FEDERAL LAW JOURNAL

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FEDERAL JUDICIAL ACADEMY
Established 1988

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Preface

The idea of fostering research culture within Judiciary through publishing research journal was incepted and embedded in the Federal Judicial Academy Act 1997. Nonetheless, like a bump on a log, it remained long overdue until recent past. The administration of Federal Judicial Academy in its approved Strategic Plan 2018-21 took it as a challenge by incorporating intellectual sustainability as one of the strategic components of restructuring Federal Judicial Academy.

Initially, various research endeavors were undertaken including two research cycles during 2019-20 with Judicial Officers from all over Pakistan and Republic of Maldives and research studies were published by Federal Judicial Academy. In another undertaking, Gilgit-Baltistan Chief Court was provided institutional support by facilitating research project for formulation of rules of civil procedure for civil courts working under superintendence and control of GB Chief Court.

In order to further the above objective, Federal Judicial Academy, decided to launch legal research journal with the name of Federal Law Journal: a high quality, open access research journal to be published biannually (September-March) with the aim to disseminate advanced legal knowledge to a wider audience. It is expected to welcome theoretical and empirical original research papers, case studies, review papers, conceptual framework, analytical and simulation models, technical note from Honourable Judges of the Superior Courts, researchers, academicians, judicial officers, practitioners and students in relevant disciplines from all over Pakistan.

We are very thankful to the enthusiastic support and supervision of Honorable Chief Justice of Pakistan in making this possible. We are delighted that Federal Law Journal is the premier journal accessible to all related to legal and judicial education for sharing their views and inputs. We urge our academic colleagues and sister judicial academies as well to join hands with us towards projecting and promoting legal research in Pakistan.

Thank you

Editorial Foreword

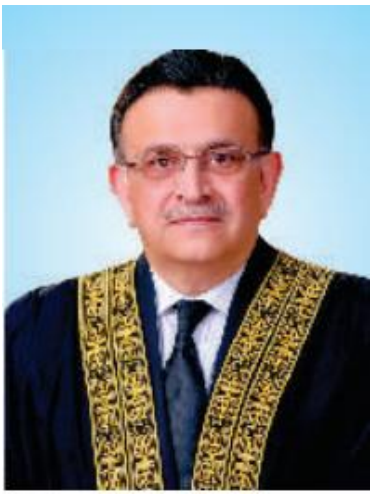
HAYAT ALI SHAH

Welcome to the inaugural issue of Federal Law Journal: The premier peer-reviewed research journal of Federal Judicial Academy, under the kind supervision of its chairman BOG, Honourable Chief Justice of Pakistan. The objective behind this initiative is to provide the entire legal fraternity and related fields with a platform for constructive conception and expression of ideas on different contemporary legal issues, as well as to draw critical opinion and to promote, monitor and publish high quality research papers in all facets of Law.

In this prefatory issue we have tried to cover diverse aspects of legal enigmas in Pakistan. Starting from the paper of Justice Khurshid Iqbal on 'Recognition and Enforcement of a foreign Arbitral Award' this issue moves towards generating new insights to conceptualize the need of Crisis Management training for the judges. Fakhar Zaman, with his pragmatic approach, has tried to encompass the gaps within district judiciary to build out a capacity development culture at various levels. This issue also features an overview on the partition matters and application of law of preemption. Niaz Khan, Registrar Supreme Appellate Court Gilgit Baltistan, highlighted the misconceptions about Immunity of Judiciary in Pakistan. Hot off the press issue of forced conversion of minorities in Pakistan is also covered in the journal. Miss Samina Cheema penned down the genesis of white-collar crimes in Pakistan. Every story in this issue tells of a challenge, an opportunity, and the transformative power of hope through reforms.

We appreciate the tireless efforts of the editorial board members, our external editorial advisers, and authors who contributed towards making this possible. The support extended to the Journal by the Honourable Chief Justice of Pakistan; Mr. Umar Ata Bandial is highly treasured. We hope that anyone with the expertise in the field would join us and collaborate with our effort of fostering and promoting research and writing culture within legal fraternity.

MESSAGE FROM THE HONOURABLE CHAIRMAN



Judicial education has emerged as a specialized discipline across the globe for proper and expeditious discharge of judicial functions. It has a critical role in the grooming of judicial officers, court staff and other stakeholders of the administration of justice. It is also crucial for establishing rule of law in the society which is imperative for the development of any nation. The Federal Judicial Academy, besides being responsible for holding conferences, seminars etc., for improving the judicial system and quality of judicial work, is mandated to publish journals, memoirs, research papers and reports. For this purpose, the Academy is required to collect, consolidate and disseminate the learning and knowledge imparted in the Academy and to engage with the members of the legal and judicial fraternities and academia so as to present the fruit of the wisdom and experience.

It may be mentioned that the Federal Judicial Academy very recently published a few research papers on topical issues that were conducted at its campus by young Judges from all over Pakistan. The Academy has now come up with the publication of the Federal Law Journal for the first time since its inception. I feel immense pleasure at the launch of the journal. It includes research papers written by members of the District Judiciary and academia. The journal is at an inceptional stage and is the first of its kind being published by the Federal Judicial Academy. It lays the foundation for collecting research and will serve as a learning experience for both its contributors and readers who are stakeholders in the administration of justice. The journal should aim to consolidate and disseminate legal materials contributed by a wide spectrum of authors offering new perspectives of the law, As the journal traverses its evolutionary path, I hope that it will find a place in the modern reservoirs of knowledge and learning about the law. To maintain the quality of the publication the reviewers and editors of the journal should always be mindful to curb plagiarism in its different forms from the work that is published in the journal.

I commend the initiative taken by the Academy and wish it great success in its endeavours in the future.

Umar Ata Bandial

(Chief Justice of Pakistan)

1. Recognition and Enforcement of a Foreign Arbitral Award– An Analysis of Pakistani Jurisprudence

Dr. Khurshid Iqbal[1]

Abstract

The recent award by the International Centre for Investment Disputes (ICSID) in the Reko diq case against Pakistan has spurred interest in international commercial arbitration. This paper discusses measures that may increase the likelihood of recognition and enforcement of a foreign arbitral award in case the parties refuse to comply voluntarily. It studies key relevant cases, including Hubco and Societe Generate de Surveillance from Pakistan. It concludes that much depends on the intention of the parties in an arbitration agreement. It also concludes that the courts tend to ensure performance of international commercial contracts in public interest as compared to severability.

1. Introduction

In 2019, the International Centre for Investment Disputes (ICSID) issued an award against Pakistan in the famous *Reko diq* case[2]. The award is of huge amount: $ 4.08 billion penalty and $1.87 billion in interest (total $5.96 billion). The claim was instituted by Tethyan Copper Company (TCC), the firm to whom the contract of mining in the Reko diq (a place in Baluchistan) was awarded by the Government. While the matter is now a subject of hectic public discourse, one key aspect of it is the 2013 decision of the Supreme Court of Pakistan which declared the contract as void for being contrary to the relevant laws and rules

[1] PhD (UK, Ulster University, 2007); LLM (UK, Hull, 2002). Judge, Peshawar High Court. The views expressed here are the those of the author and don't reflect the official position of the Government of Pakistan and/or the Judiciary, and prompted by academic interest only.

[2] ICSID, 2019. [online] Available at: <itlaw.com>: [Accessed 12 July 2019].

of the country[3]. This aspect of the matter renewed academic interest in the role of the courts in international commercial contracts vis-à-vis international arbitration.

In a world of ever growing economic interdependence, the role of arbitration, as a useful method of alternative dispute resolution, needs no emphasis. International commercial arbitration is the accepted way of resolving international business disputes. In the contemporary world, the dispute resolution mechanism will invariably be arbitration. Almost all international commercial contracts contain arbitration clauses.

International commercial arbitration is a broad designation that could include the activities of a multitude of trade associations in adjudicating disputes between parties from different countries[4]. As compared to normal court litigation, it is based on what the parties have agreed upon. It is speedy in process, cheap in costs, simple in procedure and across-the-board in resolution (award). It has a binding effect on parties by way of their mutual consent. The parties are free from the clutches of usual statutory limitations. The arbitrators they chose belong to their commercial communities, who are usually well versed in resolving disputes on facts with practical implications, in an informal, inexpensive and expeditious manner[5].

As an alternative means of settling a business dispute, it gears up its motion with the choice of the parties. Indeed, the parties enjoy a considerable freedom of choice to enter into an arbitration agreement, to appoint arbitrators, to opt for the procedure for the conduct of the arbitration process, and to choose a place for arbitration. Yet when it becomes a matter of practice, the choice appears to be difficult and even risky. The reason is that there has

[3] PLD 2013 SC 641

[4] Drahozal, Christopher R. "Commercial norms, commercial codes, and international commercial arbitration." Vand. J. Transnat'l L. 33s (2000): 79.

[5] Clements, Philip J., Daniel E. Furst, Weng-Kee Wong, Maureen Mayes, Barbara White, Fredrick Wigley, Michael H. Weisman et al. "High-dose versus low-dose D-penicillamine in early diffuse systemic sclerosis: analysis of a two-year, double-blind, randomized, controlled clinical trial." Arthritis & Rheumatism: Official Journal of the American College of Rheumatology 42, no. 6 (1999): 1194-1203.

to be a multifaceted interaction of different laws. Usually, "as many as four different national systems or rules of law" [6] come into play in an international commercial arbitration. Firstly, the law governs the arbitration agreement. Secondly, the law under which the arbitration proceedings are conducted. Thirdly, the law applied to substantive facts in issue. Fourthly, the law which regulates the recognition and enforcement of arbitral awards[7]. The last mentioned, i.e., the law, which regulates the recognition and enforcement of award, is of much more significance in the entire process of arbitration. The reason is obvious. The award being of binding force has to be executed by the losing party. An effective enforcement mechanism is, therefore, a must. What the wining party can do is to take recourse to the court for enforcement of the award if the losing party does not voluntarily execute it. Such enforcement can be either at the seat of arbitration or in another state.

The main question in this paper is: what measures could be adopted to increase the likelihood of recognition and enforcement of an arbitral award in case the parties refuse to comply voluntarily. Seeking to answer this question, the paper discusses the grounds of refusal for recognition and enforcement arbitral award as provided in the relevant international instruments and jurisprudence developed on it. The paper studies key cases from Pakistan concerning recognition and enforcement of foreign arbitral awards. It also specifically focuses on those cases—*Hubco vs. WADPA*[8] and *SGS Societe Generate de Surveillance S.A. V Islamic Republic of Pakistan*—in which Pakistani courts refused to recognize and enforce. The paper concludes that the parties must pronounce their intention clearly in an arbitration agreement. It further concludes that the refusal by court appears to be prompted more by ensuring that the mandatory requirements of international commercial contracts

6 Alan Redfern, Alan and Hunter, Martin (1999), Law and Practice of International Commercial Arbitration, London: Sweet and Maxwell (3rd Ed.).
7 Ibid
8 Barrington, Louis (2000) Arbitral Judicial Decision: Hubco v. WAPDA: Pakistan Top Court Rejects Modern Arbitration", 11 The American Review of International Arbitration 11(2000) 385

are fully fulfilled in public interest, as compared to consideration of the doctrine of severability.

2. International Commercial Arbitration: An Overview

International commercial arbitration is of two kinds, viz. *ad hoc* and institutional. In the *ad hoc* arbitration those rules of proceedings are followed which the parties have agreed to[9]. But the question is which rules these should be? These rules can be adopted by the parties or by the arbitral tribunal or some international organisation, e. g. United Nations Commission on International Trade Law (UNCITRAL)[10]. Whereas institutional arbitration is run by specialist arbitral institutions under its own rules framed for the purpose of arbitration, to name, but a few of those institutions, they are the London Court of Arbitration, the American Arbitration Association (AAA), and the International Chamber of Commerce (ICC).

The first step in an international commercial arbitration is that there must be an agreement. It means the parties must have agreed to each other that in case a dispute arises between them that will be referred to arbitration. The agreement must be valid, and in written form. Both the New York Convention (article II (2)) and the Model Law (art. 7(2)) require that the agreement must be in writing.

The arbitration agreements are of two categories, namely, the arbitration clause and the submission agreement. A clause pertaining to recourse to arbitration in case a dispute arises in future, added into the main agreement by the parties, is called arbitration clause. When the parties enter into agreement to submit an existing dispute to arbitration, it is known as submission agreement.[11] Irene Welser and Susanne Molitoris argue that arbitration clause is a "midnight clause", the need of its consideration may arise 'sometimes late at night or in the early

[9] Ibid 6
[10] Ibid
[11] Ibid 6

hours of the morning....'[12] A look at the UNCITRAL arbitration rules (21(2)) will show that an arbitration clause is independent of the remaining conditions of the contract of which it is a part and its validity is not rendered illegal if the contract is adjudged as null and void.

Validity of arbitration agreement is also an important issue. It is judged both in form and substance. While, as stated above, it must be in written form, formal requirements of arbitration agreement may vary from state to state. What is indispensable to be seen is the validity of substance. In this respect first of all the existence of arbitration agreement is to be determined by finding out the intention of the parties[13]. The intention of the parties can be determined by examining the arbitration clause. The second essential is the legal capacity of the parties. That is to say, the parties must be natural or juristic persons. The general principle is that every person having capacity to enter into a contract can make an arbitration agreement. Every person is competent to contract who is of the age of majority according to the law to which s/he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which s/he is subject[14]. Almost the same conditions of capacity apply under the English law of contract [15]. According to the New York Convention[16], capacity is seen under the applicable law. The third essential is what is known as arbitrability, i.e. whether a dispute is capable of settlement by arbitration. Both the New York Convention [17] and the Model Laws[18] clearly speak about arbitrability. The reason is that some proceedings are of public consequences, for example, a dispute over matrimonial property [19] which does not deserve to be settled by private proceedings of arbitration. The question of arbitrability needs to consult

[12] Irene Welser, Susanne Molitoris, "The Scope of Arbitration Clauses – Or "All Disputes Arising out of or in Connection with this Contract", 2012,
[13] Ibid 6
[14] Pakistan, The Contract Act, 1872: section 11
[15] UK, Contract (Applicable law) Act, 1990: article 11
[16] New York Convention, Article V (a)
[17] New York Convention, Article II (1)
[18] The Model Law, Articles 34 (2.b.i)

domestic laws of states because the states determine which matters may or may not be resolved by arbitration. A dispute not capable of settlement by arbitration means that it does fall within the contemplation of the arbitration clause; it has invited debate in legal circles in the US.

Arbitrability is deeply linked with public policy. Under the New York Convention (art.V (2.b)) as well as the Model law (art. 36 (b.ii)) recognition of award may be refused if the award is contrary to the public policy of the state where enforcement is sought. A recent example is *Hubco v. WAPDA* decided by the Supreme Court of Pakistan. It was held by majority of the court that the "dispute is not arbitrable [and] as such should be decided by a Court of law as a matter of public policy" [20] However, public policy is not one and the same in each and every country. The various subjects that may be considered covered by the doctrine of public policy, are bankruptcy, insolvency, antitrust laws, securities laws, criminal matter, grant and validity of patents and trademarks, bribery, corruption, fraud[21]. The contentious issue in the *Hubco v. WAPDA* case was 'whether the nature of the dispute and the question of *mala fide*, fraud, illegalities and the legal incompetence raised preclude resolution of the matter through arbitration as a matter of public policy and as such the dispute between the parties is not arbitral and cannot legitimately be subject matter of ICC arbitration...?'[22].

The substance of the agreement must be expressed in a language that should carry out the intention of the parties. Thus, it is advisable that due care should be exercised at the time of drafting the agreement. A clause not drafted with due diligence and care may land the parties in trouble. Look at this clause, for example:

> *Any dispute arising from this agreement shall be settled finally under the rules of conciliation and arbitration of*

[20] Barrington, Louis (2000) Arbitral Judicial Decision: Hubco v. WAPDA: Pakistan Top Court Rejects Modern Arbitration", 11 The American Review of International Arbitration 11(2000) 385.
[21] Blackaby et al., Redfern and Hunter on International Arbitration para. 2.04 (5th ed. 2009)
[22] Ibid 19

the 'Chamber de commerce' by an arbitrator appointed in compliance with such rules; the place of arbitration shall be Paris; French law shall be applicable law [23].

A dispute as to what did *Chambers de Commerce* mean arose, one of the parties argued that it meant the Paris Chamber of Commerce and Industry, known as such, adding that the dispute cannot be referred to international arbitration because the Paris Chamber of Commerce has no arbitration rules. Resultantly, the arbitration agreement was held to be null and void. Courts have observed that not enough attention has been directed to the true nature and function of an arbitration clause in a contract[24] .The flaws are owing to inadequate and insufficient drafting of the arbitration clause or to the *lacuna* in the arbitration arrangements, which later on come to light.[25] Redfern and Hunter [26] argue that defective clauses suffer from inconsistency, inoperability and uncertainty. Discussing the defects pertaining to scope of the arbitration clause and to appointment of arbitrator,[27] argues that the words, *'all matters in difference between the parties'* not only refer to claims arising from particular transaction but points to such issues which may impinge on the civil rights of the parties. Whereas defect as to appointment of arbitrator is/can be curable 'if the parties have adopted' what he calls 'statutory or regulatory framework.' The basic elements of arbitration clause are: valid arbitration agreement, the number of arbitrators (at the most three), establishment of arbitral tribunal, choice as to *ad hoc* or institutional arbitration, filling vacancies in the tribunal, place of

[23] Rubino-Sammartano, Mauro. International arbitration law and practice. Juris Publishing, Inc., 2014.
[24] Collier, John and Lowe, Vaughan (1999), *The Settlement of Disputes in International Law Institutions and Procedures,* Oxford: Oxford University Press
[25] Clive M. Schmithoff, Clive M., Defective Arbitration Clauses, 1975, The Journal of Business Law 9-22.
[26] Ibid 6
[27] Ibid 24

arbitration, governing law, inclusion of default provisions, use of contract language, entry of judgement and rule of court clauses[28].

As stated above international commercial arbitration involves a complex interplay of different laws. Although it is argued that the parties have the option to choose their own law subject to such conditions as public policy [29], the question arises which law shall apply to arbitration proceedings? The answer is that the law on which the parties have agreed (*Compagnie Tunisienne de Navigation SA v. Compagnie d' Armement Maritime)*[30]. International commercial arbitration proceedings are conducted in a neutral state[31]. Procedural law governing arbitration proceedings is usually different from the law governing substantive facts in issue. The procedural law is called *lex arbitri*. In (*UK: Bank Mellat v. Helliniki SA* (1983)[32] Kerr L.J. held that 'the procedural (curial) law governing arbitration is that of the forum of the arbitration, whether this be England...or some foreign country [...].' Some authors argue that *lex arbitri* is not merely a procedural law but much more than that, e. g. dispute over patent being a matter of public policy, is substantive in nature[33].

International commercial arbitration is governed also by municipal procedural law, most frequently by the law of the jurisdiction in which the arbitral tribunal sits. This law, known as the *lex loci arbitri*, may be crucial in resolving procedural issues that arise. Thus, arbitral tribunals often meet in a jurisdiction with an arbitration law that is both developed and supportive of arbitration as a dispute resolution mechanism[34]. The parties may opt for the procedural law of one state in another state but it may complicate the matter for them in case of a situation where they

[28] Irene Welser, Pitfalls of Competence, in Austrian Arbitration Yearbook 2007, 3 (Klausegger et al. eds., 2007)
[29] McNair, Douglas M. "Reinforcement of verbal behavior." Journal of experimental Psychology 53.1 (1957): 40.
[30] Compagnie Tunisienne de Navigation SA v. Compagnie d' Armement Maritime [1971] A. C. 572.
[31] Ibid 6
[32] (UK: Bank Mellat v. Helliniki SA (1983)
[33] Ibid 6
[34] Larson, Clifford (1997), "International Commercial Arbitration", www.asil.org/insight6.htm

take recourse to a court of law because the court of one state may obviously refrain from giving verdict on the procedural law of another country[35]. The arbitral tribunal may hold its meetings in different countries, say, to record evidence or to inspect the spot of the project. This will not affect the seat of the arbitration[36]. If a time period stipulated in the arbitration is not honoured and the proceedings are not instituted within that period, the arbitration agreement may lose its legal value[37]. In an Italian case (Italy: *Romano v. Rinaldi (Italy)*)[38], it was "held that not only the arbitration agreement is no longer effective, but also the parties' rights to refer the dispute to the courts could no longer be exercised."

The arbitration proceedings conclude with an award. A question may arise as to where an award is made. Article 25 (3) of the ICC Rules says that "the award shall be deemed to be at the place of the arbitration and on the date stated therein." Per article 2 of the New York Convention 'the term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.' Article 28 of the ICC Rules requires that the award shall state the reasons upon which it is based, and that it shall be binding on the parties. According to both the letter and spirit of the aforementioned rules, the very submission of dispute to the arbitration means that the parties undertake to enforce any award without delay. Award may be interim or final. An interim award disposes of such issues as jurisdiction or procedural matters[39]. It follows that an award, which does not cover the dispute in its entirety, is called interim award. Final award, on the other hand, is a decision on all facts in issue[40], carrying binding effect on the parties. During the proceeding, parties may arrive at a mutually acceptable resolution of the dispute by way of

[35] Ibid 6
[36] Ibid
[37] Rubino-Sammartano (1990), International Arbitration Law, Kluwer Law and Taxation Publisher.
[38] Italy: Romano v. Rinaldi, Court of Cassation (Italy), January 8 No. 111 (1980), Foro It. 1980, I, 1.
[39] Ibid 6
[40] Ibid

compromise on the basis of which an arbitral tribunal can pass an award. Such an award is called consent award. Where a party either fails or refuses to participate in the arbitration proceedings, the tribunal shall do its best to afford it the opportunity to put forward its submissions. An award passed against such a defaulting party is known as default award[41]. Once the arbitral tribunal makes an award, it has got no concern with its enforcement. However, it is the duty of the arbitral tribunal to make an enforceable award e.g., art. 26, ICC Rules[42].

3. Grounds for refusal of enforcement

3.1. Enforcement (recognition): meaning

Enforcement is a remedial right[43]. In other words, it is execution of an arbitral award by means of legally coercive methods. It is available as a sword to the wining party[44], who requests the court for enforcement of the arbitral award. In the law of international commercial arbitration, the term enforcement is often used along with the word recognition (the New York Convention, Article I. 1[45]; the Model Law, Articles 35 and 36[46]; Geneva Convention, Article 1, para. 1 *&* 2[47]). This fact itself requires seeing whether the two are different from each other or the same. As a defensive ground recognition can be raised "in respect of dispute that has been the subject of previous arbitral proceedings"[48]. Recognition prevents rising of those issues anew which the arbitration tribunal has already disposed of. The English Arbitration Act, 1996 [49] acknowledges recognition as a defence. An award may be recognised yet it may not be enforced. But its enforcement will mean that it is already recognised. In this respect, the case *Dallal*

[41] Ibid
[42] Article 26, ICC Rules
[43] Black Law Dictionary (1999), Seventh Edition, West group (1999).
[44] Irene Welser, Pitfalls of Competence, in Austrian Arbitration Yearbook 2007, 3 (Klausegger et al. eds., 2007)
[45] The New York Convention, 1958, Article I. 1
[46] the Model Law, Articles 35 and 36
[47] Geneva Convention, Article 1, para. 1 *&* 2
[48] Ibid 6
[49] English Arbitration Act, 1996 (s. 101(1))

v. Bank Mellat [50]may be cited. In this case Hobhouse J. held that recognition of the award passed by the Iran-US Claim Tribunal was conclusive between the parties, although the award was not enforceable under the New York Convention. Redfern and Hunter have explained this difference in a hypothetical case. They say that suppose a dispute as to non-payment arises between a defendant company and a foreign supplier, which is submitted to arbitrator who dismisses the claim of the foreign supplier. In case of a claim by the foreign supplier, the ground of defence available to the company is to solicit to the court for recognition of the award. If the court agrees with the defence, the claim of the opposite party will stand dismissed. This will mean the recognition of the foreign award but not the enforcement of the award itself. On the authority of Van Den Berg, Rubino-Sammartano [51] says that recognition aims at neutralising a losing party's attempt to open new questions in the court of the state requested to enforce the award.

3.2. General Principles

The wining party has to apply for enforcement of award in that state where the losing party has its property. An award is executed against assets, comprising bank accounts, or other valuable property, such as, a ship, a cargo of oil, and other goods, aircraft, etc. Different countries provide different methods of enforcement. For example, the Swiss law requires deposition of the award with a court and issuance of certificate of enforceability [With the Swiss court where the tribunal sits; certification by the tribunal shall be equivalent to such a filing][52]. The English law provides that an award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgement or order of the court to the same effect. Where leave is so given, judgement may be entered in terms of the award. In France, recognition is a step

[50] Mark Dallal v. Islamic Republic of Iran, Bank Mellat (formerly International Bank of Iran), IUSCT Case No. 149, [1983]
[51] Ibid 34
[52] Poncet, Charles and Gaillard, Emmanuel, Private International Arbitration Introductory Note, at http://www.praetor.ch/francais/whoswho/poncet/divers/arbitration-fr.htm

that precedes the enforcement[53]. In Australia, where the foreign arbitral award has a binding force on the parties, a foreign award may be enforced in a court of a State or Territory as if the award had been made in that state or territory in accordance with the law of that state or territory[54]. Almost the same is the position under the Canadian law, that is to say, the arbitral award is binding and enforceable through a court of competent jurisdiction on application in writing on supply of duly authenticated and certified copy of the award[55]. Arbitral award can also be sued upon as evidence of a debt making arbitration agreement liable to contractual obligation[56].

So far enforcement of arbitral award in the seat (the state where the arbitration proceedings are held) is concerned it is as simple and easy as if the award is under the municipal law[57]. The enforcement of an award in other state involves intricate procedure[58]. The wining party is required to ask for enforcement in that state where the losing party has its resources. It is also important for the wining party to see whether the state, in which it seeks enforcement, is a party to the New York Convention or other international agreement[59]. There is also a limitation period for the recognition and enforcement, which is usually provided by the municipal laws.

4. Grounds for refusal in international conventions

4.1. Earlier conventions

Keeping in view its global importance, there have been efforts on the international level to regulate recognition and enforcement of award through international conventions. The Geneva Protocol of 1923[60] was the first such convention in the twentieth

[53] Article 1498, of the Code of Civil Procedure, 1981
[54] International Arbitration Act, 1974: s. 8 (1&2).
[55] Commercial Arbitration Act R.S., 1985, c. 17 (2nd Supp.) Section 35 (1&2).
[56] Ibid 6
[57] Ibid 6
[58] Ibid 6
[59] Ibid
[60] The Geneva Protocol of 1923 (see art. 3)

century. It provided recognition of arbitration agreement and enforcement of award by contracting states. Very soon, the Geneva Convention of 1927, which provided for enforcement of award in the territory of any contracting state, followed the Geneva Protocol. Commentators argue that the Protocol suffered in scope and impact[61]. The Convention yielded to what is known as *double exequatur*, i. e. getting *exequatur* from the court of the state where it was made, to the effect that it was final, as well as from the court of the state where its enforcement was sought[62].

4.2. The New York Convention, 1958

The most important and effective one presently, is the New York Convention, 1958, on the recognition and enforcement of foreign arbitral awards. This Convention has greatly increased and relieved the process of recognition and enforcement. The grounds of refusal are provided in its article V. First, the parties had no legal capacity or the agreement was not valid. Second, the non-issuance of proper notice of the appointment to the party against whom an award is made. Third, the award deals with issues not contemplated by or not falling within the terms of the agreement. Fourth, the composition of arbitral tribunal or procedure is not in accordance with arbitration agreement or the relevant law. Fifth, the award is either not binding, or suspended or set aside. The two additional grounds of refusal are firstly, when the dispute is not capable of settlement by arbitration; or secondly, the recognition or enforcement of award would be contrary to the public policy of the country where its recognition and enforcement are sought.

