitution of Pakistan, 1973, art. 9.

[17] West Pakistan Salt Miners Labour Union (CBA) Khewra v. The Director, Industries and Mineral Development, Punjab, 1994 SCMR 2061.

[18] Ms. Mette Hartmeyer, "Addressing the Drinking Water Challenge in Pakistan," (Islamabad: Consumers Right Commission of Pakistan, November 2018), 7. https://www.crcp.org.pk/images/PDF/Publications/Drinking-Water--Policy-Brief--Nov2018-Formatted.pdf,

[19] Shehla Zia v. WAPDA, PLD 1994 SC 693.

civilized society shall permit the unfettered exploitation of its natural resources, particularly in respect of water." [20]

3.2. The National Environmental Action Plan (NEAP) 2001

Pakistan National Conservation Strategy (NCS) was developed in 1992 and was reviewed in 1999 for the protection of the environment.[21] To address various environmental problems and challenges National Environmental Action Plan (NEAP) was approved by Pakistan environmental protection council in 2001. However, the National Environmental Policy was developed in 2005, which provides a complete framework for addressing environmental issues through the protection and conservation of the environment and by improving the quality of life through sustainable development.[22]

National Environmental Action Plan aims to develop the legal framework for providing equal access to safe drinking water. This could be made possible by enacting the Water conservation act and relevant standards, and by launching phased programs for gradual up-gradation of the quality of water bodies. *A Clean Drinking Water for All* scheme was started in 2008 by the Ministry of Environment[23]; under this program, 6035 water filtration plants were to be installed in every union council of the country.[24]A big initiative was taken but no practical steps should be taken to fulfill the objectives of the program. These steps provide no fruitful

[20] Sindh Institute of Urology and Transplantation vs. Nestle Milkpak Limited, 2005 CLC 424.

[21]United Nations Environmental Program (UNEP), *Final Report of the International Water Resources Management Policies and Actions and the latest Practice in their Environmental Evaluation and Strategic Environmental Assessment* (Islamabad: Environmental Protection Department, 2007). https://pcrwr.gov.pk/wp-content/uploads/2020/Water-Management-Reports/IWRM%20Report%20(1-9-2021).pdf.

[22] Ibid.

[23] Punjab Municipal Development Fund Company, "Clean Drinking Water for All," accessed May 20, 2023 https://pmdfc.punjab.gov.pk/clean_drinking_water_for_all#:~:text=The%20Government%20of%20Pakistan%20launched,each%20Union%20Council%20of%20Pakistan.

[24] Ibid.

results in achieving sustainable development for the provision of clean and healthy drinking water to every citizen.

3.3. Pakistan Standard and Quality Control Act (PSQCA) 1996

Pakistan Standards Control Authority has been empowered by the Ministry of Science and Technology, to provide national standards and quality control services. The licensing, certification, inspection, testing and examination of manufacturing plant bottled water are all done by PSQCA under the Pakistan Standard and Quality Control Act 1996[25]. The authority is also empowered to cancel or suspend the license of any company working in derogation of the Pakistan Quality Control Act and Pakistan quality standards.

3.4. Pakistan Council of Research in Water Resources Act (PCRWR) 2007

The Ministry of Science and Technology has designated the task of quarterly monitoring the bottled drinking water brands and publicizing their results, to the Pakistan Council of Research in Water Resources (PCRWR).[26] The Authority is fully empowered under PCRWR Act to conduct and promote research on water-related issues; they also design and develop water conservation technologies used for all purposes. They also perform advising services to the government and submit Policies regarding drinking water quality and development and they also publish scientific papers, results and reports.[27]

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[25] "Pakistan Standard and Quality Control Act," (1996), https://na.gov.pk/uploads/documents/1329726893_317.pdf.

[26] "Pakistan Council for Research in Water Resources (PCRWR) Act," (2007), https://senate.gov.pk/uploads/documents/1658374710_896.pdf.

[27] Ibid.

3.5 National Drinking Water Policy 2009

The Ministry of Environment has formulated a National Drinking Water Policy 2009 for ensuring the availability of safe drinking water to every citizen.[28] The Policy aims to provide a complete infrastructure for addressing the environmental issues and challenges in Pakistan regarding the Provision of clean drinking water[29]. To ensure protection and conservation of water resources it encourages Public Participation and awareness.[30] However, it also promotes research, development and public-private-partnership for enhancing the effectiveness of water supply systems.

A very important thing laid down under National Drinking Water Policy was regarding legislation on Pakistan's Safe Drinking Water Act and Water Conservation Act for ensuring compliance with the National Quality Standards and for holding the water supply Institutions answerable to the general public.[31] This Policy is fully monitored and implemented by the Federal Ministry of Environment in cooperation with Provincial Governments.

3.6. National Water Policy (2018)

It is based on the concept of Integrated Water Resource Management and aimed at promoting sustainable consumption and production throughout the water sector, against exploitation to utilization.[32] It also aimed at raising public awareness to reduce the wastage of water, addressing different issues regarding drinking water demand, sewage disposal, handling of wastewater and industrial waste.[33] It also highlights

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[28] National Drinking Water Policy (Islamabad: Ministry of Environment, 2009), 3, https://mocc.gov.pk/PolicyDetail/YTA0ZDNkYjEtZTdlNC00N2M3LTg4YjgtNTIzMzUxYzg0MjEy.

[29] Ibid, 4.

[30] Ibid, 5-6.

[31] Ibid, 12.

[32] National Water Policy, (2018), 5.

[33] Ibid, 6.

different issues like depletion and deterioration of groundwater, scarcity of freshwater due to increasing demand, and its adverse effects on the health and well-being of the people of Pakistan.[34] The Policy mentions the liability of the provincial government for the management of groundwater, and for keeping the quality of water and its provision to the public along with their participation.[35] The National Water Policy again emphasizes the enforcement of legislation for the protection of water resources from contamination with the help of provincial governments.[36]

3.7. Provincial Food Authorities Acts

After the 18th amendment food was made a subject of the Provincial Legislative List and provinces have powers to issue licenses to local food operators and manufacturers, but still, the war between PSQCA and provincial food authorities continues as both authorities are claiming their jurisdiction on food operators and issuing notices to food operators about their exclusive jurisdiction over them as well as banning the food operators licensed from the other authority.

Punjab Food Authority Act 2011 was the first provincial legislation in Pakistan aimed at resolving the issues regarding food safety and standards and establishing the Punjab Food Authority.[37] After that Baluchistan Food Authority Act and Khyber Pakhtunkhwa Food Safety Act were passed in 2014 aimed at protecting public health by providing safe and standard food[38] including Halal food, to promote trade between provinces[39] and to establish Food Authorities in their respective Provinces. Similarly, the

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[34] Ibid, 3-4.
[35] Ibid, 22.
[36] Ibid, 18.
[37] "Punjab Food Authority Act," (2011). http://punjablaws.gov.pk/laws/2460.html.
[38] "Baluchistan Food Authority Act," (2014). https://faolex.fao.org/docs/pdf/pak190929.pdf.
[39] "Khyber Pakhtunkhwa Food Safety Authority Act," (2014). https://faolex.fao.org/docs/pdf/pak189941.pdf.

Sindh Food Authority Act was passed in 2016 which aimed to provide safe, healthy and standard food and establishes Sindh Food Authority.[40] According to Pakistan Quality Standards,

> Bottled drinking waters are waters other than natural mineral waters which are filled into hermetically sealed containers of various compositions forms and capacities that are safe and suitable for direct consumption bottled drinking water are considered food.[41]

The Pakistan Standard Specification was established in 2001, it was then revised in 2002, then in 2003, and after that, it was revised in 2004. The "Pakistan Standard and quality control Authority Standards Development Centre" adopted Pakistan Standards on January 24, 2018.[42] Pakistan Quality Standard specification for bottled water provides the National standards for bottled drinking water, but it does not mean that it set aside the international standards provided for bottled drinking water. The said revision specifically mentions that no packaged water shall contain harmful substances dangerous to human health and, they shall comply with the standards provided under "Guidelines for Drinking Water Quality" published by the World health organization.[43] It means that along with the National standards compliance with international standards is equally important and compulsory.

[40] Sindh Food Authority Act, 2016. http://www.pas.gov.pk/uploads/acts/Sindh%20Act%20No.XIV%20of%202017.pdf.

[41] Pakistan Standard Specification for Bottled Drinking Water (3rd and 4th Rev), 2004, https://mocc.gov.pk/SiteImage/Misc/files/Drinking%20Water%20Quality%20Standares%20MAY%202007.pdf.

[42] Ibid.

[43] Ibid.

4. Lacunas Due to Ineffective Legislation

There are many lacunas because of ineffective legislation as explained in following section.

4.1 Absence of Proper Law

The major hurdle in the protection of human rights to water and life is the insufficient legal framework to cover all issues regarding drinking water and a clean environment. Since after the drinking water policy in 2009, no step should be taken to fulfill the objectives of the policy and to introduce proper legislation which not only covers the national drinking water supply systems but also introduces new standards, code of compliance, proper check and balance system, the criteria for monitoring, penalties in case of non -compliance and compensatory system for bottled drinking water companies.

4.2 No Record of Damages Caused Due to Contaminated Water

Many problems arise due to the absence of proper records of diseases, damages and deaths caused due to unclean and contaminated bottled drinking water.

4.3 Lack of Public Awareness

Another shortcoming in controlling substandard bottled water companies is the lack of public awareness about contaminated Bottled water, the national and international standards for bottled water and their drinking water rights. These issues can be addressed by the collaboration between federal and provincial governments in introducing the legal framework which provides a complete code of compliance and legal framework to the institutions for maintaining the quality of bottled drinking water obviously this could only be possible with the help of consumer participation.

Consumers can actively participate in helping government, control such corporations selling poison in the form of pure water and earning

millions out of it. This is possible only if the consumers are well aware of their rights associated with clean water and the law associated with maintaining the quality of water. This is again the responsibility of governmental and non-governmental associations to spread public awareness about the importance of clean drinking water, the rights associated with water, the national and international water quality standards, damages caused by unclean water and the long-term effects of controlling water wastage.

4.4 Non-Registration of Cases against Substandard Bottled Water Companies

The major flaws in Pakistani Legislation and regulatory system were very well pointed out by Chief Justice in Suo Moto's case against Bottled Water Companies selling substandard water in Pakistan. Supreme Court raised numerous issues which need attention and should be handled smartly. The most important concern shown by Chief Justice was regarding the non-registration of cases against companies selling poor quality water and he also showed displeasure for these companies who are earning billions of rupees by selling poison in the form of water. The issue raised by the Environmental Protection Agency before SC was, that companies did not establish their own laboratories to examine the ingredients of the water being extracted by them, except Qarshi who have their own certified laboratory, and all other companies used to send their samples abroad for analysis.[44] This issue is again of grave concern because of why the authority does not take action against such companies who had not established independent laboratories in accordance with regulations provided by PSQCA.

[44] Amir Riaz, "SC Orders Closure of Bottled Water Company," *The News*, November 21, 2018, https://www.thenews.com.pk/print/396497-sc-orders-closure-of-bottled-water-company.

According to the report submitted by Punjab Food Authority before SC, the companies are totally not aware of what the water contains that they extract from the ground and they use 90 million liters of water a day. The groundwater which they used to sell contains Arsenic and Fluoride and these companies also pollute the aquifers by releasing the arsenic into the sewerage system.[45] The Environmental Scientist, Dr Ahsan Siddiqui also informed the court that bottled water companies are extracting 7.4 billion liters of water every month without paying any cost and it is also decreasing the level of underground water. It is also observed during the inspection that the concentration of minerals mentioned in the bottled water was not correct, upon which CJP said that water theft should not be allowed and companies extracting groundwater would have to pay and it also directed that actual and accurate concentration of minerals should be mention on bottled water label and special measures should be taken to minimize the plastic waste generated by the companies.[46]

The most important step suggested in this suo motu case was that the bottled water companies are directed to sit down with the water-appointed court commission and decide on how to improve the quality of bottled water and the treatment methods to be employed[47]. The Supreme Court in its Judgment focused on the registration of food products, imposing taxes on the bottled drinking water companies (Rs. 1 per liter on the use of surface water), environmental approvals, installation of water treatment plants, and inspection of manufacturing units by the authorities.[48] The

[45] Ibid.

[46] Hasnnat Malik, "SC Warns to Shut Down Mineral Water Companies," *The Express Tribune*, December 3, 2018, https://tribune.com.pk/story/1859329/sc-warns-shutdown-mineral-water-companies,

[47] Ibid.

[48] Shahid Bhatti, "Tax on Mineral Water and Beverage Companies Through Supreme Court's Judgment," *Courting the Law* accessed February 12, 2019, http://courtingthelaw.com/2019/02/12/laws-judgments-2/judgment-analysis/tax-on-mineral-water-and-beverage-companies-through-supreme-courts-judgment/.

question is why such important issues are being neglected by the companies and especially by the authorities. Why the authorities didn't take action against such corporations on time? Why there is always a need to look at the higher forum to take notice of such an important issue? Who will stop these corporations from playing dirty games with the people of Pakistan? When the Government of Pakistan gives importance to the Universal issue of safe drinking water, and part from signing international treaties when the actual steps should be taken to give a healthy life to the people of Pakistan?

5. An Overview of International Legislation for Protecting Bottled Water and Steps Taken to Make Pakistani Law Compatible with International Legislation

Following are some illustrations of international law for protecting bottled water and steps taken to make Pakistani law compatible with international legislation

5.1. European Union Drinking Water Directive

The European Council directive 98/83/EC aims to protect human health from adverse effects caused due to drinking water contamination. This applies to all public and private water distribution systems and is also applicable to water used in the food processing industry[49]. The directive laid down the quality standards at the European Union level but in general, the World health organization guidelines are used as the basis for developing quality standards of drinking water. The member states can also include additional standards relevant to their territory, but they are not allowed to set low standards because maintaining the level of human health below the standards is not possible. In addition to this member states can also depart for a limited time from chemical quality standards and this is called

[49] European Union, "European Council Directive 98/83/EC November 3," *Official Journal L 32-54 (1998)* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31998L0083.

derogation, provided that it does not affect human health. The member states are also under obligation to report the drinking water quality to European Commission every three years.[50]Pakistan being a dualistic state should adopt international legal norms by incorporating them into their national legislation. International Human rights law demands that all states should work in achieving universal goals and human rights principles, of providing equal access to clean drinking water.[51]

5.2 World Health Organization (WHO) Guidelines for Drinking Water Quality

These guidelines were adopted in 1984 and their primary objective is the protection and prosperity of human health, by providing quality drinking water in accordance with WHO standards.[52] These guidelines are likely to be used as the basis for the improvement of national standards of drinking water by the member states, which should be as close as possible to WHO guidelines because Proper compliance with WHO guidelines ensures the safety and protection of drinking water.[53] To achieve these goals the Ministry of Health Pakistan and the World Health Organization have reviewed the drinking water standards provided for quality control in Pakistan and updated them in accordance with drinking water quality standards provided by World Health Organization.[54] The guideline values

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[50] Ibid.

[51] Catarina de Albuquerque, "Realizing the Human Rights to Water and Sanitation: A Handbook by the UN Special Rapporteur," (India: Precious Fototype, Bangalore, 2004), 7. https://www.pseau.org/outils/ouvrages/ohchr_realizing_the_human_rights_to_water_and_sanitation_a_handbook_2014.pdf.

[52] Sombo Yamamura, "Drinking Water Guidelines and Standards" (Geneva, Switzerland, World Health Organization), 6, accessed: 20.05.2023 https://pdf4pro.com/view/chapter-5-drinking-water-guidelines-and-2ecf4c.html.

[53] Ibid, 3.

[54] Dr Mahmood A. Khwaja, Anum Aslam, "Comparative Assessment of Pakistan National Drinking Water Quality Standards with Selected Asian Countries and World Health Organization" (Sustainable Development Policy Institute, Islamabad: 2018), 2, https://sdpi.org/sdpiweb/publications/files/Comparative-Assessment-of-Pak-National-

provided by WHO are not mandatory limits, they should be set by national authorities by considering the local, environmental, social, economic and cultural conditions. When comparing the quality standard values of drinking water in Pakistan with WHO guidelines, it is observed that our National Standard values of a few parameters (Total dissolved solids, Arsenic, cadmium, copper and lead) are of serious concern and need to be reviewed and revised in accordance with WHO guidelines. There is only one parameter (chromium) in which Pakistan follows WHO standard values (0.05mg/l).[55] Pakistan also needs to include additional parameters provided by WHO guidelines like pesticides, phenol compounds, sulfates and other hazardous aromatic hydrocarbons to National drinking water quality standards for improving and securing the quality of water from all kinds of contaminations.[56] It is very encouraging to see that in acknowledging the basic right of humans to water and sanitation Pakistan became a signatory of different International and regional declarations and treaties on drinking water and sanitation.

5.3 United Nations Resolutions

The Committee on Social and economic rights recognized the 'right to water' on November 2002, which defines it as "a right of everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use*"*.[57] The human right to water and sanitation resolution 64/292 was adopted in 2010 by the United Nations Organization.[58] This resolution provides everyone with the right to safe,

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Drinking-Water-Quality-Standards-with-Selected-Asian-Countries-and-WHO(PB-60).pdf.

[55] Ibid, 6.

[56] Ibid, 7.

[57] General Comment No. 15. "The Right to Water," *UN Committee on Economic, Social and Cultural Rights*, November, 2002, https://digitallibrary.un.org/record/486454?ln=en.

[58] Resolution RES/64/292 United Nations General Assembly, July 2010. https://digitallibrary.un.org/record/687002?ln=en.

affordable and accessible water for daily use.[59] Resolution no 64/292 and 15/9 are a part of International human rights law and Pakistan being its member state is automatically bound to acknowledge the rights provided under international legislation.[60]

Pakistan also signed United Nations Habitat Agenda on Human Settlement in 1996. This Conference elaborates that, "Everyone has right to adequate living for themselves and for their families which includes food, clothing, housing, water and sanitation".[61] In 2011, Pakistan adopted resolution 16/2 of the United Nations which reaffirms the right to safe drinking water as provided under the Habitat Agenda. However, in recognizing water rights further Pakistan has adopted Human Rights Council Resolution 24/18 and General Assembly Resolution 68/157, these resolutions bind all the member states to recognize the basic right of every human regarding the provision of safe drinking water and sanitation[62].

These resolutions were evident in the fact that Pakistan has recognized the human right to water by signing different international legislations and by introducing a number of domestic-level policies and programs on water and sanitation. It could not be said that this right has been fully realized in Pakistan because the government fails to even refer to the term 'right to water' in policies or constitutions.

5.4 Global Sustainable Development Goals (SDGs)

Pakistan has not only recognized the Global sustainable development goals but has also taken practical steps by establishing its office at the Ministry of

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[59] Khairpur Rural Development Organization (KRDO), Integrated Regional Support Program(IRSP), "Realising the Human Right to Water and Sanitation," *Islamic Republic Of Pakistan briefing,* August 2015 https://www.endwaterpoverty.org/sites/default/files/oldfiles/EWP%20Islamic%20Republic%20of%20Pakistan%20Briefing%20FINAL.pdf.

[60] Ibid.

[61] Ibid.

[62] Ibid.

planning commission. This shows the state's commitment and desire to achieve the targets provided by United Nations Organization. Under one goal, there are several targets such as target number (6.1), according to which the availability of clean, healthy and affordable water to everyone around the world shall be achieved by 2030.[63] According to facts and figures provided under goal 6, on average three out of ten people have no access to safe and healthy drinking water services. These goals emphasized the need to maintain a freshwater ecosystem and sanitation facilities at the local level, which will improve Sanitation and access to drinking water.[64]

5.5 Dublin Statement on Water and Sustainable Development

Pakistan signed the Dublin Statement in 1992, which recognizes that freshwater is a susceptible resource and should be considered an economic good. It emphasized the participatory approach including every user for the development and conservation of water resources, and on the other side, it recognizes the provision of clean water for human consumption at an affordable price.[65]

5.6 Delhi Declaration

Pakistan is one of the 8 countries that have signed the Delhi Declaration of the third South Asian Conference on Sanitation (SACOSAN) and it also recognizes that the availability of water for drinking and sanitation is a basic human right.[66]

6. Conclusion and Recommendations

Clean and safe drinking water ensures a prosperous and healthy life. Unfortunately, the Bottled water industry in Pakistan has failed in

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[63] Facts and Figures Goal no. 6, Clean Water and Sanitation (Sustainable Development Goals), January 1st, 2016, United Nations https://www.un.org/sustainabledevelopment/.

[64] Ibid.

[65] Hartmeyer, *Drinking Water Challenge,* 7.

[66] KRDO and IRSP, *Human Right to Water*, 2015.

maintaining the quality of bottled drinking water and instead of resolving the water shortage issues they become the cause of pollution and the depletion of underground water resources. The majority of bottled water companies working in Pakistan have failed to follow the National and International Drinking Water Quality Standards; the reason for such violations is weak authoritative control over this industry and a lack of penalties for the violation of the law. Therefore, there is a need for proper legislation for the companies to abide by, in providing the citizens with dirt-free and safe drinking water, and to carry on their business by lawful means.

United Nations recognizes the right to water as a basic Human right and provided millennium development goals for the conservation of water resources and the provision of water to everyone. If proper steps are taken in making Pakistani law compatible with international legislation and adopting the best practices will help in combating the water crises in Pakistan.

To make Pakistan a better and healthy place to live Government need to introduce legislation on clean drinking water which acknowledges the human right to have affordable, healthy, safe and clean drinking water because it has already been affirmed by national and international instruments and covenants. Apart from signing international legislation; Pakistan requires practical steps to fulfill the directives provided under them. There is a need to increase cooperation between national and international development. To create a healthy environment public awareness should be made regarding the quality of bottled drinking water, standards and labeling of bottled water, forums to complain against substandard bottled drinking water brands and measures for maintaining the quality of underground water used at homes.

To curb waterborne diseases government should take concrete steps for protection, proper functioning, examination, sample analysis and

treatment of drinking water plants. It is also recommended that competition commission and provincial food authorities will have to take serious action in controlling the deceptive marketing practices done by bottled drinking water companies in order to secure the rights of consumers violated by such companies and to hold the culprits accountable for violating the environmental laws and damaging the environment and public health.

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Islamabad Law Review Vol. 7, Issue 1, 2023

Jurisprudence of Courts in Pakistan upon Validation of Marriages by Sui Juris Woman without the Consent of Walī

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Abstract

Family laws are an indispensable fragment of the legal system of Pakistan. However, there is no statute law in Pakistan regarding the issue of marriage by a *sui juris* woman without the consent of her *walī*. The validity given to such marriages, roots in the precedent laws. The absence of explicit statute laws in this regard has granted absolute authority to the judicial segment to 'create and interpret' rulings for the issue. The case laws dealing with such marriages maintain that such marriages are being validated on the jurisprudence of the Ḥanafī *fiqh*, which is the prevalent school of legal thought among Pakistani Muslims. However, the scrutiny of the classical Ḥanafī *fiqh* depicts that the courts of law have not taken its jurisprudence in holistic manner, rather they are only following it partially. The courts while adjudicating such cases neither pay any heed to the compliance of the pre-requisites of *kafā'ah* and *mahr al-mithl*, nor is the *walī's* right of annulment recognized. These, being the essential conditions attached to the validity of such marriages in the Ḥanafī *fiqh*, if not fulfilled, turn the marriages irregular. This research paper strives to canvass and sketch out the jurisprudence that the courts have developed while dealing with the validity status of the marriages held by adult Muslim women without their *walī's* consent. Thus, in pursuance of this purpose, the case laws, which are the fundamental essence of this jurisprudence are being scrutinized. The current research after critically evaluating and highlighting the inconsistencies and the gaps between the classical Ḥanafī rulings and the contemporary practices of Pakistani courts regarding this matter concludes that the *fiqhī* opinions must be implemented completely and not partially, to bridge the gap between both and to bring the current laws of adult

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woman marriage in better accordance with the true Ḥanafī law.

Keywords: *Sui Juris***,** Validity, Consent, Pakistani courts, adult woman, *Walī*, Irregular, Ḥanafī law, Guardian.

1. Introduction

Family laws are generally comprehended to be the laws that deal with the creation as well as removal of a legal family status, its consequences, and the physical and financial protection of the family members. The family laws of Pakistan also deal with the family matters and domestic relations including the capability and institution of marriage, all forms of its dissolution, dower, dowry, custody of children, inheritance etc. They are not only constituted through statutes; but the court decisions, ordinances and the provisions of the Federal and State enactments that have relevance with the family relationships and the rights, duties and finances attached to them are also the constituents of family laws in Pakistan.

Various acts have been enacted by the Pakistani legislature to regulate the legal issues of families but some of the matters have not been endorsed as statutes, thus are discussed in case laws and are hence applicable as precedents. Likewise, a cursory view of the Muslim family laws reveals that no statute law has been legislated concerning the marriage of an adult woman held without her guardian’s consent. Nevertheless, a few case laws have conversed over this issue. One of them, commonly known as the Saima Waheed case, has been established as a precedent for validating such marriages. A profound analysis of the case laws relevant to the matter of validation of the marriage of *sui juris* woman without the consent of her *walī* shall tend to portray the inferences and rules set down by them. Further, their similarities and contradictions with the Islamic laws pertinent to the marriage of adult woman on her own shall also be clarified. However, it is noteworthy that the constitution has ousted the jurisdiction

of Federal Sharīʿat court with reference to scrutiny of the family laws that are contrary to the Islamic laws.[1] Therefore, the revealed inconsistencies can be proposed to be amended by the legislature itself.

The conduction of an in-depth study of the case laws that have developed the Jurisprudence of Pakistani courts on this issue shall assist in exploring the extent of coherence in the Courts' decisions, legal strength of the *ratio decidendi* on which the Courts' have based their decisions, status of validity of such marriages and level of compliance of such decisions with the actual *fiqhī* rulings (which the Courts claim to have followed while issuing their decisions in this regard). As the only existing law on this issue in Pakistan is the precedential law (developed from and consequently observed by the Courts of Pakistan), thus it is very crucial to analyze these case laws in order to examine the validity of such laws in the light of the *fiqhī* rulings, upon which they are professedly based.

The courts apparently claim to follow the Ḥanafī *fiqh* in their decisions, which opposing the majority schools of thought, validates the marriage contract of an adult virgin woman contracted without her guardian's consent. But this validation is restricted with certain conditions and is not absolute. If the pre-requisites of *kafā'ah* and *mahr al-mithl* are not incorporated in such a marriage, it is irregular (*fāsid*) and not irrevocable. In addition, the *walī* is vested with the right to annul such marriage by the Ḥanafī laws, but none of these have been taken into consideration by the Courts while rendering the judgements in this regard.

Consequently, the current paper asserts a crucial necessity for imposing certain limitations and conditions to the absolutely valid marriage contract of adult virgin woman, which the contracting parties must comply, if there is no consent of the guardian. It has been proposed that these

[1]As understood by the Article 203 B (c) of The Constitution of The Islamic Republic of Pakistan, 1973.

conditions must be enquired by the courts of law before validating such marriages, so that better accordance with the Ḥanafī law might be achieved. The enactment of an unequivocal statute in this regard or practical amendment in the precedential Pakistani family laws shall assure the mitigation of destructive effects of hasty and un-consented (mostly irregular) marriages and shall also help in bringing the laws in full compliance with the classical Ḥanafī law rather than adopting the condemnable "pick and choose" technique.

