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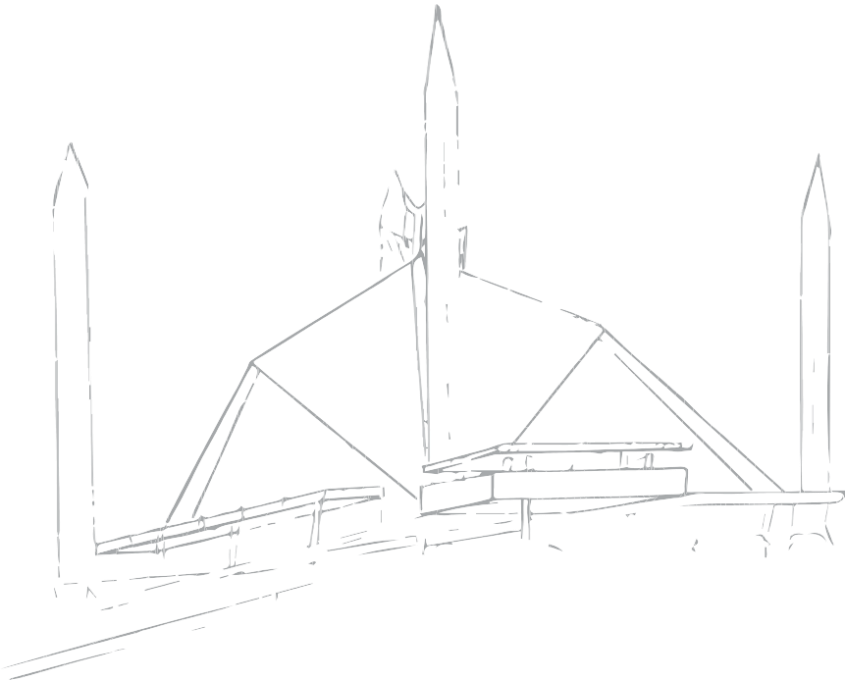

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Contents

An Overview of Bancassurance / Bancatakaful: Pakistani Regulations in the Framework of International Model Law

Kiran Yasmin*

Abstract

Using a bank's customer base to promote insurance products is known as bancassurance. It is a promising channel for selling insurance products around the world. However, in Pakistan, SECP has received numerous reports of mis-selling cases, necessitating a review of its outdated regulatory framework in light of international best practices. Therefore, this paper has analyzed bancassurance products and mainly covers the regulatory policy challenges and suggestions to adopt best practices in Pakistan. The paper identifies the best practices of bancassurance products in countries like UK, and India as cross-country comparison. The legal framework of bancassurance of Pakistan suggests a need to implement more effective laws for controlling the aggressive selling of bancassurance products. The objectives of this study are to investigate widely practiced bancassurance models, examine the issues and the problems related to the practice of bancassurance products in Pakistan that potentially affects its customers, and investigate the weaknesses of the regulatory framework of bancassurance in Pakistan. This study examines the implementation of bancassurance and its actors, which include banks, the distribution channel, insurance services, financial services, and service quality. Customers choose bancassurance because of their relationship and trust with the bank, particularly the local bank branch. Another critical component that can considerably enhance this system is digitization. Adopting current technologies and digitalization can improve customer accessibility and enhance sales of this product. This study was carried out using a qualitative technique. This study recommends the possible improvements in existing legal and regulatory framework in the light of international best practices.

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Keywords: Bancassurance, Bancatakaful, Consumer Protection Laws, Securities & Exchange Commission of Pakistan, State Bank of Pakistan, Federal Insurance Ombudsman.

1. Introduction

Bancassurance is a commercial venture in which banks offer products and services that are typically offered by insurance firms. The term 'bancassurance,' as its name implies, is created by fusing the terms 'banking' and 'insurance.' The provision of insurance products via banking channels is meant by this, i.e., when a bank and an insurance firm agree to sell the insurance products to the bank's clientele via the bank's infrastructure. Similar to 'giving and taking' arrangement, the bank provides access to a variety of resources to the insurance industry, of its clients in order to market insurance products; this generates cash for the bank.[1] Thus, it refers to the sale of insurance through banks. The problem with bancassurance is the way the insurance companies' mis-sell through the sales agents. It is not offered as an insurance policy, but rather as a banking product.[2] Successful bancassurance business models involve equal partnership between the bank and the insurer. Concentrate on the product rather than the consumer. Act more as an advisor, focusing on needs and values. The 'command and control' attitude of banks might clash with the 'inclusivity' style of insurance.

Definition of bancassurance from Guidelines for Bancassurance, 2010 while referring to insurance, the term 'bancassurance' describes the marketing, promoting, distributing and selling insurance products by banks on behalf of an insurer. The following insurance products are included but not restricted to:

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[1] *Oliveboard,* s.v. *"Bancassurance,"* Banking Awareness Notes: Published on September 3, 2018. https://www.oliveboard.in/blog/bancassurance-banking-awareness/. (accessed on April 5, 2023).

[2] Ammar H. Khan, "Beware of Bancassurrance," *Pakistan Today Profit*, Published on March 20, 2022. https://profit.pakistantoday.com.pk/2022/03/20/beware-of-bancassurance/. (accessed on April 27, 2023).

(i) Packaged with banking products,

(ii) Through the branch banking network, active independent product sales are made,

(iii) Actively offered through other channels such bank or insurance direct sales representatives, telemarketing, direct mail shoots, newspapers, ATM displays, websites, emails, SMS, or

(iv) Sold through any other channel that the SBP has acknowledged as a legitimate sales channel for banks.[3]

The definition of bancassurance from Bancassurance Regulations, 2015 as:

> "The promotion, distribution, sale, and marketing of insurance products by a bank with a license by SBP a result of bancassurance agency agreements between the insurer and the bank, to their account holders, customers and the general public through various sales and distribution channels, including but not limited to branches, telemarketing centre and websites."[4]

Thus, buying and selling insurance through banks is commonly referred to as bancassurance. Banks and insurance companies working together allow the bank to provide its clients with the insurance products of the connected insurance company.[5] Therefore, the business arrangement known as 'bancassurance' involves a bank, a micro-finance bank, or another financial institution collaborating with an insurance company to market and distribute products.

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[3] *Law Insider*, Banassurance Definition, s.v. *"bancassurance,"* https://www.lawinsider.com/dictionary/bancassurance. (accessed on February 18, 2021): *Guidelines for Bancassurance, 2010.* Guideline 2(b), 2, (SECP Insurance Division), Published on July 20, 2010. https://jamapunji.pk/sites/default/files/Dir230110BancassuranceCircular%282010%29.pdf. (accessed on April 15, 2022).

[4] *Bancassurance Regulations, 2015*. Regulation 2(b), 2. (SECP Insurance Division: Islamabad), Pulished on August 3rd, 2015. https://dawoodtakaful.com/File/BancassuranceRegulations_2015.pdf. (accessed on April 15, 2022).

[5] Bennett, Coleman & Co. Ltd. "What is Bancassurance," *The Economic Times*, https://economictimes.indiatimes.com/definition/bancassurance. (accessed on November 30, 2020).

The Federal Insurance Ombudsman directed its staff of experts to raise public awareness and draw in complainants with legitimate grievances against the insurance industry's maladministration in order to expedite the processing of the complaints. This led to a notable rise in the volume of complaints, which are regularly settled peacefully. The team of the Federal Insurance Ombudsman has been instructed to commit their professional skills to safeguarding policyholders' interests and promoting the expansion and advancement of the insurance sector. In this context, the Federal Insurance Ombudsman gave all Secretariat staff member's advice to adhere to the spirit of the Insurance Ordinance 2000 and to promote peaceful complaint settlement.[6]

The word 'bancassurance' was first used in France and quickly gained popularity across the rest of Europe. The Gramm-Leach-Bliley Act passed in 1999, permitted banks to operate in the securities and insurance industries. Prior to then, since 1933 Glass-Steagall Act, they had been forbidden from ever doing business with companies that offered different types of financial services. Several nations initially thought that the use of 'bancassurance' would give banks an excessive amount of control over the financial products available in the market. It was hence constrained.[7] Bancassurance is illegal in certain nations, although it is now permitted in the United States of America (USA) with the repeal of the Glass Steagall Act.[8] In 1999, the Federal Gramm-Leach-Bliley Act lifted the majority of limitations on American banks selling insurance products that were previously in place, but some insurance related regulations were still left up to the state.[9]

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[6] Federal Insurance Ombudsman Pakistan, Published on 2020. https://fio.gov.pk/. (accessed on October 25, 2023).

[7] Corporate Finance Institute Team, "Bancassurrance," *CFI Education Inc.* Updated on January 15, 2023. https://corporatefinanceinstitute.com/resources/knowledge/finance/bancassurance/. (accessed on April 5, 2023).

[8] Caroline Banton, s.v. *"Bancassurance,"* Updated on July 13, 2022. https://www.investopedia.com/terms/b/bancassurance.asp. (accessed on April 3, 2023).

[9] Ornella Ricci and Franco Fiordelisi, *"The Development of Bancassurance in Europe," Bancassurance in Europe: Past, Present and Future*, (London: Palgrave Macmillan, 2012), 5-25.

Although the concept of bancassurance was originally introduced to Pakistan in 2003, this sector only experienced expansion in 2008–2009. Pakistani banks, especially those with broad customers and a wide branch network, were drawn to the products. The business of bancassurance is being practiced by more than twenty banks in partnership with other businesses.[10]

It is obvious that this is a channel with a lot of potential for selling insurance products globally. Nevertheless, the SECP has received multiple reports of incidences of mis-selling of these bancassurance products, necessitating a review of its outdated regulatory structure in light of international best practices.[11] The aggressive selling of bancassurance products is the subject of an investigation by the SECP. The promise of substantial returns and insurance coverage has been used by banks for far too long to deceive consumers into purchasing these products, which combine savings and insurance instruments.[12]

Allfinanz, is also known as bancassurance, was made possible by the removal of the majority of the Glass-Steagall Act, in 1999. For the majority of insurance types, it hasn't yet been completely acknowledged as a practice.[13] With the purpose of continuously selling additional policies, the banks act as the insurance firms' agent. Banks and insurance firms are required to go by detailed standards for the bancassurance sector that have been published by SECP, which is responsible for monitoring this industry's management.[14]

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[10] *BOP*, s.v. *"Bancassurance,"* The Bank of Punjab, last modified on July 22, 2022. https://www.bop.com.pk/Bancassurance. (accessed on February 15, 2023).

[11] "Regulator Moves to Clamp Down on Malpractices in Bancassurance Sales," *Dawn*, Published on December 21, 2019. https://www.dawn.com/news/1523478. (accessed on April 15, 2020).

[12] Dawn, "Bancassurance Scams," *Dawn Paper:* Published on December 22, 2019. https://www.dawn.com/news/1523620. (accessed on October 15, 2021).

[13] Corporate Finance Institute Team, "Bancassurrance," *CFI Education Inc.* Updated on January 15, 2023. https://corporatefinanceinstitute.com/resources/knowledge/finance/bancassurance/. (accessed on April 5, 2023).

[14] "SECP Proposes New Regulations for Insurance Agents," *The Nation,* Published on May 4, 2020. https://nation.com.pk/04-May-2020/secp-proposes-new-regulations-for-insurance-agents. (accessed on April 4, 2021).

Many different business models across the world are included in bancassurance. Generally speaking, these business models may be classified into two groups; 1) Structure - Based Classification; 2) Product - Based Classification.[15] Bank of Punjab (BOP) initially has five bancassurance products available in Pakistan. It has also presented two distinct sales models: 1) Direct Sales Model, and Referral Sales Model.[16]

The hazards posed to banks' reputations and the strict laws and regulations that are imposed in some places are the elements that are limiting the growth of the global bancassurance business.[17] In several nations, bancassurance is still illegal. Nonetheless, there is a global tendency that local markets should be made more accessible to international businesses and banking regulations should be liberalized.[18]

In Pakistan, Guidelines and Bancassurance Regulations were previously released by SECP in 2010, 2015 and 2020, respectively. Owing to the fact that the majority of the products supplied to bancassurance are unit linked in nature, the recent negative stock market performance has resulted in short-term losses for insurance policyholders.[19]

Because of the way that these items have been sold to clients, this practice has to stop since it is a fraud. It is important to let customers who have already been duped by a sales pitch for a product knows that they are entitled to a complete refund of the money they have already paid. Banks and insurance firms go to great lengths to keep

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[15] "Intesa Sees Benefits in Bancassurance as others Abandon Model," *Financial Times*, Updated on September 15, 2018. https://www.ft.com/content/deb7646a-ed33-11e6-ba01-119a44939bb6. (accessed on April 5, 2020).

[16] *BOP*, s.v. *"Bancassurance,"* The Bank of Punjab, last modified on July 22, 2022. https://www.bop.com.pk/Bancassurance. (accessed on February 15, 2023).

[17] Eileen M. Friars and Robert N. Gogel, *"The Financial Services Handbook,"* 1st ed. (University of Michigan: A Wiley Interscience Publication, 1987), 136-140.

[18] Caroline Banton, s.v. *"Bancassurance,"* Updated on July 13, 2022. https://www.investopedia.com/terms/b/bancassurance.asp. (accessed on April 3, 2023).

[19] "SECP Proposes New Regulations for Insurance Agents," *The Nation*, Published on May 4, 2020. https://nation.com.pk/04-May-2020/secp-proposes-new-regulations-for-insurance-agents. (accessed on April 4, 2021).

their clients unaware of this fundamental reality; thus, it is crucial to raise awareness of it.[20] *"Let the buyer beware"* is referred to as '*Caveat Emptor'*. Sometimes, as a form of disclaimer, the 'Caveat Emptor' maxim is included into legal contracts. Despite the vendor knowing more about the quality of the product or service than the consumer, a caveat emptor disclaimer prohibits post-purchase challenges.[21] Section 16 of the Sale of Goods Act, 1930 provides an explanation of the Caveat Emptor concept.[22] Therefore, in order to encourage the expansion of the insurance industry, namely 'bancassurance' the SECP has suggested changes to the Bancassurance Regulations, 2015. Members of the Minor Dispute Settlement Committees, the Federal Insurance Ombudsman (FIO), Insurance Companies, and State Bank of Pakistan (SBP), those present were all in meeting.[23]

The participants had a lengthy discussion on the adjustments that were being proposed and were grateful to the SECP for making such efforts. Nonetheless, the industry participant emphasized that SECP should pay proper regard to factors of market growth as well as tightening regulatory controls to defend the interests of policyholders. Participants agreed that, given the present economic climate, SECP should take ease of doing business into account.[24]

The draft of Corporate Insurance Agents Regulations, 2020 has been published by the SECP. The proposed legislation' two main goals are:

1. To strengthen the regulatory environment for corporate insurance brokers, including bancassurance, and

[20] Ibid.

[21] Julia Kagan, "Caveat Emptor (Buyer Beware): What It Is, and What Replaced It," *Investopedia:* Updated on April 17, 2023. https://www.investopedia.com/terms/c/caveatemptor.asp#:~:text=Caveat%20emptor%20is%20a%20Latin%20phrase%20that%20means%20%22let%20the,of%20a%20good%20or%20service. (accessed on August 20, 2023).

[22] Sales of Goods Act, 1930.

[23] Dawn, "Bancassurance Scams" *Dawn Paper:* Published on December 22, 2019. https://www.dawn.com/news/1523620. (accessed on October 15, 2021).

[24] Ibid.

2. To stop policyholders from being mis-sold.[25]

The Guidelines set forth a variety of methods to protect consumers' interests in addition to the regulations, which forbid tied-selling and provide consumer protection. From the necessity to maintain client confidentiality to the requirement to refrain from consumer coercion, these are characteristic of an organization, marketing insurance products.[26]

The SECP should launch a platform where consumers who believe they were duped into purchasing one of these products may file a complaint and ask for the regulator's assistance in receiving a full refund of their money. There is nothing wrong with banking institutions collaborating to offer new products to their customers, but stricter regulations are required to make sure that these offerings have real benefits for the customer, that no deceptive sales tactics are used to promote them, and that the terms are stated plainly in the product brochures rather than in the small print of the contracts.[27]

2. Analysis of Bancassurance Product

The term 'bancassurance' describes the practice of selling insurance products through banking channels. Banks have the chance to use their client base to create risk-free income from non-interest sources. The primary marketing channel for insurance products is bancassurance in many places, notably in Europe. It is also developing in nations including the Middle East, India, and the Far East. The bank's internal channels of distribution are used to market insurance or directly to clients thanks to a

[25] "SECP Proposes New Regulations for Insurance Agents," *The Nation*, Published on May 4, 2020. https://nation.com.pk/04-May-2020/secp-proposes-new-regulations-for-insurance-agents. (accessed on April 4, 2021).

[26] Peter Kasanda , Michaela Marandu , Tenda Msinjili and Jasper Dymoke, *"Bancassurance Guidelines 2019"* Clyde & Co. Published on July 1, 2019. https://www.mondaq.com/financial-services/820182/bancassurance-guidelines-2019. (accessed on April 4, 2021).

[27] Dawn, "Bancassurance Scams," *Dawn Paper:* Published on December 22, 2019. https://www.dawn.com/news/1523620. (accessed on October 15, 2021).

banking and insurance system known as 'bancassurance'.[28] According to the business strategy, the banks offer products and services that insurance firms generally offer. Numerous organizations provide this service, which combines banking and insurance services. Insurance is now a part of the banks' product lineup through bancassurance, expanding their clientele and boosting their market share. With the help of commissions from insurance companies, banks can simply produce risk-free income using the bancassurance models. In order to understand the models of banking business, it is significant to analyze it in depth along with an overview of its historical development, models and the related issues that arise in the practice of this business. Accordingly, this paper furnishes the details how bancassurance products have evolved in the recent history of banking and insurance.

2.1 The Concept of Bancassurance

Bancassurance is a phrase that, which was created by fusing the French words, refers to the marketing of insurance products through banking channels in the context of banking and insurance. In German, *Allfinanz,* 'Integrated Financial Services', and 'Assurebanking' are all names that fall under the umbrella of bancassurance. Banks have emerged as a viable source for the distribution of insurance products because of the vast reach and customer penetration throughout all market groups.[29] The insurance industry was growing internationally and seeking new channels of distribution, this idea became more popular.

Globally and notably in the Asia-Pacific area, the bancassurance industry is expanding, especially for life insurance.[30] In terms of market share, each of those

[28] Ornella Ricci and Franco Fiordelisi, *"The Development of Bancassurance in Europe," Bancassurance in Europe: Past, Present and Future,* (London: Palgrave Macmillan, 2012), 5-25.

[29] Researchers Club, *"Bancassurance, The Indian Scenario,"* Useful and Newsful: https://researchersclub.wordpress.com/2014/03/31/bancassurance-the-indian-scenario/. (accessed on March 31, 2021).

[30] Nefissa Sator and David Schraub, Society of Actuaries, Marketing and Distribution Section, *"Bancassurance",* https://www.soa.org/news-and-

nations continues to dominate bancassurance. In general, the various states in the USA still control the laws governing insurance sales agents, insurance products and sales techniques. National banks and their subsidiaries' insurance activities are often exempt from 'blocking or restricting' by state laws, however, since the Office of the Comptroller of the Currency reports that the Gramm-Leach-Bliley Act, was adopted in 1999.[31]

The French and Italian insurance markets are dominated by bancassurance, which also has a significant presence across other important European markets. With the deregulation happening in a number of Asian nations and the UK, its market share is anticipated to increase.[32] Structure, sales and marketing, product development and sales compensation of the company is only a few examples of the many aspects of the bancassurance business are typically influenced by the business models. In the majority of nations, the products offered by bancassurance have tended to gradually change over time, shifting from closely related protection business to the lending operations of the banks to more ultimately leading to a greater selection of protection products from general savings company.[33]

In 1970s, phrase 'bancassurance' first appeared in France, which explains why the word appears to be French. During the 1980s, Spain was another early adopter. Today, a large number of nations permit the practice, illustrating its significant global expansion. Europe is where it is most successful. In bancassurance, banks act as the product developers while insurance firms serve as the distribution channel. It enables two industries to take advantage of the banks' current network.

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publications/newsletters/newsdirect/2014/september/ndn-2014-iss69-760oop/bancassurance/. (accessed on February 4, 2022).

[31] Office of the Comptroller of the Currency, *"Insurance Activities: Comptroller's Handbook,"* (CreateSpace Independent Publishing Platform, 2015), 3. (accessed on February 3, 2022).

[32] Gilles Benoist, Bancassurance: The New Challenges. *The Geneva Papers on Risk and Insurance. Issues and Practice*, (Palgrave Macmillan: The Geneva Association, 27(3), 2002), 295-303.

[33] Dorlisa K. Flur, Darren Huston and Lisa Y. Lowie, "Bancassurance", *The McKinsey Quarterly*, (3), 1997, 126.

By letting insurance companies use its platform, banks may generate extra revenue. They may also have the chance to offer clients more things.[34] Improved client loyalty will aid banks, because of more comprehensive offerings. They may consequently become the focal point of financial products for each particular customer. The distribution network of banks enables insurance businesses to increase sales. Customers of affiliated banks can also be accessed by insurance providers. This aids in the development of their products. Bancassurance offers financial services to customers. Because customers have simultaneous access to two separate financial services, they can save time and effort. Additionally, people are more comfortable with their bank's financial advisors, which make the process of reviewing and choosing products easier. The bank's ties with its clients are extremely important in bancassurance.[35]

Even though bancassurance began in France in the 1970s and has since moved to other countries in Continental Europe, it has also made encroachments into Asia, including India and Pakistan as well. The sale of insurance policies via a bank distribution channel is known as 'bancassurance'. In more concrete terms, bancassurance, often called '*Allfinanz'*, provides a range of financial services that can satisfy both banking and insurance demands without delay.

A bank and an insurance provider work together to provide 'bancassurance', in which the bank agrees to, charge a fee in exchange for the right to sell insurance to its clients. The banks and insurers have a reciprocal relationship. Even though it is a relatively recent fad in India, it is starting to catch on. Banks, insurance providers, as well as clients, have all embraced it.[36]

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[34] Emilia V. Clipici and Catalina Bolovan, *"Bancassurance: Main Insurance Distribution and Sale Channel in Europe,"* Scientific Bulletin–Economic Sciences, 11(1), (2012), 54-62.

[35] Corporate Finance Institute Team, "Bancassurrance," *CFI Education Inc.* Updated on January 15, 2023. https://corporatefinanceinstitute.com/resources/knowledge/finance/bancassurance/. (accessed on April 5, 2023).

[36] UK Essays, "The Study on Mis-selling Through Bancassurance Business Essay," *The Essay Writing Experts:* Published on January 1st, 2015.

2.2 Historical Development of Bancassurance

The notion of bank insurance and its conditions began to develop in Europe, around the 1970s. Later, other continents and subcontinents, including the USA, East and West Europe, Asia including India and Pakistan as well, embraced the concept.[37] Along with Spain and the Benelux Countries,[38] France has been a pioneer in Europe in the sale of insurance products through bank branches. Germany, Italy and UK, in contrast, have not yet seen much success with this distribution strategy. In contrast to the USA and Japan, where bancassurance still gaining traction, it is thriving in Latin America.[39] The development of bancassurance is influenced directly by a country's legislative framework, which facilitates to explain why its significance varies from country to country.

The word 'bancassurance' was initially used in France, where cooperation between banks and insurance companies started earlier than in other European countries. The term 'insurance distribution' was first used to refer to nonetheless, is increasingly used to describe a broad variety of economic contacts between the banking and insurance sectors, the simple distribution of insurance products through bank branches. As phenomenon grows, bancassurance definitions are growing broader.[40]

A fundamental definition is providing and selling banking and insurance products through the same business or entity is known as 'bancassurance.' And

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https://www.ukessays.com/essays/business/the-study-on-miselling-through-bancassurance-business-essay.php. (accessed on January1st, 2022).

[37] Hannah Wanjiku Njeri, *"Effect of Bancassurance on the Performance of Insurance Companies,"* http://41.89.49.13:8080/xmlui/bitstream/handle/123456789/1247/Njeri-Effect%20Of%20Bancassurance%20On%20The%20Performance%20Of%20Insurance%20Companies%20In%20Kenya.pdf?sequence=1&isAllowed=y. (accessed on April 20, 2021).

[38] A treaty-based intergovernmental association of Belgium, Netherlands, and Luxembourg, the Benelux Union was established in 1944. The three founding members anticipated the structure of the European Union.

[39] Elda Marzai, "Bancassurance: Financial Market Factor," *Revista de Studii Financiare*, 2(3), (Editura Mustang, 2017), 212-219.

[40] Tobias C. Hoschka, *"Bancassurance in Europe,"* (London: Palgrave Macmillan, Springer, 2016).

'bancassurance' is a term used to describe a technique used by banks or insurance firms to more or less integrate how they run the financial market.[41]

Spain and France were the first nations to enter the market. By protecting bank sales channels, the idea of bancassurance, which was originally popularized in Germany, allowed for big insurance firms to increase the efficiency and simplicity of selling their products. It was later adopted by both Europe and USA, and it has succeeded, especially in the countries of Europe that make up the European insurance market.[42]

However, Korea only offered saving insurance when it first created bancassurance in August 2003. After that, the entire transaction areas were fully open as of August 2007. But because of several things that were thought to have a bad effect on the financial sector, assurance bank[43] was permitted. Because big corporations in Korea's insurance market are dominated by their subsidiaries, if the assurance bank system is implemented, those corporations may try to encroach on the banking sector. The fact that insurance firms cannot benefit from assure banks while banks can from bancassurance has caused controversy because it is thought to be unfair to insurance companies.[44]

A bank's branches may distribute insurance products created by additional insurance providers with whom a sale contract has been entered into by the bank, or they may distribute insurance products created by insurance businesses that the bank owns entirely or in part. Ever since the 1980s, when interest rates on loans first began,

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[41] Ornella Ricci and Franco Fiordelisi, *"The Development of Bancassurance in Europe," Bancassurance in Europe: Past, Present and Future,* (London: Palgrave Macmillan, 2012), 5-25.
https://www.researchgate.net/publication/304647317_The_Development_of_Bancassurance_in_Europe. (accessed on April 29, 2021).

[42] Ibid 18.

[43] The most prevalent type of insurance is general insurance, which includes policies for cars and motorcycles that cover collisions and property damage. Contrarily, assurance is connected to life insurance policies that pay the policyholder's death benefit.

[44] Dorlisa K. Flur, Darren Huston and Lisa Y. Lowie, "Bancassurance", *The McKinsey Quarterly*, (3), 1997, 126.

to progressively decline and banks began looking for new revenue streams, this type of comprehensive financial conglomerate has evolved quickly.[45]

Bancassurance started to take off as a vital exchange route in several insurance market places in the early 1990s. Bancassurance procedures are most prevalent in Europe. In the European insurance market, it has been a successful model in the member states. Because in Japan, life of agents is greatest life market in the area, have a virtual monopoly on the industry, bancassurance's proportion of overall sales in the Asian markets is rather small.[46]

While bank insurance was recently made legal in some nations, like USA, where after the Gramm-Leach-Bliley Act was enacted, the Glass Steagall Act was repealed, it remains mostly illegal in other nations. Mortgage insurance, life insurance and property insurance connected to loans make up the majority of insurance sales at USA banks, notwithstanding recent declines in profits. However, China recently made it legal for banks to buy insurers and vice versa, which strengthened the bancassurance sector and caused several sizable foreign insurers to experience a major rise in consumer sales across many product lines in China.[47]

As old as Europe is, bancassurance has a long history in Nepal. Since 1970, the Small Farmers Development Project (SFDP) of the Agriculture Development Bank has been in place to help small and low-income farmers. The majority of farmers bought cows and buffalos using the loan. Since 1987, farmers have had access to livestock risk insurance. The insurance programmed, however, was started by a bank operation that was carried out without any involvement from insurance providers.[48]

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[45] Ibid 127.

[46] Ibid 128.

[47] Serap O. Gonulal, Nick Goulder and Rodney Lester, "Bancassurance, A Valuable Tool for Developing Insurance in Emerging Markets," *Policy Research Working Paper,The World Bank, Financial and Private sector,* (Development, Non-Bank financial institutions, 2012), 1-20.

[48] Ibid 120.

Historically, the technique has been used across Europe, bancassurance contracts are frequently used. Majority of the world's banks that offer bancassurance are significant differences across nations in the picture.[49] Lombard International Assurance pioneered the concept of private-bankassurance, which is now widely used around the world. The concept combines life insurance as a sophisticated financial planning tool with private banking and investment management services for affluent investors and their families to gain tax advantages and stability. Banks double as agents for insurance companies, helping them sell more policies. Bancassurance is efficient and economical distribution method than conventional distribution channels. Employees appointed by an insurance broker are put in specific banks to provide providing insurance products to bank customers in modern bancassurance module.[50]

A recent Sigma Research shows that Bancassurance is expanding, particularly in developing countries. Insurers have been successful in establishing a presence in regions with low insurance penetration and constrained distribution networks to bancassurance. In Europe, Bancassurance is most often used. At Bancassurance, the outlook for the globe is still favorable.[51]

2.3 Bancassurance and Bancatakaful

The marketing, promotion, and selling of takaful products through Islamic banking channels is known as Islamic bancassurance, also known as bancatakaful. Takaful is a form of community pooling that is built on the ideas of brotherhood and mutual aid. Participants put money into a fund to assist those who are most in need during hard

[49] Gilles Benoist, Bancassurance: The New Challenges: *The Geneva Papers on Risk and Insurance. Issues and Practice*, (Palgrave Macmillan: The Geneva Association, 27(3), 2002), 295-303.

[50] Lombard Kate Burgess, "Lloyds' growth relies on a bancassurance renaissance", *Financial Times:* last updated on June 29, 2020, https://www.ft.com/search?q=bancassurance. (accessed on February 18, 2021).

[51] Swiss Reinsurance Company Economic Research & Consulting, "Swiss Re sigma: Bancassurance: Emerging Trends, Opportunities and Challenges," Zurich Switzerland: Sigma Report no. 5, 2007. https://docplayer.net/14433528-Sigma-bancassurance-emerging-trends-opportunities-and-challenges.html#google_vignette. (accessd on April 27, 2023).

times financially. The first takaful company in the world was founded in Sudan in 1979, according to history. The Grand Council of Islamic Scholars officially endorsed the use of takaful as an Islamic alternative to western insurance in 1985.[52] Takaful upholds the strictest moral principles (complying with Shariah Adherence), which is advantageous to its clients and acceptable to everybody.[53]

Risk management and making preparations for family's future are two of the most valued and praised traits of a Muslim, even in Islam. Being responsible for one's dependents is in truth a duty to Allah. Takaful is unfortunately not well known in Pakistan, and nobody understood what it was until 2005. SECP then promulgated Takaful Rules in 2005, at which point people started to understand their significance and understood how essential they were as well as the enormous potential they had. Later, in 2012, the SECP released additional regulations.[54]

2.4 Issue Related to Bancassurance Product

Bancassurance products are now widely acknowledged to be susceptible to various issues like weak regulatory system, agents' interest in high commissions, unawareness about the product details, and mis-selling of this product. However, the last said issue is detailed out in this paper.

2.4.1 Mis-selling of Insurance Products

Basic insurance mis-selling types include mis-representation, attracting customers with false information, miscalculating benefits, unnecessary update of existing policy, fake bonus promises, forcing customers to buy policies, outright fraud, and

[52] Insurance is analyzed as an interest-based service which is expressly prohibited in Islam. (Qur'an, 2:275-81).

[53] Federal Insurance Ombudsman 2018-19, *"Annual Report Page Sequence,"* http://www.fio.gov.pk/pdf/FIO%20Annual%20Report%202018-19%20.pdf. 14. (accessed on October 15, 2021).

[54] Federal Insurance Ombudsman 2018-19, *"Annual Report Page Sequence,"* http://www.fio.gov.pk/pdf/FIO%20Annual%20Report%202018-19%20.pdf. 14. (accessed on October 15, 2021).

bundling insurance policies. Big fat commissions, poor financial literacy, and improper document reading are considered factors leading to mis-selling.[55]

The purposeful, reckless, or negligent sale of products or services is known as mis-selling, where there is a mis-representation of terms of the contract or where the products or services are not appropriate for the needs of the consumer. For instance, it is considered a kind of mis-selling to sell life insurance to a person who has no dependents.[56] The life insurance sector is a frequent location for mis-selling. A stock market investor with substantial assets and investments, but no dependent children and a deceased spouse, may be an example. It is debatable whether an expensive survivor benefit annuity or whole life insurance would be highly desirable to the investor. Therefore, a sales agent's portrayal of the product as something the investor urgently required to secure their assets or income stream in the event of death might be seen as an instance of mis-selling.[57] Bank workers' lack of product knowledge is one of the factors contributing to the mis-selling of insurance products by banks, which is presently on the rise.

Mis-selling may take place in a number of common ways. Nowadays, mis-selling of products like investments has mostly been the responsibility of banks.[58] A product or service may be purposely or negligently mis-represented, or a customer may be misled about its suitability, as part of a sales tactic called mis-selling. The deliberate with holding of crucial information, the dissemination of incorrect

[55] Pragya Arora, "The Menace of Mis-selling in Insurance Their Types, Reasons and How to Prevent it," *Insurance Samadhan:* Published on January 23, 2021. https://www.insurancesamadhan.com/blog/the-threat-of-mis-selling-in-insurance-and-how-to-prevent-it/. (accessed on April 27, 2023).

[56] Martin Membery and Sean M. Keyvan, *"The Global Bancassurance Market,"* (London: Sedley Austin LLP., 2014), 31.

[57] Serap O. Gonulal, Nick Goulder and Rodney Lester, Bancassurance, A Valuable Tool for Developing Insurance in Emerging Markets, *Policy Research Working Paper, The World Bank, Financial and Private sector,* (Development, Non-Bank financial institutions, 2012), 1-20.

[58] Goodwin Barret, *"Investment Mis-selling: The Facts,"* https://goodwinbarrett.co.uk/. (accessed April 15, 2022).

information, or the sale of an inappropriate product based on the customer's stated needs and preferences are all examples of mis-selling.[59]

Mis-selling is careless, unethical, those who do it risk facing consequences on the law, fines or even expulsion from their profession. A failure to provide fair outcomes for consumers has been described as it by previous Financial Services Authority (FSA) of UK.[60] Anyone who feels they are the victim of mis-selling should gather all necessary evidence, preferably written documentation, and as quickly as possible, submit a claim or complaint. An established internal complaints procedure would typically be in place for financial services organizations, and this should be the initial port of call. Any question or accusation will be met with a response. In some professions or jurisdictions, a complaint may be investigated by an Ombudsman or Independent Investigator if their response is unacceptable.[61]

Unfortunately, all around the world, bankers and brokers have a propensity to sell what is best for them rather than what is best for the investors. This results in the mis-selling of financial items, particularly insurance contracts.[62] The definition of 'Mis-selling' from the Bancassurance Regulations, 2015[63] and as well as the definition of 'Mis-selling' from Corporate Insurance Agents Regulations 2020, are the same states that "when an insurance product is being marketed and it is either

[59] Dorlisa K. Flur, Darren Huston and Lisa Y. Lowie, "Bancassurance", *The McKinsey Quarterly*, (3), 1997, 126.

[60] Comptroller and Auditor General, *"Financial Services Mis-Selling: Regulation and Redress,"* (Financial Conduct Authority and Financial Ombudsman Service, London: National Audit Office Report, 2016).

[61] Keith Stanton, Investment Advice: The Statutory Remedy, *Tottel's Journal of Professional Negligence*, 33(2), (2017), 153-174.

[62] UK Essays, "The Study on Mis-selling Through Bancassurance Business Essay," *The Essay Writing Experts:* Published on January 1st, 2015. https://www.ukessays.com/essays/business/the-study-on-miselling-through-bancassurance-business-essay.php. (accessed on January1st, 2022).

[63] *Bancassurance Regulations, 2015,* Regulation 2(n), 3, (SECP Insurance Division: Islamabad), Published on August 3rd, 2015. https://dawoodtakaful.com/File/BancassuranceRegulations_2015.pdf. (accessed on April 15, 2023).

being misrepresented or isn't fit for the customer's needs, it is considered to be 'mis-selling.' This behavior is also referred to as reckless selling or careless selling."[64]

Investors' lack of understanding of financial products is a major factor in mis-selling. A further factor is a lack of transparency. If a person is financially illiterate, they can learn how to grasp the product or seek a financial advisor's guidance. The terrible 'truth' of today is that insurance policies are susceptible to fraud or mis-selling. Given the large number of clients who have been victims of mis-selling or fraud, it is more or less clear to many individuals. There are many nuances to insurance fraud; given the unnecessarily complex nature of insurance products.

The consumer is deliberately misled into believing something that will never happen. The issue is getting worse because customers are succumbing to aggressive marketing strategies and because everyone is too preoccupied with their own life to double-check the information before making an investment. The infrastructure for the bank workers must be adequate, and they must be given the right training about the products. It has been observed that banks continue to lack awareness of the seriousness of the obligation they assume when they offer insurance, and that this activity continues to be for them merely a fee-based side business. However, this issue is to be addressed in this research in which mis-selling of bancassurance products refers to 'unfair business practices', which include incorrect product sales, adding more products and making promises of larger returns.[65]

3. International Best Practices of Bancassurance

Although bancassurance has grown in a variety of ways around the world, it is both expanding and gaining ground in most industrialized nations. Bancassurance has

[64] *Corporate Insurance Agents Regulations, 2020*, Regulation 2(q), 3. (Government of Pakistan, SECP: Islamabad) Published on December 3rd, 2020. https://dawoodtakaful.com/File/Corporate_Insurance_Agents_Regulations_2020.pdf. (accessed on April 15, 2023).

[65] Shailesh Kumar, "Mis selling of Insurance Products by Banks", *Insurance Samadhan:* Published on June 18, 2019, https://www.insurancesamadhan.com/blog/mis-selling-of-insurance-products-by-banks/. (accessed on July 11, 2023).

developed into a significant channel of distribution in numerous insurance markets all over the world over the past ten years. Although its use has spread to other areas, especially emerging economies, its ubiquity is particularly noticeable in Europe. The development of bancassurance has not occurred globally at the same rate, and there are still regional differences, as a result of national conditions. Pakistan having less developed practice of this product may learn lessons from global best practices.[66] Hence, the paper overviews the commonly practiced primary factors encompassing this business model, then it analyze the regulatory framework in UK. Further A cross-country comparison is also made with India. In the end some lessons are drawn through this paper.