4.3. The Model Law, 1985

With a view to achieve uniformity of arbitration laws of different countries, the Model Law was adopted by a resolution of UNCITRAL in 1985. Its article 36 enunciates the same grounds of refusal couched in the New York convention summarised above. Covering the entire gamut of the arbitration proceedings, from

[61] Kosheri, International Handbook of Commercial Arbitration, Suppl. January 11, 1990, pp1-52; El-Ahdab, J. Int. Arb., vol. 14, No. 4, pp59-88.
[62] Ibid 6

the start to the final, the Model law has recorded success worth appreciation[63]. While both the laws provide exhaustive grounds for refusal, they do not allow scrutiny of the merits of the award.

4.4. The Washington Convention

Another important international convention is the International Centre for the Settlement of Investment Dispute (ICSID), commonly known as the Washington Convention. It came into being in 1965. The ICSID articles 50 to 52 provide a mechanism to deal with revision, interpretation and annulment of the award. Articles 53 to 55 pertain to recognition and enforcement of award. It requires that each contracting state must recognise and enforce an ICSID award unless revised or annulled under its own internal procedure. As many as 166 countries have signed it till yet.

4.5. Regional Conventions

The European Convention of 1961 provides that an award in one contracting state may be set aside in another contracting state only if it has been set aside on the grounds enshrined in the Convention. It provides four grounds for refusal of foreign arbitral award. The three grounds which article IX sub paragraphs (a), (b) and (c) provide are similar to those mentioned in article V, paragraph 1 of the New York Convention. While its sub paragraph (d) differs from paragraph (d) of the above provision of the New York Convention, which relates to the composition of tribunal or procedure not in accordance with arbitration agreement or the relevant law. Interestingly, the ground of policy is not mentioned. This has been explained in the following words: "…. an award made in State A, between nationals of States B and C, which was to be enforced in either State B or C, could not be enforced because it had been set aside in State A violating public policy, notwithstanding the fact the award was not contrary to the public policy of either State B or C"[64].

[63] Ibid 6

[64] Benjamin, P.I., The European Convention on International Commercial Arbitration, XXXVII British Yearbook of International Law (1961), 478.

The Moscow Convention, 1972 provides that award 'shall be final and binding', and in case of failure to enforce award, it may be enforced as judgement of court. The Panama Convention, 1975 which provides the same grounds of refusal as the New York Convention provides for the reciprocal enforcement of awards, using the word execution instead of enforcement. The Amman Convention, 1987 is recent one. Its model is based on the Washington Convention.

4.6. Specific grounds of refusal: an analysis

The application of these grounds for refusal as laid down in these conventions has been creating legally important and academically interesting examples in international commercial arbitration. Where it was proved that the two ICC awards were "non-existent" having been made "without the preliminary advice on the referral of the dispute to arbitration, which must be given by the competent Committee of the Council of the State", the defence of incapacity was successful, and the enforcement was refused (France: *Fougerolle SA (France) v. Ministry of Defence of the Syrian Arab Republic*)[65]. In an Italian case, the defence of invalidity of agreement was unsuccessful on the ground that the arbitration agreement was printed on the reverse side of the purchase order (Italy: *Bobbie Brooks Inc. (USA) v. Lanificio Walter Banci s. a. s. (Italy) (1979*)[66].

The second ground of refusal pertaining to non-issuance of notice can be shortly called 'due process.' This means opportunity of fair hearing to the parties. The court will see whether the opportunity of fair hearing was afforded to the parties or not. As arbitration agreement is based on the consent of the parties, therefore, it needs not to be considered a fair hearing requirement as complied with by courts.

[65] France: Fougerolle SA (France) v. Ministry of Defence of the Syrian Arab Republic, XV Yearbook Commercial Arbitration (1990), 515.
Italy: Romano v. Rinaldi, Court of Cassation (Italy), January 8 No. 111 (1980), Foro It. 1980, I, 1.
[66] Italy: Bobbie Brooks Inc. (USA) v. Lanificio Walter Banci s. a. s. (Italy) (1979), IV Yearbook Commercial Arbitration, 289.

The third ground of refusal pertains to what may be called jurisdictional issues. It may contain many layers, for instance, existence of valid arbitration agreement, whether the tribunal is properly constituted, what matters have been submitted to the arbitration in accordance with the arbitration agreement, and arbitrability[67]. Jurisdiction may be challenged either at the start of the proceedings, regarding which the tribunal can pass an interim award or after the final award is made, in which case it can be raised as an attack on the award being devoid of jurisdiction. However, according to s. 31 of the English Arbitration Act, 1996 objection as to substantive jurisdiction must be raised at the outset of the proceedings. If the objection is not raised forthwith or within such time as may be allowed by the arbitral tribunal, the party wants to raise it, will be precluded from raising it subsequently. The due process defence has attracted debate because of its standards recognised in different jurisdictions. For example, in an American case a party contended before the court that one of the arbitrator's suggestions to submission of summaries was so misleading that it was denied the opportunity to present its case in a meaningful manner[68]. Due process can be seen from such angles as opportunity to appear in the arbitration proceeding, opportunity to produce evidence and opportunity to raise objection to the procedural rulings of the arbitral tribunal. The issue of jurisdiction may also be taken that there is no valid agreement of arbitration. In this respect the *Pyramids* arbitration can be cited as a good example. There was an agreement between the claimant, the owner of a holiday resort or hotel and the Egyptian Government. The claimant proposed to construct a holiday village and other facilities near Pyramids, which attracted wide spread opposition both in and outside Egypt. The government cancelled the project due to this opposition. The claimant instituted a claim for breach of contract by way of arbitration. The Egyptian government took the plea that it was not a party to the arbitration agreement, which was accepted and

[67] Ibid 6

[68] Inoue, Osamu, The Due Process Defense to Recognition and Enforcement of Foreign Arbitral Awards in United States Federal Courts: A Proposal for a Standard, 11 American Review of International Arbitration (2000), 24.7.

the award set aside by a Paris court of appeal[69]. It follows that the final authority rests with the court to adjudge whether a valid agreement exists between the parties or not. To elaborate further one can say that judicial component (the other is contractual) of arbitration is subject to the supervisory jurisdiction of the courts to see the principles of impartiality of arbitrators and natural justice are fulfilled[70].

The fourth ground of refusal is that either the composition of arbitral tribunal is not in accordance with the arbitration agreement or such agreement is not in accordance with the law of the country where the arbitration took place. This provision is an improvement over article 1(c) of the Geneva Convention of 1927. In the New York Convention this constraint is dropped. It is the agreement that has got precedence; if there were no agreement, the laws of the seat of arbitration would be give consideration[71]. In a Hong Kong case, this ground of the composition of arbitral tribunal not in accordance with the agreement, was raised because the arbitrators appointed were on the Shenzhen list but not on the Beijing list (China: *China Nanhai Oil Joint Service Cpn v. Gee Tai holdings Co. Ltd.*)[72]. The court concluded that "technically the arbitrators did not have jurisdiction to decide the dispute...in all circumstances ...the ground specified in the section is made out"[73]. But the court allowed the enforcement invoking the doctrine of estoppel because the party objected to enforcement, took part in the arbitration proceedings despite knowing the fact that arbitral tribunal was not on the relevant list.

The fifth ground of refusal is that the award is not binding, suspended or set aside. This ground is subject of much debate[74]

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[69] Redfern, Alan (1986) International Commercial Arbitration Jurisdiction Denied: The Pyramids Collapses, 1986 Journal of International Business Law 15-22.

[70] Schmithoff, Clive M., 'Arbitration: The Supervisory Jurisdiction of the Courts', Journal of Business Law (1967), pp318-328

[71] Ibid 34

[72] China: China Nanhai Oil Joint Service Cpn v. Gee Tai holdings Co. Ltd. Reported in XX Yearbook Commercial Arbitration 671.

[73] Ibid 6

[74] Ibid 34

for various reasons. For example, with reference to Van den Berg, Redfern and Hunter say that it is the practice of some national courts to examine whether the award is in fact binding under the law[75]. According to article 1 (d) of the Geneva Convention the word "final" has been used, which had led to the view of its first declared as final by the court at the seat of arbitration (the doctrine of *double exequatur*). In the New York Convention the word "binding" is used for award, which is seen as not subject to appraisal on merits[76]. Another view is that 'it can be enforced even if it has not yet been declared enforceable'.

Two other grounds of refusal are arbitrability and public policy. Where a party to the contract in one country terminated the distributorship of another party in another country, the court held that the cause of action was exclusively triable by court in the other country, as such not capable of settlement by arbitration (*Audi-NSU Auto-Union AG (Germany) v. Aseline Petit & Cie (Belgium)* reported in (1980))[77]. As referred above, the Supreme Court of Pakistan has invoked the principles of public policy and arbitrability in the *Hubco* arbitration case. In India, too, for example, the public policy ground is recognised in many cases, *Renusager Power Co. Ltd Vs General Electric Company (1994) Suppl CLAI/AIR 1994 SC 86; National Thermal Power Corfin.V Singer Co. (1992) 8 CIA116 (c))*[78]. In England the courts, may refuse to enforce unlawful contract[79]. In a case relating to contract of smuggling carpets, the court held that the arbitral award is not enforceable if it is contrary to English public policy[80]. In another case it was held that 'a contract was to be performed abroad, it would be enforced by the English court unless it was also contrary to the domestic public policy of the country of performance (*Westacre Investments In. v. Jugoimorpt-SDPR*

[75] Ibid 34
[76] Ibid 34
[77] Audi-NSU Auto-Union AG (Germany) v. Aseline Petit & Cie (Belgium) Reported in Redfern and Hunter, 1999.
[78] Renusager Power Co. Ltd Vs General Electric Company (1994) Suppl CLAI/AIR 1994 SC 86; National Thermal Power Corfin.V Singer Co. (1992) 8 CIA116 (c)
[79] Halsbury's Laws of England, 4th Ed. 1998
[80] UK: Soleimany v. Soleimany, The All E R, 3 (1999), p847

Holding Co Ltd. and others)[81]. Discussing enforcement of foreign arbitral award in the US, McClendon argues that "corruption, fraud, or undue means" and "evident partiality" will be against public policy as such a defence under article V (2) (b) of the Convention[82].

5. Enforcement of arbitral award in Pakistan

5.1. The existing regime

Pakistan's arbitration laws date back to the colonial time. The British colonial government of undivided India introduced the Arbitration (Protocol & Convention), Act, 1937, followed by the Arbitration Act, 1940. The former, pertained to foreign arbitration and enforcement of foreign arbitral award, was introduced in pursuance of the Hague Convention. The law, under section 3, excluded the application of Pakistan's Arbitration Act, 1940 and the Civil Procedure Code, 1908. It further provided that the foreign arbitral award shall be treated as binding for all purposes on the parties between whom it was made.

After independence, Pakistan signed the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") on 30 December 1958. However, no domestic legislation was passed to ratify the convention. It was, however, in 2005 that the Recognition and Enforcement (Arbitration Agreements and Foreign, was passed. Till 2011, the ordinance was repeatedly promulgated when finally, the legislation was enacted as the Recognition and Enforcement (Arbitration Agreements and Foreign Awards) Act, 2011. The Act repealed the Arbitration (Protocol & Convention) Act, 1937. Commentators argue that the Arbitration Act, 1940 is now almost obsolete in its present form as it is not well equipped to handle modern and more complex commercial arbitration disputes. There is an immense need of a new legislation so that it could provide uniformity and certainty

[81] UK: Westacre Investments In. v. Jugoimorpt-SDPR Holding Co Ltd. and others, The All E R, 3 (1999), p864.
[82] McClendon, J. Stewart Enforcement of Foreign Arbitral Awards in the United States 4 Journal of International Law and Business (1982), pp58-74.

to both the categories of arbitration, domestic as well as international commercial arbitration[83].

In this perspective, a new legislation has been proposed which is pending before the Parliament since 2009. The proposed law seeks to implement the UNCITRAL Model Law on International Commercial Arbitration. There is legislation in other fields which encourage dispute settlement through arbitration. They are family matters, industrial disputes, cooperative societies, electricity, and income tax.

5.2. An analysis of case law

Till 2011 when a new legislation was introduced, the cases of foreign arbitration were dealt with under the Arbitration (Protocol and Convention) Act, 1937. In a 1993 case, the Supreme Court articulated what it called its dynamic approach towards enforcement of a foreign arbitral award, in the following words:

"...[W]hile dealing with...foreign arbitration clause like the one in issue, the Court's approach should be dynamic and it should bear in mind that unless there are some compelling reasons, such an arbitration clause should be honoured as generally the other party to such an arbitration clause is a foreign party. With the development and growth of International Trade and Commerce and due to modernization of Communication/Transport system in the world, the contracts containing such an arbitration clause are very common nowadays. The rule that the Court should not lightly release the parties from their bargain that follows from the sanctity which the Court attaches to contracts, must be applied with more vigour to a contract containing a foreign arbitration clause. We should not overlook the fact that any breach of a term of such a contract to which a foreign company or person is a party, will tarnish the image of Pakistan in the comity of nations [...][84].

[83] Saad Mir, Saad, 'Court Intervention in Arbitration: Pakistan's Perspective', Pakistan Law Journal, 2016.
[84] PLD SC 1993, 42, 52 (Eckhardt & Co. GmbH vs. Muhammad Hanif).

A similar view was expressed by the High Court of Sindh in a 1999 case. The court argued that Pakistan's international respect lies in the proactive role of its judiciary to facilitate quick performance of international commercial agreements[85]. In another case, the same court rather lamented the institution of cases in Pakistan by those against whom awards are made abroad. The court believed that such cases "tantamount to abuse of the process of the Court tantamount to abuse of the process of the Court.... [and] may lead Pakistan into becoming pariah in the commercial world".[86]

In a number of cases, the courts have preferred to refrain from interference for several reasons. For example, in one case, the High Court ruled that 'the arbitrator is a judge of all matters arising out of a dispute whether of fact or law and the Court is not to act as a Court of appeal sitting in Judgment'[87]. In another case, the Supreme Court held that a court should not intervene 'unless it could be shown by sufficient and reliable material on the record that the arbitrator was guilty of misconduct or that the award was beyond the scope of reference or that it was violative of a statute or was in contradiction to the well settled norms and principles of law'[88]. Taking a similar view in another case, the court held the award could be challenged only on the grounds mentioned in section 30 of the Arbitration Act, 1940—the arbitrator's and the proceedings not based on merits. The court maintained that while hearing objections against the award it could not sit as a court of appeal[89].

In the case of *Hitachi Limited vs. Rupali Polyester's and Others*, where an award was made by an ICC tribunal in London in a contract which was to be governed by Pakistani law, the Supreme Court dismissed the plea of the Pakistani party to remove the

[85] (1999) CLC 437 (A. Meredith Janes Co. Ltd v. Crescent Board Ltd.)
[86] (1999) CLC 1018 (Conticotton S.A. v. Farooq Corporation and others)
[87] 2001 MLD 99 (Federation of Pakistan vs. Al Farooq Builders).
[88] 2004 SCMR 590 (President of Islamic Republic of Pakistan vs. Syed Tasneem Hussain Naqvi).
[89] 2002) CLD 153 (Meredith Jones & Co through Attorney vs Usman Textile Mills).

English arbitrators[90]. In this case, the court did not follow an Indian Supreme Court view in a case titled as *Indian Supreme Court in National Thermal Power vs. Singer Co. & other.* In this latter case, the contract was to be governed by Indian law. A dispute arose between the parties. The dispute was referred to arbitration under the ICC Rules. The parties had not agreed to a seat for the arbitral tribunal. The ICC Court decided that the arbitration would have its seat in London. The tribunal made an award in London. One party sought to set aside the award within the meaning of section 14, 30 and 33 of the Indian Arbitration Act 1940, a law applicable to domestic awards. The court accepted the appeal, holding the Indian courts have jurisdiction set aside the award.

Flame Maritime Ltd. v. Hassan Ali Rice Export [91] is another example in which the court refused to interfere with foreign arbitral award. In this case, when the enforcement of the award was sought through the court, two objections were raised: first, the arbitrator was alleged to have committed misconduct by passing the award *ex parte* as he considered the claim of one party only. Second, the interest awarded by the arbitrator was alleged to be not recoverable as interest is against the injunctions of Islam. The court rejected both the objections, arguing that the objector did not prefer with his own free will to participate in the proceedings. As for the second objection, the court ruled that since the award has become final in the UK, therefore, at the stage of enforcement in Pakistan, it cannot be nullified on the ground of interest. One commentator argued that the decision regarding the finality of the award vis-a-vis the issue of interest

'[i]s a credible decision which excludes any iota of element of biasness against the foreign parties as grant of interest being in violation of injunctions of Islam could be accepted by the Court as a public policy ground, as plead by the objecting party[92].

[90] 1998 SCMR 1618 (Hitachi Limited vs. Rupali Polyester's and Others) [1992] 2 Comp. L.J..256.
[91] 2006CLD Karachi 697 (Flame Maritime Ltd. v. Hassan Ali Rice Export).
[92] Ibid 66

Metropolitan Steel Corporation Ltd (plaintiff) filed a civil suit against *Macsteel International UK Ltd. (defendant)* for recovery of money[93]. The defendant was under an obligation to supply to the plaintiff 1600 MT rods. It supplied 500 MT rods only. As the defendant failed to perform the remaining part of the sale contract being unable to supply the remaining quantity, the plaintiff brought a civil suit. The defendant sought stay of the civil suit and issuance of direction to the plaintiff to go for arbitration proceedings. The plaintiff denied arbitration agreement. After examining the record of the case, the court found the correspondence between the parties proved that there was an agreement for arbitration. The plea of the defendant prevailed; the court stayed the suit and directed the parties to go for arbitration first.

5.3. REJECTION BY COURTS

While the above discussed cases indicate judicial support for enforcement of foreign awards, in two cases—*Hubco vs WAPDA* (*Hubco*) and *SGS vs. Pakistan* (*SGS*)—the courts rejected international arbitration. The rejection attracted comments from within Pakistan and at broad. One Pakistani commentator argued that these cases "rather undermined international arbitration." Both are high profile cases and need detailed discussion.

5.3.1. HUBCO

In 1992, *Hubco*, a Karachi-based power generation company, signed with WAPDA (Pakistan's water and power development authority, the main organization responsible for power generation and supply in the country) a power purchase agreement (PPA). According to Schedule VI to the PPA, WAPDA had to make payments to *Hubco* per a certain financial model for tariff calculations. The payment was to be made for thirty years, which was the life of the project. The agreement had an arbitration clause providing for ICC arbitration at London. WAPDA contended that the revisions to Schedule VI to the PPA, pertaining to inflated tariffs payment due from it, were prompted

[93] PLD 2006 Karachi 664

by collusion and illegality without lawful agreement by WAPDA. In October 1998, WADPA took three actions against *Hubco*: first, it repudiated through a letter three amending contractual documents on grounds of illegality, fraud, collusion and *mala fide* aimed at causing wrongful loss; second, instituted criminal proceedings against *Hubco* and its own officials; and third, filed a suit in Lahore for recovery of overpaid tariff amounting to Rs. 16.0 billion. Hubco, on the other hand, filed a suit in Karachi, challenging WAPDA's letter of repudiation, sought its suspension and issuance of an injunction restraining WAPDA from seeking any judicial remedy contrary to the ICC arbitration clause in the PPA. *Hubco* launched a second attack against WAPDA by initiating ICC arbitration proceedings alleging contractual breach.

As the matter reached the Supreme Court of Pakistan, a five-member bench heard it. By a majority opinion by three judges, the court held that the allegations of corruption constitute circumstances which provide *prima facie* basis for further probe into the matter judicially. The court ruled that if such allegation were proved, the contract will become void. This, the court ruled, was required by public policy, a ground for refusal to refer the matter to international arbitration. In its minority opinion, the court invoked the doctrine of severability. The two judges relied on two English cases titled *Harbour Assurance vs. Kansa*[94] and *Westacre Investment vs. Jugoimport*[95]. In the latter case, the court severed the allegation of bribery (public policy), directing the enforcement of the agreement.

5.3.2. SGS

In 1994, the Government of Pakistan entered into a contract with the SGS, for pre-shipment inspection services of all consignments to be imported into Pakistan on the basis of which the custom duty and other Government dues as prescribed under the relevant Statutes were to be charged and recovered from the importers. The Government of Pakistan terminated the contract on 12

[94] [1993] Llyod's Rep. 455 (UK: Harbour Assurance vs. Kansa).
[95] [1998] 4 All ER 570 (UK: Westacre Investment vs. Jugoimport).

December 1996 which the SGS accepted on 23 December 1997, but with the reservation of its legal right. SGS initiated litigation before Swiss Courts which it lost till the highest forum. Pakistan filed an application before a local court for referring the dispute to arbitration as per the contract. During the pendency of that application, SGS initiated ICSID arbitration proceedings. Later, SGS requested the Pakistani court for stay of proceedings keeping in view the ICSID tribunal proceedings. The trial court as well as the High Court rejected the request. Both the parties appealed to the Supreme Court. In 2002, the Supreme Court stayed the ICSID tribunal proceedings by an interim order and restrained both the parties from pursuing the matter further till the disposal of their appeals. While the proceedings before the tribunal were still pending, the Supreme Court accepted the appeal of Pakistan and rejected that of SGS. The court ruled that because the Washington Convention was not incorporated by Pakistan in its municipal laws, it could not be relied upon and that the parties were bound to go for arbitration in Islamabad according to their express agreement. Later, the tribunal passed an order directing Pakistan not to pursue its contempt application before the Supreme Court of Pakistan. The tribunal decided that while it has jurisdiction to hear claims arising out of Pakistan-Switzerland BIT, it lacked jurisdiction to hear claim arising from the contract. After this decision, the parties settled the matter.

Both the decisions attracted wide spread academic discussion. Commenting on Hubco, one commentator argued that the criticism focused on four aspects. First, the doctrine of separability (or severability) was not properly appreciated. Second, the allegations of corruption and illegality pertained to a separate agreement which was not relevant to the arbitration agreement. Third, the allegations of corruption and illegality were mere assertions and that the tribunal was competent to investigate them. Fourth, the court's intervention could have been only after the award was made[96]. Some comments were very harsh. For example, one argued that in Pakistan 'international arbitration is considered more risky than advantageous due to

[96] Ibid 66

interventionist approach of the local courts'...[s]uch behavior shows that there is an inherent distrust amongst the Courts of Pakistan [...][97]. Another commentator, in the opening lines of his paper, while appreciating the global festivities on the occasion of the fortieth anniversary of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1998, argued that 'in our enthusiasm we must not forget that there remains a great deal to be done. Nowhere is this more evident than in a decision of the Pakistan Supreme Court released in June of last year [2000]'[98].

In a paper, Justice Saqib Nisar referred to international criticism on both cases[99]. His first reference pertains to a paper presented in a 2001 conference in New Zealand. The paper argued that the Pakistani judiciary has set its face against the international arbitration. Justice Nisar's second reference was to a 2003 Asian Foundation paper for the Asian Development Bank, which argued that the Supreme Court essentially restricted the freedom of investors to choose how to resolve disputes. Justice Nisar offered what may be called a reply to those comments, arguing that the criticism is unduly harsh as the post-*Hubco* jurisprudence shows no deviation from the case decided earlier. He maintained that the *Hubco* had its own peculiar facts on the basis the majority formed its opinion. Justice Nisar, however, did not discuss the doctrine of severability, a key aspect of the case, on which the minority judgement was based and which is supported by case law from other countries as well (for example, the English case of *Harbour Assurance v. Kansa* ([1993] 1 Lloyd's Rep. 455, and *Westacre Investment v. Jugoimport* ([1998] 4 All ER 570)[100]. Justice Nisar specifically commented on SGS, arguing that its stance was obviously self-contradictory as it wanted arbitration

[97] Ahmad, Naima (2016) 'Pakistan's Case with Arbitrability', available at http://courtingthelaw.com/2016/02/08/commentary/pakistans-case-with-arbitrability-2/ accessed 28 Aug. 19.
[98] Ibid 7
[99] Nisar, Saqib Justice (2019) 'International Arbitration in the context of Globalization: A Pakistani Perspective', available at <www.supremeCourt.gov.pk/ijc/Articles/8/2.pdf> accessed 30 August 2021
[100] Ibid 68

on its own terms instead of the agreement that required arbitration in Islamabad.

A comment has also come from Justice Umar Ata Bandial (now honourable Chief Justice of Pakistan), who was counsel of WAPDA in the *Hubco*. Justice Bandial argues that the *Hubco* verdict 'dilutes its effect on the extremely important question of the arbitrability of criminal matters'[101]. He cited a contemporary English case in which the effect of doctrine of palpable illegality of a contract on the prospects of arbitrability was considered. The case was *Soleimany v. Soleimany* ([1999] 3 All ER 849. The court argued that where a contract could not be lawfully enforceable that would suffer with what it called palpable illegality. The examples of such a contract would be trading with the enemy, or where robbers would refer their dispute to arbitration. Commenting on the issue of public policy as a ground for refusal, Justice Bandial argued that the courts apply the mandatory procedural safeguards of a contract as a matter of public policy. He further argued that the validity of a contract should not be left for its determination by an arbitrator.

CONCLUSION

The answer to the question posed at the start of this paper now is that the parties should, while entering an agreement for arbitration, consciously attend to the grounds on which recognition and enforcement of an award may be refused. Arbitration starts with the agreement of the parties, which is based on their intention and ends not merely with the making of award but with the successful recognition and enforcement of the award by a court of competent jurisdiction. The clearer the intention of the parties is, the easier the dispute resolution will be. This is possible if the arbitration clause clearly spells out the intention of the parties. But "the drafting of arbitration clause perfection is a relative concept"[102]. The enforcement, however, is

[101] Bandial, Justice Umar Ata (2019) 'Limitations on Arbitrability of Commercial Disputes under Pakistani Law', available at <http://www.supremecourt.gov.pk/ijc/Articles/8/1.pdf> accessed 26 June 2022

[102] Ibid 24

the prerogative of a court, which begins its judicial review with the existence of a valid agreement. If an award is set aside by a competent authority (court), in a state where it was made, its recognition and enforcement is liable to be refused under the New York Convention and the Model Law. What then the courts can do? They need to give their utmost consideration to the intention of the parties. But in the realm of international commercial arbitration, other considerations, in addition to the above, are required, for example, the state legislation on the subject must be in consonance with international norms and rules accentuated in the international Conventions. And the parties themselves must exercise due diligence in drafting the arbitration agreement. The fact that majority of states are parties to the New York Convention itself indicates that a general consensus does prevail as to the institution of arbitration not only as an effective method of alternative dispute resolution but also a means to smooth running of international trade and commerce. However, the need of common methods of implementation along with common interpretation, is also recognised academically in order to promote the objectives of co-operation perceived by the New York Convention[103].

The jurisprudence, particularly, of Pakistan has proved that Pakistani courts have a clear tendency in favour of recognition and enforcement of foreign arbitral award where the parties refuse to execute an award. However, two cases have emerged as exceptions. An analysis of the academic discussion on the jurisprudence generally and on those specific case particularly has proved that the courts lay greater emphasis on the fulfilment of mandatory requirements of a contract as a serious issue of the public policy. It has also proved that the courts think that the question of validity of a contract is not to be left for determination by an arbitrator. It follows that in courts' view it is their inherent duty to check the executive's power of contract within the bounds

[103] Laura M. Murray, "Domestic Court Implementation of Coordinative Treaties: Formulating Rules for Determining the Seat of Arbitration Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" 41 Virginia Journal of International Association (summer 2001), pp 859-921 at 861

of the law. Of great significance, however, is the doctrine of severability that, arguably, appears to have been marginalized. Perhaps, giving the doctrine of severability its due role may not impinge on the public policy issue. The doctrine may greatly help separate an arbitration agreement more efficiently and thereby help encourage recognition and enforcement of an award more effectively.

2. Human Smuggling: A Serious but Constantly Growing Transnational Organized Crime

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Abstract

This research article focuses on the issue of human smuggling as a contemporary transnational organized crime which, despite being a heinous transnational crime and a serious human rights issue, is getting structurally stronger and more established with each passing year. Starting with the problem analysis, it defines and explains the phenomenon of human smuggling from criminal, humanitarian and commercial perspectives. It also highlights some principal reasons for the growth of the enterprise of human smuggling, such as, political and social unrest, violence and persecution carried out in the state of origin, the economic inequalities caused by globalization *&* strict immigration policies and border controls by the developed states. Lastly, while highlighting the main challenges faced by the migrants, the article also mentions some crimes and social evils that flourish along the smuggling routes and the countries of destination.