Before directly moving on to the scrutiny of the relevant case laws, it is quite essential to study the statutory laws regarding the contracting of marriage and its registration specifically. These laws are mentioned in the Muslim Family Laws Ordinance, 1961 with some relevant provisions in other acts. Therefore, firstly the procedure of execution and registration of marriage mentioned in the said ordinance shall be analyzed in order to get acquaintance of the initial formalities of marriage contract in Pakistan and its ceremonial conditions or requisites.

2. Registration of Marriage in Pakistan Family Law

Section 5 of the Muslim Family Laws Ordinance, 1961 deals with the registration of all the marriages that are solemnized under the Muslim law irrespective of being formalized by the *nikāḥ* registrar or anyone else. It has been declared by the Supreme Court in the Gardezi case that for the applicability of MFLO, 1961, it is not at all necessary that both the spouses must be Muslim citizens. According to the judgment, a marriage held between a Muslim Pakistani male and a non-citizen Muslim woman or even a non-Muslim woman would be dealt under the Muslim Family Laws Ordinance, 1961.[2] It has also been ruled in a case that the MFLO is applicable irrespective of the place of the execution of marriage.[3]

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[2]Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yusuf, PLD 1963 SC 51.
[3]Fazal Khitab v. Mst. Naheed Akhtar, PLD 1979 SC 864.

This is the only section relevant to the execution of marriage in the MFLO, 1961 and it does not mention any conditions or requisites for entering into the contract. The judges and commentators have however inferred various other rulings from the section. For instance, it has been established in a case law that the registration under section 5 of the MFLO, 1961 is absolutely necessary and non-registration of the marriage creates doubt in solemnization of the marriage.[4] Similarly, in another case, it was asserted that the non-production of *nikāḥ khawān* casts a serious doubt on the genuineness of the contract. Even if the *nikāḥ* registrar is present, but he has not complied with the requirements of the section 5, his eligibility of being a registrar would be in question. It was also affirmed in this case that the duty of the registrar is not to simply fill the columns of *nikāḥ nāmah*, but he has to be very prudent in satisfying all the requisites responsibly; as it is a very sacred and delicate matter, to which are attached very significant issues such that of succession, maintenance, dower legitimacy of children, divorce etc. Therefore, the *nikāḥ* registrar has to be sensible enough to enquire properly about the ages, competency and free will etc. of both the parties before authenticating the *nikāḥ*.[5]

Nevertheless, it is agreed upon by almost all the interpreters that the non-registration of marriage does not invalidate the marriage if it is proved to have taken place in accordance with the requirements of Islamic law. It only attracts penalty under section 5 (4) of MFLO, 1961 without invalidating the marriage.[6]

2.1 *Sharīʿah* Evaluation of Section 5 of the Muslim Family Laws Ordinance, 1961

[4]Dr. A.L.M Abdulla v. Rokeya Khatoon and Another, PLD 1969 Dacca 47.
[5]Syed Farman Ali v. Abid Ali and others, PLD 1995 Lahore 364.
[6]M. Farani, *Manual of Family Laws in Pakistan* (Lahore: Lahore Law Times Publication, 1985), 22.

The teachings of Islam strongly recommend the reduction of contracts and transactions into writing.[7] Marriage itself is also a contract, rather a more sacred and significant one. The Muslim jurists also consider the writing of marriage to be desirable.[8] Rationally, the conversion of marriage contract into written form is very essential as it involves a number of reciprocal obligations like maintenance, legality of children, inheritance and many others. The establishment of such accessory rights in the contemporary era requires documentary evidence, which can be presented only if the contract has been written down formally.

As far as the matter of registration is concerned, it is not obligated by the Holy Qurʾān or *sunnah*, but it is also not prohibited. So, it is noteworthy that the registration or non-registration of the *nikāḥ* does not affect its legality or validity. According to contemporary scholars, the formal deed of marriage contract, which is legally registered facilitates in solving complex issues of proof of marriage and various related problems whereas the absence of any documented evidence makes the proof of marriage cumbersome.[9] Some *'Ulamā'* of Pakistan had criticized considering of non-registration of marriage as an offence at the time when the MFLO, 1961 was freshly promulgated and some still do not deem it proper. But registration of marriage must be assumed to be a commendable act because Islam has permitted the state to enact laws regarding administrative matters which are not prohibited by *sharīʿah* and the enactment of which would curtail hazardous impacts on society. Islam emphasizes on the proliferation of such strategies by the state which shall minimize harm and chaos among the Muslims and regulate their mutual affairs in better way. The elevated number of cases of false allegations of

[7]Qurʾān, 2:281.

[8]Tanzil-Ur-Rahman, *A Code of Muslim Personal Law* (Karachi: Islamic Publishers, 1984), 88.

[9]Zeenat Shaukat Ali, *Marriage and Divorce in Islam, an Appraisal* (Bombay: Jaico Publishing House, 1987), 103.

zinā, claims of multiple husbands over one wife, denial of child's paternity etc. proves that non-registration of marriage has caused much difficulties and disputes among the citizens.

The Federal Sharīʿat Court has also vehemently advocated the requirement of registration of the marriage contract, while issuing its judgment after scrutinizing the repugnancy of certain sections of MFLO, 1961 to the Islamic injunctions.[10] The honorable court endorsed the same stance that section 5 can in no way be termed as un-Islamic or in contradiction with the Islamic laws. However, the non-registration would not amount to invalidity of the contract, if other *sharʿī* requirements are complied with.

As far as the registration of the marriage contracts held without the consent of *walī* is concerned, there is no check and balance held over such contracts while their registration. The requirements of *kafā'ah* are not ascertained and the *mahr al-mithl* is not investigated or verified. No conditions of validity, efficacy or irrevocability of the marriage contract are discussed or analyzed. The learned judge in one of the cases named Syed Farman Ali v. Abid Ali has urged the *nikāḥ* registrars to inquire about the parties before registration rather than just filling the columns of *nikāḥ nāmah*.[11] But the learned judge has only pointed to explore the matters of age, competency to understand the act and free will. The matters of equality, compatibility[12] and proportionate dower[13] are not highlighted by the judge, which are essential requisites of Ḥanafī law for the woman marrying in *sui juris* capacity without her guardian.

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[10]Allah Rakha and others v. Federation of Pakistan, PLD 2000 FSC 1.

[11]Syed Farman Ali v. Abid Ali and others, PLD 1995 Lahore 364.

[12]Wahbah tuz-Zuhaylī, *Al-Aḥwāl al-Shakhṣīyyah*, (Syria: Dār Al Fikr, 1984), 7/186-192.

[13]Abū Al-Hassan Alī bin Abū Bakar bin ʿAbdul Jalīl Al-Marghainānī, *Al-Hidāyah*, (Riyāḍ: Al-Maktabah Al-Islāmīyyah), 1/202.

3. Analysis of *Nikāḥ Nāmah* Form of the Sui Juris Woman Marrying on her Own in Pakistan

The standard template of the Islamic marriage contract known as the *nikāḥ nāmah* is regularized for the marriage of Muslim citizens of Pakistan as per the rules number 8 and 10 of the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961. No different or altered *nikāḥ nāmah* is formed for the contract of *sui juris* women; rather the same two-page form is executed for all sorts of marriages. This Form comprises of almost 25 columns which require detailed information regarding the spouses, their paternity, addresses, dower details etc.[14] Although the signatures of the bride, her attorney, bridegroom or his attorney, the witnesses of marriage, the witnesses of appointment of bridegroom's attorney, the witnesses of appointment of bride's attorney, the *nikāḥ* registrar and the *nikāḥ khawān* are required but there is no specific column for the signature of the guardian or *walī* and no mention for the presence or absence of him.

The presence of the bride's attorney is required which can be anyone and not necessarily her guardian. Moreover, there is no restriction of the attorney being a person in blood relation or prohibited degree relation with the bride. This implies that the presence of guardian is not an essential requisite of the marriage contract in Pakistani law. This may not be a seriously objectionable issue as per the Ḥanafī *fiqh*, but the pre-requisites mentioned by Imām Abū Ḥanīfah for a marriage held without the guardian are also neither demanded nor checked by the *nikāḥ khawān* or *nikāḥ* registrar while the conduction of such marriage contracts. As known from the Ḥanafī *fiqh*, the absence of *kafā'ah* between spouses and dower less than *mahr al-mithl* cause irregularity in the *sui juris* woman's contract and the contract incurs grave consequences like that of being liable to get annulled

[14]The prescribed *Nikāḥ-Nāmah* form according to the Rules No. 8 and 10 of the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961.

at the instance of the guardian.[15] Ignoring such consequences and not paying heed to irregularity of the contract is an alarming flaw in the *nikāḥ nāmah* executed for such marriages. The *nikāḥ nāmah* has to be amended by keeping in view all the conditions and requisites of the Ḥanafī law; thus, adding the columns of the consent of guardian, *kafā'ah* and all its elements, *mahr al-mithl* and other necessary rudiments in order to bring it in compliance with the entire, and not partial, Ḥanafī law pertinent to this issue.

4. Case Laws Regarding the Marriage of a Sui Juris Woman without the Consent of Her Walī

The matter of entrance of a *sui juris* woman into a marriage contract without her guardian's consent in Pakistani law has been resolved almost by the case laws, as there exists no clear statute on this issue. An overview of the case laws recorded on this matter portrays that most of the decisions are in favor of the view that an adult woman can enter into a marriage contract without her guardian's consent. It is presumably claimed by the judges that such decisions are based on the Ḥanafī law of marriage. The profound analysis of the judgments reveals their compliance with the Ḥanafī law to be partial and not absolute and complete. Some of the case laws holding paramount status or establishing basic principles in this regard shall be discussed with brevity.

4.1 Muhammad Imtiaz and Another v. the State (PLD 1981 FSC 308)

Commonly known as the Muhammad Imtiaz case, it appears to be the first case filed on the issue of validity of the *nikāḥ* held by an adult woman without her guardian's permission. The case had first been filed in the Session court by the father of the girl, where the Additional Session Judge

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[15]Muhammad Ṭāhir Manṣūrī, *Family Law in Islam (Theory and Application)* (Islamabad: Sharīʿah Academy, International Islamic University, Islamabad, 2012), 58-62.

convicted both the alleged spouses under section 10 (2) of the Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced them with rigorous imprisonment, stripes and fine. Thus, an appeal was raised in the Federal Sharīʿat Court by the spouses against this judgment and the verdict of the Federal Sharīʿat Court is now considered to be the prevalent ruling of this case.

The facts of the case demonstrate that the father of Mst. Mohammad Jan lodged an FIR at the Police Station that her 18 years old virgin daughter was abducted by Muhammad Imtiaz along with taking off Rs. 50,000, some gold and other ornaments. The police arrested both the appellants of this case and got the woman examined by a lady doctor, who declared that she has been subjected to sexual intercourse.[16]

The father of the girl had shown her unmarried in the F.I.R but later at the Session Court, he along with some other witnesses manipulated the story by adding that he was an Afghan migrant and his daughter had already been married with his nephew in Afghanistan. However, the Session Judge did not give finding in the favor of this claim due to various reasons such as the claim being contrary to the F.I.R report's record and the migration from Afghanistan being doubtful according to the witnesses' statements furnished in defense.[17]

The Federal Sharīʿat Court approved the *nikāḥ nāmah* as it was properly recorded and registered as required by the Muslim Family Laws Ordinance, 1961. But the Session Judge had convicted and sentenced the appellants on the ground that the *nikāḥ nāmah* seemed to be a forged one. Moreover, the Session Judge also opined that even if it was assumed that the *nikāḥ nāmah* is genuine, yet the *nikāḥ* would be invalid because it was performed without the consent of Muhammad Jan's *walī*. The honorable

[16]Muhammad Imtiaz and Another v. the State, PLD 1981 FSC 308-309.
[17]Ibid, 310.

judges of the Federal Sharīʿat Court defied this view by giving arguments from the interpretations of various verses.[18] Several traditions were also quoted which show that the consent of an adult virgin for her *nikāḥ* validates the marriage.

The Ḥanafī view on this subject was also clarified by the learned judge from the book Tabyān al-Ḥaqāʾiq which is the commentary of Kanz al-Daqāʾiq. It declared that the *nikāḥ* of an adult woman is permitted and effective according to Abū Ḥanīfah. The author of the book has also mentioned the viewpoints and arguments of Imām Mālik and Shāfiʿī as well and then argued that the traditions highlighted by them for supporting the invalidity of such a marriage are weak and not authentic.[19]

The learned judge also gave reference of *al-Mabsūṭ* by Sarakhsī and pointed out that Imām Abū Ḥanīfah has deduced from various traditions and occasions that the *nikāḥ* of both a virgin or deflowered woman without the intervention of *walī* but with the free will of the bride, is valid. However, if the male is of unequal status, then the guardians have the right of objection and can get it annulled through the *qāḍī*.[20]

Apart from these, the learned judge has referred to many other books depicting the Ḥanafī law on this issue. Finally, the verdict expressed that the Session Judge was wrong in invalidating the marriage. Furthermore, it was also asserted that if a man and woman marry in good faith and believe themselves to be married, then they should receive the benefit of doubt. Hence, the appellants were acquitted.

4.1.1 Analysis of the Case Law in the Light of *Sharīʿah*

The learned judge of the Federal Sharīʿat Court has undoubtedly given a well-researched judgment and has examined various aspects of the case in

[18]Qurʾān, 2:231; 2:229.

[19]Fakhar ud-Dīn Al-Zaylʿī, *Tabyān al-Ḥaqāʾiq Sharḥ Kanz Al-Daqāʾiq* (Cairo: Al-Maṭbaʿah Al-Kubrā al-Amīrīyyah, 1895), 2/117.

[20]Muhammad Imtiaz and Another v. the State, PLD 1981 FSC 308, 314.

a scholarly manner. The requisites of equality and appropriate dower have also been highlighted while mentioning various paragraphs from certain Ḥanafī books. But while deciding the case, no heed was paid to these requisites of marriage which are deemed very significant in the Ḥanafī School, in the context of the marriage conducted without the *walī's* permission. Even in some opinions of the Ḥanafī scholars, if the marriage held without guardian's permission is such that the man is not equal in status to the woman or the dower settled is inappropriate, it would be an invalid marriage. Those who do not invalidate such marriage altogether, they also declare it to be irregular and exposed to annulment by the guardian[21].

The learned judge has not emphasized upon these pre-requisites. While issuing the verdict of the case, neither the equality of spouses was evaluated, nor was notice of the appropriate dower taken. Despite the fact that the guardian was objecting upon the marriage, he was not acquainted about his right of getting the contract annulled if there were grounds of inequality between spouses or lesser dower. Hence, the marriage was validated completely only on the ground that the wife and husband had consented upon that. The honorable judge would have set a stronger and a more Sharīʿah-attuned precedent if the decision would have incorporated all the aspects of validity, irrevocability and enforceability of the contract.

4.2 Arif Hussain and Azra Parveen v. The State (PLD 1982 FSC 42)

This was another suit which was instituted in relevance to the issue of validity of a *nikāḥ* conducted without *walī's* permission. It was also originally filed in 1981 but the judgment of the Additional Session Judge was appealed by the aggrieved spouses in the Federal Sharīʿat Court. The Additional Session Judge had convicted and punished the appellants with

[21]Muḥammad bin Aḥmad bin Abū Sahl al-Sarakhsī, *Al-Mabsūṭ* (Beirut: Dār al-Maʿrifah, 1993), 5/13.

rigorous imprisonment, stripes and fine under section 10 of the Zina Ordinance, 1979.

The brief facts of the case are recorded to be that Barkat Ali complained in the court that his daughter was kidnapped by Arif Hussain and she is residing with him since one and half years. He alleged that they both have been committing *zinā* during this period and a girl has also been born to them.[22] Furthermore, the complainant also claimed that he has no knowledge of the *nikāḥ* held between the spouses and even if they have contracted any *nikāḥ*, it is invalid and unacceptable as it is conducted without his permission.

On the other hand, Arif Hussain denied all the allegations put on by the prosecution and its witnesses and asserted that he was legally married to Azra Parveen. He also stated that Azra's father had taken Rs. 10,000 from him and had promised to marry his daughter with him. Similarly, Azra also refuted the allegations and stated that her parents themselves had married her to Arif.[23]

After listening to both the parties and their witnesses and examining the records carefully, the honorable judges of the Federal Sharīʿat Court declared that there were no eye or trustworthy witnesses to the kidnapping and *zinā* of the accused spouses. The allegation of *zinā* can only be proved if some undeniable evidence is presented about the absence of *nikāḥ* between both, but no such thing could be brought on record which would suffice the denial of *nikāḥ* between them. The learned judges asserted that the appellants have admitted their *nikāḥ* to be legal and valid; and it is established in *fiqh* that if husband and wife affirm the conduction of *nikāḥ* between them and verify it, then it is a sufficient proof of existence of *nikāḥ* between them. They referred to Fatāwā-e-Qāḍī Khān, Fatāwā-e-ʿĀlamgīrī

[22]Arif Hussain and Azra Parveen v. The State, PLD 1982 FSC 42, 44.
[23]Ibid, 45.

and other books where it was mentioned that the *nikāḥ* is proved by the mutual verification of the spouses. It was said that as the *fuqahāʾ* have declared that *nikāḥ* can be proved by mutual verification, it means that the *qāḍī* or judge can consider the existence of valid *nikāḥ* and decide an issue according to it on the basis of mutual verification of the spouses. [24]

The honorable judges declared that in the matter at hand, they can rightly implement this rule of *fuqahāʾ* and hence for declaring the valid establishment of marriage contract between Arif and Azra, the proof of mutual verification of both is enough; especially when the *nikāḥ khawān* has also testified it. It was further explained that the Session Judge punished the appellants on the ground that they did not produce the *nikāḥ-nāmah*, but according to the judges of Federal Sharīʿat Court, this reason was not enough to prove the allegation against them. They asserted that neither the registration of *nikāḥ* is an essential condition of validity of *nikāḥ* in *sharīʿah*, nor does the MFLO, 1961 declare an unregistered *nikāḥ* to be invalid. Moreover, irrelevancy of the requirements of articles 91 and 92 of the Qanun-e-Shahadat Order, 1984 to writing of *nikāḥ* has been argued. The judges also declared that even if no written record of *nikāḥ* was provided and no witnesses of it were presented, yet the *nikāḥ* is validated merely on basis of the affirmation of spouses. They said that the witnesses were not required to prove the *nikāḥ*. Hence, the verdict was delivered in favor of the appellants by considering their *nikāḥ* conducted and valid; only on the basis of the statements given by both of them.[25]

4.2.1 Sharīʿah Evaluation of the Case

The judgment given by the Federal Sharīʿat Court in this case seemed to be deficient in *fiqhī* and legal arguments. It has neither covered all the aspects of the issue, nor has it entailed all the elements and conditions necessary for

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[24]Arif Hussain and Azra Parveen v. The State, PLD 1982 FSC 42, 46.
[25]Ibid., 47.

a valid marriage. The learned judges have ignored all the essentials and constituents of formation, validity, efficacy, and irrevocability of a marriage contract. They also overlooked the requisites of formation of a marriage contract upon which all the *fuqahāʾ* have consensus. They only chose to pick one statement mentioned in a few books to decide the whole critical matter; and disregarded the context in which it was issued.

The case was being set as a precedent for the coming cases, but it was negligently handled. The mutual verification of the spouses is a proof of *nikāḥ* but it is not a source of forming a *nikāḥ*. It is mentioned in *Radd al-Muḥtār* that this statement actually meant that the *qāḍī* can decide the related matters by accepting the mutual verification of the spouses.[26] Hence, it meant that the ancillary matters can be decided after the mutual verification of both. But where the marriage itself is in question, how could mere oral verification of spouses be taken as the only evidence to prove it? If this could be set as a principle that mere confirmation of the man and woman claiming to be husband and wife is sufficient to prove existence of *nikāḥ* between them; what would be the need of witnesses in marriage, the guardian's presence, the condition of announcement among people, writing of the contract and other provisos? This established rule would lead to devastating consequences and highly ambiguous situations. Any couple who would even maintain illicit relation would take advantage of the cover of mutual confirmation of their marriage and would be declared husband and wife without any other proof. This decision is also highly vulnerable to become a source of promoting false marriages, protecting extra marital affairs, claiming rights on divorced women and much more.

Furthermore, the judge has neither taken the notion of guardian's consent into account, nor the elements of equality and appropriate dower

[26]Ibn ʿĀbidīn, *Radd al-Muḥtār ʿalā Al-Durr al-Mukhtār* (Maktabah wa Maṭbaʿ Muṣṭafā al-Bābī al-Ḥalabī, 1966), 2/13.

are paid any regard. The whole judgment is based only on one statement; the context and interpretation of which is manipulated to bring it within the ambit of the situation at hand. Mere mutual confirmation of the spouses can be a source of waiving the *ḥadd* punishment for them, but not for validating the formation of their marriage.

4.3 Hafiz Abdul Waheed v. Asma Jehangir and Another (PLD 1997 Lahore 301)

Commonly known as the Saima Waheed Case, this case has been granted highest significance in the context of permissibility of a *sui juris* woman to marry without her *walī's* consent. Although it succeeds the above-mentioned cases but its prominence is due to being discussed at length and being decided by the High Court. The jurisdiction of the Federal Sharīʿat Courts has been controversial in personal laws, so their binding nature is weaker; whereas the binding nature of the precedents set by the High Courts is stronger. Hence, this judgment is considered to be a landmark judgment in the revolutionary right of women to marry independently.

The brief facts of the case are ascertained to be that Mst. Saima Waheed, a student of 4th year, had allegedly contracted marriage with Muhammad Arshad who was the tutor of his brother. After a few days, Saima's father came to know about the marriage and he approached Arshad's father and other family members. The *nikāḥ-nāmah* was returned to him with a note that no *nikāḥ* subsists or was performed. Saima continued to live with her father until after about a month, she was allegedly abducted. After two days, her family came to know that she was detained by Arshad. After negotiations, the release could not be obtained. Hence, the father of Saima lodged a suit for her recovery and declaration of unlawful marriage.[27]

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[27]Hafiz Abdul Waheed v. Asma Jehangir and Another, PLD 1997 Lahore 301, 313.

The learned Counsel for Mr. Waheed asserted that a virgin girl if steps out of her house without her parent's consent, can be asked to return. He also argued that the *nikāḥ* conducted without guardian's consent is not valid. He presented various commands of the Prophet (Peace be Upon Him) in this regard.[28] He also claimed that the judgment of Federal Sharīʿat Court in Muhammad Imtiaz case is not binding on this court because it was given in an appeal, which was directed against the verdict of Additional Session Judge. He criticized the judgment of Federal Sharīʿat court in that case stating that it was based on certain written papers and had no authentic foundation. Other arguments on un-Islamic nature of runaway marriages and necessity of guardian's consent in virgin woman's marriage were put forth.

On the other hand, the learned Counsel for respondents gave arguments on the liberty of adult girl to marry, according to the Ḥanafīs. He also argued that the judgment of the Federal Sharīʿat court is binding on the High Court, by referring to articles 203-A, 203-DD and 203-GG of the Constitution of the Islamic Republic of Pakistan, 1973. The counsel also cited a number of verses and *aḥadīth* that supported the validity of the marriage of a male and female without the intervention of the *walī*.[29]

The judges also conversed in detail about the significance of family, standards of dignity, duties of children and parents, western norms and consequences of lack of family institution, significance and nature of *nikāḥ*, ingredients of institution of *nikāḥ* etc. While mentioning the ingredients of the marriage contract, it was also discussed that Imām Abū Ḥanīfah held the view that for a valid *nikāḥ*, consent of *walī* is not necessary. After giving details from both sides of the contention, one of the honorable judges asserted that the judges are not debarred from giving opinions in matters

[28] Ibid., 316.
[29] Ibid., 301, 322.

that have ambiguity and upon which no clear ruling of Qurʾān and *sunnah* is found.[30]

It was also concluded that the decision of Federal Sharīʿat Court given in appellate jurisdiction is not binding on the High Court.[31] After giving opinions on rights and duties of parents and children at length, it was also demonstrated by one of the honorable judges that Muhammad Imtiaz's case proceeded on inaccurate authorities and was declared not to be a good law.[32] Pre-marital and extra-marital liaisons were condemned severely.[33] The concepts of *kafāʾah* and *mahr al-mithl* were also discussed.[34]

Finally, the majority of the judges of the court decided that the marriage in question, that was contracted without the consent of the *walī* is not invalid and Saima could not be deemed to be in an illegal custody as she is residing there with her own will. By giving the liberty of marriage and liberty of residence to Saima, the Court disposed the cases filed by her father and declared all the sought reliefs to be infructuous.[35]

4.3.1 Critical Analysis of the Judgment in the Light of *Sharīʿah*

The judgment of Saima Waheed case holds a prominent position in the Family Laws of Pakistan regarding the marriage of a *sui juris* woman. Although it is a detailed and lengthy judgment, but its keen study reveals that it contains a lot of immaterial and superfluous discourse. An overall view could be summarized to state that it is an unnecessarily prolonged judgment consisting of irrelevant details, emotional arguments and morality-based urgings.

Judge Ihsan-ul-Haq's judgment in this case was considered to be the minority judgment. He declared the marriage of an adult woman without

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[30]Ibid, 343.
[31]Hafiz Abdul Waheed v. Asma Jehangir and Another, PLD 1997 Lahore, 346.
[32]Ibid, 376.
[33]Ibid, 383.
[34]Ibid, 377.
[35]Hafiz Abdul Waheed v. Asma Jehangir and Another, PLD 1997 Lahore, 384.

legal guardian's consent to be invalid. His arguments were based on extracts from books of morality and religion. He discussed the importance of preservation of family, elevated status of mother and unity of families, which was not at all relevant in convincing the invalidity of an adult woman's marriage without *wali's* consent. He also conversed about the moral decline of the West. Quoting the article from the Reader's Digest and the saying of General Colin Powell did not make any sense in the judgment of a purely Pakistani case. It only described the deterioration of American society and its evils. Evaluation of number of unwed mothers and illegitimate children in America had no connection with the impugned Pakistani case of validity of marriage.

Ignorance of the relevant arguments from *sharīʿah* laws and taking judicial notice of the statistics of divorce rates and number of single parents in Britain, compels in being skeptical about the firmness of the judgment. It portrays the lack of focus on the main issue and protracting the judgment with un-required efforts. Judge Ihsan-ul-Haq tried to prove that marriage was not a civil contract and the concept was wrongly adopted from the British rule of sub-continent and the developed English law of marriage.

Muslim Family Laws Ordinance, 1961 does not require *walī's* consent for a valid marriage. But Justice Haq inferred that the provision for mentioning the bride's *wakīl's* name in *nikāḥ-nāmah* connotes the fact that the female should not appear in the assembly herself, rather her guardian should conduct her *nikāḥ*. This inference that the *wakīl* should necessarily be a *maḥram* of her, cannot be held accurate because there is no any clear evidence in Islamic injunctions that the *wakīl* must be the *walī*. Hence, there are many flaws in his judgment.