3.1 Growth Factors in Global Practice of Bancassurance

Globally, the growth of bancassurance is generally influenced by a variety of factors, according to experiences in various parts of the world. Insurers can develop a variety of options to serve underserved groups through bancassurance by segmenting the customer base by income, age, employment, gender, or other factors, and then analyzing consumer buying behavior and product preferences. Accordingly, it has developed at varying speeds which can be attributed to a few primary factors.[67]

1. Different legislative and regulatory standards.
2. The structure of the tax and pension systems differs significantly.
3. Various ways that bank play a part in the financial system.
4. The growth of bancassurance is hindered by a distinct division between the various distribution channels.

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[66] Ornella Ricci and Franco Fiordelisi, *"The Development of Bancassurance in Europe," Bancassurance in Europe: Past, Present and Future*, (London: Palgrave Macmillan, 2012), 5-25.

[67] Leigh Irwin Allen, "Keys to Bancassurance Success: Innovation and Alignment in Distribution", *RGA Reinsurance Company*, Published on September, 2014. https://www.rgare.com/knowledge-center/article/keys-to-bancassurance-success#:~:text=By%20segmenting%20the%20customer%20base,serve%20untapped%20populations%20via%20bancassurance. (accessed on April 27, 2023).

5. Markets for insurance that are developing slowly.[68]

A number of industry reforms that were already well underway are being accelerated by the COVID-19 epidemic. Leaders in the industry explain how banks and insurers can adjust to the upcoming challenges faced by the practice of bancassurance product.

3.2 Regulatory Framework in the United Kingdom

In the UK, the Financial Services Act, 1986 (FSA), established new rules on the marketing of life insurance in particular, and the Building Societies Act, 1986, which leveled the playing field between commercial banks and building societies by enhancing the powers of the latter. These two significant developments in the UK regulatory environment have had a significant impact on the bancassurance industry.[69]

Another major piece of legislative framework that controls how banking and financial services are regulated in the UK is the Financial Services and Markets Act, 2000 (FSMA). The present UK regulatory system is primarily derived from the FSMA and its associated implementing laws and regulations, but other EU legislation that set minimum requirements for the regulation of banks and banking services in the European Economic Area (EEA) also play a role have historically had a significant impact on it and have been partially implemented as well. Large portions of EU regulations that were directly relevant, before Brexit, the UK's regulatory framework included all laws and regulations that carried out the obligations of EU Directives. In the UK, there are three primary regulators that are responsible for banking.

[68] Gilles Benoist, "Bancassurance, The New Challenges," *The Geneva Papers on Risk and Insurance, Issues and Practice*, (Palgrave Macmillan: The Geneva Association, 27(3), 2002), 295-303.

[69] Emanuele Marsiglia and Isabella Falautano, "Corporate Social Responsibility and Sustainability Challenges for a Bancassurance Company," *The Geneva Papers on Risk and Insurance-Issues and Practice:* 30, (Springer: 2005), 485-497.

i. Bank of England (BOE).
ii. Prudential Regulation Authority (PRA), a division of the BoE.
iii. Financial Conduct Authority (FCA).[70]

Two main regulators of banks are PRA and FCA. The BoE has the decision-making power, and it is mostly accountable for taking regulatory action and using resolution authority with relation to failing or about to fail banks. The FCA oversees conduct for banks, whereas the PRA oversees prudential matters. In 2013, the PRA and FCA collectively took over as the UK's regulators in place of the FSA.

Under the FSMA, PRA and the FCA are jointly accountable for overseeing, enforcing, making rules and establishing regulatory policy for authorization, practical considerations, and business practices.[71] Each regulator's regulatory goals are outlined in the FSMA as well. The PRA's major objective is to guarantee the safety and soundness of the institutions it has authorized by striving to ensure that their activities don't jeopardize the stability of the UK financial system. Its secondary objective is to promote effective competition in the markets for the services provided by such organizations. The FCA is responsible for monitoring business operations, guaranteeing effective financial markets, safeguarding consumers, and promoting healthy competition.[72]

3.3 Bancassurance in India: A Cross-Country Comparison

The idea of bancassurance was first established in India in 2000. In India, there are two distinct authorities that oversee the financial services and insurance sectors. The

[70] Bob Penn, Raluca Dumitru, Arthur Tan, Allen and Overy LLP, *"Banking Regulation in the United Kingdom,"* Overview: Published on November 1, 2022. https://uk.practicallaw.thomsonreuters.com/w-008-0211?transitionType=Default&contextData=(sc.Default)&firstPage=true#:~:text=The%20regulation%20of%20banks%20in,Financial%20Conduct%20Authority%20(FCA). (accessed on April 15,2023).

[71] Ibid.

[72] Stella Fearnley and Tony Hines, "The Regulatory Framework for Financial Reporting and Auditing in the United Kingdom," The Present Position and Impending Changes. *The International Journal of Accounting*, 38(2), (Summer: 2003), 215-233.

Reserve Bank of India (RBI) entirely oversees banking industry, while the Insurance Regulatory and Development Authority (IRDA) oversee the insurance industry. Section 6(1)(o) of the Banking Regulation Act of 1949 states that the Indian government has classified 'Insurance' as a permissible area of business for banks to operate in. However, banks wishing to engage in the industry must first obtain particular the RBI authorization.[73] Due to increased competition caused by the insurance sector's openness to private competitors, fresh strategies for connecting with its sizable consumer base emerged.

Bancassurance is viewed as a distribution channel that increases the penetration of insurance, but recently, a small number of cases of mis-selling by banks have come to the attention of IRDA. Concerned about these actions, the IRDA has chosen to investigate the bancassurance model.[74]

To examine the bancassurance model, IRDA had formed a panel. The IRDA has been made aware of some instances in which certain banks have coerced their customers into purchasing insurance policies in order to advance their loans. These customers who were forced to purchase the policies against their will in order to obtain the loans do not maintain them, and as a result, the policies expire after the first premium is paid, costing the insurer money. This practice is improper for the insurance industry as the sale of policies should be based on need rather than coercion.[75]

The biggest issue is that if a bank is allowed to sell numerous items, it may end up favoring those that offer a bigger commission than what the customer actually needs. If this danger is not reduced, a bank's reputation will be at jeopardy.

[73] *Oliveboard,* s.v. *"Bancassurance",* Banking Awareness Notes: Published on September 3, 2018. https://www.oliveboard.in/blog/bancassurance-banking-awareness/. (accessed on April 5, 2023).

[74] Ibid.

[75] UK Essays, "The Study on Mis-selling through Bancassurance Business Essay," *The Essay Writing Experts:* Published on January 1st, 2015. https://www.ukessays.com/essays/business/the-study-on-miselling-through-bancassurance-business-essay.php. (accessed on January1st, 2022).

Additionally, insurers believe that banks will only engage in mis-selling if there is a reputational risk. In order to reduce mis-selling, banks should opt for simpler items to sell. The connection between their insurance provider and other banks causes problems for some institutions.[76]

Two distinct organizations in India regulate the banking and insurance industries. IRDA and RBI, respectively, are in charge of overseeing the banking and insurance sectors. Due to its composition of two distinct industries, bancassurance is governed by both of the aforementioned agencies. There are detailed and illustrative regulations, norms and limitations for each of them.[77]

3.4 Lessons Learned from International Best Practices

It is anticipated that sales of general life insurance will expand at a rate of four times slower than that of bancassurance, a major global distribution channel for life insurance.[78] According to Reinsurance Group of America's Survey (RGA's) and distribution research, relationships banking in mature markets and geographical considerations have a significant role in the growth of bancassurance. The use of digital techniques, automated underwriting and sales, targeted client messaging and enhanced customer experiences will ultimately boost the expansion of the bancassurance industry. A challenging, diverse and fiercely competitive environment must be navigated by bankers.[79]

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[76] Ibid.

[77] Rupali Satsangi, *"An Analysis of Effectiveness of Bancassurance as a Distribution Channel in India,"* Delhi Business Review: Rohini, 2014, 15(1), 41-52.

[78] Joao Bueno, Bruno Dinis, Bernhard Kotanko, Dario Maggiora and Rui Neves, "Bancassurance: It's Time to Go Digital," *McKinsey & Company:* Published on March 15, 2019. https://www.mckinsey.com/~/media/McKinsey/Industries/Financial%20Services/Our%20Insights/Bancassurance%20Its%20time%20to%20go%20digital/Bancassurance-Its-time-to-go-digital-final.ashx. (accessed on July 11, 2023).

[79] Leigh Irwin Allen, "Digitization and Strategy, Bancassurance Trends and Best Practices in 2019," *RGA: Insurance Distribution,* Published on October 8, 2019, https://www.rgare.com/knowledge-center/media/research/digitization-and-strategy-bancassurance-trends-and-best-practices-in-2019. (accessed on April 3rd, 2023).

According to RGA's surveys and distribution research, regional factors including financial deregulation, social security costs, tax breaks and the enhancement of relationship banking in mature markets are what significantly influence the development of the assurance sector. Ultimately, digital methods, automated underwriting and sales, targeted client messaging, and enhanced customer experiences will all contribute to the expansion of the bancassurance industry. In order to accomplish these objectives, bancassurers must traverse a challenging, diverse and intensely competitive environment.[80]

4. Legal Framework of Bancassurance in Pakistan

Protecting the stability and soundness of the financial system is one of the SBP's main responsibilities. SBP has established a strong legal and regulatory framework to accomplish this goal. When institutions disregard legal or regulatory obligations, SBP takes supervisory enforcement measures against them. Business is administered by takaful or life insurance firms and is regulated by SECP and the Bancassurance plans and models of Pakistan. The role of regulators of the insurance companies deals with the bancassurance products in which banks are governed by SBP, whereas Modaraba and insurance companies are governed by SECP. The list of insurance related regulatory laws have been presented and throw light on the analysis of bancassurance regulation 2015 which has been repealed after the finalization of The Corporate Insurance Agent Regulations, 2020. After that, the emerging challenges faced by the customers related to the sale of bancassurance products. The flaws and weaknesses in the given legal, regulatory framework and suggestions related to improvement of these and the goal of FIO is to create a cutting-edge of bad administration in the Pakistani insurance industry and to ensure prudent protection of stakeholders' interests.[81]

[80] Ibid.

[81] FGE Ebrahim Hosain, "In Review: the Legal Framework for Insurance Disputes in Pakistan," *The Law Reviews:* Published on November 29, 2022, (Pakistan).

4.1 Related Case Laws

Jubilee Life Insurance Company limited 2016 and Faisal Bank. Jubilee Life Insurance Company limited 2019 and HBL.

Although insurance company litigation has remained very broad in Pakistan in recent years, three judgments in particular stand out for their conclusions and precedential relevance. One is a Supreme Court of Pakistan decision that elaborates on the fundamentals of interpreting phrases used by insurance firms. The second is a judgment of the Lahore High Court concerning insurance firms' liability under the Insurance Ordinance 2000. Finally, a 2020 Supreme Court of Pakistan judgment defines insurance firms' duties to customers under the Insurance Ordinance 2000.

Universal Insurance Company and another v. Karim Gul and another.

This lawsuit involved an insurance company's contract to sell salvage material. The disagreement arose as a result of an insured motor vehicle being involved in an accident that resulted in its entire loss. The automobile was classified as 'salvage' material, and the insurance company sold it to the respondent. Following the transaction, the respondent repaired the car and registered it with the motor vehicle authorities. However, his request was denied since another car with the identical registration number was already registered, and the documents submitted in connection with the registration were not authentic. As a result, the respondent brought a lawsuit against the insurance company.

The Supreme Court had to decide whether the motor vehicle sold by the insurance company was a motor vehicle or debris. The rationale for emphasizing this distinction was that if the salvage material was sold as debris, the insurance company would have no duties regarding the vehicle's registration and usability.

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https://www.lexology.com/library/detail.aspx?g=3fd526c6-44a4-4ebf-8f38-adfbf9440730. (accessed on April 27, 2023).

The salvage material was classed as a total loss in the contract between the insurance company and the customer. As a result, the Supreme Court considered the definition of entire loss under the contract. It initially considered whether the parties used the term "total loss" in a technical sense or in the usual use of the word. Then it stated that the contract's provisions must have the meaning that a 'reasonable person with all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract' would have. It went on to say that because the insurance company proposed and prepared the contract, a reasonable person would assume that the phrase was being used in a technical meaning.

There was one more crucial factor to this case. The Supreme Court examined the concept of total loss after ruling that it should be read technically. Actual total loss and constructive total loss are defined under the Marine Insurance Act of 2018. Actual total loss is defined as 'where the subject-matter insured is destroyed or so damaged as to cease to be a thing of the kind insured or where the assured is irretrievably deprived thereof,' whereas constructive total loss is defined as 'where the subject-matter insured is reasonably abandoned due to its actual total loss appearing to be unavoidable or because it could not be preserved from the actual total loss without an expenditure which would exceed its value when the exclusion applies.'

As a result, if the Supreme Court concluded that real total loss was the right word to employ, the buyer of the salvage material would have acquired debris, and the insurance company would have had no duties in that regard. However, the Supreme Court concluded that constructive complete loss was the right criterion under these circumstances. The reasoning for this was based in part on the notion that if there is any dispute about the meaning of a provision in a contract, the words will be interpreted against the person who proposed them. As a result, because the contract was written by the insurance company, the Supreme Court construed the word "total loss" in the respondent's advantage.

According to the author's opinion, this decision has two significant ramifications for the interpretation of insurance contracts:

1. It was noticed that a reasonable person would understand the provisions of an insurance company's contract in a technical meaning rather than in the usual sense of the word. As a result, because insurance policies are drafted and issued by insurance companies, this would apply to all insurance policies; and
2. If there is any ambiguity about the meaning of a term in a contract prepared by an insurance company, the ambiguity will be decided against the insurance company.

4.2 Bancassurance Plans

Currently, The BOP provides the following bancassurance plans:

i. EFU Child Savings Program.
ii. Marriage Program at EFU.
iii. EFU Savings Program.
iv. EFU Pension Scheme.
v. Vitality Plan – IGI Life.
vi. The IGI Value Life.[82]

The Equity Savings Scheme is the most recent example. Never purchase a product which doesn't fully comprehend. Despite not being aware of the risks, many investors purchased the product since it offers a viable tax-saving strategy.[83]

"Caveat Emptor" is a legal doctrine as well a Latin word which means *"let the buyer beware"* is a legal theory that states that in the absence of an express warranty in the contract, the customer acquires at his own risk. The norm was ideally

[82] *BOP*, s.v. *"Bancassurance,"* The Bank of Punjab, last modified July 22, 2022. https://www.bop.com.pk/Bancassurance. (accessed on February 15, 2023).

[83] *Oliveboard,* s.v. *Bancassurance,* Banking Awareness Notes: Published on September 3, 2018. https://www.oliveboard.in/blog/bancassurance-banking-awareness/. (accessed on April 5, 2023).

adapted to buying and selling in the open market or among near neighbors as an early common law maxim. Because of the rising complexity of modern business, the customer is at a disadvantage. Buyer is obliged to rely on the sellers and manufacturer's competence, judgment, and honesty more and more.[84]

SEC v. Zandford, 535 U.S. 813 (2002).

The present law of commercial transactions recognizes this legal maxim and safeguards the buyer by indicating different exceptions to the caveat emptor principle. Thus, in the event of a sample sale, the law suggests a contract requirement that the majority of the product will correspond in quality to the sample and that the buyer will have a reasonable chance to evaluate the bulk of the merchandise. Similarly, when the buyer informs the seller of the specific purpose for which the products are required, the law implies a requirement in the subsequent contract that the item is of merchantable and average quality and reasonably suited for the intended use.[85]

As a result, the distribution of insurance products has found bancassurance to be a crucial channel. If done correctly, the merging of the banking and insurance sectors may be advantageous for all parties involved, including the clients, insurers, and banks.[86]

4.3 Role of concerned Authorities related to Insurance Division

The role is defined of concerned authorities related to bancassurance business which regulates and managed the insurance system in Pakistan are as follows:

[84] Cornell Law School, s.v. *Caveat Emptor*, Legal Information Institute, Wex Definitions Team: Published on July, 2022. https://www.law.cornell.edu/wex/caveat_emptor. (accessed on October 25, 2023).

[85] Ibid.

[86] *Oliveboard*, s.v. *Bancassurance*, Banking Awareness Notes: Published on September 3, 2018. https://www.oliveboard.in/blog/bancassurance-banking-awareness/. (accessed on April 5, 2023).

4.3.1 Role of SECP as an Insurance Regulator

The SECP made the correct decision by opening an investigation into the pushy marketing of bancassurance products. SECP entail collaboration between banks and insurance firms, which makes it simple for both to evade responsibility when the customer inevitably realizes that the product was not truly what it had been represented to be throughout the sales process. .[87]

It is the role of the SECP to oversee the insurance industry in Pakistan, which consists of insurance firms, brokers, agents, third party administrators for health insurance and insurance surveyors. Since its inception in 1999 in accordance with the terms of the SECP Act, 1997, the SECP has been responsible for regulating the insurance industry in Pakistan and executing the insurance law. This function used to be carried out by the Department of Insurance, which reported to the Minister of Trade. Since the regulation of the insurance industry was transferred, SECP has fought to defend the interests of current, prospective and ongoing policyholders while also promoting the steady and orderly growth of the industry.[88]

4.3.2 Role of SBP

The SBP was established by the State Bank of Pakistan Act, 1956, which gave the bank the ability to act as the country's central bank. The SBP Act mandates the Bank to control Pakistan's monetary and credit system and to nurture its expansion in the greatest national interest, with the goal of ensuring monetary stability and maximizing the country's productive resources. SBP plays a critical role in preserving financial sector stability. SBP promotes the safety and soundness of individual financial institutions, the seamless operation of payment systems, and the

[87] Dawn, "Bancassurance Scams," *Dawn Paper:* Published on December 22, 2019. https://www.dawn.com/news/1523620. (accessed on October 15, 2021).

[88] Federal Insurance Ombudsman 2018-19, *"Annual Report Page Sequence,"* http://www.fio.gov.pk/pdf/FIO%20Annual%20Report%202018-19%20.pdf. 6. (accessed on October 15, 2021).

effective resolution of problem institutions. The SBP has also taken an active role in the process of islamization of the banking sector.[89]

4.3.3 Role of Federal Insurance Ombudsman

Related to Insurance, the institution of the Ombudsman is becoming increasingly significant in enhancing public administration.[90] The Federal Insurance Ombudsman's job is to defend the public from wrongdoing, including the infringement of rights, the abuse of authority, arbitrary judgments, and poor administration. The function of Federal Insurance Ombudsman institutions in enhancing public administration is becoming more and more significant as a result of the increased transparency and public accountability of government operations. In addition, the institution of the Federal Insurance Ombudsman became more well-known because to the provision of swift justice at no cost to the general public as opposed to the regular legal system, where delays and costs are the main obstacles for people.[91]

The Federal Insurance Ombudsman organization provides policyholders or their beneficiaries with a quick and free means of resolving complaints they may have with the private insurance companies. Since its founding, the organization has handled hundreds of complaints regarding various types of insurance, including marine, property, motor vehicle, and life insurance, including individual, group, and health insurance, among others, all without charging the complainants or insurers anything.[92]

[89] State Bank of Pakistan, 2016. https://www.sbp.org.pk/about/Intro.asp. (accessed on October 25, 2023).

[90] Federal Insurance Ombudsman 2018-19, "Annual Report Page Sequence" http://www.fio.gov.pk/pdf/FIO%20Annual%20Report%202018-19%20.pdf. (accessed on October 15, 2021).

[91] M. A. Zuberi, 'Insurance Ombudsman's Institution Plays an Increasingly Important Role in Improving Public Administration' *Business Recorder:* Published on March 14, 2016. https://fp.brecorder.com/2016/03/2016031425476/. (accessed on April 15, 2021).

[92] Ibid.

4.4 The Insurance Regulatory Framework

The Insurance Ordinance 2000 read in conjunction with the Insurance Rules, 2017 largely regulates the insurance industry in Pakistan. The Insurance Accounting legislation 2017, Insurance Companies Sound and Prudent Management Regulations 2012, and Corporate Insurance Agents Regulations 2021, among others, are further legislation that control particular facets of the insurance industry. Insurance conflicts are governed by Pakistani law, which is made up of the fundamental laws, insurable risks, judicial procedures, and various dispute settlement techniques.[93] The insurance regulatory framework in Pakistan comprises of the following statutes:

1) Corporate Insurance Agents Rules, 2020
2) The Insurance Ordinance, 2000
3) Insurance Rules, 2017
4) Insurance Accounting Regulations, 2017
5) The Takaful Rules, 2012
6) The SEC (Micro insurance) Rules, 2014
7) The Unit Linked Product and Fund Rules, 2015
8) Insurance Companies (Sound and Prudent Management) Regulations, 2012
9) The Third-Party Administrator for Health Insurance Regulations, 2014
10) The Bancassurance Regulations, 2015
11) Small Dispute Resolution Committees (Constitution and Procedure) Rules, 2015
12) Guidelines for Estimation of Incurred but Not Reported Claims Reserves, 2016
13) Code of Corporate Governance for Insurers, 2016
14) Directive for Life Insurance and Family Takaful Illustrations, 2016
15) Circular for Awareness among Policy holders about Availability of Complaints Resolution Forums

[93] FGE Ebrahim Hosain, "In Review: the Legal Framework for Insurance Disputes in Pakistan," *The Law Reviews:* Published on November 29, 2022, (Pakistan). https://www.lexology.com/library/detail.aspx?g=3fd526c6-44a4-4ebf-8f38-adfbf9440730. (accessed on April 27, 2023).

16) SEC Directive for Corporate Insurance Agents and Technology Based Distribution Channels, 2017
17) SEC Regulations, 2018 (Anti Money Laundering and Countering the Financing of Terrorism)
18) Credit and Surety ship Rules, 2018 (Conduct of Business)[94]

It is crucial to take the necessary precautions to ensure that the information technology systems of the insurance companies, their partners, and intermediaries are secure and robust. In recent years, the insurance industry in Pakistan has started to rely more heavily on technology for the distribution and sale of insurance products. In response, the SECP, Pakistan's top regulating authority for insurance businesses, has released the SEC Guidelines on Cyber Security Framework for the Insurance Sector 2020, putting in place legal measures for threat and vulnerability reduction and deterrent.[95] The SECP published a master circular in January 2022 that included all legislative and regulatory requirements and instructions sent to the insurance industry through circulars and directives to the insurance sector.[96]

4.4.1 Bancassurance Regulations, 2015 and Corporate Insurance Agents Regulations, 2020

SECP has informed the Bancassurance Regulations 2015, with the Policy Board's support. The three main players in the life insurance industry, namely policyholders, insurers and banks, are expected to have more aligned long-term interests with the adoption of the legislation. Several new regulatory measures have been implemented, including the rationalization of bank compensation structures, restrictions on recycling life insurance policies, commission claw back provisions, minimum cash

[94] Federal Insurance Ombudsman 2018-19, *"Annual Report Page Sequence,"* http://www.fio.gov.pk/pdf/FIO%20Annual%20Report%202018-19%20.pdf. 6, 7. (accessed on October 15, 2021).

[95] Ibid.:

Jubilee Life Insurance Company limited 2016 and Faisal Bank. And *Jubilee Life Insurance Company limited 2019 and HBL.*

[96] Abdul Razzaq Kemal, "Regulatory framework in Pakistan", *The Pakistan Development Review*, 2002, 41(4), 319-332.

values, minimum financial underwriting standards, and mandatory after-sale call-back requirements. The responsibility has been given to the insurer by the existing insurance regulatory framework for agents, who are also in charge of ensuring that the regulatory requirement for training and qualification is met.[97]

Corporate Insurance Agents Regulations, 2020 have been published for public opinion by SECP. The regulatory framework for corporate insurance agents, including bancassurance, is intended to be strengthened by proposed regulations in order to prevent mis-selling to prospective policyholders. The proposed Regulations provide greater information to prospective policyholders and customers, thereby strengthening the sales process.[98]

4.5 Weaknesses in Legal Framework of Bancassurance in Pakistan

Working together is necessary for the implementation of bancassurance, but integrating the commercial activities of two different industries is a difficult challenge. The sale of an insurance company's products is not under the direct control of the insurer under bancassurance. Managing marketing tactics may be more difficult. Targeting the appropriate clientele, for instance, might be challenging for insurance businesses. Bank personnel must become knowledgeable about insurance products, which add to their workload and training requirements.[99]

Bank advisers could be motivated by competing interests in the situation of several bancassurance agreements. They could favor one product over another for their own gain. Determining who should be held legally accountable in cases of

[97] "SECP notifies Bancassurance Regulations 2015," *The News International,* last updated on August 04, 2015. https://www.thenews.com.pk/print/54523-secp-notifies-bancassurance-regulations-2015. (accessed on April 15, 2021).

[98] M. A. Zuberi, "SECP Proposes New Regulations for Insurance Agents," *Business Recorder:* Published on April 30, 2020. https://www.brecorder.com/news/593508/. (accessed on April 4, 2023).

[99] Corporate Finance Institute Team, "Bancassurrance," *CFI Education Inc.* Updated on January 15, 2023. https://corporatefinanceinstitute.com/resources/knowledge/finance/bancassurance/. (accessed on April 5, 2023).

consumer complaints is another challenge. Banking institutions and insurance providers need to coordinate their goals in order to address the issues. In addition, insurance providers can train bank workers in sales. This improves communication and helps both parties reach their goals.[100]

5. Conclusion

Bancassurance has become a crucial conduit for the marketing of insurance products. If correctly executed, this combination of the banking and insurance sectors can benefit all parties involved, including the clients, insurers and banks. Through this paper, an effort has been made to highlight the significant problems and difficulties banking partners encounter while implementing and experiencing the bancassurance concept. This paper sheds light on some of the most important developments in the sector of insurance in Pakistan. Although there is a substantial global market for global bancassurance and it is developing, the products' performance is not the same everywhere such as Europe, South America, Asia and Australia. It is clear that it is most popular in European nations where banks sell the majority of life insurance policies; nevertheless, the cross comparison in the UK and India, direct agents continue to sell the majority of the policies. Although there is still a great chance for bancassurance to serve the majority of the people in India despite the low insurance penetration rate, these opportunities come with a number of unique difficulties of all kinds.

One of the main issues facing Pakistan's bancassurance sector is client ignorance. The terms and conditions need to be carefully studied by client and, if necessary, clarified with the help of friends and family members. The distribution of individual life products by life insurers around the world has historically been handled by captive agency sales forces. A life insurance policy is sold, not purchased by a customer, and this phenomenon is a clear illustration of this fundamental and differentiating aspect of the life insurance industry. As a result, in order for insurance

[100] Ibid.

sale to occur, a committed, educated and experienced professional must actively engage the potential clients, in order to assess their needs for financial protection and offer a suitable insurance policy to address those needs.

In general insurance, claim rejection refers to failure to comply with the terms or warranties of the policy, whereas in life insurance it refers to failure to disclose or hide a significant fact at the time the policy was issued. The insurers take use of this principle when dealing with individual life claimants and reject claims on the grounds of non-disclosure or concealing of information regarding health issues. The insurance is a contract of indemnity and based on the utmost good faith. When handling individual life insurance claims, some insurers overreach and deny on the grounds of hypertension, seasonal illnesses, or smoking habits that a policyholder forgot to disclose on the application form, which is typically filled out by their sales representatives. It is more difficult for bankers to persuade customers to buy insurance since they do not view it as a valuable asset, especially among rural customers. The trust aspect is crucial when it comes to financial transactions, thus a client may also be reluctant to purchase a product from a bank or a private corporation.

The bank workers' lack of training and knowledge about the insurance product is essential from the supply side as it may result in mis-selling or even the loss of business. As it may obscure the true benefits for both customers and businesses, the target-based strategy of banks presents a problem for insurance partners. Banks offer insurance plans from numerous firms, and because each has its own set of regulations, managing all the various relationships is difficult when using an open architectural distribution. For banks offering insurance, fierce rivalry between private and public players is another obstacle.

The success of bancassurance depends on the integration of banks' long-term strategies with insurance partners, which also take into account things like proper capital allocation in the bancassurance sector and therefore making full use of their

synergies. The achievement of company objectives will depend on these integrated synergies, which will also increase consumer pleasure by following the state current laws and regulations.

The study identified several trends, including the value of multi-tabs, the usage of different distribution channels, the significance of telemarketing, the bundling of insurance and banking products, digitalization, and the influence of technology. After carefully examining the demands and expectations of the target consumer, the research concludes that banks and insurance businesses in bancassurance should offer customer-centric products. With everything finished, Pakistan's Bancassurance, whose virtues have been established in other nations, should be able to develop rapidly in the years to come for the best practices.

6. Recommendations

The paper recommends that in order to control mis-selling of bancassurance products, various actors must adopt certain course of action. These actors may include banks, consumers, insurance agents, insurance companies, legislators, regulators and the specialists. There is need to increase the earning potential by introducing fresh and unique bancaaaurrance products. The majority of Pakistani banks are successful in earning money from the bancassurance sector. The majority of this revenue is currently earned by life and investment insurance products. Therefore, they should continue life and investment insurance products. There is a need to return to basics and begin selling modest price products with recurring commission revenue to banks and other distribution partners on an annual basis. The bancassurance channel must provide fresh, creative, and low-cost products. These products can be marketed via a variety of channels, including as branch banks, contact centers, sales representatives, cross-selling, and so on.

For Banking Sector

1- Relationship managers must receive automatic recommendations to increase engagement if a branch is falling short of objectives. They must be facilitated day-to-day planning in accordance with renewal objectives. To be as effective as possible, provide relationship managers visiting the branch with a prioritized job list and a route map.

2- Banks can opt to sell complex items when they feel comfortable doing so, but they should prefer simpler ones to avoid making the wrong sales.

3- It has frequently been observed that after paying the first premium, policy holders fail to pay additional premiums, so bankers shouldn't push an insurance product on a customer without first determining what they need.

4- Banks have been recommended to create and put into practice a code of conduct to enhance the accountability of bank employees taking part in the marketing of outside products.

For Consumers

1- A crucial recommendation is a loss prevention advice issued to an insured by an insurer that is deemed vital to prevent losing that insured's capital and money in the near future. The suggestions often need to be followed by the insured in order for the policy to be established. They are usually based on acknowledged and publicized safety and loss prevention standards or governmental requirements.

2- Developing the practice of saving, or making sure the policyholder sets aside a regular portion of his salary to save, can help him have the money he needs to pay the premium when it is due.

3- The most important recommendation is that before agreeing to any insurance coverage, consumers should first educate themselves. They must carefully read all the contents, and try to comprehend all the terms and conditions. It frequently happens, that lay persons do not understand what insurance is and they just fall into

the trap due to the influence of bankers and insurance providers and policy agents. Bankers receive substantial commissions for marketing these plans, so individuals should exercise caution. Likewise, there is additional responsibility upon the bancassurance providers and policy makers to keep in consideration the benefit of consumer who is a lay person and not much vigilant about the technicalities of complicated insurance policies.

For Insurance Agents

1- Establish objectives for relationship managers and all branches. Give the relationship managers the tools they need to accomplish their daily goals. One of the most difficult tasks for bancassurance teams is keeping track of relationship managers' attendance at branches. It must be executed mechanically.

2- Establishing a relationship with the bank branch manager and personnel and fostering that relationship to generate leads. Prospecting, meeting, and doing quick needs analysis with walk-in bank clients.

3- Bankers' agents should focus on the necessity and requirements of a policy for that consumer rather than their own interests and commission.

For Insurance Companies

1- Selling the appropriate policy, that is, the rule that adequately addresses customer's needs and conditions. A successful insurance sale requires clearly articulating the benefits so that the insured is compelled to maintain the policy.

2- An effective sales manager hires, develops, and supports their employees professionally. They also set weekly, monthly, or quarterly targets based on the team's performance to date.

3- The selling of third-party products must rigorously adhere to Shariah law and SBP rules, and all Islamic banks and conventional bank branches that practice Islam must have their agreements with third parties approved by the Shariah Boards.

4- Encourage market competition and protect customer choice.

For Legislators

1- The creation of a committee to look into consumer complaints in order to make sure that issues are resolved quickly, fairly, and successfully. A consumer may feel more secure in a company if a complaint is resolved swiftly, which will reduce their propensity to patronize the rivals. Thus, it is important to convey to the policyholder that their coverage is a reliable and valued asset.

2- It is important to instill trust in the likelihood of a speedy resolution of the claims. The only way this is possible is if policyholders receive prompt service when making requests.

3- To ensure that customers may continue to access and use bancassurance or bancatakaful as a viable means of purchasing insurance and takaful products. Encourage ethical business practices that protect customers' interests by making sales based on their requirements, being transparent, and being more open.

For Regulators

1- A contemporary and effective corporate sector, insurance, NBFCs, and capital markets are the goals of SECP, a regulator that was founded with those goals in mind. It has authority to conduct investigations and enact laws.

2- Whereas SBP oversees the regulation of banks, DFIs, exchange companies, and MFBs. SBP is essential to maintaining the financial sector's stability. The SBP Act, 1956 states that in its function as the nation's central bank and banking regulator, it

has the jurisdiction to ‘regulate the monetary and credit system of Pakistan and to foster its growth in the best national interest.’

3- Pay attention to what the customer has to say. They must listen even if the complainant is unable to address the issue.

For Specialists

The specialists must create a business case for new wealth-related products or projects come under their duty. Assist in the establishment of the business operating model, which includes having the appropriate product propositions, policies, processes, and procedures in place and are conforming to the regulatory standards.

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Human Rights Defenders in the Clutches of Draconian Laws – Curtailment of Constitutional Rights in Pakistan

Zoya Chaudary[1]

Abstract

Human rights defenders (HRDs) work like frontline warriors. They upheld the falling democracies and the rule of law at the cost of their own fundamental freedoms and protection. In Pakistan, HRDs are subjected to extra-judicial killings, torture, forced disappearances, data retention, mass surveillance, and court martial amid the civilian governments and military coup d'état. Despite of ratifying international treaties for the protection and promotion of human rights, domestic laws of Pakistan are unable to address the grievances of HRDs. Prevention of Electronic Crimes Act, Army Act and the Official Secrets Acts are weaponised against Constitutional freedoms and protections available to HRDs in Pakistan. This study examines the restrictive cum draconian nature and consequences of domestic laws, along with newly passed amendments in the same, on the rights and freedoms of HRDs e.g., right to fair trial, security, privacy and freedom of expression etc. The study identifies an unreasonable approach of the legislature and security agencies towards security of the State that have unreasonably curbed fundamental rights of HRDs. Meanwhile the Superior Courts evaluated and criticised State practices from time to time which has also been discussed in the study. Lastly, the study extends recommendations for the legislature to bring these draconian laws in conformity with the Constitutional guarantees to protect those who strive for the protection of human rights and play a significant role in a functioning democracy.

Keywords: Human Rights Defenders (HRDs), Fundamental Rights, Prevention of Electronic Crimes Act 2016, Army Act 1952, and Official Secrets Act.

1. Introduction

Human rights defenders (HRDs) are the frontline warriors who upheld the falling democracies and the rule of law at the cost of their own fundamental freedoms and

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protection.[2] Human rights defenders are sheer advocates of human rights in a democratic setup, campaigning either individually or in association, to ensure human rights are opted as a grundnorm in each domestic legal framework, policy or programme designed and executed in a democratic system. HRDs are recognized as essential actors for the achievement of socio-economic rights, promotion and protection of civil and cultural rights, as well as for the realization of sustainable development goals of United Nations 2030 Agenda.[3] In Pakistan HRDs are actively involved in human rights promotion and protection, however they are subject to extra-judicial killings, enforced disappearance and mass-surveillance which is often quoted in the interest of State and armed forces, whereas domestic laws have opted a draconian approach towards HRDs by introducing new avenues to curb various types of fundamental rights falling in the ambit of civil, social and political rights. History reveals that in Pakistan, HRDs have been subjected to discriminatory treatment from time to time which gotten severity over the years. Previously, these rights were curtailed via unannounced rigid policies and in present times several civil, social and political rights are being curtailed through the help of draconian laws either passed by the legislative assemblies (e.g., National Assembly and Senate of Pakistan) or Presidential authority.

This paper first explores Pakistan's international human rights commitments and pertinently its international obligations towards HRDs. Pakistan is not signatory to UN General Assembly Declaration which talks about rights of HRDs and duties of State parties to protect HRDs. However, Pakistan is still answerable under Universal Declaration on Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR) to respect and protect privacy, right to fair trial, freedom of expression and association of HRDs. The Constitution of Pakistan provides protections and fundamental freedoms to every citizen on equal footing and settles a

[2] Hina Jilani, "The Perils of Defending Human Rights," *Alternative Law Journal* (Gaunt) 39, no. 3 (2014): 183.

[3] Nolan, Helen. Protecting Those Who Protect Human Rights: Opportunities and Risks for Action at the UN. Stimson Center, 2022.

primary principle for every law to not be in derogation of fundamental freedoms except with some reasonable limitations. Inferring from the *Preamble* of the Constitution of Pakistan, 1973 a fundamental right is a right recognized, guaranteed and protected by the Constitution itself. Part II on *Fundamental Rights and Principles of Policy* of the Constitution stresses upon security of the citizens, fair trial, freedom of assembly and association, right to speech and information. Article 8 specifies that a law in derogation of any of the fundamental rights stands void. In *K.B. Threads (Pvt.) Limited Mian Saqib Nisar vs. Zila Nazim Lahore,* the high court settled an important principle that "fundamental rights are superior which cannot be interfered even by the State without strict recourse to the law.[4] Though some reasonable restrictions can be imposed on fundamental rights by preferring interest of society over interest of an individual person. However, judicial decision as in *Rimsha Shaikhani vs. Nixor College* settled that such restrictions must be based on proportionality principle.[5] Higher courts clarified that if the State is in danger, interests of individuals cannot be given preference over State interests. Meanwhile, judicial precedents signified that instance of putting State security and interest over and above the fundamental rights is subject to reasonable limitations. It implies that neither the legislature nor executive bodies have unbridled powers to restrict constitutional guarantees as per their whims and wishes. Nonetheless, apex and higher courts of the country are playing plausible role by settling remarkable *ratio decidendi* in matters of extra-judicial killings, torture and State authorized surveillance to evaluate State practices of limiting the rights and freedoms of HRDs by introducing draconian laws regarding mass surveillance, unwarranted investigations and unreasonable censorship.