1. Introduction

Human smuggling – also called alien smuggling or migrant smuggling - is a growing transnational crime that, on the one hand, puts thousands of illegal migrants to unacceptable risks, and, on the other hand, challenges the

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integrity of international borders.[4] It is a highly secretive and illicit activity controlled by organized transnational criminal groups[5] and facilitated by corrupt public officials especially in border police, immigration, embassies and police at ports, who turn a blind eye to such activities in return for bribe.[6] According to different news reports and governmental agencies, the world witnessed a considerable growth in human smuggling across international borders since the 1990s as a result of strict immigration policies introduced by the developed countries,[7] but the subject has gained international prominence in the recent years.[8]

2. The Scale of the Problem

Albeit a very serious issue by its very nature and a huge challenge for the international community, it is difficult to assess the actual size of the problem because it takes place underground and often goes unidentified or misidentified.[9] The clearly distinguishable lines between human smuggling and human trafficking are often confused in the reports of law enforcement and intelligence

[4] "International Office of Migration", The International Office for Migration and People Smuggling, available in http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/ibm/10-IOM-IBM-FACT-SHEET-People-smuggling.pdf

[5] Bhabha Jacqueline, (March 1, 2005). Trafficking, Smuggling, and Human Rights. Migration Policy Institute, para 3-4 http://www.migrationpolicy.org/article/trafficking-smuggling-and-human-rights

[6] United Nations Office on Drugs and Crimes, (2010). Toolkit to Combat Smuggling of Migrants, Pp. 5-8. http://www.unodc.org/documents/human-trafficking/Toolkit_Smuggling_of_Migrants/10-50812_Tool2_eBook.pdf).

[7] Kyle David & Zai Liang, (2001). "Migration Merchants: Human Smuggling form Ecuador and China. Working Paper 43". The Center for Comparative Immigration Studies, University of California, San Diego. https://ccis.ucsd.edu/_files/wp43.pdf

[8] Antonopoulos, G. A. and Winterdyk, J. (2006). "The smuggling of migrants in Greece: an examination of its social organization", European Journal of Criminology, 3 (4), pp.439-461.

[9] Financial Task Force Action, (2011). "Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants", http://www.fatfgafi.org/media/fatf/documents/reports/trafficking%20in%20human%20beings%20and%20smuggling%20of%20migrants.pdf

agencies as well as open sources.[10] According to UNHCR[11] around 123,300 people crossed Mediterranean illegally in 2021 to arrive in Europe with the possibility that many may have died or gone missing on their way. According to some estimates, as of January of 2022 the illegal immigrant population in the US stood at 11.35 million.[12] Regardless of the accuracy or otherwise of the reports that quantify the scale of human smuggling, the fact remains that it is a constantly growing business due to the increasing number of people aspiring to travel illegally to the developed countries.[13] Paradoxically, with the introduction of new measures by States to prevent illegal entry, the criminal groups become more organized as they regularly adapt to such situations.[14]

3. Definition of Human Smuggling

Human smuggling is a recent term linked to the transformation of illegal migration into a commercial enterprise by organized groups, who assist migrants in a coordinated way, in exchange for high monetary gains.[15] Article 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime (2000), defines the smuggling of migrants as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a

[10] Human Smuggling and Trafficking Center, (July 1, 2013). "Human Trafficking Vs. Human Smuggling. Fact Sheet.", http://www.state.gov/documents/organization/226276.pdf

[11] United Nations High Commissioner for Refugees (UNHCR), (February 11, 2015). http://www.unhcr.org/54db82536.html

[12] Britannica ProCon.org, (June 22, 2022). US undocumented immigrant population estimates. Retrieved from https://immigration.procon.org/us-undocumented-immigrant-population-estimates/

[13] Aronowitz Alexis A., (2001). "*Smuggling and Trafficking in Human Beings: The Phenomenon, the Market that Drive it and the Organizations that Promote it."* European Journal on Criminal Policy and Research 9: 163–195. https://link.springer.com/article/10.1023/A:1011253129328

[14] Ollus Natalia, (n.d.). "*Transnational Organized Crime: A Tool for Criminal Justice Personnel. Resource Material"*, No. 62. 31-43. Retrieved from https://www.unafei.or.jp/english/publications/Resource_Material_62.html

[15] Zhang Sheldon X., (2007). Smuggling and Trafficking in Human Beings: All Road Lead to America. Praeger, Connecticut.

State Party of which the person is not a national or a permanent resident".

Smuggled persons are parties, at low leverage though, to the commercial contracts by willingly paying or promising to pay money for the illegal travel to the country of destination.[16] While some illegal migrants seek out smugglers' services, many are tricked by the smugglers/traffickers[17] and may be subsequently exploited at different stages of the travel.[18]All going well, they usually manage themselves after arriving in the final destination. Nevertheless, in many cases when they fail to make payment to the smugglers, they are forced into sex trade or debt bondage and threatened with severe consequences if they speak or complain to anyone about it.[19,20]

4. The Phenomenon of Human Smuggling

Human smuggling is not just illegal transportation of persons from one country to another. It is a complex phenomenon and a lucrative industry which is supported by various market forces and traffickers/smugglers in the countries of source, transit and final destination.[21] Most of the smuggled persons are usually the most disadvantaged in their countries of origin who aspire to immigrate to developed countries for economic reasons. However, refugees/asylum seekers from Syria or those fearing political, religious or ethnic persecution in their home countries see it as a useful tool to travel to safer places seeking international protection. So, human smuggling can be looked at

[16] Iselin Brian and Adams Melanie, (10 April 2003). "*Distinguishing between Human Trafficking and People Smuggling*." UN Office on Drugs and Crime, Regional Centre for East Asia and the Pacific, Bangkok. https://www.embraceni.org/wp-content/uploads/2006/06/Distinguishing[1]1.pdf

[17] Shaw Mark and Mangan Fiona, (July 2013). "Profits and Losses: Illicit economies and emerging patterns of organized crime as obstacles to peace and state consolidation in Libya", United States Institute for Peace (USIP). http://www.usip.org/sites/default/files/PW96-Illicit-Trafficking-and-Libyas-Transition.pdf

[18] Ibid 7

[19] Ibid 10

[20] (n6) 1

[21] Ibid 13

from different angles – a commercial activity, a transnational criminal activity or a humanitarian response.[22]

5. Reasons for the Growth in Human Smuggling

It is difficult to comprehend all factors and patterns behind the enormous growth of the human smuggling industry. However, it can be safely said that political and social unrest, persecution and discrimination in the countries of origin, and conflicts are the main reasons pushing people to move abroad.[23] Those fleeing their countries of origin mostly look for travelling to the countries in which the principles of freedom of expression, democracy, human rights and the rule of law are upheld.[24] Many people from the *Hazara Shia* ethnic community-a minority Shia sect in Balochistan province of Pakistan, for example, are at extreme of risk of being perished at the hands of extremist *Sunni* militants who regularly persecute members of this community.[25] It is impossible for them to get valid visas for other countries or to be granted refugee status straight away by the UNHCR. Therefore, they resort to the services of human smugglers/traffickers who illegally smuggle them to New Zealand or Australia where they can live in peace.[26]

Globalization has resulted in enormous economic growth but it has also bred an ever-widening gap of wealth between countries. The increased global inequality has affected socio-economic and

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[22] John Salt, (2001*). "Trafficking and Human Smuggling: A European Perspective*", International Migration, Special Issue 2000/1, 31-56. http://lastradainternational.org/lsidocs/538%20pdf.pdf

[23] United Nations Human Rights Office of the High Commissioner, 2014, Factsheet 36, http://www.ohchr.org/Documents/Publications/FS36_en.pdf

[24] Parliament of Australia, (February 5, 2013). "Destination anywhere? Factors affecting asylum seekers' choice of destination country". Research Paper no. 1 2012–13

[25] The Diplomat, (April 12, 2019). "*Hazaras Gripped by Religious Extremism in Balochistan,"* https://thediplomat.com/2019/04/hazaras-gripped-by-religious-extremism-in-balochistan/

[26] "We are walking dead – Killings of Shia Hazara in Balochistan, Pakistan". Hazara Asylum Seekers. July 15, 2014.https://hazaraasylumseekers.wordpress.com/category/hazara-persecution/page/2/

political domains in the form of inadequate healthcare and social/public services, poor standards of living, and the maintenance of political power in the hands of a few powerful families in the countries that have failed to show economic progress.[27] This has also led to disappearance of jobs in many third world countries, thus, propelling many to seek escape in the more developed and affluent countries in search of better employment opportunities.[28] There are many 'pull' factors in the developed countries, such as high wages, dual labour markets with shortage of labour for the low level jobs, and the benefits of welfare systems etc. that attract many people from the developing and underdeveloped countries.[29]

With the developed countries tightening their border controls, many of the illegal migrants fall into the hands of smugglers and traffickers. Strict migration policies and border controls in the developed countries, especially in the aftermath of 9/11, based on xenophobic feelings of some local population, popular misperception of the negative impact of immigration flows on employment, and political expediency have triggered the formation of increasingly sophisticated smuggling and trafficking networks[30,31] who have converted irregular migration and asylum to a successful and opportunistic criminal business. Smugglers, exploiting the miserable situation of the migrants, make huge profits by providing illegal services to arrange illegal entry into the destination countries.[32]

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[27] *John R. Barner, David Okech and Meghan A. Camp, (2014). "Socio-Economic Inequality, Human Trafficking, and the Global Slave Trade. Societies," 4, 148–160. www.mdpi.com/journal/societies*

[28] Janie, Chuang (2006). *"Beyond a Snapshot: Preventing Human Trafficking in the Global Economy"* Indiana Journal of Global Legal Studies. Volume 13, Issue 1, Article 5. 136-163

[29] Edward R. Kleemans and Monika Smit, (2014). "*Human smuggling, human trafficking, and exploitation in the sex industry".* In L. Paoli (ed.), Oxford Handbook on Organized Crime. Oxford: Oxford University Press (draft). 1-21.

[30] (n28) 136.

[31] International Council on Human Rights Policy, (n.d.). "*Policy Brief on Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*." http://www.ichrp.org/files/summaries/41/122_pb_en.pdf

[32] Ibid 32

6. Issues (socio-economic, criminal, human rights) Related to Human Smuggling

The smuggled persons take all possible risks including sale or mortgage of their properties to pay the smugglers' fees, which put them and their families in severe financial difficulties.[33] Depending on the routes and transportation methods, they are exposed to a wide-range of real physical risks, including drowning in unsafe boats, suffocating to death in overcrowded truck compartments and ships, and being caught up in the middle of conflicts. When arrested in transit countries, they are often victimized in detention centers for disclosing information about the smugglers and are detained for prolonged periods without any judicial guarantees.[34] There is less exposure to physical risks in smuggling by air, but the smugglers often subject the migrants to provide sexual services or carry drugs to pay for the services rendered by them.[35] They are also exposed to some forms of psychological vulnerability, such as isolation from their families and social network or separation from their country and culture.[36,37]

Human smuggling affects almost every country whether of origin, transit or destination.[38] States are the actual victims of this crime as their economy, international relations and security is adversely

[33] The Effective Administration of Criminal Justice to Tackle the Smuggling of Migrants. Resource Material Series No. 62. Pp. 167 – 180, http://www.unafei.or.jp/english/pdf/RS_No62/No62_20RC_Group2.pdf
[34] Ibid 5
[35] (n6) 8.
[36] International Committee of the Red Cross, (November 21, 2014). "*Efforts to restore family links bring some relief to migrants held in Libya*". http://familylinks.icrc.org/en/Pages/NewsAndResources/News/RFL-brings-some-relief-to-migrants-in-Libya-.aspx
[37] Office of Attorney General, (n.d.). State of California Department of Justice. http://oag.ca.gov/human-trafficking/what-is
[38] United Nations Office on Drugs and Crime (UNODC), (Feb. 3, 2012). Promoting a Criminal Justice Response to Smuggling of Migrants and Trafficking in persons Anchored in Human Rights Approach. A Contribution to the Security and Safety of Migrants. UN/POP/MIG-10CM/2012/08. http://www.un.org/en/development/desa/population/migration/events/coordination/10/docs/P8.United%20Nations%20Office%20on%20Drugs%20and%20Crime.pdf

affected.[39] Like other organized crimes, it undermines the efforts of the law enforcement agencies, adversely affects economic growth, and disrupts the transition to a market economy. It also poses great threats to the management of States' regular migration policies and affects their capacity to protect their borders and regulate migration.[40]

Determined by the laws of supply and demand, human smuggling is a service industry where the market dynamics tend to play a crucial role in the equation. There would be less need for the services rendered by human smugglers if there are low barriers for migrants to overcome during their journey and the need for smugglers becomes greater where the barriers are high.

Strict border control management, with no rescue and life-saving response measures, can lead to migrant deaths as human smugglers easily divert to treacherous traffic routes showing no regard to the safety of the migrants.[41] Thus, States are put under extra financial burden to take more law enforcement measures and/or hire extra personnel. Although States may want to reduce clandestine entry of illegal migrants at ports, it is quite difficult for individual States to do it without international cooperation.[42]

On the recipient side, most of the law enforcement measures are aimed at interdiction of the migrants instead of 'reducing demand for illegal migrants', such as mandatory verification by the

[39] (n16) 8.

[40] Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime: Co-Chairs' Statement (26–28 February 2002). Retrieved from http://www.baliprocess.net/files/ConferenceDocumentation/BRMC1.pdf

[41] Guerette Rob T., (2007). "Immigration policy, border security and migrant deaths: an impact evaluation of life-saving efforts under the border safety initiative". Criminology and Public Policy. Volume 6, No. 2, pp.245-266. http://onlinelibrary.wiley.com/doi/10.1111/j.1745-9133.2007.00433.x/pdf

[42] Koslowski Rey (2008). Global Mobility and the Quest for an International Migration Regime. In Joseph Chamie and Luca Dall'Oglio (2008). International Migration and Development: Continuing the Dialogue: Legal and Policy Perspectives. Center for Migration Studies (CMS) and International Organization for Migration (IOM). http://publications.iom.int/bookstore/free/International_Migration_Development.pdf

employers of the eligibility of the workers. Most of the illegal migrants use the services of remittances agents to send money back home to their families,[43] which raises concerns about money-laundering and financing terrorist activities.[44] They often disturb the local economy and employment markets, as most of them work for low wages without paying taxes. Since they do not have access to public funds and resources, they can engage themselves in criminal activities to support themselves and their families. They are also a source of continuous security concern for many recipient States - illegal migrants from politically polarized and conflicts backgrounds may trigger communal tensions or spread militant beliefs,[45] while many terrorists can make their ways illegally to the countries of destination.[46]

Organized crimes, such as human smuggling, thrive easily in the countries with weak governments.[47] In countries hit by violence or natural disaster, it is often difficult for the governments to exert their authorities.[48] Human smugglers, benefiting from such situations, rapidly increase their activities as there are minimum chances of intervention from the law enforcement agencies or immigration authorities. A good recent example is the unrest in Libya and the general instability in North Africa and Sahel, which

[43] Wuebbels Mark, (n.d.). "Demystifying Human Smuggling Operations Along the Arizona-Mexican Border", Pp. 25-27, available in http://traccc.gmu.edu/pdfs/publications/human_trafficking_publications/wuebbe01.pdf

[44] Maimbo Samuel Munzele, (2004). "The Regulation and Supervision of Informal Remittance Systems: Emerging Oversight Strategies. Seminar on Current Developments in Monetary and Financial Law." Retrieved from https://www.imf.org/external/np/leg/sem/2004/cdmfl/eng/maimbo.pdf

[45] Graycar Adam & Tailby Rebecca, (August 14, 2000). People Smuggling: National Security Implications. AUSTRALIAN INSTITUTE OF CRIMINOLOGY http://www.aic.gov.au/media_library/conferences/other/graycar_adam/2000-08-smuggling.pdf

[46] McGee Sibel, Joel Michael, Edson Robert, (2009). "Mexico's Cartel Problem: A Systems Thinking Perspective. Applied Systems Thinking Institute, Analytic Services, Inc." Retrieved from http://www.anser.org/docs/asyst-doc/Mexican_Cartels.pdf

[47] Bagley Bruce, (2005). "*Globalization and Latin American and Caribbean Organized Crime. In Mark Galeoti"* (Ed.), (2005). Global Crime Today: The Changing Face of Organized Crime. Routledge, Taylor & Francis, London.

[48] (n6) 98.

have resulted in an unprecedented flow of illegal migrants to Europe in recent years.[49]

Human smuggling promotes several other parallel crimes such as forging of documents, prostitution, theft, fraud, and drug trafficking,[50] and erodes social values. More and more people become part of the smuggling chain as it fetches good and easy money.[51] Different layers of corrupt public officials including immigration directors and visa-issuing authorities, border guards or airports staff can be involved in the smuggling business.[52] Police officers, prosecutors, judges and other public officials in many countries are reportedly being bribed with the goal to avoid proper investigation, prosecution and get favourable court decisions.[53] The smugglers sometimes coordinate their activities with other criminal groups (e.g. with drug cartels in case of US-Mexico border) to benefit from their safe smuggling routes. The overall effect of such activities is the development of black-market economies along the 'illegal migration' routes, and the increase of many social evils and crimes.

The effects of human smuggling do not end upon the arrival of illegal migrants in the country of destination. They are confronted with many unexpected challenges upon arrival into the desired destination. Most of them live in unhygienic conditions and have no access to the healthcare services, which

[49] Global Initiative against Transnational Organized Crime, (2014). Smuggled Futures The dangerous path of the migrant from Africa to Europe. http://www.globalinitiative.net/download/global-initiative/Global%20Initiative%20-%20Migration%20from%20Africa%20to%20Europe%20-%20May%202014.pdf

[50] (n6) 46.

[51] Johnson Scott, (August 10, 2014). "Busy "Pipeline" Migrant Route Makes Texas Town Hub for Human Smuggling. Easy highway access and a frontier lawlessness has transformed Falfurrias". National Geographic News. http://news.nationalgeographic.com/news/2014/08/140810-immigration-minors-smuggling-central-america-texas/

[52] United Nations Office on Drugs and Corruption (2013). "*Corruption and the Smuggling of Migrants."* http://www.unodc.org/documents/human-trafficking/2013/The_Role_Of_Corruption_in_the_Smuggling_of_Migrants_Issue_Paper_UNODC_2013.pdf

[53] ibid 22

expose them to various health problems.[54] They face continuous discrimination, exclusion, exploitation and abuse,[55] which makes it difficult for them to integrate in the community.[56] The separation from family with almost no possibility of coming back for many years, place them and their families under a considerable emotional and psychological stress. There are reports of children of illegal migrants ending up using drugs, family breakdowns and break-ups, and weakening of social ties etc.[57] In case of migration by a whole family, the children are also affected by the education system in the destination country as it is not tailored to their needs and they are often stigmatized as illegal migrants which affects them psychologically.[58]

7. The Characteristics and Modus Operandi of Smuggling Organizations

The routes and *modus operandi* of the smuggling operations depend on the geographical challenges, the location of the operation, nationalities of the smuggled persons, and the history of smuggling in the relevant areas.[59] The smugglers accomplish their business by avoiding immigration check-points in the countries of transit and destination or by deceiving, through forged documents, or involving, by paying bribes, the immigration authorities.[60] The potential illegal migrants usually want to go to

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[54] Arslan Gökçe, (2013). "Migrant Smuggling – The Impact of the Turkish Highway to Europe". Thomson Reuters. p. 1 Retrieved from http://accelus.thomsonreuters.com/sites/default/files/GRC00714_MigrantSmuggling_TurkishHighway.pdf

[55] Ibid 23

[56] Levinson Will , (January 22, 2014). Illegal Immigration: Let's begin integrating – rather than ostracizing the U.S' illegal migrants. Point of View, para 1. Retrieved from http://www.bbnpov.com/?p=1393

[57] D'Emilio, A.L., B. Cordero, B. Bainvel, C. Skoog, C., D. Comini, J. Gough, M. Dias, R. Saab, & T. Kilbane, (2007). "*The Impact of International Migration: Children left behind in selected countries of Latin America and the Caribbean"*. Division of policy and planning, UNICEF, New York. p. 9. http://www.childmigration.net/UNICEF_2007

[58] Illegal Immigration and Education, (November 7, 2012). The National Law Review, para 4, http://www.natlawreview.com/article/illegal-immigration-and-education

[59] Ibid 42.

[60] (n33) 167.

those countries, which offer favourable conditions to fulfill their migration goals. The network of human smugglers in the countries of origin provide them with information about different countries, explain different modes and aspects of the journey including travel costs, connect them to their friends or communities, and promise to help in accommodation, healthcare support, and employment etc. upon arrival in the destination countries.[61]

Human smuggling can be carried out in different ways, ranging from academic institutes bringing in fake students[62] and families inviting fake tourists, to low level smugglers belonging to the same ethnicities or a loose chain of smugglers in different locations who pass on the smuggled persons from one to the other.[63] Petty smugglers with simple operational capacities may offer low-cost services, which could be extremely dangerous to the health and life of the migrants. The more complex and organized groups of smugglers involve an assortment of people offering illegal services at various stages. According to Ko-lin, the big chain of human smugglers resembles a dragon, which though lengthy in creature, has all its organic parts tightly linked.[64] Small scale entrepreneurs provide transportation while some agents supply various basic services such as shelter and food. The big networks of smugglers also provide complex products such as forged travel and identity documents, coaching with immigration interviews, and links to employers and immigration lawyers against a large initial down-payment.[65] They adapt their moves according to the changing situations on the ground and at the international borders or ports. Sometimes the initially planned

[61] Bilger Veronika, Hofmann Martin *&* Jandl Michael (2005). "*Human Smuggling as a Transnational Industry: Evidence from Austria*". Retrieved from http://www.net4you.com/jandlftp/Human_Smuggling.pdf

[62] The Pie News, (June 24, 2014). "UK: Exam fraud fallout hits 57 private colleges, 3 unis". http://thepienews.com/news/57-colleges-suspended-45000/

[63] Neske, Matthias, and Jeroen Doomernik (eds.), (2006). "Comparing Notes: Perspectives on Human Smuggling in Austria, Germany, Italy, and the Netherlands—Cluster Introduction." International Migration 44(4): 39–58. http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2435.2006.00379.x/pdf

[64] (n31) 20.

[65] (n31) 21.

chain of smugglers is broken *en route* (due to policing operations for example), and other individuals or groups take over the operation.[66]

There are no fixed routes for human smuggling, but a few common ones amongst others are: i) South-North America (by land), ii) Asia-Central Asia-Russia–Western Europe, iii) China/Philippines/Asia–Indonesia–Australia (by sea), and iv) Middle East/Turkey/North Africa–(Libya/Algiers)–Italy/Greece/Spain (by land and sea)[67].

CONCLUSION

Human smuggling is a highly profitable and organized transnational criminal business run by underground criminal groups. Though it puts thousands of humans' lives in risky situations and challenges the integrity of international borders, it is still a constantly growing business due to the increasing number of people aspiring to travel to the developed countries due to poverty, political instability, discrimination and persecution, and conflicts in the countries of origin. Quantification and verification of data about human smuggling is very difficult as the crime takes place underground. Illegal migrants are law offenders and are somehow partners in the crime, but they often become victims as the smugglers have no regard for human suffering. Upon arrival in the destination countries through illegal ways, the sufferings of most of the migrants continue which put them under severe physical and psychological stress for many years. Although they contribute to the improvement of the financial conditions of their families and communities back home, they adversely affect the local employment markets and raise considerable security concerns in the country of destination. Human smuggling, a serious crime in

[66] (n8) 439.

[67] Gaziarifoglu Yasemin, (2012). "Risk Factors of Smuggling of Migrants by Land. RTM Insights", 24. http://rutgerscps.weebly.com/uploads/2/7/3/7/27370595/riskfactorsofsmuglingofmigrants_rtminsights24.pdf

itself, promotes many other crimes and distorts social values along the smuggling routes and the destination countries.

3. Misconception About Immunity of Judiciary in Pakistan–An Analysis

NIAZ MUHAMMAD KHAN[1]

The Judicial Immunity has remained a widely discussed issue in Pakistan for many years. The discussion on the topic has created confusion not only for a lay man but experts on law have also been misled. The misleading aspect of the issue is as if Judiciary has been exempted from culpability of law and is immune from accountability. The terms like 'sacred cow' have been used for Judiciary in order to give an impression as if Judiciary cannot be brought before court of law being not susceptible to process of law and thereby violate the concept of rule of law. This discussion has taken a new turn when recently the Supreme Court of Pakistan in a judgment of *Gultiaz v Registrar Peshawar High Court and others*[2] ruled that no writ can be issued to a High Court or Supreme Court both in judicial and administrative matters leading to an impression as if the judgment has extended judicial immunity to superior judiciary before courts of law. One such write up in the form of a research paper has been written by a very learned teacher of a university in Pakistan namely Professor Muhammad Munir[3]. The said paper has thrashed out the history of different judgments of superior courts and has built up a case that how superior courts in Pakistan had been changing their stance over the years by holding that administrative/legislative actions of Superior Courts were subject to judicial review or not. A list of such cases with divergent views has been cited. The said list is reproduced below.

Muhammad Mohsin Siddiqi v Government of West Pakistan[4]

Abrar Hassan v Government of Sindh[5].

[1] The author remained a Judicial Officer in District Judiciary of Khyber Pakhtunkhwa and currently is Registrar Supreme Appellate Court Gilgit-Baltistan

[2] PLD 2021 SC 391

[3] Judging the Judges: Judicial Immunity in Pakistan published in Review of Human Rights Vol.6, No.1, Winter 2020

[4] PLD 1964 SC 64

[5] PLD 1976 SC 315

Malik Asad Ali v Federation of Pakistan[6]

Wukala Muhaz Barai Tahafaz Dastoor v Federation of Pakistan[7]

Asif Saeed v Registrar Lahore High Court[8]

Muhammad Iqbal v Lahore High Court[9]

Muhammad Akram v Registrar Islamabad High Court[10].

The said paper concluded that those employees or one judge victim of *Muhammad Akram* Case *supra* might not be compensated due to the overruling of said judgment in *Gultiaz* case *supra* which does not appear to be fair to the learned writer[11].

The learned writer has touched a topic which needs to be further debated in order to set the record right regarding immunity of judges and judiciary. I, with great respect for the learned Professor, would like to comment on his paper as per my understanding of the issue. The purpose of present paper is to clarify that how people including bench, bar and teachers of law have been favoring one view or the other which resulted in the form of judgments cited above over a period of almost 60 years and it appears that this confusion still exits and may lead to continuation of the trend of overruling the latest view. How this paper of mine is different and how can it stop the ongoing divergence on the issue in legal circles? This paper would strive to surmount the difficulty not from the intrinsic words used in the relevant provisions but from extrinsic sources like history of exemption of superior courts from writ jurisdiction which has never been approached from this angle so far as my knowledge goes. Another approach of this paper would be to highlight the kinds of jurisdictions under constitution and laws and difference between different jurisdictions. As a first step the history of Article 199(5) of the Constitution of Islamic Republic of Pakistan

[6] PLD 1998 SC 161
[7] 1991 MLD 2546
[8] PLD 1999 Lahore 350
[9] 2010 SCMR 632
[10] PLD 2016 SC 961.
[11] Ibid 3

1973, is to be traced which will help in understanding that why Superior Courts are exempted from this jurisdiction. It should be borne in mind that the divergent views of superior courts in Pakistan listed above pertain to susceptibility or otherwise of superior courts to Article 199 and not to any other law.

1. Whether non susceptibility to a particular forum or to a particular jurisdiction can be termed as immunity to law and legal process?