On the other hand, the judgment of the majority judges is also arguable as much as its compliance with the *sharʿī* rulings is concerned. Justice Muhammad Qayyum just gave arguments to uphold the judgment of

the Federal Sharīʿat Court in the Imtiaz case and declared in a single statement that the *nikāḥ* contracted by a *sui juris* girl without her guardian's consent is valid. He neither gave any evidences for that, nor mentioned the Ḥanafī *fiqh* over it.

Justice Khalil-ur-Rehman Ramaday discussed the theme of the moral decline of the West and rights of women etc. And while discussing the status of women in Islam, he unnecessarily mentioned the details of Greek mythology, the true meaning of Aphrodite, Roman culture, Israeli women and the practices of England and America regarding women rights. Moreover, many verses of various chapters of the Holy Qurʾān were quoted out of the context. However, he spared few words for mentioning the notion of *kafā'ah* and *mahr al-mithl*, but in his decree he paid no regard to these requirements. The order decreed simply validated Saima's marriage and no certain *ratio decidendi* could be extracted. The marriage was validated absolutely, without evaluating the *kafā'ah* standards, without calculating the *mahr al-mithl* and without declaring any right of annulment to the guardian. The claim of following the Ḥanafī *fiqh* was just specious. This judgment granted absolute and unconditional validity to the marriages conducted by women without their guardians. It not only is an un-compliant judgment but also a doorway to much social turmoil.

4.4 Other Miscellaneous Cases on this Issue

There are a number of other cases on the issue of the marriage conducted without guardian, which followed the above-mentioned cases. But the fact remains that no strict rule has been followed in the cases, rather a new dimension has been given to the rulings in almost each case. Like Muhammad Ramzan v. State was argued 2-3 years later than the Imtiaz case and the Arif Hussain case.[36] It opposed the judgment of the Arif Hussain

[36] Muhammad Ramzan v. State, PLD 1984 FSC 93.

case and stated that the mutual confirmation of the man and woman about their *nikāḥ* can only waive *ḥadd* punishment from them and it cannot be a proof of the conduction of *nikāḥ*. It was ruled that only their mutual confirmation will not be enough evidence to prove the conduction of their *nikāḥ*, if there exist other circumstantial evidences which oppose its conduction.

On the contrary, in a much later case with almost the same facts, the *nikāḥ* itself was considered to be doubtful in spite of the presence of *nikāḥ-nāmah*. The reasons given were that it was not made public and apparently seemed not to be in interest of the girl.[37]

In another case, it was established that the marriage contracted by a girl on her on accord, who has not attained the age of majority, but has attained puberty is valid and not void.[38]

These are a few instances out of the many cases on this issue. Almost each case has come up with different rulings but generally the marriage of *sui juris* woman without her guardian's consent is declared to be valid. It is noteworthy that no judgment has incorporated the elements of *kafā'ah* and *mahr al-mithl* in the grounds of their judgement. No verdict has evaluated these elements which have a very significant place in the Ḥanafī School; the only school of thought which allows such marriages.

5. Conclusion

After thorough research and analysis on the *fiqhī* rulings, statutes and precedents on the marriage contracted by an adult woman without her *walī's* consent, it is therefore concluded that there exists considerable disparity between the actual *sharʿī* principles in this regard and their claimed implementation in the Pakistani Muslim Family laws.

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[37]Syed Farman Ali v. Abid Ali, PLD 1995 Lahore 364.

[38]Mst. Hajra Khatoon and Another v. Station House Officer, Police Station Fateh Jang, District Attock and two others, PLD 2005 Lahore 316.

The statutory family laws of Pakistan do not integrate any concrete laws on the marriage contracted by an adult woman without her guardian's permission. The only provision, which can be said to have relevance with this issue is the section 5 of the MFLO, 1961, which necessitates a formal *nikāḥ-nāmah* and its registration for all sorts of marriages. The analysis of the common *nikāḥ-nāmah* for all sorts of marriages depicts that there is no requirement of the presence of the guardian of a woman in the *nikāḥ* conduction. The *nikāḥ-nāmah* also does not incorporate any columns regarding the assessment of *kafā'ah* and *mahr al-mithl*.

The only laws in Pakistan regarding the marriage of an adult Muslim woman held on her own accord are the case laws or the precedential laws. The study of the case laws reveals that in general, the marriage contracted by an adult woman without her guardian's consent, may she be a virgin or deflowered is valid and not void. The case laws have yielded various rulings while decreeing the cases on this issue. But it is quite astonishing that despite of being well furnished with the *fiqhī* rulings and regardless of the claim of applying the Ḥanafī law in these cases, the learned judges have ignored the notions of *kafā'ah* and *mahr al-mithl* in entirety. No judgement has been based on these two essential requisites, hence leaving such marriages prone to annulment or *faskh* due to their irregularity.

As it has been established that the Ḥanafī School is the only school, which allows such marriages but with certain conditions, whereas the majority declares them absolutely void; the judges must had been very cautious in its implementation in entire terms. The practice of pick and choose in *sharʿī* rulings is not only deplorable but also very likely to increase perilous impacts on the Muslim society and its legal structure. The current jurisprudence which has been developed by the Pakistani courts on this issue is not only incoherent and ambiguous, but also lacks rational stability and referential compliance and authenticity. It is therefore

extremely indispensable to add the procedure of scrutiny of *kafā'ah* and *mahr al-mithl* in the contracts of marriages conducted without the permission of the girl's guardian to ascertain their validity and irrevocability. The judges can act as *mujtahids* in this regard if the legislature furnishes a comprehensive, explicit and coherent enactment on this issue. Unless such a reform is assured in the present laws, the precedential laws in this regard cannot be said to be in complete accordance with the Ḥanafī laws.

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Legal Analysis of Harassment Laws in Public Places: A Case Study of Pakistan

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Abstract

This study explores harassment in public places that violates the fundamental rights of women by making them insecure in such places. It is a social issue in Pakistan. Many studies have been conducted on sexual harassment rampant in educational institutes and the workplace surroundings, nonetheless, we find any study regarding public place harassment, especially with a legal perspective. Therefore, the study in hand highlights the notion of public place harassment and analysis of the laws of Pakistan regarding harassment in public places by considering case studies of Pakistan. The study reveals that harassment in public places is an everyday experience women face and recommends that legal reforms are necessary to restrain this act committed against women.

Keywords: Harassment in Public Places, P.P.C., Perpetrator, Street Harassment, Women Protection.

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1. Introduction

Harassment harms the life of a person, especially women. It is widespread and undesirably affects the fundamental rights of women, such as liberty, education, health, etc.[1] The United Nations (U.N.) statistics show that about 1/3rd of women globally have faced harassment through known persons.[2] Women's lives also have a profoundly alarming picture in Pakistan.[3] Sustainable Social Development Organization (SSDO) shared data analysis that around 8 out of 9 cases throughout the country is related to violence against women and child, i.e. domestic violence, honour killing, child abuse, rape, child marriages, and kidnapping.[4] Most cases are not reported for many reasons, including fear of revenge, the stigma of immoral police, complex legal procedures, fewer penalties and conviction rates, etc. Therefore, the overall ratio of crimes committed against women is higher than the statistical numbers.[5]

Interestingly, the trend of this phenomenon was traced back to the late 1800 A.D.[6] Before the nineteenth century, "mashing" was used for harassment in public places, which means shameful action. The first case of public harassment was reported in the nineteenth century, as per the record

[1] Yusuf Çelik and Sevilay Şenol Çelik, "Sexual Harassment Against Nurses in Turkey," *Journal of Nursing Scholarship* 39, no. 2 (June 1, 2007): 200–206, doi:10.1111/j.1547-5069.2007.00168.x.

[2] "Facts and Figures: Ending Violence against Women," *UN Women – Headquarters*, accessed September 8, 2023, https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures.

[3] S. Khan, "Violence against Women on the Rise in Pakistan," *Deutsch Welle*, September 23, 2019, https://www.dw.com/en/violence-against-women-on-the-rise-in-pakistan/a-50550672.

[4] SSDO, State of Violence against Women and Children in Pakistan, (2021) https://www.ssdo.org.pk/storage/app/uploads/public/604/9f2/3fb/6049f23fbf245777465964.pdf.

[5] Megha Dhillon and Suparna Bakaya, "Street Harassment: A Qualitative Study of the Experiences of Young Women in Delhi," *SAGE Open* 4, no. 3 (2014), 4, doi: 10.1177/2158244014543786.

[6] Cynthia Grant Bowman, "Street Harassment and the Informal Ghettoization of Women," *Harvard Law Review* 106, no. 3 (1993):520, doi: https://doi.org/10.2307/1341656.

of police.[7] In recent years, the rarely discussed form of sexual harassment that gets attention from feminist legal scholars is harassment in public places, and public areas include markets, streets, transport, parks, bus stops, sidewalks, etc.[8] It is generally defined as "any action or comment between strangers in public places that is disrespectful, unwelcome, threatening or harassing and that action or comments motivated by gender or sexual orientation or gender expression,".[9] This harassment is also known as 'street harassment'.

Bowman and Leonardo were the first to give the concept of such harassment. Leonardo defined it as, "[s]treet harassment occurs when one or more strange men accost one or more women whom they perceive as heterosexual in a public place which is not the woman's/women's worksite. Through looks, words, or gestures, the man asserts his right to intrude on the woman's attention, defining her as a sexual object and forcing her to interact with him."[10] Bowman also elaborates on this definition by giving some characteristics of harassment, such as, 1) women are the target, 2) males are harassers, 3) harassers are strangers to their act, 4) harassers and target meet face-to-face, and 5) a public place is a medium that is streets, parks, transport, 6) visiting the place, and other places which are accessible to people in public.[11] Gardner defines a public place as "the place which is open for all; the behaviour of society and their appearance towards that

[7] Major W. E. Fairbairn, *Self-defense for Women* (New York: D. Appleton-Century Company, 1942) 213.

[8] Deirdre Davis, "The Harm that Has No Name: Street Harassment, Embodiment, and African American Women", *UCLA Women's Law Journal* 4, no. 2 (1994):133, doi: 10.5070/L342017595.

[9] Asian Development Bank, "Rapid Assessment of Sexual Harassment in Public Transport and Connected Spaces in Karachi", December, 2014, https://www.adb.org/projects/documents/rapid-assessment-sexual-harassment-public-transport-and-connected-spaces-karachi.

[10] Micaela di Leonardo, "Sexual harassment research: A methodological critique," *Journal of Personnel Psychology* 48, no. 4 (1995):841-864, doi: https://doi.org/10.1111/j.17446570.1995.tb01783.x.

[11] Bowman, "Street Harassment," 521.

place varies from those places which are in private dwellings".[12] Recently, Fernandez also illustrated public place harassment as vulgar or sexual verbal remarks on women's non-verbal expression, including whistling, staring, stalking, winking, pinching, grabbing and inappropriately touching women. He also stated that the harasser gazed at the victims to make them uncomfortable.[13]

Verbal and nonverbal harassment are the most familiar types of street harassment. It is also challenging to collect evidence in this harassment that attests to the existence of verbal or nonverbal abuse. In Pakistan, harassers prefer to use a nonverbal form of harassment because there is minimal social interaction between males and females. Furthermore, the harasser can quickly escape the situation through nonverbal harassment. Physical harassment is less common than verbal and nonverbal harassment, but society considers it dangerous because it is a gateway to other forms of harassment, such as rape.

Lengnick-Hall introduces a more inclusive categorization scheme to differentiate three types of perpetrators; "Hardcore harassers" find occasions to harass and do not abstain from harassing even though the victim resists. "Opportunists" are those who do not find circumstances/opportunities, but if they present, they will take advantage of them. Lastly, "insensitive harassers" are not aware of the effect of their actions on others.[14] Perpetrators believed that harassment is a source of entertainment or pleasure. According to the perception of Pakistani society, street harassment is not considered a crime at all. Men admitted the fact that men harassed women in public spaces and believed that any woman who

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[12] Gardner, *Gender and Public Harassment* (University of California Press, 1995).

[13] Noemi Fernandez, *Street Harassment Effects on Women: An Exploratory Study* (California State University, Long Beach, 2016).

[14] M.L. Lengnick-Hall, "Sexual harassment research: A methodological critique", *Journal of Personnel Psychology*, 48, no. 4 (1995):841-864, doi: https://doi.org/10.1111/j.1744-6570.1995.tb01783.x.

tries to go out of their house without a male or abaya must be ready to face harassment. Similarly, it was reported in a survey that every one out of four Pakistani urban women are harassed by men on their way to home, school, workplace, etc.[15] Moreover, it is the perception of society that women harassed by men means they are doing something to provoke them. Pakistan has a law to deal with street harassment, whereas a quick assessment of that law shows that it is insufficient in its framing and implementation.[16]

Against this background, this article is an endeavour to highlight the gaps in the current legal framework of Pakistan regarding harassment in public places. This article suggests that the heinousness of this social problem needs to be highlighted to draw attention from policymakers, educational institutions, and media towards acts and laws of Pakistan regarding harassment in public places with punishments for deterrence and change in the perpetrator's behaviour.

2. Literature Review

The existing literature shows minimal research on public place harassment worldwide and in Pakistan. It also highlights that the research in Pakistan is much related to its social and psychological effects on women. However, no research ever analyzed the laws of Pakistan on public place harassment. Sexual harassment or violence is a problem that creates hurdles to the success of women. All forms of harassment, including public place harassment, violate women's fundamental rights to equality, her right to live with dignity and her right to practice any profession or to carry on any

[15] World Bank Group, "Labour Force Aspirations, Experiences and Challenges for Urban, Educated Pakistani Women: Discussions in Four Metro Cities," *Pakistan Gender and Social Inclusion Platform and Center of Gender and Policy Studies,* February 2014, https://documents1.worldbank.org/curated/en/190071611611113613/pdf/Labor-Force-Aspirations-Experiences-and-Challenges-for-Urban-Educated-Pakistani-Women-Discussions-in-Four-Metro-Cities.pdf.

[16] Ibid.

occupation, trade or business.[17] Women experienced any form of harassment due to unequal treatment in society.[18] Chery Benard and Edit Schlaffer have noted that public places are the medium for street harassment where people are unknown to one another.[19] Any interference or invasion of women's privacy in public places committed without their consent is known as Street harassment.[20] In the study of Kissling and Kramarae on public place harassment, a woman also noted, "[s]trangers making rude personal comments. Whether the comment is sexual or not, optimistic or negative, it is still rude and interferes with privacy."[21] There are different forms of street harassment, which include playing vulgar songs public masturbation, which means touching their private parts to annoy or commenting on physical appearances, such as body or clothing, etc.

The study of Fairchild and Rudman indicates that 41 per cent out of 228 female college students experienced "sexual attention from unknown persons at least once a month, which is also undesirable and includes seductive or sexist remarks."[22] Additionally, the standard form of street harassment experienced by these participants is verbal, such as "catcalls,

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[17] Meghan Davidson, Sarah Gervais, and Lindsey W. Sherd, "The Ripple Effects of Stranger Harassment on Objectification of Self and Others", *Educational Psychology Papers and Publications*, no. 1 (2015):39, doi: https://doi.org/10.1177/0361684313514371.

[18] Robin Clair, Nadia E. Brown, Debbie S. Dougherty, Hannah K. Delemeester, P. Geist-Martin, and W. I. Gorden, Turner, "Sexual harassment: An article, a forum, and a dream for the future," *Journal of Applied Communication Research* 47, no. 2 (2019):1–9, doi: 10.1080/00909882.2019.1567142.

[19] Cheryl Benard & Edit Schlaffer, "The Man in the Street: Why He Harasses, in Feminist Frameworks: Alternative Theoretical Accounts of The Relations between Women and Men", *Yale Journal of Law and Feminism 6*, no. 313 (1984), https://core.ac.uk/download/pdf/72836708.pdf.

[20] Robin West, "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory," *Wis. Women's LJ* 3, no. 81 (2011), doi: 10.4324/9780203094112.

[21] Elizabeth A. Kissling and Cheris Kramarae, "Stranger Compliments: The Interpretation of Street Remarks," *Women's Studies in Communication* 14, no. 75 (1991):75-93, https://psycnet.apa.org/psycinfo/1993-37430-001.

[22] Kimberly Fairchild, and Luraie A. Rudman, "Everyday Stranger Harassment and Women's Objectification," *Social Justice Research* 21, no.3 (2008):338–357, doi: 10.1007/s11211-008-0073-0.

whistles, and stares."[23] However, hundreds of women in Pakistan also experienced unwanted sexual remarks, lewd comments on body and faces, etc., within a few days or weeks.[24] This form of harassment is a serious offence, but in this offence, it is challenging to collect evidence and prove the intention of the harasser.[25]

According to Bowman, a person who perpetrated street harassment is a stranger to the victim, and their remarks are usually sexual in spirit.[26] He publicly comments on women's physical appearance through "verbal and nonverbal actions such as wolf-whistles, leers, winks, grabs, pinches, catcalls, etc."[27] Benard and Schlaffer mention the relationship that this harassment usually occurs between a man being the perpetrator and a woman being the victim.[28] According to Dhillon and Bakaya, this relationship shows a patriarchal system, a kind of gender inequality.[29] It may allow men to use (physical) power to embarrass them. In his book, Jos Boys stated that society controls women's rights and safety, and street harassment is a reminder that men exploit women.[30]

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[23] Beth Nightingale, “Street Harassment the Invisible Issue” (Bachelor diss. Kele University, 2018), https://www.academia.edu/45085777/Street_harassment_the_invisible_issue.

[24] Dr. Nida Kirmani, “The Past Few Months have been Harrowing for Pakistani Women,” *AlJazeera,* October 8, 2021, https://www.aljazeera.com/opinions/2021/10/8/violence-against-women-in-pakistan-is-not-new-but-it-must-stop.

[25] Fairchild, and Rudman, “Women’s Objectification,” 351.

[26] Bowman, “Street Harassment”, 523.

[27] Hasnaat Malik, “Gender Bias also Constitutes Harassment Rules, Supreme Court,” *the Express Tribune*, June 6, 2023, https://tribune.com.pk/story/2420483/gender-bias-also-constitutes-harassment-rules-sc.

[28] Cheryl Benard and Edit Schlaffer, Alison M. Jaggar & Paula S. Rothenberg eds., *Feminist Frameworks: Alternative Theoretical Accounts of the Relation between Women and Men* (New York: MacGraw Hill book company, 1984).

[29] Dhillon and Bakaya, “Street Harassment,” 5.

[30] Jos Boys, *Women and Public Space, in Making Space: Women and The Man-Made Environment* (Pluto press, 1985), 1-148.

The study of Wesselmann and Kelly discovered that men were more likely to engage in group harassment to annoy women.[31] However, women mostly ignore their behaviour due to the fear of being labelled as aggressors or immoral women.[32] The sexually harassing conduct of perpetrators discussed by Margate Crouch can differ from place to place, or it is based on the circumstance in which it occurs. [33] For example, victims of harassment at the workplace know the person who perpetrated it. However, the perpetrator and victim are strangers to harassment in public places. Perpetrators can belong to any age, from teenage to old age, race, or social class.

Sometimes, harassing women is merely a source of pleasure for male perpetrators. However, according to Ramezani, the perpetrator sometimes aims to get women's attention.[34] Most of the time, men take street harassment as usual, especially in underdeveloped and developing societies like Afghanistan, Bangladesh, India, Nepal, and Pakistan.[35] The results of a Gallup survey show that men had stalked every 1 out of 4 urban women in Pakistan.[36] Men hunted either on their way to home, educational institutions, markets, offices, parks, etc.

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[31] Eric D. Wesselmann, & Janice R. Kelly, "Cat-Calls and Culpability: Investigating the Frequency and Functions of Stranger Harassment," *Sex Roles* 63, no. 7 (2010):451–462, doi:10.1007/s11199-010-9830-2 .

[32] Vicki J. Magley, "Coping with Sexual Harassment: Reconceptualizing Women's Resistance," *Journal of Personnel Social Psychology* 83, no. 4 (2002):930–946, doi: 10.1037/0022-3514.83.4.930.

[33] Margate Crouch, "Sexual Harassment in Public Places," *Social Philosophy Today* 25, (2019):135-148. doi: 10.5840/socphiltoday20092511.

[34] Ahmad Bilal, Sehrish Wazir, Shakeela Altaf, and Samina Rasool, "Relationship between sexual harassment at workplace and subjective well-being among working women in South Punjab, Pakistan," *Liberal Arts and Social Sciences International Journal (LASSIJ)* 5, no. 1 (2021):554-567, doi: 10.47264/idea.lassij/5.1.36.

[35] Shamile Shams, "Violence and harassment: South Asian women fight against patriarchy," *DW.com,* November 25, 2018, https://www.dw.com/en/violence-and-harassment-south-asian-women-fight-against-patriarchy/a-46444410.

[36] Imtiaz, Shumaila, and Anila Kamal. "Sexual Harassment in the Public Places of Pakistan: Gender of Perpetrators, Gender Differences and City Differences among Victims." *Sexuality & Culture* 25, no. 5 (2021):1808-1823, doi: 10.1007/s12119-021-09851-8.

While discussing the social status of women, Amber Ferdoos stated that women face harassment in both rural and urban areas, and they are not treated due to the masculine society of Pakistan.[37] Also, women are only expected to visit public places with their men.[38] As many women do not have much exposure to male strangers, they did not tackle the situation of harassment. Many women experience street harassment, which is unsuitable for their health and the development of any country.[39] Therefore, an effective law regarding street harassment is necessary. However, public place harassment is still controversial in Pakistan, and there is limited research on this topic.[40] The reason is that this harassment is not considered a crime in our society.

The traditional perspective of gender distinguished women into good and evil women.[41] Similarly, Pakistani women are also advised to cover themselves and ignore any act of harassment as a good woman.[42] It is a perception in Pakistan that the women who raise their voices against harassment are immoral and Westernized.[43] However, women in abaya have also experienced harassment in public places.[44] Ahmed also mentioned

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[37] Amber Ferdoos, "Social Status of Rural and Urban Working Women in Pakistan - A Comparative Study," 2007, https://api.semanticscholar.org/CorpusID:141821653.

[38] Javed Syed, Faiza Ali and Daina Winstanley, "In Pursuit of Modesty: Contextual Emotional Labor and the Dilemma for Working Women in Islamic Societies," International Journal of Work Organization and Emotion 1, no. 2 (2005):150-167, doi: 10.1504/IJWOE.2005.008819.

[39] Ali Jan Maqsood, "Sexual Harassment in Pakistan," *Daily Times*, 2018, https://dailytimes.com.pk/323651/sexual-harassment-in-pakistan/.

[40] Maliha Husain & Khadija Ali, "*The AASHA Experience - A Decade of Struggle against Sexual Harassment in Pakistan*," *Mehergarh Research Publication*, (2002), https://aasha.org.pk/reports/The_AASHA_Experience.pdf.

[41] Crouch, "Sexual harassment in public place", 137.

[42] Noman Ansari, "Being groped, harassed and video-taped on Independence Day," *The Express Tribune*, August 18, 2015, https://blogs.tribune.com.pk/tag/august-14/.

[43] Dr. Nida Kirmani, "The past few months have been harrowing for Pakistani Women."

[44] Tehreem Azeem, "Street harassment in Pakistan," *The Diplomat,* August 31, 2018 https://thediplomat.com/2018/08/street-harassment-in-pakistan/

in his study that women are frequently harassed by men in the Rawalpindi city parks and public areas.[45]

There are many international instruments for the protection of women. Along with other countries, Pakistan signs and ratifies those instruments, including the Universal Declaration of Human Rights (UDHR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), etc. Pakistan also has anti-harassment laws for the protection of women. However, these laws were passed for decades and did not clearly define sexual harassment. In 2010, Pakistan enacted new legislation for workplace harassment; this was the first-time sexual harassment was determined. However, it does not deal with harassment outside the workplace.

The Study of Holly Kearl shows that laws do not protect women because men engage in most common types of street harassment, which do not apply as crimes under current laws, like commenting on a woman's body or whistling, etc.[46] However, an amendment in 2010 was made in P.P.C., and Section 509 was added that deals with harassment in public places.[47] Nevertheless, this provision is only good once it clarifies its terms and imposes strict implementation because this behaviour is socially acceptable. To change the behaviour of society, Laura Beth mentioned an interview with a woman who has no expectations from the law. He also stated that rules were made to protect her, but it does not work in this harassment.[48]

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[45] Bilal Ahmed, Farhan Navid Yousaf, and Umm-e-Rubab Asif, "Combating Street Harassment: A Challenge for Pakistan," *Women Criminal Justice* 31, no. 4 (2019):283-293, doi: 10.1080/08974454.2019.1644697.

[46] Holly Kearl, *Stop Street Harassment Making Public Places safe and welcoming for Women* (Bloomsbury Publishing USA, 2010).

[47] Magazine Desk, "Stop the Harassment," *the News*, Tuesday, 07 2015 https://www.thenews.com.pk/magazine/you/76927-stop-the-harassment.

[48] Laura Beth Nielsen, "Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment," In *the Law and Society Reader II*,

Generally, cases of public place harassment are not noticed or even reported, which is the leading cause of failure to implement the laws. Naila Masood and his colleagues witnessed those cases in which victims did not say to Pakistan's law enforcement agencies.[49] Mustafa also stated that the police are not the solution but a problem; it is a perception of society that has a strong effect.[50] Laura Beth also mentioned another interview who told her that the action of unjust police raises questions about implementing any law to protect them from harassment.[51] Hlavka observed that girls do not report incidents due to the fear of being criticized for overstressing or overreacting.[52] Mostly, women prefer to stay home and avoid public places.[53]

Anna Gekoski, Jacqueline M. Gray, and their colleagues mentioned various reasons for non-reporting. The most common street harassment is not considered severe for reporting. The victim avoids the behaviour, thinks that the authorities would do nothing about it, and lacks awareness about the procedure.[54] Due to low reporting of cases, authorities are unable to implement laws. Deborah M. Thompson mentioned that an administration

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edited by Erik Larson and Patrick Schmidt, (NYU Press, 2014) 232–40. http://www.jstor.org/stable/j.ctt9qg0dk.33.

[49] Naila Masood Ahmad, M. Masood Ahmad, and Ramsha Masood, "Socio-Psychological Implications of Public Harassment for Women in the Capital City of Islamabad," *Indian Journal of Gender Studies* 27, no. 1 (2020), doi: 10.1177/0971521519891480.

[50] Waqar Mustafa, "Pakistani Province Launches App for Women to Report Harassment," *Reuters*, January 6, 2017, sec. APAC, https://www.reuters.com/article/us-pakistan-women-app-idUSKBN14P2B7.

[51] Nielsen, "Situating Legal Consciousness,".

[52] H. Hlavka, "Normalizing sexual violence: Young women account for harassment and abuse," *Gender Society* 28, no. 3 (2014):337-358, doi: 10.1177/0891243214526468.

[53] Bowman, "Street Harassment", 555.