The three main pieces of legislation *"Prevention of Electronic Crimes Act (PECA), Army Act and Official Secrets Act"* have undermined right to fair trial, right to security & privacy and freedom of expression in one way or another. Furthermore,

[4] K.B. Threads (Pvt.) Limited Mian Saqib Nisar vs. Zila Nazim, Lahore (Amir Mehmood), 2004 PLD 376 (Lahore High Court).

[5] Rimsha Sheikh vs. Nixor College, 2016 PLD 405 (Karachi High Court).

the latest amendments in these laws shook up the confidence of HRDs on legislative system of the country. For instance, right to holding an opinion and expressing it on electronic or social media platforms is framed as criminal defamation under PECA law. It extends a demanded duty towards the legislature e.g., National Assembly and the Senate to review, rescind or amend the said domestic laws in light of Pakistan's international obligations pertaining to HRDs and the Constitution of Pakistan, 1973 to bring domestic laws in conformity with the Constitution and international commitments.

Though, extensive research is available on human rights promotion and protection in Pakistan however, domestic laws curbing civil, social and political rights in context to HRDs are yet to be reviewed Therefore, this research study has critically analysed the stringent effect of the said laws on HRDs in order to list down recommendations for the legislator and policy makers to bring the laws in conformity with the Constitution and international obligations to form legitimate nexus between democracy and human rights.

The research is conducted by using qualitative research methodology and data is collected through using secondary sources. While using secondary sources, the prime focus was on desk-based analytical review of national and international laws on the subject under discussion, along with an in-depth study of relevant research papers, academic articles and experts' reports. Furthermore, apex and higher courts judicial decisions, opinion articles, policy briefs and websites were also relied upon for the research study.

2. Pakistan's International Commitments on Human Rights

Back in 1998, United Nations General Assembly adopted a declaration, titled '*the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms'* which is not of binding nature however recognizes the rights

and responsibilities of HRDs working across UN member states.[6] It is pertinent to mention that there is no universally accepted definition of HRDs neither UN declaration directly uses the term "human rights defender." However, the mandate of the declaration has made HRD a settled term to be used in international and national legal frameworks.[7] Furthermore, the UN declaration does not articulate any latest right and emphasizes on the accessibility of fundamental protections to HRDs by the member states.[8] For instance, Article 1 of the declaration exhibits prime responsibility of all individuals to promote human rights and their collective right to protection. Article 5 entitles the HRDs to assemble for the promotion & communication of human rights along with forming an association with the non-governmental organizations (note: one of the cases of human rights defender from Pakistan 'Idris Khattak' has been discussed later in this study, who was subjected to court martial for being associated with some international agencies.) The declaration further acknowledges the right to publish, discuss, and disseminate information or opinions regarding human rights violations in a State under its Article 6. Currently, in Pakistan PECA law, Army Act and Official Secrets Act limits most of these rights which have been analysed later in the study. Furthermore, Article 8.2 of the declaration permits to HRDs to submit pieces of criticism or suggestions to government institutes on its human rights' centric policies and initiatives. The declaration further allows to HRDs to attend court proceedings to determine the compliance status of domestic legal frameworks and to raise judicial enquiries on compliance with international obligations. In context to Pakistan, it has been observed that HRDs who were facing judicial trials were not permitted in the past to hire private counsels to defend them in military courts as it happened in Idris Khattak

[6] UNGA. "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms." Resolution 53/144 (1998).

[7] Caitlin Eaton, "Human Rights Defenders in the United Nations Framework," *Human Rights Defender* 25, no. 1 (April 2016): 5.

[8] Ibid, 5.

case, whilst the current scenario on right to higher private counsels for defence purposes in the military courts has slightly improved over the time.[9]

Though, the declaration itself is not legally binding; however, it places a major reliance on other international human rights instruments to invoke the responsibility of state parties to protect HRDs by calling in aid the *Universal Declaration of Human Rights* (UDHR), and the *International Covenant on Civil and Political Rights* (ICCPR) that has been ratified by Pakistan.

2.1 Article 2 of UDHR

Article 2 of UDHR sets forth the entitlement of every individual to fundamental rights and freedoms irrespective of any distinction / discrimination. It further undermines State practices to distinct between individuals in order to refuse any of the rights, freedoms and protections guaranteed in UDHR.[10] It implies that HRDs who advocate for human rights protections during civil democracies as well as coup' d'état in Pakistan is entitled to right to fair trial, right to live peacefully without any surveillance and right to form or become part of an association / organization adhering to the rule of law. Unfortunately, the actual practices have been quite contrary to it and left HRDs at the mercy of weak domestic laws which are often amended to attain ulterior or political motives. Detail of such legislative frameworks and practices is discussed hereinbelow.

2.2 Article 2 of ICCPR

ICCPR, basically, protects civil and political rights of an individual. With reference to civil rights "right to life, freedom of speech, freedom of assembly and pertinently right to fair trial" stands on top of human rights protections under ICCPR. It obliges the State parties to opt for necessary legislative steps or other relevant measures to

[9] Ibid. 5.

[10] UNGA, "United Nations Declaration on Human Rights," Resolution 217 A (1949), Article 2.

grant hinderance free civil and political rights to every individual. As a matter of fact, passing domestic laws or policies on HDRs protection is a rare practice across the globe.[11] Speaking of Asia, so far Mongolia has adopted a law *"Law of Mongolia on the Legal Status of Human Rights Defenders, 2021"* that granted a legal status to HDRs and listed obligations of the State pertaining to HDRs along with establishing a comprehensive mechanism for their protection. Pakistan is also amongst such countries that lacks in passing laws, policies, or mechanisms to protect rights of HRDs particularly. We can set this aspect aside, as the actual concern is not about Pakistan having HDRs' centric legislation, in fact, the effectiveness of already available pieces of legislation, and implementation of protections and freedoms granted under these legislative instruments e.g., Constitution of Pakistan, is a matter of consideration here.

Furthermore, ICCPR prohibits the State parties to make an individual subject to torture, cruel or inhuman treatment. In fact, neither domestic laws can allow any of such degrading treatment neither national courts can inflict such punishments.[12] It is followed by right to security from arbitrary arrests and detentions. Hereunder, we shall go through the adverse type of practices against HRDs' security & protection in Pakistan that are sheltered by domestic laws which are being amended from time to time to restrict Constitutional freedoms of HRDs. Later in 2016, UN Human Rights Council introduced a resolution pertaining to HRDs' protection, working individually, or in groups on economics, social and cultural rights.[13] Pakistan voted against the said resolution and called it a western agenda to interfere in domestic setup of the country. The country further stance that HRDs cannot be labelled as

[11] "Protection Instruments," *International Service for Human Rights,* accessed August 1, 2023, https://ishr.ch/defenders-toolbox/national-protection/.

[12] International Covenant on Civil and Political Rights, Article 7, opened for signature December 19, 1966, 999 U.N.T.S. 171, entered into force March 23, 1976, https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf.

[13] UNGA, "Resolution on Protecting Human Rights Defenders, whether Individuals, Groups, or Organs of Society, Addressing Economic, Social, and Cultural Rights," Res. A/HRC/31/L.28, 2016. https://www.sahrc.org.za/home/21/files/SAHRC%20international%20and%20regional%20report%20FINAL.pdf.

special group neither it can be awarded any special status.[14] Apparently, it goes against Pakistan's commitment to protect HRDs in 2nd Universal Periodic Review (UPR) cycle, where it made a commitment to implement recommendations w.r.t freedom of expression, press & information, and misuse of blasphemy laws to restrict free speech, however, Pakistan did not comply with any of these recommendations and subsequently opposed UN Resolution pertaining to economic, social and cultural rights of HRDs.

3. Current Situation of HRDs in Pakistan

Before unfolding domestic laws on HRDs' protection, let's discuss what sort of grave human rights violations towards HRDs are being committed in Pakistan. It is being argued by the experts on HRD subject that in times of conflict HRDs are targeted by armed groups as well as by State actors and security forces, due to their core agenda of promoting peace amongst the masses.[15]

3.1 Enforced Disappearances

Enforced disappearances of HRDs is not something new to the citizens of Pakistan. Without delving into the history of how and when, it is pertinent to highlight that since military coup d'état of General Pervaiz Musharaf, there has been constant reporting of thousands of missing persons including whosoever speaks for his own rights or rights of a society.[16] Commission of Inquiry on Enforced Disappearances (COIOED) formulated by the federal government released statistics regarding involuntarily disappearances that crossed a digit of total 8000 disappearances mostly

[14] International Service for Human Rights, "Human Rights Council: Adopt resolution on human rights defenders and reject hostile amendments," *ishr.ch,* accessed August 10, 2023, https://ishr.ch/latest-updates/human-rights-council-adopt-resolution-human-rights-defenders-and-reject-hostile-amendments/.

[15] Hina Jilani, "The Perils of Defending Human Rights," Alternative Law Journal (Gaunt) 39, no. 3 (2014): 183.

[16] Cerys Williams, "Pakistan Declared a World Leader in Number of Enforced Disappearance Cases," *The Organization for World Peace,* accessed August 11, 2023, https://theowp.org/pakistan-declared-a-world-leader-in-number-of-enforced-disappearance-cases/.

from Baluchistan and Khyber Pakhtunkhwa since 2011 onwards.[17] At this point in time, when number of missing persons is surging exponentially given the current political and democratic instability in the country, the very essence of established commission has become doubtful. In fact, the HRDs have zero confidence in the statistics of COIOED and claimed that actual numbers are higher than the numbers issued by the Commission.[18] Few of the activists also showed concerns over biasness of the body and its miserable failure to prosecute even a single case since its formation.[19]

Once the Commission was formulated and it started practicing within its domain, the UN Working Group on Enforced and Involuntary Disappearances (WGEID) visited Pakistan and issued a report on the status of missing persons along with recommendations for government to recover missing persons.[20] A big chunk of the recommendations was left unaddressed that further gave rise to enforced disappearances in 2015-16.[21] However, there are two significant advancements at the part of judiciary and legislator that needs consideration. In a missing persons case "Human Rights Case No.29388-K of 2013" the Supreme Court of Pakistan held that to meet the ends of justice, the court will observe the provisions of International Convention for the Protection of All Persons (ICPPED) despite the fact that Pakistan is a not signatory to the convention.[22] The apex court further labelled it as a crime against humanity and violation of article 10 of the Constitution that offers protection

[17] "Missing Persons List," *Commission of Inquiry on Enforced Disappearances,* 2022, accessed August 11, 2023, http://coioed.pk/missing-persons/.

[18] Zahra Kazmi, "Enforced Disappearances in Pakistan Raises Questions," *Made for Minds,* accessed August 11, 2023, https://www.dw.com/en/enforced-disappearances-in-pakistan-raise-questions-over-role-of-secret-services/a-62969115.

[19] Ikram Junaidi, "Call to legislate limits for state institutions over disappearances," *the Dawn*, August 31, 2022.

[20] UNGA Human Rights Council, "Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Pakistan," UN Doc. A/HRC/22/45/Add.2, February 26, 2013, https://www.refworld.org/publisher,UNHRC,,PAK,,,0.html.

[21] United Nations General Assembly, Human Rights Council, "Report of the Working Group on Enforced or Involuntary Disappearances," UN Doc. A/HRC/42/40, July 30, 2019,

[22] Human Rights Case No.29388-K of 2013, 2014 PLD 305 (Supreme Court).

against enforced disappearance. Recently, Karachi High Court issued a verdict in *Mst. Asma Nadeem vs. Federation of Pakistan* stating that;

> State was duty bound to protect its citizens. State has the power and ability to prevent such practices as missing persons/enforced disappearances and to pass appropriate legislation to such effect, High Court observed that the onus rests on federal government to put an end to such illegal practices….[23]

In another ruling of Islamabad High Court in *Mahera Sajid vs. Station House Officer*, it was held that the effect of enforced disappearances is complex and it virtually suspends fundamental rights of the victim.[24] The court further added that behind every missing person's case the involvement of the State exists either directly or indirectly. Undoubtedly, such judicial precedents of the apex and higher courts highlights grave urgency and leads the lower judicial forums to address missing persons cases as a matter of public importance.

The legislator also took a crucial step and introduced a criminal amendment Bill, titled "The Criminal Laws (Amendment) Bill, 2021 in National Assembly that criminalized enforced disappearances by the agent of the State or on the order of State.[25] The Bill has a provision on fake complaints filed by family members of missing persons. This provision heated a public discussion on its tendency to engage family members of the victim in a separate agony. The Bill once passed was referred to the Senate, which was returned to National Assembly along with some recommendations. The fate of the Bill is yet to decide that must not be delayed for an unreasonable amount of time given the deteriorating human rights situation in the country.

[23] Mst. Asma Nadeem vs. Federation of Pakistan, 2022 PLD 264 (Karachi High Court).
[24] Mahera Sajid vs. Station House Officer, 2018 CLC 1858 (Islamabad).
[25] Criminal Laws (Amendment) Bill, 2022. Available at: https://senate.gov.pk/uploads/documents/1644816630_522.pdf

3.2 Torture and Extra-Judicial Killings

It is an undisputed fact that human rights defenders have been subjected to torture along with their families due to their audacity to challenge the violations of fundamental rights.[26] Given the political upheavals since March 2022 in Pakistan, journalists from all across the country continued broadcasting the unpredictable political scenario. It all led to arrest and custodial torture of journalists, lawyers and political workers.[27] If we unfold history of inflicted torture on HRDs many cases come in mind including the case of human rights activist Salman Haider who raised voice for minorities and religious communities' rights. He kept on receiving threat calls and eventually got arrested in the capital city of Pakistan. The kidnappers were unknown to everyone, even the State refused to take the responsibility of his illegal abduction. Salman Haider later revealed that he received serious physical torture while abduction. At last, Slaman Haider got acquitted as the police could not find any evidence for conviction purposes.[28] It is neither the first case of illegal abduction and torture nor always the victims find safe release, and most often it ends with extra-judicial killing of the defenders.

Let's comprehend the term "extra-judicial killing" described in a report of Amnesty International as "*an unlawful and deliberate killing carried out by order of a government or with its acquiescence*". The report further states that extra-judicial killings in one way or the other is outcome of a government policy of any level to eliminate targeted individuals avoiding the risk of their arrest and fair trial as per the rule of law.[29] Extra-judicial killings are often handled by the executive authorities

[26] Hina Jilani, "The Perils of Defending Human Rights," Alternative Law Journal (Gaunt) 39, no. 3 (2014): 185

[27] "Pakistan: Journalists and Activists Criminalized and Abducted While Government Seeks More Powers," *CIVICUS*, accessed August 12, 2023, https://monitor.civicus.org/explore/pakistan-journalists-and-activists-criminalised-and-abducted-while-government-seeks-more-powers/.

[28] Tazeen Inam, "A victim of torture, blogger continues fight for human rights in Pakistan," *New Canadian Media*, accessed August 12, 2023, https://newcanadianmedia.ca/a-victim-of-torture-blogger-continues-fight-for-human-rights-in-pakistan/.

[29] Amnesty International, Israel and the Occupied Territories: Israel Must Put an Immediate End to the Policy and Practice of Assassinations, AI Doc. Index: MDE 15/056/2003, accessed July 2023, https://www.amnesty.org/en/wp-content/uploads/2021/06/mde150562003en.pdf.

which is clearly not their ambit of work.[30] It's a prime duty of judicial bodies to conduct the trial of an accused and announce his fate after examining pro & contra evidence. In *Benazir Bhutto vs. Federation of Pakistan* the apex court held that "Extra-judicial killings by State machinery violates fundamental rights and right to life cannot be taken away except as provided by the law."[31]

In 2023 national report submitted by Pakistan pursuant to Human Rights Council resolution No. 5/1 and 16/21 lacked figures and significant advances on behalf of the State to address extra-judicial killings. It merely mentions the Bill to criminalize enforced disappearances and talks about the COIOED as a designated working body on extra-judicial/arbitrary killings. The report poorly lacks the prominent actions on behalf the State, and provincial governments to protect HRDs from extra-judicial detentions that lead to murder as well.[32] In addition to this, the report highlights efforts of provincial governments e.g., Punjab, Khyber Pakhtunkhwa and Baluchistan to safeguard HRDs and journalists by announcing welfare and relief funds for their services.[33] These positive developments deserve appreciation however, it fails to safeguard right to life, right to security and ensuring an enabling environment for HRDs and journalists. Such schemes work as a band-aid once the violation is committed by way of arbitrary detention and extra-judicial killing and does not provide legal precaution to HRDs' rights violation.

3.3 State Authorized Surveillance

Targeted surveillance of HRDs is not a latest item on the list of human rights violations. It is something happening across the globe for its assistive use in capturing

[30] Faisal Daudpota, "Pakistan: How to Suppress the Offence of Extra-Judicial Killing in the Light of Superior Courts' Decisions – (Reforming Criminal Justice Series)," SSRN 25, no. 2 (May 2019), 104, http://dx.doi.org/10.2139/ssrn.3380948

[31] Benazir Bhutto vs. President of Pakistan, 1998 PLD 388 (Supreme Court).

[32] UNGA Human Rights Council, "Seventy-second year, "National report submitted pursuant to Human Rights Council resolutions 5/1 and 16/21," A/HRC/WG.6/42/PAK/1, November 10, 2022. https://www.ohchr.org/Documents/HRBodies/HRCouncil/A-67-53-Add-1_en.pdf

[33] Ibid, 10.

terrorists and criminals.[34] In 2018, the Amnesty International conducted a four-month long investigation on mass surveillance of HRDs in Pakistan. To surprise of many, human rights defenders or activists are subject to chain of surveillance attacks in form of malicious emails and messaging.[35] The report highlights a case of fake Facebook profile approaching HRDs working in civil society organizations to track their activities and to gather their personal information. Quite often, these fake IDs pretend to be working with renowned authorities like Human Rights Commission of Pakistan, to avoid doubts and to build trust with HRDs to further tap their activities. Another way of surveillance is through sending malware via email and by creating phishing pages to collect google credentials of HRDs. It is reported that this practice goes back to 2016 and has a longer history of mass surveillance.[36]

We may count such type of surveillance as private surveillance instigated in personal hostility or a type of surveillance which is not backed by the State machinery. However, State authorized surveillance suggests otherwise. For instance, Digital Rights Foundation mentioned in its report that technologies which Pakistan's government uses for censorship is also being used for surveillance that strikes against right to privacy of HRDs in Pakistan.[37] Later the State, justifies it as a tool to prevent circulation of pornographic and blasphemous material. The State provided some sort of autonomy to intelligence agencies to identify the security threats to the State, which eventually results in mass surveillance from phones taping, wiretapping to social media accounts hacking.[38] PECA law which allows surveillance and data

[34] "Demand an end to the targeted surveillance of Human Rights Defenders," *Amnesty International*, accessed August 14, 2023, https://www.amnesty.org/en/petition/targeted-surveillance-human-rights-defenders/.

[35]Amnesty International, Human Rights Under Surveillance: Digital Threats Against Human Rights Defenders in Pakistan, Report No. ASA 33/8366/2018. accessed August, 2023, https://www.amnesty.org/en/documents/asa33/8366/2018/en/.

[36] Ibid, page 28.

[37] Digital Rights Foundation, "Impact and Legality of Surveillance" (14 October 2020), 1-32.

[38] Areeba Itzaz Qureshi, "Should Intelligence Agencies be Given Access to Social Media and Technology for Surveillance Purposes? Policy Analysis," 2018, *LUMS Center for Business and Society*, accessed August 16, 2023, https://cbs.lums.edu.pk/sites/default/files/2021-11/Abstract%2056.pdf.

retention clashes with *the Investigation for Fair Trial Act, 2013*. The said Act placed checks on law enforcement agencies / investigation authorities while interception and surveillance of the masses. Under this Act, the agencies are supposed to get prior warrant from High Court for interception / surveillance purposes along with submitting diligent reasons for court satisfaction. On the contrary, PECA permits that the investigation agency can issue a written request to information provider directly and Court permission for data collection and retention can be taken afterwards within 24-hours' time period. Here the court can be any court with competent jurisdiction even the trial court. It implies that PECA law removed judicial oversight to State as well as the intelligence agencies authorized surveillance to a negligent level. In *Qazi Justice Faez Issa vs. the President of Pakistan* the court argued that in Pakistan surveillance is allowed in limited areas under judicial and executive oversight, and surveillance in other areas of the country is constitutionally prohibited.[39] The Supreme Court of Pakistan declared surveillance without judicial and executive oversight unconstitutional which ultimately questions the validity of provisions of PECA law that allows surveillance and retention of data of the citizens. It prioritizes security of the State and armed forces over privacy rights of the public to an unreasonable extent which sometimes ends with enforced disappearance of HRDs.[40]

Likewise, it is observed that journalists and HRDs run their campaigns on human rights promotion on social media. The surveillance on the part of State may frame these campaigns as cyber terrorism under PECA law which is discussed hereunder.[41] If the State continues to authorize mass surveillance by intelligence agencies under draconian laws the infringement of privacy rights will be continued. Subsequently, it will lead to no accountability culture, non-transparent data collection & removal practices that would affect not only human rights defenders but to the society as a whole. The Supreme Court of Pakistan held in *Justice Qazi Faez Isa vs.*

[39] Justice Qazi Faez Isa vs. The President of Pakistan, PLD 2021 SC 1.
[40] Ibid.
[41] Haroon Baloch, "Internet Rights and Legislation in Pakistan: A Critique on Cyber Crime Bill, 2016," 1.

The President of Pakistan[42] that "intrusion by the State into the sanctum of personal space, other than for a larger public purpose, was violative of constitutional guarantees." Moreover, the apex court showed concern regarding manipulative use of illegally procured information and its impact on individuals security and dismantled information. HRDs are the one who help in strengthening rights of citizens in a democratic State, if the defenders themselves are subject to insecurities and mass surveillance then fundamental rights of a common man will be a distant dream to achieve.

4. Domestic Laws Effecting HRDs

State is the prime authority responsible in above-listed international legal instruments for human rights promotion and protection, along with protection of those who defend and fight for fundamental rights and freedoms. Pakistan is signatory to UDHR, ICCPR and similarly opted for UN General Assembly declaration on HRDs' protection back in 2018.[43] Let's unfold both decrepit & draconian pieces of legislation that have been deployed from time to time to restrict HRDs activities rather than providing a safe and secure place to unanimously promote fundamental rights in the country. Given the reason that Pakistan has not yet legislated specific law on human rights defenders' protection the Constitution of Pakistan is basic legal document for HRDs to be relied upon which have previously been discussed in detail. Though the legislator made some advancements by criminalizing custodial torture etc., it is not adequate to balance the unconstitutional impact of the draconian laws which are perused hereinbelow one by one.

4.1 Penalization of Custodial Torture, Death and Rape

Despite several attempts in the recent pass to criminalize custodial torture, finally, in 2022 a significant piece of law titled *Torture and Custodial Death*

[42] Justice Qazi Faez Isa vs. The President of Pakistan, PLD 2021 SC 1.
[43] Ibid.

(Prevention and Punishment) Act, 2022 was passed by the Parliament of Pakistan on criminalization and penalization of custodial torture, death and rape. The law is an achievement in itself due to its prime intent to provide protection to citizens during arrests by public officials. It designates Federal Investigation Authority (FIA) to investigate into the matters of custodial torture, death and rape which shall be tried before the Court of Session.[44] However few gaps are identifiable in the Act as it does not speak about mental torture, neither it has gender-neutral language that leave female human rights defenders and transgender rights defenders at highest risk to face custodial torture. Secondly, HRDs face torture at the hands of intelligence authorities who get abducted and forcefully disappeared without following any legitimate procedure. Section 2(f) under its Explanation-II states that a person is deemed be in custody when the due process of arrest and detention is followed. This definition somehow limits its application of enforced disappearances, and the victim has to prove first that he was arrested following the due process of law and then he is supposed to prove that he was subjected to custodial torture. Hence, the Act can work as double edge weapon for HRDs.

Secondly, this Act involves two statutory bodies at a time as FIA has investigatory role while National Commission on Human Rights (NCHR) has a supervisory role. However, the provisions are unclear about their designated role, especially the role of NCHR which can possibly create operational clashes between the two bodies. Moreover, territorial jurisdiction of NCHR is limited to the Federation and not extended to the provinces which can create hindrance in supervision of custodial torture, murder and rape that occurs outside the Federation. Thirdly and most importantly, the Act talks about *mala fide* complaints which is enough to pressurize the family members and even the victim itself to get manipulated by the hands of those who are at powerful positions. There must be some proper process to check the validity of the complaint through reasonable means.

[44] "Torture and Custodial Death (Prevention and Punishment) Act 2022," Act No. XXVI of 2022, Section 6.

4.2 Cyber Laws Enabling Mass Surveillance

Prevention of Electronic Crimes Act, 2016 (PECA) is considered deterrent to the right to privacy and freedom of expression especially at current times when most of the defenders voice out their opinions and concerns regarding human rights violations through social media platforms. Latest proposed amendments in the Act have instigated severe reaction amongst HRDs, civil society organizations and journalists both nationally and internationally. Hereunder, paragraph (A) discusses the pre-amendment issues with PECA regarding right to privacy and freedom of expression, whereas paragraph (B) discusses the post amendment implications of PECA law.

A. The Act has been a controversial piece of legislation as it provides a way for mass data surveillance by permitting service providers to retain data u/s 32 of the Act without proposing any data safeguard measures and without disclosing who will have access to retain data besides the Government.[45] PECA, invokes the application of the Electronic Transactions Ordinance, 2002 Act that requires the service providers to retain data u/s 5 & 6 which is also silent about data safety measures. Hence, PECA allows retainment of citizens' data in absence of mandatory data protection measures. Phone tapping is a common practice and recently a plethora of audio calls of politicians, and judges were released amid the political war between different political parties in the country that gives a strong indication that HRDs' data can be acquired and misused at any time. Previously, it was allowed under Mobile Cellular Policy of the Ministry of Information and Technology, which made it a pre-condition to intercept phone calls and messages of the users to get a license. However, PECA allowed retention of data for year long time period which has caused much severity to anti-privacy practices in the country[46]. One can easily infer from this practice that security & privacy of HRDs is relatively at higher risk as cyber laws are permitting

[45] "The Prevention of Electronic Crimes Act 2016," Act No, XL of 20I6, section 32.

[46] Mobile Cellular Policy, 2004 (Pakistan: 2004), 20. https://www.pta.gov.pk/assets/media/mobile-cellular-policy-jan-28-2004.pdf .

both censorship and mass surveillance through the help of "pocket surveillance" technologies.[47] Though the Act criminalizes unauthorized access to information system, however, it is not a matter of much concern, as personal data of HRDs holds more value and needs more protection.

Secondly, Pakistan Telecommunication Authority (PTA) has power to remove unlawful content from electronic media u/s 37 of the Act. It describes unlawful content as content that goes against the glory of Islam, poses threat to the security, a threat to public order and morality principles.[48] However, the Act misses the parameters to determine what type of content can fall in any of such categories. The proposed Rules of PECA Act has also not given procedure on how to exercise power to remove unlawful data from electronic media. It leaves another possibility that human rights campaigns operationalized by HRDs on social media can be removed by giving it a colour of unlawful content or political rivalry. The Act has allowed censorship and surveillance in absence of accountability and transparency mechanisms. In addition to this, HRDs need a law which can promote proportionality principle between State security and curtailment of freedom to expression and privacy rights which has not been met so far.[49] Clearly, the restrictions placed in light of unlawful data are unreasonable because HRDs who are banned to made appearance on national T.V. channels cannot run campaigns on social media as well. It does not only curtail freedom of speech, but also, it is a direct strike on human rights promotion and protection in Pakistan.

Section 10 of the Act on cyber terrorism though addresses the intent of legislation, however, the vagueness of the actions defined that amount to cyber terrorism are not serving the purpose.[50] It creates a possibility that any campaign run

[47] "State of Privacy Pakistan," *PI,* January 26, 2019, https://privacyinternational.org/state-privacy/1008/state-privacy-pakistan, accessed August 15, 2023.

[48] "The Prevention of Electronic Crimes Act 2016," Act No, XL of 20I6, section 37.

[49] Eesha Arshad Khan, "The Prevention of Electronic Crimes Act 2016: An Analysis," *LUMS Law Jou rnal* 5 (2018): 117.

[50] Ibid, 119.

by HRDs e.g., awareness campaign on religious minorities rights, can be made fallen into cyber terrorism as it can instigate public hatred amongst a specific group/community. What sort of actions amount to cyber terrorism needs clear definition, whereas the PECA does not provide definition of cyber terrorism at all.

B. An amendment was proposed in PECA, titled "Prevention of Electronic Crimes (Amendment) Ordinance, 2022" that heated a socio-legal debate amongst legal fraternity, national statutory bodies e.g., National Commission for Human Rights, civil society organizations and HRDs. On the face of amendment, it provided definition of term "person" u/s 2 to further include any company, association, authority or body established by the Government. Secondly, it declares online defamation a non-bailable offence and enhanced its punishment from three-years to five-years u/s 20 which also uses the term person. A collective reading of both sections reveals that no statement can be made against government, judicial and military bodies either in form of accountability question, healthy criticism or an unfavourable statement by HRDs.[51] The amendment is all in all the curtailment of freedom of expression. It is worth nothing that such amendments are being introduced at times when UN Human Rights Committee in General Comment No. 34 directed the State parties to decriminalize defamation.[52] Another worrisome problem with the amendment is that it was introduced through an ordinance while both Houses were in session and no national emergency was reported that instigated the need to pass such crucial amendment through a presidential ordinance avoiding the legislative debate. This undemocratic step amounts to violation of legislative procedure and *ultra vires* of the powers granted to the Presidential chair under the Constitution.

[51] "Pakistan: Repeal Amendment to Draconian Cyber Law," *Human Rights Watch*, February 28, 2022, https://www.hrw.org/news/2022/02/28/pakistan-repeal-amendment-draconian-cyber-law#:~:text=While%20PECA%20already%20contained%20broad,association%2C%20or%20body%20of%20persons%2C.

[52] United Nations Human Rights Office of the High Commissioner, "General Comment No. 34 on Article 19: Freedoms of Opinion and Expression," July 29, 2011, accessed August 20, 2023. https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no34-article-19-freedoms-opinion-and.

Islamabad High Court took a bold stance that will be written in golden words in judicial history by declaring PECA amendment unconstitutional and strike it off.[53] The Court held that the very essence of the amendment opposes the fundamental freedom and guarantees. The court directed the Federal Government to propose reasonable amendments in Defamation Ordinance, 2002 and also ordered to look into abuse of power by FIA. Through this order Islamabad high court acted as guardian of right to freedom of expression and somehow lessened the severity of this draconian legislation.

4.3 Official Secrets (Amendment) Act, 2023

After PECA, amendment in Official Secrets Act (OSA) has brough great surprise to fundamental freedoms of citizens whereas, HRDs are at risk to get victim of another draconian law. Amendment in OSA is disowned by the then Presidential power of Pakistan by not signing the amendment Bill, which eventually got published in official gazette avoiding the due process of law.[54] Nonetheless, it also seeks apex or higher courts declaration on the legitimacy and validity of OSA amendment just as Islamabad high court's declaratory order regarding PECA Amendment 2022. In addition to this, the amendment conferred excessive powers upon intelligence agencies and targeted digital means of communication as well. Let's look into the amended provisions hereinbelow;

- The expansion in the meaning of "enemy" has severely affected the principle of natural justice which places a liability of "spying" on a person who unintentionally happens to work with a foreign power or organization. Secondly, the term "work" is quite ambiguous to ascertain what type of work in collaboration with any foreign power, organization, or association is considered prejudicial to the State security.

[53] Meera Shafi vs. Federation of Pakistan, 2022 PLD 773.
[54] Ibid.

- Amendment in section 3, sub-section (2) can possibly exacerbate the severity of the actions which are counted as offences against the defence, security or interest of the State. Initially, presence of a person with some sketch or plan at prohibited/defence places at the time of war was punishable without conditioning the offence to be proved beyond a reasonable doubt, however, the latest amendment criminalized the presence of a person at prohibited places during peace times as well. It clearly restricts freedom to movement in peaceful times that amounts to an unreasonable legislative approach and unreasonable restriction as the major interest of the community is missing here.
- The amendment further authorizes the formation of joint investigation team to investigate civilian espionage. FIA can also be assigned the investigation of civilian espionage however it is at the whim and wishes of Director FIA. The investigation team will consist of persons from intelligence agencies and one to two persons from the federal or provincial governments as the Director FIA deems appropriate.
- A new insertion of sub-section (2A) in section 11 that has permitted open access to intelligence agencies to enter any place at any time without warrant. It has given an unquestionable, unaccountable power to intelligence agencies over civilians as agencies can conduct search operations at any time, on any person without being accountable for their actions. Law professional raised serious concerns and evaluated such provisions a great threat to a functional democracy like Pakistan.[55]

Nonetheless, HRDs, lawyers, journalists, CSOs are prone to these search operations in absence of any oversight mechanism which means no law or legal system can come to their rescue in presence of these draconian laws.

[55] Aamir Saeed, "Protests by lawmakers block approval of bill granting blanket powers to Pakistani spy agencies," *Arab News*, August 2, 2023, https://www.arabnews.com/node/2348511/pakistan, accessed August 20, 2023.

4.4 Army (Amendment) Act, 2023

Amendments in Official Secrets Act and Army Act were passed on same day without following the due process of law as alleged by the then Presidential power of Pakistan. Army Act is a military legal code and its application is limited to army personnels. However, during military coup d'états and emergency situations trial of civilians is also conducted under Army Code e.g., terrorist attack on Army Public School Peshawar in 2014. Recently, the latest amendments in Army Act conferred more powers to the Chief of Army staff and protected the interests of Army by supressing freedom of expression. Let's review the amendments in respective sections one by one;

- A newly inserted section 26A criminalizes the disclosure of information by an ex-army personnel which can be threatful to the State security or the armed forces itself. It not only imposes 5-years rigours imprisonment, but also invokes relevant provisions of the Official Secret Act that confers an unlimited power to investigate, either a place or a person, on an apprehension that an ex-army personnel might have disclosed information to some foreign organization or institute. Likewise, another section permits military trial of civilians who are accused of sharing secret information with any foreign organization or power. Irrespective of the intent of the legislature behind inserting this amendment, plain reading of the section reflects that the provision intimidates and creates a holistic environment for human rights defenders and violates constitutional guarantee of right to fair trial and IHL.[56] Lawyers, journalists and human rights activities criticized the amendment and called it a blatant violation of constitutional rights and international human rights as military trials are highly secretive and only one right to appeal is granted before the military appellate tribunal and ousted

[56] Abid Hussain, "Pakistan's controversial Army Act: What is it, how does it work?" (*Aljazeera*, 18 May 2023) <https://www.aljazeera.com/news/2023/5/18/pakistans-controversial-army-act-what-is-it-how-does-it-work> Accessed 20 August 2023

the power of judicial review of superior judiciary. Though the Supreme Court reasoned in *District Bar Association, Rawalpindi vs. FOP* that the orders of military courts are subject to judicial review by both High Courts and Supreme Court.[57] However, this remedy of forum is limited to two grounds; 1. coram non judice, orders passed without jurisdiction, 2. orders passed with *mala fide* that does suffice the curtailment of judicial review.

- It further talks about "conflict of interest, electronic crimes and defamation" under newly inserted sections 55-A, 55-B and 55-C respectively. Section 55-B invokes the application of PECA law against civilians for scandalizing, ridiculing or undermining the armed forces of the country. The three terms clarify that armed forces cannot be made part of any dialogue / discussion either it is in the form of healthy criticism or part of any accountability practice. PECA law considers it criminal and electronic defamation and imposes severe punishment in severe manner as described earlier. Whereas section 55-C makes the same offence committed by the former army personnels punishable under Army Act with two years' imprisonment and fine.

It is quite evident that Army Act, Official Secrets Act and PECA law go hand-in-hand to restrict fundamental freedoms. A recent example of simultaneous application of these laws was witnessed in military trial of human rights defender "Idris Khattak" who was convicted of espionage and leaking the sensitive information to foreign powers which were concluded to be threatful to the State and armed forces' security.[58] Idris Khattak, a Pakistani civilian and a human rights defender was forcefully disappeared for eight months and later tried under Army Act and Official Secrets Act. In fact, a writ petition of *habeas corpus* was filed before Peshawar High Court which bore no fruits. Eventually, Idris Khattak was convicted

[57] District Bar Association, Rawalpindi vs. FOP, PLD 2016 SC 401.
[58] Ibid.

of espionage constituting a blatant abuse of power by military forces and violation of human rights law and Pakistan's international commitments on the subject. Court martial of Idris Khattak ended in 2021, whereas given the current amendments in the said draconian laws has great potential to silence the voices of HRDs. These laws permit full fledge data surveillance, retention, at spot investigation without warrant the court as well martial of civilians without any oversight mechanism.

5. Recommendations & Conclusion

A thorough review of domestic laws, in the light of international commitments of the State and Constitutional guarantees conferred upon HRDs filtered down a list of recommendations for the legislature. These recommendations are in pattern of general to specific and requires immediate actions by the legislative bodies to ensure fundamental protection and freedoms to HRDs.

- Firstly, the legislative bodies are suggested to recognize the status of HRDs and legally back their work in human rights advancements. A legal recognition may be granted through a Constitutional amendment, which seems a distant dream at this stage. Other possibility can be through introducing a separate piece of legislation that not only grants a legal status to HRDs, but also, acknowledges their rights and duties of the State towards HRDs protection.
- It is suggested that laws which place limitation on HRDs activities in the promotion of human rights either should be repealed or amended by the legislator in conformity with Constitutional freedoms and international obligations of Pakistan.
- Forced disappearances, judicial torture, and mass surveillance needs to be publicly condemned by the legislatures at first. The condemnation should not be limited to oral condemnation, in fact relevant authorities must be held accountable and answerable before the judicial and legislative bodies.

- It is suggested that the designated / responsible authorities must be relieved from inter and intra departmental pressure while investigating the cases of threat, harassment, or intimidation against HRDs.
- It is recommended to introduce effective oversight mechanism for the cases which are being dealt by FIA e.g., custody or investigation of an HRD under PECA law, Army Act and Official Secrets Act. Storing power into one body, in absence of any oversight and accountability measure can possibly leads to *ultra vires* and abuse of power. To ensure unbiased and transparent case investigation the provincial human rights commissions may also be assigned the oversight and supervisory role.