The exemption of superior courts from the purview of Article 199 of the Constitution of Islamic Republic of Pakistan 1973, does not mean that Superior Courts or judges are immune from culpability in law or not amenable to process of law. The legal system has raised multiple jurisdictions and different laws and all persons are not subject to all laws and every jurisdiction. For example, all the persons in employment of different bodies cannot be redressed in Service Tribunals and are not subject to their jurisdictions. This does not mean that their employers are immune from process of law. Moreover, it is assumed that most of these employers cannot be made subject to jurisdiction of Superior Courts under Article 199 of the Constitution. In order to get a particular person amenable to a jurisdiction we will have to first read the provision of law and if that person falls within the defined scope, then he is subject to that provision, otherwise not, regardless of any express ouster like Article 199(5) of the Constitution. But this never means that those persons who are not subject to a particular jurisdiction are immune from legal process. If we read Article 199, we will find that only those persons are subject to this jurisdiction who are performing functions in connection with affairs of the Federation, a province or a local Authority. This definition itself ousts many citizens from its purview. And if the wordings of definition brings some one within its scope, then the framers of law may expressly oust someone from that definition, keeping in view the nature and purpose of jurisdiction and scheme of law. The purpose and scheme of ouster of Superior Judiciary from the jurisdiction of Article 199 shall be dealt with in detail in later part of this paper.

There are number of special laws and courts for only those special persons who qualify the definition of that special law. If we go further deep into the common law system, we will find that a matter may be subject to both civil and criminal jurisdiction and decision of one jurisdiction has no impact on other jurisdiction. The example of famous American case of *O.J.Simpson* [12]who was acquitted in criminal trial for murder but civil case was decreed against him. The educated people of USA could not understand this scheme of law and this case was a hot topic for years to follow that how one court acquitted the accused and the other court decided against him[13]. Though this was a case not of susceptibility to criminal courts but the difference of standard of proof in criminal and civil courts of the same occurrence. The purpose of citing *O.J.Simpson* case is to highlight the complexity of judicial system that even acquittal under one jurisdiction does not mean exoneration from another available jurisdiction. Now we are to see whether executive orders passed by a High Court can be made subject to any other jurisdiction if not to Article 199? The answer is that the Service Tribunals constituted under Article 212 of the Constitution have the jurisdiction to examine these orders if passed against civil servants employed in the courts. The judicial officers of subordinate judiciary and ministerial staff of subordinate judiciary are civil servants and all administrative orders passed by a High Court relating to the terms and

[12] The People of the State of California v. Orenthal James Simpson [1995] was a criminal trial in Los Angeles County Superior Court in which former National Football League (NFL) player, broadcaster and actor O. J. Simpson was tried and acquitted for the murders of his ex-wife Nicole Brown Simpson and her friend Ronald Goldman. The pair were stabbed to death outside Brown's condominium in the Brentwood neighborhood of Los Angeles on the night of June 12, 1994. The trial spanned eleven months, from the jury's swearing-in on November 9, 1994. Opening statements were made on January 24, 1995, and Simpson was acquitted of both counts of murder on October 3 of the same year, despite overwhelming forensic evidence against him. The trial came shortly after the 1992 Los Angeles riots, and it is agreed that, controversially, the defense capitalized on the anger among the city's African-American community towards police to convince the majority-Black jury to acquit Simpson. The trial is often characterized as the trial of the century because of its international publicity, and has been described as the "most publicized" criminal trial in human history.

[13] ibid

conditions of these employees are examined and reviewed by these tribunals. These tribunals mostly consist of serving/retired judges of High Courts, members of subordinate judiciary and some executive officers.[14] This clearly suggests that High Courts are not immune from the process of law.

2. Why Superior Courts have been excluded under Article 199(5) of the Constitution of Islamic Republic of Pakistan 1973.

Under Article 199 (5) of the Constitution of Pakistan, 1973 the following five types of orders are issued by a High Court to a person (i) directing him not to do an illegal act (ii) directing him to do a legal act (iii) to declare any act without lawful authority and of no legal effect (iv) directing a person in custody to be brought before it (v) directing a person to show under what authority he holds an office.[15]These five orders are of the nature of prerogative writs used to be issued by King. Though initially the writs were only a written command issued by person in authority and "tested" or sealed by him in proof of its genuineness. The King's writ, soon after the Norman Conquest and the establishment of a strong, centralized monarchy, swallowed up, as it were, all the rival and inferior writs; and when people spoke of a "writ" they soon thought exclusively of the King's writ, just as a "shilling" came to mean exclusively a King's shilling, and a "chancellor" or "judge" (though other authorities had chancellors and judges) meant, unless the contrary was stated, the King's Chancellor, or one of his judges.[16]The story of evolution of writs is long one spreading over almost half a century. The development of these writs into modern form passing through different era is dealt with in the journal[17]. But to cut it short these writs became famous under the names of *prohibition, mandamus, certiorari, procedendo, habeas corpus and quo*

[14] The Punjab, Sindh, The Khyber Pakhtunkhwa and Baluchistan Service Tribunals –The Punjab, Sindh, The Khyber Pakhtunkhwa, Baluchistan Subordinate Judiciary Service Tribunals
[15] Article 199 of the Constitution of Pakistan 1973
[16] Yale Law Journal, Volume XXXII, April 1923, No 6
[17] Yale Law Journal, Volume XXXII, April 1923, No 6

warranto. These prerogative writs then became part of legal system of India being under the rule of British empire. The powers of issuance of these writs were given gradually to Chartered Supreme Court at Calcutta[18] and then Chartered High Courts in India. The first High Court of the nature in present Pakistan was High Court of Judicature at Lahore raised by its letters patent in 1919.[19]Under these letters patent the High Court of Judicature at Lahore was given the powers to issue almost all the writs with their original names in vogue in England. To whom these writs were to be issued and who were exempt was not mentioned in these Letters Patent nor did rules explain this aspect[20]. But the courts used to issue writs only to those who were well known through development of jurisprudence on the subject in England. These were to be issued to inferior courts or known persons only[21]. It is also a matter of common sense that how King could issue writ to himself and for that matter the delegate of these prerogative writs could not issue writ to himself. Approaching this aspect of judicial authority issuing order/writ from another angle it is well known Latin phrase of dispensation of justice that no one can be a judge in his own cause[22].Under this phrase an issuing authority cannot issue command to himself. The High Court or Supreme Court for that matter is one entity irrespective of number of judges. Issuance of command to one judge is issuance of command to whole High Court or Supreme Court.[23] Similar is the case of federal or provincial government who are one entity and if any order/notification is issued by one ministry it is on behalf of whole government concerned. The internal working of such entities is performed by an individual or committee on behalf of whole entity under the delegation of powers or rules of business. In the case of High Courts in

[18] The Regulating Act of 1773 and Charter of 1774

[19]Letters Patent Constituting the High Court of Judicature at Lahore, for the Provinces of the Punjab and Delhi, Dated the 21st March, 1919.

[20] Rules For the Issue of Writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari framed under Clause 27 Of the Letters Patent

[21] Yale Law Journal, Volume XXXII, April 1923, No 6

[22] Nemo judex in causa sua

[23] Asif Saeed v Registrar Lahore High Court PLD 1999 Lahore 350

Pakistan, for instance, the executive and administrative business is performed either by committee of all judges or administration committee or one administration judge on behalf of the High Court under the Rules of business[24]. How then, a judge of High Court can be expected to issue writ against himself? As discussed above the known writs under known names were made part of chartered High Courts of India and there was no need of detailed rules or exceptions as to who were subject to these writs. This legislative tradition continued in Constitution of India[25] and Pakistan 1956[26]. But for the first time in Pakistan the well-known names of writs were done away with and instead different orders (without known names) fully defining their respective scopes were incorporated[27] and the same trend continued in the latest Constitution of Pakistan[28].The reason for this shift in legislation, it appears, was the evolving era where statutes gradually replaced the common law traditions. With this new tradition the specific wordings attributed to particular orders (not with known names) it became legislative necessity to oust the superior courts from the ambit of these orders and in Pakistan it was for the first time in Article 98(5) of Constitution of 1962 which continued in the form of Article 199(5) of the Constitution of 1973.This ouster was nothing new but continuation of old tradition. Now this background would help us in deciding which one of the two opinions as to amenability of administrative/legislative orders of Superior Courts in writ jurisdiction is correct. In fact, the issue mainly revolved around the judicial review of matters of appointment of employees of Superior Courts under Article 208 of the Constitution. Any aggrieved employee has no other special forum for redressal unlike judicial officers and employees of subordinate courts for the reason that they are not civil servants within the meanings of respective Civil Servants Acts[29]. The

[24] Chapter 10 Part A of Volume V of Rules for the Disposal of Executive and Administrative Business of Lahore High Court as applicable to almost all the High Courts in four provinces.
[25] Article 226 of the Constitution of India
[26] Article 170 of the Constitution of Pakistan 1956
[27] Article 98 of the Constitution of Pakistan 1962
[28] Article 199 of the Constitution of Pakistan 1973
[29] Registrar Supreme Court of Pakistan Islamabad v Wali Muhammad PLD 1997 SCMR 141

remedy lies in providing a judicial forum for redressal of their grievances pertaining to the terms and conditions of their service and not in twisting Article 199 in their favor. Same is the case of legislative, consultative authority of the High Courts/Supreme Courts. As a general law every right has a remedy[30]. This aspect needs further inquiry as to which forum can be approached for remedies when no special forum is available. Can forum of general jurisdiction be resorted to or not? But no entity is immune from legal process as is general perception. It is also clear that non availability of any forum is no justification for making superior courts amenable to Article 199 of the Constitution of Pakistan. This aspect is elaborated in *Gultiaz* case *supra* by referring to *Ikram Chaudhery and Others v Federation of Pakistan & Others* (PLD 1998 SC 103). Otherwise too, the writ jurisdiction is summary in nature and is not substitute of regular legal proceedings. This jurisdiction is discretionary and extraordinary in nature and is issued only when extraordinary circumstances are there and there is no need of further evidence and no other adequate remedy is available[31]. Non susceptibility to this extraordinary jurisdiction cannot be termed an immunity.

3. Judicial Immunity in other jurisdictions.

In the paper of learned Professor three foreign jurisdictions have been discussed i.e., UK, USA and India to highlight that to what extent Judiciary in these jurisdictions are immune. But the leaned writer with due respect has not appreciated that the issue under discussion is not of immunity but as discussed above non amenability to a particular jurisdiction. For the purpose of present discussion, a judgment of Supreme Court of India referred to in the said paper is relevant[32]. As per this judgment administrative orders of High Court are subject to writ jurisdiction of High Court. Now we are to see whether this judgment or recent judgment of Supreme Court of Pakistan in *Gultiaz* case *supra* is sound. As discussed above the approach of

[30] Ubi jus ibi remedium

[31] Dr Imran Khattak v Ms. Sofia Waqar Khattak, PSO to Chief Justice 2014 SCMR 122- Aftab Ahmed Khan v Muhammad Ajmal 2010 PLD SC 1066

[32] High Court of M.P v Mahesh Prakash and others, AIR 1994 SC 2599

this paper is not restricted to narrow rules of literal interpretation but going deep into the whole scheme of writs in historical perspective and known traditions. The Indian Judgment is the result of literal approach because Article 226 of Indian Constitution concerning writ jurisdiction is loosely worded in traditional style only mentioning the names of writs without any definition/explanation as was the case in Pakistan and joint India prior to 1962 Constitution. It is highlighted above that why in the Constitution of Pakistan, 1962 the traditional names of writs were substituted by orders with definitions and also exclusion clause to persons not subject to this jurisdiction. The Indian Judgment fell in error by declaring High Court subject to writ jurisdiction by following literal rule as there is no definition of writs nor exclusion clause in Article 226 of Indian Constitution. Had the approach been holistic the error could have been avoided. The anomaly of this judgment is apparent in the judgment itself when the concerned High Court challenged the decision of High Court on judicial side in the Supreme Court of India and it became an enigma that the Registrar of High Court is to defend judicial verdict of his own High Court or administrative order of his High Court. Paragraph 14 of this judgment is of worth perusal which is reproduced below

> *"14. The order that the first respondent challenged in the writ petition filed by him before the High Court was an order passed by the High Court on its administrative side. By reason of Article 226 of the Constitution it was permissible for the appellant to move the High Court on its judicial side to consider the validity of the order passed by the High Court on the administrative side and issue a writ in that behalf. In the writ petition the first respondent was obliged to implead the High Court for it was the order of the High Court that was under challenge. It was, therefore, permissible for the High Court to prefer a petition for special leave to appeal to this Court against the order on the writ petition passed on its judicial side. The High Court is not here to support the judicial order of*

> *its Division Bench passed but to support its administrative order which its Division Bench set aside. We find, therefore, no merit in what may be termed the preliminary objection to the maintainability of the appeal."*

It can be easily understood that what the same High Court will do in such situation in defending judicial verdict or administrative order. Further who decided in the High Court whether to defend her judicial or administrative order before the Supreme Court and who directed the Registrar to defend the administrative order and not judicial order? Whether it was the Chief Justice or full court or any committee of judges who instructed Registrar to defend administrative order and not judicial order. Arguably if it was allowed to do so then High Court was supposed to defend her judicial order in preference to administrative order. Whatever the case might be it is a paradox of highest degree and cannot be resolved except by adhering to long standing tradition that no command can be issued by a High Court to itself. The rationale behind non issuing of command to self is now clear from this example. In *Gultiaz* case *supra* issuance of writ to himself is discussed by referring to a judgment of Supreme Court of Pakistan in the following words

> *"the process involves the rather ludicrous position that judges are called upon themselves to show cause to themselves"33*

Another reason for Article 199(5) of the Constitution of Pakistan excluding High Court and Supreme Court from definition of 'Person' is non issuance of writ to Supreme Court by a High Court. If this exclusion was not there then there was no hurdle in the way of High Court to issue writ to Supreme Court which is against all judicial norms and comity amongst judges of superior judiciary. This aspect of comity amongst judges is also touched in

[33] Mian Jamal Shah v The Member Election Commission, Government of Pakistan, Lahore etc PLD 1966 SC 1

Gultiaz case *supra* by referring to same judgment mentioned above and the relevant part is reproduced below.

> *"Quite apart from the aspect of 'ludicrousness' there are other and more weighty consideration involved, such as the necessity of maintaining a high degree of comity among the judges of the Superior Courts, which could be urged in support of such a provision."* [34]

When an issue arose in another case as to the person to whom writ could be issued under Article 226 the Gujrat High Court instead of following literal approach resorted to holistic approach. The relevant paragraph is reproduced below

> *"Article 226(1) of the Constitution states:- Notwithstanding anything in Article 32 every High Court shall have power, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari, or any of them for the enforcement of any of the rights conferred by Part II and for any other purpose The language of Article 226 is no doubt very wide. It states that a writ can be issued to any person or authority and for enforcement of right conferred by Part III and for any other purpose. However, the aforesaid language in Article 226 cannot be interpreted and understood literally. I cannot apply the literal rule of interpretation while interpreting Article 226. If I take the language of Article 226 literally it will follow that a writ can be issued to any private person or to settle even private disputes. If I*

[34] Ibid

> *interpret the word for any other purpose literally it will mean that a writ can be issued for any purpose whatsoever, e.g., for deciding private disputes, for grant of divorce, succession certificate etc. Similarly, if I interpret the words to any person literally it will mean that a writ can even be issued to private persons. However, this would not be the correct meaning in view of the various decisions of the Supreme Court in which it was held that a writ will lie only against the State or an instrumentality of the State vide Chander Mohan Khanna v. N.C.E.R.T (19 91) (4) SCC 578, Tekraj Vasandhi v. Union of India AIR 1988 SC 496, General Manager, Kisan Sahkari Chini Mills Ltd. v. Satrughan Nishad (2)."*[35]

This judgment is clear manifestation of ignoring words and following tradition for issuance of writ. In Pakistan after Article 98(2) of Constitution of 1962 the detail definition of orders/writs to be passed and exclusions have left little room for error even in following literal rule.

4. Whether judiciary in Pakistan is absolutely immune from legal process?

In the said write up of learned Professor reference has been given to Judicial Officers' Protection Act, 1850 by holding that there is absolute immunity to judicial officers and quasi-judicial officers. The following section from the said Act was reproduced.

"Section 1. Nonliability to suit of officers acting judicially, for official acts done in good faith, and of officers executing warrants and orders .*No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the*

[35] Pummy Harshil Thakkar V State of Gujrat & 3 *https://indiankanoon.org*

time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

The above provision clearly makes the judicial officers and quasi-judicial officers accountable to law. The protection to these officers is qualified. This provision unequivocally protects only those officers who in good faith had belief of having jurisdiction at the time of doing their duty or passing the order complained of. Such type of protection is called qualified immunity. No absolute immunity is available to any judicial officer or quasi-judicial officer in Pakistan under any law. The learned writer while referring to USA and UK has referred to some cases which granted absolute immunity to judges in those jurisdictions[36]. The writer has gone to the extent that due to this absolute immunity judges may not be sued for their wrongful judicial behavior, even if they act for purely corrupt or ulterior motives or malicious reasons[37] But in Pakistan there is no such immunity what to talk of absolute immunity. In the Constitution of Pakistan, the judges of superior judiciary have not been given any sort of immunity at all. But Executive in Pakistan has been given absolute immunity from process of law and all courts in all jurisdictions in exercise of powers and performance of functions of their respective offices under Article 248(1) of the Constitution of Pakistan, 1973. The said Sub-Article is reproduced below.

> *"248. Protection to President, Governor, Minister, etc.—*
> *(1) The President, a Governor, the Prime Minister, a Federal Minister, a Minister of State, the Chief Minister and a Provincial Minister shall not he answerable to any court for the exercise of powers and performance of functions of their respective offices or for any act done or*

[36] Pierson v Ray, 386 U.S. 547 (1967); Stump v Sparkman, 435 US. 349 (1978)
[37] Pierson v Ray, 386 U.S. 547 (1967); Stump v Sparkman, 435 US. 349 (1978)

purported to be done in the exercise of those powers and performance of those functions: Provided that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Federation or a Province."

The constitutional and legal position in Pakistan is that the judges of superior judiciary have been made to follow a code of conduct and violation of which has made them to face inquiry and removal from service through a body known as Supreme Judicial Council.[38]This code of conduct is harsher than Code of Conduct for civil servants in Pakistan. This code of conduct for judges of superior judiciary covers not only performance of judicial and administrative functions but also private life.[39]

The removal of judges in India, US and UK is either through Parliament or impeachment by going through a rigid process. But in Pakistan it is through Supreme Judicial Council consisting of Judges.

Going back to Section 1 of Judicial Officers Protection Act, 1850 it is quite clear that this qualified immunity is form civil litigation and not criminal liability. Whereas all executive functionaries have been given qualified immunity from civil as well as criminal liabilities in many laws.

Some examples are given below.

KPK Local Government Act, 2013—Section 116. Action taken in good faith. ---"No suit, prosecution, or other legal proceedings shall lie against any public servant serving in local governments for anything done in good faith under this Act.

Explanation: The word "good faith" shall have the same meaning as given to it in section 52 of the Pakistan Penal Code."

[38] Article 209 of the Constitution of Pakistan
[39] Code of Conduct issued by Supreme Judicial Council dated 2nd September 2009

KP Zakat and Usher Act 2011—Section 27. Indemnity and bar of jurisdiction. ---"(1) No suit, prosecution or other legal proceedings shall lie against any person for anything in good faith done or intended to be done under this Act or any rule framed thereunder."

Khyber Pakhtunkhwa Public Property Province (Public Property) Removal of Encroachment Act,1977.—Section 16. Indemnity. --

"No suit or legal proceeding shall lie against Government or any authority or person in respect of anything which is in good faith done or intended to be done under this Act."

This legal and constitutional scheme in Pakistan shows that Executive has been given more immunity than judiciary. It was then in the chapter of General Exceptions in the Pakistan Penal Code that a judge acting judicially has been made not liable to criminal liability but again subject to belief in good faith of the powers exercised by him (qualified immunity)[40].

The accountability of judicial officers in exercise of judicial function has been explained by Supreme Court of Pakistan. The relevant paragraph of the judgment of Supreme Court is reproduced below.

> *"However, in cases where judge(s) of the High Court, espouses an opinion that the judge of District Judiciary has exhibited grave incompetence or has misconducted himself in discharge of judicial duty and needs to be warned or proceeded against, the appropriate process is to inform the competent authority on the administrative side through a confidential note addressed to the Chief Justice of the Court, along with copies of the relevant judgment (s), and then leaving it to the discretion of the competent authority to take appropriate action against the judge concerned. This discreet and confidential*

[40] Section 77 of Pakistan Penal Code, 1860

> *processes is consistent with the deliberative character of the judicial system."*[41]

The judicial officers in Pakistan are civil servants under different Civil Servants Acts[42]. They are subject to same code of conduct as one for civil servants and same disciplinary rules as that for civil servants[43].

Here I would like to mention that in all the referred provisions of Constitution and laws of Pakistan in this part of the paper there is no use of the word 'Immunity' but the words used are 'Protection', 'Indemnity' *&* 'Nonliability'. This is another discussion which is relevant and those interested in further elaboration may dig out the jurisprudence and legal consequences of these terms.

5. JUDICIAL OVERRULING

Now we will discuss the fate of those aggrieved of judgment of *Akram* case *supra* as pointed out in the paper of learned Professor about their compensation. This is not a case of first impression when *ratio* of earlier judgment is overruled. Every now and then the superior courts overrule the *ratio* of earlier judgments but the material decision is not changed having attained finality. The decision can only be altered in due course of judicial proceedings in appeals, revision and review etc. but subject to law of limitation. There are many such cases which attained finality and then *ratio* of the decision get altered in some other proceedings. The issue of prospective or retrospective overruling has been a topic in legal and judicial systems, especially in common law jurisdictions, world over[44]. The overruling process is a regular

[41] Miss Nusrat Yasmeen v Registrar, Peshawar High Court, Peshawar *&* Others PLD 2019 SC 719

[42] Punjab, Sindh, KPK, Baluchistan Service Tribunals –Punjab, Sindh, KPK, Baluchistan Subordinate Judiciary Service Tribunals

[43] In Khyber Pakhtunkhwa Province for instance KPK Government Servants (Conduct) Rules,1987 and KPK Government Servants (Efficiency *&* Discipline) Rules 2011

[44] Realist Jurisprudence and Prospective overruling By Beryl Harold Levy Published in University of Pennsylvania Law Review, Vol 109 November 1960, also see "Disturbing the Past and Jeopardizing the Future Retrospective and

feature world over in different legal and judicial systems as part of development of law and jurisprudence which, of course, is a dynamic phenomenon. These overruling include judgments of convictions and executions in criminal matters but could not be reopened due to prospective effect in different systems. If overruling is allowed retrospectively then there would be no end to litigations. Different jurisdictions have adopted different ways to ensure closure of litigation. In Pakistan a settled jurisprudence exists to meet this objective. The principles of *stare decisis* and *res judicata* are the main tools which help resolve the issue of judicial overruling in Pakistan. A balance has been struck between these two competing and supplementing principles in particular context of judicial overruling. The authoritative explanation of principles of *stare decisis* and *res judicata* by the Supreme Court of Pakistan has been made in the following words

> *"There is a distinction in what a case decides generally and as against all the world from what it decides between the parties themselves. Salmond "On jurisprudence", Twelfth Edition, at page 175. Brings out this distinction in these words:*
>
> *"What it decides generally is the ratio decidendi or rule of law for which it is authority; what it decides between the parties includes far more than just this. Since it would be obviously impracticable if there were no end to litigation and if either party to a legal dispute were at liberty to reopen the dispute at any time, the law provides that once a case has been heard and all appeals have been taken (or the time for appeal has gone by) all parties to the dispute and their successors are bound by the Court's finding on the issues raised between them and on questions of fact and law necessary to the decision of such issues. According to this principle, these matters are now*

Prospective Overruling" By Professor Johannes Chan Dean, Faculty of Law, the University of Hongkong.

> *res judicata between them and cannot be the subject of further dispute, but the Court's findings will not be conclusive except as between the same parties.... Third parties not involved in the original case, however, will not be bound nor will either of the original parties be bound in a subsequent dispute with a third party"*[45]

The rationale behind rule of *stare decisis* has been the need to promote certainty, stability and predictability of law. But this never means that this rule is inflexible. The following words of Justice Hamood ur Rehman are very much relevant.

> *"I am not unmindful of the importance of this doctrine but in spite of a Judge's fondness for the written word and his normal inclination to adhere to prior precedents I cannot fail to recognize that it is equally important to remember that there is need for flexibility in the application of this rule, for law cannot stand still nor can we become mere slaves of precedents-------It will thus be seen that the rule of stare decisis does not apply with the same strictness in criminal, fiscal and constitutional matters where the liberty of the subject is involved or some other grave injustice is likely to occur by strict adherence to the rule"* [46]

Such overruling (legislative and of precedents) are regular features both in substantive as well as procedural rules. The case of Akram supra overruled Iqbal case supra and Gultiaz supra overruled Akram case. These overruling are procedural in nature. And procedural overruling does not mean that respondents in Akram case supra had a good case on merits and they require compensation. As discussed above there are cases in which overruling is of substantive laws and aggrieved in such situations stand at a very high pedestal like conviction in criminal cases but

[45] Pir Bakhsh v Chairman Allotment Committee PLD 1987 SC 145
[46] Miss Asma Jilani v Government of the Punjab PLD 1972 SC 139

they are rarely compensated rather their decisions are mostly protected under principles of past and closed transaction and res judicata.

4. Do Judges Need to be Trained on Crisis Management?

HAYAT ALI SHAH[1]

1. INTRODUCTION

I Stumbled across the phrase crisis management in a training conducted for the district judiciary in 2003. I was slow on the uptake as to how crisis management is relevant to Judicial Officers? We have such other departments and institutions in place, who could be reached out in case of emergency, catastrophes and crisis. Nevertheless, it was just two years after the training, while I was carrying out my duties as the District and Sessions Judge Abbottabad, that the horrendous October, 2005 Earthquake accentuated Pakistan's vulnerability to natural disasters. It shattered everything and made every mind inquisitive about the scantiness of crisis management system in Pakistan and lack of governmental attention to the matter. The horrifying incident did not only cost five thousand human lives in district Mansehra and Abbotabad but also a plenty of valuable data and record was lost. We tried to converge on different departments which are expected to be the dab hands in crisis management. Nonetheless to my realization, everyone was so grappling and bent over backwards to hedge themselves that we were left with no option than to rely upon ourselves, put our feet down and to mitigate the loss. The need for an adequate institutional and policy arrangements and a huge public grief resulted in the constitution of the National Disaster Management Commission (NDMC), the National Disaster Management Authority (NDMA), and the passing of the National Disaster Management Ordinance, 2006.[2] It proved to be a *crowning glory* of the catastrophe.

However, the tragedy evoked every department to live on its hump and necessitated an institutional policy of preparedness

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[2] National Disaster Risk Management Framework Pakistan, March 2007

and response to such strokes of ill luck. The judiciary, being the most vulnerable public sector to human induced disasters, felt more dearth of such policies and training. The need was further hungered for after 9/11 terrorist attack and subsequent developments in Pakistan, when a series of attacks on legal fraternity and judicial officers, court staff, family of judges took place on many occasions even in the compounds of courts. It cultivated the need for awareness and training of judges for any crisis situation. Therefore, I advocate the conductance of crisis management trainings to judges and court staff and establishment of a full-fledged mechanism in courts in that regard. I am confident that implementation and further preservation of the said policies will prevent the Justice sector of Pakistan from disasters to a huge extent.

2. Comprehending the Phrase

The Oxford Dictionary defines the term of crisis that it is 'a time of great danger, difficulty or doubt when problems must be solved or important decisions must be made'. Alternatively termed as disaster, UNO defines it as *"A serious disruption of the functioning of a community or a society causing widespread human, material, economic or environmental losses which exceed the ability of the affected community or society to cope using its own resources.*[3]*"* Crisis brings harmful changes in the environmental as well as in the human affairs and its negative impact directly affects the individual, group of certain people and society at whole. In a living society it is easy to constitute a crisis intentionally or unintentionally, but there are various solutions which can justifiably combat the crisis.

3. Types of Crisis

While sorting out the crisis, it can be mainly divided in two categories i.e., natural crisis and man-made crisis. The following is a short description of the both categories:

i. Natural crisis are those which occur without intimation and with very minimum or almost no

[3] Emergency Response Plan Judicial Complex Sirsa, 2014

direct contribution on the part of human beings, such as floods, earthquakes, avalanches, cyclones/storms, droughts, glacial lake outbursts, pest attacks and epidemics. The natural disasters and crisis are difficult to manage and therefore such crisis give a though time.

ii. Man-made crisis are those which occur on the ground of proper planning. It can occur in shape of bomb blasts, terrorist attacks, strike of lawyers, fight between litigant parties in the court and/or other issues that create barriers in the dispensation of justice. There is always an agenda behind such type of crisis.