[54] Anna Gekoski et al., eds. *What works in reducing sexual harassment and sexual offences on public transport nationally and internationally: A rapid evidence assessment* (2015).

system would also be very complex and cause hurdles in reporting cases.[55] Unfortunately, the perpetrators are generally unaware of the consequences of their acts on the victims and society. According to the Special Rapporteur of the U.N., public harassment affects self-respect, creates terror, and violates their rights to "bodily integrity" and "freedom of movement," harming women's self-esteem.[56] Along with the non-reporting of cases, awareness is also the main hurdle in protecting against harassment in public places.[57] Recently, Sullivan states that some Non-Profit Organizations (NGOs) have begun awareness campaigns on this issue through social media.[58] Similarly, some of the N.G.O.s in Pakistan also launch awareness campaigns on violence against women. These include White Ribbon, Aurat Foundation, Acid Survivors Foundation of Pakistan, Gilani Research Foundation, War Against Rape, etc.[59] However, such awareness mainly focuses on severe sexual harassment, such as rape. There are laws or awareness, but women are not standing up for themselves, mainly due to a lack of awareness. It is expected that the issue of harassment can be minimized with the changing times and with the help of awareness campaigns.

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[55] Deborah M. Thompson, "The Woman in the Street: Reclaiming the Public Space from Sexual Harassment," *Yale J.L. & Feminism* 6, (1993):313, http://hdl.handle.net/20.500.13051/7188.

[56] Maheen Salman, Fahad Abdullah, and Afia Saleem, "A. Sexual Harassment at Workplace and its Impact on Employee Turnover Intentions," *Business & Economic Review* 8, no. 1 (2016):87–102, doi: 10.22547/BER/8.1.6.

[57] Imtiaz and Kamal, "Sexual Harassment in the Public Places of Pakistan", 1830.

[58] Gail Sullivan, "Woman harassed 108 times as she walks around New York," *The Washington Post*, October 29, 2014, https://www.washingtonpost.com/news/morningmix/wp/2014/10/29/video-woman-harassed-108-times-as-she-walks-around-new-york/.

[59] "Pakistan Centre for Development Communication," *Directory of Non-profit Organizations in Pakistan*, July 12, 2021 https://sites.google.com/site/thecivilsocietyforumofpakistan/Pakistan-nonprofits-directory.

2. Analysis of National Laws on Harassment in Public Places

From a legal perspective, street harassment may not have a civil remedy because it is impossible to sue the perpetrator, who is a stranger and disappears after harassment.[60] Hence, many victims neither reply to the harasser nor report this behaviour.[61] It is a common issue in Pakistan that challenges women in their lives.[62] Women face several incidents of harassment in public places every day, which restricts their freedom. Freedom of movement is a fundamental human right provided to Pakistan females under the Constitution of the Islamic Republic of Pakistan, 1973. At the national level, there are many laws and policies to protect women from violence. These are the Women Protection Bill 2006, the Prevention of Anti-Women Practice Act 2011, the Protection against Harassment of Women at Workplace Act 2010, the Domestic Violence Act 2020, and the Pakistan Penal Code 1860. Following is the summary of laws that are relevant to public place harassment.**2.1 Constitutional Law**

"The Constitution of the Islamic Republic of Pakistan, 1973" provides equal rights to females. The chapter on Principles of Policy underlines the principle of equal rights and equal treatment to all citizens/persons, without any distinction, including based on sex. Following is a summary of relevant articles that protect women.

Article 4: Every citizen of Pakistan has the right to enjoy the protection of the law and to be treated by the law. *The* Court stated that equal protection

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[60] Catharine A. Mackinnon, "Sexual Harassment of Working Women: A Case of Sex Discrimination," *Political Science Quarterly* 94, no. 4 (1979):95–97, doi: https://doi.org/10.2307/2149645.

[61] F. L. Fitzgerald, S. Swan, and K. Fischer, "Why Didn't She Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment," *Journal of Social Issues* 51, no. 1 (1995):117–138, doi: 10.1111/j.1540-4560.1995.tb01312.x.

[62] A. Aamir, "Victim Shaming, the Burden of Proof in Sexual Harassment Cases," *Pakistan Today*, June 2, 2018 https://www.pakistantoday.com.pk/author/aadilaamir/page/2.

is the inalienable right of every citizen and, in particular, no action detrimental to a person's life, liberty, etc., shall be taken except by law.[63]

Article 15: The Pakistani Constitution gives freedom of movement to every citizen of Pakistan. It is an inherent right of citizens to move, reside or settle anywhere in Pakistan. The right of citizens to travel on a public Highway by van or automobile is not a privilege but a common right under their right to life and liberty.[64]

Article 26: Law gives the right of access to all public places to every citizen irrespective of sex, including public transport, public entertainment, resorts, etc.[65] The government can make special provisions for women and children that may exclude men.[66] However, Public space harassment violates women's fundamental rights under the Constitution of Pakistan, 1973. Women did not enjoy their right to access public resources due to harassment in public places. They also pay taxes for such enjoyment as public conveyance, markets, streets, footpaths, and parks.

2.2 Pakistan Penal Code, 1860

"Pakistan Penal Code, 1860 (P.P.C.)" has various provisions that are important for both women and men, as they allow victims to seek justice against the actions of their criminals.[67] P.P.C. provided no clear definition of street harassment but provided examples of such behaviour. This makes it difficult for authorities to implement the law and for victims to find help.

Section 294: To invoke this section, the accused must do some obscene act in any public place, or the accused utters, sings or recite any obscene songs, ballads, or words in any public place to annoy others. The literal meaning

[63] (1978) PLD (Lah.) 523 (Pak.).
[64] M. Rafique Butt, *Constitution of the Islamic Republic of Pakistan, 1973* (Mansoor Book House, 2017).
[65] Pakistan Const. art. 26.
[66] (1954) A.I.R. (SC) 321 (India).
[67] M. Abdul Basit, *the Pakistan Penal Code, 1860* (Federal Law House, 2018).

of the word "obscene" is something offensive to modesty or decency.[68] However, the term "modesty" is not defined in the Code. Very few cases exist under this provision of P.P.C. because people did not report verbal harassment in a public place under Section 294(b). All the issues are related to the first part of the section, which is an obscene act, for instance, In the Mst. Mahjabeen v. D.P.O. case[69], the Court discusses the intention of legislatures that Section 294 enacted to stop the nuisance of prostitution and similar other illegal activities in or near public places. In the instant case, the premise was used for unlawful activities. Therefore, the High Court directed the police officials to lodge F.I.R.

In Mst. Shakeela v. the State case[70], the accused were found busy kissing each other in a Guesthouse. The Court stated that kissing each other does not fall within the meaning of an attempt to Zina but is termed as an intention to commit Zina. As the mere purpose is punishable by law, this act is an obscene act that falls under Section 294 P.P.C. Bail was admitted in this case, and that case needed further inquiry.

Section 354: For the constitution of an offence under this section, there must be an assault or use of criminal force to any woman and intention to outrage the modesty of women.[71] However, the term modesty is not defined in P.P.C. There is also a case[72] in which the Court remarks that whether a woman has or has not developed modesty is a question of fact in each case, and no definition of modesty applies to all cases.

In another case, Muhammad Noman v. the State[73], the prosecution had successfully established that the accused took snaps of the girls while the co-accused took away the shalwar of the victim girl. The Court stated

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[68] (2009) PLJ (Lah.) 584 (Pak.).
[69] Mst. Mahjabeen v. D.P.O., (2009) PCr.LJ (Kar.) 173 (Pak.).
[70] Mst. Shakeela v. the State, (2001) P Cr. L J (Pesh.) 43 (Pak.).
[71] Pak. Penal Code, section 354.
[72] (1963) A.I.R (Punj.) 443.
[73] Muhammad Noman v. The State, (2008) PCr.LJ (FSC) 1439 (Pak.).

that these circumstances do not fall in the case of Zina-bil-jabr but in the outrage of modesty of females under Section 345. The Court awarded a conviction to the accused under Section 345 P.P.C.

Section 509: In Pakistan, the Ministry of Human Rights explained that Section 509 of the P.P.C. was amended in 2010. This section has two parts, but only the first part of the provision deals with harassment in public places. To constitute an offence under this section, it has the following elements;

1. Accused uttered any word, made any sound or gesture, or exhibited any object,
2. The intention of the accused is that such words or sounds be heard, and women see gestures,
3. The accused also intends to insult any woman's modesty.[74]

This section specifies imprisonment for such an act, which may extend to three years or a fine up to Rs. 500,000 or both. This provision did not explicitly define either street harassment or public places. It is still open for clear interpretation because courts could neither rewrite the law nor read into it something not provided therein. As in the case Government of Khyber Pakhtunkhwa v. Muhammad Younas,[75] The Supreme Court stated that the law and its interpretation must be clear and consistent because it helps to stabilise the system and increase the confidence of citizens in the law and the legal system.

There are very few cases of this provision because most women need to report, and sometimes police will not consider their complaints, for instance, in Mst. Faizan Mai v. S.H.O. and four other cases,[76] S.H.O. refused the registration of F.I.R. against accused persons for outraging a lady's modesty. The Police Superintendent of the area also declined to

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[74] Pak. Penal Code, section 509.

[75] Government of Khyber Pakhtunkhwa v. Muhammad Younas, (2020) Civil appeal no: 73 (Pak.).

[76] Mst. Faizan Mai v. S.H.O. and 4 others, (1995) P Cr. L J (Lah.) 1000 (Pak.).

apply. Usually, this Court does not interfere in such matters and issues directions for registration of criminal cases or cancellation. Courts direct the S.H.O. to register a case on the complaint lodged by the petitioner and to stop the respondents from inflicting humiliation, insult, and intimidation in any manner. However, at the time of the announcement of the order, the inspector was not available. In another P.L.J. 2009, Lah.584, the Court clarified that any word spoken or sung or any picture that suggests lewd thoughts is immoral and insulting to female modesty.[77] Also, the fact that females did not mind such indecent acts is not an excuse for the offence.[78]

It is difficult to prove the harassment under Section 509, and the accused get bail from the Court. For instance, in the case of Mujahid Hussain Naqvi v. Ansar Mehmood Awan,[79] the prosecution gave evidence that the accused was fully involved in the occurrence, which was recorded by Close Circuit T.V. (CCTV) footage. This footage shows a conflicting and contradictory situation. The Court stated that the case required further inquiry as there is nothing on the record to show that when witnesses and the allegations of harassment had been witnessed, the occurrence was also doubtful. The Court refrained from the bail and dismissed the petition based on the Zaffar Mehmood v. Muzaffar case judgment.[80]

2.3 Procedure

According to Section 345 of the Criminal Procedure Code,[81] The Magistrate of first class takes cognizance of complaints under Section 509. However, the procedure and elements for filing complaints are complex. The perpetrator's intention is the essential element of these sections that is

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[77] (1967) A.I.R. (SC) 63.

[78] (2009) P L J (Lah.) 584 (Pak.)

[79] Mujahid Hussain Naqvi v. Ansar Mehmood Awan, (2016) PLD (AJ&K) 32 (Pak.).

[80] "Once a pre-arrest bail is granted by competent jurisdiction, then exceptional grounds are required to cancel that bail". Zaffar Mehmood v. Muzaffar, (2014) P Cr. L J 1512 (Pak.).

[81] Pak. Code. Crim. Proc. 1860, section 345.

difficult to prove in the case of public place harassment. Therefore, women who were harassed publicly could not seek justice in Pakistan. These provisions are open for interpretation and can only be more effective once more specific provisions are made. Because the provisions are compoundable and bailable, it gives time for the perpetrator to escape, and he can also threaten the victim. For instance, in the case Abdul Rashid and another v. the State,[82] The complainant resisted the Court not granting the concession of bail to the accused as he repeated the offence while on bail in the previous F.I.R. The Court granted bail because the accused was punishable under Section 354 P.P.C., which is a bailable offence, and according to the precedent law established in Qurban Ali v. the State, the effect of a previous criminal case is irrelevant for disposing of the instant petition.

2.3 Special Laws

As Pakistan is a highly male-dominated society, it has taken a long time to pass laws favouring women against violation. Also, a clear definition of harassment was not present before the passing of the law against harassment of women in the workplace in 2010.

Protection against Harassment at Workplace Act, 2010: This Act aims to provide a fundamental right to work with dignity and create an environment for women free of harassment. This Act also helps women offer high work efficiency and escape poverty with their families. It obeys the international standards for women's empowerment provided under UDHR, CEDAW, and International Labor Organization Convention 100 and 111 on worker's rights. It permits establishing an inquiry committee to inquire about the complaints under Section 3 of this Act. It also provides a complaint/appeal mechanism for creating a safe environment for all

[82] Abdul Rashid and another v. the State, (2018) P Cr. L J Note 138 (Pak.).

working women under Section 6 of this Act. It also allows the establishment of an Ombudsman at both Federal and provincial levels under Section 7.[83]

However, there is no special law regarding harassment in public places that provides procedures or adheres to the CEDAW, UDHR like Columbia, Workplace Act of Pakistan. Therefore, complaints related to harassment, such as wolf-whistles, evil eyes, touches, catcalls, stranger remarks, etc., are registered under Section 294 or Section 509 of P.P.C. However, the victim cannot sue the harasser because he is a stranger to them. Also, no inquiry committee looks at the complaints of street harassment and provides speedy justice.

2.4 National Committees

There is no National Committee to monitor the legal framework regarding public place harassment and review the existing laws to recommend amendments in favour of women.

2.5 National Policies

Punjab Commission on Status of Women (PCSW) Helpline: PCSW introduced helpline "1043" for people experiencing harassment, including women. In 2017, the Punjab Safe Cities Authority (PSCA) and PCSW also launched the Women Safety App. This app is helpful for women to mark those places where they do not feel safe. Women also alert the police through a crisis button of the app to tackle the situation. The police follow the location through the Global Positioning System and trace the man from the CCTV cameras.[84] However, this app is valid only for those women of

[83] Protection of Women against Harassment at Workplace, 4 of 2010, "Senate Secretariat," last modified March 9, 2010, https://senate.gov.pk/uploads/documents/1363266764_764.pdf.

[84] Waqar Mustafa, "Pakistan Province launches app for women to report harassment," *Thomas Retures Foundation,* January 6, 2017, https://www.reuters.com/article/us-pakistan-women-app/pakistani-province-launches-app-for-women-to-report-harassment-idUSKBN14P2B7.

See also: The Pakistan Commission on Status of Women, "Government of Pakistan," https://pcsw.punjab.gov.pk/.

Punjab who are educated, aware and have smartphones. Police can follow the location but failed to trace the man because CCTV is not on every street/road in Punjab, Pakistan.

2.6 Implementation of Laws and Policies

Existing provisions can be much more effective due to exemplary implementation. However, poor performance in Pakistan makes the current laws vain and makes society unjust for women.[85] This lack of enforcement of policies also encourages violence in public places such as transport, markets, parks, historic/visiting places, etc. Pakistani society is a patriarchal society. Therefore, the non-reporting of cases, the mindset of the society, and lack of awareness is also the biggest challenge to implementing such laws.[86]

3. Conclusion

Public place harassment, or street harassment, is a common problem in Pakistan. The existing literature of this research indicates that street harassment is a part of the daily life experience of women. The most typical form of street harassment experienced by women is verbal harassment. They have to cope with this problem independently due to the lack of knowledge about street harassment by society. Also, women of Pakistan neither reply to the harasser nor report cases of harassment due to societal stress and many other fears. No law in Pakistan dealt with harassment in public places before the amendment was made to P.P.C. in 2010. The provisions of P.P.C. are not precisely defined but give examples of harassment in public places. Regardless of the amendment made to P.P.C., the incidents of harassment are not reported to the police. Because the

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[85] The Rule of Law in Pakistan, “World Justice Project,” 2017 https://worldjusticeproject.org/our-work/wjp-rule-law-index/special-reports/rule-law-pakistan.

[86] Ahmed, Yousaf and Asif, “Combating Street Harassment”, 289.

provision is open for interpretation, and the procedure for reporting the case is very complex and lengthy. Therefore, women of Pakistan who are affected were unable to seek justice. Existing laws may be more effective by adding specific and clear provisions. Initiatives are needed to give social, moral, and legal support. It is required to empower women to exercise their fundamental right to freedom of movement, which can boost the economic growth and development of the country.

Recommendations

The analysis of this research identifies the following set of recommendations to minimize/prevent cases of harassment in public places.

Legal Reform Relating to the Harassment in Public Places: This research recommends revising Section 509 of P.P.C. to include an explicit definition of Street Harassment or Harassment in Public Places. It is also strongly recommended that Section 354 and Section 509 be revised to elaborate the term "modesty" like in India. The amendment was made in 2013 to clarify the scope of modesty of women. For a better future, it is recommended that a special law on harassment in public places be developed. In Columbia, there is a special law, "Harassment of Bicyclists", which includes bicyclists, pedestrians, and persons in wheelchairs. That law needs the following significant contents;

1. Scope and beneficiaries,
2. Explanation of terms including Harassment, Harassment in Public Places, which are public places,
3. Rights and remedies provided to the victim who is harassed in a public place,

4. National Committees, like in India, are National Committees to monitor and review existing rules and procedures regularly to recommend amendments supporting victims.

Implementation of Current Laws

Procedure: Non-reporting cases are the main hurdle for implementation. Therefore, making the procedure easy for filing complaints is recommended. Like Italy, it is recommended to make a hotline at the national level for a victim to receive help, report, etc. That hotline includes different languages of provinces, a national language (Urdu), and an official language (English). A website is also needed, like in India, where complaints are registered online.

Enforcement Agencies: It is recommended that the government help the enforcement agencies, especially local authorities and police, comprehend the impact of street harassment on victims and consider their reports. Police stations need to strengthen and increase the number of female police officers. That is why women did not hesitate to go to police stations. Also, the government must provide support and a safe environment for victims in public places such as markets, sidewalks, parks, and transport.

Awareness: Lastly, it is recommended to make awareness among the people through media about harassment in public places and the respect of women. There is a need to include material in the school curriculum and organised campaigns or seminars in universities that females should consider harassing acts and feel free to report them for moving freely in public places.

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Legal Framework of Civilian's Trial in the Military Courts of Pakistan Viz-a-Viz International Fair Trial Standards

Ayesha Youssuf Abbasi[*]

Abstract

Civilian trial in military courts is not a novel concept in Pakistan as it has been practiced multiple times in the country. However, the term has surfaced again with the events following the political unrest in Pakistan in May 2023. The government of Pakistan announced the trial of 33 civilians arrested on the allegation of inciting violence against the armed forces of the country. This announcement spurred uproar in the multiple fractions of civil and legal societies of Pakistan and also attracted concerns from International Human Rights Organizations. In this research, the workings of the military courts in Pakistan are investigated along with the analysis of the military laws and procedures in light of international human rights law. The study finds that the trial of civilians in military courts does not fully observe the standards of fair trial as guaranteed by the international human rights law that binds the state of Pakistan legally to comply. Military courts are established to try military personnel and instead of trying civilians in the military courts, the paper recommends that judicial reforms should be introduced in the civilian legal system to make it more robust and effective.

Keywords: Right to Fair Trial, Civilian Trials, Military Courts, ICCPR, UDHR, Constitution of Pakistan, 1973, International Human Rights Law, Pakistan Army Act (PAA), 1952.

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1. Introduction

Pakistan has a long history of trying her civilians in the military as well as in the special courts. In the backdrop of religious riots in 1953, many civilians were tried in the military courts under military laws.[1] Some special tribunals[2] were also established to try civilians over the charges of terrorism and rebellion in 1975. Some of the military courts established by the civilian government were challenged on the basis of their constitutionality[3] and were later declared unconstitutional by the apex court of Pakistan.[4]

To deal with the crimes related to terrorism, special anti-terrorism courts[5] have also been working in the country since 1997. However, the procedures and laws followed in these special courts are outside the domain of this paper. The focus of this paper is mainly on the procedures and laws followed by the military courts. Despite the presence of the anti-terrorism courts, in 2015 Pakistan's Constitution underwent the 21st amendment to try the civilians in the military courts for the charges of terrorism.[6] In 2017 the military courts were given an extension of an additional 24 months through the 23rd. Amendment,[7] as the former amendment was inserted through a sunset clause of two years. In 2019, the 23rd Amendment also expired

[1]Hussain Ahmed and Sara Qayum, "Civilian Trial in Military Courts in Pakistan v. The International Fair Trial Standards on Military Justice. A Critical Analysis," *Pakistan Journal of Criminology* 13, no. 1 and 2 (2021): 49.

[2]"Suppression of Terrorist Activities (Special Courts) Act," (1975).

[3]Bakht Munir and Attaullah Khan Mahmood, "Establishment of Military Courts in Pakistan and its Effects on Trichotomy of Powers: International and Domestic Standards," *Pakistan Vision* 21, no. 2 (2020): 251, 252.

[4]Niaz Ahmed Khan v. Province of Sindh, PLD 604, (Karachi Hight Court 1977); Darwesh M. Arbey v. Federation of Pakistan and others, PLD 206, (Lahore High Court 1980).

[5]Established under the "Anti-Terrorism Act," (1997).

[6]Mirza Hasib Zubair Baig, "Abusive Constitutionalism and Military Courts in Pakistan," *Islamabad Law Review* 4, no. 1 & 2 (2020): 2.

[7] "Constitution of Pakistan (Twenty-Third Amendment) Act," Pub. L. No. XII of 2017 (2017), secs. 2 & 3, https://senate.gov.pk//uploads/documents/23rdamendment.pdf.

following the sunset clause, and military courts established under the 21st Amendment ceased to exist.[8]

Significantly, the military courts do function in Pakistan for the trial of military officers. Additionally, these courts are empowered to try civilians as well in certain cases under the Pakistan Army Act, 1952[9] (hereinafter will be mentioned as PAA (1952) and its rules. This research primarily discusses the trials of civilians in these courts and critically analyzes their trials under the provisions of international human rights law. Many scholars have researched and analyzed the workings of the military courts and challenged their constitutionality and their compliance with international human rights law standards. However, their research is particularly on the backdrop of the terrorist attack on the Army Public School in 2016 and the subsequent 21st and 23rd Amendments in the Constitution of Pakistan and the PAA 1952. However, the scenario of this research is quite different from the previous research work because this research explores how civilians can be tried in the military courts even after the lapse of the 21st and 23rd Amendments under the PAA (1952). Further, it investigates the question if international human rights of a fair trial are observed for the trial of civilians in the military courts or not.

This article is partitioned into four portions. The first part discusses what military courts are and what laws and procedures are followed by them. It discusses the situations and cases under which civilians are tried under the military laws in the military courts. The second part of the article deals with a discussion on the normal course of civilian trials and points out the differences found between military and civilian court trials. The third part of the article discusses if the military courts ensure the principles of a

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[8]"Pakistan: As Military Courts Lapse, Government Must Prioritize Reform of the Criminal Justice System," *International Commission of Jurists* (blog), April 1, 2019, https://www.icj.org/pakistan-as-military-courts-lapse-government-must-prioritize-reform-of-the-criminal-justice-system/.

[9]"Pakistan Army Act," (1952) (Act XXXIX of 1952).

fair trial as ensured by the Constitution of Pakistan along with the discussion on the fundamentals of a fair trial as laid down by international human rights law and investigates if the military laws and procedures comply with the international human rights law in all prospects.

2. Military Courts, their Laws and Procedures Under the PAA (1952)

Military courts are established under military laws that are enforceable by the armed forces of Pakistan. Several laws are enforceable on the armed forces' members in Pakistan, that are quite distinct from the ordinary criminal legal system present in Pakistan. It is pertinent to mention here that in the personal dealings of a civil nature conducted by the members of the armed forces, civil law applies to them. This paper only focuses on those military laws which apply to civilians as well.

In this regard, the discussion revolves around the PAA (1952) whose section 2 discusses the classes of people who are subject to the said act. The sections in its sub-clauses 1(d)[10] and 1(dd)[11] discuss the civilians who are not otherwise subject to the PAA (1952) but are subjected to the said act under the circumstances as have been defined by these clauses. These clauses explain various circumstances under which the PAA (1952) can be applied to the civilians of Pakistan. These situations can be summarized as provoking any member of the armed forces for non-allegiance to his duty, committing offenses against the army (including all heads) concerning their work, property, violations of some provisions of the Pakistan Penal Code 1860, Pakistan Arms Ordinance, 1965, Explosive Substances Act, 1908, High Treason Act, 1975, Officials Secret Act, 1923 and Prevention of Anti-National Activities Act, 1974. It also includes damaging state property and

[10]Clause (d) was inserted in section 2 of the PAA (1952) through Defense Services Laws (Amendment) Ordinance, (III of 1967).

[11]Clause (dd) was inserted in section 2 in the PPA (1952) through Pakistan Army Amendment Act 1977 (Act X of 1977).

trespassing in restricted areas. In violation of all these laws, a civilian is subjected to the PAA (1952).

The PAA (1952) directs that every person who has committed an offense under the said act is to be held by military personnel for military custody.[12]It indicates that a civilian is taken into military custody if he is accused of committing any offense under the PAA (1952). The said law also sets the period of detention without a formal investigation of the charge.[13]However, this period of 48 hours (excluding public holidays) commences when the commanding officer is informed about the military custody of the accused. This period is extendable based on reported reasons given by the commanding officer and he can be kept in custody until the trial or his release from custody provided that the commanding officer keeps giving reasons in a special report every eight days intervals.[14]

The military courts are called court-martials and are of four kinds constituted under this act. These kinds are;

i. General Courts Martial: These courts are either convened by the Chief of Army Staff of Pakistan (hereinafter to be mentioned as Chief) or any person whom the Chief authorizes.[15] According to the PAA (1952), these courts must be comprised of at least five officers fulfilling the requirements laid down by the relevant law.[16]

ii. Districts Courts Martial: These courts can also be either convened by the Chief or by any authority whom the Chief warrants.[17] These courts must be comprised of three or more officers who satisfy the requirements laid down by the relevant law.[18]

[12]Pakistan Army Act, sec.74.
[13]Ibid., sec.75.
[14]Ibid.
[15]Ibid., sec.81.
[16]Ibid., sec.85.
[17]Ibid., sec.82.
[18]Ibid., sec.86.

iii. Field General Courts Martial: These courts may either be convened by any person whom the Chief or the Federal Government appoints, or by an officer having a brigadier rank or above.[19]Its composition should be of three or more officers but not less than three.[20]

iv. Summary Courts-Martial: According to the Act, any commanding officer can convene these courts. These courts can be constituted by a single officer but mandate the attendance of two officers.[21]

It is pertinent to mention here, that in the hearings before all these courts, a Judge Advocate, who is an officer of the Pakistan Army, must be present.[22] However, no kind of courts have been specifically allocated to try the civilians under the PAA (1952) but as the District Courts Martial and Summary Courts-Martial try petty offenses under the act, it can be implied that civilians are not tried under these two courts-martial. The power rests with the convening officer to try any case under the said act. The judgment passed by any of these courts, except for the summary trial courts,[23] must be confirmed[24] by the authorities designated by the law, who also have the power to revise,[25] mitigate, commute, or remit the sentence.[26]

Military laws have prescribed some protections to the accused as well, such as protection against double jeopardy, which means once the accused is acquitted or convicted by the military court or the criminal court, he can be tried for the same offense neither by the military nor by the criminal courts.[27] It is the right of the accused, as per the PAA (1952), that the names of all the members convening the trial must be read over to the accused. The accused can get his objections recorded over any officer who

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[19]Ibid., sec.84.
[20]Ibid., sec.88.
[21]Ibid.
[22]Ibid., sec.103.
[23]Ibid., sec.127.
[24]Ibid., sec.119.
[25]Ibid., sec.126.
[26]Ibid., sec.124.
[27]Ibid., sec.90.

has to sit at the court.[28]However, to decide on the question of the objection is at the discretion of those remaining officers of the court (through voting) against whom no objection has been recorded.