First of all, the Act titled *Torture and Custodial Death (Prevention and Punishment) Act, 2022* needs adherence to gender neutral terms / language to provide protection to female defenders and transgender activists. Moreover, a clear wording of the Act can assist the courts to correctly interpret the intent of the legislator in order to provide relief to the victims of custodial torture, death or rape. Moreover, the ambit of the Act is limited to physical torture and it does not address mental torture which is often inflicted on the victims. It is suggested to revise the definition of term "torture" to include mental torture just as the Protection from the Workplace Harassment Act, 2010 addresses the mental harassment on equal lines to physical harassment. In addition to this, it is commendable that NCHR has a supervisory duty to oversee the performance of FIA, however, it is suggested to distinguish the functions of both bodies as their duties apparently are bit unclear. Secondly, the requirement of due process to be followed for arrest and custody purposes limits the application of the protections available to the victims. Most often HRDs are forcefully disappeared hence, the victim has to go through double procedure under the law to prove that he was abducted following the due process and subsequently he is required to prove the custodial torture. It implies a need to widen the scope of section 2(f) to equally disperse legal protections to HRDs. Thirdly, provision regarding *mala fide* complaints discourages the idea of filing complaints and leaves

the victim and his family members at the mercy of unbridled powers inflicting custodial torture. Therefore, it is recommended to introduce a preliminary investigation process to ascertain the validity of the complaints in order to avoid exploitation of the resources as well as to provide immediate relief to HRDs.

With respect to online surveillance, this study supports the idea of transparent and informed surveillance to ensure a reasonable balance between State security and privacy rights of HRDs. It would be a reasonable practice to introduce few important provisions in PECA law regarding circumstances when State surveillance can be allowed, technologies which are being deployed for mass surveillance, and nature of data which can be retained sufficiently for maximum six months with a court warrant to avoid the misuse of retained data. Likewise, it must be made a legal requirement for intelligence agencies to register their online surveillance activities in order to oversee agencies' surveillance activities and to undermine the practice of illegally obtained information. These provisions can also pave way to the formation of a legitimized and informed-surveillance policy.[59]

Intent of PECA law is to regulate the online space which arbitrarily supress the freedom of expression by criminalizing the online speech as discussion in PECA law section. The law significantly missed the protection on freedom of expression and standards to evaluate the nature of content being shared on social media to avoid the application of cyber terrorism and criminal defamation. Law must be equipped to segregate piece of information, awareness campaigns and information shared by whistle blowers to address human rights violations - a mandatory point to be entertained by the legislature.[60] Similarly, blocking or removal of online content from social media sites must be conducted by adhering to the transparency principles. It is an unreasonable step on the part of legislator to grant unbridled powers to PTA for

[59] Areeba Itzaz Qureshi, "Should Intelligence Agencies be Given Access to Social Media and Technology for Surveillance Purposes?" 40.

[60] Media Matters for Democracy, "White Paper on Reforms for the Prevention of Electronic Crimes Act (PECA) 2016 (White Paper, 2020)."

data censorship. It is recommended to establish legislative guidelines to interpret the content shared by HRDs. In present times, HRDs conduct most of human rights campaigns through social media, which are often banned or removed by PTA without adhering to any transparency measure.

In addition to this, detailed analysis of latest amendments in Official Secret Act and Army Act lays down few important suggestions for the legislature in context to its consequence on HRDs. Firstly, the definition clauses need revision as term enemy, or work are ambiguous and dangerously expands the ambit of the law which is also applicable on civilians. In addition to this, fundamental rights cannot be restricted until or unless the intent of the law is to ensure major interest of the community which clearly lacks in this scenario. Freedom to movement at peace times in restricted places needs a crystal cut intent of the legislature, hence this point needs a review as well. Thirdly, the Act needs to define "civil espionage" to ascertain the necessity of intelligence agencies involvement in FIA investigation team and to weigh down its merits and demerits in context to right to fair trial of every civilian including HRDs. Lastly, the newly inserted sub-section (2A) in section 11 should be repealed immediately as it violates right to safety & security, violates dignity of a person, and violates the safeguard to arrest and detention simultaneously. This section particularly entails more instances of misuse than a legitimate use for State security purposes. There is a highest probability of its ulterior uses against human rights defenders. It can also give rise to enforced disappearances in the country. It terminates judicial accountability and executive oversight that will lead to a chaotic outcome.

Whereas amendments in Army Act invokes the application of PECA law and Official Secrets Act to a dreadful level. In a way the amendment extends the application of army code upon civilians and legitimizes the court-martialling of civilians that stands as grave violation of Constitutional rights and curtails the power of judicial review of superior courts. Instead of authorizing military courts for conducting civilians' trial it is better to equip civilian courts to efficiently and timely decide the heinous crimes like terrorism, or espionage etc. Furthermore, in present

times electronic and print media is subject to grave censorship and immense pressure to not broadcast anything against the State and agencies interests, HRDs revert to social media as last resort to highlight human rights violations.

Hence, PECA law, Official Secrets Act and Army Act are striking down the work ambit of human rights defenders. Initially, the Fair Trial Act reasonably conditioned State surveillance for investigation purposes and somehow created a reasonable balance between constitutional protections available to HRDs and State security, and intelligence agencies sanctity. However, PECA Act started restricting the freedoms and rights of HRDs by curtailing judicial oversight on State surveillance and censorship. Similarly, it badly influenced freedom of expression by criminalizing the statements, or discussion contrary to State interests. Then, amendments in Army Act and Official Secrets Act touched unreasonable level of State surveillance and censorship. Nonetheless, a tranquil balance between domestic laws and human rights guarantees available to HRDs is a need of the hour that rests with the legislators to address.

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Conflicting Salient Features of the Constitution

Ghufran Ahmed[1]

Abstract

The Constitution of the Islamic Republic of Pakistan, 1973 has various salient features. Among these salient features are its democratic character and the Islamic colour. The democratic character of the Constitution is reflected by the conferment of certain fundamental rights, and their enforcement mechanism by the Supreme Court and the High Courts exercising powers under articles 184(3) and 199 respectively. Likewise, the Federal Shariat Court has the jurisdiction under article 203D to declare a law void if the same is repugnant to the injunctions of Islam. It follows that a law to be valid must neither be inconsistent with the fundamental rights nor repugnant to the injunctions of Islam. Any singular declaration that a law is not inconsistent with the fundamental rights is not sufficient for the validity of that law so long as that law does not pass the test of repugnancy with the injunctions of Islam as well and vice versa. Nonetheless, on the basis of article 189 and article 203G read with other provisions of chapter 3A both the Supreme Court as well as the FSC have held that the decision of the either court is binding on the other. Consequently, they have shown reluctance to determine the fate of a law on the touchstone of the other test if one of the tests has been validly passed. One step further, a law declared void hence nonexistent under chapter 3A can still be revived and enforced by the Supreme Court under special circumstances. On the contrary, a law declared void by the Supreme Court cannot be enforced by any court.

Key words: Jurisdiction, Fundamental Rights, *Zaheeruddin* case, Article 203 D, Salient features, *stare decisis.*

1. Introduction

This paper evaluates two salient features concerning the validity of laws under the Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution). The first is the inconsistency with the fundamental rights test regulated under Part II, Chapter 1

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of the Constitution. While the second such test concerns the repugnancy with the injunctions of Islam. This last-mentioned test is regulated under article 227 and Chapter 3A of the Constitution. The former is performed by a High Court or the Supreme Court exercising jurisdiction under articles 199 and 184(3) respectively.[2] While the latter is performed by the Federal Shariat Court (FSC) exercising jurisdiction under article 203D. However, in certain cases where the jurisdiction of the Shariat Appellate Bench of the Supreme Court (SAB) under article 203(F) is invoked, the decision of the FSC may be maintained, modified or reversed by the SAB.

With respect to the invocation of jurisdiction of a High Court and the Supreme Court, it should be noted that the jurisdiction under article 199 can only be invoked when there is no other adequate and efficacious remedy available to an aggrieved person. On the other hand, article 184(3) does not require any such trapping. Thus, the remedy under the last-mentioned provision can be availed independent of any other alternative remedy or forum available to the petitioner though the so-called public importance test has to be qualified.

2. Application of *Stare Decisis*

Under the scheme of the Constitution, all but a few laws have to pass each of the two tests simultaneously but independently. Thus, the successful clearance of the either test does not make the laws immune from the other test. However, under the doctrine of *stare decisis* as envisaged in the Constitution and practiced by the courts, the decision of the Supreme Court is binding on all courts under article 189. Similarly, the decision of the FSC is binding on a High Court and on all courts subordinate to a

[2] The Supreme Court has been vested with various jurisdictions and powers under different constitutional provisions. These jurisdictions and powers include the original jurisdiction of the Supreme Court under article 184, appellate jurisdiction under article 185 to hear appeals against the final decisions of the High Courts, advisory jurisdiction under article 186 to give an opinion on a question of law of public importance to the President of Pakistan, power to transfer cases pending before different High Courts under article 186A, power to do complete justice under article 187 and power of the Supreme Court to review its own decisions under article 188 of the Constitution.

High Court under article 203GG. This obviously does not include the Supreme Court. However, the Supreme Court itself has held in *Zaheeruddin* case that in certain cases the decision of the FSC is binding even on the Supreme Court[3].

In fact, this observation was made by Abdul Qadeer Chaudhry J. in the above referred case. It was held that the FSC is vested with exclusive jurisdiction under article 203D to decide the vires of a law on the touch stone of the Islamic injunctions. This fact is supported by article 203G. The last-mentioned article creates a bar on all courts and tribunals in Pakistan including a High Court and the Supreme Court to exercise jurisdiction with respect to any matter which is in the jurisdiction or power of the FSC. In this scheme, if the FSC decides a case and its decision becomes final, it will be binding even on the Supreme Court. The decision of the FSC becomes final if it is not challenged in the SAB or it is maintained by the SAB. When the decision is maintained by the SAB, it is debatable whether the decision gets binding on the Supreme Court being a decision of the FSC or that of the SAB. In the former case, a lower court binds a higher court. While in the latter case, one bench of the Supreme Court binds the other bench of the same court.

It is against the established norms of precedent that a lower court binds a higher court. However, in the light of the judgment of the Supreme Court in *Zaheeruddin* case, this unique kind of precedent exists in the Constitution. Abdul Qadeer Chaudhry J. observed in this case that in the light of Article 203A read with Article 203 G, a finding of the FSC is binding even on the Supreme Court if the same is not modified in appeal.[4]

Surprisingly, Abdul Qadeer Chaudhry J. did not refer to article 203GG that actually makes the decision of the FSC a binding precedent. However, according to this provision the decision of the FSC is a binding precedent subject to articles 203D and 203F. As far as mentioning of article 203F is concerned, it is very understandable

[3] *Zaheeruddin and others versus the State*, 1993 SCMR 1718 [Supreme Court of Pakistan]
[4] Ibid, 1764.

that the appellate forum may alter the decision of the FSC. In such a case, the decision of the appellate forum and not that of the FSC will rule the field. But "subject to article 203D" is confusing. The FSC exercises original jurisdiction under this provision. On the other hand, according to article 203E (9), the FSC can review its decisions and orders. Where the FSC reviews its earlier decision that had been given under article 203D a question arises as to whether the binding decision will be the one that has been given later under article 203E (9) or the earlier given under article 203D. It is hardly refutable that the later decision shall be binding and not the earlier since the earlier does not exist anymore. In these circumstances, article 203GG should not be subject to article 203D. Rather, it should be subject to article 203E.

It is important to note that there is no provision in chapter 3A which makes the decision of the SAB binding on other courts. However, it has been held that the SAB is a bench of the Supreme Court[5]. Therefore, the decision of the SAB is binding on other courts under article 189 of the Constitution as a decision of the Supreme Court. This brings the discussion to an important question whether a decision of the SAB is binding on the Supreme Court itself. If this question is answered in affirmative, a subsidiary question arises in what capacity the SAB binds other benches of the Supreme Court. There may be two possibilities of so doing. One, the SAB binds other benches of the Supreme Court as any other larger bench of the same court binds an equal or a smaller bench of that court. Two, the SAB being a special bench binds even the other larger benches of the Supreme Court within the scope of its exclusive jurisdiction.

The Supreme Court has held in *Zaheeruddin* case as well as in *Mst. Aziz Begum* case that the Supreme Court is bound by the decisions of the SAB[6]. Both these cases are discussed and analysed below. However, before this discussion and analysis, it is important to note that the decision of the FSC or the SAB is binding

[5] In *Re: Said Kamal Shah,* PLD 1990 Supreme Court 865.

[6] *Zaheeruddin and others versus the State,* 1993 SMR 1718 [Supreme Court of Pakistan], *Mst. Aziz Begum and others versus Federation of Pakistan and others,* PLD 1990 Supreme Court 899.

only to the extent of Islamic perspective. While the decision of the Supreme Court is binding on the SAB as well as the FSC in all respects other than the Islamic perspective.

The above exposition of the doctrine of *stare decisis* has led to hold in various cases that the successful clearance of the either test makes such laws constitutionally valid. Thus, we observe that the courts have restrained from exercising jurisdiction with respect to certain laws which have passed the either test. This paper analyses whether a court otherwise having jurisdiction to determine the validity of a law can lawfully restrain itself from exercising such jurisdiction with respect to a law that has been adjudged by another court sitting in different jurisdiction. Another very important issue to be analysed below is whether the adjudication with respect to the validity of a law by the FSC has the same force as that of a decision of the Supreme Court.

3. Constitutionality of the Anti-Islamic Activities of the Qadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, 1984

Zaheeruddin and others versus The State is a very important case in the context of the present research and needs to be analysed in detail.[7] This case was decided by the Supreme Court exercising its appellate jurisdiction under article 185 of the Constitution. The Court consisted of a full bench of five members who gave a split judgment as shall be analysed below. In this case, the Court decided a number of appeals against different orders passed in different cases decided by two High Courts, the Lahore High Court and the one exercising jurisdiction in the province of Baluchistan.

On 26.04.1984 an Ordinance numbering XX of 1984 was issued by the President of Pakistan. This Ordinance was called the Anti-Islamic Activities of the Qadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance,

[7] Ibid.

1984. Section 3 of this Ordinance inserted two provisions in PPC. These provisions are Sections 298B and 298C of the PPC.

It should be noted that according to article 260(3) (b) of the Constitution persons of the Qadiani group or the Lahori group who call themselves Ahmadis or by any other name are included in the definition of a non-Muslim. These non-Muslims are the followers of Mirza Ghulam Ahmad of Qadian, a place in India. That is why they are called Ahmadis after his name or Qadiani referring to his place of birth.

The basic difference in the belief of these non-Muslims and the Muslims is that the former do not believe in the finality of the prophet-hood of Muhammad (PBUH) which amounts to the denial of explicit teachings of the Holy Quran. This belief is so dangerous that it makes the entire teachings of Islam questionable. When the Prophet of Islam is not considered the last and the final messenger of Allah, any person claiming to be his successor and the messenger of Allah will have the full authority to bring any changes in the true teachings of Islam.

It is believed that this sect emerged in 1889 at the behest of the imperial power. The basic aim behind this conspiracy was to divide the Muslims of the sub-continent so that they get weaker and weaker to resist the imperialists with full power. Since this sect was formed and encouraged to divide and weaken the Muslims of the region, the Ahmadis disguised themselves into the cloth of Islam and posed to be true Muslims. That is why, they planned and insisted to use the titles, epithets and descriptions reserved for certain holy personages, places of worship of Muslims and certain Islamic rituals and ceremonies.

The object of declaring such persons non-Muslims was to safeguard and protect the holy personages of Islam, the sanctity of important teachings and rituals of Islam. These non-Muslims had been using specific titles and epithets for their own clergies, places of worship and religious rituals that had actually been reserved for the Islamic personages, places of worship and holy rituals. In this background, it was

provided by Section 298B (1) that if a person of the Qadiani group or Lahori group whether called Ahmadis or by any other name refers, addresses or uses any title or epithet for any person, place of worship or religious ritual or ceremony reserved for the Muslims and specific to Islam, s/he shall be punished with imprisonment of either description which may extend to three years and shall also be liable to fine.

In the light of this provision, it is banned for such non-Muslims to refer or address any person other than a Caliph of Muslims or a companion of the Holy Prophet (PBUH) as Ameer-ul-Momineen, Khalifat-ul-Momineen, Khalifat-ul-Muslimeen, Sahaabi or Razi Allaho Anho. Similarly, the title of Ummul-Momineen is banned for any person other than a wife of the Prophet (PBUH). Likewise, the title Ahle-bait is reserved for the family members of the Prophet (PBUH). Hence, the use of Ahle-bait is also forbidden for any person who does not belong to the family of the Prophet (PBUH). In the like manner, a place of worship of such non-Muslims cannot be termed as Masjid.

The Muslims offer prayers five times a day. The call to prayer is called Azan in Islam. Section 298B (2) declares that if such non-Muslims use the term of Azan for their call to prayers or use a similar call to prayer as used by Muslims, it is an offence under the last-mentioned provision. This offence is punishable in the like manner as provided by Section 298B (1) i.e. imprisonment of either description which may extend to three years and fine.

Section 298C declares that a non-Muslim of the above description cannot pose himself/herself to be a Muslim either directly or indirectly. Similarly, it is forbidden by law to declare the faith of such non-Muslims as Islam. Since the faith of such non-Muslims is a distorted form of Islam, the law forbids them to preach their religion. Because by preaching their religion or inviting other people to accept their faith they are not actually spreading their religion but, in fact, distorting the true picture and teachings of Islam. This, of course, must be strictly prohibited and banned in a State where Muslims are in majority. Moreover, the Constitution vide article 2

declares Islam to be the State religion. Finally, it is prohibited by law for such non-Muslims to outrage the religious feelings of Muslims in any manner whatsoever. All these acts have been made punishable under Section 298C with imprisonment of either description for a term which may extend to three years and with fine.

The above discussed Ordinance of 1984 was challenged in the FSC by way of different Shariat petitions invoking the jurisdiction of the FSC under article 203D in *Mujibur Rehman* case[8]. It was claimed by the petitioners that the law made by the said Ordinance is *void ab initio* and a nullity in the eyes of law being repugnant to the injunctions of Islam. The FSC after hearing lengthy arguments and analyzing all aspects of the case gave a very exhaustive judgment on the subject. The petitioners were unable to impress the FSC and make a case in their favour. Consequently, the FSC dismissed all these petitions. It was found by the FSC that none of provisions of the Ordinance is repugnant to the injunctions of Islam. The Ordinance, therefore, was declared a valid law as far as the jurisdiction under article 203D is concerned[9].

The above decision of the FSC was challenged in the SAB under article 203F by the petitioners before the FSC invoking the appellate jurisdiction of the SAB[10]. It is interesting to note that the appeals in the SAB against the decision of the FSC were not disposed of on merit. Rather, the appellants withdrew their appeals without arguing the case on merits. Nonetheless, the effect of the withdrawal of the appeals by the appellants is that the decision of the FSC in *Mujibur Rehman* case holds the field. Consequently, the Ordinance providing for the prohibition of the anti-Islamic activities of the Ahmadis and punishments thereto still remains a valid law as far as its Islamic perspective is concerned.

[8] *Mujibur Rehman and 3 others versus Federal Government of Pakistan and another,* PLD 1985 FSC 8.

[9] Ibid.

[10] *Capt. (Retd.) Abdul Wajid and 4 others versus Federal Government of Pakistan,* PLD 1988 Supreme Court 167 [Shariat Appellate Jurisdiction].

It is interesting to note that the same Ordinance was challenged before the High Court by invoking the constitutional jurisdiction of the Court under article 199 by filing two separate constitutional petitions. One of these petitions numbering 2591/84 was filed on 30.05.1984 i.e. a little more than a month after the promulgation of the Ordinance on 26.04.1984. The other petition numbered 2309/84 and the same was amended on 06.06.1984 by the petitioners to pray for the suspension of the Ordinance till the final disposal of the said petition. It was generally claimed by the petitioners that the said Ordinance is *ultra vires* of the Provisional Constitutional Order, 1981 as the same is inconsistent with the fundamental rights particularly those provided by articles 19, 20 and 25 providing for the freedom of speech, freedom of religion and equality before the law respectively[11].

It was contended by the petitioners that the restrictions imposed by Section 298B PPC regarding the use of certain expressions is an unlawful curtailment on the freedom of speech. Similarly, the restrictions imposed by Section 298C PPC on the propagation and preaching of one's faith and religion to others is a negation of the freedom of religion. Finally, Ahmadis should be treated like other non-Muslims in all matters. The law provides freedom to other non-Muslims to express their holy personages, places of worship and religious rituals and ceremonies by whatever name they like. Likewise, they enjoy legal freedom to profess, practice and propagate their religion. Therefore, the restrictions imposed by Sections 298B and 298C of the Penal Code amount to discrimination within non-Muslims and the same is forbidden by article 25 of the Constitution.

Nevertheless, both the above-mentioned constitutional petitions were dismissed *in limine* considering the judgment given by the FSC in *Mujibur Rehman*

[11] It should be borne in mind that the Constitution was held in abeyance pursuance to the Proclamation of Martial Law of the 5th day of July 1977. After the Proclamation, the Laws (Continuance in Force) Order, 1977 was promulgated which, *inter alia*, provided that the State shall be governed as nearly as may be possible in accordance with the provisions of the Constitution that has been held in abeyance. After that a number of President's Orders (P.Os) were issued. The Provisional Constitutional Order, 1981 was one such Order.

case under article 203D a bar on the maintainability of the petitions. Intra court appeals (ICA) were filed without success against the orders in both the petitions. The appeal bench hearing the arguments against the order passed in constitutional petition No. 2309/84 made very important observations while disposing of the ICA. The bench did not consider the said judgment of the FSC under article 203D a bar on the maintainability of the petition. Rather, the bar of making inconsistent laws with the fundamental rights provided by the Constitution was considered non-existent at the time of the promulgation of the Ordinance and at the time of hearing the ICAs.

It was observed by the appeal bench that the Constitution of 1973 providing the fundamental rights is not enforced in its entirety. The Constitution had been held in abeyance by the Proclamation of the Martial Law of the 5th day of July 1977. While article 2(1) of the Laws (Continuance in Force) Order, 1977 provided that the State shall be governed as nearly as may be in accordance with the provisions of the Constitution subject to this Order or any other law made by the President or the CMLA. However, article 2(3) of the same Order suspended all the fundamental rights provided by the original scheme of the Constitution.

In pursuance to the above referred Proclamation and the Order, another Order called the Provisional Constitution Order, 1981 was promulgated by the President on 24 March 1981. This Order adopted certain provisions of the 1973 Constitution. But importantly no provision of the Constitution providing the fundamental rights was adopted. The effect of this all according to the appeal bench is that the fundamental rights still remain suspended. Thus, no law could be declared void on the sole ground that the same was inconsistent with the fundamental rights provided by the 1973 Constitution. The appeal bench, nonetheless, was pleased to observe that had the fundamental rights been in force, the arguments of the appellants would have been

worth examination. These observations of the appeal bench have been taken note of in the judgment of Shafiur Rehman J. in *Zaheeruddin* case.[12]

The above part of the judgment is very significant. It clearly suggests that the High Courts and the Supreme Court are competent to determine the fundamental rights perspective of a law even if the Islamic perspective of the same has been determined under chapter 3A. Thus, each court has its own scope of jurisdiction and the exercise of jurisdiction by one court within its scope does not bar the other to exercise the jurisdiction within the scope of the other court.

Apart from the above discussed two constitutional petitions, another constitutional petition No. 2089/89 was filed in Lahore High Court under article 199. This petition challenged three different orders dated 20.03.1989, 21.03.1989 and 25.03.1989 passed by the Punjab Government, District Magistrate Jhang, and the Resident Magistrate, Rabwa respectively. The background of this petition is that in March 1989 the Ahmadis wanted to arrange centenary celebrations of their religion publically. This was likely to outrage the feelings of the Muslims and disturb the public peace and tranquility particularly in the presence of Sections 298B and 298C PPC on the book.

In order to avoid all this, the Home Secretary, Government of the Punjab banned the centenary celebrations of the Ahmadis throughout the Province of the Punjab by issuing an order dated 20.03.1989 in exercise of his powers under Section 144 Cr. PC. Similarly, the District Magistrate Jhang also exercised his powers under the last-mentioned provision to ban a number of activities of the Ahmadis which were likely to create disorder in public peace and outrage the feelings of the Muslims in the district Jhang by issuing an order dated 21.03.1989. The said order was to last till

[12] *Zaheeruddin and others versus the State,* 1993 SCMR 1718 [Supreme Court of Pakistan], 1740.

25.03.1989. The Resident Magistrate, Rabwa extended the said orders on 25.03.1989 till further orders.

All the above orders were challenged being repugnant to article 20 of the Constitution which had been revived in 1985. The Lahore High Court dismissed the said constitutional petition No. 2089/89 mainly holding that article 20 does not provide absolute freedom of religion. Rather, this freedom is subject to law, public order and morality.

In all the above discussed cases, the jurisdiction of the High Court was directly invoked under article 199 of the Constitution. However, in the following cases the appellate and revisional jurisdiction of the High Court was invoked under the provisions of the Cr. PC. A number of criminal cases were registered against different persons by different complainants under Section 298C PPC. All such cases were registered in the police stations of Quetta city.

Interestingly, the allegations against the accused persons were very similar. It was alleged in different FIRs that the accused persons were wearing badges of *kalima Tayyaba* and on inquiry such persons posed themselves to be Muslims while, in fact, they were known to be Ahmadis. The act of wearing the badges and posing to be Muslims by Ahmadis constituted an offence under Section 298C PPC according to the FIRs. On trial all the accused persons were convicted under the said provision and were awarded different sentences by the trial courts.

All these convictions and sentences were challenged in the High Court invoking its appellate jurisdiction. Contrarily, the prosecution considered that the sentences awarded by the trail courts were insufficient and did not match the gravity of the offence. Consequently, revision petitions were filed in all cases in order to get the enhancement of the sentences. The High Court, however, maintained the decisions of the trail courts in all the cases and dismissed both the appeals as well as the revisions.

All the decisions of both the High Courts passed in above discussed three constitutional petitions as well as in criminal cases were challenged before the Supreme Court invoking its appellate jurisdiction under article 185. The Supreme Court disposed of all these cases by a consolidated judgment reported as *Zaheeruddin and others versus The State and others* (1993 SCMR 1718) [Supreme Court of Pakistan].

The most important point for determination before the Supreme Court in this case was the constitutionality of the Ordinance No. XX of 1984. The Supreme Court was asked to determine the fundamental rights perspective of the said Ordinance. It should be recalled that the FSC had already declared the same a valid law and the decision of the FSC had been maintained by the SAB. In these circumstances, another very vital question was whether the Supreme Court could exercise jurisdiction to determine the fundamental rights perspective of the Ordinance when its Islamic perspective had already been determined under chapter 3A.

The arguments presented before the Supreme Court were more or less similar to those advanced earlier before the High Courts. However, at the time of hearing of these cases before the Supreme Court in 1993 the Constitution was in force in its entirety. Thus, the fundamental rights test could be applied if there was not any other bar in the exercise of the jurisdiction by the Court.

One such bar was pointed out by Dr. Syed Riaz-ul-Hassan Gilani, Senior Advocate Supreme Court representing the Federal Government in this case. His contention was that the Ordinance No. XX had been directly challenged before the FSC in *Mujibur Rehman* case being repugnant to the injunctions of Islam and the fundamental rights[13]. In this case, the FSC had declared the said Ordinance a valid law. Similarly, the SAB in *Capt. Retd. Abdul Wajid* case while disposing of the appeal

[13] *Mujibur Rehman and 3 others versus Federal Government of Pakistan and another,* PLD 1985 FSC 8.

against the decision of the FSC in *Mujibur Rehman* case upheld this Ordinance[14]. Therefore, in these factual circumstances the Supreme Court could not determine the vires of the said Ordinance otherwise. This argument was based on the authority of the decision of the Supreme Court in another case reported as *Mst. Aziz Begum and others versus Federation of Pakistan and others*[15]. The arguments of the senior counsel on this point as reported in *Zaheeruddin* case say that once the FSC had given its verdict and the same had not been modified in the appeal, the Supreme Court cannot review it any further.[16]

This argument was not accepted by two members of the bench. The dissenting judges were Shafiur Rehman and Saleem Akhtar JJ. Both these judges decided the appeals on merits though each wrote his separate judgment. Shafiur Rehman J. allowed the appeals and set aside the convictions and sentences awarded under Section 298C PPC in various criminal cases while Saleem Akhtar J. allowed the appeals and remanded the same for retrial. It was held by these judges that certain restrictions such as the use of the terms Azan and Masjid for call to prayer and place of worship respectively could not be lawfully imposed. Similarly, the restriction to invite other people to accept Qadiani faith was unreasonable. Thus, such restrictions imposed by Sections 298B and 298C PPC inserted by Section 3 of Ordinance No. XX of 1984 were held to be inconsistent with the fundamental rights provided by various articles of the Constitution. To that extent these provisions were declared *ultra vires* of the Constitution being inconsistent with the fundamental rights hence void.

On the other hand, the majority of the judges accepted the arguments advanced by Syed Riaz-ul-Hassan Gilani. Rather, it was contended on behalf of the

[14] *Capt. (Retd.) Abdul Wajid and 4 others versus Federal Government of Pakistan,* PLD 1988 Supreme Court 167 [Shariat Appellate Jurisdiction].

[15] *Mst. Aziz Begum and others versus Federation of Pakistan and others,* PLD 1990 Supreme Court 899.

[16] *Zaheeruddin and others versus the State,* 1993 SCMR 1718 [Supreme Court of Pakistan], 1745.

appellants that the finding of the FSC in Mujibur Rehman case is of no consequence as far as this Court is concerned. This contention of the appellants was refuted by the majority. The majority judgment was authored by Abdul Qadeer Chaudhry J. and agreed by Muhammad Afzal Lone and Wali Muhammad Khan JJ. The judgment of the FSC in *Mujibur Rehman* case and that of the SAB in *Abdul Wajid* case were considered final authority on the issue. It was held that the judgment of the FSC is binding even on the Supreme Court if the same is either not challenged or challenged but maintained by the SAB. In this regard reference was made to the provisions of chapter 3A more particularly to articles 203A and 203G. Nonetheless, all the appeals were decided purely on merits. The merits of the appeals for the purposes of the present research are not important and thus not analysed here. What is important for us is whether the Supreme Court can exercise jurisdiction to decide the fundamental rights perspective of a law when the Islamic perspective of the same has been determined under chapter 3A. The findings of Abdul Qadeer Chaudhry J. in this respect are worth mentioning here when he opined that the findings of the FSC cannot be ignored[17].

As far the arguments of Syed Riaz-ul-Hassan Gilani are concerned, he based his arguments on the authority of *Mst. Aziz Begum* case. It is, therefore, considered expedient to analyse this case before analyzing the majority and minority views in *Zaheeruddin* case.

3.1 Mst. Aziz Begum Case

Mst. Aziz Begum case was decided by a full bench of the Supreme Court consisting of five judges on 02.06.1990.[18] All the judges were unanimous in their decision. Shafiur Rehman J. agreeing with other members preferred to give his separate reasons. In this case, a constitutional petition No. 1-R of 1988 under article

[17] Ibid, 1764.

[18] *Mst. Aziz Begum and others versus Federation of Pakistan and others*, PLD 1990 Supreme Court 899.

184(3), a couple of civil appeals and a number of civil review petitions were disposed of by a single judgment. Each of these cases is not desired to be discussed here in detail. However, the constitutional petition under article 184 (3) will be analysed after the analysis of the points desired to be evaluated in this case.

All these cases revolved around pre-emption matters. Even the relief claimed by the petitioner in the constitutional petition concerned the right of pre-emption. In particular the claims were based upon Sections 15 and 30 of the Punjab Pre-emption Act, 1913. The enforcement of these provisions after the judgment of the SAB in *Said Kamal Shah* case and the judgment of the Supreme Court in *Aziz Ahmad* case was also under consideration[19].

Various provisions of different laws dealing with the right of pre-emption were declared null and void being repugnant to the injunctions of Islam in *Said Kamal Shah* case by the SAB. The decision of the SAB was to take effect on 31.07.1986. Meanwhile, it was desired that a new law of pre-emption be enacted though no such law could be made within this time. This led to the placement of different interpretations on this judgment by different courts while disposing of pre-emption matters. Consequently, an uncertainty in the application of the law of pre-emption was created.

In *Mst. Aziz Begum* case the appellants/petitioners approached the Supreme Court with the contention that their claims regarding pre-emption matters were rejected by relying upon certain cases placing interpretation on *Said Kamal Shah* case. These relied upon cases had been overruled in 1989 by the Supreme Court vide its judgment reported as *Ahmad versus Aziz Ahmad etc*. The effect of this overruling according to the appellants/petitioners is that their claims stand revived.

[19] *Government of N.W.F.P. through Secretary, Law Department versus Malik Said Kamal Shah*, PLD 1986 Supreme Court 360 [Shariat Appellate Bench], *Ahmad versus Aziz Ahmad etc.*, PLD 1989 Supreme Court 771.

Given the uncertainty created by the judgment in *Said Kamal Shah case*, the Shariat Appellate Bench of the Supreme Court had initiated proceedings in a *suo moto* Shariat review petition and gave a final judgment on 26.05.1990 in the said petition[20]. This judgment clarified that Sections 15 and 30 of the Punjab Pre-emption Act, 1913 have ceased to have effect in their entirety from 31.07.1986. Therefore, no pre-emption suit can be continued based on these provisions after the said date. However, if any pre-emption suit based on these provisions has been decreed before the said date, proceedings can continue in that case.

In the light of this judgment of the SAB, the Supreme Court held that the judgment given in *suo moto* Shariat review proceedings was a final verdict on the issue. It is in the light of this judgment of the SAB that the uncertainties created by the judgment in *Said Kamal Shah* case are to be settled and the pre-emption matters are required to be disposed of accordingly.

Faced with this position, the appellants/petitioners contended that the SAB had no jurisdiction to initiate *suo moto* Shariat review proceedings to clarify its earlier verdict given in *Said Kamal Shah* case. This argument, however, had already been responded in the said *suo moto* Shariat review petition. It had been held that the Shariat Appellate Bench of the Supreme Court is and remains a bench of the Supreme Court. Therefore, the SAB had jurisdiction to initiate *suo moto* Shariat review proceedings under article 188 of the Constitution as any other bench of the Supreme Court could exercise this jurisdiction.

In these circumstances, the Supreme Court dismissed the constitutional petition, both the appeals and all the review petitions. The Court was pleased to observe that the order of the SAB in *suo moto* Shariat review proceedings is an order passed by a court of competent jurisdiction. In the presence of such an order no court or tribunal including the Supreme Court can properly exercise any jurisdiction or

[20] In *Re: Said Kamal Shah*, PLD 1990 Supreme Court 865.

power regarding any matter which is within the power or jurisdiction of the SAB. The Supreme Court, therefore, cannot enforce any claim or grant any relief that is based on the non-existent provisions.[21]

On the basis of the above observation of the Supreme Court in *Mst. Aziz Begum* case, Syed Riaz-ul-Hassan Gilani formed the above discussed arguments in *Zaheeruddin* case. However, the analysis of the circumstances of *Mst. Aziz Begum* case and the above observation made therein reveal that the arguments of the leaned counsel are not well formed. Both the cases are distinguishable on facts as well as circumstances.

The fundamental rights jurisdiction is altogether a different jurisdiction. It should be noted that under the scheme of the Constitution, a law can only validly remain on the statute book if it passes two tests. One test is with respect to the fundamental rights while the other is with respect to the injunctions of Islam. Thus, a law must neither be inconsistent with the fundamental rights nor repugnant to the injunctions of Islam. Both these tests must be passed simultaneously but separately. It means that passing one test does not make the other test inapplicable. It is so because each test is to be applied by a distinct court exercising its own jurisdiction.

There is only one possibility that a law can still be a valid law even if it does not pass these tests or either of them. In such a case, the law must be given protection under clause 3 of article 8 to avoid the inconsistency with the fundamental rights test or it must be excluded from the definition of law as provided in article 203B(c) to avoid the test of repugnancy with the injunctions of Islam. Here comes the application of articles 189 and 203GG of the Constitution and the same is analysed after concluding *Zaheeruddin* case.

[21] *Mst. Aziz Begum and others versus Federation of Pakistan and others,* PLD 1990 Supreme Court 899, 909.

In *Zaheeruddin* case the impugned Ordinance having been declared a valid law by the FSC and maintained by the SAB was challenged being inconsistent with the fundamental rights. It means the Ordinance had successfully passed one test but was still to pass the other. In these circumstances, the judgment of the FSC and the SAB cannot bind the Supreme Court sitting in other jurisdiction. On the other hand, in *Aziz Begum* case the provisions of the pre-emption law did not pass the test of repugnancy with the injunctions of Islam and thus failed at this stage. These provisions, therefore, could not be enforced.

Finally, before reverting to *Zaheeruddin* case, the constitutional petition No. 1-R of 1988 is analysed briefly. In this petition, the petitioners claimed that they have a fundamental right to get their pending cases decided in accordance with the provisions of Section 15 of the Punjab Pre-emption Act, 1913. This fundamental right is based on article 25 providing equal protection of law to all the citizens. However, the above analysis shows that in 1988 Section 15 of the said Act had ceased to have effect. Therefore, leaving apart other requirements of article 184(3), the relief claimed by the petitioners could not be provided to them. Consequently, the fate of the said petition was not different from other cases.