4. Purpose of Crisis Management training

A typical crisis management training program encompasses the full range of leadership and governance structures designed to prevent, prepare for, respond to, and recover from any threat, emergency, or disaster that could disrupt operations. It includes policies, procedures, plans as well as internal and external outreach strategies along with multi-year strategic planning based on training and capacity building.

Historically Pakistan has been known to be a terra firma of casualties, emergencies and disasters and is exposed to a wide range of natural disaster risks. Geographically speaking Pakistan, India and Nepal are situated on the Indo-Australian plate which, is constantly moving northward and sub-ducting under the Eurasian plate and hence tripping earthquakes in the channel of Himalayan Mountains. Additionally, 56% of the Indus River basin lies in Pakistan which overlays almost 70% of the country's land prone to floods in summer from July to September annually due to heavy monsoon Rains.[4] The regions of Kashmir, Northern Areas and parts of the KP province are particularly vulnerable to landslide hazard. Aside from the young geology and fragile soil

[4] Ibid

type of mountain ranges, accelerated deforestation is a major cause behind increased incidences of landslides[5].

Besides natural disasters discussed above, Pakistan being religiously, ethnically, culturally and linguistically a heterogeneous society has also suffered the human induced disasters in the name of civil conflicts, terrorism and sectarian violence etc. The crisis also includes all other modes which breach the public peace and tranquility and create hindrance in smooth running of the system such as strikes, protests etc.

Purpose of crisis management awareness and training within the courts is to enable judicial officers to respond effectively to a broad array of such potential operational interruptions and crisis. After 9/11 consequent to war on terror and subsequent military operations in Tribal areas of Pakistan, there have been several occurrences (including bomb blast, target killing and suicide attacks) on court staff, judicial officers and even their families and legal fraternity. The shoddier security situation has compelled courts to revisit and enhance critical incident and security procedures to ensure the protection of court assets: people, facilities, and records. Similarly, the earthquake in 2005, and multiple floods and other like incidents underscored the necessity for courts to ensure that essential functions are sustained in the event of a broad array of disruptions and disasters. Moreover, Judges do come across bar strikes or court staff strikes oftentimes and must be prepared and trained to handle all such situations.

5. Crisis Management by a Judge

The role of judiciary in Pakistan, being a pillar to democratic country is the vital one. During any state of crisis, especially the constitutional crisis, judiciary is expected to be a safeguard against state encroachment in the wake of such crisis and thus protect the fundamental rights of citizens, as guaranteed by Constitution. On the other hand how a judge should deal with the

[5] Ibid

natural disasters, emergency or crisis remains a question mark and focal point of various legal institutions across the globe.

Justice sector, like all other departments of state, also experiences crisis on and off which sometimes create unmanageable situations. It harms the social norms and basic structure of a running system and possibly the human lives too which are connected to an organization or system. Crisis always occur suddenly and unexpectedly and lead to a huge loss, therefore, for smooth functioning of the system it is important that every possible step be adopted to eradicate and combat crisis. Generally, all sort of crisis need immediate solution to tackle any issue which becomes the reason of crisis. All events of crises appear suddenly which create high level of uncertainty. Particularly the environment of court must be free from any sort of crisis if it is natural or manmade, because it would not only create hurdles in dispensation of justice but it would also present a gloomy picture of the society. A good team leader/judicial officer should be capable to manage the unexpected and sudden situations which create unmanageable circumstances.

The court is one of the most sensitive public sectors in terms of vulnerability and the nature of services it provides. Its functions make it exposed to a number of controversies and public opinions. Besides all those crisis which an ordinary Public or private sector faces, the courts are prone to many other appalling disasters like camouflage, riot, affray and disturbance of public tranquility and peace due to diurnal disputes in the name of litigation and strikes of bars etc. A myriad of such examples are found in the judicial history of Pakistan.

A judge being a custodian of the court needs to acquire the necessary crisis management Training to deal with such mishaps to crucially perceive what to do and how to act under such threats. Getting trained shall enable a judge to fight tooth and nail by following the prescribed set emergency protocols to minimize the risk and overcome physical injuries. Training shall impart confidence to the responder judge while facing threats and he'll be more assured of his capabilities. Besides moral there

are also some technical advantages of training e.g. consuming safety resources e.g. Fire extinguishers, more efficiently

The most imperative promise to be made during the crisis, especially those of bomb blasts and other terrorist attacks, natural disasters including rainfall, wind, earthquake, floods and affray etc., is the safety of human lives as well as building and structures of the court, so that it is operative and is accessible to public with the routine ease. In order to prevent the building and structure of courts from being the casualty of any disaster, the phenomenon Crisis Management provides a very effective process in the name of "HRVC analysis" abbreviated as "Hazard, Risk, Vulnerability and Capacity."

The potential danger is known as hazard. It usually (if happens) results in disaster or crisis. Risk is the probability of a hazard to occur. It may be of any of the certain categories depending upon the severity i.e. high, moderate and low risk. Vulnerability is the extent to which a certain body (courts for our concern) is exposed to loss, casualties and injuries caused by hazard. While capacity is the potential of the judicial body to mitigate or otherwise prevent the risk.

Technically speaking, risk is directly proportional to hazard and vulnerability while indirectly proportional to capacity id est. Risk of severe loss increases if the court is more vulnerable to hazardous situations whereas by maximizing the capacity of the court and judges to mitigate the potential consequences of any hazard, the risk of harm can be reduced. Hence comes the indispensable need for a judge to acquire the crisis management training. The process of crisis management training or awareness can be channeled into the following stepladders:

5.1. Predictability of Crisis & Collection of Information

The foremost job to be done by a judge, in crisis management, is to identify and analyze how much the court or its structure are vulnerable to any crisis and then to make sure that it endures to function during such crisis. Generally, a judge with its limited resources can't whitewash the disaster in a helter skelter; hence

it's important for him to have awareness and predictability of the danger beforehand and to prepare his 'to do list' accordingly. Awareness and predictability can be acquired by collecting information. However, the information whether beforehand or prompt should be accurate. Crisis could be prevented or managed once occurred, through;

(a) Beforehand information
(b) Prompt information and
(c) Accurate Information

Access to beforehand, prompt and accurate information facilitates the process of decision making in crisis management. Awareness of information creates capability to take precautionary measures at earliest. There are certain situations where a judicial officer can get beforehand information. These include a possible strike by court staff, some unpleasant situation created by a group of lawyers in court premises, decision of a sensitive case, decision against a terrorist or some criminal gang etc. Apart from this, extreme weather can also create crisis. In today modern world, any sort of crises can occur with or without formal warning which can create alarming situations. In this regard prompt and beforehand information of such incidents can provide chances to revoke harmful crises. Another related issue is the accuracy of information. Whether it is justice sector or any other institution, access to accurate information is always equally important.

5.2. Defining Priorities

The second step in the process of crisis management is defining priorities. The topsy-turvy priorities may result in ruining the implementation of response plan. As discussed earlier protecting and preserving human lives should be the top priority of a judge in the time of crisis, tracked by the following;

- Protecting sensitive records and official documents
- Securing assets of courts if possible
- Protecting communication system and Facilities like water supply, electricity etc.

- Protecting the infrastructure, offices and residential site of the building

5.3. Readiness (pre-emptive measures)

When a judicial structure is exposed to hazard, it may result in loss of human lives, injury to human bodies, damage to public property and an obstacle in judicial functions i.e., Litigation.

Judges while acquiring the training, must be taught disaster risk management, encompassing the risk-reduction strategies[6] and taking pre-emptive measures like risk assessments, HRVC analysis, arrangements, trainings and exercises. A judge should always be prepared to face any unpleasant event and must take anticipatory measures rather than locking the barn door after the horse has bolted. The stage of preparedness may be achieved by;

- Ensuring the availability of first aid,
- Securing file cabinets, lockers and other movable items to walls by angle clips,
- Installing hand grips right through for earthquake preys,
- Lodging fire extinguishers with fire alarms.
- Using fire retardant coats for wood vulnerable to fire.
- Installing double action door hinges at halls and auditoriums
- Coating exposed electric wires
- Illuminating Exit signals at passages.
- Renovating ceilings and overcoming falling cement plasters thereon.

The best example coming into my mind in this regard is the response during 1996 bombing in Manchester by the Crisis management team as widely considered to be successful in terms of constituting a crisis control center within 30 minutes. The team was able to establish collaborations between different departments and initiate an expeditious evacuation with less than an hour saving hundreds of lives. The only recognized

[6] Ibid

reason behind such success was considered to be the planning preparedness[7].

5.4. Analysis & Communication

For the sake of getting better solutions for crisis management, all stakeholders should sit together and properly analyze the crisis with respect to its nature, effect and possible solutions or management should be sorted out with consensus in order to reduce the vulnerability posed by a potential crisis.

The process of proper communication should be adopted after having the accurate information and complete knowledge of the crises. It is important to bring such incidents in the notice of seniors and immediate boss for information and guidance as well. The same methodology can be adopted to discuss the same issues with colleague and subordinate staff for the sake of consultation and also getting their opinion for crisis management. It would help to build a result-oriented crises management team.

5.5. Selection of Crisis Response Team (CRT)

The vision and mission of a competent judicial officer is to accomplish the assigned tasks whether it is related to court work or other administrative work such as presiding in general elections or working in crisis management. He must perform as a team leader and must also know the strength of their team. It depends upon judicial officer to prove that he is a perfect team leader and problem solver especially when his team is working in crises management.

The three fundamental Cs required to respond to any disastrous situation are Command, Control, and Coordination. These three factors can be obtained by constituting an institutionalized team in the name of CRT (Crisis Response Team). The successful response of Australia to the Bali Bombings in 2002 was primarily due to the fact that all the team members stuck firmly to the plan

[7] Williams, Bath, & Russell, 2000

with a mission to promise a 'joined up' response.[8] Hence the district and sessions judge of the judicial complex of every district should formulate a crisis management team and assign roles to them accordingly. SOPs should be designed to prescribe role and responsibility of every team member. A database should be developed to maintain records of resources accessible by court for disaster response.

In district judiciary, district and sessions judge enjoys the role of a team leader and therefore it's his responsibility to take charge of the affairs and formulate the crisis management team assign tasks to each member. He may use his loaf and direct the team about the Command, Control, and Coordination and the priorities thereof. He may endorse the operation and get the show on the road. He may also obtain help from other departments which will be explained in following part of this paper. He should make certain team members responsible for obtaining information about the number of people, sensitive documents and other property exposed to incident, making and authorizing reports for allocation of response equipment in accordance with the severity of incidence and priorities drafted by District and sessions Judge thereon, coordinating with all members of team.

Another major role in crisis management is to be played by court security officer who may well be regarded as A Knight in the Shining Armor. The primary duties of court security officer being expert at security matters, depend upon the nature of incident e.g. evacuation in earthquakes or Fire incidents. He has to maintain telephone/radio communication with his security personnel deployed in potentially vulnerable portions of the court building e.g. courtrooms. They will conduct inspection through the CCTVs, magnetometers and x-rays metal detector provided to them on regular basis. They have to establish a uniformed screening policy at the entrance which is systematically applied to every visitor. There must be compulsory additional security training for judges, staff, jurors, and others.

[8] Paul, L. (2005). New levels of responsiveness – joining up government in response to the bali bombings. Australian Journal of Public Administration, 64(2), 31–33.

5.6. Response and Mitigation

A judge must establish quick response strategies in case of crisis. Operationally, the response may include saving lives, treating the injured, creating security zones and restoring critical infrastructures.[9]

Once a disaster happens, the judge must endeavor to minimize the risk at best possible rate. Emergency mock drill/exercises should be conducted. Warning systems and specialized communication systems, must be installed to mitigate the disastrous circumstances. Following steps may mitigate the hazard;

- Notifying occupants of court premises and the residents of immediate area to seek assistance
- In case of Fire, confining it by closing the doors of halls once it's vacated.
- Activating nearest Fire Alarm Restraining occupants from standing near windows to prevent them from shattered glass.

Following problems may occur during response stage that may throw a wrench in the work and against which the judge should be alerted;

- Overcrowding and blockade in exit ways
- Alarm not heard
- Team members getting dubious about responsibilities / response
- Human lives not accounted
- People running towards lifts
- Inconvenience in evacuating disabled Personal.
- Phone and communication issues
- Delay in medical response
- Delay in fire service response
- Delay in the response of security

[9] (McEntire, 2007)

- Liaison miscommunications
- Problems in Command, Control and Coordination

With the risk of any of these issues surfacing, a judge must go the whole nine yards and take all the necessary steps as demanded by the circumstances and severity of the incident. Nonetheless he must have alternative plans in his list for any unseen change of the situation.

5.7. ALTERNATIVE PLANS/CONTINGENCY PLANS

The judicial officer should not put all the eggs in one basket while making strategies for crisis management. There is always a need of contingency planning which is an anticipatory step prior to the occurrence of disaster. The factors like foregoing issuance of resources, personnel, weapons, emergency control rooms, and assignment of tasks, responsibilities and decision guidance/rules, play important role in minimize the risk and maximizing an effective response to emergency. Locking the barn door after horse has bolted doesn't make sense. Contingency planning doesn't necessarily promise an effective response to disaster but it surely enables the responders to deal with problems, e.g. loss of sensitive data, records, administrative files etc. Hence making the contingency planning as a part of routine work will carry weight in any disastrous situations.

The full-fledged crisis management plans are to be adopted mutatis mutandis to establish an effective contingency plan that would include;

I. Scenarios: Considering the nature, geography and architecture of court building, expecting the most likely incident that may happen in the near future e.g. terrorist attacks in frontier areas, cyber-attacks at urban areas, earthquakes in earthquake prone cities and heavy snowfall in Northern Areas.

II. Trigger: Deciding as to what spot the plan triggers. E.g., should the established contingency plan for heavy snowfall will be triggered by heavy rainfall or actual snowfall?

iii. Prescribing who to inform: The liaison should be smartly practiced.

iv. Responsibilities: that brings us to our next important part of the crisis management which is selection of crisis response team and assigning tasks to every member of the team with prescribed stage to be deployed on.

5.8. CO-ORDINATION/LIAISON WITH OTHER DEPARTMENTS

Court must establish an effective liaison with all those departments whose resources and services may prove helpful during crisis. To be effective, court emergency management programs should be multi-disciplined, both internally and externally. This means courts should interface with external other departments, such as;

- District Administration
- Emergency Medical Services e.g., Rescue 1122.
- Meteorological Department
- Red Cross
- Fire Department
- WAPDA
- Armed Forces
- Civil Defense
- Federal Flood Commission
- Police etc.

The judge shall incorporate all facets of court operations, including administration, automation, finance and budget, security, human resources, and facilities management.

5.9. RECOVERY

It means retrieving the pre- disaster conditions. The stage of retrieval begins only when threats to the priorities discussed above ceases to exist. The primary purpose of recovery is to bring back the affected area back to some degree of normalcy.[10]

[10] 'The Five Phases of Emergency, Management', Office of Emergency Managements, San Antonio.

Bringing back courts to same stage where it's conveniently accessible to Public and is suitable for litigation, will serve better as an effective Recovery.

5.10. Re-habilitation

Once a disaster occurred and all the protocols of an effective crisis management as discussed above have been followed and there's still a room for further management, there comes the stage of rehabilitation. It includes resettling the targeted site and to manage the hazard occurred thereof. The court soon after the hazard, besides getting down in the mouth, should lick its wounds and make necessary renovations in order to make court accessible to public and make the litigation processes stay in course. If the original court isn't of such condition to resume the litigation, court should find an alternative location and relocate its proceedings thereon. Where the data and records are destroyed and are obscure, the courts should assist the lawyers by providing them with copies of materials already saved in the courts' systems. Such steps will not only aid attorneys but will also prevent unnecessary postponements of cases, which would have ultimately resulted in further case backlogs.

A judge should also perform following tasks at the state of rehabilitation for a secured future;

- Highlighting mistakes made during crisis management.
- Assembling lessons learnt during crisis management.
- Creating prospective plans for potential future crisis of same nature.
- Calculating the financial impact of crisis and request the government to make reparations thereof.

Conclusion

It is a well-known fact that judiciary is considered as one of the highly esteemed branches of government and is always held in high regards. Nonetheless it comprises of the most imperiled public servants who are between wind and the water, exposed to threats and controversies. Crisis management training is a long-

term investment on a judge which will enable him to deal in such situations with required professionalism.

The pace at which a judge or other responsible person responds is the factor which plays a key role in mitigating the loss. At the same time, the fact should also be absorbed that the responder, after getting a close call during emergency, may experience a broad array of emotions e.g., fear, anxiety, dread, hopelessness and helplessness. Hence, it's quite obvious for a judge or other responsible officer to be in a lather which can be obtained through training him for any such like situations. There can be psychological barriers to his quick and effective response. Furthermore, briefing the terrified people in targeted court premises may prove to be merely preaching to deaf ears. But every cloud has a silver lining. A judge should acknowledge the fact that Fear is an important psychological consideration in the response to a threat and a perceived threat can motivate and assist people take required steps. Hence rather than ruffling feathers to people bearing heebie-jeebies, he should give anticipatory guidance to people and assign them with tasks to do in order to make them feel engaged and overcome fear. A judge should not be over concerned about eliminating people's emotions; he should rather cash their emotions and help them manage their negative feelings by setting them on a course of action. Taking an action during a crisis can help to restore a sense of control and overcome feelings of hopelessness and helplessness. [11]Any member of the team should not rap over the knuckles for not having their assigned tasks accomplished within due time, for it's not an orderly situation. These efforts are not only establishing an atmosphere of peace and trust but morally it is demand of the present day.

I conclude with the words that a judge bearing a high horse in the dominion and custodian of public rights must be trained in crisis management to act responsibly in the gut-wrenching scenes of emergency.

[11] Benight CC, Bandura A. Social cognitive theory of posttraumatic recovery: The role of perceived self-efficacy. Behaviour research and therapy, 42(10), 1129-1148;2004

5. Forced Conversion of Minorities in Pakistan and Legal challenges

AISHA RASOOL[1], KAMRAN ABDULLAH[2]

ABSTRACT

Pakistan, a state established in the name of Islam, is comprised of 96% of Muslim populace and the rest 4% is minority belonging to different faiths, ethos, castes, traditions and religious beliefs. The Constitution of Pakistan 1973 has granted the citizens of Pakistan the liberty and freedom to profess any religion they choose. Quaid-e-Azam Muhammad Ali Jinnah in his presidential address, advocated strongly for a more tolerant state where every citizen would be at liberty to follow his own faith and there shall be no distinction among citizens on the basis of religion. But regrettably, in recent past a huge number of cases have been witnessed in Pakistan, where the minorities of Pakistan are forcefully and coercively converted from their religion to accept Islam. The number of minorities being suffered from involuntary conversion is increasing with the rise in intolerance towards religious issues and in the absence of a strict prohibitory legal provisions. In this regard, the most affected zone in Pakistan is Sindh particularly Thar region including Umerkot, Tharparkar and Mirpur Khas districts, Sanghar, Ghotki, and Jacobabad. Keeping in view this concern, Protection of Minorities Act 2015, was passed by Sindh provincial assembly, criminalizing the forced conversion of minorities. Similarly, another bill was presented in Senate in 2020 which penalized the forceful conversion of minority conversion.[3] This article securitizes the potential challenges posed in the implementation of such laws prohibiting the forceful and involuntary conversion of minorities' religions to Islam. The very recent rejection of Anti forced conversion Bill on 24th August 2022 and the possible contributing

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[3] Protection of the Rights of Religious Minorities Act, 2020

factors are also incorporated in the paper. It also highlights certain constitutional and municipal law provisions including special Laws and also the international treaties ratified by Pakistan which guarantee the freedom to minorities to profess their respective religions. Furthermore, it also analyzes the sanctity of such Acts and Laws prohibiting them in terms of Fiqh and Shariah.

1. INTRODUCTION

The forced conversion happens when a person is subjected to change his religious beliefs by the use of force or pressure, whether physical, emotional and/or psychological. The common practice in vogue for the purpose is to abduct the victim, submit them to force, duress and threats to choose between bearing the abuses or converting.[4] According to the statistics provided by former Vice-Chairperson of the Human Rights Commission of Pakistan (HRCP), Amarnath Motumal, every month more than 20 Hindu girls are abducted and converted forcefully in Pakistan, although exact figures are yet to be known.[5] This state of affairs becomes further grave when associated with big names of religious clerics and Islamic institutions allegedly involved in the act.[6] According to the Amarnath Motumal, "*in the absence of strict legislation to redress such acts the culprit believes that they have performed a religious obligation and will earn a place in Jannah for coercing minorities to convert into Muslims.*", Another voice raised in this regard is of PMLN politician Haresh Chopra who calls out the abduction and forced conversion of Hindu and Sikh girls as a business in Pakistan done by organized gangs.[7]

[4] Matthews, J.R., 1995. Major Greenwood versus Almroth Wright: contrasting visions of" scientific" medicine in Edwardian Britain. Bulletin of the History of Medicine, 69(1), pp.30-43.

[5] The News International (2010). "Hindu girls abducted every month

[6] *Javaid, Maham (18 August 2016).* "State of fear". Herald (Pakistan). Retrieved 13 February 2021.

[7] "Abduction of Hindus, Sikhs have become a business in Pak: PML MP". Times of India. *28 August 2011.* Retrieved 13 February 2021.

2. Reported cases of Forceful Conversion

Unfortunately, in recent past, numerous cases in Pakistan have been reported alleging violation of minority rights of freedom to profess their religion. According to a survey made by local NGO, in Pakistan approximately seven hundred (700) Christian girls are coercively converted to Islam every year.[8] A joint report by Global Human Rights Defence (GHRD) and Human Rights Focus Pakistan (HRFP), human rights NGOs based in the Hague and Faisalabad, respectively, signposts that Muslim men are encouraged to convert Non-Muslim women to Islam by marrying them by Mullahs through mosque sermons and public speeches.[9] A reported case in Punjab presents a horrendous picture of the scenario where a 12-year-old Christian girl was abducted, raped over the period of eight months, and forcefully converted.[10]

One of such heinous acts happened recently on March 20, 2019 which was the Holi day, when two sisters Reena Meghwar and Raveena Meghwar, were abducted from their home in Daharki, a city in Ghotki district of Sindh.[11] It led to arise tension between the state and Hindu Community and protest up heaved when SHO refrained from lodging the FIR. The day when the FIR was lodged, a video of the two sisters reciting the *Kalima* sprung up on social media. The video shows them professing conversion to Islam while the colours of Holi were still on their cheeks.[12] According to their recorded statement, they left home to marry two brothers Safdar Ali and Barkat Ali respectively, both of whom

[8] US 20 Mar. 2012, 7; GHRD and HRFP [2012], 10 note 12; Franciscans International 29 July 2011.

[9] (GHRD and HRFP [2012], 9), a statement that is corroborated by the Jinnah Institute (2011, 55).

[10] (AHRC 10 Oct. 2011; ANI 13 Oct. 2011).

[11] In Pakistan, 'The Problem Of Forced Conversions' by Mehmal Sarfraz, April 13, 2019 00:15 IST. Updated: April 13, 2019 21:47 IST

[12] Ibid

were already married and have children.[13] A compilation of some of the reported cases is following;[14]

i. 25th February 2012, Hindu girl Rinkal Kumari abducted from Mirpur Mathelo city, converted and married forcefully to Naveed Shah at the Dargah of Bharchundi;

ii. 3rd March, 2012, Aisha Kumari from Jacobabad, coerced to convert to Islam and marry with an eighteen-year-old Muslim;

iii. 5th April, 2012, young couple Rekha and Kailash and was coercively converted in Pangrio city;

iv. 8th August, 2012, fourteen years old Hindu girl Mansha abducted from Jacobabdad, and was coercively converted to Islam and to marry Murtaza Ujjan;

v. 5th February, 2013, Meena Meghwar abducted from Kunri city, and was coercively converted to Islam and to marry Riaz Kappri;

vi. 19th July, 2013, young girl Baari Bheel abducted from Kunri, and was coercively converted and married to Ali Murad Noohani;

vii. 11th July, 2013, Bhagwanti abducted from Kunri, and was forcefully converted and married to Javed Sahto;

viii. 15th July, Koonj Bheel from Nawabshah, abducted and converted to Islam at the Dargah of Jhandu Pir;

ix. 17th July, Bibi from Tando Jam was abducted from Kotri, and was coercively converted and to marry Muhmmad Ali Machi;

[13] Ibid

[14] 'Forced Conversion Of Minority Girls And Women In Pakistan', Submission to the UN Office of the High Commissioner for Human Rights for the consideration of the 3rd Universal Periodic Review of the Islamic Republic of Pakistan during the 28th Session

x. 9th August, Raaj Bai abducted in Tando Jam city, and was coercively converted at the Dargah Ayoub Jan Sarandi and to marry Essa Kaloi;

xi. 10th December, Bhagori Meghwar abducted from Chachro city, and was coercively converted and married to Zulfiqar Ali Rind;

xii. 26th December, Shirimati Meeran abducted from Kunri and and was coercively converted;[15]

xiii. 5th January, 2014, Hazar Bhagri abducted in Pano Akil, and was coercively converted at the Dargah of Bhurchundi;

xiv. 29th January, 2015, Pooja from Karachi was abducted and converted in Jamia Banoriya, Karachi;

xv. 8th January, 2015 in a very tragic move, two very young girls Jamna and Pooja, ages seven and eleven were kidnapped in Mirpur Khas. Both were converted by force in Bhaan Singh's Madrassa;

xvi. 22nd February, 2015, Mariam Meghwar abducted, and was coercively converted to marry Asif Lund at the Dargah of Bhurchundi;

xvii. 15th May, 2015 daughter of Harichand Thakur abducted and forced to marry Rameez Raja in Tando Muhmmad Khan;

xviii. 30th October: 2015 twelve-year-old girl Anjeli Meghwar abducted, and was coercively converted and to marry Riaz Siyal;

xix. 7th November, fourteen-year-old Kiran abducted, converted and married forcefully to Qurban Samo in Nawabshah;

xx. 13th November, 2015 Lali Meghwar abducted in Samaro, and was coercively converted at the Dargah Pir Ayoub Jan Srahndi;

[15] Greenwood, Ibid p. 10-11

xxi. 11th February, 2016, Sheela Meghwar abducted and was coercively converted by Ayoub Jaan Sarhandi;

xxii. 2nd March, 2016Walhi Kollhi abducted in Jam Nawaz Ali city and was coercively converted;

xxiii. 4th April, 2016, Chandar Mati Baghri abducted in Ghotki (the girl had to escape from the abductor to sumbit her testimony before the court);

xxiv. 18th December, 2016, fifteen-year-old Ramila Meghwar abducted and forced to marry eighty-year-old man;[16]

xxv. 2nd January, 2017: two Hindu girls named Sapna and Raj Kumari abducted from Thul city, and was coercively converted and marry with Muslim men before being released from Amort Sharif;

xxvi. 26 July 2021 Reena Meghwar was handed over by a court order to the parents, claimed to be subjected to forced conversion and marriage.[17]

3. Mechanisms used to forcefully convert minorities

The main stigma behind these forced conversions is the societal actors including extremist clerics. As per assertions, in some cases, where the victims refused to voluntarily convert to Islam, they were subjected to the allegations of Blasphemy and contempt of Islamic provisions. Sources have reported cases where members of religious minorities who refused to convert to Islam were charged with blasphemy or threatened to be treated so.[18] They faced societal backlash if they refuse the offer to accept Islam. There are several mechanisms to forcefully convert minority without his free consent. Two most common among them are Bonded Labor and Forced Marriage. Huge part of bonded laborers consists of Hindu minority, mostly belonging to scheduled castes. They are enslaved because of unpaid loans,

[16] Ibid P.13

[18] (Compass Direct News 12 Mar. 2012; *The Express Tribune*9 Oct. 2012)

using their labor as a way of compensation and consideration for the debts they were beneficiaries of and spending their lives under the surveillance. The cases, where the enslavement has been inferred on the core basis of religious hatred, are also reported. They usually are subjected to physical, mental and/or sexual torture and sometime employing them in bonded labors e.g., farming, brick furnaces, tanning, and carpet industries etc. Unfortunately, there is no strict legislation against bonded labor and if there is some (the national law on Bonded Labor Abolition (1992) government has miserably failed to enforce and implement that. It is said that police officials are also reluctant from registering the victims' reports due to the offenders being politically affable and strong. Such discrimination is backed further by several other societal factors which prop up and justify social acceptance of such occurrences in Pakistan.[19]

Another notable reason for such conversion is Forced Marriages. The number of minor girls marrying Muslim men and ultimately convert has significantly increased over the past few years[20] Other contributing factors include but are not limited to, are maintain the status quo by the religious Institutions, discriminatory practices against non-Muslim communities, misogyny and extreme patriarchy affecting women adversely, lack of proper space in education for minorities and conservative local pressure groups. Moreover, once the incident happens, political allegiances or traditional sympathies customarily constrain prompt and effective action against such crimes.[21]

4. Legal protection to minorities in Pakistan

Pakistan is a democratic country, and it ensures the implementation of fundamental rights for every citizen. Constitution of Pakistan 1973 guarantees the fundamental rights

[19] Malik, N. (2016). Bonded Labour in Pakistan. Advances in Anthropology, 6, p. 127-136.