The authority of these officers is final and if the majority of officers do not agree on the objection, the objection is set aside and the trial begins. It is barely possible that the officers of armed forces vote against their colleagues especially when on trial is a civilian. It is pertinent to mention here, that this right of objection is not granted to those who are tried by the Summary Courts Martial. The PAA (1952) gives the advantage of the disagreement of the officers of the court to the accused, meaning thereby that every judgment that is to be passed by the officers should be in majority, and in case of equality of votes, the decision will be given in the favor of the accused.[29]During the Trial by the military courts, rules concerning the examination and procurement of witnesses as well as the evidence are as same as in the criminal courts,[30]unless specifically elucidated by the PAA (1952).

In case of revision of the judgment passed by the Military Courts Martial, the case is again tried by the same court by the same officers who have passed the judgment earlier.[31]The proceedings of the Military Courts Martial can be annulled on the grounds of illegality or injustice by the Chief or any officer appointed by the Federal Government on this behalf.[32] However, all the courts of Pakistan are barred from entertaining any appeal from the decision of the Military Courts Martial.[33]

[28]Ibid., sec.104.
[29]Ibid., sec.105(1).
[30]Ibid., sec.112.
[31]Ibid., sec.126.
[32]Ibid., sec.132.
[33]Ibid., sec.133.

2. Trial of An Accused under the Criminal Legal System

The main laws dealing with the criminal legal system in Pakistan are the Pakistan Penal Code 1860, the Qanoon-e-Shahadat Ordinance, 1984, and the Code of Criminal Procedure 1898. The criminal proceeding begins with an initial report of the offense recorded by the police, commonly known as a First Intimation Report (FIR)[34]after which an investigation begins and evidence is collected based on which arrest is made. On being arrested, the accused is to be produced before the concerned magistrate within 24 hours of his arrest, as fixed by the Constitution[35]as well as the Code of Criminal Procedure.[36]The arresting authorities must intimate the accused of the grounds of his arrest at once[37]and provide him with a legal counsel of his choice.[38]On being produced before the magistrate, the magistrate can send the accused to the police remand[39]the duration of which should not exceed fifteen days.[40]This duration is fixed so that law enforcement agencies are restrained from keeping the accused for an unlimited time.[41]On the completion of the investigation, a police report[42]is to be submitted to the magistrate within 14 days, commencing from the date of the lodging of the FIR, after which the trial of an accused commences.

The ultimate right to a fair trial and due process of law is guaranteed by the Constitution of Pakistan[43]to the accused and the Constitution has left it to the subordinate statutes and precedents to elaborate what amounts to a fair trial and due process of law and where the Supreme Court of Pakistan

[34]"Code of Criminal Procedure," (1898) (Act V of 1898), sec.154.
[35]"Pak. Cons," (1973), art.10(2).
[36]Code of Criminal Procedure, sec.61.
[37]Pak. Cons, art.10(1).
[38]Ibid., art. 10(2).
[39]Code of Criminal Procedure, sec.167.
[40]Ibid., sec.344.
[41]Mariam Sherwani, "Rights of the Accused in the Legal System of Pakistan: A Legal Analysis," *Islamabad Law Review* 3, no. 3 & 4 (2019): 103.
[42]Code of Criminal Procedure, sec.173.
[43]Pak. Cons, art.10A.

on various occasions has elaborated them in the light of the international human rights law.[44]However, certain provisions have been laid down by the subordinary legislative enactments that provide for facilitating the accused to prepare his defense, the right to appeal to the higher forums,[45] the right to have a public trial in an open court,[46]the announcement of judgment in an open court in the attendance of the accused[47]and the judgment containing the points of determination, the reasons as well as the rationale behind the judgment.[48] Moreover, the right to bail[49]is also available to the accused if reasonable evidence shows the non-involvement of the accused in committing the alleged offense, keeping intact the presumption of innocence of the accused until proven guilty. These safeguards when compared with the provision of the PAA (1952) leave a lot of areas uncovered by the principle of fair trial for a civilian tried by a military court. Firstly, the indefinite period of detention of the accused endangers the principle of the presumption of innocence. According to the PAA (1952), military trials can be held anywhere,[50] whereas, in practice, the places of these trials are barely disclosed to the public.[51]

Adjudication, as per the Constitution, is the function of the Judiciary and the Constitution of Pakistan has guaranteed the independence and impartiality of the judiciary.[52]The function of adjudication as performed by the military that falls under the Executive branch of the State is altogether something far and beyond as envisaged by the Constitution. Moreover,

[44]Niaz A Shah,“The Right to a Fair Trial and the Military Justice System in Pakistan,”*The Journal of International Humanitarian Legal Studies* 7, no. 2 (2016): 340, https://doi.org/10.1163/18781527-00702003.

[45]Ibid.

[46]Sherwani, “Rights of the Accused in the Legal System of Pakistan,”: 103.

[47]Code of Criminal Procedure”, sec.366.

[48]Ibid., sec.367.

[49]Ibid., sec 96;497 and 498.

[50]Pakistan Army Act, sec.93.

[51]Munir and Mahmood, “Establishment of Military Courts in Pakistan and Its Effects,":254.

[52]Ibid., 255.

nowhere in the military laws, a proper procedure has been laid down, nor the qualifications and expertise of a military judge have been declared. Military judges are officers of the military and are not working under the judicial branch of the state. Their subordination to the Military, as well as the Executive, sabotages their independence and hence the principle of an impartial judge.

The minimum duration of three years for the commencement of trial as set by the PAA (1952), that too without the grant of bail also raises suspicions about the principle of speedy justice. Especially, where a civilian is held for such a long period by military authorities that are quite inaccessible to the public is challenging for an accused civilian and his family members. The punishments as laid down in the PAA (1952),[53]are of different types, but for the offenses for which civilians can be tried under the said law, there are rigorous punishments including the death sentence. The convening officers of the court, where civilians can be tired can give any punishment, they want to give, which is confirmed by the Chief or the federal government, the same authority who has appointed the officers of the court. In case of non-confirmation of the sentence or punishment, the trial commences again before the same body of officers.

The PAA (1952) gives the right to the convicted to apply for review but all sorts of civilian courts are barred from exercising appellate jurisdiction over the judgments rendered by the military courts.[54]The trials conducted by the military courts are secretive and are not open and public trials, nor the judgments given by the military courts have all the essentials as prescribed by the Code of Criminal Procedure.[55]

[53] Pakistan Army Act, sec.60.
[54] Ibid., sec.133.
[55] Code of Criminal Procedure, sec.366 and 367.

4. The Right to Fair Trial in International Human Rights Law and the Military Trials

In the realm of International Human Rights Law, many instruments ensure the right to fair trials such as the Universal Declaration of Human Rights,[56] the Convention on the Rights of Child,[57] and the International Covenant on Civil and Political Rights[58] (forming a part of the international law), and European Convention on Human Rights,[59] American Convention on Human Rights,[60]Arab Charter on Human Rights[61] and the African Charter on Human and People's rights[62] (forming the part of the respective regional international law).

However, from the standpoint of Pakistan's obligation under International Human Rights law, the two key instruments concerning fair trial rights are the Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), as Pakistan has voted for UDHR and ratified ICCPR.[63]While guaranteeing fair trial prerogative, the UDHR, in its Article 10, has categorically mentioned some terms that can be construed as setting some parameters of a fair trial as per the said declaration. First, the entitlement of fair trial rights to everyone, without any discrimination. Second, an open public hearing,

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[56]UNGA, "*Universal Declaration of Human Rights"*, 10 December 1948. 217 A (III), art. 10.

[57]"*Convention on the Rights of the Child*," 20 November 1989, UNTS 1577, entered into force 2 September 1990, art.40.

[58]"*International Covenant on Civil and Political Rights*,"16 December 1966, UNTS 999, entered into force 23 March 1976, art. 14.

[59]"*European Convention for the Protection of Human Rights and Fundamental Freedoms*," as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, entered into force 3 September 1953, art. 6.

[60]"A*merican Convention on Human Rights, "Pact of San Jose", Costa Rica*," 22 November 1969, entered into force 18 July 1978, art. 8.

[61]"Arab Charter on Human Rights," 2004, art. 13 and 16

[62]"African Charter on Human and Peoples' Rights ("Banjul Charter")," 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, art. 7.

[63]Shah, "The Right to a Fair Trial and the Military Justice System in Pakistan,": 335.

and third an independent and impartial body before whom the trial takes place. Hence, as per the UDHR, every trial must be held in an open hearing and before an independent and impartial tribunal, and justice is delivered without any discrimination on whatsoever basis.

The ICCPR, in its article 14, has elaborated on the fair trial right to some length according to which everyone is equal before the courts. The article entitles everyone to an open and public hearing that too before an impartial and independent court or any adjudicating body. However, the article provides exceptions to public hearings on the grounds of public morals and policy, the national interests of a democratic state, and meeting the ends of justice. The article also enshrines for the accused the principle of the presumption of innocence until proven guilty and other minimum guarantees such as the provision of information as to the nature of the charge, a reasonably required time for preparing for defense, the right to a lawyer of choice, trial without undue delay, examination of witnesses, availability of the interpreter and protection against self-incrimination. Moreover, Article 14 also entitles the accused to the right to review his punishment from the body of law higher than the body that has awarded the punishment. It also recognizes the entitlement of the accused to compensation in case of miscarriage of justice and protection against retrospective punishment.

The right to equality before the court is guaranteed to the accused as per Article 14, regardless of the kind of offense the accused is charged with and the nature of the proceeding before the body that tries the accused.[64] It is pertinent to mention here that this provision is not only applicable to courts or tribunals but also to a body to whom the judicial task has been

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[64]General comment no. 32, Article 14, "Right to equality before courts and tribunals and to fair trial," 23 August 2007, CCPR/C/GC/32GC3, para 3.

assigned.[65]The tribunal is regarded as a body established under law independent of the legislative and the executive branch of the state.[66]There is no exception to the right to have a trial before such an impartial and independent body.[67]

ICCPR has however not outlawed military trials nor has it forbidden the trial of civilians in the military courts.[68]However, the guarantees provided by Article 14 must be ensured in every trial that has to take place before anybody of law whatsoever.[69]In light of the safeguards, as guaranteed by the international human rights law on the matter of the right to a fair trial to which Pakistan is under obligation, the trial of civilians before military courts is quite questionable. The military courts overlook certain safeguards as ensured by international human rights law, such as the principle of an impartial and independent tribunal.

The military courts in Pakistan are not presided over by the judges working under the judicial branch of the state but rather are the officers and personnel of the military itself. They are neither judicially qualified nor trained. The work under the executive branch of the state hence violating the condition of impartiality and independence. The Human Rights Committee while commenting on Article 14 of ICCPR observed that the impartiality of military courts raises serious concerns regarding the ensuring of a fair trial.[70]It also observed that such trials are to be held only in exceptional situations, and the practice of such trials has declined globally

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[65]General comment no. 32, Article 14, “Right to equality before courts and tribunals and to fair trial,” para.7.

[66]Ibid., para.18.

[67]Ibid., para.19.

[68]Shah, “The Right to a Fair Trial and the Military Justice System in Pakistan,”: 338.

[69]General comment no. 32, Article 14, “Right to equality before courts and tribunals and to fair trial,” para 25.

[70]Ibid., para 22.

given the reservations.[71]The impartiality of judges highly depends on factors such as their independence from the executive or legislative branch of the state, the rules and procedure according to which they are appointed and removed and the terms and conditions under which they continue their service,[72] factors which are highly questionable regarding the presiding officers of the military courts. Moreover, the right to review and appeal by a higher tribunal is also a protection guaranteed by Article 14 of the ICCPR that has been ignored by the military laws and courts. According to human rights standards, the jurisdiction of the military courts or tribunals should only be limited to the trial stage, the appeal against the decision of these trials should lie before the civil court, having impartial and independent judges.[73]

Regarding the question of public hearing of a trial, the UDHR has recognized no exception to the right, whereas the military trials in Pakistan are notorious for their secrecy. A public hearing of a trial ensures the fairness of the trial. During the Nuremberg Trials, the trial of one of the high-ranking German ministers who worked under the Nazi regime was objected to by the US Military as a violation of fair trial on the grounds of its secret proceedings.[74] Despite the reservations on the military trials from a human rights perspective, these trials are conducted by many countries throughout the world, however, many European Countries such as Germany do not have military courts at all, and they try their military personnel in the ordinary criminal courts. In the United States, military personnel are

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[71]Shah, "The Right to a Fair Trial and the Military Justice System in Pakistan,": 339.

[72]Farkhanda Zia Mansoor, "Reassessing Packer in the Light of International Human Rights Norms,"*Connecticut Public Interest Law Journal* 4, no. 2 (2005): 270.

[73]"Draft Principles Governing the Administration of Justice through Military Tribunal," UN Doc. E/CN.4/2006/58, Principle 17.

[74]*In re Altstötter and Others* (The Justice Trial), 1947, cited by International Humanitarian Law Databases, Fair Trail Guarantee, Rule 100, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule100#Fn_8AD7AC55_00127.

governed by military laws, and their trial is also held under the court-martial. These court martials are governed by the Uniform Code of Military Justice, which the Supreme Court of the United States has declared to be separate from the jurisprudence in the civilian courts.[75]According to these laws, only those civilians are tried in the military court who accompany the armed forces during the emergency or war times, otherwise not.[76]

5. Conclusion and Recommendations

The distinction between military laws and ordinary civil laws is drawn due to jurisprudential differences between these two legal systems. Many Constitutions of the world, including the Constitution of Pakistan excludes the operation of fundamental rights enshrined in the constitution on the military laws. Military personnel when recruited into the armed services agree to the laws and conditions of the armed forces, whereas the civilians are under the oath, obligation, and protection of their constitution. Therefore, to try the civilians of Pakistan under the shady laws and procedures of the laws and courts is in contravention of the dictums of fair trial principles as recognized by the Constitution of Pakistan and the well-settled principles of International Human Rights Law. Even though every trial, regardless of the legal system under which it takes place, must comply with the principle of fairness and equality to try civilians in the courts specifically designed to try military personnel raises concerns from a human rights perspective.

Instead of establishing a parallel judicial system along with the civil judicial system, the Pakistani state should bring judicial reform in the ordinary judicial system. Robust system protection of Judges and witnesses

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[75]Jennifer K.Elsea and Jonathan M. Gaffney, "Military Courts-Martial Under the Military Justice Act of 2016,"(Library of Congress Public Edition 2020): 3,https://crsreports.congress.gov/product/pdf/R/R46503/2; Also see Parker v. Levy, 417 U.S. 733, 744 (1974).

[76]UCMJ; 10 U.S.C. § 802(a)(10), art. 2.

should be established, effective digital reforms should be introduced, police should be trained and updated to deal with the cases of unusual cases and situations and all legal fraternity should be made responsible for swift trials to prevent the miscarriage of justice.

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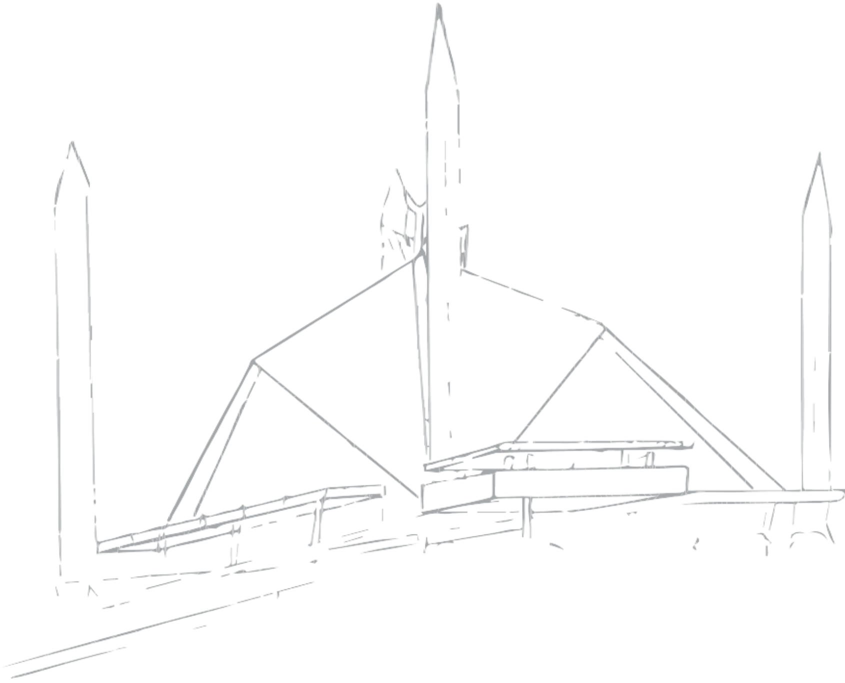
اردو سیکشن



Islamabad Law Review Vol. 7, Issue 1, 2023

اسلام میں ارتداد کی سزا اور بین الاقوامی انسانی حقوق: ایک تقابلی مطالعہ

Punishment of Apostasy in Islam and International Human Rights Law: A Comparative Study

مفتی شاد محمد شاد*

Abstract

In Europe, the religious liberty is proclaimed as one of the fundamental freedoms of every human being. Hence, right to change one's religion is recognized as a fundamental human right. Nevertheless, Islamic law declares it a major crime, apostasy, for which not only sever punishment has been prescribed for the offender, rather its impacts on the marital relationship and other related matters are also detailed out. In contemporary times, the punishment of apostasy has been questioned much more than any other punishments, mainly because this punishment is debated in the paradigm of Islam's worldview of other religions. Therefore, from orientalists to Muslim thinkers, everyone expressed numerous reservations regarding this punishment. The Muslim scholars have been responding to these doubts from time to time. The significance of this topic requires that the relevant provision of Universal Declaration on Human Rights (UDHR) must be analyzed through the lens of logic and principles of Islamic law. Therefore, this paper presents the notion of apostasy, nature of its punishment, opinions of scholars, and briefly compares this concept with international human rights law regime in this regard.

Keywords: | ارتداد- شرعی سزا- بین الاقوامی انسانی حقوق کا قانون - حریتِ فکر

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1۔ تعارف

یورپ میں کنیسہ کے ظلم وجبر کے رد عمل کے طور پر جب نئے افکار سامنے آنے لگے تو ان ہی میں سے"تبدیلی مذہب"کی آزادی کی فکر بھی شامل تھی، جس کو باقاعدہ فرد کی بنیادی آزادی قراردیا گیا اور بین الاقوامی انسانی حقوق میں اس کی مکمل چھوٹ دے دی گئی۔ لیکن اسلامی قانون میں "ارتداد" کو ایک بڑا جرم قراردیا گیا ہے اور اس پر سخت سزا مقرر کر کے ازدواجی زندگی اور دیگر معاملات پرمرتب ہونے والے اثرات کو بھی بیان کیا گیا ہے۔ عصرِ حاضر میں ارتداد کی سزا ،دیگر سزاؤں کی بنسبت زیادہ زیرِ بحث آئی ہے، کیونکہ ایک تو ارتداد کی سزا صرف فروعی احکام تک منحصر نہیں ہے، بلکہ اس کا تعلق مرتد کے دائرہ اسلام سے خارج ہونے کے ساتھ ہے اور دوسرا اہم نکتہ یہ ہے کہ یہ سزا دیگر مذاہب کے بارے میں اسلام کے زاویہ نگاہ سے مربوط ہوجاتی ہے۔ اسی لیے اس سزا کے حوالے سے ایک طرف مستشرقین سے لے کر، مسلم مفکرین تک سب نے مختلف شبہات کا اظہار کیا اور دوسری طرف، علماء شریعت ان شبہات کے وقتا فوقتا جوابات دیتے آئے ہیں۔ اس پہلو کو مدنظر رکھنے سے متعلقہ موضوع کی اہمیت معلوم ہوجاتی ہے، خصوصا اقوام متحدہ کے "انسانی حقوق کے آفاقی منشور"کی متعلقہ شق کا شرعی وعقلی جائزہ لینے کی اشد ضرورت ہے۔ اس مقالہ میں متعلقہ موضوع کے بنیادی پہلووں کو زیرِ بحث لایا گیا ہے اور ارتداد کا تعارف، شرعی سزا، اہلِ علم کی آراء اور دلائل کو مختصرا ذکر کر کےاس حوالے سے بین الاقوامی انسانی قانون کا جائزہ پیش کیا گیا ہے۔

2- ارتداد کا مفہوم

"ارتداد" یا "ردۃ" عربی زبان کا لفظ ہے جس کے لغوی معنی واپس لوٹنے اور رجوع کرنے کے آتے ہیں۔علامہ ابن فارس ان جیسے الفاظ کے اصولی معنی بیان کرتے ہوئے لکھتے ہیں: الراء والدال أصل واحد مطرد منقاس، وهو رجع الشيء... وسمي المرتد؛ لأنه رد نفسه إلى كفره.[1] یعنی راء اور دال کا ایک مستحکم و صاف اصول ہے کہ اس کے معنی کسی چیز کو لوٹانے کے آتے ہیں... اور مرتد کو مرتد اس لیے کہتے ہیں کہ وہ اپنے نفس کو کفر کی طرف لوٹاتا ہے۔

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[1] احمد بن فارس زکریا ابو الحسین، معجم مقاییس اللغۃ (بیروت، لبنان، دار الفکر2002ء) 386/2-

جہاں تک ارتداد کے اصطلاحی مفہوم کا تعلق ہے تو علماء نے اس کی تعریف مختلف الفاظ میں کی ہے، تاہم سب کے مفہوم قریب قریب ہیں ۔ ارتداد کا اصطلاحی مفہوم یہ ہے کہ کوئی مکلف مسلمان،اپنے اختیار سےدین اسلام چھوڑ کر کفر اختیار کر لے،خواہ یہ رجوع کسی کفریہ عقیدہ سے ہو، یا کفریہ قول یا فعل کی وجہ سے ہو ۔ قرآن مجید میں بھی ارتداد کا لفظ اس مفہوم کے لیے استعمال ہوا ہے، چنانچہ باری تعالیٰ کا ارشاد ہے:

{وَمَنْ يَرْتَدِدْ مِنْكُمْ عَنْ دِينِهِ فَيَمُتْ وَهُوَ كَافِرٌ فَأُولَئِكَ حَبِطَتْ أَعْمَالُهُمْ فِي الدُّنْيَا وَالْآخِرَةِ وَأُولَئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ}[2]

اور تم میں سے جو لوگ اپنے دین سے پلٹ جائیں اور کفر کی حالت میں مر جائیں، دنیا اور آخرت میں اس کے اعمال ضائع ہوجائیں گےاور یہ لوگ جہنمی ہوں گے اور ہمیشہ جہنم میں ہی رہیں گے۔

اس حوالے سے سب سے مختصر اور جامع تعریف علامہ ابن ہمامؒ اور علامہ ابن قدامہؒ نے لکھی ہے: المرتد: هو الراجع عن دين الاسلام إلى الكفر.[3] مرتد وہ ہے جو دینِ اسلام سے کفر کی طرف لوٹے۔ ارتداد کے مفہوم اور فقہی تفصیلات کو سامنے رکھنے سے یہ معلوم ہوتا ہے کہ ارتداد کے تین ارکان ہیں: اول قصد وارادہ ، اس کو اختیار بھی کہہ سکتے ہیں کہ انسان باقاعدہ اپنے اختیار اور ارادہ سے ہی دینِ اسلام سے رجوع کرلے۔ دوم مرتد، جو شخص اسلام سے کفر کی طرف لوٹتا ہے، اس کی ذات بھی ارتداد کا اساسی رکن ہے، کیونکہ اس کے بغیر ارتداد کے فعل کا کوئی تصور ممکن نہیں ہے۔سوم کفریہ تصرف، یعنی کوئی ایسا عقیدہ،قول یا فعل ہے جس کی بنیاد پر مرتد دینِ اسلام سے کفر کی طرف لوٹتا ہے، ایسے تصرف کے بغیر بھی ارتداد کا وجود ممکن نہیں ہے۔

جہاں تک ارتداد کی انواع واقسام کا تعلق ہے تو اس حوالے سے ارتداد کی تفصیلات کو سامنے رکھنے سے ارتداد کی مندرجہ ذیل تقسیمات ممکن ہیں:

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[2] البقرۃ: 217۔

[3] محیی الدین یحی بن شرف، نووی ابو زکریا ، المجموع شرح المھذب (قاہرہ، مصر، دار الکتب العلمیہ، 1996ء) 19/ 223؛ محمد بن عبد الواحد وکمال الدین ابن ہمام، فتح القدیر شرح الھدایۃ (بیروت، لبنان، دارالفکر 1989ء) 13/ 219۔

ذریعہ ارتداد: اس اعتبار سے ارتداد کی تین قسمیں بنتی ہیں، یعنی کفریہ عقیدہ، کفریہ قول، کفریہ فعل۔[4]

صریح وغیر صریح: اس اعتبار سے ارتداد کی دو قسمیں ہیں، ایک قسم یہ ہے کہ کوئی شخص واضح اور صریح الفاظ میں کفر اختیار کرلے اور دوسری قسم اقتضائی ہے، یعنی وہ کوئی ایسا عمل کرلے جس کے تقاضے کی بنیاد پر اسے دائرہ اسلام سے خارج سمجھا جائے، مثلا ضروریاتِ دین کا انکار کرنا۔[5]

سببِ ارتداد : اس اعتبار سے مشہور قسمیں تین ہیں، ایک یہ کہ کوئی شخص باقاعدہ کفریہ عقیدہ کو جان بوجھ کر اور درست سمجھ کر اختیار کرلے۔ دوسری قسم یہ ہے کہ کسی عناد،غصہ اور حمیت کی وجہ سے دینِ اسلام سے رجوع کرلے۔ تیسری قسم یہ ہےکہ استہزاء کی بنیاد پر اسے مرتد قراردیا جائے۔[6]

2.1 حکمِ ارتداد کی تطبیق کے ضوابط

چونکہ دوسری بحث میں، جو کہ بذات خود ایک اہم بحث ہے، ارتداد کے حکم کی تفصیل ذکر کی جائےگی، اس لیے مناسب معلوم ہوتا ہےکہ ارتداد کے حکم کے اطلاق وتطبیق کے لیے فقہا نے جو شرائط اور ضروری قیود ذکر فرمائی ہیں، ان کو باقاعدہ قواعد وضوابط کی شکل میں مرتب کیا جائے، تاکہ ان کا احاطہ آسان ہو اور آنے والی بحث سمجھنے میں مدد ملے۔ اگرچہ یہ قواعد وضوابط بعینہ انہی الفاظ میں کسی فقہ کی کتاب میں موجود نہیں ہیں، معاصر اہلِ علم اور اسکالرز نے فقہاء کی بیان کردہ تفصیلات سے ہی ان ضوابط کو اخذ کیا ہے ، جیسے دکتور تیسیر العمر نے اپنی تحقیقی کتاب "الردة وآثارها:دراسة مقارنة مع القانون"میں اس پر تفصیل سے گفتگو کی ہے۔ ذیل میں ان ضوابط کا تجزیہ مختصر انداز میں پیش کیا جاتا ہے۔