In the following lines, the majority and minority opinions in *Zaheeruddin* case and the exercise of jurisdiction by the FSC in *Mujibur Rehman* case with respect to the fundamental rights discussed above are analysed. A thorough reading of *Mujibur Rehman* case reveals that the FSC not only applied the repugnancy test of the injunctions of Islam on the provisions of the impugned Ordinance but also the inconsistency test of the fundamental rights. At pages 120 to 122 of the judgment the impugned Ordinance was evaluated in the light of article 20 of the Constitution. In this regard, the FSC held that the impugned Ordinance is covered by the exception provided in this article with respect to maintenance of public order and law. To this extent, the FSC erred in giving its judgment. It is well known that the FSC does not enjoy jurisdiction to determine the fate of a law on the touch stone of the fundamental rights. This jurisdiction is enjoyed by a High Court and the Supreme Court under

articles 199 and 184(3) respectively. It leads to the obvious conclusion that the last-mentioned courts can exercise jurisdiction to apply the fundamental rights test even where the FSC or the SAB has already applied the repugnancy test of the injunctions of Islam. That is why Shafiur Rehman J. had to say that the respondents mainly argued their case on a wrong assumption. They could not differentiate between the forums of attack on the Ordinance. The forum for the vires of the Ordinance with respect to the injunctions of Islam is the FSC where the case is to be argued in the light of the injunctions of Islam and not in that of the fundamental rights. While in the present case the forum for the vires of the Ordinance with respect to the fundamental rights is the Supreme Court where the case is to be argued in the light of the fundamental rights and not in that of the injunctions of Islam.[22]

The majority opinion seems to have considered this point too. It is perhaps for this reason that the majority opinion was by and large based on pure merits of the case.

4. Conclusion

It should be noted that article 203G does not create any obstacle in the exercise of jurisdiction by the Supreme Court under article 184(3) of the Constitution. Because the bar created by article 203G on the exercise of jurisdiction by the Supreme Court or a High Court is limited to matters within the power or jurisdiction of the FSC. This provision, therefore, implies that the Supreme Court or a High Court are barred from exercising jurisdiction to determine the vires of a law on the touch stone of the injunctions of Islam. On the other hand, the FSC, as is known, has not been vested with the jurisdiction to decide the vires of a law on the touch stone of the fundamental rights under any legal or constitutional provision. Hence, it is misapprehended that article 203G on its own creates a legal obstacle in the exercise

[22] *Zaheeruddin and others versus the State,* 1993 SCMR 1718 [Supreme Court of Pakistan], 1756.

of jurisdiction by the Supreme Court under article 184(3). In fact, this issue came to surface because of the above analysed observations made by Abdul Qadeer Chaudhry J. in *Zaheeruddin* case.

As far as article 203GG is concerned, its application is that the decision of the FSC is binding on all courts to the extent it determines the vires of a law on the touch stone of Islamic injunctions. Thus, where the FSC determines that a certain law is repugnant to the injunctions of Islam hence void, its decision will be binding on all courts. No court including the Supreme Court or a High Court will have jurisdiction to enforce the provisions of that particular law because that law will cease to have effect as soon as the decision of the FSC takes effect. Moreover, the fundamental rights perspective of that law need not be determined since it has failed to pass the first test so the second test need not be applied. It should be noted, however, that it is true only where the exercise of jurisdiction is proper[23].

On the other hand, if the FSC declares a particular law not to be repugnant to the Islamic injunctions, the decision of the FSC will still be binding. However, the effect of this binding decision will be different from the one discussed in the above paragraph. In this case, the law has successfully passed the first test; therefore, neither the Supreme Court nor a High Court will have jurisdiction to declare that law void being repugnant to the injunctions of Islam. However, the other test i.e. the fundamental rights test still remains to be applied. In case, that law fails the second test, it will cease to have effect being *ultra vires* of the Constitution. In this case, the decision of the court will be binding on the FSC pursuance to article 201 or article 189 as the case may be.

The above analysis may suggest that the two tests prescribed for the validity of a law are of equal force. It is correct to a certain extent but it is not the whole truth. There is a very fine difference between these two tests. This difference pertains to the

[23] Proper exercise of jurisdiction in the present context means that the FSC has determined the vires of a law which has not been excluded from the definition of law under article 203B(c).

difference in the powers, functions and jurisdiction of the courts applying these tests[24].

The Supreme Court applying the fundamental rights test has twofold jurisdiction under article 184(3). One aspect of this jurisdiction is the power of the Court to declare a law void being repugnant to the fundamental rights. The other aspect of this jurisdiction is that the Court can redress the violations of the fundamental rights provided by the Constitution and enforce the same. Moreover, being the apex court and the guardian of the Constitution, the ultimate right of interpretation of a constitutional provision rest with the Supreme Court. Thus, the Supreme Court cannot allow rendering a constitutional provision redundant.

The FSC, on the other hand, applying the Islamic injunctions test is vested with jurisdiction under article 203D only to determine the vires of a law on the touch stone of the injunctions of Islam. Nowhere in the Constitution is provided a set of Islamic injunctions to be enforced by the FSC. Likewise, article 203B(c) excludes the Constitution from the definition of law in respect of which the FSC has to exercise all its powers and jurisdiction.

What follows from the above discussion and analysis is that a law declared void by the Supreme Court under article 184(3) being inconsistent with the fundamental rights cannot be upheld by the FSC or the SAB under chapter 3A in any case. On the contrary, a law declared void by the FSC under article 203D or by the SAB under article 203F being repugnant to the injunctions of Islam can still be upheld by the Supreme Court if the following conditions are present:

[24] The fundamental rights test can be applied by the Supreme Court as well as a High Court. Nonetheless, in the context of present research the analysis is restricted only to the jurisdiction of the Supreme Court.

i. The FSC or the SAB has exercised jurisdiction under article 203D or 203F respectively with respect to a law not covered by the definition of law as provided in article 203B(c).

ii. The exercise of jurisdiction by the FSC or the SAB has made one or more articles of the Constitution redundant.

iii. The law in respect of which jurisdiction has been exercised is essentially required for the enforcement of the fundamental rights.

In the above circumstances, the decision of the FSC or the SAB will amount to *coram non judice* and to have been taken without jurisdiction thus per *incuriam*. Consequently, the Supreme Court will be fully entitled to exercise jurisdiction to set aside the effects of the judgment of the FSC or the SAB and make the entire provisions of the Constitution effective. Similarly, the other requirements of article 184(3) are also satisfied in the above circumstances. The promulgation of a law essentially required for the enforcement of the fundamental rights clearly suggests that the matter involves questions of public importance related to the enforcement of the fundamental rights.

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Limitations for Domestic Jurisdiction of States in the Post-UN International Legal Order: An ICL Perspective

Mazhar Ali Khan[1]

Abstract

Domestic jurisdiction or state sovereignty are the notions closely associated with the political and legal existence of state. In legal sense, domestic jurisdiction is referred to the state internal authority to legislate, adjudicate and execute the laws. On the contrary, sovereignty is used in a broader context covering both internal as well as external affairs of the state. Some scholar argues that the shift in the paradigm of public international law such as the contemporary regime on human rights law and international criminal law carries restrictive implications for domestic jurisdiction of states. In this context, this work evaluates the abstract notions of domestic jurisdiction and state sovereignty under the contemporary international law. It briefly analyzes the legal basis of sovereignty in historical context. What are limits of domestic jurisdiction under the post-UN international legal order is the question which this work tends to examine. The article mainly focuses on evaluation of the notion of domestic jurisdiction from the perspective of international criminal law especially the jurisdictional overlap between international organs and national courts. Lastly, it is concluded that the concept of domestic jurisdiction is not without limitations in the post-UN international legal order.

Keywords: Domestic Jurisdiction, sovereignty, criminal jurisdiction, international criminal law, immunity.

1. Introduction

One of the underpinning elements behind opposing the universality and extra-territoriality of international judicial organs by some states is the doctrine of domestic jurisdiction or in other words the state sovereignty. They rest their claim on the premise that it is the state alone which has right to exercise criminal jurisdiction instead of international judicial organs. On the contrary, the shift in the paradigm of

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public international law and progressions made in the area of International Human Rights Law (IHRL) and International Criminal Law (ICL) suggests that jurisdiction of international judicial organs such as International Criminal Law (ICC) becomes compulsory when the states are not willing to prosecute the accused persons for commission of international crimes and that the notion of state sovereignty no more exists in absolute form. Similarly, that in the post-UN cosmopolitan world there are various limitations for domestic jurisdiction of states.

In this article, the questions that what are the limitations for domestic or national jurisdiction of states and in what way the notion of absolute state sovereignty has changed in the context of post-UN international legal order will be answered. The political term usually used for national or domestic jurisdiction is sovereignty therefore, in order to evaluate the limitations on the domestic jurisdiction it is imperative to understand that what is state sovereignty and whether the term sovereignty used in the United Nations (UN) Charter encompasses the elements of domestic jurisdiction. Finally, the chapter will evaluate the legal developments took place in the area of ICL that have put an end to the traditional concept of official immunity. Thus, it will be argued that how these progressions restrict the absoluteness and exclusiveness of domestic jurisdiction of states.

2. Domestic Jurisdiction or Sovereignty? Understanding the Limits

In legal sense, the state prerogative to prescribe, enforce and adjudicate upon law is called the national or domestic jurisdiction. Under contemporary international law, the term domestic jurisdiction was for the first time employed in article 2(7)) of the UN Charter. Though, the language of article 2(7) is not exclusive because certain exceptions have been created to it. Verily, the limitations placed on domestic jurisdiction are not in legislative matters rather it is related to the enforcement matters falling under chapter VII of the UN Charter. On the other hand, article 2(1) of the Charter contains the phrase ‘sovereign equality of all its members’. This sovereign equality is further elaborated in article 2(4), wherein the phrases ‘territorial integrity’

and 'political independence' are used. Apparently, it seems that the phrases referred to sovereign character of a state is broader in scope than the phrase 'domestic jurisdiction'. For this purpose, it will be appropriate to examine the sovereignty that what does it implies in legal sense.

The concept of sovereignty is closely connected with state and society.[2] Primitive stateless societies were short of political institutions and centralized authority. Quite the opposite, modern state system is based on uniform and unequivocal flowing of authority from sovereign entities.[3] In primitive societies, the rules and authority were subject to the notion of 'might is right' and the ultimate outcome was anarchy in the absence of institutions and prescribed rules. The abstract concept of sovereignty came into existence with the emergence of state. On the other hand, domestic jurisdiction is only referred to the states' internal executive, legislative and adjudicative authority. In this sense, it may be held that the contents of sovereignty encompass the doctrine of domestic jurisdiction.

Legal and political scholars treat sovereignty as an essential and indispensable element for statehood alongside territory, population and government. In this context, for the existence as well as recognition of state all of the four elements must co-exist.[4] The elements of statehood under international law are prescribed in a different manner according to "Montevideo Convention on Rights and Duties of States, 1933" which refer to the phrase "capacity to enter into relations with other states" instead

[2] *See on the concept of state and society in historical context* Matthew Innes, *State And Society In The Early Middle Ages: The Middle Rhine Valley, 400–1000* (UK: Cambridge University Press, 2000); Joel S. Migdal, *State in Society: Studying How States And Societies Transform And Constitute One Another* (UK: Cambridge University Press, 2001); *see also* James W. McAuley, *An Introduction to Politics, State and Society* (London: SAGE Publications Ltd, 2003);Christopher Pierson, *The Modern State*, 2nd ed., (New York: Routledge, 1996).

[3] *See on the concept of authority in the modern state system* Harold J. Laski, *Authority in the Modern State* (USA: Yale University Press, 1919); *see also on the development of modern state* Graeme Gill, *The Nature and Development of the Modern State* (New York: Palgrave Macmillan, 2003).

[4] *See generally* Kevin R. Cox, *Political Geography: Territory, State, and Society* (Oxford: Blackwell Publishers Ltd, 2002); Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States Since 1776* (New York: Oxford University Press, 2010).

of sovereignty.[5] For legal and political thinkers, society, after a consistent political process gave birth to state- a political organization of a society. The famous theories of 'Social Contract'[6] presented by Thomas Hobbes, John Locke and J.J.Rousseau are conceived by contemporary scholars as theoretical and conceptual basis for the establishment of state.[7] Though, the contents of social contracts theories differs from each other, however, all the three theorists are in general agreement with respect of centralized and uniform authority of state over people.

The theory of social contract gave birth to a new domain of positive era with the exclusion of the state of nature ruled by natural law. Moreover, the seventeenth century Westphalian concept of modern nation states was also based on the complex notion of sovereignty.[8] Meaning thereby that the concept of sovereignty has always been crucial to the *de jure* and *de facto* existence of state. In 20th century, the formation of League of Nations and that of UN restricted the concept of absolute sovereignty in a systematic manner through a chain of international obligations under treaty law, whereas non-compliance with treaty obligations carries unpleasant

[5] Article 1 of the 1933, Montevideo Convention on Rights and Duties of States provides as; "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States."

[6] See Jean-Jacques Rousseau, *The Social Contract*, trans. G. D. H. Cole (New York: Cosimo, Inc., 2008); Carl Schmitt, *The Leviathan In The State Theory Of Thomas Hobbes*, trans. George Schwab and Ema Hilfstein (USA: Greenwood Press, 1996); John Locke, *Two Treatises of Government and A Letter Concerning Toleration*, ed. Shapiro Ian (New Haven; London: Yale University Press, 2003), http://www.jstor.org/stable/j.ctt1npw0d.

[7] *See* Brian R. Nelson, *The Making of the Modern State: A Theoretical Evolution* (New York: Palgrave Macmillan, 2006); *see also* Dmitry Shlapentokh, *Societal Breakdown and the Rise of the Early Modern State in Europe* (New York: Palgrave Macmillan, 2008).

[8] It refers to a series of treaties, signed between May and October 1648 in the Westphalain cities of Osnabruck and Munster, ending the thirty years destructive war in Europe. The peace of Munster took place between the Dutch Republic and the Kingdom of Spain on 30th January, 1648, ratified on 15 May, 1648 in Munster. Similarly, Two complementary treaties were also signed on 24th October, 1648: first, the Treaty of Munster (*Instrumentum Pacis Monasteriensis*) between the Holy Roman Empire, France and their allies; second, the Treaty of Osnabruck (*Instrumentum Pacis Osnabrugensis)* between the Holy Roman Empire, Sweden and their allies. The treaty was a landmark achievement regarded by legal and political scholars as it gave independence to Switzerland and the Netherlands of Austria and Spain respectively. The German principalities also secured their autonomy. Sweden and France gained territories. Significantly, under the treaty the Roman Catholic Church lost it control over the Europe which it was enjoying for more than thousands of years.

consequences. Before discussing the complex and all times disputed concept of 'state sovereignty', it is necessary to analyze the legal basis of sovereignty.

The notion of sovereignty is closely linked with the concept of state which represents an organized political community.[9] Sovereignty being an abstract term is not a fact, rather it is a quality attributed and applied by humans to a particular circumstances in relation to legal and political power exercised by them.[10] The term sovereignty originally expresses the idea that an absolute and final authority exists in a political community.[11] On the other hand, the idea that an absolute authority exists in a political community- the state, is irrelevant in stateless societies.[12] It denotes that the 'concept of sovereignty' cannot be construed in concrete term. Rather, the instrument of political power to which the sovereignty is attributed exists in a phenomenal world, therefore, both of the concepts are indispensable for each other at same time.[13]

[9] *See* Harold J. Laski, *Studies In The Problem Of Sovereignty* (New Haven: Yale University Press, 1917); *see also* Raia Prokhovnik, *Sovereignties: Contemporary Theory and Practice* (New York: Palgrave Macmillan, 2007); Jens Bartelson, "The Concept of Sovereignty Revisited", *European Journal of International Law 17, no. 2* (April 2006): 463–474, https://doi.org/10.1093/ejil/chl006; *see also* Hans J. Morgenthau, "The Problem of Sovereignty Reconsidered," *Columbia Law Review* 48, no. 3 (1948): 341-365; *See for detail discussion on the historical evolution of the concept of sovereignty and its relevancy in contemporary political affairs* Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995).

[10] *See* Warren L. McFerran, *Political Sovereignty: The Supreme Authority in the United States* (Florida: Southern Liberty Press, 2005); *See generally* John H. Jackson, "Sovereignty - Modern: A New Approach to an Outdated Concept", *The American Journal of International Law* (2003): 782-802, http://scholarship.law.georgetown.edu/facpub/110/; *see also* Dieter Grimm, *Sovereignty: The Origin and Future of a Political Concept,* Belinda Cooper, trans. (New York: Columbia University Press, 2015); *see on the indivisibility of the concept of sovereignty* Jens Bartelson, "On the Indivisibility of Sovereignty." *Republics of Letters: A Journal for the Study of Knowledge, Politics, and the Arts* 2, no. 2 (June 1, 2011): 85-94, http://rofl.stanford.edu/node/91.

[11] F.H.Hinsley, *Sovereignty,* 2nd ed. (UK: Cambridge University Press, 1986), 1.

[12] Ibid, 17.

[13] *See for the historical account of sovereignty with reference to natural law* Ian Hunter and David Saunders, eds., *Natural Law and Civil Sovereignty: Moral Right and State Authority in Early Modern Political Thought* (New York: Palgrave Macmillan, 2002); *see generally on the issues pertaining to sovereignty and its dimensions in different legal and political system of the world* Stephen D. Krasner, ed., *Problematic Sovereignty: Contested Rules and Political Possibilities* (New York: Columbia University Press, 2001).

2.1 The Legal Basis of Sovereignty in Greeks, Romans, Muslims and Christians Religious Thoughts

Historically, sovereignty has been perceived as an absolutism of authority vested in some person or body of persons.[14] In the ancient Greek city states- *polis,* the ruler was a sovereign enjoying the legal as well as political authority over the subjects, known as emperor-worship. Similarly, it has roots in the Hellenistic theory of rule- the exercise of authorities over specific territories by the famous ancient Hellenistic Monarchies.[15] In the writings of Aristotle, it was the *polis*-body politics in which the legal power and authority vested.[16]

Sovereignty, as regarded by Romans, was different than that of Greeks. The highest body treated as sovereign in the ancient Rome was '*imperium populi Romani*'- Roman People's Empire, the notion elaborated during 2nd Century B.C., which in fact was the resemblance of Greek city states-the *polis*.[17] It was the *populus Romanus* in whose name the authority was to be exercised and the law to be enforced, however, the law for the rulers was not the will of Roman people, rather it was some kind of higher morality. Similarly, the *imperium* was not a political and territorial community but it was a power to rule conferred by the Roman people over the rulers.[18] Conversely, the Islamic "concept of sovereignty" stands on different footings from that of Greek and Romans. In Islam there is a divine concept of sovereignty. It

[14] *See generally* Daniel Engster, "Jean Bodin, Scepticism and Absolute Sovereignty," *History of Political Thought* 17, no. 4 (1996): 469–499; *See also* J. H. M. Salmon, "The Legacy of Jean Bodin: Absolutism, Populism or Constitutionalism?" *History of Political Thought* 17, no. 4 (1996): 500–522.

[15] Hellenistic monarchies refer to those monarchies arose out of fifty years warfare between the Generals of Alexander the Great-the Kingdom of Ptolemaic in Egypt, that of Seleucids in Syria and Mesopotamia and that which was formed out of mainland Greece. See Hinsley, *Sovereignty*, 32.

[16] See Fred Mille, "Aristotle's Political Theory", *TheStanford Encyclopedia of Philosophy,* ed. Edward N. Zalta (USA: Metaphysics Research Lab, Stanford University, 2017), https://plato.stanford.edu/archives/win2017/entries/aristotle-politics/.

[17] Matthew S.Weinert, *Democratic Sovereignty: Authority, legitimacy, and state in a globalizing age* (USA: University College London Press, 2007), 24-25.

[18] Hinsley, *Sovreignty,* 37; *see also* MP Ferreira-Snyman, "The Evolution of State Sovereignty: A Historical Overview", *Fundamina: A Journal of Legal History* 12, no.2, (2006): 1-28, http://uir.unisa.ac.za/bitstream/handle/10500/3689/Fundamina%20Snyman.finaal.pdf.

belongs to and vests in *Allah Almighty* and has no territorial and geographical limitations. In Quran it is stated as follow:

> "Say, "O Allah, Owner of Sovereignty, you give sovereignty to whom You will and You take sovereignty away from whom You will. You honor whom You will and You humble whom You will. In Your hand is [all] good. Indeed, You are over all things competent." —3: Al–Imran: 26

Unlike, the popular concept of sovereignty, Islamic notion of sovereignty provides a divine conception of authority delegated to the rulers as sacred trust.[19] Muslim rulers are duty bound to exercise authority as sacred trust and not to misuse it. As oppose to positive legal doctrine, the Islamic concept of sovereignty obliges the ruler-*khalifah* or *Imam* to remain within the limits prescribed by God as a religious duty.[20]

After the fall of Rome, Western Europe experienced that it could not sustain its political unitary society. Learning from Islamic political unity, Europe adopted the single theocracy on the lines of Islam for preservation of its political unity. Following the Islamic pattern, a tendency for the unification of Europe under one government and one law developed in order to establish a Christian community as a universal

[19] Islamic concept of sovereignty differs from the concepts of popular and parliamentary sovereignty in various aspects. In parliamentary sovereignty, the legislative body is the ultimate source of powers and can make, change or repeal any law without judicial review or any check thereupon. This kind of sovereignty exists in U.K, New Zealand and Finland. In popular sovereignty, people are the ultimate source of powers, and are associated with Republic form of government. It exists in U.S.A and is noticeable in the constitution of U.S.A which is read as: "*We the People of the United States*". Under the concept of Islamic sovereignty, the Islamic Republic is based on the will of the Almighty, wherein the God Almighty is ultimate source of powers and authority. *See generally* Busṭāmī Muḥammad S'aīd Muḥammad Khīr, "The Islamic Concept of Sovereignty" (PhD Diss., University of Edinburg, 1990), https://www.era.lib.ed.ac.uk/handle/1842/19012.

[20] *See for comparative analysis of Islamic and Westphalian concepts of sovereignty* Amin Saikal, "Westphalian and Islamic Concepts of Sovereignty in the Middle East" in *Re-Envisioning Sovereignty*, ed. Trudy Jacobsen, Charles Sampford and Ramesh Thakur (England: Ashgate Publishing Limited, 2008); *see also* Abdalhadi Alijla and Gahad Hamed, "Addressing the Islamic Notion of Sovereign state", *Journal of Islamic Studies and Culture* 3, no. 2 (December, 2015): 133-142, http://dx.doi.org/10.15640/jisc.v3n2a13; *see also on the Islamic concept of nation state and sovereignty* Gerrit Steunebrink, "Sovereignty, the nation state, and Islam", *Ethical Perspectives: Journal of the European Ethics Network* 15, no. 1 (2008): 7-47, http://www.ethical-perspectives.be/viewpic.php?TABLE=EP&ID=1087.

Church or common wealth.[21] Resultantly, the Church through Pope inherited from St. Peter-who himself was once appointed by the Emperor became the center of legal and political authority whereas the Emperor was to rule the Europe through delegation from Pope.[22] The logical outcome was establishment of the sovereignty of Pope instead of Emperor as was in the '*imperium populi Romani*'.[23]

2.2 The Legal Basis of Sovereignty in Early Modern and Modern Political Thoughts: From Bodin to Foucault

Throughout the history of Europe, the legal aspect of sovereignty has been perceived not different than its political one. Because at domestic level the term sovereignty had been used in reference to the internal authority of states which is nowadays known as domestic jurisdiction. It was until the beginning of seventeenth century, that Bodin for the first time introduced the theory behind the word sovereignty on contemporary footings.[24] Bodin's theory of sovereignty was formulated on the pattern to strengthen the legal as well as political authority in center.[25] The critics of

[21] *See for detail discussion on the transformation from the divine conception of sovereignty to that of positivistic one* Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (USA: The University of Chicago Press, 2005), 36-52.

[22] *See generally for detail analysis of the medieval Christian notion of sovereignty* Francesco Maiolo, *Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (The Netherlands: Eburon Academic Publishers, 2007), 128-129; *see also* Michael Wilks, *The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy with Augustinus Triumphs and the Publicists* (New York: Cambridge University Press, 1963); *see for detailarguments on the assumption that sovereignty is a secular truth as opposed to religious faith* Constantin Fasolt, "Sovereignty and Heresy," in *Infinite Boundaries: Order, Disorder, and Reorder in Early Modern German Culture* 40 (Kirksville, Sixteenth Century Journal Publishers, 1998).

[23] Hinsley, *Sovereignty*, 53-55; *See for detail discussion on imperium populi Romani* Andrew Lintott, "What was the 'Imperium Romanum'?" *Greece & Rome* 28, no. 1 (1981): 53-67, http://www.jstor.org/stable/642483.

[24] Jean Bodin, *Bodin: On Sovereignty*, ed. Julian H. Franklin (Cambridge: Cambridge University Press, 1992); *see also* Andrew, Edward, "Jean Bodin on Sovereignty." *Republics of Letters: A Journal for the Study of Knowledge, Politics, and the Arts* 2, no. 2 (June 1, 2011): 75-84, http://rofl.stanford.edu/node/90 ; J. U. Lewis, "Jean Bodin's 'Logic of Sovereignty" *Political Studies*, 16 (1968): 206-222, doi:10.1111/j.1467-9248.1968.tb00424.x.

[25] *See for Bodin's conception of political authority, sovereignty and state* Jean Bodin, *Six Books of the Commonwealth*, abridged and trans. M. J. Tooley (Oxford: Blackwell, 1955); *see also for Bodin's theory of sovereignty* Winston P. Nagan and Aitza M. Haddad, "Sovereignty in Theory and Practice" *San Diego Int'l L.J.* 13 (2012): 429-519, http://www.worldacademy.org/files/Dubrovnik_Conference/Soverignity_in_Theory_and_Practice_W.Nagan.pdf.

Bodin treat his theory as a strengthening element of the divine rights of the King or center. In other words, Bodin's views accentuate on localization of legal authority within a particular dominion.

As oppose to the Bodin's theory of sovereignty formulated in the interest of authority in center, Althusius, the German Calvinistpolitical philosopher and Bodin's contemporary took a different and entirely opposite view on sovereignty by rendering it as an exclusive authority of the people.[26] Thereafter, Althusius views formed the basis of the famous theory of popular sovereignty.[27]This popular sovereignty theory is short of legal flavor such as who to legislate and execute the law.

Legal elements in the contents of the theories of sovereignty formulated by Bodin and Althusius differs from each other in terms of deductive and inductive flow of authority. For instance, Bodin advocated that the absolute authority must belong exclusively to the ruler and should flow from the ruler towards the subject. On the contrary, Althusius viewpoint is based on the premise of popular flavor and it say that the power and authority must be vested in the people.[28] Unlike Bodin and Althusius, Suarez- a Spanish politico-legal philosopher propounded the theory of partial or limited sovereignty.[29] The limited sovereignty thesis contemplates the division of

[26] Calvinism refers to reformed Christianity or reformed faith, and is a major branch of Protestantism that follows the Christian theological traditions of John Calvin and other reformative era theologians separated from Roman Catholic Church in 16th century. *See* T. H. L. Parker, *John Calvin: A Biography* (Philadelphia: Westminster Press, 1975).

[27] See Johannes Althusius, *Politica*, An Abridged Translation of Politics Methodically Set Forth and Illustrated with Sacred and Profane Examples, ed. and Trans. Frederick S. Carney (Indianapolis: Liberty Fund, 1995), http://oll.libertyfund.org/titles/692; *see generally* H.E.S Woldring, "The Constitutional State in the Political Philosophy of Johannes Althusius."*European Journal of Law and Economics* 5,(1998)*:* 123-132; *see also* Alain de Benoist, "The First Federalist: Johannes Althusius." *Telos* 118, (2000): 25-59, https://s3-eu-west-1.amazonaws.com/alaindebenoist/pdf/the_first_federalist_althusius.pdf; *see generally* M. R. R. Ossewaarde, "Three Rival Versions of Political Enquiry: Althusius and the Concept of Sphere Sovereignty," *The Monist* 90, no. 1 (2007): 106-25, http://www.jstor.org/stable/27904017.

[28] Hinsley, *Sovereignty*, 132-133; *see generally for comparative analysis of Bodin's and Althusius theories of sovereignty* Alain de Benoist, "What is Sovereignty?" *Telos* 116, (2000): 99-118.

[29] *See* Christopher Shields and Daniel Schwartz, "Francisco Suárez", *The Stanford Encyclopedia of Philosophy,* ed.Edward N. Zalta (USA: Metaphysics Research Lab, Stanford

authority among the people and the Ruler.[30] According to limited sovereignty, certain legal boundaries has to be fixed between the people and the ruler.

In his *De Jure Belli ac Pacis* (1625), Hugo Grotius, attempted to give an account of the theory of sovereignty on entirely new lines and it says that political society contains a twofold subject of supreme authority- the whole community or body politic on one hand and the Ruler on the other.[31] He was of the view that the fully developed political societies are represented by the Ruler, therefore, sovereignty of the people is visible in the Ruler alone which is transferred by the people that ruler.[32]In addition to, Grotius formulated the idea of sovereignty on territorial lines cementing it with natural law.[33] According to Grotius, universal sovereignty became redundant as the Church had failed to maintain its universal moral authority over the

University, 2016), https://plato.stanford.edu/archives/win2016/entries/suarez/; *see generally* John P. Doyle, "Francisco Suarez: On Preaching the Gospel to ´ People Like the American Indians," *Fordham International Law Journal* 15, no. 4 (1991): 879-951, https://pdfs.semanticscholar.org/336b/2e94984582bdc7c4109a4ee25e1ca560a601.pdf.

[30] Francisco Suarez took a different line of arguments than that of Bodin and Althusius. His limited sovereignty thesis gives an idea that the Ruler held his authority from the community by a transfer of the sovereignty of the people. He was of the view that the people have permanently alienated this sovereignty to the Ruler, but limited by positive law (rules) and the permanent natural rights of the people. *See* Hinsley, *Sovereignty*, 135-136. It is pertinent to mention that the idea of limited sovereignty as propounded by Suarez is totally different from that of twentieth century socialist theory of 'limited sovereignty' both in its content and form. According to socialist theory of 'limited sovereignty' the countries of the 'socialist community' have no right to formulate and determine their foreign policies in a sovereign way without having prior approval of the Soviet Union, which has been regarded as denial of sovereignty by the legal and political critics. *See on limited sovereignty theory* L. Erven, "Limited Sovereignty," *Review of International Affairs* (November 1968): 66-68, https://doi.org/10.1080/00396336908440956.

[31] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, trans. Francis W. Kelsey, Vol. 2 of *The Classics of International Law*, ed. James Brown Scott (Oxford: Clarendon Press, 1925); *see generally* Susumu Yamauchi, "The Ambivalence of Hugo Grotius: State Sovereignty and Common Interests of Mankind," *Hitotsubashi Journal of Law and Politics* 22 (1993): 1-17, http://doi.org/10.15057/8195; *see also* Benjamin Straumann, "Early Modern Sovereignty and Its Limits," *Theoretical Inquiries in Law* 16, no. 2 (2015): 423-446, http://www7.tau.ac.il/ojs/index.php/til/article/view/1344/1389.

[32] Sovereignty defined by Hugo Grotius is as follow "That power [potestas] is called sovereign [summa potestas] whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will." The translation is taken from Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* (Francis W. Kelsey trans., 1925).

[33]*See for the Grotius theory of territorial sovereignty as opposed to popular and universal theories of sovereignty and importantly his discourse on the nation states* Ali Khan, "The Extinction of Nation-States," *American University International Law Review* 7, no. 2 (1992): 197-234, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1523&context=auilr.

people. Similarly, popular sovereignty also proved problematic because it could not accommodate those sovereigns who do not believe on the popular will.[34]

After a long scholastic and intellectual battle, it was Thomas Hobbes who in his famous book *Leviathan,* provided the first clear formulation of the theory of sovereignty in the history of English legal and political thoughts which is generally conceived as problem solving thesis.[35] His famous Social Contract theory provided basis for the absolute authority of the ruler over subjects.[36] Unlike Bodin, Hobbes rationale behind the sovereign's authority was not the divinity of King's rights but the Social Contract- the contract between individual and individual and between the people and the ruler.[37] Hobbes' sovereign took no part in the contract, whereas in Althusius's views the contract took place between the people. In this way, no contract can bind Hobbes' sovereign.[38]

[34] Ibid, 205.

[35] Schmitt, *The Leviathan;see generally* Arihiro Fukuda, "Thomas Hobbes's Theory of Sovereignty, 1640–1647: Private Judgement, Fear, Covenant," in *Sovereignty and the Sword: Harrington, Hobbes, and Mixed Government in the English Civil Wars* (Oxford: Calrendon Press, 1997); *see also* James R. Hurtgen, "Hobbes's Theory of Sovereignty in Leviathan," *Reason Papers* No. 5, (Winter 1979): 55-67, https://reasonpapers.com/pdf/05/rp_5_5.pdf; *see for example* Quentin Skinner, "Hobbes on Sovereignty: An Unknown Discussion," *Political Studies* 13, no. 2 (June, 1965): 213-218, https://doi.org/10.1111/j.1467-9248.1965.tb00365.x.

[36]*See generally* Jean Hampton, *Hobbes and the Social Contract Theory* (Cambridge University Press, 1988); *see for example* David Gauthier, "Hobbes"s Social Contract" in *Perspectives on Thomas Hobbes* eds. G A J Rogers and Alan Ryan (Oxford University Press, 1988).

[37]*See for example on comparison of Hobbes' and Bodin's ideas of sovereignty* Howell A. Lloyd, "Sovereignty: Bodin, Hobbes, Rousseau," *Revue Internationale De Philosophie* 45, no. 179 (4) (1991): 353-79, http://www.jstor.org/stable/23949578; *see also* Kinch Hoekstra, "Early Modern Absolutism and Constitutionalism," *Cardozo Law Review* 34 (2013): 1079-1098, http://scholarship.law.berkeley.edu/facpubs; *see also* David Schraub, "Finding the Sovereign in Sovereign Immunity: Lessons from Bodin, Hobbes, and Rousseau," *Critical Review* 29, no. 3 (2017): 388 – 403, http://works.bepress.com/david_schraub/16/.

[38] Johannes Althusius has been generally regarded as the founder of popular sovereignty. In his political thoughts, it was the community which entered into a social contract and thus all the authorities exclusively belong to the people. Althusius social contract differs from Hobbes in several aspects: that there exists mainly two contracts, the first contract establishes organized social life among the individual as an equal partners; while the second contract took place between the people and the rules, therefore, determining the limits of mandated government. In this context, according to Althusius, the first contract constitutes as basis for the second one. On the other hand, in Hobbes views sovereign is absolute and thus cannot be entered into contract, nor can any contract bind the sovereign. *See* Thomas O. Hueglin, *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism* (Canada: Wilfrid Laurier University Press, 1999), 3-4.

Hobbes also departed from the dualist conception of sovereignty propounded by Grotius and the limited concept of sovereignty theorized by Suarez. It is for this reason that sovereignty is absolute and uniform, therefore, cannot be subjected to division or restrictions. The political community, according to Hobbes is transformed to a corporate entity -the state- through a covenant, wherein the absolute authority belongs to the ruler which he called sovereign.[39] It was Hobbes' Social Contract theory, which later on became the philosophical basis for the state (corporate body politic) as well as the determination of absolute authority within the state or domestic jurisdiction.[40] After a long time, Hobbes' intellectual contributions made it possible to consolidate the abstract notion of sovereignty with the state and thus laid down tangible foundations for the state domestic jurisdiction to be exercised on the authority of sovereign.

In 17th century, the notion sovereignty was further clarified by John Locke an English naturalist philosopher. However, this time the terms state and sovereignty were outcome of the social contract between the people and the ruler (institution).[41] Locke asserted that there are certain inalienable rights such as of life, liberty and property, and it is the duty of the ruler to protect these rights.[42] Unlike Hobbes, for

[39] Morton A. Kaplan, "How Sovereign Is Hobbes' Sovereign?," *The Western Political Quarterly* 9, no. 2 (1956): 389-405, http://www.jstor.org/stable/444613.

[40] *See generally* Bertrand Russell, "Hobbes's Leviathan," in *The History of Western Philosophy* (New York: Simon & Schuster, 1972), 546-557; *see also* Glen Newey, *Routledge Philosophy GuideBook to Hobbes and Leviathan* (USA: Routledge, 2008).

[41] *See* Locke, *Two Treatises of Government*; *see generally* Julian H. Franklin, *John Locke and the Theory of Sovereignty: Mixed Monarchy and the Right of Resistance in the Political Thought of the English Revolution* (Cambridge: Cambridge University Press, 1978); *see also* Raghuveer Singh,"John Locke and the Idea of Sovereignty," *The Indian Journal of Political Science* 20, no. 4 (1959): 320-334,http://www.jstor.org/stable/42743527 .

[42] *See for Locke conception of natural rights* Gary B. Herbert, "John Locke: Natural Rights and Natural Duties," *Jahrbuch Für Recht Und Ethik / Annual Review of Law and Ethics* 4 (1996): 591-613, http://www.jstor.org/stable/43593573; *see generally* Mark Francis Hurtubise, "Philosophy of Natural Rights According to John Locke" (Master's Thesis, Paper 1057, Loyola University Chicago, USA, 1952), http://ecommons.luc.edu/luc_theses/1057 ; *see generally for detail discussion on natural law and natural rights* John Finnis, *Natural Law And Natural Rights*, 2nd ed. (New York: Oxford University Press, 2011); *see also* Ginna M. Pennance-Acevedo, "St. Thomas Aquinas And John Locke On Natural Law," *Studia Gilsoniana* 6, no. 2 (2017): 221-248, http://www.gilsonsociety.com/files/Pennance-Acevedo.pdf; *see also for general discussion on the origin of natural rights* Brian Tierney, The Idea of Natural Rights-Origins and Persistence, *Northwestern Law Journal of International Human Rights* 2, no.1(2004),

Locke the authority of the rulers came into existence in consequence of the social contract. Under the contract, people conditionally surrendered the authority whereas the government is mere bearer of executive powers entrusted by community.[43] Locke's theory influenced the constitution of U.S.A.[44] Historically, Locke theory has been regarded as substantial basis of the modern states and domestic jurisdiction.

At the other end of spectrum, Jean Jacques Rousseau, in his *Contract social* (1756) dismissed the authoritarian thesis of sovereignty propounded by Hobbes.[45] Sovereignty according to him, vests in the people or community instead of ruler. In Rousseau view, only community is sovereign while the state performs the role of political organization and exercise its powers and functions in pursuance of the authority entrusted to it by the community.[46] It is the Rousseau's community as a sovereign which actually replaced the earlier form of popular sovereignty.[47]

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https://scholarlycommons.law.northwestern.edu/njihr/vol2/iss1/2; *see generally on the evolution of natural rights since 12th century C.E.* Virpi Mäkinen, "The Evolution of Natural Rights, 1100–1500," in *Universalism in International Law and Political Philosophy* 4, eds., Petter Korkman & Virpi Mäkinen (Helsinki: Helsinki Collegium for Advanced Studies, 2008), 105-119, https://helda.helsinki.fi/bitstream/handle/10138/25778/06_makinen_2008_4.pdf?sequence=1 .