[20] Aftab, S; Taj, A (2015). Migration of Minorities in Pakistan: A Case Study Analysis. AWAAZ Programme.

[21] Movement for Solidarity and Peace (2014). Forced Marriages & Forced Conversions In the Christian Community of Pakistan, p. 23

including equal rights and freedom irrespective of any belief and faith without any discrimination against any minority. Article 20 (a) of the Constitution of Pakistan provides that *"every citizen shall have the right to profess, practice and propagate his religion'* [22]furthermore, it states that *"Every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions"*.[23]. Article 25 (1), guarantees that all citizens are equal before law and are entitled to equal protection of law[24]. Article 28 provides that "*adequate provision shall be made for the minorities to freely profess and practice their religions and develop their cultures'.* According to Article 26 of the constitution, there must be no discrimination shown against any citizen solely on the grounds of religion, gender, caste, race, residence etc. Similarly, The Objective Resolution, a preamble to the constitution of 1971 and an operative provision by virtue of article 2A, provides the citizens of state including all the minorities the right of freedom of religious liberty and autonomy without any obstruction.[25] Moreover, Article 36 of the Constitution safeguards the legitimate rights and interests of minorities by the state, including their proper representations in the provincial and federal services.[26] In terms of forced conversions or forcing someone's religious beliefs on others, Article 22 clearly provides that no person shall be required or forced to receive religious instructions or take part in religious ceremony or attend religious worship other than his own[27].

Several bills have been presented to the Parliament proposing the prohibition of forced conversion of minorities. In November 2016, Sindh Assembly unanimously passed a bill named The Criminal Law (Protection of Minorities) Act[28], to penalize forced

[22] Article 20(a) of Constitution of Pakistan, 1973
[23] Article 20(B) of Constitution of Pakistan, 1973
[24] Article 25 (1) of the Constitution of Pakistan,1973
[25] Interim report of the Special Rapporteur on freedom of religion or belief, 15, U.N.Doc.A/67/303 (Aug.13, 2012).
[26] Article 36 of the Constitution of Pakistan, 1973
[27] Article 22 of The Constitution of Pakistan, 1973
[28] Provincial Assembly of Sindh (2015). Criminal Law (Protection of Minorities) Act, PB 9-2015

religious conversions. It is considered as a landmark legislation for human rights and minority rights in the region.[29]. Following is a brief skeleton of that Bill;

- Chapter IV (5) sufficiently defined a forced conversion as forcing a person to adopt another religion under duress, force, coercion or threat, which can be directed at them or a member of their family, loved one, community or property.

- Chapter II mandated the government of Sindh to give police and members of the judiciary periodic sensitization and awareness training on the issues related to child marriages. It also mandated the creation of a commission, committee or institution to oversee and ensure the implementation of the act and to provide this body with enough resources to enable them to do so.

- Chapter III (4) prohibited the conversion of anyone under 18, unless the parents or guardian also changed religion.

- Chapter IV (6) set a minimum of 5 years to a maximum of life imprisonment and a substantial fine to anyone convicted, and that anyone abetting the crime would suffer a minimum of 3 years in jail.

- Chapter V (7) made an attempt to cut through the back log of cases in Pakistan's courts and to ensure the necessary swift action in these cases by mandating that courts set a date to hear the case within a week after receiving the petition from the victim or their family members and loved ones.

- Chapter X mandated that the victim either be immediately produced in court, placed in the custody of their parents in the case of an alleged or proven minor, or placed in a shelter. However, as demonstrated above, whilst shelters

[29] The Hindu (2017). "Sindh Governor returns Minorities Bill against forced conversion"

for women do exist, they often fail to protect the women from further coercion and threats,

- Chapter X stipulated that no meetings can take place without the written consent of the victim. Furthermore, even if the woman was protected inside the shelter this does not end the utility of threats as the husband; his family and friends often threaten to harm the families of the women that they kidnap.70 Protection must be provided to the families as well as the women involved in these cases.

- Chapter X mandated that the accused be placed in custody, whilst Chapter XII mandated the courts to provide adequate security to the victim, to prosecution witnesses investigating officers, prosecutors, victim's family, and the judges during the pendency of investigation and trial and, if necessary, post-trial.

- Chapter XI mandated that a victim of alleged forced conversion be given 21 days for an independent decision regarding conversion and that during this time they should be placed under temporary custody under the provisions of Chapter X.

There are also laws which indirectly oppose forced conversion of minority by restraining the child marriage, kidnapping, abducting, wrongful confinement, inducing women to compel for marriage and rape etc. All these acts have been redressed by the national penal law of Pakistan, the Pakistan Penal Code, 1860.

- Forced marriage; Section 498B of the PPC; Whoever coerces or in any manner whatsoever compels a woman to enter into marriage shall be punished with imprisonment of description for a term, which may not be less than three years and shall also be liable to fine of 500,000 Rupees.

- Sections 375 and 376 of the PPC for the purpose of defining rape, include, sexual intercourse with a woman,

without her consent or with her consent, when the consent has been obtained by putting her in fear of death or of hurt. It also applies where the act is done with or without her consent when she is under sixteen years of age.

- Wrongful confinement and restraint; XVI-A of the PPC
- Abducting or inducing a woman to compel for marriage; Section 365B of the PPC
- Kidnapping or abducting from lawful guardianship; Section 361 of the PPC;
- Kidnapping or abducting a person under the age of fourteen; Section 364A of the PPC,

Speaking of international laws, Pakistan is signatory of various international treaties including, The International Civil and Political Rights Covenant (ICCPR), and the Universal Declaration of Human Rights (UDHR). Article 18 of the Universal Declaration of Human Rights guarantees the right to freedom of religion. It includes the right to change one's religion, but without compulsion. Article 18(4) of the International Covenant on Civil and Political Rights instructs that the choice of religion for a child is restricted by the parents' rights to determine religion up to an age when the child attains maturity. Pakistan is also party to the UN Convention on the Rights of the Child where a child's consent is considered uninformed consent under Article 14(2).[30]

On a positive note, courts in Pakistan are trying to deliver its best in the situation. In a recent case of Pumy Muskan, Lahore High Court held that no one can forcefully change the faith of another person as constitution of Pakistan safeguards the right of freedom to profess religion. It is declared that the matter of faith is one's personal belief and, in that situation, even court cannot declare her conversion invalid or void. That is why court handed over the custody of Muskan to her mother. Court said that petitioner being the lawful guardian of Muskan is entitled to her

[30] Ibid

custody.[31] This approach on the part of judiciary is precedented in many such like cases and reflects a ray of hope in the dark.

5. Challenges in Implementation of Laws

In this part we would like to highlight the possible perceived impediments and challenges in implementation of anti-conversion laws or the law regulating matters of conversion by means of force, coercion or allurement. The most recent example reflecting the situation is Anti forced conversion Bill which is rejected by the Parliament after Ministry of Religious Affairs opposed it, as of today.[32] The Religious Affairs Minister Mr. Noor ul Haq Qadri opposed it on the grounds that it was inconsistent with the environment of Pakistani society. It was just not the favorable environment for enacting new laws restricting forced conversion.[33] He warned that such Laws will cause more problems for minorities and will deteriorate peace in the country.

Similarly, implementation of the proposed bills discussed above may prove to have need of adjudicating and detecting the state of mind of the converts by assessing their motives and will. Hence it may be difficult to determine whether the converts were "lured" or legitimate. Hence the biggest challenge for government especially the Judiciary of Pakistan is the assessment of legitimacy of conversion that whether it's the voluntary one with free consent or not. Some other challenges that Judiciary and other related stakeholders may face are following;

5.1. A matter of Imponderable Identity

The legal intricacy of individual and group identity is a subject that encompasses the efforts of Marc Galanter and many other

[31]Bertie G. Ramcharan. "The Concept and Present Status of the International Protection of Human Rights", Brill, 1989 Publication dar.aucegypt.edu Internet Source Alessandro Mantelero, Maria Samantha Esposito. "An evidence-based methodology for human rights impact assessment (HRIA) in the development of AI data-intensive systems", Computer Law & Security Review, 2021

[32] The bill is rejected today on 24th August 2022, the news accessed from Dawn Newspaper at <https://www.dawn.com/news/1651813>

[33] Dawn, Nadir Guramani, Published October 13, 2021.

scholars he has enthused[34]. Religious conversion seems to meticulously puzzle the courts trying to evaluate unambiguous identities, as demonstrated in Galanter's essay on the Brother Daniel case. The essay depicts case of a Polish Jew who converted to be a Carmelite monk and applied to be admitted to Israel under the Law of Return. Galanter lays out the problems involved in all such cases from pinning the "state inquiries into the imponderables of personal identity" and the inelegance of a state trying to recognize and evaluate "personal qualities by administrative and judicial procedures ill-suited to the task.[35]

Hence categorizing the caste and religion for in order to take affirmative action in Pakistan, is a complicated process. Delineating who is subject to which religious *"personal laws"* is something difficult to do. Judges and administrators grapple with the opacities of personal and group identities, including the authenticity of converts.[36]

5.2. Matter of Coercion/Force

Concerns regarding forced conversions and steps taken to prevent it, are not a new phenomenon for this region. The issue of forced conversion and akin legal framework dates back to a resolution adopted by the All India Muslim League in December 1927, in Calcutta. Historian Ghulam Ali Allana's book Pakistan Movement: Historic Documents pens down the measures as reproduced here: "Every individual or group is at liberty to convert or re-convert another by argument or persuasion, but that no individual or group shall attempt to do so or prevent its being done by force, fraud or other unfair means, such as the offering of material inducement.

The distinction between willingness as compared to use of force to change one's religious identity grows more foggy (and easier

[34] Marc Galanter, "Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change', Law & Society Review , Vol. 9, No. 1, Litigation and Dispute Processing: Part One (Autumn, 1974),

[35] Marc Galanter, 'A Dissent on Brother Daniel', 36 COMMENT. 10, 13 (1963)

[36] Mitra Sharafi, 'Litigating the Zoroastrian Conversion Debates', 1906–25, Paper Presented at the Annual Meeting of The Law and Society Association (July 6, 2006).

to ignore) if the convert is noticed as the object rather than as the subject of conversion. Talal Asad canvases the verb, "to convert," in both senses i.e. a transitive and an intransitive verb.[37] In the intransitive sense—"I converted"—the idea of forcible conversion could be seen in many religious traditions as an enigma. On the other hand laws limiting forced conversion, the court decisions upholding them, and the commission reports justifying them, use the transitive sense—"He converted them." This usage nurtures two related ideologies (i) perpetuating assumptions about "them," the so-called "weaker sections" of society (especially lower castes, tribes, and women), and (ii) raising apprehensions about outside interference threatening national beliefs and national order[38]. This represents a complex yet protective aspect of the all the state related stake holders to the act; a confused albeit connected equation to the purpose of discouraging force conversions.

5.3. Political Ideology & Public Acceptance

Pakistan and Iran are the only two countries in the world which were founded on the name of Islam and are Islamic Republics. It was one of the reasons that the Religious Affairs Minister Mr. Noor ul Haq Qadri opposed the aforementioned Bill on the grounds that it was inconsistent with the environment of Pakistani society. It was just not the favorable environment for enacting new laws restricting forced conversion.[39]. In Pakistan, with 96% Muslim population, it may socially get harder to enact and implement such laws affecting the religious sentiments of citizens, as in Islam *"Tableegh" (Inviting others to Islam)* is considered as Sunnah and is admired much. Like, in some states such conversion by way of *"Tableegh"* is considered as enforced Rehabilitation. Therefore, in first place making such laws which the public perceives as threat to their religious beliefs, is not an

[37] Arjun Appadurai, 'Fear Of Small Numbers: An Essay On The Geography Of Anger', 83 (2006).

[38] Christopher Craig Brittain , 'The Secular As A Tragic Category: On Talal Asad, 'Religion and Presentation: Method & Theory in the Study of Religion', Vol. 17, No. 2 (2005), pp. 149-165 (17 pages) Published By: Brill

[39] Dawn, Nadir Guramani, Published October 13, 2021.

easy job. Moreover, in a democratic state, for a law to be successfully implemented, it must be publicly accepted to be considered as legitimate and representative of public will. In Pakistan, the courts dealing with cases relating to forced conversions are saddled with immense public pressure while hearing. In numerous cases when the victim of forced conversion is presented before the court to determine whether he has converted on his own free consent or not, the courtroom is crowded with people supporting and chanting slogans in favor of the conversion. Even so, at times the conversion is properly celebrated by the Muslims outside the courtrooms. In the case of Rinkle Kumari,[40] the victim was transferred from District Ghotki to Sindh High Court principal seat at Karachi. This not only bears down the girls/victims giving statement but also puts ruthless pressure on the judges and lawyers engaged with such cases.

5.4. Ripe of Abuse

Another challenge in this regard lays in the fact that the laws in Pakistan which criminalize forced conversion are by and large vague and arduous in scope and applicability. The legal questions and different factors involved make it tricky for the interpreters and adjudicators to apply it in its true spirit. Nevertheless, these laws are suitable for arbitrary interpretation and application. The problem, however, compounded by these laws is making governments or judiciary the umpire of truth and religious veracity. It could possibly be true to some extent, but on the flip side, it may trigger the abusive use of these laws. There are instance on the record where the appliance of these laws has eventuated in individuals being jailed for simply questioning religious beliefs or being falsely accused. Allegations of apostasy have also sparked extrajudicial killings, assaults, and mob violence.

[40] Policy Brief by the National Commission on the Rights of Child – Forced Conversion, Published February 22, 2022.

6. Analysis in the view of Fiqh

Forced conversion of religious conviction is restrained in Islamic Law, following the Quranic verse that there is *"no compulsion in religion"*[41]Minorities, in Islam, are given the status of *"Dhimmi",* أهل الذمة, a historical term meaning "protected persons'. This term applies to those non-Muslims who live in an Islamic state and are entitled to the legal protection.[42] Islam mandates the state under Sharia to safeguard not only its citizen's life and property, but also protects his right to freedom of religion, in the consideration for his allegiance to the state and payment of the jizya tax, in contrast to the zakat, or obligatory alms, paid by the Muslim citizens. The assertive feature of this law is to exempt Dhimmis (Non-Muslim Minority) from certain duties assigned specifically to Muslims if they paid the poll tax (jizya) but otherwise, they are entitled to equal protection of the state under the laws of property, contract, and obligation. Islam has recognized every individual's fundamental right to life and honor regardless of beliefs, creed and religion. According to Holy Quran "He who takes away an individual's life without legitimate authority is considered the one who has killed the humanity in general". The fundamental rights of non-Muslims are provided by Islam as being an equal with Muslims. No Muslim can harm the lives, property or religious places of non-Muslims. According to the Holy Prophet (PBUH), "He who tortures a dhimmi is like the one who has counteracted him (the prophet). I shall counteract against him (he who tortures a dhimmi) on the Day of Judgment.[43]"

Islam emphasizes the states to show great tolerance towards minorities and including them in the administrative tiers of state to play their role in the state's development. They have the right to follow their religion and fulfill the obligations of their religion, build their educational institutions and places of their worship so that they can give the education of their faith and creed to their

[41] (Quran 2:256).

[42] Definition of Dhimmi" accessed from <www.merriam-webster.com>

[43] Al-Ayni, Vol: IX. n.d. "Sahih-al-Bukhari (Volume-9) - Flipbook by Books Related to Aqeedah | FlipHTML5." Accessed 15th August 2022 at < https://fliphtml5.com/eooj/srbj>

children.[44] Moreover they are governed by their own laws (Personal Laws), for instance, during the Muslim rule, the Jewish community of Medina was permitted to have its own Halakhic courts.[45] They are also permitted to perform certain practices which were otherwise forbidden for Muslims such as Drinking alcohol.[46] Christians, Jews, and Sabians are unanimously acknowledged as Dhimmi by all four schools of Islamic Jurisprudence. Hindus and Polytheists, however, are granted status of Dhimmi by only two schools of Islamic jurisprudence, the Hanafi and Maliki.[47] It is worth mentioning here that the majority Muslim believers in Pakistan belong to Hanafi School of Jurisprudence hence Hindus, according to commentators, fall within the categories of Dhimmi (protected Minority) in Pakistan.

A misconception and confusion about the forced conversion is often linked to the wars of the Ridda (against apostasy) commenced by Hazrat Abu Bakr (RA), the first caliph of the *Rashidun* Caliphate. This was initiated against those Arab tribes who had accepted Islam and used to pay Zakat (tax) but later on refused to pay Zakat and Jizya Tax[48] Such agitation by those tribes was considered as the breach of Political Contract instituted by the Holy Prophet (SAW). It brought a misconception about forced performance of obligations and was by some historians, listed as the first instance of forced conversion. But the reality as different as chalk and cheese stands poles apart as commentated by Allama Badr al-Din al-Aini (1360–1453) in Sahih-ul-Bukhari which is as following;

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[44] Parveen ShokatAli,, 'Human Rights in Islam'. New Delhi: Adam Publishers, 2007.

[45] Cohen, Mark R. 'Under Crescent and Cross: The Jews in the Middle Ages'. Princeton University Press. P. 74. ISBN 978-0-691-01082-3. (2005) Retrieved 10th April 2022

[46] 'Al-Misri, Reliance of the Traveler' (edited and translated by Nuh Ha Mim Keller), p. 608. Amana Publications, 1994.

[47] Gerhard Bowering, ed. (2009). Islamic Political Thought: An Introduction. Princeton University Press. Pp. 127–128. ISBN 9781400866427.

[48] Richard W. Bullient (2013). "Conversion". In Gerhard Böwering, Patricia Crone (ed.). The Princeton Encyclopedia of Islamic Political Thought. Princeton University Press.

> *"Hazrat Abu Bakr al-Siddiq fought those who refused to pay Zakat because they had taken up the sword and started a war against the Muslim community ... Hazrat Abu Hanifa took the ground that he who refuses to pay Zakat must neither be killed nor even fought. However, he must be forced to pay it without the use of the sword, and must only be killed if he rose up to attack. This is exactly what Hazrat Abu Bakr did with those who refused to pay Zakat during his caliphate. He did not fight them until they rose up to attack him".*[49]

Hence Islam, through the concept of Dhimmi, grants several privileges to the minorities, one of which is freedom of religion and prohibition on forced conversion of minorities. It's an undeniable fact that during commencing period of Islam, the practices of forced conversion have been witnessed but the matter has now been settled by the way of *Ijtehad* by different Muslim Jurists and commentators. Quran says;

> *"There shall be **no** compulsion in [acceptance of] the religion."*[50]

This Quranic verse was quoted by the companion of Holy Prophet (SAW), Hazrat Umar (may Allah be pleased with him) the second Caliph after the death of the Holy Prophet (SAW), in a reported incident when he offered an old Christian woman to accept Islam, but she refused saying she was old and close to death [meaning thereby that she did not want to revert to Islam]. Hazrat Umar (RA) accepted her plea and did not in any way compel her irrespective of his position as ruler of Islamic state.

A vast majority of historians bank on the opinion that most conversions to Islam were voluntary and the phenomenon of forced conversion is against the grain. The most prominent

[49] 'The Development of Apostasy And Punishment Law in Islam' Faculty of Divinity of Glasgow University: Allama Badr al-Din al-Aini (1360–1453). 2002. pp. Lamarti page 131–132.
[50] Al-Quran [2:256]

examples in this regard can be taken of Spain and India where Muslims ruled for hundreds of years. Communities from other countries immigrated to Muslim Spain to escape tyranny. Yet, today, the populace of both these countries is majority non-Muslim. If conversion by force was sanctioned by the faith or a policy, this would not have been the case. Hence, it's abundantly clear that Islamic law not only prohibits forced conversion but strictly discourages it.

CONCLUSION

To conclude it may be said that the law recognizes the minority's right to freedom of thought, conscience and religion, as codified in the Constitution of Pakistan. But Pakistan being a religiously homogeneous and belligerent society is facing numerous cases of forced conversion of the already rare minority (4%). The state has been in dire straits in passing the bills to prohibit such acts of coercive conversion of minorities due to extremist pressure groups, clerics, Islamic institutions and religious technocrats in Parliament. It's indeed a great upset in the legislative system of Pakistan which has to be solved in order to meet the standards of globally recognized human rights legislations. The state is responsible to safeguard and execute the rights of all its citizens including the members of different religious faiths including those troubled with the issues of forced conversion so that, cases of such victims undergoing forced conversions and related forced marriages are to be prevented, prosecuted and to provide them a redress.

In era where the human rights concerns have acquired global attention, it is suggested that Pakistan must guarantee the ratification and implementation of the Sindh Criminal Law (Protection of Minorities) Act against forced conversions, approved by Sindh Assembly in 2016. It is further suggested that Government should eliminate certain ambiguities and inconsistencies between child marriage laws and different sections of Pakistan Penal Code, 1860 such as 498-B making it as cognizable pertaining to forced and child marriages and also the relationship between personal laws as regards to the conversion of girls under 18 years of age belonging to other faiths for

marriage purpose. The civil society may help the victims by raising their voice on media and the legal fraternity may contribute by providing the legal assistance to the victim to promote harmony.

6. Application of Law of Preemption on Commercial Properties in Islamabad Capital Territory: A Critical Appraisal of Case Law in Light of Islamic Law

Saeeda Mirbaz[1], Dr. Saqib Jawad[2]

Abstract

Right of preemption has been recognized by English law, as codified in the Sub-continent, as well as Islamic law. English law was initially enacted in the shape of Punjab Preemption Act, 1913 and remained applicable until the same was substituted by different provinces after codification of different provincial laws as applicable today. These laws were though codified after independence, but the principles of these laws are almost the same as were available in the Punjab Preemption Act, 1913, which was promulgated during English rule. However, certain principles applicable in English law have been seen and declared to be against the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (ﷺ) by various jurists as well as by the Honorable Federal Shariat Court and august Supreme Court of Pakistan, which has been mandated under the Constitution of Pakistan to analyze and declare any law or provision of law un-Islamic, if found as such. Certain provisions of Punjab Preemption Act, 1913 as well as other provincial laws as applicable today in the provinces of Pakistan exclude commercial properties from the scope of the right of preemption. Astonishingly, base of this principle has been attributed to Islamic law, but main texts of the Holy Quran and Sunnah as well as writings of the classical as well as contemporary jurists do not make any such distinction between commercial and private properties from the exercise of the right of preemption. The case with regard to the exercise of the right of preemption in Islamabad Capital Territory is altogether different as no special

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law has been enacted for Islamabad and old law being applicable with regard to properties being subject to law of preemption, principles of Islamic law shall be applicable in accordance with verdict of Honorable Federal Shariat Court rendered in Said Kamal Shah case.

1. INTRODUCTION:

Right of preemption has been defined by legal jurists as well as courts and the precise and oldest definition appears to be given in *Gobind Dayal* case, where the right of preemption was defined as:-

> *Pre-emption is a right which the owner of immovable property possesses, as such, for the quiet enjoyment of that immovable property, to obtain, in substitution for the buyer, proprietary possession of certain other immovable property, not his own, on such terms as those on which such latter immovable property is sold to another person.*[3]

Law of Preemption is an important subject of civil law particularly in the Subcontinent and the same has also been recognized by Islamic law. Based on the same, Punjab Preemption Act, 1913 was promulgated during English rule. Later on, Punjab and Khyber Pakhtunkhwa have promulgated their own laws on preemption as Punjab Preemption Act, 1991 and Khyber Pakhtunkhwa Preemption Act, 1987 respectively. Whereas, there is no codified law of preemption in the provinces of Sindh and Baluchistan and in accordance with the principles laid down in the case of *'Iftkharuddin v Jmshed K. A. Marker'*, honourable Sindh High Court held that having no codified statutory law, the law of preemption in Sindh and Baluchistan shall be governed by the custom, if there was an established custom, or according to Islamic law.[4] Therefore, it is clear that in the provinces of Punjab and Khyber Pakhtunkhwa, statutory law is applicable and in Sindh and Baluchistan, customary law and Islamic law are

[3] Govind Dayal v Inayatullah, (1885) 7 All 779.
[4] PLD 1995 608 Karachi.

applicable. However, case is different as far as Islamabad Capital Territory (ICT) is concerned. A few Courts and even legal experts are of the view that Punjab Preemption Act, 1991 is applicable in ICT. A few others say that having no codified statutory law, principles of Islamic law are applicable. However, the position has been clarified by the honorable Islamabad High Court in the case of "*Rab Nawaz & others Vs. Rustam Ali*", wherein the Honorable High Court was pleased to hold that: -

> *"13. An attempt was made in 1997 to make preemption laws for the I.C.T. The Islamabad Capital Territory Preemption Ordinance 1997 ("the 1997 Ordinance") was promulgated on 15.02.1997 and it extended to the I.C.T. This Ordinance lapsed by efflux of four months in terms of Article 89 of the constitution. Section 34 of the 1997 Ordinance is reproduced herein below: - "34...Repeal. The Punjab Pre-emption Act, 1913 (Punjab Act I of 1913) in its application to the Islamabad Capital Territory, is hereby repealed.*
>
> *14. The mere fact that the Ordinance repealed the 1913 Act implies that the 1913 Act was in force in the I.C.T. prior to its repeal by the 1997 Ordinance. Since the 1997 Ordinance lapsed upon the expiry of ninety days from the date of its promulgation, the 1913 Act to the extent of it being applicable to the I.C.T. revived. It is well settled that when an Ordinance amends or repeals a statute and thereafter the Ordinance expires, the original Statute re-emerges. Reference in this regard may be to the law laid down in the cases of Federation of Pakistan v. M. Nawaz Khokhar (PLD 2000 SC 26) and Sarghoda Bhera Bus Service Limited V. Province of West Pakistan (PLD 1959 SC 127)."*[5]

[5] PLD 2020 Islamabad 293.

It has been made further clear by holding that: -

> *"It is not disputed that the 1913 Act was in force in the I.C.T. prior to the passing of the President's order No.1 of 1970. By virtue of Article 19 of the President's Order of 1970, the 1913 Act continued to apply to the I.C.T. The President, in exercise of powers under Article 6 of the President's Order No.1 of 1970, could have amended the 1913 Act to the extent that it applied to the I.C.T. or could have passed an Order with respect to the laws of pre-emption. This, the President did not do. However, in exercise of the powers conferred under Article 89 of the Constitution, the President promulgated the 1997 Ordinance dealing with the laws of pre-emption applicable to the I.C.T. Therefore, upon the repeal of the 1997 Ordinance by efflux of time, the 1913 Act stood revived to the extent of its application to the I.C.T. Until the 1913 Act is not repealed or amended by the competent legislature, its provisions (other than the ones that were declared unlslamic in the case of Government of N.-W.F.P v. Said Kamal Shah (supra)) would continue to apply in the l.C.T. Even though the 1991 Act had repealed the Punjab Pre-emption Ordinance, 1991 and other Ordinances which in turn had repealed the 1913 Act, the application of the 1991 Act would be confined to the Province of the Punjab and cannot by implication be extended to the I.C.T. The enactment of the 1991 Act would not operate as a repeal of the 1913 Act to the extent of its application to the I.C.T. This is because the provisions of the 1913 Act continued to apply to the I.C.T. by virtue of Article 19 of the President's Order No.1 of 1970."*[6]

[6] Ibid.