[4] شہاب الدين احمد بن احمد قلیوبی، حاشية قليوبی (بيروت،لبنان، دارالفکر 1998ء) 4 /175-

[5] محمدعرفہ دسوقی، حاشية الدسوقی(بيروت،لبنان،دارالفکر 1999ء) 301/4؛ منصور بن یونس بہوتی، کشاف القناع (بیروت، لبنان، دارالفکر 1991ء) 168/6۔

[6] محمد بن ابی بکر بن ایوب، ابن قیم الجوزی، زاد المعادفی ہدی خیر العباد (بیروت، لبنان،مؤسسة الرسالة 1994ء)407/3؛ احمد،قلیوبی،حاشية قليوبی 175/4۔

پہلا ضابطہ: وجودِ شرائط اور انتفاءِ موانع

اس ضابطہ کو یوں تعبیر کیا جاتا ہے:"الردة تقع من المسلم المکلف شرعا مع انتفاء المانع"۔اس کا مفہوم یہ ہے کہ ارتداد کا حکم وہاں لاگو ہوگا جب ایک مسلمان، مکلف شخص کفر اخیار کرلے اور وہاں ارتداد کے حکم کے لیے کوئی مانع اور رکاوٹ بھی نہ ہو۔ اس ضابطہ میں بنیادی طور پر دو اہم نکات کو جمع کیا گیا ہے: ارتداد کی شرائط اور انتفاء موانع۔

ارتداد کی شرائط: سابقہ ضابطہ میں "مسلم مکلف" سے ارتداد کی شرائط کی طرف اشارہ کیا گیا ہے۔ اہلِ علم نے ارتداد کے لیے مندرجہ ذیل چار شرائط ذکر کی ہیں:

1-اسلام: اس شرط پر تقریبا تمام فقہاء کا اتفاق ہے کہ جب کوئی شخص کفر اختیار کرتا ہے تو اس پر اس وقت ارتداد کا حکم لاگو ہوگا، جب وہ پہلے مسلمان ہواور اسلام چھوڑ کرکفر یا کوئی بھی دوسرا مذہب اختیار کرلے۔

اس بحث کے ضمن میں فقہاء نے یہ نکتہ بھی ذکر کیا ہے کہ اگر کوئی شخص ایک کفریہ مذہب چھوڑ کر،دوسرا کفریہ مذہب اختیار کرتا ہےاور کفر سے کفر ہی کی طرف منتقل ہوتا ہے تو کیا اس پر بھی ارتداد کا حکم لاگو ہوگا یا نہیں؟ اس سلسلے میں اہلِ علم کی دو آراء ہیں :1-فقہاء حنفیہ، مالکیہ اور حنابلہ کی رائے یہ ہے کہ اس نے جو بھی مذہب اختیار کیا ہے، اس کو اسی پر رہنے دیا جائےگا اور اسے مرتد نہیں سمجھا جائےگا۔[7] 2-فقہاء شافعیہ اور ظاہریہ کی رائے یہ ہے کہ ایسے شخص پراسلام قبول کرنے کے لیے زبردستی کی جائے گی اور اس کو اختیار کردہ کفریہ مذہب پر نہیں چھوڑا جائےگا۔[8]

پہلی رائے اختیار کرنے والے اہلِ علم نے ان آیات سے استدلال کیا ہے جن میں آیا ہے کہ کفار ایک دوسرے کے اولیاء اور دوست ہیں۔[9] اس سے معلوم ہوتا ہے کہ کفار،خواہ کسی بھی مذہب کے ہوں، سارے دوست اور یکساں ہیں۔ اسی طرح سورہ کافرون میں بھی تمام کفار کو ایک ہی دین کے سمجھ کرخطاب کیا گیا ہے۔

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[7] محمد امین بن عمر ابن عابدین، رد المحتار (بیروت،لبنان، دارالفکر 1992ء) 247/4؛ ابومحمد علی بن احمد ابن حزم اندلسی، المحلی (بیروت، لبنان، دارالفکر 1990ء)194/11؛ محمد علیش، منح الجلیل شرح علی مختصر سید خلیل (بیروت،لبنان،دارالفکر 1989ء)205/4۔

[8] اندلسی، المحلی، 196/11۔

[9] سورہ انفال: 73۔

دوسری رائے کے اہلِ علم نے ان عمومی دلائل سے استدلال کیا ہے جن کا تعلق اسلام سے رجوع کرنے والے مرتد کے ساتھ ہیں اور ان میں "دین" کا لفظ صرف اسلام کے ساتھ خاص نہیں کیا، بلکہ عام رکھا ہے۔اسی طرح اس آیت سے بھی استدلال کیا جاتا ہے جس میں یہ آیا ہے کہ جو شخص اسلام کے علاوہ کسی دین کو تلاش کرتا ہے تو اسے قبول نہیں کیا جائے گا۔[10]

راجح پہلی رائے ہے، کیونکہ حضرت عمررضی اللہ عنہ کا قول ہے کہ :"الکفر ملة واحدة"[11]۔ اس کے علاوہ ارتداد کےکئی احکامات صرف اسلام سے کفر کی طرف منتقل ہونے والے کے ساتھ خاص ہیں اور دوسری رائے کےدلائل کا تعلق بھی خاص اسی صورت سے متعلق ہیں، جبکہ سورہ آلِ عمران کی آیت میں عدمِ قبولیت سے مراد اخروی قبولیت ہے کہ اسلام کے بعد کوئی شخص اسلام کے علاوہ کوئی مذہب اختیات کرتا ہے،آسمانی ہو یاغیر آسمانی، آخرت میں اسے قبول نہیں کیا جائے گا۔

2-عقل: انسان کے مکلف ہونے کے لیے "عقل" ایک بنیاد اور اساس ہے، اس کے بغیر انسان سے حقوق وفرائض اور ذمہ داریوں کا مطالبہ شرعا نہیں کیا گیا۔ ارتداد کے لیے بھی یہ ضروری ہے کہ مرتد شخص میں عقل ہو، لہذا اگر مجنون،معتوہ یا ناسمجھ بچے سے کوئی کفریہ فعل یا قول صادر ہوتا ہے تو اس کی بنیاد پر اسے مرتد نہیں کہا جائے گا۔[12]

اگر کوئی شخص حرام نشہ کرتا ہے اور نشہ کی حالت میں ارتداد کا ارتکاب کرتا ہے تو کیا اس پر مرتد کا حکم لاگو ہوگا یا نہیں؟ اس سلسلے میں فقہاء کی آراء مختلف ہیں، جن کی تفصیلات کا یہ موقع نہیں ہے۔ مختصرا اتنا ذہن میں رکھنا ضروری ہے کہ امام ابوحنیفہؒ اور ظاہریہ کی رائے ، امام مالکؒ اور امام احمدؒ کا

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[10] آل عمران: 85۔

[11] ظفر احمد عثمانی، إعلاء السنن (کراچی، پاکستان، ادارۃ القرآن والعلوم الاسلامیه1997ء) 583/12۔

[12] ابن عابدین، رد المحتار، 224/4؛ عبد اللہ بن احمد ابن قدامه المقدسی، المغنی(بیروت،لبنان، دارالفکر 1986ء) 124/8؛ ابو زکریا محیی الدین یحی بن شرف نووی، روضة الطالبین (شام، دمشق،المکتب الاسلامی 1986ء) 71/10۔

ایک قول یہ ہے کہ ایسا شخص مرتد نہیں کہلائےگا، جبکہ فقہاء شافعیہ، اور حنابلہ ومالکیہ کا راجح قول یہ ہے ایسے شخص پر ارتداد کا حکم لاگو ہوگا۔[13]

3-بلوغت: اگر کوئی بالغ انسان اسلام سے نکلتا ہے تو اس پر اہلیت کے مکمل ہونے کی وجہ سے ارتداد کا حکم لاگو ہوگا، جہاں تک بچے کی ردت کی بات ہے تو اسلسلے میں اہلِ علم کی آراء مختلف ہیں اور ہر رائے پر کئی دلائل بھی موجود ہیں،تاہم ان آراء کا خلاصہ حسبِ ذیل دیہے:

امام ابوحنیفہ اور امام محمدرحمہما اللہ کی رائے یہ ہے کہ اگر نابالغ بچہ ممیز اور سمجھ دار ہے توجس طرح اس کا اسلام لانا ٹھیک ہے، اسی طرح اس کی ردت بھی معتبر ہےاور اس پر ارتداد کا حکم لاگو ہوگا، البتہ اس کی سزا قتل نہیں ہے، بلکہ اس پر دوبارہ اسلام لانے کے لیے جبر وزبردستی کی جائےگی۔[14]

امام ابویوسفؒ کی رائے یہ ہے کہ بچے کا اسلام لانا تو درست ہے، لیکن بلوغت سے پہلے اگر بچے سے کوئی کفریہ قول یا فعل سرزد ہوتا ہے تو اس پر ارتداد کا حکم لاگو نہیں ہوگا، کیونکہ بچہ مرفوع القلم ہے اور اس پر ارتدا د کا حکم لگانے میں اس کے لیے ضرر ہے، لہذا ایسا عمل لغو ہے۔[15]

امام شافعی اور امام زفرؒکی رائے یہ ہے کہ نابالغ بچے کا اسلام لانا یا اسلام سے نکلنا دونوں غیر معتبر اور لغو ہے، لہذا اس پر ارتداد کا حکم لاگو نہیں ہوگا،کیونکہ احادیث میں واضح طور پر آیا ہے کہ بچہ مرفوع القلم ہے۔[16]

4-اختیار: جمہور علماء کی رائے یہ ہے کہ اگر کسی شخص پرارتداد اور کفر اختیار کرنے کے لیے اکراہ اور زبردستی کی گئی اور اس نے کوئی کفریہ قول یا عمل کردیا تو اس پر ارتداد کا حکم لاگو نہیں ہوگا، کیونکہ قرآن میں واضح طور پر ایسے شخص کے لیے استثنائی حکم آیا ہےکہ : {إِلَّا مَنْ أُكْرِهَ وَقَلْبُهُ مُطْمَئِنٌّ بِالْإِيمَانِ}[17] اور حدیث

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[13] علاء الدین سمرقندی،تحفة الفقهاء (قاہرہ،مصر،دارالکتب العلمیہ 1984ء)310/3؛ محمد بن ادریس الشافعی، الأم (قاہرہ، مصر، دارالمعرفة1978ء) 48/6؛ یحی بن شرف نووی، المغنی 148/8۔

[14] ابن ہمام،فتح القدیر، 94/6۔

[15] عثمان بن علی حنفی زیلعی،تبیین الحقائق (قاہرہ، مصر، المطبعة الكبرى الاميرية1970ء) 292/3۔

[16] محمد ابن احمد سرخسی، المبسوط (قاہرہ، مصر، دار المعرفة 1993ء) 120/10؛ نووی، روضة الطالبین77/10۔

[17] النحل: 106۔

میں بھی ایسے شخص کو رخصت دی گئی ہے۔[18] امام محمدؒ کی رائے یہ ہے کہ ایسے شخص پر ظاہری طور پر کفر کا حکم لاگو ہوگا اور کفر کے دیگر آثار بھی مرتب ہوں گے، جیسے نکاح کا ٹوٹ جانا وغیرہ۔ اس کی کچھ تفصیل "موانع" کے ضمن میں آجائے گی۔[19]

انتفاء موانع: موانع کا مطلب ایسے امور یا احوال ہیں جن کی موجودگی میں حکم لاگو نہ ہوسکے۔ شیخ رفیق العجم اس کی وضاحت یوں کرتے ہیں: "ما يلزم من وجوده عدم وجود الحكم."[20] ارتداد کے حکم کے لیے اہلِ علم نے جن موانع کا تذکرہ کیا ہے، وہ کل چار ہیں: اکراہ، جہل، خطا اور تاویل۔

1-اکراہ: ارتداد کی شرائط کے تحت یہ بات گزرچکی ہے کہ جمہور علماء کے ہاں اگر کسی پرارتداد کے لیےزبردستی کی گئی تواس پر ارتداد کا حکم لاگو نہیں ہوگا، البتہ فقہاء احناف کے ہاں یہاں اکراہ سے مراد "اکراہ ملجئ" ہے جس میں جان یا کسی عضو کے تلف وجانے کا اندیشہ ہوتا ہے۔ امام محمدؒ کی رائے یہ ہے کہ چونکہ مکرہ کے پاس کچھ نہ کچھ اختیار ہوتا ہے کہ وہ کفر اور اپنی جان کے درمیان کسی ایک جہت کو اختیار کررہا ہے، اس لیے اگرچہ حقیقی طور پر وہ مؤمن رہےگا، لیکن ظاہری طور پر دنیوی احکامات کے اعتبار سے اس پر کفر کے احکامات لاگو ہوں گے، تاہم راجح قول جمہور علماء کا ہی ہے۔[21]

2-جہل: اگر کسی شخص سے لاعلمی میں کوئی کفریہ قول یا فعل صادر ہوتا ہے تو بعض مواقع پر ایسے شخص کے لیے بھی رخصت دی گئی ہے، جس کے تفصیلی احکامات کا یہ موقع نہیں ہے، تاہم خلاصہ یہ ہے کہ دارالاسلام اور مسلمانوں کے درمیان رہنے والے شخص کی طرف سے لاعلمی یا جہالت عذر نہیں ہے، لہذا اگر اس سے کفر سرزد ہوتا ہے تو اس پر ارتداد کا حکم لاگو ہوگا، البتہ اگر وہ نومسلم ہے یا دارالکفر اور کفار کے درمیان رہ رہا ہے تو ایسی صورت میں لاعلمی یا جہل عذر ہے اور اس پر فورا ارتداد کا حکم لاگو نہیں ہوگا۔

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[18] إن الله وضع عن أمتي الخطأ والنسيان وما استكرهوا عليه۔ محمد بن یزیز، ابن ماجه قزوینی، سنن ابن ماجه (سعودیه، مکتبه ابی معاطی 1990ء)1/ 659،حدیث نمبر:2045۔

[19] ابن قدامه،المغنی 145/8۔

[20] دکتور رفیق العجم،موسوعة مصطلحات اصول الفقه عند المسلمین(بیروت،لبنان،مکتبه لبنان ناشرون1998ء) 1305/2۔

[21] علاء الدین ابوبکر بن مسعود کاسانی، بدائع الصنائع (قاہرہ، مصر، دار الکتب العلمیه1986ء)485/9۔

علامه ابن قدامةؒ لکھتے ہیں: فان کان ممن لا يعرف الوجوب كحديث الاسلام والناشیء بغير دار الاسلام أو بادية بعيدة عن الامصار وأهل العلم لم يحكم بكفره.[22] اگر کوئی شخص ایسا ہے جسے وجوب کا علم ہی نہ ہو، جیسے نیا نیا مسلمان ہوا ہو یا دار الاسلام کے علاوہ کسی اور ملک میں پرورش پائی ہو یا شہر سے دور کسی گاوں میں پلا بڑھا ہو تو اہلِ علم ایسے شخص پر کفر کا اطلاق نہیں کرتے۔

3-خطا: اس بات پر تقریبا اہلِ علم کا اتفاق ہے کہ اگر کسی نے غلطی سے کوئی کفریہ قول یا عمل کرلیا تو اس پر ارتداد کا حکم لاگو نہیں ہوگا، کیونکہ ایسی صورت میں قصد وارادہ نہیں ہے اور نصوص سے عمومی طور پر خطا کو معاف قراردیا گیا ہے۔[23]

4۔تاویل: تاویل کا مفہوم یہ ہے کہ کسی لفظ کو ظاہری معنی سے ہٹاکر کسی دوسرے ایسے معنی پر محمول کرنا جس کا احتمال لفظ میں موجود ہو۔اگر کوئی شخص نصوص میں ایسی تاویل کرتا ہے تو اس کی بنیاد پر اس پر ارتداد کا حکم لاگو نہیں ہوگا، بشرطیکہ اس کی تاویل شریعت کے قطعی عقائد اور قرآن وسنت کے عمومی احکام اور قواعد کے خلاف نہ ہو، ورنہ اس کی تاویل کو قبول نہیں کیا جائےگا، جیسے قادیانی ختمِ نبوت کے مفہوم میں ایسی تاویل کرتے ہیں جو شریعت کے عام قواعد اور قطعی عقیدہ کے خلاف ہے۔[24]

دوسراضابطہ: ارتداد کا ثبوت شرعی طریقے سےہو

اس ضابطہ کی تعبیر یوں کی جاتی ہے: "يجب اتباع الطريقة الشرعية في إثبات الردة"۔ اس کا مفہوم یہ ہے کہ ارتداد کو ثابت کرنے ے لیے باقاعدہ شرعی طریقے کی اتباع ضروری ہے۔ چونکہ ارتداد کا تعلق بھی حدود کے ساتھ ہے، اس لیے حدود میں اثباتِ جرم کا جو شرعی طریقہ بیان کیا گیا ہے،اسی طریقے پر عمل کرکے ہی کسی شخص پر ارتداد کا حکم لاگو ہوسکتا۔ ارتداد کے ثبوت کےلیے ضروری ہے کہ باقاعدہ قاضی کے سامنے مندرجہ ذیل دو ذرائع میں سے کسی ایک ذریعے سے ثابت ہوجائے:

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[22] ابن قدامہ، المغنی 10/ 82۔
[23] محمد الخطیب شربینی، مغنی المحتاج (بیروت، لبنان، دارالفکر1990ء) 4/135۔
[24] محمد انور شاہ کشمیری،فیض الباری شرح صحیح البخاری(قاہرہ، مصر، دارالکتب العلمیہ،2005ء) 4/373۔

1-اقرار: مجرم خود اپنے جرم کا اقرار کرلے تو قاضی اس پر ارتدادکا حکم لاگو کرے گا۔

2-شہادت: اگر دو عاقل، بالغ مرد کسی شخص کے ارتداد پر گواہی دےدے تو قاضی ان کی گواہی کی جانچ پڑتا کے بعد ارتداد کا حکم لاگو کرے گا، تاہم امام حسن بصریؒ نے چار گواہوں کی شرط عائد کی ہے۔ اس سلسلے میں عورتوں کی گواہی مقبول نہیں ہے۔[25]

تیسرا ضابطہ: مرتد کو توبہ کی پیشکش اور مہلت دی جائے

اس ضابطہ کی تعبیر یوں اختیار کی جاتی ہے"وقع الاختلاف في استتابة المرتدعرضا وإمهال"۔ اس کا مفہوم یہ ہے کہ مرتد کو توبہ کی پیشکش کرنے اور توبہ کی مہلت دینے میں اہلِ علم کا اختلاف ہے۔ اس ضابطہ کو سمجھنے سے پہلے یہ سمجھنا ضروری ہے کہ جب کوئی شخص ارتداد کا ارتکاب کرلیتا ہے تو کیا اس پر ارتداد کا حکم لگانے کے لیے یہ ضروری ہے کہ اس نے باقاعدہ "کفر کی نیت اور قصد" کی ہو یا صرف کفریہ قول یا فعل کو اپنے اختیار اور ارادہ سے ادا کرنا کافی ہے؟ اس مسئلہ میں اہلِ علم کی آراء مختلف ہیں:

1-فقہاء شافعیہ اور ظاہریہ کی رائے یہ ہے کہ صرف کفریہ قول یا فعل میں ارادہ کافی نہیں ہے، بلکہ باقاعدہ کفر کی نیت اور قصد بھی ضروری ہے۔[26]

2-فقہاء حنفیہ، حنابلہ اور مالکیہ کی رائے یہ ہے کہ کسی پر ارتداد کا حکم لاگو کرنے کے لیے صرف اتنا کافی ہے کہ اس نے اپنے اختیار سے کوئی کفریہ قول یا فعل اختیار کیا ہو، خواہ کفر کا قصد اور نیت ہو یا نہ ہو۔[27]

اس اختلاف کو سمجھنے کے بعد یہ سمجھنا چاہیے کہ اگر کوئی شخص ارتداد کا ارتکاب کرلیتا ہے، اس پر ارتداد کا حکم شرعی طریقے سے ثابت بھی ہوجاتا ہے تو کیا اس کو فوری طور پر سزا دی جائےگی یا اس کو توبہ کے لیے مہلت دی جاسکتی ہے؟ کیا اس کی توبہ قبول کی جاسکتی ہے؟اگر ہاں ، تو اس کو توبہ کی مہلت دینا صرف جائز ہے یا واجب؟ اس قسم کے مسائل میں اہلِ علم کی آراء

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[25] ابن قدامہ،المغنی 141/8۔

[26] شمس الدين محمد بن ابی العباس شافعی رملی، نہاية المحتاج (قاہرہ،مصر، دارالفکر 1984ء) 394/7، ابن حزم، المحلی 200/10۔

[27] بہوتی،کشاف القناع 168/6،ابن ہمام ، فتح القدير407/4۔

مختلف ہیں اور انہی کی طرف سے ذکر کردہ ضابطہ میں اشارہ کیا گیا ہے۔ اس سلسلے می اہلِ علم کی تین راء ہیں:

1-فقہاء مالکیہ اورحنابلہ وشافعیہ کا راجح قول یہ ہے کہ مرتد کو توبہ کی پیشکش اور مہلت دینا واجب ہے۔یہی قول ابراہیم نخعی،سفیان ثوری اور امام اوزاعی رحمہم اللہ کی طرف بھی منسوب ہے۔[28] ان حضرات نے توبہ سے متعلق عام قرآنی آیات اور خاص ارتداد کی صورت میں استتابہ کے بارے میں منقول صحابہ کے آثار سے استدلال کیا ہے۔[29]

2-حنفیہ کی رائے یہ ہے کہ مرتد کو توبہ کی پیشکش اور مہلت دینا مستحب ہے،واجب نہیں ہے۔ شافعیہ اور حنابلہ کا بھی ایک قول یہی ہے۔ یہ قول طاووس، حسن بصری رحمہم اللہ کی طرف بھی منسوب ہے۔[30] انہوں ان تمام واقعات وآثار سے استدلال کیا ہے جن میں توبہ کرنے والوں کو تو معاف کیا گیا، لیکن دیگر مرتدین کو استتابہ کے بغیر ہی سزا دےدی گئی۔ صحابہ سے بھی مختلف آراء منقول ہیں، بعض نے عدمِ استتابہ اور بعض نے استتابہ کا قول اختیار کیا ہے، اس لیے دونوں قسم کے اقوال میں تطبیق کی یہی صورت ہے کہ استتابہ مستحب ہے، لیکن واجب نہیں ہے۔

3۔ظاہریہ کی رائے یہ ہے کہ مرتد کو توبہ کی پیشکش اور مہلت دینا ممنوع ہے، بلکہ اسے فورا سزا دی جائے گی۔ یہی قول امام احمدؒ کی طرف بھی منسوب ہے۔ انہوں نے ان قرآنی نصوص سے استدلال کیا ہے جن میں مرتد کے اعمال کے ضائع ہونے اور ہمیشہ کے لیے جہنم کی سزا کاتذکرہ ہے۔[31] اسی طرح جن احادیث میں یہ آیا ہے کہ"جس نے اپنا دین بدلا،اسے قتل کردو" سے بھی انہوں نے استدلال کیا ہے۔[32] لیکن یہ رائے بظاہر دو وجوہات کی بنیاد پر کمزور ہے:

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[28] ابوالحسن علی بن محمد ماوردی، الحاوی الکبیر (قاہرہ،مصر،دارالکتب العلمیہ 1994ء)179/13۔

[29] التوبۃ: 5؛ آل عمران: 89؛ ابوبکر عبد الرزاق بن ہمام صنعانی، مصنف عبد الرزاق (شام، دمشق، المکتب الاسلامی 1980ء) 170/10، حدیث نمبر:18710۔

[30] سرخسی، المبسوط 99/10، ابن قدامہ، المغنی 124/8۔

[31] البقرہ:217۔

[32] احمد بن علی ابن حجر، فتح الباری شرح صحیح البخاری (قاہرہ، مصر، دارالمعرفۃ 1990ء)267/12۔

1۔ان کی پیش کردہ نصوص کا ظاہری مفہوم دیگر ان نصوص کے معارض ہیں جن میں توبہ کے بعد مغفرت کا ذکر آیا ہے ، اس لیے ان نصوص کا ایسا مفہوم مراد لیا جائے جو دیگر نصوص کا معارض نہ ہو کہ اس سے مراد توبہ نہ کر کےارتداد پر مصر رہنے والے شخص کی سزا ہے۔

2۔خودآپﷺ کے عمل سے بھی مرتد کی توبہ کی قبولیت ثابت ہے۔[33] توبہ کی پیشکش کی تعداد میں بھی علماء کی آراء مختلف ہیں، اکثر اہلِ علم کے ہاں تین بار مرتد سے توبہ کرنے کا کہا جائے گا۔

چوتھا ضابطہ: ارتداد یقینی ہواور دلیل موجود ہو

اس ضابطہ کی تعبیر یوں ہے"یجب التیقن من الارتداد مع قیام الدلیل الشرعي"۔ اس کا مفہوم یہ ہے کہ کسی شخص پر ارتداد کا حکم لگانے کے لیے یہ ضروری ہے کہ ارتداد کا یقین ہوجائے اور اس پر باقاعدہ شرعی دلیل موجود ہو۔ ارتداد ایک عظیم جرم ہے، جس کا اثر نہ صرف مرتد کے معاشرتی حقوق اور معاملات پر پڑتا ہے، بلکہ اس پر دائرہ اسلام سے خارج ہونے کا اور سخت ترین سزا کا اطلاق بھی ہوتا ہے۔ اس لیے اس سلسلے میں مکمل احتیاط اور اعتدال سے کام لینا نہایت ضروری ہے، کیونکہ کسی مسلمان پر کفر کا حکم لگانے انتہائی خطرہ کا باعث اور بڑا گناہ ہے۔ اس سلسلے میں مندرجہ ذیل نکات ذہن میں رکھنا ضروری ہیں:

1۔یہ ضروری ہے کہ جس قول یا فعل کی بنیاد پر ارتداد کا حکم لاگو کیا جارہا ہے وہ یقینی طور پر کفریہ قول یا کفریہ فعل ہو، اگر اس کے کفریہ ہونے یا نہ ہونے میں شک ہو تو اس کی بنیاد پر ارتداد کا حکم لاگو نہیں کیا جائے گا۔[34]

2۔ایسا قول یا فعل جس میں کفر اور غیر کفر،دونوں کا احتمال اور تاویل ممکن ہو تو اس کی بنیاد پر بھی کفر کا حکم لاگو نہیں کیا جائے گا، بلکہ صاحبِ قول وفعل سے وضاحت طلب کی جائے گی۔[35]