[43] *See generally* Thomas Mouritz, "Comparing the Social Contracts of Hobbes and Locke," *The Western Australian Jurist* 1 (2010): 123-127, https://www.murdoch.edu.au/School-of-Law/_document/WA-jurist-documents/WAJ_Vol1_2010_Tom-Mouritz---Hobbes-%26-Locke.pdf; *see also* Deborah Baumgold, "Hobbes's and Locke's Contract Theories: Political not Metaphysical," *Critical Review of International Social and Political Philosophy* 8, no. 3 (2005): 289-308,https://doi.org/10.1080/13698230500187169. Locke theoretical basis of the social contract was entirely differs with that of Hobbes. Unlike Hobbes, Locke propounded the conditional surrender of authority by the people to the ruler. The Lockian concept of sovereignty implies a sort of check and balances over the ruler class, wherein, it was the duty of the ruler to protect the three fundamental and inalienable rights of the people: right to life, liberty and property. On the other hand, the Hobbes' sovereign was absolute and could not be subjected to any check or condition.

[44] *See* Anita L. Allen, "Social Contract Theory in American Case Law," *Florida Law Review* 51, no. 1 (1999), http://scholarship.law.upenn.edu/faculty_scholarship.

[45] *See generally* Ethan Putterman, *Rousseau, Law and the Sovereignty of the People* (New York: Cambridge University Press, 2010); *see also* John B. Noone, "The Social Contract and the Idea of Sovereignty in Rousseau," *The Journal of Politics* 32, no. 3 (1970): 696-708, http://www.jstor.org/stable/2128837; *see generally* Christopher W. Morris, "The Very Idea of Popular Sovereignty: "We The People" Reconsidered," Social Philosophy & Policy Foundation (2000), https://pdfs.semanticscholar.org/8bac/214ff1ad4adc24e2a2a85cc172a370ed5465.pdf.

[46] Rousseau, *The Social Contract.*

[47] John Neville Figgis,"Political Thought in the Sixteenth Century," in *the Cambridge Modern History*, eds., Stanley Mordaunt Leathes, Sir Adolphus William Ward and G. W. Prothero(Cambridge: Cambridge University Press 1904), 767.Rousseau is generally regarded as the pioneer of modern day concept of popular sovereignty. According to him sovereignty belong to the

The modern trend in constitutional paradigm was advanced by Immanuel Kant in 1780s. He accepted the Rousseau's popular sovereignty in its entirety. This fact was also accepted by Kant that state is in principle mere an agent and representative of sovereign's general will.[48] In Kant's view, all the popular rights are absorbed in Hobbes' sovereign- the state being an agent of the sovereign.[49] In a constitutional state where the divisions of power is in conflict with the freedom of executive powers, the question before Kant was that where the actual sovereignty can be found? To prove this he argued that theoretical sovereignty is vested in people while the actual sovereignty in executive state.[50] Thus, Kant devised a rational and permanent solution to this fundamental problem in constitutional states in the context of power and authority.

The most suitable theory of sovereignty was presented by twentieth century thinker Michel Foucault, who while encountering all the previously established theories of sovereignty accentuate on the contents of sovereignty. In Foucault's viewpoint sovereignty either popular or absolute is not weighable in terms of facts. To this he answered that sovereignty is not a fact or a state of affairs in which a political authority could find itself.[51] Rather sovereignty is a claim by authorities. It

community and it is the community at large in which behalf the ruler exercise the authority within a state. Rousseau conception of sovereignty is not that much different from Althusius, however, the difference lies in the form of the social contract theory of state given by Rousseau, which is missing in the political philosophy of Althusius. It is generally conceived that the Rousseau popular sovereignty theory is the modern version of the Althusius classical theory of sovereignty. Some scholars argue that Rousseau was influenced by the writings of Althusius and borrowed the contents of the theory from the works of Althusius, however, it needs a strong piece of evidence.

[48] Jacob Weinrib, "Sovereignty as a Right and as a Duty: Kant's Theory of the State" (2017): 4-6, https://ssrn.com/abstract=2976485; *see also* Frederick Rauscher, "Kant's Social and Political Philosophy", *TheStanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (USA: Metaphysics Research Lab, Stanford University, 2017), https://plato.stanford.edu/archives/spr2017/entries/kant-social-political/.

[49] *See generally on Kant idea of sovereignty* C. E. Merriam, Jr., *History of the Theory of Sovereignty since Rousseau* (Canada: Batoche Books Kitchener 2001), 21-27; Antonio Franceschet, "Sovereignty And Freedom: Immanuel Kant's Liberal Internationalist 'Legacy'," *Review of International Studies* 27, no. 2 (2001): 209–228, doi:10.1017/S0260210500002096 ; *see also* Peter Nicholson, "Kant on the Duty Never to Resist the Sovereign," *Ethics* 86, no.3 (1976): 214-230, http://www.journals.uchicago.edu/doi/abs/10.1086/291995.

[50] Hinsley, *Sovereignty*, 156.

[51] Eli. B. Lichtenstein, "Foucault's Analytics of Sovereignty," *A Journal of Philosophy and Social Theory* 22, no. 3 (2021), 300 in 287-305.

is not the fact of political powers rather it is a discourse of performing authority which must be obeyed. He further emphasized that sovereignty is a flexible thing instead of being static. In nutshell, Foucault believe that absolutist and popular forms of sovereignty are altogether irrelevant to the modern means of technology.[52]

In sequel to the above, the doctrine of domestic jurisdiction is embodied in the political concept of sovereignty. In classical and early modern era, sovereignty stood the underlying principle behind legal authority of states. The concept of sovereignty involves the belief that there exists an absolute political authority within the community and such authority is thus uniform and indivisible. In modern context, it is the state being a juristic person enjoying all the executive, legislative and adjudicative powers under the umbrella of domestic jurisdiction.

Though, the term sovereignty is fluently used in political debates but legally it originally refers to domestic jurisdiction of states. The detail analysis of sovereignty tells us that it is not only limited to the internal affairs of states but it also accomplish external objectives of its exclusiveness. Contrary to this, domestic jurisdiction is limited to internal affairs of a state. Apparently, it seems that rules of domestic jurisdiction are substantially derived from sovereignty. It is due to this reason that domestic jurisdiction of states is only recognized under the UN Charter to the extent of internal affairs. On the other side, sovereignty of members of the UN refer to both external and internal affairs.

3. Limitations on Domestic Jurisdiction

In the post-UN legal cosmopolitan world, the states being sovereign entities are the subject of PIL. Its rules and principles are exclusively applicable to states.[53] Treaties,

[52] *See e.g. on Foucault views on sovereignty* Michel Foucault, *Discipline & Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995).

[53] *See generally* Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th Rev. ed., (USA New York: Routledge Publishers, 1997); Malcom N. Shaw, *International Law*, 6th ed., (USA New York: Cambridge University Press, 2008); Sir Robert Jennings and Sir Arthur Watts, eds., *Oppenheim's International Law,* 9th ed, Vol 1, (U.K: Longman Group Limited, 1992); Hans Kelson, *Principles of International Law*, 2nd ed. (New York: Holt, Rinehart and Winston,

Conventions, international customs and decisions of international judicial organs (not most of the time) lays down a chain of binding obligations for states. For instance, IHRL requires the states to take measures for the protection and promotion of individuals' rights.[54] Likewise, International Humanitarian Law (IHL) regulate the conduct of conflicting parties in order to protect civilians, civilian property, prisoners of war and wounded and sick people during the armed conflicts.[55] Any possible violations of IHL or IHRL norms by the state authorities or even by non-state actors give rise to international crimes, which then falls within the jurisdictional ambit of ICL.[56] Obviously, ICL only fixes individual criminal responsibility instead of states.[57]At the end, these progressions in PIL leave serious repercussions for the

1967); Fernando R. Teson, *A Philosophy of International Law* (USA: Westview Press, 1998); Anthony Aust, *Handbook of International Law* (New York: Cambridge University Press, 2005); David J. Bederman, *The Spirit of International Law* (Athens: The University of Georgia Press, 2002).

[54] *See for example* Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (New York: Cambridge University Press, 2010); Shelley Wright, *International Human Rights, Decolonisation and Globalisation: Becoming human* (London: Routledge, 2001); Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics and Morals* (UK: Oxford University Press, 2013); Shiv R S Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (USA: Hart Publishing, 2007); Benjamin Gregg, *Human Rights as Social Construction* (New York: Cambridge University Press, 2012).

[55] *See* Yaël Ronen, "International humanitarian law,"in *International legal positivism in a post-modern world*, eds., Jean d'Aspremont and Jörg Kammerhofer (Cambridge : Cambridge University Press, 2014), 475-497, https://library.ext.icrc.org/library/docs/ArticlesPDF/40096.pdf; *See also* Robert Kolb, *Advanced introduction to international humanitarian law* (Cheltenham: Edward Elgar Publishing limited, 2014); Howard M. Hensel, "International humanitarian law," in *The Ashgate Research Companion to Military* Ethics, James Turner Johnson and Eric D. Patterson, eds, (Farnham; Burlington: Ashgate, 2015), 153-167.

[56] Rene Provost, *International Human Rights and Humanitarian Law* (UK: Cambridge University Press, 2002). IHRL and IHL follow each other in a series of events. The rationale behind the whole scheme of IHL is the minimization of the effects of war over human lives, which falls under the broader category of the right to life, property and dignity. It is to say that IHL did not come into existence only for the regulation of warfare or it is not the rules of game, but the purpose behind its scheme is the extension of maximum protection to human lives during warfare. Unlike IHL, the scope of human rights law is vast applicable both in war and peace times, thus, the whole scheme of IHL is purposely designed to lessen the impacts of war over human lives, or in other words the aiming the maximum protection of human rights from grave violations during armed conflicts. *See for example* Alain-Guy Tachou-Sipowo,"Does International Criminal Law Create Humanitarian Law Obligations? The Case of Exclusively Non-State Armed Conflict under the Rome Statute," *Canadian Yearbook of International Law/Annuaire Canadien De Droit International* 51 (2014): 289–318, http://ssrn.com/abstract=2550438.

[57] See Article 25 of the ICC Statute. The said article contains provisions in respect of individual criminal responsibility. It has been regarded by the legal scholarship throughout the world as a tremendous shift in the paradigm of public international law from state (juristic person) to an individual (natural person). Being a pragmatist, one can truly imagine that the corporate veil behind

domestic jurisdiction of states because balancing its obligations under the international treaties as well as customary law with that of internal authority pragmatically seems difficult.[58]

The phrase domestic jurisdiction for the first time appeared in article 15 of the Covenant of the League of Nations, 1919.[59] According to the language of article 15, the Council's powers of interference was altogether ousted when the matter would fall within the domestic jurisdiction of states. Later on, the phrase domestic jurisdiction was re-introduced in article 2(7) of the UN Charter but with few exceptions. Due to the mass internationalization of various issues such as human rights, environmental protection, international and non-international conflicts and international prosecutions, it is now difficult to ascertain that which and what affairs falls within the domestic jurisdiction of states. Conversely, few scholars argue that domestic jurisdiction clause is still intact and the interference is only warranted in enforcement measures by the UN Security Council and not otherwise.[60]

The prohibition of the use of force in Article 2(4) of the UN Charter and the obligations of peaceful international cooperation have a great influence on the nature

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the abstract entity of state has been pierced with the emergence of modern ICL. Before the modern ICL, the rulers (Heads of State or Government) would put forward the narrative that the state are the key actors that should be held responsible, although, determining the responsibility of state being a corporate entity in concrete terms was impossible. Re-considering the above narrative of state self-contained responsibility, the international community when drafting the ICC statute in the Rome Conference, introduced the substantive provisions of individual criminal responsibility by putting the states in secondary list. The individual criminal responsibility rule is incomplete unless it is read with Article 27 of the statute which provides for the irrelevancy of official capacity. Article 27 for the first time ended the historic and so-called holy rule of head of state immunity, which has been regarded as a great achievement. *See for detail discussion on individual's criminal responsibility* Ciara Damgaard, *Individual Criminal Responsibility for Core International Crime* (Heidelberg: Springer Science+Business Media B.V., 2008).

[58] *See generally* Zhu Wenqi, "On co-operation by states not party to the International Criminal Court," *International Review of the Red Cross* 88, no. 861 (2006): 87-110.

[59] Article 15(8) of the Covenant of League of Nations, 1919: "If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement."

[60] Kawser Ahmed, "The Domestic Jurisdiction Clause in the United Nations Charter: A Historical View," *Singapore Year Book of International Law and Contributors* 10 (2006), 196 in 175-197.

and contents of domestic jurisdiction as well as state sovereignty. Article 2(7) restricts the domestic jurisdiction of states in case, whenever a humanitarian intervention is required, article 2(7) states as:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.[61]

The language of article 2(7) reduces the scope of domestic jurisdiction when interference is required on the yardstick of peace and security or humanitarian grounds. Quite the opposite, the scope of 'peace and security' and 'humanitarian grounds' is far wider because any matter could easily become the concern of international community when it threatens international peace and security or warranted on humanitarian grounds. Since the language used in article 2(7) is so open for interpretation that even any action rightly exercised by the national authorities in pursuance of its domestic jurisdictional powers could itself become the subject of humanitarian intervention.[62]

[61] *See for details on the state sovereignty and UN intervention* Samuel M. Makinda, "The United Nations and State Sovereignty: Mechanism for Managing International Security," *Australian Journal of Political Sciences* 33, no. 1 (1998): 101-115; M. Ayoob, "Humanitarian Intervention and State Sovereignty," *The International Journal of Human Rights* 6, no. 1 (2002): 81-102.

[62] Bernhard Graefrath, "Universal Criminal Jurisdiction and an International Criminal Court," *European Journal of International Law* 1, no. 1 (1990): 72-73, http://www.ejil.org/article.php?article=1146&issue=71. Graefrath argued that, "For a long time, the question of international implementation of criminal law was approached from the viewpoint of the need to prevent possible interference with state sovereignty and not from that of the need for coordinated struggle and cooperation in the fight against international crimes. Thus, states either cited the sovereignty principle as justification for objecting to the extension of universal criminal jurisdiction or as justification for rejecting the establishment of an international criminal court This situation continues to exist today, though in a different fashion; there is increasing recognition that national security is at present achievable only by way of international cooperation."

In ICL perspective, under the complementarity rule domestic jurisdiction has been given upper hand over the jurisdiction of ICC but in matters of universal jurisdiction exercised by national courts oust the jurisdiction of the state of nationality of offender. Besides, it is also argued that implications of articles 12(2) and 13(b) of the Rome Statute for domestic jurisdiction of states are universal because in both cases the jurisdiction of Court supersede the national jurisdiction.[63]Similarly, the irrelevancy of official's immunity clause in the Rome Statute has overriding legal impacts over claim of primacy of jurisdiction by domestic authorities because under most of the states' national legislations, officials are mostly immune from prosecution

[63] *See for example* Cenap Cakmak, "The International Criminal Court In World Politics," *International Journal on World Peace* 23, no. 1 (MARCH 2006): 3-40, http://www.jstor.org/stable/20753516 ; *see also* Matthew H. Charity, "Criminalized State: The International Criminal Court, The Responsibility to Protect, and Darfur, Republic of Sudan," *Ohio Northern University Law Review* 37 (2011): 67-110.

for the acts done in official capacity.[64]Consequently, this new rule of ICL remove the impression of being immune from criminal prosecution in heinous crimes.[65]

4. Legal Limits of State Sovereignty in post-UN International Legal Order

Historically, the concept of sovereignty has been conceived by legal and political thinkers as an absolute authority within a political community.[66] The formulation of

[64] Article 27 of the ICC Statute: Irrelevance of official capacity, "(1). This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (2). Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person". *See for example Prosecutor v Omar Hassan Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) (ICC, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) ('*Prosecutor v Al-Bashir'*). It is notable that Sudan's President *Omar Hassan Ahmed Bashir* was charged in the warrants for war crimes and crimes against humanity in Darfur. The ICC issued arrest warrants against the incumbent President *Omar Bashir* in pursuance of the situation referred to it by the United Nations Security Council under Article 13 (b). *Al-Bashir* was also accused of Genocide but due to lack of express provisions regarding head of state immunity, such charges could not be framed in the warrants. Dapo Akande has suggested that the test applied with regard to the 'reasonable grounds to believe' was totally restrictive and erroneous; the obligations contained in the Genocide Convention might would have served the purpose of removing the immunity of *Al-Bashir*. Furthermore, the International Court of Justice while in Application of the Convention on the Prevention and Punishment of Genocide (Bosnia Herzegovina v. Serbia & Montenegro, 2007) Case held that "the Genocide Convention implicitly contains an obligation to cooperate with competent international courts, including an obligation to arrest persons suspected of genocide". *See* Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on *Al-Bashir's* Immunities'" *Journal of International Criminal Justice* 7 (2009) 333-352, http://councilandcourt.org/files/2012/11/Akande-Referrals-Immunities.pdf; *See also* M. Milanovic, "The ICC Issues Arrest Warrant for Bashir but Rejects the Genocide Charge'", *EJIL: Talk!* (2009), http://www.ejiltalk.org/icc-issues-arrest-warrant-forbashir-but-rejects-the-genocide-charge/; K. Heller, "The Majority's Complete Misunderstanding of Reasonable Grounds'" *EJIL: Talk!* (2009), http://opiniojuris.org/2009/03/05/the-majoritys-complete-misunderstanding-of-reasonablegrounds/

[65] *See* Paola Gaeta, 'Official Capacity and Immunities,' in *The Rome Statute of the International Criminal Court: A Commentary*, vol I, eds, Antonio Cassese et al (UK: Oxford University Press, 2002); Phillip Wardle, "The Survival of Head of State Immunity at the International Criminal Court," *Australian International Law Journal* 9 (2011): 181-205, http://www5.austlii.edu.au/au/journals/AUIntLawJl/2011/9.pdf.

[66]*See generally* Dieter Grimm and Belinda Cooper, *Sovereignty: The Origin and Future of a Political and Legal Concept*, (New York: Columbia University Press,2015); Robert Jackson, *Sovereignty: The Evolution of An Idea* (Cambridge: Polity Press, 2007); Hent Kalmo and Quentin Skinner, *Sovereignty in Fragments: The Past, Present, and Future of a Contested Concept* (Cambridge: Cambridge University Press, 2014); Carmen Pavel, *Divided Sovereignty: International Institutions and the Limits of State Authority*, (Oxford: Oxford University Press, 2014); Corinne Comstock Weston and Janelle Renfrow Greenberg, *Subjects and Sovereigns: The Grand*

sovereignty on legal theoretical basis took place with the emergence of state- the political organization of a society.[67] Legal and political scholars generally trace the origin of modern nation states from the Treaty of Westphalia, 1648.[68] It was the Westphalian model that originally paved the way for the nowadays so-called sovereign territorial states either monarchy, principality or republic.[69] Moreover, for the purpose of identifying the existence of state sovereignty, the Westphalian peace established in 1648 legitimized the rights of monarchs (states) to rule their people free from interference by extrinsic legal and political forces.[70] In this context, the

Controversy over Legal Sovereignty in Stuart England (Cambridge: Cambridge University Press, 1981).

[67] *See for example* Joel S. Migdal, *State in Society: Studying How States and Societies Transform and Constitute One Another* (Cambridge: Cambridge University Press, 2001). It has been generally argued that it was the establishment of state which compelled the legal and political thinkers to present the idea of sovereignty. Moreover, it was the peculiar circumstances of Western Europe that the separation of state (political authority) from the church was highly needed, and for that purpose the theories of sovereignty provided ideological strength to the establishment of state and as well played the role of catalyst in repealing the authority of Church.

[68] *See generally* Andreas Osiander, "Sovereignty, International Relations, and the Westphalian Myth," *International Organization* 55, no. 2 (2001): 251–287; Andreas Osiander, *The States System of Europe, 1640-1994*, (Oxford: Clarendon Press, 1994); Daniel H Nexon, *The Struggle for Power in Early Modern Europe: Religious Conflict, Dynastic Empires, and International Change*, (Princeton: Princeton University Press, 2009).

[69] Joseph R. Strayer, *On the Medieval Origins of the Modern State* (New Jersey: Princeton University Press, 1970), 107-108. Political thinkers generally divide the existence of political authority within the European societies into two eras: one the pre-Westphalian era, and second the post-Westphalian era. In pre-Westphalian era there was a general tendency among the masses as well as the ruling elite, that there is one man-the ruler designated by God through the authority of Church, had the right to rule a particular territory, and all the people must obey him without questioning. This tendency, however, was resisted in the thirty years war, in consequence to which the Treat of Westphalia was concluded in 1648. On the other hand, there was an idea that no divine rights of the monarchs exist at all, and that a sort of political organization-state is necessary for the welfare of human beings and to exercise all the legitimate authorities (sovereignty) over the subjects.

[70] Douglas Howland and Luise White, eds, "Introduction: Sovereignty and the Study of States," in *The State of Sovereignty: Territories, Laws, Populations* (USA: Indiana University Press, 2009), 3; *see also* Anne L. Clunan, "Redefining Sovereignty: Humanitarianism's Challenge to Sovereign Immunity," in *Negotiating Sovereignty and Human Rights Actors and Issues in Contemporary Human Rights Politics*, eds, Noha Shawki and Michaelene Cox (England: Ashgate Publishing Limited, 2009), 7. Generally the state sovereignty has two necessary components: internal and external sovereignty. In classical sense, internally the state has an exclusive authority to regulate all affairs over a particular territory. In furtherance of the objects contained in the Treaty of Westphalia 1648, the states for the next three hundred years recognized each other's rights to determine their own internal political, economic or social affairs. Afterwards, such rights were also recognized in the UN Charter under Article 2(4). Externally, the states got freedom to regulate their affairs on inter-states level, e.g. to conclude treaties and agreements with other states.

state sovereignty may be understood as the "absolute territorial organization of political authority".

For all practical purposes, Krasner classified the state sovereignty into four classes as:

> The term sovereignty has been used in four different ways—international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty. International legal sovereignty refers to the practices associated with mutual recognition, usually between territorial entities that have formal juridical independence. Westphalian sovereignty refers to political organization based on the exclusion of external actors from authority structures within a given territory. Domestic sovereignty refers to the formal organization of political authority within the state and the ability of public authorities to exercise effective control within the borders of their own polity. Finally, interdependence sovereignty refers to the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state.[71]

International legal sovereignty and Westphalian sovereignty for Krasner entails the issues of authority and legitimacy, not control.[72] He stated the rule for international legal sovereignty as the extension of recognition to territorial entities that have formal juridical independence.[73] Similarly, the Westphalian sovereignty

[71] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (New Jersey: Princeton University Press, 1999), 3-4.

[72] Ibid, 5-6. *See also* John Agnew, "Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics," *Annals of the Association of American Geographers* 95, no. 2(2005): 437–461, doi:10.1111/j.1467-8306.2005.00468.x.

[73] *See* Stephen D Krasner,"Sovereignty," *Foreign Policy*, no. 122 (2001): 20-29,http://www.jstor.org/stable/3183223; *see also* Janice E. Thomson, "State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical Research," *International Studies Quarterly* 39, no. 2, (1995): 213–233.

provides for a rule of exclusion of external actors from the territory of a state.[74] The rule for Domestic sovereignty is the exercising of effective and legitimate authority and control within a defined territorial limits.[75] Interdependence sovereignty in Krasner view is concerned with control-the capacity of state to regulate across the border movements.[76]

The aforesaid different classes of state sovereignty cannot be logically coupled simultaneously because all of the classes provide diversified justifications of sovereign authority.[77] International legal sovereignty has its relevancy when it comes to the status of states in their international relations- the modern concept of statehood under international law.[78] On the other hand, the Westphalian sovereignty provides for the exclusion of foreign interference within the territorial limits of a state- such as Article 2 (4) of the UN Charter put general obligations on members states "to refrain from threat or use of force against the territorial integrity or political independence of any state".[79]Resultantly, article 2(4) safeguards the states from

[74] *See for example* Jason Farr, "Point: The Westphalia Legacy and the Modern Nation-State," *International Social Science Review* 80, No. 3&4 (2005): 156-159, http://www.jstor.org/stable/41887235; *see also* Peter M. R. Stirk,"The Westphalian Model and Sovereign Equality," *Review of International Studies* 38, no. 3 (2012): 641-60, http://www.jstor.org/stable/41681482.

[75] Krasner, *Sovereignty,* 11.

[76] Ibid, 12.

[77] Ibid, 9.

[78]*See generally* Stéphane Beaulac, "International Law: Challenging the Myth," *Australian Journal of Legal History* 8, no. 2 (2004), http://classic.austlii.edu.au/au/journals/AJLH/2004/9.html. In international law the Treaty of Westphalia being a peace establishing agreement is historically treated as the foundation stone of modern state system. The modern sovereign states derived their legitimacy and absolute authority both internally and externally from the Westphalian agreements. International lawyers pay a great attention to the Westphalian peace when it comes to the recognition of states in international law. *See also* Derek Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty," *The International History Review* 21, no. 3 (1999): 569-591, http://www.jstor.org/stable/40109077; *See for example* A.C. Culter, "Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis in Legitimac," *Review of International Studies* 27 (2001): 133-150; D. Hassan, "The Rise of the Territorial State and the Treaty of Westphalia," *Yearbook of New Zealand Jurisprudence* 9, (2006), http://epress.lib.uts.edu.au/research/bitstream/handle/10453/3289/2006006060.pdf?sequence=1.

[79] *See for the principle of sovereign equality under the UN Charter* Behrooz Moslemi and Ali Babaeimehr, "Principle of Sovereign Equality of States in the Light of the Doctrine of Responsibility to Protect," *International Journal Of Humanities And Cultural Studies* (2015): 687-697. Alex Ansong, "The Concept of Sovereign Equality of States in International Law," *GIMPA Law Review* 2, no. 1 (2016): 14-36, https://works.bepress.com/alex_ansong/2/. Article 2(1) of the UN

foreign interference within the domestic affairs of states which is the essence of Wetsphalian sovereignty.[80]

Theoretically, the history of sovereignty is closely linked with the concept of domestic jurisdiction.[81] The rule for domestic jurisdiction as discussed earlier is the exercising of control and authority within a polity.[82] It is mainly concerned with the affairs of authority as well as control within a defined territory. Authority and control are hereby used in both legal and political senses.[83] In broader sense the authority refers to absolutism of powers within prescribed framework i.e. legislative, executive

Charter lay down the general principles of the equality of states as obvious from its text, "The Organization is based on the principle of the sovereign equality of all its Members". Moreover, in order to safeguard the sovereign equality of all states, the UN charter further put an express bar on the use of force in Article 2(4) which states, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

[80] *See for example* Müge Kinacioğlu, "The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate," *Perceptions* 10(Summer 2005): 15-39, http://sam.gov.tr/wp-content/uploads/2012/01/Muge-Kinacioglu.pdf; Leta Jaleta Negeri, "The Tension Between State Sovereignty And Humanitarian Intervention In International Law" (Master Thesis, University of Oslo, Norway, 2011), https://www.duo.uio.no/bitstream/handle/10852/19668/ThesisxFinal.pdf?sequence=2.

[81] *See generally* G. Nolte, "Article 2(7)" in *The Charter of the United Nations: A Commentary*, 2nd ed., ed, B. Simma, (New York: Oxford University Press, 2002).

[82] *See* Kawser Ahmed, "The Domestic Jurisdiction Clause in the United Nations Charter: A Historical View," *Singapore Year Book of International Law and Contributors* 10 (2006): 175-197, http://www.commonlii.org/sg/journals/SGYrBkIntLaw/2006/10.pdf. Domestic sovereignty in modern context generally refers to the domestic jurisdiction of states: the jurisdiction to legislate, enforce and adjudicate. However, the same has been restricted in one way or other through the application of article 2(7) of the UN Charter. The principle of domestic jurisdiction was laid down by article 15 (8) of the Covenant of the League of Nations, the text of article 15(8) appeared as: "If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement." Similarly, the phrase "domestic jurisdiction" used in article 2(7) lays down a general rule for the exercise and enjoyment of domestic jurisdiction as prerogative of the member states. In other words, article 2(7) embodies the principle of non-intervention as well, meaning thereby, that states are free to exercise its own executive, legislative and judicial jurisdiction independently.

[83] Exercising exclusive authority and control within a particular territory is the essential ingredients of domestic sovereignty. A state cannot claim its sovereign status without effective authority and control over its subjects and territory. Some scholar argues that emergence of global issues and technological advancement in twentieth and twenty first centuries adversely undermined the classical concept of state domestic sovereignty. As Krasner argues that it is possible at one time that a state may not be able to exercise effective authority and control but still it would have international recognition (*de jure*). *See* Krasner, *Sovereignty*, 8.

and adjudicative powers of state.[84] On the other hand, interdependence sovereignty merely deals with control and not authority.

Besides, the concept of interdependence sovereignty is closely associated with the era of new post-UN international legal order.[85] Emergence of new issues especially after 1950s and followed by technological advancements created serious concerns for states that whether they would be able to sustain the interdependence sovereignty- the ability to regulate or control movements across the border.[86] Additionally, the emergence of new transnational issues such as atmospheric pollution, drugs trade, terrorism, currency crises, cybercrimes etc. are the outcome of interdependence or technology. In the foregoing scenario, states are not able to provide solution for how to deal with these issues, therefore, the emerging transnational issues restrict the so-called state sovereignty both in form and substance.[87]

In Krasner's terms 'globalization' has almost perished the classical concept of sovereignty as well as domestic jurisdiction.[88] He argues that "the inability to

[84] Hinsley defined the sovereignty in the following terms, "the idea that an absolute and final authority exists in a political community". The definition given by Hinsley suggests the absoluteness of authority and powers within a political community- the powers to legislate, enforce and adjudicate. Absoluteness of authority carries a broader range of meaning with the exclusion of any restrictions associated to it. *See* Hinsley, *Sovereignty*, 1-2.

[85] *See generally* John Agnew, *Globalization and Sovereignty* (USA: Rowman & Littlefield Publishers, Inc., 2009). The assumption under the Westphalian model that states have exclusive absolute territorial sovereignty is undermined/ transformed by globalization. *See also* D. Held, ''Democracy, the nation-state, and the global system,'' in *Political Theory Today* ed., D. Held (Cambridge: Polity Press, 1991), 22. David Held argues that globalization is posing the question as to whether global networks are displacing ''notions of sovereignty as an illimitable, indivisible, and exclusive form of public power'' such that ''sovereignty itself has to be conceived today as already divided among a number of agencies—national, regional, and international—and limited by the very nature of this plurality."

[86] *See* S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton, NJ: Princeton University Press, 2006).

[87] Krasner articulated the interdependence sovereignty as, "While a loss of interdependence sovereignty does not necessarily imply anything about domestic sovereignty understood as the organization of authoritative decision making, it does undermine domestic sovereignty comprehended simply as control. If a state cannot regulate what passes across its borders, it will not be able to control what happens within them." Krasner, *Sovereignty*, 13.

[88] It has been argued by the advocates of globalization that it undermines the concept of state sovereignty through different means such as global finance flow, multinational corporations, global

regulate the flow of goods, persons, pollutants, diseases, and ideas across territorial boundaries has been described as a loss of sovereignty".[89]Likewise, Richard Cooper holds "that in a world of large open capital markets smaller states would not be able to control their own monetary policy because they could not control the trans-border movements of capital".[90] The growing economic interdependence, free market economy and the foreign direct investments are the factors that played a key role in transforming the concept of states' domestic jurisdiction.[91]

Additionally, the formation of a global capital market represents a monopoly of power being capable of influencing the national economic policies of states in one way or the other.[92]The increasing role of multinational corporations in the global capital market has decreased the role of states to an enormous level especially in regulation of the economic affairs on inter-state level.[93] Similarly, the economic interdependence has crucial implications for the foreign policies of states because

media empires and the internet. The physical borders of the states are turned into soft borders which are out of the control of states. Political science regards the sovereignty as essential element of the state accompanied with the concept of complete supremacy in domestic policies and independence in foreign affairs. However, technology and the flow of capital have brought considerable changes in the notion of state sovereignty. Globalization catalyzed the transformation process and resultantly, the scope of national sovereignty has changed from the classical to the modern one. *See for detail discussion* Leonid E. Grinin, "State Sovereignty in the Age of Globalization: Will it Survive?," in *Globalistics And Globalization Studies*, eds., Leonid E. Grinin, Ilya V. Ilyin, and Andrey V. Korotayev (Volgograd: 'Uchitel' Publishing House, 2012); *see also* Dukagjin Leka, "Challenges of State Sovereignty in the Age of Globalization," *AUDJ* 13, no. 2 (2017): 61-72, http://journals.univ-danubius.ro/index.php/juridica/article/viewFile/4051/4125; Leonid E. Grinin, "Transformation of Sovereignty and Globalization," in *Hierarchy And Power In The History Of Civilizations: Political Aspects of Modernity* eds., Leonid E. Grinin, Dmitri D. Beliaev and Andrey V. Korotayev (Moscow: KD "LIBROCOM", 2009).

[89] Krasner, *Sovereignty*, 12.

[90] *See* Richard Cooper, *The Economics of Interdependence* (New York: McGraw- Hill, 1968); *see also* Richard N. Cooper, "Economic Interdependence and Foreign Policy in the Seventies," *World Politics* 24, no. 2 (1972): 159-81, http://www.jstor.org/stable/2009735.

[91] In Richard Cooper terms the speedy flow of goods, persons, funds, information and ideas across the borders are the reasons that is causing difficulties for states. In modern world, the economic interdependence is followed by psychological interdependence due to rapid technological advancements such as electronic and information technology. *See* Cooper, "Economic Interdependence", 162-163.

[92] Ibid, 172.

[93] Ibid, 173.

states are economically dependent on the inter-state organizations like "World Bank and International Monetary Fund (IMF)".[94]

Institutions like World Bank and IMF provide loans to the states which are subject to various stipulations where under the states are bound to formulate their economic policies. In nutshell, the economic, social and cultural aspects of growing internationalized issues are beyond the control of states.[95] All these suggests that post-UN international legal order has curtailed the scope of state sovereignty as well as domestic jurisdiction which is no more a valid ground for immunity from the jurisdiction of international judicial organs.

5. Domestic Jurisdiction and ICL: From Impunity to Accountability

Since the Westphalian model of statehood, state have always claimed immunity from certain criminal jurisdictions.[96] This rule is known as the rule of sovereign immunity in PIL.[97] Historically, heads of states were granted absolute immunity due to being

[94] Valerie Sperling, *Altered States: The Globalization of Accountability* (New York: Cambridge University Press, 2009), 35-36. The World Bank and IMF also known as Bretton Woods's institutions were established in the aftermaths of Second World War. Both the institutions are since then regarded as global institutions for the regulation of economic affairs. The political critics of the World Bank and IMF often allege that these intuitions have a direct influence over the economic policies of states, and in consequence to, the states have compromised their national sovereignty, especially, when it comes to the loans borrowed by the states accompanied with various conditions. *See also* Martin Wolf, "Globalization and Global Economic Governance," *Oxford Review of Economic Policy* 20, no. 1 (2004): 72-84, http://people.ds.cam.ac.uk/mb65/documents/wolf-2004.pdf.

[95] David J. Bederman, *Globalization and International Law* (New York: Palgrave Macmillan, 2008), 147-148. "The emergence of a 'borderless world' can certainly give credit to the notion that the concept of bounded territory, which is necessary for State sovereignty, is no longer a meaningful concept for describing political and social change. Under this theory, the nation-State has lost its dominant role in international governance (in both the political and economic senses of that concept) and is being supplanted by transnational networks of authority and non-State actors. Taken to its extreme, this theory of globalization—called by some as 'hyperglobalization'—will inevitably involve the decreasing relevance and ultimate withering away of the nation-State."

[96] State immunity is a concept of international law, which has its origin in the "principle *par in parem non habet imperium* that one sovereign power cannot exercise jurisdiction over another sovereign power". It is the basis of the act of state doctrine and sovereign immunity. *See generally* Yoram Dinstein, "Par in Parem Non Habet Imperium," *Israel Law Review* 1, no. 3 (1966): 407–420, doi:10.1017/S0021223700013893.

[97] Historically the head of foreign states has enjoyed complete immunity, even in the acts done in their private capacity. Under customary international law the doctrine of state immunity applies to all activities of the state with very narrow exceptions. The prevailing trend in many

the personification of state.[98] It means that under international law the head of state can act with impunity without any fear from prosecution. The rule of sovereign immunity is embodied both in customary law as well as treaty law.[99] Immunities granted to the diplomats and counselors of foreign states from the jurisdiction of the forum states are also based on the 'principle of sovereign immunity'.[100]

The first step towards eliminating the impunity clause (head of state immunity) was taken in shape of IMT or Nuremberg Tribunal and the Tokyo Tribunal.[101] It was a paramount decision with respect of divorcing the inviolability of head of state as an individual from the inviolability of state itself.[102] Article 7 of the IMT Charter states that:

countries is that they have adopted the doctrine of qualified immunity instead of the absolute immunity- that is, they grant immunity to foreign states only in respect of their governmental acts (acts iure imperii), not in respect of their commercial acts (acts iure gestionis). Nowadays most of the states follow the doctrine of qualified immunity except some South American states that still follow the absolute immunity rule. *See the* Inter-American Draft Convention on Jurisdictional Immunity of States, approved by the Inter- American Juridical Committee on 21 January 1983.

[98] LIU Daqun, "Has Non-Immunity for Heads of State Become a Rule of Customary International Law?" in *State Sovereignty and International Criminal Law* eds., Morten Bergsmo and LING Yan (Beijing: Torkel Opsahl Academic EPublisher, 2012), 55. The immunity rule has been reaffirmed by the International Court of Justice in *Arrest Warrant* case. Three judges in their joint separate opinion holds that "immunities are granted […] to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system" The ICJ verdict reflects the idea that "an equal has no power over an equal". *See* International Court of Justice, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), February 14, 2002, para. 75, http://www.legaltools.org/doc/23d1ec/. The Court further holds at para. 54 that, "throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability".