In accordance with abovementioned detailed analysis of the situation and the principles laid down by the honorable Islamabad High court, Islamabad, it is now well established that the Punjab Preemption Act, 1991 is not applicable in ICT rather any claim of preemption is required to be governed by the Punjab Preemption Act, 1913 to the extent of provisions having not been struck down by the Honorable Federal Shariat Court in the case titled "*Government of NWFP Vs. Said Kamal Shah*".[7]

Having established that the applicable law on preemption in ICT is the Punjab Preemption Act, 1913, with regard to the subject matter of law of preemption, provisions have been inserted in the Act, 1913 to include or exclude certain properties from the operation of law of preemption. In this regard, Section 3 of the said Act states that: -

> *"In this Act unless a different intention appears from the subject or context, -*
>
> *(1) 'agricultural land' shall mean land as defined in the [Punjab Alienation of Land Act, 1900] (as amended by Act I of 1907), but shall not include the rights of a mortgagee, whether usufructuary or not, in such land;*
>
> *(2) 'village immovable property' shall mean immovable property within the limits of a village other than agricultural land;*
>
> *(3) 'urban immovable property' shall mean immovable property within the limits of a town, other than agricultural land. For the purposes of this Act a specified place shall be deemed to be a town (a) if so declared by the [State] Government by notification in the Official Gazette, or (b) if so found by the Courts".*[8]

[7] PLD 1986 SC 360.
[8] Section 3 of Punjab Preemption Act, 1913.

Furthermore, Section 4 of the Act of 1913 mentioned the property where the right of preemption is applicable and states that: -

> *"the right of pre-emption shall mean the right of a person to acquire agricultural land or* village immovable property or urban immovable property in preference to other persons, and it arises in respect of such land only in the case of sales and in respect of such property only in the case of sales or of foreclosures of the right to redeem such property. Nothing in this section shall prevent a Court from holding that an alienation purporting to be other than a sale is in effect a sale."[9]

Section 5 of the Act of 1913, on the other hand, excludes the property from the right of preemption and states that: -

> *" No right of pre-emption shall exist in respect of -*
>
> *(a) the sale of or foreclosure of a right to redeem -*
>
> *(i) a shop, serai or katra;*
>
> *(ii) a dharmsala, mosque or other similar building; or*
>
> *(b) the sale of agricultural land being waste land reclaimed by the vendee."*[10]

The above-mentioned provisions of Punjab Preemption Act, 1913 reflect those certain properties are subject to the law of preemption and certain others are not included within the law of preemption. Among others, the description of property given in Section 5(a)(i) is also excluded from the application of law of

[9] Section 4 of Punjab Preemption Act, 1913.
[10] Section 5 of Punjab Preemption Act, 1913.

preemption. The principle has been primarily deduced from the word 'shop' occurring in section 5 *supra*. On the basis of the same, opinion has been adopted that the law of preemption is not applicable on commercial property and no right of preemption can be exercised over any such property. Apart from the word 'shop' occurring in section 5 *supra*, different terms have been used in other laws including Punjab Preemption Act, 1991 and Khyber Pakhtunkhwa Preemption Act, 1987. The case law developed in this regard also supports the contention that the law of preemption is not applicable over commercial property. For instance, it was held in the case of '*Bilal Ahmed and another Vs. Abdul Hameed*' by august Supreme Court of Pakistan that:-

> *"First, we will consider whether the Respondent/Plaintiff can claim the right of pre-emption on the basis of Revenue Records. We are clear in our mind that the Suit property was constructed and urbanized, and it has also been admitted between the parties that the Suit property, as well as the property on the basis of which the Respondent/Plaintiff claims the right of pre-emption, are commercial properties having property number allocated by the Excise and Taxation Department. Therefore, no benefit of Revenue records, even if ownership of both the parties would have been recorded in the same Khewat, would be given to the Respondent/Plaintiff for grant of a decree of pre-emption on the basis of Shafi-e-Shareek in the light of section 3 (before its amendment in 2019) read with section 56(d) of the Land Revenue Act, 1967. Where co-ownership could not be established on the basis of Revenue Records, the question arises as to whether the properties are physically adjacent to one another.[11]"*

August Supreme Court of Pakistan also laid down the same principles earlier as it was held in the case of '*Muhammad Idress and others. Vs. Sardar Ali*' in the following manner that even

[11] 2020 SCMR 445

urban immoveable property is outside the ambit of law of preemption: -

> *"A close look at the afore-referred provision would indicate that urban immovable property is not merely the immovable property which fell within the limits of a town as declared by the Board of Revenue but the courts of law could also hold any property to be urban immovable property if there was evidence to that effect. The suit land was a small plot of two kanals and it was specifically averred in the written statement that it was purchased for building a house; that it was part of the Shakargarh Town; that no custom of pre-emption prevailed at the relevant time. Respondent plaintiff did not lead evidence to prove that it was not urban property. The sale deed itself indicates that the suit land was purchased for construction purposes and three vendors had placed on record their affidavits to the effect that the suit land was not agricultural and further that it was sold for construction purposes.[12]"*

Section 3 of Punjab Preemption Act, 1913 deals with 'urban immoveable property' and while interpreting section 3 of Punjab Preemption Act, 1913, it was held by august Supreme Court of Pakistan in the case titled '*Muhammad Hussain and others Vs. Ghulam Qadir through legal heirs*' that: -

> *8. The provisions of subsection (3) of section 3 of the Punjab Pre-emption Act, 1913 which Act regulated the pre-emption of sales at the relevant time, read as under: -*
>
> *"(3) Urban immovable property' shall mean immovable property within the limits of a town, other than agricultural land. For the purposes of this Act, a specified*

[12] 2013 SCMR 913

place shall be deemed to be a town--(a) if so declared by the Board of Revenue A by notification in the official Gazette, or (b) if so found by the Courts." (Underlining is ours)

9. It would thus be noticed that 'urban immovable property' did not mean only that immovable property which fell within the limits of a town and that it was open to the Courts of law to declare any property to be urban immovable property even if the same fell outside the limits of a town provided there were facts and circumstances warranting such a finding.

10. Having perused the entire evidence which has been noticed above, we find that the suit-land had all the characteristics of urban property which pieces of evidence available on record appear to have escaped the notice of all the three learned Courts including the Hon'ble High Court. The above noticed facts and circumstances available on record are a definite indication of the fact that the suit-land was nothing other than urban immovable property and we hold accordingly.[13]"

All the above-mentioned principles laid down by august Supreme Court of Pakistan reflect that the commercial property is not subject to law of preemption. Furthermore, urban immoveable property has also been excluded from the operation of law of preemption. However, provisions excluding all these properties are no more part and parcel of the relevant law as the same shall be seen in the proceeding section of this paper.

[13] PLD 2006 Supreme Court 594

Provisions of Punjab Preemption Act, 1913 as well certain other laws were challenged before honourable Federal Shariat Court and according to the decision in '*Government of NWFP Vs. Said Kamal Shah*', Section 5 of the Act of 1913 has been declared to be against the injunctions of Islamic Law as laid down in the Holy Quran and Sunnah of the Holy Prophet (ﷺ). According to the judgment of Mr. Justice Muhammad Taqi Usmani, as he then was, he has concluded the matter in the following terms: -

> *"Section 5 of the Act exempts various types of immovable property from pre-emption. Clause (b) of Section 5 exempts Dharamshala, mosque, church and other charitable institutions and buildings from preemption. It is held that if such property is a trust or Waqf, then their exemption is correct and this is not against the Sunnah. But where the immovable property is privately owned, it is not valid to exempt them from preemption. [Translated].*

With regard to exclusion of any property from the operation or application of law of preemption, it was further held by the Honorable Court in categorical terms that: -

> *"And since the right of preemption has been proved only by analogy based on the hadiths of the Holy Prophet (peace and blessings of Allah be upon him), and the Holy Prophet (peace and blessings of Allah be upon him) has explicitly expounded on the right of preemption to every land, therefore any exclusion thereof would be against Sunnah. However, only in exceptional circumstances or extreme need, in the light of Islamic principles, there can be scope for creating an exception, and that too temporarily and as much as necessary. Nonetheless some lands are permanently excluded from the orbit of right of preemption, hence to authorize the provincial government with the power to make it subject to preemption whenever*

and wherever it wishes at its own discretion, would not be in accordance with Islamic injunctions"[Translated]

In the above-mentioned scenario, it is quite evident that clause'd' of Section 5 has been partially declared un-Islamic by the Honorable Federal Shariat Court and Section 5 of the Act of 1913 to the extent of exclusion of any kind of property in the private ownership has been declared un-Islamic. Furthermore, with regard to application of law of preemption in ICT, in accordance with *Rab Nawaz* case *supra*, it has already been laid down by the Honorable Islamabad High Court, Islamabad that to the extent of decision of honorable Federal Shariat Court in *Said Kamal Shah* case and after efflux of time period after promulgation of the Islamabad Capital Territory Preemption Ordinance, 1997, provisions of the Act of 1913 not declared un-Islamic by the honorable Federal Shariat Court stood revived and in accordance with above mentioned ratio of honorable Federal Shariat Court, Section 5 of the Act of 1913 was declared against the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (ﷺ). Therefore, it is also evident that no provision exists in Punjab Preemption Act, 1913 which could exclude any property from the operation of law of preemption in ICT and accordingly all the properties, including commercial properties, are subject to the law of preemption in ICT except those defined in the judgment of honorable Federal Shariat Court in *Said Kamal Shah* case *supra*.

Furthermore, to the extent of Punjab Preemption Act, 1991, provisions of the said Act were also challenged before the honorable Federal Shariat Court in the case of '*Muhammad Ismail Qureshi v Government of Punjab*' and it has been held by the honorable Court that among other provisions, section 2(a), to the extent it excluded urban property from the purview of preemption, has been declared against the injunctions of Islam.[14] Said judgment of honorable Federal Shariat Court was assailed by the Provincial Government before the Shariat Appellate Bench of the Supreme Court and the august Court in this regard held in

[14] PLD 1991 FSC 80.

case of '*Muhammad Shabbir Ahmed Khan v Government of Punjab*' that:

The exemption of all the immoveable properties situated in urban areas does not fulfill the requirement of Zarurat on the basis of which a particular property can be exempted in the Sharai'h from the application of the law of Preemption. Thus section 2(a) of the Act, 1991 is repugnant to the injunctions of Islam to the extent it excludes all the urban properties and the properties situated within the Cantonment limits permanently from the application of the Act.[15]

Therefore, it is evident that all the properties falling within the definition of urban immoveable property and any property even if situated within Cantonment limits cannot be excluded from the operation of the law of preemption by the Federal or Provincial governments. To this extent and to the extent of remaining provisions declared by honorable Federal Shariat Court and Shariat Appellate Bench of the Supreme Court to be against the injunctions of Islam, have not been amended in accordance with the decision of these Courts and thus all those provisions, including section 2(a), excluding urban immoveable properties and properties situated within Cantonment limits, have ceased to exist, but practically continuous reference is still being made by the lawyers as well by the Courts to these provisions as they are still part of the said Act. Therefore, it was proposed by the Law and Justice Commission of Pakistan to refer the matter to the Government of Punjab and Khyber Parkhtunhwa to amend Punjab Preemption Act, 1991 and Khyber Pakhtunhwa Preemption Act, 1987 respectively in accordance with directions of Federal Shariat Court and Shariat Appellate Bench of the Supreme Court in the abovementioned cases.[16]

[15] PLD 1994 SC 1.

[16] "Amendment in Pre-emption Law", Report No. 122, *Law and Justice Commission of Pakistan*, available at 122.pdf (ljcp.gov.pk), last accessed on 20-08-2022.

2. Islamic Law on Preemption:

It has been seen that the Courts in Pakistan are of the firm view that the law of preemption is not applicable in commercial properties and while taking this view, reference is also made to Muhammadan Law as well as Islamic law, but majority of the principles of honorable Superior Courts are laid down with regard to Law of Preemption of the Provinces and not in respect of principles of the right of preemption in ICT. It has also been seen that the provisions of the Act of 1913 are applicable in ICT and Section 5, excluding commercial property, has been declared against the injunctions of Islam in Said Kamal Shah case supra. Therefore, no exclusion or ousting provision with regard to commercial property is available in the applicable law of preemption in ICT and in such like situation, recourse should be made to the principles of preemption in Islamic Law. In this regard, in accordance with Traditions of the Holy Prophet (ﷺ), every kind of immovable property in the private ownership of any party is included within the right of preemption and no exception is made in this regard. For instance, it has been narrated by Imam Malik that: -

> *"Yahya related to me from Malik from lbn Shihab from Said ibn al- Musayyab and from Abu Salama ibn Abd ar-Rahman ibn Awf that the Messenger of Allah, may Allah bless him and grant him peace, decreed for partners the right of preemption in property which had not been divided up. When boundaries had been fixed between them, then there was no right of pre-emption."*

It has been further reported by Imam Malik that:-

> *"Malik said that he heard that Said ibn al-Musayyab, when asked about pre-emption and whether there was a sunna in it, said, "Yes. Pre-emption is in houses and land, and it is only between partners."*

Various other sources of Islamic Law including original sources containing traditions of the Holy Prophet (ﷺ) have been cited by Honorable Mr. Justice Muhammad Taqi Usmani, as he then was, in the Said Kamal Shah supra and even according to contemporary scholars, no distinction has been found in any immovable property in private ownership with regard to the exercise of the right of preemption. For instance, according to Dr. Wahba Al-Zuhayli, a Syrian Scholar, following conditions are required to be fulfilled for exercise of right of pre-emption under Islamic Law: -

> *"1) Negation of all seller ownership rights in the preempted, with no options established*
>
> *2) The contract must be a commutative financial contract, such as a sale or equivalent*
>
> *3) The contract must be valid*
>
> *4) The preemptor must have ownership from the sale time to the time of ruling that he has the right of preemption.*
>
> *5) The preemptor must be objecting to the sale*
>
> *6) The non-Hanafis stipulated further that the preemptor must be a partner in the sold property. Thus excluding preemption by neighbors and also object of sale to be an unidentified share in a divisible property.*
>
> *7) All jurists agreed that the preemptor must take the entire sold part of the property, to avoid harming the buyer by portioning his contract. This follows from the principle that one harm cannot be removed by imposing another.*
>
> *8) Property must be immovable.*

9) Property cannot be owned by the preemptor prior to sale."

Therefore, even the writings of contemporary scholars do not make any distinction with regard to the exercise of the right of preemption in immovable property, including residential and commercial and in light of the decisions of honorable Federal Shariat Court and Shariat Appellate Bench of Supreme Court in PLD 1984 SC 360, PLD 1991 FCS 80 and PLD 1994 SC 1, all the provisions excluding commercial property, urban immoveable property and property situated within Cantonment limits, have been declared to be repugnant to the injunctions of Islam and these provisions, at the moment and in light of abovementioned decisions, do not form part of these laws anymore.

Conclusion:

Law of preemption is part of Islamic law as well as law of the land in Pakistan. Two provinces in Pakistan have enacted their provincial laws on preemption namely Punjab and Khyber Pakhtunkhwa as Punjab Pre-emption Act, 1991 and Khyber Pakhtunkhwa Pre-emption Act, 1987 respectively. Rest of the provinces namely Sindh and Baluchistan have no codified law on the law of preemption and in accordance with the case law available on this subject, customary law and principles of Islamic law are applicable in such like cases. In ICT, in accordance with ratio of Rab Nawaz case supra, provisions of Punjab Pre-emption Act, 1913 are applicable. Furthermore, provisions of Punjab Preemption Act, 1913, Punjab Preemption Act, 1991 and Khyber Pakhtunkhwa Preemption Act, 1987, to the extent of exclusion of certain properties including commercial, urban immoveable property and property situated within Cantonment Limits, have been declared repugnant to the injunctions of Islam by the Federal Shariat Court and Shariat Appellate Bench of Supreme Court and in accordance with the directions passed by these Courts, those provisions do not practically exist in these laws and legally no property, including commercial, urban immoveable property or the one situated within Cantonment limits can be

excluded from the operation of the law of preemption. However, all these provisions are still part and parcel of abovementioned laws despite of having legally ceased to exist and their physical existence still causes ambiguity and confusion among the legal fraternity as well as Courts. Therefore, it is desirable that either these provisions should be amended or should be completely removed in order to avoid any confusion and ambiguity in this regard.

7. Genesis of White Collar Crimes In Pakistan And Its Impact: Current Situation

Samina Ijaz Cheema[1]

Abstract

The objective of this research is to understand the concept of white collar crime with special reference to the socio-historical factors responsible for the growth of such crimes in Pakistan, to unfold society's concern, the impact of white collar crime on the system of governance, and how these crimes have and are stifling overall economic growth of the country. Laws have been formulated to deal with white collar criminals still there are areas which need a deep understanding of the concept and the measures required to coupe up with the problem. This study aims to create an awareness in general public with the support of relevant literature. It is suggested that a proactive approach is needed to deal with such criminals to avoid future financial and physical losses by formulating deterrent policies.

1. Introduction

Inexorable menace of deeply entrenched and systematic white-collar crime is damaging social, economic, political and even religious stratum of Pakistani society due to which overall economic growth of the country is highly effected and developmental objectives are being compromised. Corruption has permeated in all facades of the society. Pakistan's corruption score as per Corruption Perception Index (CPI) of Transparency International was 28 in 2021, 31 in 2020, the perceived level of corruption in public sector. The problem of white-collar crime in Pakistan has its roots in colonial era. After independence this legacy of corrupt practices was carried forward and now it has permeated in private as well as governmental

[1] Addl. Distt. & Session Judge, Sahiwal, Punjab

sectors/institutions. The reasons of white-collar crime are external as well as internal such as lack of social and institutional training, low income, role of external powers, political instability, horse-trading, lack of accountability, individual greed and gluttony to gain more, lack of moral training, desire to control others and weak sense of responsibility. The macro level repercussion of white-collar crime on society besides financial loss is far more damaging. For example, the psychological impact of such crimes inculcates a general sense of deprivation in the society and double standards of law to deal with poor and rich which leads to social unrest and distrust on the justice system because the general impression is that that white collar offenders are resourceful people who cannot be prosecuted effectively and even if their trial is conducted they will not be sent to jail. For example, in 2017 in Pakistan 26,551 complaints were filed in NAB and inquiry was held in only 456 (2% of total), only 215 were investigated' out of which only 112 were convicted. The overall impact of white-collar crime on societal growth is devastating because the White collar class is the backbone of a social system and the major contributor of its growth. And if this class starts thinking on individual level and exploits its high-ranking position, then corruption goes to the roots and penetrates in every organ of that society. The impression of oppression and inequality it leaves on the downtrodden not only destroys one class but prevents the rule of law to take root. Laws have been formulated to curb the problem and mitigating techniques like institutional training, moral training, and effective implementation of law, public awareness that none is above law and awarding exemplary punishments to the white-collar offenders are required to be implemented through effective policy making.

Primordial purpose of a legal system is to provide justice to its subjects without any discrimination. This justice is delivered against violation of a legal right, i.e., crime. The concept of crime is based upon criminal instinct and behavior. This criminal instinct exists and prevails at every level and in every class of human society. From this perspective there are two categories of crime, i.e., blue collar crimes and white collar crimes. Blue-collar

crimes are the crimes committed by poor class individuals whereas white collar crimes are nonviolent and financially motivated crimes committed by effluent lawbreakers belonging to middle and upper socioeconomic classes who, by taking advantage of their rank, relations, influence and skillful handling of the matters not only extract money from others but also evade legal consequences.[2]

White-Collar crimes encapsulate varied offences like fraud, insider trading, Ponzi schemes, identity theft, money laundering, counterfeiting, embezzlements, espionage,[3] price fixing, racketeering, bank frauds, tax evasion, bribery, cybercrimes, insurance frauds, telemarketing fraud etc.[4] White collar crimes don't end here. Where circumstances allow the white collar criminals may also indulge in crimes of moral turpitude or consensual crimes like victimization, adultery and the victims are mostly the people they have an authority upon. White collar offenders, be they individuals, group of individuals or corporations, are skillful, financially secure affluent and impactful people who commit such offences with proper planning due to strong desire to become more rich, their natural instinct to adapt deviant behavior,[5] lack of sense of social consciousness, or, the opportunity to grow, and ineffective and ineffectual culture[6] at organizational level. The impact of white collar crimes is not only macro level financial loss but is also a social cost which people of all the classes have to pay.

In past high-ranking people, though involved in criminal activities by using their rank, were not supposed to be involved in criminal activities neither they were easily detectable. In 1934 Morris drew attention to the necessity of a change in emphasis regarding crime. He asserted that anti-social activities of persons

[2] Clinard 1968, p. 483

[3] >https://corporatefinanceinstitute.com/resources/knowledge/finance/white-collar-crime/< site visited on 08.03.2022

4 https://zallp.com/practice/white_collar_crime/

[5] 'Gottschalk P (2017) White Collar Crime triangle: Finance, organization and behavior. J Forensic Sci Crimin Invest

[6] "Bucy et al., 2008

of high status committed in course of their profession must be brought with the category of crime and should be made punishable. Finally, Edwin Sutherland gave a new notion to the pathology of crime by stating that crime was not only committed due to poverty but the main cause behind it was criminal instinct and behavior therefore 'individuals from all the social and economic classes could commit criminal acts' including the elite class. In this way the white-collar crime is different from the traditional portrait of crime and criminal. To distinguish this class of criminals he coined the term "white collar crime"[7] and stated that,

> *"white collar crime is a crime by a person in the upper or white-collar class, composed of respectable or at least respected business and professional men" of high social status in the course of their occupation."*

Sutherland also distinguished "blue collar criminals' with those of white-collar criminals. He included bribery, tax evasion, fraud, embezzlement, violation of trade and safety regulations in industry, violating food laws, professional misconduct by doctors and etc in the preview of white-collar crime. Later on Hazel Croall categorized white collar crime as (a) Occupational crime, committed by professionals or executives or other office bearers in the course of their professional duties; (b) the Corporate crime, the white collar crime committed by the corporations or business entities, and; (c) Organizational crimes, committed by governmental or private organizations.

Insofar as the genesis of white-collar crime in Pakistan is concerned the dilemma of corruption in the government offices as well as other facets of society was rampant since the colonial era. During the British rule lands were awarded to the favourites of the British rulers according to their social status and services to the British crown. Similarly, a system of presenting title badges

[7] (1949, p.9) Sutherland, E. (1949) White Collar Crime (New York: Holt, Rinehart & Winston).

of honour[8] and jobs of high ranks to the Indian subjects was also prevalent. These policies of the Crown divided their Indian subjects in distinctive social classes on one hand which resulted in a race among the Indians to win the favours of their rulers at any cost and on the other hand it created two significantly different economic classes in the society. After independence in 1947 the newly emerged State of Pakistan carried forward this legacy of corruption from the colonial India and here the occupational corruption played a significant role in rehabilitation of migrants and allotment of evacuee properties. At that time people who were holding offices or were in an influential position submitted false and fabricated claims of evacuee properties and land awards and succeeded to have financial gain. Soon after that in 1950s and 1960s a certain class came forward to take hold of the economy of the country by taking industrial, import export and trade licenses thus restricting industrial growth amongst a few families. Likewise, nepotism in patronage schemes like route permits, bonus vouchers and etc. also played havoc. Afterwards denationalization of the nationalization programme in 1974 opened the door of political corruption and redistribution of public resources to the favourite individuals.[9] In 1970s and 1980s billions of rupees of public money were usurped through private cooperative housing societies scam. In early 80s influx of drug money gave rise to the atrocious notion of making black money. Horse-trading in politics, taking huge loans from banks by the influential people and political interference in the loan recovery system,[10] Pakistan Steel Mill sale scandal to Saudi Arabia and Russia on low price, money laundering cases and many cases on politicians for using their position for personal gain, etc. became the ultimate reasons for spreading the culture of corruption and mal-practices.

[8] There were certain classes of badge holders: Nawab Bahadur, Khan Bahadur and Khan Sahib for Muslims and Sikhs and Diwan Bahadur, Rai Bahadur and Rai Sahib for Hindus

[9] Noman, Omar (1990). Pakistan: A Political and Economic History. New York: Routledge, Chapman and Hall. pp. 77-79

[10] Mansoor Qadir, Dans Revue international de droit penal, 2003/1-2 (Vol. 74), pages 515-525

On the legal side laws dealing with corruption and corrupt practices are being tailored since the beginning. For example, Prevention of Corruption Act, was introduced in 1947. In 1949 Public and Representative Offices Disqualification Act[11] was introduced. In 1956 Anti-Corruption Department was established. In 1958 Criminal Law Amendment Act making scheduled offences the crimes committed by the public servant, was introduced. In 1959 Elective Bodies (Disqualification Order)[12] was promulgated. Then in 1975 Federal Investigating Agency[13] was established after which Ehtesab Act (Repealed) was enacted. National Accountability Bureau was established in 1999. Being a federal agency, it had wider powers. In the year 2004 Section 409 was deleted from FIA Act and the cases of public functionaries were transferred to NAB. Later, in 2004 Anti-Corruption and Economic Crime cases were also transferred to NAB. In November 1999 National Accountability Ordinance was promulgated. Through the Ordinance the scope of law to deal with suchlike criminals was widened and the "holders of the offices" as well as the persons involved in corporate businesses" were also included. Section 161-165-A of PPC, Section 5 of Prevention of Corruption Act, 1947 and Section 9 of National Accountability Ordinance, 1999 are the main Sections to deal with offences of corruption. In Section 21 of Pakistan Penal Code, 1860 bears that holder of a public office also includes a public servant. Besides these laws Income Tax Act, Customs Act, Anti-Money Laundering Act, Recovery of Loan Ordinance were also enacted to make the justice system more efficient and expedient.

The main causes of spread of the culture of corruption and white-collar crime are absence of fair accountability and transparency, jobbery, strong desire to become more rich, the instinct to adapt deviant behavior,[14] lack of sense of social consciousness, the opportunity to grow, and ineffective and ineffectual culture[15] at

[11] PRODA
[12] EBDO
[13] FIA
[14] 'Gottschalk P (2017) White Collar Crime triangle: Finance, organization and behavior. J Forensic Sci Crimin Invest
[15] "Bucy et al., 2008

organizational level, low salaries, informal economy with less state control giving room to the criminal minded people, weak institutional system and no system of check and balance to control evil practices. According to a Perception Survey conducted by Transparency International Pakistan in 2004, the main contributors of spread of corruption in the country are,

Lack of Accountability	**31.68%**
Low Salaries	**16.54%**
Monopoly of Power	**16.43%**
Discretionary Powers	**12.61%**
Lack of Transparency	**9.97%**
Power of Influential People	**4.59%**
Red Tapism	**4.28%**
Others	**4.9%**

Source: Javaid (2010, 126)

Current situation with regard to white-collar crime is bleak. Present day white-collar criminals are 'more suave and less forthright.'[16] Now corruption in government offices or bribe is a normal social phenomenon. The basic question is that despite the existence of codified law and elaborate administrative structure why the issue of involvement of public functionaries as well as other people in corrupt practices could not be resolved. The reasons are manifold. Even if we transgress from the historical incipience the issue of corruption still remains there. One of the major reasons is reason is lack of accountability. There is a general impression that the white collar offenders are resourceful people who cannot be prosecuted effectively and even if their trial is conducted they will not be sent to jail. For example, in 2017 in Pakistan 26,551 complaints were filed in NAB and inquiry was

[16] Sutherland, E. (1949) White Collajobbery r Crime (New York: Holt, Rinehart & Winston).

held in only 456 (2% of total), only 215 were investigated' out of which only 112 were convicted. Besides this crypto currency scam, Havala scam, Hascol fraud, sugar crisis and etc. are recent examples of white collar crimes. Another aspect is that generally white collar crimes are committed secretly and with full planning hence the offender believes that he would not be caught.