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[33] ابوعبد الرحمن احمد بن شعیب، سنن نسائی (قاہرہ، مصر، دارالمعرفة 1999ء) 107/7، حدیث نمبر:2869۔
[34] زین الدین بن ابراہیم ابن نجیم، البحر الرائق (عمان،دارالکتاب الاسلامی 1999ء) 134/5۔
[35] عبد الرحمن بن محمدشیخی زادہ، مجمع الأنهر (قاہرہ،مصر، دارالکتب العلمیة، 1998ء) 688/1۔

3۔ گناہ کے مرتکب پر ارتکابِ گناہ کی وجہ سے ارتداد کا حکم لاگو نہیں کیا جائےگا، خواہ صغیرہ گناہ ہو یا کبیرہ، تاہم اگر کسی قطعی حرام کو حلال سمجھ کر گناہ کا ارتکاب کیا جائے تو اس پر کفر کا حکم لاگو کیا جائےگا۔[36]

پانچواں ضابطہ: ملزم کو عدالت میں حاضر کیا جائے

اس ضابطہ کے الفاظ یوں ہیں"یلزم حضور المتھم بالردة المحاکمة"۔ اس کا مفہوم یہ ہے کہ جس شخص پر یہ الزام عائد ہوجائے کہ اس نے ردت کا ارتکاب کیا ہے تو اس پر جرم کو ثابت کرنے اور کسی بھی قسم کا فیصلہ کرنے کے لیے اسے حاکم/قاضی کے سامنے یعنی عدالت میں پیش کیا جائےگا اور عدالت خود ہی شرعی طریقے کے مطابق جرم کے اثبات اور فیصلہ صادر کرے گی۔

اس قسم کی سزا کے نفاذ کو اسلام میں حاکم اور قاضی کے سپرد کیا گیا ہے ، کیونکہ ایک تو اس میں فرد کی مصلحت ہے کہ اس کی جان،مال اور حقوق کی حفاظت ہوسکے ،دوسرا اگرہر شخص کو دوسرے پر سزا کے اطلاق سے معاشرے فتنہ وفساد اوربدامنی پھیلتی ہے۔ علامہ ابن فرحونؒ لکھتے ہیں: وَبِالْجُمْلَةِ فَإِنَّ إقَامَةَ الْحُدُودِ لَا تَكُونُ لِكُلِّ أَحَدٍ بَلْ وَلَا لِكُلِّ وَالٍ ؛ لِمَا تُؤَدِّي إلَيْهِ الْمُسَارَعَةُ إلَى إقَامَةِ الْحُدُودِ مِنْ غَيْرِهِمْ مِنْ الْفِتْنَةِ وَالتَّهَارُجِ. [37] خلاصہ یہ ہے کہ حدود قائم کرنا ہر کسی کے اختیار میں نہیں ہے، بلکہ ہر والی کے اختیار میں بھی نہیں ہے، کیونکہ حدود کے قیام میں یوں سرعت فتنہ اور فساد کا باعث بنتی ہے۔

2.2 ارتداد کی سزااور اثرات

اسلام میں ارتداد کی سزا :اسلام سے نکلنے والے شخص کے لیے شریعت کی طرف سے بیان کردہ سزا دو قسم کی ہے۔ اخروی سزا اور دنیوی سزا

1۔اخروی سزا: جہاں تک پہلی قسم کی سزا (اخروی سزا)کی بات ہے تو اس سلسلے میں باری تعالیٰ کا ارشاد ہے:

{وَمَنْ يَرْتَدِدْ مِنْكُمْ عَنْ دِينِهِ فَيَمُتْ وَهُوَ كَافِرٌ فَأُولَئِكَ حَبِطَتْ أَعْمَالُهُمْ فِي الدُّنْيَا وَالْآخِرَةِ وَأُولَئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ}[38]

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[36] ابن ہمام،فتح القدیر،92/1۔

[37] ابراہیم بن علی ابن فرحون، تبصرة الحکام فی أصول الأقضیة ومناہج الأحکام (قاہرہ، مصر،مکتبہ الکلیات الازہریہ، 1986ء) 1/ 26-

[38] البقرة: 217۔

اور تم میں سے جو لوگ اپنے دین سے پلٹ جائیں اور کفر کی حالت میں مرجائیں، ان کے اعمال دنیا اور آخرت میں ضائع ہوجائیں گے اور یہ لوگ جہنمی ہیں، جو ہمیشہ ہمیشہ جہنم میں رہیں گے۔

اس کے علاوہ سورہ آلِ عمران[39]،سورہ مائدہ[40] اور سورہ الزمر[41] میں بھی تقریبا اسی جیسی سزا کی طرف اشارہ کیا گیا ہے۔ قرآنی آیات کو سامنے رکھنے سے دو باتیں معلوم ہوتی ہیں:

اول حبطِ اعمال یعنی مرتد نے حالتِ اسلام میں جو بھی اچھا عمل کیا ہے وہ ضائع اور بےکار ہوجائےگا، جس پر اسے کسی قسم کی جزاء اور ثواب نہیں ملےگا۔ اہلِ علم کا اس بارے میں اختلاف ہے کہ کیا محض ارتداد سے ہی مرتد کے اعمال ضائع ہوجائیں گے یا موت تک ردت پر قائم رہنے سے اعمال ضائع ہوں گے؟فقہاء حنفیہ اور مالکیہ کی رائے یہ ہے کہ جیسے ہی انسان مرتد ہوجاتا ہے،اس کے سارے اعمال ضائع ہوجائیں گے، کیونکہ قرآن کی آیات میں اس بارے میں کوئی قید نہیں ہے، بلکہ عام ہیں۔جبکہ فقہاء شافعیہ اور حنابلہ کی رائے یہ ہے کہ اگر مرتد موت تک ارتداد پر قائم رہےگا تو اس کے اعمال ضائع ہوجائیں گے، ورنہ اگر توبہ کرکے دوبارہ اسلام لےآیا تو اس کے اعمال ضائع نہ ہوں گے۔[42]

دوم خلود فی النار یعنی اسلام سے روگردانی کرکے کفر اختیار کرنے اور اسی پر موت تک قائم رہنے والا ہمیشہ کے لیے جہنم میں رہےگا ۔

2-دنیوی سزا:جہاں تک مرتد کی دنیوی سزا کی بات ہے تو اس سلسلے میں قرآن میں کوئی صریح اور واضح حکم موجود نہیں ہے،لیکن بعض اہلِ علم نے بعض آیات سے ارتداد کی سزا پر استدلال کیا ہے، جس کا حاصل یہ ہے:

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[39] آلِ عمران: 86،88،90۔
[40] مائدہ:5۔
[41] الزمر:65۔
[42] ابن نجیم، البحر الرائق 137/5؛ محمد عیش، منح الجلیل 222/9؛ نووی، المجموع المہذب 6/3۔

1۔بعض اہلِ علم نے آیتِ محاربہ[43]سے قتلِ مرتد کی سزاپر استدلال کیا ہے۔امام بخاریؒ نے مرتد کی سزا سے متعلق باب کے شروع میں اسی آیت سے استدلال کیا ہے۔[44]اسی طرح علامہ طبریؒ نے اس بارے میں مختلف روایات نقل کی ہیں کہ یہ آیت کن کے بارے میں نازل ہوئی۔ ایک روایت یہ بھی ہے کہ یہ آیت اہلِ عرینہ کے ان لوگوں کے بارے میں نازل ہوئی،جو مرتد ہوگئے تھے،لہذا ان کو اسی آیت کی بنیاد پر قتل کردیا گیا تھا۔[45]

2-قتلِ مرتد پر شمس الائمہ امام سرخسیؒ نے سورہ فتح کی ایک آیت سے استدلال کیا ہے۔ باری تعالیٰ کا ارشاد ہے:

{قُلْ لِلْمُخَلَّفِينَ مِنَ الْأَعْرَابِ سَتُدْعَوْنَ إِلَى قَوْمٍ أُولِي بَأْسٍ شَدِيدٍ تُقَاتِلُونَهُمْ أَوْ يُسْلِمُونَ}[46]

آپ کی رائے یہ ہے کہ یہ آیت مرتدین کے بارے میں نازل ہوئی ہے کہ ان سے اس وقت تک قتال کا حکم ہے جب تک وہ اسلام نہیں لے آتے۔ چنانچہ آپ لکھتے ہیں: والأصل في وجوب قتل المرتدين قوله تعالى {أو يسلمون}، قيل: الآية في المرتدين. [47]

جہاں تک احادیث وآثار کی بات ہے تو اس بارے میں کئی مرفوع اور موقوف احادیث موجود ہیں، تاہم یہاں صرف دو اہم احادیث کا تذکرہ کافی ہے، تفصیل کے لیے مفتی محمد شفیعؒ کا رسالہ"طریق السدادفی عقوبة الرتداد"دیکھیں۔[48]

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[43] إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِنْ خِلَافٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ذَلِكَ لَهُمْ خِزْيٌ فِي الدُّنْيَا وَلَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ} (المائدة: 33)

[44] محمد بن اسماعیل الجعفی بخاری،صحیح البخاری(قاہرہ،مصر،دارالکتب العلمیة 2000ء) ص: 333۔

[45] ابوجعفر محمد بن جریر طبری، تفسیر الطبری (بیروت، لبنان،مؤسسة الرسالة ، 2000ء)10/ 244۔

[46] الفتح: 16۔

[47] سرخسی، المبسوط 10/ 98۔

[48] مفتی محمد شفیع، جواہر الفقہ (کراچی، پاکستان، مکتبہ دارالعلوم کراچی 2012ء) 130/6۔

1-حضرت ابن عباس رضی اللہ عنہ سے روایت کہ آپﷺ نے فرمایا: مَنْ بَدَّلَ دِينَهُ فَاقْتُلُوهُ. [49] جس نے اپنا دین تبدیل کیا،اسے قتل کردو۔

2۔حضرت عبداللہ ابن مسعود رضی اللہ عنہ نے آپﷺ کا ارشاد نقل کیا ہےکہ آپ نے فرمایا: لَا يَحِلُّ دَمُ امْرِئٍ مُسْلِمٍ يَشْهَدُ أَنْ لَا إِلَهَ إِلَّا اللهُ وَأَنِّي رَسُولُ اللهِ إِلَّا بِإِحْدَى ثَلَاثٍ النَّفْسُ بِالنَّفْسِ وَالثَّيِّبُ الزَّانِي وَالْمَارِقُ مِنَ الدِّينِ (وَالْمُفَارِقُ لِدِينِهِ) التَّارِكُ الْجَمَاعَةَ (لِلْجَمَاعَةِ)[50] جو مسلمان یہ گواہی دے کہ اللہ کے سوا کوئی معبود نہیں اور میں اللہ کا رسول ہوں، اس کا خون ان تین صورتوں کے علاوہ کسی صورت حلال نہیں: جان کےبدلے جان، شادی شدہ زنا کرنے والا،اور دین چھوڑنے والا اور اپنی جماعت سے الگ ہونے الا۔

ان دلائل کی بنیاد پر جمہور اہلِ علم کی رائے یہ ہے کہ اگر مرتد نے توبہ کرلی تواس کی توبہ قبول کرلی جائےگی، لیکن اگر وہ ارتداد پر ہی قائم رہا اور توبہ کی مہلت ملنے کے باوجود اسلام نہ لایا تو اس کی سزا قتل کی ہے۔اس نکتہ پر علامہ نووی ، علامہ ابن رشد،علامہ ابن حجر،علامہ ابن تیمیہ اور علامہ ابن المنذر وغیرہ نے اجماع نقل کیا ہے۔[51] اس حد تک اتفاق کے علاوہ مندرجہ ذیل تین اہم مسائل میں اہلِ علم کا اختلاف رہا ہے:

1-مرتد کو توبہ کی مہلت دی جائےگی یا نہیں؟ کیا یہ ضروری ہے یا مستحب یا صرف جائز؟کتنی بار اور کتنے عرصے تک توبہ کی مہلت دی جائےگی؟ اس کی کچھ تفصیل پہلے ذکر کی جاچکی ہے۔

2-مرتد کو قتل کرنا حد ہے یا تعزیر؟اس سلسلے میں جمہور اہلِ علم کی رائے یہ ہے کہ مرتد کی سزا حد ہے، جس کو ترک کرنا،یااس میں کسی بھی قسم کی تبدیلی کرنا جائز نہیں ہے۔[52] جبکہ فقہاء حنابلہ کی ایک روایت اور شیعہ امامیہ کی رائے یہ ہے کہ مرتد کی قتل کی سزا تعزیر ہے،جو آپﷺ نے بطورِ حاکم، سیاستِ شرعیہ اور مصلحت کی بنیاد پر جاری فرمائی تھی، جس میں حاکم اپنے اجتہاد سے تغیر

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[49] بخاری، صحیح البخاری، 128/1، حدیث نمبر: 3017۔

[50] بخاری، صحیح البخاری6/1، حدیث نمبر: 6878۔

[51] یحی بن شرف نووی، المنہاج (بیروت،لبنان،دارابن حزم،2011ء) 208/12۔ محمد بن احمد ابن رشد قرطبی، بدایة المجتهد (قاہرہ،مصر،دارالکتب العلمیہ 1990ء)242/4،ابن حجر، فتح الباری58/12۔

[52] شافعی، الأم 168/7؛ نووی، المجموع 100/20۔

وتبدل کرسکتا ہے، کیونکہ اگر یہ سزا حد ہوتی تو توبہ کی وجہ سے معاف نہ ہوتی۔[53] جہاں تک حنفیہ کی رائے ہے تو ان کے ہاں ارتداد کی سزا کا ذکر حدود میں نہیں ہے، بلکہ سیر میں ہے، اس سے بعض معاصر اہلِ علم نے یہ نتیجہ اخذ کیا کہ کہ ارتداد کی سزا حنفیہ کے ہاں حد نہیں، بلکہ تعزیر ہے، لیکن یہ درست نہیں ہے۔حنفیہ کے ہاں ارتداد کی سزا حد ہی ہے، اس پر علامہ شامیؒ نے اپنے رسالہ"تنبیہ الولاۃ والحکام" میں تفصیل سے لکھا ہے کہ اس میں حد کی تمام صفات پائی جاتی ہیں اور ان اعتراضات کے جوابات بھی لکھے ہیں جو اس سزا کے حد ہونے پر کیے جاتے ہیں۔ڈاکٹر محمد مشتاق صاحب نے اس رسالہ کے انگریزی ترجمہ کے مقدمہ میں بھی اس پر لکھا ہے۔

3-تیسرا اختلافی نکتہ یہ ہے کہ کیا مرد اور عورت کی سزا الگ الگ ہے یا ایک؟ اس بارے میں جمہور اہلِ علم کی رائے یہ ہے کہ عورت کی سزا بھی مرد کی طرح قتل ہی ہے، یہ رائے حضرت ابوبکرصدیق اور حضرت علی رضی اللہ عنہ کی طرف بھی منسوب ہے۔ان حضرات ان ان عمومی احادیث اور دلائل سے استدلال کیا ہے،جن میں مرتد کی سزا قتل بیان ہوئی ہے۔[54] حنفیہ کی رائے یہ ہے کہ عورت کو قتل نہیں کیا جائےگا، بلکہ اسے قید میں ڈال دیا جائےگا،یا توبہ کر کے اسلام لے آئے یا ہمیشہ کے لیے قید میں ہی رہے۔[55]اس کی بنیادی وجہ یہ ہے کہ حنفیہ کے ہاں ارتداد بذات خود"حرابہ" ہے اور حرابہ کی سزا میں عورت کو قتل نہیں کیا جاتا ہے۔ اس کے علاوہ کئی دلائل سے بھی استدلال کیا جاتا ہے، مثلا ایک دلیل وہ عمومی حدیث ہے جس میں آپﷺ نے عورتوں کے قتل سے منع فرمایا ہے۔[56]دوسرا مرتد کی سزا سے متعلق حدیث حضرت ابن عباس رضی اللہ عنہ سے مروی، جبکہ خود ان کی رائے یہ ہے کہ عورت کو قتل نہیں کیا جائےگا۔ تفصیل کے لیے فقہی کتب دیکھی جاسکتی ہیں۔

مرتد کی شرعی سزا پر معاصر مفکرین کی آراء مختلف ہیں، کچھ حضرات قتلِ مرتد کا انکار کرتے ہیں، جبکہ کچھ حضرات بعض خاص صورتوں پر ہی قتل

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[53] ابن قدامہ، المغنی8/9۔
[54] ابن رشد، بدایۃ المجتهد462/2؛ ابن قدامہ، المغنی 123/8۔
[55] سرخسی،المبسوط109/10۔
[56] محمد بن عیسی ترمذی، سنن الترمذی (بیروت-لبنان، دار احیاء التراث العربی،1990ء) 4/ 136، حدیث نمبر: 1569۔

کی سزا تجویز کرتے ہیں،لیکن جمہور اہلِ علم کی رائے وہی ہے جو اوپردلائل کی روشنی میں بیان ہوچکی ہے،مزید تفصیل کا یہ موقع نہیں ہے۔

ارتداد کے دیگر اثرات :مرتد کی اخروی اور دنیوی سزا کے علاوہ، اس کے مال اور دیگر حقوق پر بھی ارتداد کی وجہ سے اثر پڑتا ہے، جن کی تفصیلات کو مندرجہ ذیل نکات میں بطورِ خلاصہ پیش کیا جائےگا: 1-مرتد کے مال پر اثر، 2-مرتد کے تصرفات پر اثر، 3-مرتد کی میراث، 4-مرتد کی زوجیت پر اثر.

1-مرتد کے مال پر اثر: ارتداد کی وجہ سے مرتد کے مال پر کیا اثرپڑتا ہے؟ اس سوال کے جواب میں اہلِ علم کی آراء مختلف ہیں۔ جمہور علماء،حنفیہ میں سے صاحبین اور امام شافعی کا ایک قول یہ ہے کہ مرتدکی توبہ اور موت تک اس کے مال پر کوئی اثر نہیں پڑتا، بلکہ اس کا مالک بدستور اس کی ملکیت میں رہےگا، کیونکہ ارتداد سے نفس کی معصومیت اور محفوظ ہونا ختم ہوتا ہے، لیکن ملکیت پر فرق نہیں پڑتا،لہذا جس طرح اصل کافر کی ملکیت ہے،اسی طرح مرتد کی ملکیت بھی ہے۔ اگر اس نے توبہ کرلی تو ٹھیک، ورنہ موت تک ارتداد پر قائم رہنے سے اس کا مال "مالِ فیئ" شمار کیا جائےگا اور حاکم اپنی صوابدید سے جہاں چاہے،خرچ کرسکتا ہے۔[57]

بعض علماء کی رائے یہ ہے کہ مرتد کا مال اسی وقت "مال فئی"ہوجائےگا۔[58]
امام ابوحنیفہ کا قول اورامام شافعی ومالک کا راجح قول یہ ہے کہ مرتد کا مال اس کی ملکیت سے عارضی طور پر نکل جائےگا،اگر اس نے توبہ کرلی تو دوبارہ اس کی ملکیت میں آجائےگا، ورنہ "مالِ فئی"قراردیا جائےگا۔[59]

2-مرتد کے تصرفات پر اثر: جہاں تک مرتد کے مالی معاملات اور تصرفات کی بات ہے تو اس سلسلے میں بھی اہلِ علم کی آراء مختلف ہیں، بعض کی رائے میں اس کے تصرفات درست ہیں، بعض کے ہاں باطل اور بعض کے ہاں موقوف ہیں، تاہم اسلسلے میں حنفیہ کی رائے کچھ تفصیلی ہے۔ ان کے ہاں عورت کی ملکیت پر ارتادا کی وجہ سے کوئی اثر نہیں پڑتا، تاہم مرد کے ارتداد کے بعد اس کے تصرفات چار قسم کے ہیں:

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[57] سمرقندی،تحفۃ الفقہاء310/3،ابن قدامہ،المغنی 128/8۔
[58] ابراہیم بن علی شافعی شیرازی،المہذب (بیروت، لبنان، دارالفکر، 1990ء) 223/2۔
[59] سرخسی، المبسوط 104/10،شربینی،مغنی المحتاج 142/4۔

1-نافذ تصرفات: وہ اعمال جن میں ملکیت کی ضرورت نہیں ہوتی، جیسے طلاق اور عتاق وغیرہ، البتہ ارتداد سے زوجیت پر کیا اثر پڑتا ہے،اس کا ذکر آگے آرہا ہے۔

2-باطل تصرفات: وہ اعمال جن کی بنیاد دین اور ملت ہے، جیسے نکاح اور ذبیحہ۔ مرتد کے ایسے اعمال باطل ہوں گے۔

3-موقوف تصرفات: وہ اعمال جو مساوات اور برابری کے متقاضی ہوتے ہیں، جیسے شرکتِ مفاوضہ وغیرہ۔

4-اختلافی تصرفات: وہ تمام مالی معاملات جن کا تعلق ملکیت اور مال کے ساتھ ہیں، جیسے خریدوفروخت وغیرہ۔امام ابوحنیفہؒ کے ہاں یہ اعمال موقوف رہیں گے، جبکہ صاحبین کے ہاں نافذ ہوں گے۔ [60]

3-مرتد کی میراث: جب مرتد کا کفر کی حالت میں انتقال ہوجاتا ہے تو اس کے مال سے قرضے اور اس کی اولاد وغیرہ کا نان ونفقہ دیا جائے گا، کیونکہ ارتداد کی وجہ سے اس پر لازم شدہ حقوق ضائع نہیں ہوتے۔ میراث کے سلسلے میں دو نکات ذہن میں رکھنا ضروری ہیں:

1-اس بات پر تقریبا اہلِ علم کا اتفاق ہے کہ مرتد کی زندگی میں اگر اس کے رشتہ داروں میں سے کسی مسلمان کا انتقال ہوتا ہے تو مرتد کو اس کی وراثت میں سے کچھ بھی نہیں ملے گا۔، کیونکہ اس بات پر واضح احادیث موجود ہیں کہ کافر ، مسلمان کا وارث نہیں بن سکتا۔[61] اسی طرح مرتد کو کسی کافر رشتہ دار سے بھی بطورِ میراث کچھ نہیں ملے گا۔[62]

2-اگر مرتد کا کفر کی حالت میں انتقال ہوجاتا ہے تو کیا اس کا مال اس کے مسلمان ورثاء کو ملے گا یا "مالِ فئی"بن کر بیت المال میں جائےگا؟ اس سلسلے میں اہلِ علم کی آراء مختلف ہیں۔امام مالک، امام شافعی اور امام احمدؒ کی رائے یہ ہے کہ اس کا مال "مال فئی"بن کر بیت المال میں جائےگا، اس کے کسی مسلمان

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[60] وہبہ زحیلی، الفقہ الإسلامي وأدلته (بیروت، لبنان، دارالفکر، 2010ء) 190/6۔
[61] ترمذی، سنن الترمذی 4/ 423، حدیث نمبر: 2107 ۔
[62] سرخسی، المبسوط 100/10۔

وارث کو نہیں ملےگا۔[63]،جبکہ فقہاء حنفیہ کی رائے یہ ہے کہ عورت کا مال تو سارا اس کے مسلمان ورثاء کو ملےگا، جبکہ مرد مرتد نے حالتِ اسلام میں جو مال کمایا ہے وہ اس کے مسلمان ورثاء کو شرعی اصولوں کے مطابق ملےگا اور جو مال اس نے ارتداد کے بعد کمایا ہے،اس بارے میں امام ابوحنیفہؒ کی رائے یہ ہے کہ وہ بیت المال میں جائےگا، جبکہ صاحبین کی رائے یہ ہے کہ وہ بھی مسلمان ورثاء کو ملےگا۔[64]

4-مرتد کی زوجیت پر اثر: مرتد نےچونکہ دین کے سلسلے میں فساد اوربگاڑ کو اختیار کیا ہے ، اس لیے ارتداد کی وجہ سےاس کی زوجیت کے تعلق پر بھی اثرپڑتا ہے۔ اس قسم کے مسائل اور ان میں اہلِ علم کی آراء اور دلائل کافی تفصیل طلب ہے۔ مثلا میاں بیوی میں سے کسی ایک کے ارتداد کے اثرات،دونوں کی یکبارگی ارتداد کے اثرات، رخصتی سے قبل اور رخصتی کے بعد ارتداد کا فرق اور ارتداد کی وجہ سے واقع ہونے والی جدائی "طلاق" ہے یا "فسخِ نکاح"؟ یہاں ان مسائل کی تفصیل کا موقع نہیں ہے، تاہم مختصرا یہ ذہن میں رکھنا ضروری ہے کہ اہلِ علم نے کئی قرآنی آیات اور احادیث سے استدلال کرکے یہ نتیجہ نکالا ہے جو شخص اسلام سے پلٹ جاتا ہے اسی وقت اس کی زوجیت منقطع ہوکر میاں بیوی کے درمیان فرقت ہوجائےگی، جس کے بعد کسی مسلمان بیوی کے لیے مرتد شوہر کے ساتھ یا کسی مسلمان مرد کے لیے کسی مرتدہ عورت کے ساتھ زوجیت کے رشتہ کے ساتھ رہنا جائز نہیں ہے۔[65]

2.3 ارتداد اور وضعی قوانین

1-ارتداد اور بین الاقوامی انسانی حقوق: اقوام متحدہ کے عالمی منشور برائے انسانی حقوق میں کسی بھی دین کو چھوڑنے اور کسی بھی دوسرے دین کو اختیار کرنے کی مکمل آزادی دی گئی ہے اور اسے حریتِ فکر اور ضمیر کی آزادی کا حق قراردیا ہے، چنانچہ دفعہ نمبر 18میں ہے کہ:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community

[63] محمد بن احمد کلبی غرناطی، القوانین الفقهية (قاہرہ،مصر،دارالکتب العلمیہ1999ء) 370؛ نووی، المجموع 237/19

[64] سرخسی، المبسوط 100/10۔

[65] امام مالک بن انس، المدونة الكبرى (قاہرہ،مصر،دارالکتب العلمیہ1990ء) 220/2؛ ابن حزم،المحلی449/9۔

> with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.[66]

> ہر انسان کو فکر اور ضمیر کی آزادی کا اور آزادیِ مذہب کا مکمل حق حاصل ہے۔ اس حق میں مذہب یا عقیدے کو تبدیل کرنے ، اعلانیہ یا نجی طور پر، تنہا یا دوسروں کے ساتھ مل جل کر عقیدے کی تبلیغ،عبادت اور مذہبی رسمیں پوری کرنے کی آزادی بھی شامل ہے۔

اس منشور کی مذکورہ دفعہ کلی طور پر اسلامی قانون کے خلاف ہے، کیونکہ اس میں مذہب کی تبدیلی پر سزا تودرکنار، اس کو باقاعدہ انسان کا حق قراردیاگیا ہے۔ اس اختلاف اور ٹکراؤ کی پشت پر دو بڑی بنیادیں موجود ہیں: ایک یہ کہ اقوام متحدہ کے عالمی منشور کا ماخذ اور منبع انسانی سوچ اور عقلِ مجرد ہے،لہذا جن چیزوں کو ان کے اجتماعی عقل ودانش نے قبول کیا، انہیں حق کا نام دے کر قانون کی شکل دےدی گئی، اسی لیے "تبدیلی مذہب" کو بھی انسانی حق قراردیا گیا، جبکہ اسلامی قانون کے اولین مآخذ قرآن وسنت یا بالفاظِ دیگر عقل سے اعلی درجہ کی چیز "وحی الہی" ہے۔وحی الہی کو چھوڑ کر صرف عقل کی بنیاد پر کسی بھی شرعی قانون میں تغیر وتبدل یااسے منسوخ نہیں قرار دیا جاسکتا۔ لہذا"تبدیلی مذہب" کے حوالے سے وہی قانون رہےگا جو اسلام نے بذریعہ وحی بتلایا ہے، اس میں انفرادی یا اجتماعی دانش کی بنیاد پر تغیر وتبدل کی اجازت نہیں ہے۔

دوسری بنیاد یہ ہے کہ اہلِ کلیسا کے ظلم وجبر کے رد عمل کے طور پر بھی اور استعماری مفادات کے حصول کے لیے بھی اہلِ یورپ نے مذہب کو معاشرتی نظام اور سیاسی معاملات سے بالکل الگ کردیا، چنانچہ عیسائیت کے ساتھ یہی ہوا کہ ان کے دین دار طبقہ کو معاشرہ اور سیاست سے کاٹ کر گوشہ نشین کرکے رہبانیت میں ڈال دیا گیا۔ اسی لیے حکومت اور قوانین کی بناء میں مذہب کو بالکل نظر انداز کردیا گیا اور دیگر نتائج کی طرح تبدیلی مذہب میں آزادی بھی قانون کا حصہ بن گئی،لیکن اس کے بالمقابل اسلام رہبانیت کی نفی کرتا ہے۔ اور اسلامی تعلیمات کے مطابق مذہب کا سیاسی معاملات کے ساتھ گہرا تعلق ہےاور سیاست

[66] "Universal Declaration of Human Rights," (1948), art. 18 http://www.jus.com.