[99] *See* United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004. It is expressed in the preamble of the convention that the jurisdictional immunity of states are "generally accepted as a principle of customary international law". Moreover, the phrase in the preamble "Taking into account developments in State practice with regard to the jurisdictional immunities of States and their property" reflects the state practices at national level in respect of jurisdictional immunities of states. *See also* European Convention on State Immunity and its Additional Protocol, 1972.

[100] *See* Vienna Convention on Diplomatic Relations, 1961; the Vienna Convention on Consular Relations, 1963.

[101] *See* Paul G. Lauren, "From impunity to accountability: Forces of transformation and the changing international human rights context," in *From sovereign impunity to international accountability: The search for justice in a world* eds., Ramesh Thakur and Peter Malcontent (Tokyo: United Nations University Press, 2004); M. Cherif Bassiouni, "Combating Impunity for International Crimes [comments]," *University of Colorado Law Review* 71, no. 2 (Spring 2000): 409-422.

[102] Daqun, "Has Non-Immunity for Heads of State", 57.

> "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."[103]

The Nuremberg Tribunal marked stamp over the principle of irrelevancy of head of state immunity in its judgment of 1 October, 1946 by stating that: "The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot take shelter behind their official position in order to be exempted from punishment in appropriate proceedings."[104]

It is evident from the IMT Charter and the judgments of Nuremberg Tribunal that the notion of immunity has stood excluded from the sphere of special defenses in criminal prosecution.[105]Likewise, article 4 of the 1948 Genocide Convention, article 3 of the Apartheid Convention 1973, and the 1984 Torture Convention in articles 4 and 12 also provides for the "removal of the head of State and other public officials immunity from criminal prosecution".[106]

In the same manner, article 7(2) of the ICTY and article 6(2) of the ICTR provides for the removal of the head of state immunity in criminal prosecutions.

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[103] Article 7, Charter of the International Military Tribunal, 1945.

[104] The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Part 22 (22 August 1946 – 1 October 1946), para. 447.

[105] M. Cheriff Bassiouni, *Introduction to International Criminal Law: Second Revised Edition*, (The Netherland: Martinus Nijhoff Publishers, 2012), 75.

[106]*See* Andrea Bianchi, "Immunity versus Human rights: The Pinochet case," *European Journal of International Law* 10, no. 2 (1999): 237-277, http://www.ejil.org/pdfs/10/2/581.pdf. "The famous Pinochet case, in which the UK House of Lords allowed an extradition application by Spain in respect of the former Chilean president to proceed, remains the leading case on such an exception. The House of Lords in 3:2 majority decision held that Pinochet being a head of state of Chile is not entitled to immunity from criminal proceedings and therefore, be extradited to the Spanish government. Pinochet was accused of torturing the Spanish citizens in Chile, while he was on his visit to England, on the following day the Spanish Metropolitan magistrate issued a provisional arrest warrant accusing him for the murder of Spanish citizens between 1973 and 1983 in Chile. The principle laid down by the House of Lord in its decision of 24th March, 1999 was that Pinochet does not enjoy immunity in respect of acts of torture committed after the entry into force of the 1984 Convention against Torture. Moreover, Chile, Spain and the United Kingdom are all parties to the Torture Convention, therefore, contractually bounds to give effect to its provisions pertaining to irrelevancy of the head of state immunity." http://www.internationalcrimesdatabase.org/Case/855/Pinochet/.

Generally, ICL removes both substantial and temporal immunity for all public officials for international crimes. The ICC's Statute in article 27 also provides for the removal of immunity in criminal prosecution.[107] Quite the opposite, the ICJ in Congo v. Belgium (2002) recognized the temporal immunity of the incumbent officials.[108]

One of the notable example of ICC regarding irrelevancy of immunity to criminal prosecution is the issuance of arrest warrant of Sudanese President Omar Hassan Ahmed Bashir.[109] Bashir was charged in the warrants for the "crimes against humanity and war crimes" for events in Darfur. Similarly, in 2011 the Court issued the arrest warrant for Libyan leader Muammar Gadhafi, his son Saif Al-Islam Gadhafi and Abdullah Al-Senussi for the "crimes against humanity".[110] These practices of the Court were in line with the essence of article 27 of the Statute. Article 27 is exhaustive for all purposes, however, article 98 of the Statute places certain limitations over the exercise of these powers of Court.[111]

Thus, it can be held that the principle of sovereign immunities is no more absolute rather the removal of official's immunity clauses in various international

[107] Article 27: "Irrelevance of official capacity, (1). This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (2). Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

[108] *Democratic Republic of Congo v. Belgium*, ICJ, 2002.

[109] Warrant of Arrest for Omar Hassan Ahmad Al Bashir issued by the Pre-Trial Chamber on 04th March, 2009 in *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-1.

[110] Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi issued by the Pre-Trial Chamber on 27th June, 2011in *The Prosecutor v. Saif Al-Islam Gaddafi*, https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/11-01/11-2.

[111] Article 98: "Cooperation with respect to waiver of immunity and consent to surrender, (1). The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. (2). The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

treaties have created strong exceptions to this principle. The claim regarding absolute sovereignty as well as domestic jurisdiction is restricted due to operation of international rules and principles which are binding in nature.[112] Likewise, the traditional concept of immunity from criminal prosecution which was in fact an impunity is no more relevant in criminal prosecution.[113]This aspect of ICL has devastating impacts for the domestic jurisdiction of states where under the official immunities were granted to certain officials. Besides ICL, other branches of PIL such as IHRL, International Environmental Law, International Investment Law and Arbitrations, International Economic and Commercial Law too carries overriding impacts for the domestic jurisdiction of states.[114]

6. Conclusion

The legitimate claim of states regarding exercising jurisdiction is based on the principle of domestic jurisdiction as oppose to universal jurisdiction. The factual aspect of domestic jurisdiction on the other side is rooted in the theory of state sovereignty. Sovereignty in legal sense, is in fact the ability of state to exercise control and authority both internally as well as externally. Different legal and political thinkers associate the idea of sovereignty with the absolute politico-legal authority of state or ruler. However, in the post-UN international legal order there are certain

[112] *See* Robert Cryer "International Criminal Law vs State Sovereignty: Another Round?," *European Journal of International Law* 16, no. 5 (2005): 979-1000.

[113] Benjamin N. Schiff, "Universalism Meets Sovereignty at the International Criminal Court," in *Negotiating Sovereignty and Human Rights Actors and Issues in Contemporary Human Rights Politics*, eds, Noha Shawki and Michaelene Cox (England: Ashgate Publishing Limited, 2009), 60. The International Criminal Court that came into force in 2002 expresses the member states commitment to hold individuals accountable for committing the most serious international crimes- "war crimes, genocide, crimes against humanity and possibly the crime of aggression". The Rome Statute of 1998 challenges the Westphalian model of state sovereignty by regarding the individuals apart from the states either acting on their own or as state official, inside their own states' territories or on the territory of other states. Further, it constrains the sovereignty of states by creating obligations: the obligation to implement the Court statute in their domestic law, and the obligation to cooperate with the Court.

[114] *See generally* M. Cherif Bassiouni, "The Future of Human Rights in the Age of Globalization," *Denver Journal of International Law and Policy* 40, no. 1 - 3 (2011-2012): 22-43; M. Cherif Bassiouni, *Globalization and Its Impact on the Future of Human Rights and International Criminal Justice* (Cambridge – Antwerp – Portland: Intersentia, 2015).

limitations for both sovereignty and domestic jurisdiction. For instance, article 2(7) of the UN Charter explicitly stipulates that in matters of international peace and security and humanitarian matters, the domestic jurisdiction clause would not oust the intervention of UN. Thus, the scope of domestic jurisdiction has been reduced in many ways.

Similarly, in the post-UN international legal order the state sovereignty has also lost its absoluteness which was once rendered a strong ground to oust all the external elements to interfere within the state's internal affairs. In fact, it is the modern technological advancements and cross border flow of goods, money and even human population that are beyond the sovereign control of states. Likewise, the traditional principle of sovereign immunities upon which certain states' officials were granted immunity from criminal prosecution both before the national courts as well as foreign and international courts has lost its validity, since at different occasions the official's immunity has been declared altogether irrelevant. This progression in ICL has restricted the scope of the domestic jurisdiction where under such immunities were granted. In nutshell, in the post-UN legal order especially under the ICL universal jurisdiction has got primacy over domestic jurisdiction of states in certain matters.

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Analysis of Anti-Sexual Harassment Legislation in Pakistan Under International Human Rights Law Obligations

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Abstract

This legal research article delves into the evolution of anti-sexual harassment legislation in Pakistan by its international human rights law commitments. Recognizing sexual harassment as a pervasive issue in our society, particularly within the workplace, the study elucidates its role in fostering a hostile and offensive environment while simultaneously violating fundamental human rights and perpetuating gender discrimination. Applying a human rights-based perspective, the analysis situates sexual harassment within the broader context of victims' economic and social rights and underscores its interconnectedness with global imperatives such as international harmony, defense, and economic development. The primary objective of this research is to comprehensively examine the trajectory of anti-sexual harassment legislation in Pakistan, shedding light on its development and the factors influencing its evolution. It critically evaluates the legislation's effectiveness in addressing the multifaceted challenges posed by sexual harassment and its impact on the victims' rights, economic well-being, and social standing. Employing a qualitative methodology, the research draws on an extensive review of legislative texts, case law, and scholarly articles. The study concludes by affirming the necessity for Pakistan to uphold its international human rights law obligations in combating sexual harassment effectively. It highlights the symbiotic relationship between a robust legal framework and broader societal objectives, emphasizing the interconnectedness between human rights, economic development, and global well-being. The findings of this research contribute to the ongoing discourse surrounding the development and

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implementation of anti-sexual harassment legislation, offering valuable insights for policymakers, legal practitioners, and advocacy groups committed to fostering a fair and just society.

Key Words: Sexual Harassment, International Human Rights Law, Pakistan law, CEDAW, ICESR, ICCPR, UDHR.

1. Introduction

Sexual harassment is a usual crime in our society. Its occurrence can be found everywhere, whether it is a bus stop, market, park/recreational area, restaurant, mall, or more important office/workplace. All occupations are affected by this inappropriate and bothersome sex-related behavior and hiding phenomenon. Often the victims of harassment are women, especially working women as they are more vulnerable than men to being sexually harassed. Numerous exploratory studies conducted in all nations, including Pakistan, show that women experienced sexual harassment.[4]

A few common forms of harassment are verbal, written, and visual through which the harasser demands sexual favor and in case of refusal threats like termination, demotion, deprivation from service benefits, etc. are offered to the victim. Regardless of the occupation, workplace incidences of sexual harassment or harassment of other kinds happen wherever women work[5]. Sexual harassment is a type of discrimination that is important both structurally and practically. It violates universally established human rights since it is a kind of violence that mostly targets women.

[4] Niazi, Amarah. 2012. Expressions of Modernity In Rural Pakistan: Searching for Emic Perspectives: Oregon State University.

[5] McLaughlin, Heather, Christopher Uggen, and Amy Blackstone. "The economic and career effects of sexual harassment on working women." *Gender & Society* 31, no. 3 (2017): 333-358.

The legal literature has not given significant attention to the historical aspects of sexual harassment.[6] American radical feminist and legal scholar Catherine MacKinnon first used the term "sexual harassment" in 1974. She differentiates between the two types of *quid pro quo* and offensive job conduct[7]. Sexual harassment is described as unwanted sexual approaches, demand for sexual favors, and other verbal or bodily actions of a sexual kind" by the Equal Employment Opportunity Commission (EEOC).

It is an improper conduct, either orally or bodily, of any person who is objectionable and unwelcomed for another person according to the United Nations (UN). The Protection Against Harassment of Women at the Workplace Act 2010 ("The 2010 Act") defines it:

"Any unwanted sexual advances, requests for sexual favors, physical acts of a sexual nature, or sexually demeaning remarks that hinder work performance or foster an intimidating, hostile, or offensive work environment, or that attempt to punish the complainant for refusing to comply with such a request or that are made a condition of employment"[8].

The 2010 Act also defines the term workplace: "Place of work or the premises where an organization or employer operates, including any location linked to official work or official activity outside of the office, where the business operations of the organization or the employer are performed"[9]. Supreme Court of India in Punjab and Sind Bank & Others Vs. Durgesh Kawar, significantly held that workplace harassment is an arrangement of ferocity especially against women that

[6] Ali, Rafia Naz, Johar Wajahat, and Mohammad Jan. "Combating the Harassment of Women at Workplace: An Analysis of Legislation in Pakistan." *Journal of Social Sciences Review* 1, no. 1 (2021): 72-93.

[7] Sapiro, Virginia. "Sexual harassment: Performances of gender, sexuality, and power." *Perspectives on Politics* 16, no. 4 (2018): 1053-1066.

[8] "The Protection against Harassment of Women at the Workplace Act," 2(h) § (2010).

[9] Supra note,4, S 2(n).

affronts their basic rights, respectability, and self-esteem under Article 14, Article 15, and Article 21 of the Constitution of India[10].

The Constitution of Pakistan also guards these fundamental rights under Articles 14, 25, and 34. Women's participation in the workforce is a crucial indication of economic progress and gender equality. In practically every country in the globe, fewer women are working than men[11].

According to the census of 2017, women constitute 49% of Pakistan's population and their share in the workforce is only 24% according to International Labor Organization. One of the major reasons for such an insignificant share is workplace harassment which impedes women from joining the workforce in Pakistan.

The constitution of Pakistan under Article 18 provides the freedom to every citizen to join the lawful profession Article 25 protects all citizens from all sorts of discrimination. Sexual harassment is gender-based discrimination.[12]Therefore, the eradication of this evil is inevitable for making the workplace environment more dignified for women to play their equitable part in the development of the country. The Islamic Republic of Pakistan's Constitution now views sexual harassment as a breach of such rights[13].

According to a nationwide study carried out by the Alliance Against Sexual Harassment (AASHA) it was found that out of 17 nurses (Aged 16 to 21) interviewed 58% of them admitted having been harassed by male doctors, paramedics, attendants, patients, and visitors of the opposite sex,[14]as a result, 93% of working women in the

[10] *Civil Appeal No. 1809 of 2020*, Supreme Court of India.

[11] Thakur, Sai, and Shewli Kumar. "Sexual harassment in academic spaces: a comparative analysis of legal processes in India and Pakistan." *Jindal Global Law Review* 10 (2019): 173-196.

[12]Rabia Jawaid, "'Situation Analysis of Sexual Harassment at Workplace'," *https://Aasha.org.pk/*, 2012.

[13] Ibid.

[14]ibid

different sectors who were surveyed for (AASHA) interviews on workplace harassment reported experiencing some kind of harassment.[15]

The offense is not limited to office settings only. Another study of domestic workers by AASHA revealed that 91% of [16] landlords and contractors sexually exploit the women working under them in fields and brick factories (Bhatta). It can be easily inferred from the above statistics that workplace harassment is a common phenomenon in Pakistan.

Moreover, talking about harassment is taboo in our society therefore the actual occurrence of the offense is much higher than what is reported. Furthermore, the burden of proof lies upon the victim, patriarchal social norms and future adverse implications on the matrimonial life of the victim are also the major reasons for not complaining of sexual harassment at the workplace[17]. It persists regardless of age, education, or status. This issue has been talked about now and is becoming a legal and management concern in modern workplace settings.

International Human Rights Laws under the framework of following treaties and conventions provide broad guidelines for nations to formulate legislation for the eradication of different social evils including harassment.

- Convention on the Elimination of All Types of Discrimination against Women (CEDAW)
- Universal Declaration of Human Rights (UDHR)
- International Covenant on Economic, Social, and Cultural Rights (ICESCR)
- Declaration on the Elimination of Violence Against Women (DEVAW)

A maiden attempt at the legislative front in history, following legislation exclusively dealing with issues related to sexual harassment at the federal level was

[15]Ibid
[16]Ibid
[17]Deeba, Malieka F. "Protection of Women against Sexual Harassment-Social Barricades and Implementation of Laws in Pakistan." *Journal of International Women's Studies* 22, no. 4 (2021): 134-151.

passed by the Parliament of Pakistan in 2010. The first comprised an amendment to Section 509 of the Pakistan Penal Code that made sexual harassment a crime anywhere in the country and the second is an exclusive law "The 2010 Act" which pertains to the harassment of women in the workplace. After the eighteenth constitutional amendment, all the provinces also enacted the same at the provincial levels.

2. Sexual Harassment Under International Human Rights Law

Sexual harassment is viewed from a human rights perspective in the context of women's economic and social rights as well as, more broadly, within the greater framework of international needs, such as the preservation of global harmony and defense and economic development. Recently, this this problem gained global attention. There hasn't been a large pushback as there has been in certain national jurisdictions because sexual harassment is a novel phenomenon in international law. Compared to other aspects of women's human rights, such as various types of violence against women, generative rights, and crimes against women in armed conflict, it has received less attention at the international level.

Generalizations concerning the kinds of harassment experienced and the necessary reactions are problematic due to the range and variety of paid jobs performed by women worldwide. According to the World Conference on Females held in Beijing in 1995, women are now acknowledged as significant economic contributors who work for both paid and unpaid wages at home, in the community, and at work. This has helped to eradicate poverty. Women frequently have no choice but to take employment that lacks long-term job security or entails hazardous working conditions, engage in unprotected home-based manufacturing, or be unemployed, according to the 1995 Beijing Platform for Action.

Many women want to increase their household income by entering the workforce in underpaid and devalued positions; other women choose to relocate for

the same reason[18]. All of these circumstances encourage sexual harassment in ways that are very similar all around the world. This assertion also acknowledges that women endure a variety of working environments and situations around the world. For instance, women labor in rural vocations in huge numbers throughout the world. In addition, women make up a sizable portion of the home-based workforce, which prevents them from organizing and leaves them open to abuse from both their suppliers and sellers[19]. Although other estimates suggest that during the 1980s women migrant workers significantly outnumbered males, at least half of these employees were women[20].

They are coerced into modern kinds of slavery because of their significance to the economies of the states they have left and to their relatives[21]. These variations in the workplace need the identification of sexual harassment and discrimination in its many types, which can include unequal pay and working conditions, sexual abuse and degrading behavior, sweatshop labour, isolation, vulnerability to violence, and even death and these problems affect people everywhere and are not specific to any one culture. Their application necessitates taking gender into account within the settings of each specific society's ethnic, religious, racial, and class groups. Other problems arise when sexual harassment is included in international human rights law.

According to human rights legislation, states must accept global responsibilities for the individuals under their jurisdiction. Even where formal human rights standards exist, the importance of work done predominantly by women to both national economies and the global liberalization of trade and investment undermines commitment to those standards and leads to the suppression of any claims for their enforcement. From claiming that state economic development comes first to using

[18] Rabia, supra note, 9.

[19] Alexander, M. Jacqui, and Chandra Talpade Mohanty, eds. *Feminist genealogies, colonial legacies, democratic futures*. Routledge, 2013.

[20] 'Report of Special Rapporteur on Violence against Women, Preliminary Report, U.N. Doc. E/CN.4/1995/42, Para. 220'.

[21] ibid.

women's passivity and femininity as a national economic resource, the state can be found culpable in the denial of individual workplace rights[22].

The compliance and participation of women are additionally necessary for the operation of numerous governmental enterprises, most notably the military. To sum up, women's labor is subject to national and international policies that disregard their rights and are economically and socially undervalued throughout the world. At best, their working circumstances are typically poorly regulated or monitored, which increases their susceptibility to various and frequently severe types of harassment. The institutional design of the International Labor Organization (ILO) contains elements of international law dealing with sexual harassment, common and specialized instruments about human rights, and dedicated institutes. These have all grown independently, and there has been less institutional knowledge and experience sharing than could have been expected. The contributions of each are briefly examined in this section.

Even though discrimination, including that based on sex, has long been outlawed by human rights legislation, sexual harassment hasn't always been thought to be under the purview of the broader human rights international agreements negotiated inside the U.N. framework.[23] Particular employment rights are included as per the list of monetary and societal rights that have received a lower priority than civilian and partisan rights, at least in Western legal doctrine[24]. Although sexual harassment isn't specifically mentioned in the ICESCR, which is the main international document guaranteeing economic and social rights, it can be included because it's mentioned in the context of equality at work, the right to "fair and promising conditions of work," and the right to "safe and healthy working environment."

[22] Danjo Koyo Kikai Kintoho and Minaoshi Ni Kansuru, 'Recommendations on Reexamination on the Equal Employment Opportunity Law after Its Enact- Ment'.

[23] UDHR, art. 2, G.A. Res. 217 A (III) (1948)

[24] (ICESR), arts. 6–8

A cogent strategy for addressing wrongs that fall under both categories of rights has been hampered by the false dichotomy between categories of rights, which has been reinforced by two separate treaty monitoring bodies, the ICESCR and the Human Rights Committee (civil and political rights).

The issue of harassment extends beyond the workplace. It infringes on civil and political rights including equality, freedom of movement, and freedom of association, but it frequently takes place in the workplace, neglecting to take into account how it interferes with the enjoyment of such other rights. The statement of the indivisibility of all human rights established at the World Conference on Human Rights, which was held in Vienna in 1993, may help to change is perception.[25] However, the ICESCR's substantive and enforcement procedures are weaker in practice than those of its civil and political rights counterparts. Demands for a women-specific convention grew as it became clear that the general human rights mechanisms of the U.N. gave insufficient attention to the types of discrimination that are particularly harmful to women. The CEDAW was ratified by the UNGA in 1979. Contrary to the U.N. Covenants, the Women's Convention's Article 1 "According to the definition given by the UN, discrimination is any difference, prohibiting, or limit based on sexuality with the effect or drive of obstructing or annulling the credit, gratification, or workout by women, regardless of their matrimonial status, based on the parity of men and women, of human rights and important freedoms in the political, economic, social, cultural, civil, and political ranges.."

The aspects of sexual harassment included in this definition include the objective presence of a differentiation, exclusion, or restriction based on sex and the resultant interference with the enjoyment of rights by women[26].

[25] U.N. World Conference on Human Rights: Vienna Declaration and Programme of Action, pt. I, para. 5, U.N. Doc. A/CONF.157/24 (1993).

[26] Nielsen, Henrik Karl. "The concept of discrimination in ILO Convention No. 111." *International & Comparative Law Quarterly* 43, no. 4 (1994): 827-856.

The ILO Convention No. 111 and the 1965 (EATRD) both define discrimination in this document. The ILO Committee of Experts clarified its understanding of harassment under ILO Convention No. 111 and reiterated its belief that sexual harassment is a type of bias. The ILO's concept of harassment can be applied to the other Conventions thanks to the shared definition of discrimination.

The undesirable behavior must exhibit one of the traits listed below: it is legitimately regarded as a requirement or prerequisite for employment; it affects hiring decisions or negatively affects job performance; or it humiliates, degrades, or threatens the target[27]. The Women's Convention's (CEDAW) inclusion of monetary, civilian, and other allied rights is one of its strengths e.g., article 11 deals particularly with banning discrimination in the workplace.

Although Article 11 addresses the right to work, the right to equal employment opportunities, the right to free professional choice, promotion, job security, and training, the right to societal care, the right to health and safety at work, and measures related to maternity and childcare, it does not specifically address sexual harassment. In Helen Campbell's 1887 report on women wageworkers, she refers to the widespread belief that "household employment has become associated with the lowest degradation that comes to woman," which was prevalent by the end of the nineteenth century. Campbell also went into considerable length about the various ways that women employed in the textile and apparel industries were subjected to sexual extortion.

The right to reasonable and favorable working circumstances is included in the Convention for the EATRD, which the Women's Convention is largely based on. The ICESCR also contains this formula, but the Women's Convention does not. This backs up MacKinnon's assertion that racial discrimination receives a more severe and

[27] Ibid p.834

comprehensive response than sex discrimination.[28] Given that the Women's Convention was adopted in 1979, when the idea was still relatively new in national legal systems, the lack of any specific reference to sexual harassment is hardly surprising. Instead of being a charter of women's rights, the Women's Convention's main principle is equality between men and women in the aforementioned areas.

The Women's Convention is not a charter of women's rights, but rather its central principle is equality between men and women in the aforementioned areas. Therefore, widespread failure to see sexual harassment as an equality issue at the time prevented its inclusion in the Convention. The regional human rights mechanisms have frequently promoted human rights law, but in this situation, the same prejudice is present. The European Social Charter's rights, such as workplace rights, are not covered by the court system that upholds the civilian and other allied rights provided by the European Convention on Human Rights (ECHR)[29].

The American Convention on Human Rights (ACHR) contains a single clause requiring states to gradually meet certain economic, social, educational, scientific, and cultural standards[30]. The Added Protocol (ACHR) in the Area of monetary societal and allied Rights contains specific workplace rights and is subject to the Inter-American Commission and Court of Human Rights jurisdiction by individual petition[31]. It defends the right to healthy and safe working conditions and workplaces that respect employees' dignity (article 29). The charter's format, however, has not yet been decided and will only apply to the member states of the European Union.

This concise evaluation of sexual harassment law under human rights law depicts a hybrid picture. It is possible to construe the equality clauses of the U.N. human rights treaties to include sexual harassment. It is possible to construe the

[28] Lin Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* (Warner Books, 1980), 39.

[29] *European Social Charter*, Part I, October 18, 1961.

[30] *American Convention on Human Rights, art. 26, November 22, 1969*

[31] *Protocol of San Salvador*, Nov. 17, 1988

equality clauses of the U.N. human rights treaties to include sexual harassment. However, there are few indications that the relevant supervisory authorities agree with this reading due to a lack of attention to the likelihood of such an interpretation.

Additionally, enforcement measures are limited, except for the European Community and regional human rights institutions. Due to its dedication to workplace equality, the European Community has the most significant legal protections against sexual harassment; yet these protections are sui generis and do not constitute universal international law. Another indication of a lack of awareness at the international level is the U.N.'s poor progress in considering claims of sexual harassment seriously[32].

The challenge has been to integrate evolving national conceptions of sexual harassment and discrimination into global equality norms, which can then be used to exert pressure on national legal systems that have not yet made similar changes. Furthermore, accusations of discrimination must be made about the rights protected by the applicable convention, making the nondiscrimination articles contained in regional treaties insufficient on their own. Although discrimination is generally prohibited by Article 26 of the (ICCPR), its applicability to employment rights has been hindered by the Human Rights Committee's emphasis on civil and political rights. However, it does emphasize the need for equality in the workplace in General Comment 28, which was adopted on March 29, 2000. This Convention allows sexual harassment to be brought more readily under its terms than those of the American or ECHR, but once again, the monitoring procedures are inadequate. It also forbids sex-based discrimination.

In Europe, the European Community has been more successful in tackling equality issues than the Council of Europe's human rights procedures. Several

[32] Charlesworth, Hilary, and Christine Chinkin. *The boundaries of international law: A feminist analysis, with a new introduction*. Manchester University Press, 2022.

pertinent soft law measures have addressed sexual harassment[33].A deeper explanation of actions that violate this dignity can be found in the European Commission's Code of Practice on the dignity of men and women in the workplace. These actions include unwelcome physical sex, sexually explicit verbal or nonverbal communication, sexually explicit nonverbal communication, and sex-based behaviour such as comments about looks.

Regardless of the reason for the behaviour, it qualifies as harassment "after it has been made evident that it is seen by the recipient as objectionable[34]." Recommendations and Codes of Practice are a part of the Community's "soft law," which refers to non-binding rules that rely on self-regulation and outside pressure to be followed. The application of the equal treatment mandate to workplace sexual harassment has given rise to a substantial body of legal guidance that is outside the purview of this study.

While the relationship between the equal treatment directive and the soft law against sexual harassment creates a legally enforceable framework, barriers still stand in the way of a comprehensive ban on hostile working environments and all types of sexually degrading behavior in the workplace[35]. Unlike the ECHR, the Draft Charter of Fundamental Rights of the European Union, which was approved on July 28, 2000, has separate articles on equality before the law (article 20), equality and non-discrimination (article 21), and equality opportunities between men and women regarding employment and work (article 22). Additionally, it defends the right to healthy and safe working conditions and workplaces that respect employees' dignity (article 29). The charter's format, however, has not yet been decided and will only apply to the member states of the European Union.

[33] European Commission Recommendation on the Protection and Dignity of Men and Women at Work, Nov. 27, 1991

[34] Ibid

[35] Ibid

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Due to its dedication to workplace equality, the European Community has the most significant legal protections against sexual harassment; yet these protections are sui generis and do not constitute universal international law. Another indication of a lack of awareness at the international level is the U.N.'s own poor progress in considering claims of sexual harassment seriously[36]. The challenge has been to integrate evolving national conceptions of sexual harassment and discrimination into global equality norms, which can then be used to exert pressure on national legal systems that have not yet made similar changes. However, it is difficult to formally amend human rights accords, hence other methods of enacting change have been considered.

The CEDAW is the most obvious means of enacting change. The CEDAW was unable to develop jurisprudence clarifying and advancing the articles of the Convention, especially those pertaining to sexual harassment, in the past because there was no individual complaints process.[37] This has altered now that the Optional Protocol to the Women's Convention has established an individual complaints procedure and an investigation process. Three months after the tenth country accepted the Optional Protocol, on December 22, 2000, it became operative.

[36] Charlesworth, Hilary, Christine Chinkin, and Shelley Wright. "Feminist approaches to international law." *American Journal of International Law* 85, no. 4 (1991): 613-645.

[37] Byrnes, Andrew, and Jane Connors. "Enforcing the human rights of women: A complaints procedure for the women's convention." *Brook. J. Int'l L.* 21 (1995): 679.

The equality provisions of the Convention have nonetheless served as the foundation for subsequent developments that have been crafted using two interrelated strategies: direct recognition of sexual harassment through the concept of discrimination. These advancements have mostly been caused by two forces. First, nongovernmental organizations (NGOs) represent.

Women around the world have successfully advocated for and rallied support for the recognition of women's rights as human rights. Second, CEDAW has worked on future-focused interpretations of certain Convention sections, which it has released as broad suggestions. These have grown in quantity and complexity, partially making up for the absence of an international body of law governing women's human rights. General Recommendation No. 19 on Violence Against Women was adopted by CEDAW in 1992. This suggestion is exactly based on the Women's Convention's wording, which strengthens its power and validity.

States are required by CEDAW to include information about the steps they have taken to protect women from harassment, violence, and coercion in the workplace in both their initial and periodic reports to the Committee. States can also anticipate being questioned about their progress, though it seems that this hasn't happened very often. Test case uses of these provisions are possible now that the Optional Protocol to the Women's Convention has entered into force. In addition to CEDAW's work, women's NGOs organized around the demand that violence against women be acknowledged as a universally invalidating of all human rights and as a direct violation of women's human rights as a unifying theme of the campaign for the broader affirmation of women's rights as human rights. This campaign was carried out in the 1990s through a number of fora, such as the U.N. human rights bodies, the General Assembly, and the international summit meetings that took place during the decade, particularly the World Conference on Human Rights in Vienna in 1993 and the Fourth World Conference on Women in Beijing in 1995.

3. International Human Rights Law Under Anti Sexual Harassment Legislation in Pakistan

Pakistan has ratified the ICESCR, it is under obligation to ensure that its domestic laws are in line with the terms of the aforementioned agreements. According to Article 7 of the treaty, women have the right to reasonable working conditions and are prohibited from being sexually harassed at work. The responsibility of the courts is greatly increased in this situation. Pakistan is a signatory to the UN Declaration on Violence Against Women, and Article 2 goes into great detail about sexual harassment and coercion in the workplace. In addition, Pakistan is a signatory to the International Labor Organization Conventions 100 and 111, which deal with equal pay for equal work and employment discrimination.

Almost all international treaties dealing with women's rights indirectly address the issue of harassment under the realm of the right to work for women. The right to work is multifaceted under the legal framework of International Human Rights and cannot be considered a single right, but rather a collection of rights. It includes all the rights associated, including the protection of human dignity which is violated due to sexual harassment as the process of getting justice is very cumbersome and the victim is required to undergo the procedural requirement set under the local and above-mentioned convention. This drawn-out process of obtaining justice has crushing impacts on the victims, including tremendous personal pain, reputational harm, loss of dignity, and low self-esteem. As a result, it undermines the victim's self-esteem, respect, and social acceptance.

The Planning Commission of Pakistan’s report published in 2019 says that under the international human obligation framework: "The right to labour has many different ramifications and binds Pakistan to a range of commitments. It is recognized as a fundamental right and a guiding rule in the Constitution. As a result, the State has a duty to guarantee the availability of resources and workplace amenities, as well as to grant citizens the freedom to select their professions."

UDHR is a significant piece of writing in the history of the modern world that was created by legal and regional specialists and endorsed by the UN General Assembly on December 10, 1948, in Paris. This instrument provides guidelines regarding the enforcement of different human rights to the signatory states. UDHR was ratified by Pakistan in 1948 along with 48 other Muslim countries, including Egypt and Iran. UDHR discusses harassment under Article 23 which talks about the right to work): [38]

- Every individual has to work right
- Fair beneficial circumstances
- Equal Remuneration for Equal Job

As per the definition, harassment creates a hostile and offensive environment in which it becomes difficult for the victim to perform up to the mark. It causes physical and mental trauma for the victim. By virtue of the signatory of UDHR, it is the responsibility of the states to protect the right to work and provide dignified just, and favorable working conditions for women so that they can contribute optimally.

The CEDAW was adopted by the UN General Assembly in 1979 comprising 30 articles and a preamble. This legally non-binding document provides a protection mechanism for discrimination against women. Pakistan by virtue of rectifying this treaty on April 12, 1996, is bound by its provisions. The harassment definition of CEDAW also signifies gender-based discrimination.[39]

Due to the violence against women, sexual harassment is considered to be a type of gender-based discrimination and is therefore illegal under international human rights legislation. Article 11 of CEDAW provides equal rights of employment to women and provides them the liberty to join the profession of their own choice. Women are equally entitled to all the employment rights and privileges men enjoy.

[38]Supra note, 20, art 23
[39](CEDAW), art. 1

However, sexual harassment in the workplace impairs the concept of equality in employment when women are facing gender-based violence.

It can be implied from the above discussion that sexual harassment infringes the right to work and subsequently all the underlying rights including the right of the dignity of the victim. As a party to CEDAW, it is the responsibility of Pakistan to take remedial measures to eliminate discrimination based on gender[40]. It was highlighted during periodic review by the CEDAW Committee that practically in the legislative sphere, the reflection of CEDAW is lacking[41].The local legal framework of the country is inadequate to prosecute the harassers, instead, it reinforces the woman's experience of humiliation, embarrassment, and public exposure by isolating her further[42].

However, Pakistan reaffirmed its obligation to conform to its domestic legislation accordingly[43] On December 16, 1966, ICESCR was adopted by the UN GA, and entry into force by January 03, 1976, and Pakistan ratified the ICESCR in 2008. As a signatory Pakistan is under obligation to safeguard and protect the right to work of its citizens.[44] the state to provide a fair and promising working environment including a safe and healthy working environment [45].

These obligations cannot be fulfilled without eliminating gender discrimination and sexual harassment against women.

DEVAW was adopted by the UN General Assembly on December 20, 1993. The purpose of this declaration is to strengthen and complement the process of elimination of violence against women which originated from CEDAW46.

[40] Ibid

[41] Women's International League for Peace and Freedom. "Pakistan's CEDAW Session: A Step Further in the Integrated Human Rights Approach for Women." 2020. Accessed July 2, 2022

[42]Ibid

[43]Ibid

[44](ICESCR), art. 6.

[45]Su41 art 07.

[46]DEVA

Intimidation and sexual harassment at the workplace also come under the scope and definition of violence against women[47]. The essence and spirit of these conventions remain compromised as the above conventions and treaties are not legally binding on the states and the governments are more interested in politically motivated agendas rather than the protection of human rights. In this regard situation in Pakistan is not very different. The showcased attempts of dealing with the matter related to human rights often lead to miscarriage of justice.

4. Anti-Sexual Harassment Legislation in Pakistan

Pakistan had to deal with constitutional issues up until 1956 because it was a newborn state plagued with so many enormous challenges. However, Pakistan had given women enough constitutional protections in its constitution of 1956[48]. The most notable aspect of the said constitution was its provisions against sex-based employment discrimination and its prohibition of discrimination in access to public areas[49]. In Pakistan, the state was given the authority to pass special laws to advance women's status.[50]Within a span of less than ten years, the constitution was superseded by the new Constitution of 1962 since it could no longer advance. Basic rights were initially not mentioned in the aforementioned constitution; nevertheless, as a result of the first constitutional amendment, citizens were granted fundamental rights. The 1962 constitution, like its forerunner, guaranteed women's fundamental rights, including freedom from sex discrimination in public spaces[51]. On a similar note, sex-based discrimination in services was also prohibited[52].

[47] DEVA, art 2(b)
[48] *The Constitution of Pakistan* (1956).
[49] Supra note, *44, art 17*
[50] Supra note, *4, art 14(2*)
[51] The Constitution of Pakistan *(1962), art. 16.*
[52] Supra note, *47, art. 17.*

The Constitution of 1973, which superseded the aforementioned one and, in contrast to its forerunners, featured extensive measures dealing with women's welfare.

Pakistan Women's Rights Committee, 1976, was established comprising 14 members and the attorney general serving as its chairman almost three decades after the country's independence. The committee was tasked with reviewing all of Pakistan's current legislation governing women and offering suggestions for their advancement. Even though the committee produced multiple reports, the change in government prevented the implementation of those reports.

A Commission on the Status of Women was established in 1985 in a similar manner to the previous attempt. The third attempt to improve the status of women in Pakistan was the Commission of Inquiry for Women in 1994. The panel was tasked with reviewing all current laws to take the required action to improve the status of women in Pakistan. The commission comprising ten members under the chairmanship of Mr. Justice Nasir Aslam Zahid delivered its report in 1997 and suggested that several discriminatory laws be repealed. Additionally, it highlighted the need to create a powerful framework for observing how those laws are being implemented while recommending changes to legislation.

The committee placed a strong emphasis on the creation of mechanisms to handle instances of gender discrimination promptly. So, taking a closer look at the situation reveals that Pakistan's laws pertaining to women's issues have undergone regular updates, and in this regard, commissions and committees have been making their proposals for updating those laws.

The (AASHA) was founded in 2001 by organizations focused on women's concerns under the capable leadership of Dr. F. Saeed, a well-known women's rights activist.[53]. She had been involved in a sexual harassment case in which she along with

[53] "AASHA." 2019. Accessed August 2022. https://www.aasha.org.pk.

10 other women filed a complaint against a senior staff member in an international development organization and they pressured the government to participate in this procedure. AASHA played a vital role in policy formulation for countering sexual harassment[54].

In order to address the issue of sexual harassment, AASHA and the Government of Pakistan began establishing a policy framework and collaborating closely with the ILO and senior government officials in 2002, and the same was named as Code of Conduct for gender justice AASHA later implemented the policy in the private sector[55].

The Pakistani government passed legislation outlawing harassment of women in the workplace because it values women's rights. In 2010, Pakistan became the first nation in South Asia to enact a law against sexual harassment in the workplace. For the first time in history, legislation exclusively dealing with issues related to sexual harassment at the federal level was passed by the Parliament of Pakistan in 2010.[56] Moreover to counter sexual harassment at places other than work an amendment in Section 509 of the Pakistan Penal Code was made which contains provisions for the modesty of women but not discussing the harassment. In accordance with revisions made, entries have been made to the Schedule related to Section 509 of the Pakistan Penal Code, 1980 (Criminal Code, Amendment of Schedule II, Act V of 1898). After the eighteenth constitutional amendment, all the provinces also enacted the same at provincial levels as per the following details.

Province	**Enactment Adopt in**
Punjab	2012

[54] Ibid.
[55] Ibid.
[56] Maleeha Hussain and Fouzia Saeed, "A Baseline Study on Anti-Sexual Harassment Policies in the Public and Private Sector before March 2010" (Mehergarh: A Centre for Learning, Islamabad, Pakistan, 2010).

Baluchistan	2016
KPK	2017
Sindh	2018

The 2010 Act was passed to legally protect women's right to work and make the workplace gender inclusive. Many terms defined in the 2010 Act including harassment are almost identical to the definitions provided by the CEDAW. The 2010 Act also complies with the CEDAW requirements regarding the provision of separate legislation to women. A formal mechanism is laid down in the 2010 Act for addressing the issue, specifically in the organizations. This also makes the management responsible for establishing internal mechanisms within the organization[57].

A standing inquiry committee comprising at least three members including a woman is required to be constituted under the 2010 Act[58]. Within three days of the receipt of the complaint, the Inquiry Committee shall communicate the charges and statement of allegation to the accused and demand a reply within seven days of communication of the charge in the type of written defence. The committee has the right to examine the written or oral evidence provided in charge or defence of the case and also provide the opportunity for cross-examination between the parties. The committee is required to furnish its report within thirty days of initiation of inquiry to competent authority along with findings and recommendations, and the imposition of penalty (if any)[59]. The committee also has the powers to issue summons, enforce recording evidence, and demand records[60]. Any party aggrieved by their decision can

[57] Supra note, *05.*
[58] Ibid.
[59]Ibid.
[60]Ibid.

file an appeal before the ombudsman appointed under Section 7 of The 2010 Act. The 2010 Act is extended to the whole of Pakistan[61].

5. Conclusion

It is quite evident from the available literature that this problem has now been recognized as a legal and management concern at national and international levels. The most prevalent type of gender-based violence experienced by working women in Pakistan nowadays is sexual harassment at work. Sexual harassment is the grim reality of life and one of the reasons for the disproportionate share of women in the workforce.

Pakistan's dedication to guaranteeing the enjoyment of these rights for its population is demonstrated by the ratification of seven important international human rights accords. These legally binding treaties do, however, impose a significant obligation on the State to guarantee that the rights inherent in them are not infringed and that, in the event that they are, adequate methods for their redress are available. Despite the many difficulties the nation faces, there are still a number of significant indications that point to a successful trajectory for the State's efforts to uphold and advance human rights. On the legislative front, the last ten years have seen the adoption of several laws that have significantly improved the rights protections for specific groups, such as minorities, women, and children.

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[61]Ibid.

The Role of Election and Election Commission of Pakistan in the Development of Democracy in Pakistan

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Abstract

Democracy is the best government system in the world. In this system, the peoples are independent to choose their own representatives and therefore it is called representative government as opposed to the dictatorship wherein no one is allowed to elect their governments – the voice of the people is suppressed. UK democracy is the oldest in the modern world and democracy is also developed in the US and European Union, where peoples' voice is heard and given weightage. Whereas in the third world either democracy is not flourish at par with the developed world, or it is time and again derailed by the military dictators particularly in Pakistan. Since, in democracy, the representatives are elected by the peoples through elections; therefore, the fair, impartial and transparent election is the most important aspect in developing the democracy. Imagine, the election is the main gate of democracy and if it is not done fairly, impartially, and transparently, how real representatives will be sent out to Parliament. The Part VIII having two Chapters and spanning Articles from 213 to 226 of the Constitution 1973 entrusts the task to Election Commission of Pakistan to conduct fair, impartial, and transparent elections in the country – a noble and gigantic responsibility has been entrusted to the ECP. Apart from Constitutional and Election Act 2017 provisions; the superior courts in Pakistan have pronounced a plethora of cases wherein the ECP is declared duty-bound to conduct elections fairly, impartially, and transparently and made responsible for all the ancillary issues. Unfortunately, the ECP has failed in discharging its duty to conduct fair, impartial, and transparent elections in the country. Therefore, it is necessary that ECP asserts and fulfill its constitutional and legal duty to conduct fair, impartial, and transparent

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election in the country enabling the peoples Pakistan to elect their representatives as per their wishes in the true sense of democracy.

Keywords: Constitution, election, representative government, fair, transparent, and impartial, responsibility, development of democracy, Sovereignty of Parliament, and democracy.

1. Introduction

The election is the process by which people choose their representatives for a public office and Law-making in a democratic dispensation. Representative democracy is the most suitable form of government in modern day life. The election,[5] is important because people, through their choice, choose or elect their leader for a specific period for the purpose of making law and governing. By virtue of election, peoples are free to choose and if they are not satisfied by their chosen political leadership, they can change their leadership,[6] as per the prescribed procedure.[7] The election and democracy are inseparable, and elections play a significant role in shaping democracy and the right to vote is backbone of democracy.[8] The right to vote is a fundamental right and responsibility of the people who can freely choose their representatives and if elections are not held freely in any country, then democracy cannot flourish, and it will not be a genuine democracy. The Election Commission of Pakistan (ECP) has been entrusted this gigantic task to conduct fair, honest, impartial, and transparent election in Pakistan by the Constitution itself.[9]

[5] The word "election" is narrowly defined in Section 2 (ix) 'mean election to a seat of a member held under this Act (ROPA), 1976.

[6] Report on General Election 2013, Volume-I, Justice (Retd) Sardar Muhammad Raza Khan, the then Chairman Election of Pakistan, https://www.ecp.gov.pk/Documents/General%20Elections%202013%20report/Election%20Report%202013%20Volume-I.pdf

[7] Polyas Election Glossary. Available at https://www.polyas.com/election-glossary/elections

[8] Report on the General Election, 2013. Published by Election Commission of Pakistan; Available at ECP website file:///D:/D%20Drive-M%20Imran-4%20Oct%2022/Muhammad%20Imran/Publication%20of%20Maryam%20Qasim/Role%20of%20Election/Election%20Report%202013%20Volume-I.pdf

[9] Ibid.

The answer of the question, *as to who is eligible to cast vote*? is given through the Constitution; a person who is a citizen of Pakistan can vote if he is not less than 21 years of age and if his name is registered in the voter list in the consequences where he resides and also he is not declared unsound minded by a court of competent jurisdiction.[10] Further, by Section 29 of Representatives of Peoples Act (ROPA), 1976 and subsection 5 of section 7 of Election Act 1974, a person who is detained in prison or in any other custody can cast his vote through Postal Ballot. The reason behind ensuring the casting vote of a prisoner is further emphasizing the importance of casting vote is as under:

> At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil marking a little cross on a little bit of paper – no amount of rhetoric or voluminous discusses can possibly diminish the overwhelming importance of the point.[11]

The election is defined narrowly in Representatives of Peoples Act, 1976 (ROPA), as election means "election to a seat of number held under this Act.[12] To conduct free, fair, honest, impartial and transparent election is the constitutional obligation of the Election Commission of Pakistan (ECP) and before the 22nd Amendment 2016, the Chief Election Commissioner was to be appointed from the Superior Judiciary but now a 22-Grade retired civil servant,[13] or a technocrat can also be appointed.

[10] Section 26 (2) of Election Act 2017.
[11] Sir Winston Churchill made speech in Cabinet Speech on October 31, 194.
[12] Section 2(ix) ROPA, 1975.
[13] The current Chairman, Election Commission of Pakistan Mr. Sikander Sultan Raja, is a retired civil servant of Pakistan of grade-22. https://www.ecp.gov.pk/frmGenericPage.aspx?PageID=22

The elections in Pakistan have always been marred by rigging allegations except 1971 election.[14] The Election Commission of Pakistan has been entrusted the tasks to conduct fair, free, honest, impartial, and transparent election and to materialize this, all other ancillary measures are to be taken by the ECP viz; delimitation of constituencies, updating voter lists, arrange to hear election petitions. In a democratic step, the ECP has the most crucial task to conduct elections as per the law and Constitution, where peoples have freedom to elect their leaders without any influence and duress, fear, or favor. The election is the gate way of democracy thus fair election has become more important in the growth of the democracy and democratic institutions.[15] The ECP, to cope up with the difficult task, has devised multi-year strategic plan, to start deliberation by all the stakeholders and participatory rounds, the First Strategic Plan was started in 2010-2014 and after completion of this plan the second was initiated in 2014-2018 and consequently the Election Act 2017 was enacted. This Act brought reform in electoral practice and through this enactment, women's 10% voting was assured and ECP was empowered, voting if less than 10% women voting was experienced. By virtue of this Act 2017, the ECP was financially empowered to Registration of votes, for women, minorities and of transgender. These steps are to ensure the election process transparent and fairly held to the growth of democracy.[16] The relevant portion of Faqir Hussain article is as under:

> The founding fathers who formulated the Objectives Resolution which was adopted as a preamble to every successive constitution and later on added to the substantive part of the present (1973) Constitution conceived Pakistan to be a democratic polity, governed through the "chosen representatives of the people". The

[14] Abbas, M. [2020 January 26]: 'How elections are Rigged'. *The News* on Sunday. https://www.thenews.com.pk/tns/detail/603482-how-elections-are-rigged.

[15] 3rd Strategic Plan 2019-2023, Election Commission of Pakistan. Available at www.ecp.gov.pk

[16] Ibid.

> Resolution provides that the State shall use its authority as a "sacred trust" on behalf of and for the welfare of the people. This phraseology indeed furnishes the "normative moorings" of our Constitution, namely that the system of governance must be democratic and representative one, based on the consent of the peoples."[17]

The ECP has chalked out a comprehensive program through the 3rd Strategic Plan of 2019-2023. The ECP has expressed that for fair election it should be remained independent and impartial. The ECP accountability and integrity are important and are the factors to get trust of the most important stakeholder i.e., peoples of Pakistan and their trust on ECP is important for election. The ECP ensured that money, time, and human resources of ECP be efficiently utilized for the benefit of voters and democracy. The ECP is under constitutional command to conduct transparently, freely, fairly, and impartially thus 3rd Strategic Plan of 2019-2023, it was obligated on ECP to conduct election of every tier, whether National, Provincial, Senate and Local government. The ECP, has also ensured to give appropriate role of Women in ECP Staff and all the ECP staff is imparted training for overseeing the election related issues.[18]

Pakistan is a member of Commonwealth, and it requires its members to observes true democratic values and norms. To its democratic commitment, whenever military take over Pakistani government, the Commonwealth suspends the membership of Paksitan and revived once democratic and constitutional rule is restored. In 1993 election in Pakistan, on the invitation of the then Caretaker government of Moeen Qureshi, Commonwealth sent its delegation under leadership of Sir Anthony Siaguru Deputy Secretary General (Political).[19] By Terms of References (ToRs), the Group is only to observe independently and assess whether

[17] Ibid at footnote No.39.
[18] Ibid.
[19] The National Assembly Election in Pakistan, 6th October 1993. The Report of Commonwealth Observer Group. Commonwealth Secretariat.

election are held in accordance with the legal framework of Pakistan and in free and fair manners. The Observer Group required to submit its report/findings to Government of Pakistan through Commonwealth. The Observer Group did not mean to supervise the election but only to observe its overall authenticity, impartiality, and fairness and freedom of peoples to choose their representatives without any external pressure.[20] The Observe Group after narrating the political skirmishes in the country and successive use of the then Article 58(2)(b) which had in the past, dismantled the democratic governments. The Observe Group concluded its report that the election was transparent, honest, and free and all the main political parties expressed their satisfaction with the arrangements of ECP. The electoral rolls were updated and on polling day except showing is ID cards created minor problem but was ignorable. The role of Armed Forces was exemplary. The Armed Forces presence inside and outside the polling stations ensured peaceful electioneering of polling day and Observer Group foreseen/wished that one day ECP would be able to conduct election without the Armed Forces, efficiently and robustly. Similar deplorable questions were posed in editorial of DAWN of 24th March 2023 but this time on postponing the election by the ECP.[21] All the political parties in the country participated in the election of 1993 except MQM, they did not accede to the counselling of all other parties and Observer Group as well failed to convince them.[22]

2. Historical Background of Elections in Pakistan

Elections in Pakistan have been marred by allegations of *rigging of prepoll, on-poll day and post polling*. The first election in 1951 under the Prime Minister Khan Liaquat Ali Khan, was allegedly rigged by Mumtaz Daultana and the election of East Bengal were considered free and fair, wherein ruling party was lost the election and the election scheduled for 1959, were never held because under the

[20] Ibid.

[21] DAWN, Editorial "Delayed Polls" 24th March 2023 and Controversial Postponement, by Malik Muhammad Ashraf, The News 27th March 2023 at https://www.thenews.com.pk/print/1054329-a-controversial-postponement

[22] Ibid.

Martial Law of 1958. Two, general elections and one Presidential election between General Ayub and Mohtarma Fatima Jinnah, were held by General Ayub, in 1962 and 1965 respectively through *electoral colleges* of Basic Democrats comprising about 600 and 300 for National Assembly and Provincial Assembly respective and these were rigged with full might of dictator Ayub and he defeated Mohtarma Fatima Jinnah, through these rigged polls – a systemic rigging process was started in these election which is still haunting this nation.[23]

The general elections 1970 universally recognized fair and impartial and Bhutto came to power but unfortunately the next elections were held under Bhutto regime were widely alleged rigged, resultantly Pakistan National Alliances (PNA) launched anti-Bhutto movement that culminated in the form of Zia Martial Law. Under Zia military regime, in 1985, non-party basis elections were held, and they were also widely dubbed as rigged and malpractices were registered.[24] The elections from 1990 to 2018 after Gen Zia were also rigged and even in one of the elections, the Supreme Court of Pakistan has decided a case of Air Marshal Asghar Khan wherein allegation of involvement by Intelligence Agencies and of establishment was proved.[25] The elections of 2013 and 2018 are recent examples of rigging and SC constituted a judicial commission on the election of 2013 which gave a mixed findings.[26]

Rigging elections in Pakistan is a common phenomenon and it takes place before election, on the polling day, and after completing polling process. As the election is said to be the process of free choice by the people to choose their representatives; conversely the rigging keeps away the true representatives by employing different illegal methods to deprive the peoples to choose their genuine

[23] Ibid at Page 781. Hamid Khan's book.

[24] How an Elections was are Stolen: The PDA White Paper on the Pakistan Election 1990, Midasia 1991. Issued by Pakistan Democratic Alliance.

[25] Muhammad Asghar Khan v Mirza Aslam Baig – PLD 2013 SC 1.

[26] SC form Judicial Commission to probe alleged rigging in 2013 polls. Tribune April 20, 2013. https://tribune.com.pk/story/866444/judicial-commission-formed-to-probe-alleged-rigging-in-2013-polls

representatives. Every election in Pakistan has been tainted with grossly abusing the process. In the 1990 election IJI was brought to power with support of the establishment and elections were stolen at massive level. The Pakistan Democratic Alliance (PDA) has levelled allegations countrywide and issued White Paper with proof attached as Appendix with White Papers.[27]

In Pakistan, administrative machinery of every nature and cadre was used against PDA. One of these machineries was the highest office of Pakistan i.e. Head of the State – the President. PDA pointed out almost nine situations/actions of the President to rigging are includes as, dissolution of Assemblies. In 2018, SC disqualified Muhammad Nawaz Sharif by invoking article 184 (3) and PMLN leaders equated this action as rigging the polls of 2018, appointment of partial caretaker governments, anti-PDA speeches on TV and Press, establishment of Election Cell to monitor and manipulate the election and the controversial Cell was headed by General (Retd) Rafaqat, who managed Referendum of Gen Zia, Appointment of acting Judges to the Courts, controversial appointments of Election Commission like Chaudhry Shaukat Ali and Humayun Khan as Secretary and Additional Secretary respectively of ECP, during partial and one sided accountability against PDA members, particularly Benazir Bhutto, the role of President and powerful intelligence agencies in keeping IJI alliance intact and lastly President's office used for arm-twisting of PPP candidates with the threat of accountability. All these tactics were used to rig the election in Pakistan and these tactics are still in the vogue in one or other form.[28]

Hamid Khan, Senior Advocate Supreme Court, has enlisted some of reasons to rig the polls in the country as; use of government administrative machinery, The government supported candidates are provided every kind of support, provided the transportation, and police show the leniency and Deputy Commissioners provide

[27] Ibid footnote No.18.

[28] Ibid. Naveed Malik advisor to Prime Minister Nawaz Sharif. The News August 14, 1991, Page 12.

them every kind of support. These are provided before and on polling day rigging. Presiding officers are appointed from the bureaucracy, though RO and DROs are appointed from district judiciary. The presiding officers are directly ordered by DCs and thus they do change the result sheets. The officers are to get pat and benefits from the government, so they cannot deny their illegal orders and thus they deny the voters their true and genuine representation.[29] Before establishment of permanent election commission, the government had upper hand of appointing election members, at the time of election and these members are always ready to tow the governments. Now a permanent election commission has been established and tenure of CEC/Members are protected under the Constitution under Article 225, in the manner of superior courts judges, now CEC/members cannot be removed without invoking Article 209 i.e., through Supreme Judicial Council. Still, they are not discharged from their duties as per the law and Constitution. State print and electronic media and private media are hired for running the campaign and thus there is truly little chance for honest and poor candidates to compete with billionaires' candidates and government/establishment supported candidates have leverage over opponent partis candidates.[30]

3. Legal Framework on Election Commission of Pakistan (ECP) – Article 213

The election is important enough that the ECP has been sanctioned the responsibility in the Constitution of Pakistan 1973. There is a separate Part-VIII consisting of two Chapters where all the matters relating to the elections are to be dealt with in accordance with the law and Constitution. That means the ECP cannot take any action which is not mandated by law and any provisions of the Constitution. In this part, all the matters related, are enlisted.

[29] Khan, H. [2022]. '*Constitutional and political history of Pakistan'.* 2nd Edition, Oxford University Press, Karachi – Lahore, page 782-3.

[30] Ibid at footnote No.23. And Muhammad Asghar Khan v Mirza Aslam Baig supra.

The Article 213 provides that there shall be an Election Commissioner, who shall be appointed by the President on the recommendation of Prime Minister and Opposition Leader. The original Constitution of Paksitan 1973 provided the President in consultation with Prime Minister but through 8th Amendment, which was brought by General Zia, President assumed the power to appoint in his discretion. The 13th Amendment removed the power to appoint the Chairman, Chief of Staff Committee but the power to appoint Chief Election Commissioner was left to remain. Then by 18th Amendment of 2010,[31] this power of President was linked to the recommendations of Prime Minister and Opposition Leader in the National Assembly. The Speaker must constitute twelve members of the Parliamentary Committee, comprising 50% from the Treasury and Opposition each. The Prime Minister and Opposition Leader are required to send 3 names, to be chosen by the Parliamentary Committee. The 9 members shall be taken from the Senate and in case of dissolution of assembly, then all the members shall be taken from Senate. The Commissioner shall have to power and functions which are commanded by the law and Constitution.[32] To differentiate the presidential discretionary powers. The Supreme Court answered the Presidential Reference in PLD 2013 SC 279. The SC sifted the discretionary power. In case of Commissioner, ECP, It is no more discretionary powers of President to appoint or return for reconsideration, but he has only one option to appoint as recommended and finalized by the Parliamentary Committee. The SC equated this Parliamentary Committee with the Parliamentary Committee set for appointing the Judges of Superior Courts, whose recommendations are binding on President, meaning Presidential discretionary powers are ousted and he does not have any choice other than to appoint the Commissioner and members of Election Commission, considering the recommendation of PC.[33]

[31] This Amendment was passed by all major political parties with an exhaustive deliberation – all parties consensus Amendment which amended more than one hundred Articles of the Constitution, including scrapping the infamous 17th Amendment made by General Pervaiz Musharraf.

[32] Rizvi, S.S.R, [2022]: *'The Readings: The Constitution of Pakistan 1973'.* Volume 4. Published by Manzoor Law Book, 2nd Edition.

[33] Presidential Reference No.01 of 2012 - PLD 2013 SC 279, Para 31.

4. Oath, Terms & Conditions, Protection of CEC/Members and their Removal – Article 214 to 215

Articles 214 and 215 discuss the oath and terms of CEC and members of ECP, respectively. By Article 214, the CEC shall take the oath of his office before the Chief Justice of Pakistan, as mentioned in the Third Schedule and all other members of ECP shall take oath before CEC. Under article 215, the terms of CEC and all members have been fixed for five years and the Constitutional protection has been given at par with the judges of superior courts. The CEC or any member cannot be removed from his office except in the manners provided in Article 209, meaning he can only be removed from office, by the Supreme Judicial Council (SJC)'s findings. The CEC or any members of Commission can resign by writing under his hand and in case of any vacancy is occurred then the most senior in age shall be appointed as Acting CEC and that vacancy shall be filled within forty-five days.[34]

5. CEC/Members EC Not to hold Office of Profit and Acting CEC Controversy – Articles 216 to 217

The Article 216 requires that CEC member of ECP cannot hold any office of profit and in any office in service of Pakistan which enable them to draw remuneration. According to subclause 2 of Article 216, even he cannot work after completing two years of retirement from ECP. Therefore, they cannot only hold office of profit during the tenure of their ECP but also, they are barred to hold office before completing two years. Article 217 provides for the appointment of Acting CEC; in case of vacancy of CEC, the most senior in age amongst the members shall be appointed as Acting CEC. This provision was amended by the Twentieth-Second Amendment of 2016. Before this amendment in this Article, the President was competent to appoint any Sitting Judge of the Supreme Court of Pakistan as Acting

[34] 20th Amendment of the Constitution.

CEC. Mr. Justice Mushtaq Hussain was given additional charge of Acting CEC and this appointment was challenged in ZAB v The State case.[35] The SC after discussing precedents and Articles 207 and 216 reached the conclusion that there is difference between a permanent appointment and acting (temporary) appointment and it was held that a sitting Judge after completing tenure as Acting CEC, can resume his judicial work and sub-clause 2 of article 216 does not attracted in his case.[36]

6. Establishment of a Permanent EC and Its Core Duties – Articles 218 to 219

The Article 218 as amended of today provides the establishment of a permanent Election Commission having a Chairman (Chief Election Commissioner) and four members for each Province. The qualifications for Chief Commissioner are given in article 213 and for members he should be a retired Judge of High Court, or a retired civil servant of grade-22 as mentioned in Article 213. The article also dictates the prime duty of the ECP, who is to organize and conduct free, fair, and honest elections and safeguard the corrupt practices in connection with the election. The significant aspect of the Article 218 is, it has established a permanent election commission and now one man show of CEC has been over. All the decisions are taken collectively and democratically.[37] Article 219 as amended as of today, the members of ECP are under constitutional obligations to prepare the electoral rolls for the election of National, Provincial Assemblies and of Local Governments and to revise periodically but annually.[38] To organize and conduct the election of the Senate or if any vacancy is occurred in the National or Provincial Assembly.[39] Apart from

[35] Zulifiqar Ali Bhutto v State - PLD 1978 SC 40.
[36] Ibid.
[37] Aftab Shaban Mirani v Muhammad Ibrahim - PLD 2008 SC 779.
[38] Sections 26 (1) and 36 of Election Act 2017.
[39] Arshad Mahmood v Commissioner/Delimitation Authority, Gujranwala - PLD 2014 Lah. 221.

these duties, ECP is also duty-bound to appoint an Election Tribunal,[40] for disposing of the election related disputes.[41]

Every person or officer who is involved in conducting election is to perform in accordance with the law. The Returning Officer (RO) is one of them, who is appointed under section 7 of ROPA, 1976. By section 14 of the ROPA, he is not merely a silent spectator, waiting for anybody to object, but can also act himself and inquire about the qualification and disqualification at the time of nomination paper and can keep check and balance on future leadership. He enjoys enough powers and functions to check corrupt leadership to bar leader of this nation.[42] The duty of ECP is not only apple-polishing, towing on Government or establishment, and giving fancy briefing before and after election. Rather, it is legally obliged wide duty and powers to exercise. In Workers' Party Pakistan case,[43] the SC quoted Javaid Hashmi case and ruled that ECP is to play a very significant and meaningful role *before, on and after polling* and dubbed the electioneering a very important aspect of democracy.[44] By virtue of 18th and 20th Amendments, the strength, powers and independence of ECP, has been enhanced by seeking the role assigned to ECP in a democratic set-up – a foundation role in developing democracy[45] in the Pakistan.[46] The followings are the some of the functions of the ECP:

a) **Delimitation of Constituencies**

If we carefully examine the provisions of Part-VIII with precedents, it would be clear that the ECP is not, and cannot be treated as an attached department of

[40] Section 140 of Election Act 2017.
[41] Section 139 of Election Act 2017 and 2004 YLR 1459.
[42] Nawabzada Iftikhar Ahmad Khan v Election Commission of Pakistan – PLD 2010 SC 817.
[43] Workers' Party Pakistan v Federation of Pakistan – PLD 2012 SC 681.
[44] Ibid.
[45] Hussain, Faqir [1994]: 'Access to Justice'. In: PLD 1994 Journal section pp.10-23.
[46] Ibid at footnote No.37.

Government but it is an autonomous and fully independent Institution and it does not subservient to any Government (Executive Authorities) but conversely all Executive Authorities are placed under the constitutional command to assist the ECP in discharging its noble cause of conducting and organizing fair, free, honest, impartial, transparent election in accordance with the law.[47]

b) **Non-Supply of Voter List**

The SC held that non-supply of voter list to the election staff and casting bogus votes is disfranchising of voters right and it is violative of Article 218 of the Constitution wherein ECP has been obligated to conduct election justly, fairly, justly and corrupt practices guarded against,[48] and with bogus electoral list cannot be called genuine and is violative of Constitution.[49]

c) **The Voter List Case under Article 219**

The ECP is under obligation by Article 219 to prepare electoral rolls for election and it is also under obligation to revise and update the electoral roll annually. The SC on the petition of Imran Khan, it was contended/alleged the electoral rolls of Karachi are not correct and 693 voters are registered in a house of 120 sq. ft, and there are numerous votes which are disfranchised and dislocated from one city or Province to another city or Province. The SC directed the ECP to correct the electoral rolls enabling the electorate to exercise their right to vote and elect their representative with free will. It is pertinent to mention here that SC did not accept the contention of ECP that law and order situation is not conducive for preparing electoral roll, but SC directed ECP for door-to-door counting the voters and executive authorities including Armed Forces of Pakistan re directed to accompany the ECP

[47] Commentary on Constitution of Pakistan 1973, M. Mahmood, Volume-II, published Al-Qanoon Publishers, Lahore, edition 2017, at Page 1716.
[48] Muhammad Siddique Baloch v Jahangir Khan Tareen – PLD 2016 SC 97, Para 9.
[49] Imran Khan v Election Commission of Pakistan - 2012 SCMR 448.

staff for door-to-door counting and correcting the voters lists. The relevant para of SC judgment is reproduced herein under:

"In view of the peculiar security situation in Karachi highlighted hereinabove such verification must be carried out by the Election Commission with the help and assistance of Pakistan Army and FC."[50]

7. All Executive Authorities and Hiring of Officers and Staff of ECP – Article 220 to 221

Fair and free elections are so important in a democratic system that the Constitution has granted every necessary power to the ECP for this purpose. People send their representatives by their votes, who make laws for the country whether statutory or constitutional. Thus, the importance of ECP be placed upon. The SC while deciding different cases has equated the Article 229 with Article 190, by which all executives and judicial authorities to aid Supreme Court and similarly to assist or to aid ECP in discharging its constitutional duty to conduct election of Houses, Provincial Assemblies and Local Governments, fair, justly, honestly, and impartially and in accordance with law. The ECP is independent to recruit officers and staff for ECP to conduct the purpose and functions of the commission i.e., conducting and organizing the election in the country. The ECP can hire officers and staff with the approval of President of Paksitan.[51]

8. Electoral Laws and Conduct of Election – Articles 222 to 226

Chapter 2 of Part-VIII with its title "Electoral Law and Conduct of Election" empowers ECP to allocate Seats and delimitation of National, Provincial Assemblies,

[50] Imran Khan v Election Commission of Pakistan – PLD 2013 SC 279, Paras 139-140. Syed Shabbar Raza Rizvi, in his Readings: The Constitution of Pakistan 1973, has pointed out that objection that plain reading of the Constitutional provision that "not more than sixty-eight years of age" was escaped by the SC.

[51] Section 5 of ROPA, 1976.

including Local Governments. To prepare electoral rolls and address the objections to the electoral rolls.[52] The election commission is responsible for conducting the election and appointing Election Tribunals for deciding the election disputes. The ECP is independent to take steps for guarding against corrupt practices that are committed in connection with the election and all other necessary steps that are ancillary to election process before, on and after the election polls. The Parliament, through enactments has made ECP so independent that no one can take away or abridge the powers of the ECP. This is constitutionally prescribed.

On the postponement of election by ECP for October 2023, Dawn editorial of 24th March 2023, delaying of polls as betrayal by ECP and all other department that are concerned.[53] The flimsy excuse of non-provisions of security, the editorial posed very meaningful questions as to when the situation will be clear for free, fair, honestly and impartially? And the more important question, when ECP will become in a position to conduct polls without the security establishment? The delaying of poll is blatant slap on Constitution and Supreme Court whose order for conducting polls within ninety-days days is being defied in broad-daylight.[54] The delaying of poll is

[52] Hussain, Faqir [1994]. 'Electoral System of Pakistan – Suggestions for Reform'. In: PLD 1994 Journal section pp.86-94.

[53] Declaring ECP decision unconstitutional, SC order poll of Punjab on 14 May. The Nation at https://www.nation.com.pk/05-Apr-2023/declaring-ecp-decision-unconstitutional-sc-orders-punjab-polls-on-may-14#:~:text=ISLAMABAD%20%2D%20Declaring%20the%20Election%20Commission,assembly%20elections%20on%20May%2014. And Election or Else, The Editorial of DAWN, 5th April 2023 at https://www.dawn.com/news/1745961/elections-or-else and On a Collision Course, Zahid Hussain DAWN 5th April 2023 at https://www.dawn.com/news/1745968/on-a-collision-course

[54] Delayed Polls, Editorial, DAWN 24th March 2023 available at https://www.dawn.com/news/1743931. Pakistan Bar Council Summons Meeting on Monday to take Stock of "Murky" Political Situation available at https://www.dawn.com/news/1743864; Legal Questions, Political Realities, Arifa Noor available at https://www.dawn.com/news/1743923; SCBA Slams ECP Move to Postpone Punjab Polls, The News available at https://www.thenews.com.pk/print/1053359-scba-slams-ecp-move-to-postpone-punjab-polls; PTI to Move SC against election postpone: Imran, The News, at https://www.thenews.com.pk/print/1053223-pti-to-move-sc-against-election-postponement-imran, Bad Precedent: Editorial of The News, at https://thehimalayantimes.com/opinion/editorial-bad-precedent;, Sheikh Rashid Ahmad Moves SC against ECP over Punjab Poll Delay, The News at https://www.thenews.com.pk/print/1053398-sheikh-rashid-moves-sc-against-ecp-over-punjab-polls-delay; and Postponing of Poll Unacceptable. Siraj, The News at https://www.thenews.com.pk/print/1053306-postponing-of-polls-unacceptable-siraj.

the practice of dictators as General Zia regime in 1977 was reluctant to conduct polls because the popularity of Bhutto was exponentially increasing and was uncontrollable. Zia by any means convinced the PNA leadership and PNA was also confused to conduct election and this Zia postponed election for suitable time.[55] The most relevant portion of the editorial is reproduced herein below:

> So, what will it take for Paksitan to once again be 'safe enough' for democracy to prevail? Who will make that call? Will it be the same people who, at the moment, are refusing to provide security to the poll exercise? When did this country make decision-making regarding the electoral process officially dependent on the whims of the security establishment? What happens if, come October, they once again refuse to 'greenlight' the poll exercise?[56]

Constitutionally, it is now clear that a member of any House cannot hold more than one seat of any House, let say that of National Assembly, Provincial Assembly or Senate. But Article 223 does not embargo for contesting election for more than one seat but once he is elected, he has to retain only one seat of any House and he has to retain the last winning seat. Articles 224 and 224A are extensions of each other. There are two ways of pronouncing the date of election; firstly, is that once Assembly completes its tenure of five years and secondly if it is dissolved in terms of Articles 58 and 112, National and Provincial Assembly, respectively. In case of completion of tenure, the President or Governor as the case may be, shall give the date for holding election in sixty-days and if the National or Provincial Assembly is dissolved sooner, then the President or the Governor, shall give the date of holding election with ninety-days. In either case, the date is to be given by the President or Governor for National

[55] Postponement of Elections. Hamid Khan, Constitutional and Political History of Pakistan, Page 447-448. 2nd Edition, Oxford University Press. Karachi-Lahore.

[56] Ibid. Delayed Polls; DAWN.

and Provincial Assembly respectively and shall appoint the Caretaker governments in Federation and Provincials, respectively.[57]

It is pertinent to mention that by Supreme Court's successive precedents, the mandate of Caretaker governments is very limited to run the day-to-day affairs of the government[58] and provide every kind of help to ECP for conducting and organizing free, fair, just, and impartial election and nothing else and to leave the government after 90 days or 60 days. The Caretakers are also under restriction that no immediate family members of theirs can contest the election going to be held immediately and the immediate family member has been explained in the Constitution that their spouse and children. Now another controversy has been resolved by the Constitution that who will appoint the Caretaker Prime and Chief Ministers? The article 224A, has resolved this as; in first stage PM and Opposition Leader has to give the name for appointment, but if they fail to reach consensus, then the Parliamentary Committee that is immediately constituted by the Speaker will receive two names from each PM and Opposition Leader and even if it is failed to appoint then the two from each shall be forwarded to the Commissioner ECP and he will finalize the name within two days. The following issues related to ECP are discussed briefly:

a) **Election Tribunal**

The establishment of Election Tribunal has briefly discussed as one of the functions of elections of ECP in Article 219 (C) but a separate article 225 is dedicated for the role of Election Tribunal. By virtue of that article no one challenges the election of Senate, NA, and Provincial assemblies, before any court of law except Election Tribunal. The election Tribunal, and all other steps, shall be taken by the ECP in accordance with the law, meaning that without any enactment of the Parliament, ECP cannot do anything. The nutshell of all the precedents of superior

[57] Imtiaz Ahmad Kaifi v Government of Punjab - PLD 2013 Lah. 598.

[58] Syed Hafeezuddin v Province of Sindh through Chief Secretary - PLD 2016 Sindh 63. Section 230 (2) of Election Act, 2017 by which Caretaker shall not take policy decision except on urgent matters.

courts, is that Election Tribunal has exclusive jurisdiction in election petitions, at intermediate stage because interference of courts at this stage, can cause the delay of election process. Since the election is a sacred duty and the right to vote is vital for developing democracy in the any country. The general election has been made by a secret ballot, but the election of Prime Minister and Chief Ministers shall be conducted openly, without a secret ballot.[59] In this article, it is categorically mentioned that all elections by Constitution shall be held through secret ballot and local bodies lection cannot be excluded from the ambit of this article. The election of two offices has already been excluded expressly by this Article i.e., of PM and CMs. In the Workers' Watan Party case, it has been held:

b) **Caretaker Government**

The issue of installing Caretaker Governments is resolved now by the Constitution itself. Now, the Prime Minister and Opposition Leader in NA, required to give two names to Parliamentary Committee that is constituted by the Speaker. If PC fails to decide within the stipulated period, then the matter shall be referred to CEC to finalize the names sent by PC and CEC must finalize within two days. In our democratic setup, most of the appointment have been referred to CEC.[60]

9. Recommendation and Conclusion:

If we read all the provisions of Law and Constitution with help of judgments pronounced by the Supreme Court f Pakistan; it is evident that now Election Commission of Pakistan has become independent enough that can discharge its duty to conduct fair, honest, transparent, and impartial election in the country of National

[59] Muhammad Akram Baloch v Akbar Aksani – 2014 CLC 878.

[60] Khawaja Muhammad Asif v Federation of Pakistan – 2013 SCMR 1205 and Nemat Ullah Khan v Chairman Governing Body, Workers Welfare Boards/Secretary to Government of KPK Labour Department – 2016 SCMR 1299. Sections 230 & 230 (1) of Election Act, 2017 Caretaker Governments are to assist ECP, and its activities are restricted to day-to-day function.

& Provincial Assemblies, Senate, and Local Bodies. The ECP has been empowered to take all necessary steps to conduct elections in the country and for this noble cause all the Executives Authorities in the country have been placed under the disposal of ECP.

Since, the Pakistani Constitution, through its Preamble and other provisions of it, provides the parliamentary government and Sovereignty over entire University is belongs to Almighty Allah alone this authority shall be exercised by the chosen representatives and for genuine representation, the fair, honest, transparent, and impartial and most important continued election in the country is necessary for the true democracy. The ECP is under legally and constitutionally, obligation to conduct elections in the country.

The Election Commission of Pakistan needs to update voter/electoral list and do proper delimitation and remain impartial and take whatever steps that is necessary for conducting election because ECP is not subservient to any department or is not attached with any department of the country – it is an independent and thus cast a constitutional duty to conduct fair, free, transparent and impartial election in the country so that peoples can send their chosen representatives in the parliament for the betterment of the country and development of democracy.

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