دین کا حصه بن کر معاشرے کی ضروریات اور مشکلات کا حل پیش کرے گی۔ اسی لیے سیاسی معاملات ہوں،قانون سازی کا کوئی مرحله ہو یا معاشرتی نظام کی بناء رکھنی ہو، بہرصورت اسلامی قوانین کو مدنظر رکھنا ضروری ہےاور قرآن وسنت کے کسی بھی قانون کی خلاف ورزی کرنے کی اجازت نہیں ہے، لہذا تبدیلی مذہب میں آزادی کی اجازت اسلام نے نہیں دی اور نه ہی اس آزادی کو کسی بھی مسلمان ریاست کے قانون کا حصه بنانے کی اجازت دی جائے گی۔

اقوام متحدہ کے عالمی منشور کے مذکورہ دفعه سے متعلق دو سوالات نہایت اہم ہیں:

1. کیا تبدیلی مذہب کو حریت فکر وتعبیر کهه کر انسانی حق قراردیا جاسکتا ہے؟ اور انسان کو اس کی کھلی آزادی ہونی چاہیے؟
2. تبدیلی مذہب پر سزائے موت خلافِ عقل یا ناقابلِ عمل ہے؟ کیا سزائے موت کی موجودہ دور میں کوئی قابلِ عمل صورت نہیں ہے؟ کسی بھی جرم پر ایسی سزا نہیں دی جاسکتی؟

1-کیا تبدیلی مذہب، حریت فکر اور انسانی حق ہے؟

جہاں تک پہلے سوال کا تعلق ہے که "تبدیلی مذہب"کو حریتِ فکر اور انسانی حق قراردینا عقل اور دانش کے مطابق ہے یا نہیں؟ تو اس سلسلے میں کچھ گزارشات ذہن میں رکھنا ضروری ہیں:

1-اگرقرآن وسنت کی نصوص میں غور کیا جائے تو ہمارے سامنے دو قسم کی نصوص آتی ہیں: ایک قسم ان نصوص کی ہے جن میں مذہب اور دین کے سلسلے میں مکمل آزادی دی گئی ہے اور اس سلسلے میں جبر واکراہ کی نفی کی گئی ہے، جیسے باری تعالیٰ کا ارشاد ہے:

{لَا إِكْرَاهَ فِي الدِّينِ قَدْ تَبَيَّنَ الرُّشْدُ مِنَ الْغَيِّ فَمَنْ يَكْفُرْ بِالطَّاغُوتِ وَيُؤْمِنْ بِاللَّهِ فَقَدِ اسْتَمْسَكَ بِالْعُرْوَةِ الْوُثْقَى لَا انْفِصَامَ لَهَا وَاللَّهُ سَمِيعٌ عَلِيمٌ}[67]

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[67] البقرة: 256.

{لَسْتَ عَلَيْهِمْ بِمُصَيْطِرٍ}[68]

{أَفَأَنْتَ تُكْرِهُ النَّاسَ حَتَّى يَكُونُوا مُؤْمِنِينَ}[69]

دوسری قسم کی نصوص وہ ہیں جن میں وحی کی حاکمیت کا تذکرہ ہے اور یہ حکم دیا گیا ہے کہ وحی کے فیصلے کے بعد مؤمنین کے لیے انسانی منشا پر عمل کرنے اور وحی کو چھوڑنے کی اجازت نہیں ہے اور انہی نصوص میں سے بعض سے ارتداد کی سزا کا بھی علم ہوتا ہے۔

وَمَا كَانَ لِمُؤْمِنٍ وَلَا مُؤْمِنَةٍ إِذَا قَضَى اللَّهُ وَرَسُولُهُ أَمْرًا أَنْ يَكُونَ لَهُمُ الْخِيَرَةُ مِنْ أَمْرِهِمْ وَمَنْ يَعْصِ اللَّهَ وَرَسُولَهُ فَقَدْ ضَلَّ ضَلَالًا مُبِينًا}[70]

بظاہر نصوص کی یہ دو اقسام ایک دوسرے سے ٹکراتی اور ایک دوسرے کی مخالفت کرتی نظر آتی ہیں،لیکن یہ غلط فہمی ہے جو اس لیے پیدا ہوتی ہے کہ دونوں قسم کی نصوص کو ایک ہی محل وموقع کے ساتھ متعلق کردیاجاتا ہے،حالانکہ ان دونوں قسم کی نصوص کا تعلق دو الگ الگ مواقع ومحل اور الگ احوال کے ساتھ ہیں:

پہلی قسم کی نصوص کا تعلق ان لوگوں کے ساتھ ہے جو ابھی تک ایمان نہیں لائے، نہ ہی انہوں نے اسلام کے اوامر ونواہی اور احکام کو ماننے کا التزام کیا ہے، ایسے لوگوں کے بارے میں یہی حکم ہے کہ ان کو صرف اسلام کی دعوت، تذکیر اور نصیحت ہی کی جاسکتی ہے، ان پر ایمان لانے کے لیے کسی بھی قسم کا جبر واکراہ کی اجازت نہیں ہے۔

نصوص کی دوسری قسم ان لوگوں کے بارے میں بات کرتی ہے جو لوگ ایمان لے آئے ہیں اور دینِ اسلام کو مان کر ، اس کے احکام کا التزام کرلیا ہے۔چنانچہ اس قسم کی نصوص میں مؤمن اور مؤمنہ کو مخاطب کیا گیا ہے اور اس پر وحی کے مطابق عمل کرنے کو لازم اور دینِ اسلام سے پلٹ جانے کی صورت میں سزا کے اطلاق کا حکم دیا گیا ہے، تاکہ دینِ اسلام کی نظریاتی سرحدوں کی حفاظت ہوسکے اور اس کو منافقین اور شرپسند ایک کھلواڑ نہ بنادے۔

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[68] الغاشية: 22۔
[69] يونس: 99۔
[70] الأحزاب: 36۔

خلاصہ یہ ہے کہ اگر کوئی شخص اصلا ہی کافی ہے تو اس پر اسلام لانے کے لیے کسی بھی قسم کی زبردستی کرنا جائز نہیں ہے، نہ ہی اس کے کفر پر رہنے پر اسے کسی قسم کی سزا دی جاسکتی ہے، یہ اس کا اپنا اختیار ہے، چاہے تو اسلام قبول کرے، چاہے تو قبول نہ کرے۔ لیکن اگر کسی کافر نے اپنے اختیار اور رضا سے ایک مرتبہ اسلام کو قبول کرلیا، اس پر مسلمانوں کے ہی احکام لاگو ہوں گے، اگر وہ اسلام سے پلٹتا ہے تو اسے شکوک وشبہات دور کرنے کی اور توبہ کی مہلت دی جائے گی، ورنہ اس پر ارتداد کی سزا کا اطلاق ہوگا۔

وحی کے ذریعے جو ان دونوں احوال کی تفریق کی گئی ہے، اس کی تائید خود عقل اور عصری قوانین سے بھی ہوتی ہے، کیونکہ جس شخص نے کسی قانون کا سرے سے التزام ہی نہیں کیا، اس پر اس قانون کی مخالفت کا اطلاق یا سزا لاگو نہیں کی جاتی ، لیکن ایک مرتبہ قانون کا التزام کرنے کے بعد اگر اس کی مخالفت کی جاتی ہے تو تقریبا تمام عصری قوانین میں اس کے لیے سزا تجویز کی گئی ہے۔ اس کے علاوہ بھی معاصر قوانین میں اس کی بہت سی مثالیں پائی جاتی ہیں، مثلا:

1۔اگر کوئی آدمی اپنے اختیار آزادانہ الیکشن کے ذریعے کسی حکومت منتخب کر کے ووٹ دےدیا اور حکومت نے اقتدار سنبھالنے کے بعد ایک قانون بنایا تو اس آدمی پر اس قانون کا لازم ہی سمجھا جاتا ہے۔ اگر وہ آکر کہتا ہے کہ مجھے آزادی ہے کہ میں اس قانون کو مانوں یا نہ مانوں، کیونکہ میں اس حکومت کو منتخب کرنے کے لیے آزاد تھا تو تمام سمجھدار لوگ اس بات پر متفق ہوں گے کہ یہ طرز عمل جائز نہیں ہے اور الیکشن سے پہلے آزادی کا مطلب یہ نہیں ہے کہ یہ شخص منتخب حکومت کے طے کردہ قانونی ذمہ داری سے الگ ہو جائے۔

2-جو ملک بین الاقوامی معاہدوں میں شریک ہوتا ہے تو ان کی خلاف ورزی کے لیے جوابدہ ٹھہرایا جاتا ہے، لیکن اگر کوئی اس قسم کے معاہدوں میں شامل ہی نہ ہو،اس کی مخالفت پر اس سے کسی قسم کی جوابدہی نہیں کی جاتی۔

3-وہ غیر ملکی افراد جو اپنے ملک سے نکل کر کسی دوسری ریاست کی سرحدوں کے اندرقانون کے مطابق داخل ہوجاتے ہیں،ان کر اس ریاست کے قوانین کی خلاف ورزہ پر سزا دی جاتی ہے، لیکن جب تک وہ اس ریاست سے باہر ہوتے ہیں، ان کو مکمل اختیار ہوا ہے کہ چاہے تو اس ریاست کے قانون کو تسلیم کر کے

ریاست کی حدود میں داخل ہوجائیں یا داخل نہ ہوں، لیکن قانون کے التزام کے بعد اس قسم کا اختیار نہیں ہوتا۔اس کے علاوہ بھی اس کی کئی مثالیں موجود ہیں۔

خلاصہ یہ ہے کہ عصری قوانین میں حکومت اور حاکم کو یہ اختیار دیا گیا ہےقانون کا التزام کرنے اور نہ کرنے والوں اور ان کی سزاوں میں فرق کرے۔ بالکل اسی طرح وحی الہی نے بھی دونوں احوال میں فرق کیا ہے اور جس نےاسلام لایا، اپنے آپ کو شریعت کے احکام کے تابع کردیا، اس پر دین سے ارتداد کی سزا دی جائے گی۔

2۔جہاں تک تبدیلی مذہب کو "عقیدہ کی آزادی"یا "انسانی حق" کہنے کی بات ہے تو اس سلسلے میں چند نکات سمجھنا ضروری ہیں:

الف-پہلی بات تو یہ ہے کہ مسلمان ہونے کی حیثیت سے ہمارے لیے انسانی حق وہی ہے،جسے اسلام نے حق قراردیا ہے، عقلِ مجرد سے کسی ذاتی خواہش یا کسی بھی چیز کو انسانی حق قراردینے کی اجازت نہیں ہے،کیونکہ محض عقل کوئی ایسا معیار نہیں ہے جس کی بنیاد پر کسی چیز کو حق قراردیا جاسکے۔

ب-اس میں کوئی شک نہیں کہ عقل وشریعت دونوں کا تقاضا ہے کہ انسان کو عقیدہ کی آزادی ہونی چاہیے اور اسلام نے یہ آزادی دی بھی ہے، لیکن یہ آزادی مطلق نہیں ہے، بلکہ اس کی کچھ حدود ہیں، جن کے اندر رہ کر اس آزادی کو استعمال کیا جاسکتا ہے اور کسی بھی ایسے محرک اور آزادی کو ضروری حدود سے محدود کرنا عقل کے بالکل بھی خلاف نہیں ہے،ایسے کئی دیگر محرکات ہیں جن کو خود عقل ومعاصر قوانین نے بھی حدود سے محدود کردیا ہے، مثلاً ملکیت کی آزادی، نقل و حرکت کی آزادی، زندہ رہنے کی آزادی وغیرہ۔

ج-ارتداد کی سزا کو "عقیدہ کی آزادی" کے منافی قراردینا درست نہیں ہے، کیونکہ عقلی طور پر محض یہ بات تو قابلِ طعن وتشنیع نہیں بن سکتی کہ کسی قانون میں کچھ پابندیاں عائد کی گئی ہیں یا کسی آزادی کی حدود مقرر کی گئی ہیں، بلکہ عقلی طور پر غور طلب سوال یہ ہوتا ہے کہ کیا اس قانون کے ذریعے آزادی کو محدود کرنے یا پابندیاں عائد کرنے میں عوام کی مصلحت ،معاشرے کی بقاء اور قوانین کی تعمیر زیادہ ہے یا اس قانون اور آزادی کو غیر محدود اور بےلگام چھوڑنے میں زیادہ مصلحت اور فائدہ ہے؟

اگر غور کیا جائے تو عقلا یہی مناسب معلوم ہوتا ہے کہ اس قانون کو پابندیوں اور حدود کے ساتھ مقید کیا جائے، کیونکہ خود آزادی کے حامیوں کا اس میں کوئی اختلاف نہیں ہے کہ عقیدہ کی یہ آزادی اس شرط اور قید کے ساتھ محدود ہے کہ دوسروں کے خلاف جارحیت نہ ہو۔ لہذا اگر کوئی مذہب یہ قید یا حد بندی کرتا ہے کہ اس مذہب کو اختیار کرنے نہ کرنے کی مکمل آزادی ہے، لیکن اس کو تسلیم کرنے کے بعد اس سے پلٹ جانا خود اس مذہب کے خلاف جارحیت ہے اور اس جارحیت کے مرتکب کو سزا دی جائے گی۔ اسی دو جہتی تفریق میں مذہب اور عوام دونوں کی مصلحت ہے، ورنہ بصورت دیگر لوگ اس مذہب سے کھیلیں گے اور اس مذہب کی کوئی حرمت نہیں ہوگی اور کسی قومیت کے استحکام کے ساتھ چھیڑ چھاڑ سے، اسے کھیل بنانے سے بچانے سے کہیں زیادہ اہم یہ ہے کہ اپنے مذہب اور عقیدہ کو کھیل بنانے سے بچایا جائے۔

3-تبدیلی مذہب کو ”حریتِ فکر“ یا ”آزادی رائے“ (freedom of thought) کہنا اس لیے درست نہیں ہے کہ یہ محض رائے نہیں ہے، بلکہ ایک معاہدہ کی خلاف ورزی ہے، کیونکہ ایک شخص نے مسلمان ہوکر اسلام کی شرائط پر عمل کرنے کا معاہدہ کرلیا اور اب اس معاہدہ کو توڑرہا ہے تو دوسرے فریق کو یہ حق حاصل ہونا چاہیے کہ وہ اسے سزا دے۔

2-کیا سزائے موت ،خلافِ عقل اور ناقابلِ عمل ہے؟

جہاں تک دوسرے سوال کا تعلق ہے کہ کیا سزائے موت ایک ظلم ہے؟ کیاتبدیلی مذہب پر سزائے موت خلافِ عقل یا ناقابلِ عمل ہے؟ کیا سزائے موت کی موجودہ دور میں کوئی قابلِ عمل صورت نہیں ہے؟ کسی بھی جرم پر ایسی سزا نہیں دی جاسکتی؟

اس حوالے سے شرعی تصور یہ ہے کہ معاشرے کو فساد اور بگاڑ سے بچانے ، لوگوں کی مصالح اور جرائم کے علاج کے لیے شریعت نے مختلف سزائیں مقرر کی ہیں، جہاں جن جرائم میں سختی کی ضرورت تھی وہاں سختی اور جہاں نرمی کی ضرورت تھی وہاں سزا میں تخفیف سے کام لیا ہے، چنانچہ بعض جرائم (جیسے قتلِ نفس عمد،زنا اور ارتداد)پر سزائے موت بھی مقرر کی ہے۔

قتل کی سزا کوئی نئی اور انوکھی چیز نہیں ہے، بلکہ یہ سزا سابقہ اقوام میں بھی رہی ہے اور عصرِ حاضرمیں بھی یہ سزا کئی ممالک میں بدستور قائم ہے،

چنانچہ چین میں بعض جرائم پر قتل کی سزا مقرر تھی،جاپان میں سولی پر لٹکانے کی سزا طے کی گئی تھی۔[71]ہندوستان میں برہمن کے علاوہ کسی اور کے قتل پر سزائے موت مقرر تھی۔[72] یونانی قانون میں فرد کو یہ حق دیا گیا تھا کہ اگر وہ اپنی قریبی رشتہ دار خاتون کو فحش عمل میں دیکھے تو اسے فورا قتل کردے۔[73]روم کے قوانین میں سب سے زیادہ سختی تھی، چنانچہ باپ کو مکمل اختیاردیا گیا تھا کہ وہ اپنے بیٹے کو کوڑے مارے،جیل میں ڈالے یا قتل کردے۔[74]

دوسری جنگ عظیم کے بعد دنیا بھر میں قتل کی سزا پر پابندی کا رجحان غالب آیا، چنانچہ 1977ء میں تقریبا سولہ ممالک نے اس سزا پر پابندی عائد کردی تھی۔ ایک رپورٹ کے مطابق 2010ء تک95 ممالک نے سزائے موت پر پابندی عائد کرلی تھی، لیکن اس سزا کے خاتمہ کی تحریک کے باوجود بہت سے ممالک نے اب تک سزائے موت کو برقرار رکھا ہے،بلکہ کچھ ممالک نے اس کا دائرہ بڑھا دیا ہے۔ 30 سے زائد ممالک نے بعض منشیات کی درآمد اور فروخت کے لیے بھی سزائے موت کا قانون بنایا ہے۔ 58 ممالک میں یہ سزا بدستور قانون کا حصہ ہے، جیسے چائنہ، انڈیا، امریکہ کے بعض اسٹیٹ،انڈونیشیا، پاکستان، بنگلہ دیش،نائجیریا، مصر،سعودی عرب، ایران، جاپان اور تائیوان وغیرہ اور دنیا کی ساٹھ فیصد آبادی ان ہی ممالک میں آباد ہے جنہوں نے اس سزا کو قانون کا حصہ بنایا ہوا ہے۔ [75]

حاصل یہ ہے کہ قتل کی سزا کو کلی طور پر انسانی حقوق کے خلاف قراردینا یا خلافِ عقل کہنا درست نہیں ہے، یہ الگ بات ہے کہ کونسا جرم اتنا قبیح اور بڑا ہے کہ اس پر سزائے موت دی جائےگی؟ اس سوال کا جواب مختلف قوانین میں مختلف دیا گیا ہے اور شریعت میں کسی انسان کو جان بوجھ کرقتل کرنے، شادی شدہ محصن شخص کے زنا کرنے اور ارتداد پر اس سزا کا اطلاق کیا گیا ہے، کیونکہ شریعت کی نظر میں یہ انتہائی درجے کے جرائم ہیں، جن کے مفاسد صرف مجرم کی ذات تک محدود نہیں رہتے، بلکہ مکمل معاشرے کے فساد اور بگاڑ کا سبب بنتے ہیں۔

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[71] زکی نجیب محمود، کتاب قصةالحضارة (بیروت،لبنان،دارالجیل2012ء) 4/ 19-111۔

[72] زکی، کتاب قصة الحضارة، 167/3۔

[73] ایضا، 7/ 38۔

[74] Roger Hood, "Capital Punishment | Definition, Debate, Examples, & Facts," in *Britannica*, March 21, 2023, https://www.britannica.com/topic/capital-punishment.

[75] Ibid.

2.4 ارتداد اور مسلم ممالک کے قوانین

اکثر معاصر اسلامی ممالک کے قوانین میں عمومی طور ایسا کوئی قانون نہیں ہے جس کے مطابق اسلام سے پلٹنے والے اور ارتداد کا ارتکاب کرنے والے پر کوئی حد اور سزا کا اطلاق کیا جاسکے۔ اس جرم کی سزا طے نہ کرنے کا یہی مطلب ہے کہ ان اسلامی ممالک نے بھی اقوامِ متحدہ کے عالمی منشور کے مطابق ارتداد کے اس عمل کو حریتِ فکر اور انسانی حق مان لیا ہے اور اسی پر خاموشی اختیار کرلی ہے۔

بعض اسلامی ممالک میں ارتداد کی سزا کا قانون شرعی موجود ہے، چنانچہ سوڈان کے قانون میں مرتد کی سزا قتل مقرر تھی، لیکن بعد میں اسے ختم کردیا گیا۔[76] یمن کے قانون میں بھی ارتداد کو ان جرائم میں شمار کیا گیا ہے جن پر قتل کی سزا دی جائے گی۔ماریٹانیا کے قانون میں بھی مرتد کی سزا قتل ہے اور اس کا مال بیت المال میں دینے کا حکم موجود ہے۔سعودیه ،قطر اور افغانستان میں بھی ارتداد کی سزا قتل مقرر کی گئی ہے۔[77]

جہاں تک پاکستانی قانون کی بات ہے تو پی پی سی(PPC) قوانین وترامیم کے مطابق(295-C) سرورِ دو عالم ﷺ کی شان میں گستاخی کرنے والے کی سزا موت یا عمر قید لکھی ہے،لیکن پاکستانی معاصر قوانین میں ارتداد پر سزائے موت کا واضح قانون موجود نہیں ہے، نہ ان سوالات کے تفصیلی جوابات قانون میں موجود ہیں کہ ارتداد کی جامع تعریف کیا ہے جس کی بنیاد پر کسی کو مرتد قراردیا جائے؟ مرتد کے قتل کی سزا انفرادی معاملہ ہے یا حکومتی؟ اب تک کسی ایک عدالت نے بھی مرتد کے قتل کی سزا کا فیصلہ سنایا ہے؟ سزائے موت کا طریقہ کیا ہوگا؟ پھانسی یا کوئی اور؟

2007ء میں پارلیمنٹ نے ایک بل قومی اسمبلی پیش کیا تھا جس میں یہ مطالبہ کیا گیا تھا کہ:"مرتد کو قتل کیا جائے اور مرتدہ کو عمر بھر قید کیا جائے۔"، لیکن قومی اسمبلی میں یہ بل بھاری اکثریت سے مسترد ہوگیا تھا۔[78]

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[76] القانون الجنائی السودانی، مادة:126، 1991، و 2020۔

[77] عبد الله الفالح ،عقوبة الردةفی الفقه الاسلامی (سعودیه، جامعه نایف العربیه للعلوم الامنیه، کلیة الدراسات العلیا)130۔

[78] Hanibal Goitom, "Laws Criminalizing Apostasy in Selected Jurisdictions" (USA: The Law Library of Congress, Global Legal Research Directorate, 2014), 11, https://tile.loc.gov/storage-services/service/ll/llglrd/2014434112/2014434112.pdf.

3- خاتمہ: نتائج و سفارشات

1-اگر کوئی مسلمان اپنے اختیار سے ارتداد کا ارتکاب کرتا ہے تو یہ ایک ایسا جرم ہے جس کی شرعی سزا قتل ہے اور اس بات پر جمہور اہلِ علم کا اتفاق ہے۔

2-ارتداد کی اصل سزا (قتل) کے علاوہ بھی انسان پر اس کے اثرات مرتب ہوتے ہیں، چنانچہ اس کے نیک اعمال ضائع ہو جاتے ہیں، اس کے مال، معاملات و تصرفات، اس کی میراث اور زوجیت پر بھی مختلف اثرات مرتب ہوتے ہیں۔

3-مرتد کو سزا دینا دیگر حدود کی طرح حکومتِ وقت کی ذمہ داری ہے، لہذا اس سزا کے اطلاق کے لیے تمام ضوابط کو ملحوظ رکھنا ضروری ہے، جیسے۔ ارتداد کی شرائط موجود ہوں، موانع موجود نہ ہوں، شرعی طریقے سے ارتداد ثابت ہو جائے، مرتد کو باقاعدہ توبہ کی مہلت دی جائے۔ ثبوتِ جرم کے بعد اور مہلت ملنے کے باوجود اگر مجرم توبہ نہیں کرتا تو مرد ہونے کی صورت میں اس کو سزائے موت، جبکہ عورت ہونے کی صورت میں عمر قید کی سزا دی جائے۔

4-اقوام متحدہ کے عالمی منشور کی دفعہ نمبر18، شرعی قوانین کے خلاف ہے، اس کے بجائے مسلم ممالک کو دینِ اسلام کی فکری اساس کی حفاظت کے لیے جامع قانون سازی کرنی چاہیے، جیسا کہ بعض مسلم ممالک میں ارتداد کا شرعی قانون موجود ہے۔

5-ارتداد پر سزائے موت نہ انسانی حقوق کے خلاف ہے، نہ یہ حریتِ فکر اور انسانی آزادی کے خلاف ہے، کیونکہ ارتداد محض آزادانہ فعل نہیں، بلکہ ایک معاہدہ کی خلاف ورزی ہے۔

6-قتل کی سزا کو بھی بالکلیہ عقل کے خلاف سمجھنا درست نہیں ہے اور یہ ایسی سزا نہیں ہے جو اسلامی شریعت ک علاوہ دنیا میں دیگر اقوام یا ممالک میں نہ ہو، بلکہ یہ سزا اب بھی کئی ممالک میں مختلف جرائم کے لیے بدستور قائم ہے۔

7-پاکستان پینل کوڈ کے مطابق ارتداد اختیار کرنے والے کی سزا قتل ہے، لیکن یہ ایک مجمل قانون ہے، نہ تو اس حوالے سے مکمل قانون سازی کی گئی ہے اور نہ ہی اس پر کسی قسم کا عمل درآمد ہوا ہے۔

8-اس حوالے سے اہلِ علم اور علماء کی بھی یہ ذمہ داری بنتی ہے کہ وہ اس موضوع پر تحقیق کر کے اختلافی جزئی مســـائل میں بھی اور اس حوالے سے قانون ســـازی میں بھی اپنا کردار ادا کریں۔

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