> *"A stereotype of the white-collar offender has created an image of the high-status, respectable business or corporate offender whose crimes are underreported, rarely prosecuted, and therefore absent from official criminal statistics."*[17]

Today the white-collar criminal is effecting the economy of the country more skillfully by using advanced techniques and avoiding the process of law. According to Farooq et al. (2013),[18] increase in the level of corruption has caused a considerable decrease in new investment not only of foreign investment but even in investment within the country. Moreover, the influential white-collar criminals take advantage of change of political regimes and stop the projects started by the previous government and direct funding in useless and nonessential projects which effects the economic development of the country. Poor management to collect revenue and of collected revenue are also problematic areas. Another aspect is that white-collar crimes and criminals are not easily detected. Policies to make white collar crime and criminals more visible. Due to individual greed foreign aid has not been utilized for the development of economy.

Furthermore, on organizational level it is noteworthy that with the influx of economic development the interest of international companies is increasing in third world countries, especially in emerging economies like Pakistan. In order to grab a lion's share of such markets these international companies bribe the regional

[17] Hazel Croall, H. (1989) 'Who is the white-collar criminal?', British Journal of Criminology, Vol. 29 (2), 157-74

[18] Farooq, A., Shehbaz, M., Arouri, M., & Teulon, F. (2013). Does Corruption Impede Economic Growth in Pakistan? Economic Modeling, Volume.35, 622-633.

company's employees and extract internal and confidential information of local companies from them in order to device their own policies to defeat these companies. Here in this case the greed of the employees is the main reason for indulgence in suchlike corrupt activities. More so, globalization has given rise to 'large-scale transnational theft of public funds'[19] by high level officials. Another form of white-collar crime is establishing off shore or secret companies with anonymous investments to make money and evade legal consequences and accountability. It is a widespread observation that as a common practice, companies invest more on their system developments for interior controls and fraud disclosure but they pay lesser attention in behavioral monitoring of their employees. So, there is a need to determine possibility of criminal instinct in employees not only at the time of induction but also during life time of their jobs so that if at any point it is felt that the person is now tending towards unusual way then necessary corrective and precautionary actions can be taken.

2. Statement of the problem

The wave of white collar crime is surging deeply in almost all the facets of our society. Chronologically the root cause goes back to the colonial era. Since 1947 the newly emergent State segregated in two distinctive socio-economic groups, i.e., people who had sacrificed their properties for independence and the office holders and influential people who took it as an opportunity to make properties by submitting false evacuee claims. Unfortunately, the problem didn't end here and these people, by securing themselves financially, acquired conspicuous social and political positions in our society and continued effecting the societal fabric from every aspect. Even otherwise loose institutional control over the employees and organization, greed to get more, gaining more without putting effort are also the causes of this social problem. Although laws have also been coined but the problem is going deep inside our society and social consciousness. This study will focus on denuding the root cause

[19] Transparency International

of the problem as well as the suggestions to coup up with the problem efficiently.

3. Research Objectives

The objectives of the Research are given below:

- To analyze the genesis of the white collar crime in our society from historical, social, economic perspectives and its impact on current day society.
- To go through the existing laws.
- To advance an argument for the effective implementation of existing laws and devising new laws.

4. Research Questions

The research focuses on the questions as follows:

I. What type of white collar crimes are prevalent in our society?
II. What are the reasons of spread of these white collar crimes?
III. What socioeconomic and political challenges we face due to white collar crimes?
IV. How we can eradicate white collar crimes?

5. Literature Review

Exhaustive literature is not available on the topic. A few books are there on the subject. Some of these books are,

- Edwin Sutherland, the most significant author on the subject has not only given the definition of white collar crime in his book "White Collar Crime" but has also elaborated the crime committed by the skilled, educated class of a society.
- Eugene Soltes in "Why They Do It: Inside the Mind of the White-Collar Criminal" throws light on the criminal instinct of the white collar criminals.

6. Research Methodology

Every research is based on a particular methodology and it is the duty of the researcher to find out the appropriate technique which completely suits the topic of his research so that accurate and perfect result of the research findings can be drawn. This research is based upon secondary sources such as research articles, journals, books and internet sites to examine and analyze the historical perspective of white-collar crime in Pakistan and its impact on present day political instability and economic upheaval. Report of Transparency International was used to analyze the impact of white-collar crime on economy of the country. As the white-collar crime is committed by the individuals occupying powerful seats hence the country's history from the aspect of increase in the number of fraudulent schemes and scams, organizational frauds and corruption in the occupational sectors have been evaluated.

7. Conclusion

U Myint[20] holds that following the corruption equation of Kiltgaard[21]

$$C=R+D—A$$

A stand for accountability, D stands for discretionary powers, R stands for economic rent and C stands for corruption, U Myint says that the higher the economic rent or discretionary powers in a country, the 'greater will be the corruption. He states that considering above corruption equation there will be high probability of the spread of corruption if,

> "1- A country has large number of laws, rules, regulations, and administrative orders to restrict business and economic activities and thereby creates huge opportunities for generating economic rent, and especially

[20] U Myint, 'Corruption: Causes, Consequences and Cures', Asia Pacific Development Journal, Volume 7, No.2, December 2000

[21] Kiltgaard, Robert, 1998. International Cooperation against Corruption," IMF/World Bank, Finance and Development, 35(1): 3.

if these restrictive measures are complex and opaque and applied in a selective, secretive, inconsistent and non-transparent way;

2- Administrative are granted large discretionary powers with respect to interpreting rules, are given a lot of freedom to decide on how rules are to be applied, to whom and in what manner they are to be applied, are vested with the powers to amend, alter, and rescind the rules, and even to supplement the rules by invoking new restrictive administrative measures and procedures; and

3- There are no effective mechanisms and institutional arrangements in the country to hold administrators accountable for their actions."

Unfortunately, here in our country all three conditions exist. In isolation from the past we have not been able in last seven decades to implement the laws relating to accountability of the corrupt people of high positions with such a force so as to develop a culture of jobbery free society.

The policy-makers and law wizards need to realize that the effect of white collar crime goes to the root of the society leaving a morbid sense of deprivation and of double standards of law for rich and poor resulting in departing from the rule of law. Therefore, to preserve equality before law a general sense of awareness among people is to be developed. As many scams are introduced on daily basis in which simpletons are easily entrapped. A strict check on such scams is to be made and a Governmental portal to keep the masses aware of these scams should be made. Above all law should be implemented strictly and no one whosoever he is, should be considered above the law of the land. White collar class is the backbone of a social system and the major contributor of its growth and if this class starts thinking on individual level and exploits its high ranking position corruption goes to the roots and penetrates in every organ of that society. The impression of oppression and inequality it leaves on the downtrodden not only destroys one class but it prevents the

rule of law to take roots. To deal with this issue the loopholes in legal side of the system, peer support, lack of accountability[22] and loopholes on administration which urges someone and provides him with the opportunity to commit crime are the main reasons of this problem.

For proper implementation of laws punishment of white collar crimes should be made stricter, deterrent and exemplary free from the influence of 'class and sentencing.

[22] Aneel Sagar, 'The Concept of White-Collar Crime: Nature, Causes, Political and Legal Aspects in Accountability and Way Forward', journal of Political Studies, (2019), accessed from <https://go.gale.com/ps/i.do?id=GALE%7CA594098430&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=19941080&p=AONE&sw=w&userGroupName=anon%7E97d4af40< site visited on 11.03.2022>

8. An Overview of Partition Matters

MUHAMMAD MASOOD ASGHAR[1]

1. OBJECT

Preamble of The Punjab Partition of Immovable Property Act, 2012 states that its purpose is to reform existing laws relating to partition and to provide for ancillary matters. Practice under the preceding enactment; The Partition Act, 1893 had generated some difficulties and delays in finalization of partition matters especially with regard to modes of partition. The Act of 2012 prescribed comprehensive procedure for partition suits which was not the case with its predecessor. It made provision for frame of suit, prescribed time limit for filing written statement, gave penal provisions for curbing delays and most importantly gave a mechanism of three clear-cut options for execution of preliminary partition decrees. The previous Act of 1893 had only a few provisions which related to modalities of sale of property in case partition was not done.

2. LEGAL ASPECTS OF A SUIT FOR PARTITION

While dealing with partition matters some key law points should be kept in mind. Partition is a division of joint property among co-owners so that each may become exclusive owner of part allotted to him. It converts joint enjoyment into enjoyment severally.[2] A suit for partition may be brought by one or more of the owners of jointly owned immovable property; which is defined in section 3(c) of the Act of 2012 as a property owned jointly and not being an agricultural land. Unity of title and unity of possession is a condition precedent for a partition suit.[3] However, as a matter of legal fiction, every co-owner is presumed to be in possession of each and every inch of un-partitioned land

[1] Author is a civil judge working in Punjab under Lahore High Court. This article has been accomplished by the Author in his personal capacity. The opinions expressed in the article are author's own and will not reflect the view of the organization wherein he is working.

[2] 1993 CLC 31

[3] 2003 MLD 884 (Lahore), 2019 CLC 211 (Sindh) & 1993 CLC 31

according to his share, even though not in actual physical possession.[4] A partition suit necessarily implies a prayer for declaration of joint ownership of parties. Co-owner seeking partition should be able to display clear title of property sought to be partitioned and without title all proceedings will be a nullity.[5] Sometimes, partition is sought on the basis of P.T.1 Form. It is settled law that P.T.1 Form is not a title document and only a decree for protection of possession can be passed on the basis of it.[6] As such partition cannot be done on its basis.

A suit for partition is based on old maxim of Roman Law "*Nemo in communione potest invitus detineri*" which means that no one can be kept in co-proprietorship against his will.[7] This maxim is followed in nearly all modern legal systems. Partition is an equitable relief.[8] A plaintiff cannot be allowed to pick and choose from joint property or properties.[9] A suit for partial partition is bad in law and not maintainable.[10]

All co-owners of the joint property should be made parties to the partition suit and none should be left out, in order to save the suit from plea of non-joinder. However if some co-owner is not impleaded, proper course for court is not to dismiss the suit but implead the joint owner left out.[11] However, a person holding only an agreement to sell in his favor from a co-owner is yet to become a joint owner and not a necessary party in partition suit.[12] Every co-owner, whether arrayed as plaintiff or defendant, stands in the position of a plaintiff.[13] If a co-plaintiff wants to withdraw from suit, he should rather be transposed as defendant so that suit does

[4] 2007 SCMR 1884, 2004 SCMR 1581, 1993 SCMR 1463 & 1989 SCMR 130
[5] Bulwant Singh v Ishawar Singh 2001 (3) RCR (Civil) 303 (FCH), PLD 1970 Dacca 466
[6] 2007 SCMR 181
[7] PLD 2009 Supreme Court 198
[8] PLD 1960 Dacca 15
[9] 2006 YLR 2289
[10] PLD 2009 Supreme Court 198, 1999 SCMR 2182, 2016 YLR 1489, PLD 2016 Peshawar 8, 2006 YLR 2289, 2000 CLC 519, 1999 YLR 2190, 1994 CLC 75, 1983 CLC 684, PLD 1960 Dacca 15, PLD 1961 Dacca 679, 2020 YLR 2206 (Peshawar), PLD 2014 Lahore 417
[11] 2007 SCMR 729, 2013 MLD 708, 1990 CLC 1205 & 1987 MLD 694
[12] PLD 2011 Lahore 539, 1999 CLC 1291 & 1986 MLD 443
[13] 1981 CLC 409

not become improper.[14] Although Punjab Partition of Immovable Property Act, 2012 is a special law, provisions of general law; Code of Civil Procedure, 1908 are applicable given that they are not inconsistent with any provision of the Act of 2012.[15]

3. Relevant Provisions

- Punjab Partition of Immovable Property Act, 2012
- Sections 54, 75, rules 13 & 14 of Order XXVI and rule 18 of Order XX of Code of Civil Procedure 1908
- Section 2(15) read with article 45 of schedule of The Stamp Act, 1899
- Chapter XI consisting of sections 135 to 150 of West Pakistan Land Revenue Act 1967 read with chapter 18 of Land Records Manual & chapter XIII of Land Administration Manual

4. Preliminary Matters

4.1 Jurisdiction

Partition of residential and commercial immovable property is done by Civil Court[16], whereas forum for partition of agricultural land is Revenue Officer.[17]

At times questions arise before court about jurisdiction for hearing and decision of a partition suit where part of the joint property is residential or commercial on one side and the other part consists of agricultural land. This point came up before honorable Peshawar High Court in *Raisham Khan v Mir Zad Khan18* and the court held emphatically that only forum for partition of joint property consisting of land as well as

[14] 1994 CLC 1967
[15] See section 15 of The Punjab Partition of Immovable Property Act, 2012
[16] See section 4 read with section 3(c) of The Punjab Partition of Immovable Property Act, 2012
[17] See section 135 and other provisions of Chapter XI of The Land Revenue Act, 1967. May also see 2012 SCMR 695, PLD 2008 Peshawar 97
[18] 2019 YLR 2772 (Peshawar)

constructed property is civil court. In a similar case titled *Qadeer Ahmed v Ejaz Ahmed19* Honorable Lahore High Court ruled that where most of the joint properties were of residential/commercial nature, Civil Court being the court of ultimate jurisdiction was the sole forum to decide the lis. It further held that if from a cluster of joint properties, one is within jurisdiction of Civil Court, then it can also adjudicate upon properties not within its jurisdiction, being court of ultimate jurisdiction.

For determining as to whether a property is agricultural or non-agricultural, regard may be had to following questions:

Whether the land is occupied as the site of a town or village?[20]

Whether or not the land is assessed to land revenue?[21]

Whether the land is being cultivated or not?[22]

Whether there is construction over the land?[23]

If there is construction over the land, whether or not it is used for any purpose subservient to agriculture?[24]

Mere fact that some land was described as "ghair mumkin" does not necessarily mean that it has ceased to be an agricultural land.[25] Jurisdictional competence of court is determined on the basis of value of plaintiff's share in the joint property.[26]

4.2 Limitation

Limitation for a suit for partition is six years under article 120 of The Limitation Act 1908 but it has been held that it is a

[19] 2017 YLR 1217
[20] See section 3 of The Land Revenue Act, 1967 and case law reported as 2019 CLC 1343 (Lahore)
[21] See section 3 of The Land Revenue Act, 1967
[22] PLD 1965 Lahore 429
[23] Ibid and 1997 SCMR 1792
[24] 1991 SCMR 1944, 1989 SCMR 293, 1989 SCMR 1564, 1987 SCMR 1426, 1974 SCMR 356
[25] 2019 CLC 1343
[26] PLD 1961 Supreme Court 349, PLD 1962 A J & K 29 & PLD 1960 Dacca789

continuing right and partition suit can be filed any time during joint possession.[27] Limitation is irrelevant and does not run in case of a suit for partition.[28]

5. PROCEDURE

Ordinarily courts bifurcate a partition suit into two houses:

1) First round ends on passing of a preliminary decree. A plaint for partition should state details of the joint property, implead all co-owners as parties. Relevant documents should be annexed.29 Not more than 10 days 'notice' (instead of summons) is to be issued to defendant(s).30

   Defendant is required to file written statement within 30 days of his first appearance in court, failing which his defence shall be struck off.31 In case defence is struck off, defendant will not be allowed to lead any evidence.32

   Court may order the owner in possession of property to deposit mesne profits in proportion to share of a co-owner not in possession, pending adjudication of suit and in case of default, court may strike off his defence if he is a defendant or dismiss the suit if he is plaintiff.33 Court can also pass order for mesne profits at final stage under section 12 of the Act.

   Decision of question of title and shares of joint owners amounts to decree.34 For deciding question of title court may, and at times should, frame issues and record evidence.35 Shares of co-owners can be amended later on in case of death of an owner.36 Legal questions about

[27] 2004 SCMR 1036, 2017 YLR 735 (Lahore), 2017 MLD 1902 (Sindh), 2017 CLC Note 177 (Sindh), PLD 2014 Lahore 417, 2014 CLC 254 , 2006 MLD 1496
[28] PLD 2014 Lahore 417, PLD 2012 Sindh 449, 2007 MLD 54
[29] See section 4 of The Punjab Partition of Immovable Property Act, 2012
[30] section 5 ibid
[31] section 6 ibid
[32] section 6 & 7 ibid
[33] Section 7 ibid
[34] Section 8(2) ibid
[35] PLD 2020 Lahore 684
[36] PLD 1954 Federal Court 184

jurisdiction, partial partition, no co-ownership, non-joinder or mis-joinder and maintainability of the suit otherwise, should be decided at this stage.

2) Second round is usually known as final decree proceedings. After preliminary decree three modes of execution are prescribed in the Act. These are (i) Appointment of Referee (ii) Internal Auction & (iii) Open Auction. These modes are to be adopted only in the sequence given above and court cannot choose any other sequence.

Here a question arises as to whether any other mode of execution of preliminary decree like appointment of local commissioner is permissible or not? In this regard it is important to keep in mind the delay caused by practice of appointment of local commissioners, objections of aggrieved party on such report, decision of those and sometimes, repetition of this process, under the previous Act; Partition Act, 1893. In the Act of 2012, a visibly swifter and comprehensive mechanism is provided. In this context, application of maxim "Expressio Unius Alterius Exclusio", which means that mention of one thing implies exclusion of other37, may be applied and listing of options by the statute in the shape of appointment of referee, internal and open auction, may be taken as a bar on other options as a result of necessary legal intendment. Therefore, court should stick to the three modes of execution given by the statute and resort to provisions of Code of Civil Procedure like section 75 and rules 13 & 14 of Order XXVI should be taken as prohibited through legal intendment.

5.1 Referee for Partition

Referee is appointed on the basis of agreement in writing of all co-owners. Court grants limited time to referee for making

[37] PLD 1975 Supreme Court 32

proposal of partition and may extend that time. Fee of referee shall be paid by co-owners according to their respective shares.[38] Referee is required to determine whether the property is partition-able and if so, to devise a partition plan. Court shall affirm the proposal of referee unless it is in contravention of any law.

5.2 Internal Auction

If partition through referee fails; which may be due to parties not agreeing on a referee or the referee finding that property is not partition-able or court finding proposal of the referee in contravention of any law like law relating to town planning etc., court is required to go to internal auction after fixing reserve price.

All joint owners are allowed to participate in auction conducted in court. Record of internal auction is maintained by court. Highest bidder is declared by court as auction purchaser and required to deposit auction price in 15 days after deducting amount equaling his share in the property. If auction purchaser does not deposit auction price in said period, court re-conducts internal auction without the defaulter participating.[39]

5.3 Open Auction

If co-owners do not participate in internal auction or only one of them is willing to participate in such auction, court will go to open auction in which any co-owner may also participate. Open Auction is conducted by appointment of a Court Auctioneer against fee payable by co-owners in proportion to their respective shares. The auction is conducted after approval of auction plan to be submitted by the auctioneer. Twenty percent of the bid money is to be deposited immediately on close of bidding and remaining within 7 days. Auctioneer deposits auction price in court with auction report. Court is required to confirm the

[38] Section 9 ibid
[39] Section 10 ibid

auction on deposit of auction price and in case of failure to forfeit the deposited amount and restart the open auction.[40]

6. Owelty of Partition

An equal and just division of value in property is not always possible. In such eventuality, courts, conscious of the fact that partition is an equitable relief, may order that a certain sum be paid by the party to whom the more valuable property is assigned. This amount is called owelty and as such, an equalization charge.[41]

7. Construction Pending Partition Suit

Sometimes a co-sharer starts raising construction over joint property without approval of court. Construction has an element of apprehension that nature and value of property or portion thereof may be changed. Question that has confronted courts is as to whether co-owner intending to raise construction over the joint property should be required to first seek partition or the owner seeking to restrain such construction. Apex court of our country answered this by stating that person intending to raise construction over the joint property should have first of all got the same partitioned and then may raise construction over his share.[42] There have been some instances when courts allowed construction to be raised at the risk and cost of the person doing so but many of those were on the basis of an offer by the person intending to raise construction to do so at his own risk and cost.[43]

8. Alienation Before Partition

It is settled law that a co-sharer is entitled to alienate or transfer his share in the 'khata' and deliver possession of property in his occupation/control. The vendee steps into his shoes as a co-sharer and the property so purchased shall of course be subject

[40] Section 11 ibid
[41] Paravathi Amma v Makki Amma cited as AIR 1962 Ker 85
[42] 2003 SCMR 999, PLD 1998 Supreme Court 1509 & 1989 SCMR 130. Also see 2004 YLR 1136 (Lahore), 2003 CLC 1695 (Lahore), PLJ 2012 Islamabad 168 & 2000 CLC 1138 (Peshawar)
[43] 1994 MLD 116

to partition.[44] However co-sharer transferring his share must be in possession.[45] If specific property is transferred without partition, it will entitle the vendee only to retain possession till partition.[46]

9. Private Partition

Private arrangement and partition deserve same respect like any other lawful contract.[47] Court may pass judgment and decree in terms of private settlement submitted by co-owners at any stage of the proceedings.[48] It is also open to parties to revert to be joint owners again. [49] However official partition has precedence over private.[50]

10. Partition of Shamilat

Partition of 'shamilat' is permissible.[51] However, partition of 'shamilat' may not be possible in all eventualities. Such partition could be done if majority of 'khewatdars' sought it.[52] Plaintiff should be able to show that partition of 'shamilat'is feasible.[53] West Pakistan Land Revenue Act, 1967 makes ample provision for protection of grazing ground and other common rights in partition of 'shamilat'.[54]

[44] 1993 SCMR 1463, PLD 1959 Supreme Court (Pak.) 9, 2021 CLC 1394 (Lahore), 2014 CLC 254 (Lahore), 2009 CLC 92, PLD 2007 Lahore 83, 2006 MLD 442 (Lahore), 2010 CLC 285
[45] 1998 CLC 2006 (Peshawar)
[46] PLD 1959 Supreme Court (Pak.) 9, 2007 YLR 1723
[47] PLD 2007 Karachi 421 & 2004 SCMR 126
[48] See section 13 ibid
[49] R. Ramamurthi Iyer v Rajeswara Rao (1972) 2 SCC 721 (paragraphs 9 & 10)
[50] PLJ 2014 A J & K 318
[51] 1996 SCMR 123 & 1998 SCMR 1589
[52] 2016 YLR 1489
[53] 117 PR 894; 2 Lah. 73
[54] See section 136 of West Pakistan Land Revenue Act, 1967 read with PLD 1949 Lahore 352

11. Time Limit

Statutory time period for deciding suit for partition is 6 months from date of institution of suit. However, District Judge may extend the time.[55]

[55] See section 14 of Punjab Partition of Immovable Property Act, 2012

9. Bridging the Gap-Conceptualizing Professional Development Strategy for District Judiciary of Pakistan

Mr. Fakhar Zaman[1]

Abstract

Of all the tiers of judicial hierarchy, district judiciary is burdened the most due to its interaction with maximum percentage of litigant population. Being placed at the grassroots level, it is expected by vulnerable segments of our society to deliver in terms of deliverance. It has been observed that a limited number of disputes are taken before superior courts. An exceptionally higher percentage of litigants either end up resolving their disputes at district level or their accessibility to superior judiciary is restricted for host of reasons. Based on my personal observations as a field officer, once a team member of the high court administration and of course, a former civil servant, this paper accentuates the role of district judiciary and conceptualizes professional development strategy for it. It provides for a comprehensive transformation strategy and necessary tools there for. Focussing capacity building, it proposes a road map for securing total reformation and behavioural change in district judiciary.

1. Introduction:

Being main facet of the system, district judiciary[2] is burdened with enhanced responsibilities. The perception of judges as problem solver for a variety of personal,

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[2] The phrase was unconsciously coined for subordinate judiciary during reform interventions under Asian Development Bank funded Access to Justice Programme (2002+).

economic, educational and political disputes, has put an enormous amount of pressure over district judiciary in particular. Moreover, with separation of judiciary and executive in the recent past, a perceivable vacuum was noticed in the justice system of Pakistan. The responsibility of district judiciary, having succeeded the erstwhile executive magistracy, therefore, got multiplied manifold. The exposure of a civil judge, at the lowest rung of the institution, became more diverse and versatile. His output, now, was gauged against a totally distinct and multi-pronged benchmark. He was expected to be perfect professionally and sensitized to the frame of reference he is working in. He was to remould his perception and to rehash his approach to ideals. He was expected to see beyond the window and to be committed to deliver more effectively as compared to his predecessor.

In the above backdrop, it was considerate for the district judiciary to have netted adequate refurbishment both in terms of assets and human recourses. But unfortunately, it was burdened even more, with enhanced responsibilities, without strengthening its capacity. Of late, a comprehensive reform agenda was implemented under Access to Justice Programme (AJP)[3] during 2002+. The long-term objective of the AJP was to reduce poverty and promote good governance through improved rule of law[4]. Material development in terms of paraphernalia was made and capacity of district judiciary was strengthened considerably. The efficiency of the system, though, underwent a paradigm change but it was not that much radical as could signify service delivery. Neither the attitudes allowed any change nor were the key players sensitized to the qualified scenario. The ultimate goals of substantial justice, reduced vulnerability, transparency and predictability thus remained unachieved.

The obvious reason for partial success of reform agenda was portrayed to be lack of sustainability in the reform process. This malaise was taken care of by creation of an endowment fund

[3] Pakistan-Access to Justice completion Report at https://www.adb.org/sites/default/files/project-document/63951/32023-01-pak-pcr.pdf accessed 31/08/2022
[4] Ibid

so as to provide for support to recurring expenses. Feeling the need for continuing judicial education, a dedicated window was created for judicial academies[5]. It was noticed at the policy making level that professional capacity of the district judiciary is having a visible gap which held it back with its old mind set. Reform agenda seemed to be a temporary and stopgap arrangement as perception blocks remained intact. The traits stuck to the same stagnant frame of reference and the contemporary dynamics went un-noticed. A general perception got developed in rank and file that members of the district judiciary are least sensitized to the concepts of gender, vulnerability, accessibility, transparency, predictability and capability deprivation. This was at times dubbed to be the main reason for failure and counter productivity of the reforms[6].

Based on my personal observations as a field officer, once a team member of the high court administration and, of course, a former civil servant, this paper is an attempt to outline a blue print of what the district judiciary is in need of? It provides for a comprehensive transformation strategy and necessary tools there for. This paper tries to provide a drips and drabs roadmap for total reform through capacity building, judicial education and behavioural change in district judiciary.

2. Professional Development Strategy

The proposition that 'independence of judiciary makes it accountable for its professional competence' is now accepted beyond debate. It patently hints at accountability of judiciary besides its capacity enhancement and professionalization. While emphasis on academics is important in achieving professionalism, development of personal skills is also an established phenomenon. For years, the most efficacious prescription for meeting with challenge of professionalism was considered to be 'continuing judicial education (CJE)'. It was restricted to the knowledge of law and court related activities

[5] Access to Justice Development Fund at http://ljcp.gov.pk/nljcp/ajdf/pages/2 accessed 31/08/2022

[6] Armytage L, Pakistan's Law & Justice Sector Reform Experience - Some useful Lessons

only. In the backdrop of globalization, however, the scope of professional competence of judges got enhanced. It is now considered to include personality development beside acumen and was acknowledged to have direct bearing on service delivery. With this conceptual background, professional development strategy has been envisioned with Federal Judicial Academy[7] (FJA) providing secretarial support for its execution. It broadly outlines four level graded career courses for members of district judiciary, to be linked with career progression. The courses are to be designed on the pattern of civil service of Pakistan career development courses and it would be a continuous process. The levels indicate different target groups and the modules would be upgraded for every upper level. The strategy is expected to further national integration, encourage peer learning and inculcate collegiality in the district judiciary so as to develop it as an institution with shared responsibility.

3. The Role of Federal Judicial Academy

FJA was established in 1997 with the prime objective of providing continuing legal education to judicial officers in order to improve their professional competence and the quality of justice administered in the courts[8]. In its strategic plan 2018-2021[9], FJA envisioned itself as an institution of excellence, aimed at continued professional development of an independent and accountable judiciary for expeditious and inexpensive justice that upholds the values in line with the aspirations of the people of Pakistan. Though, FJA has been striving for capacity development of key players of justice sector since its inception, but it could not bring a perceivable improvement in its service delivery. After concerted introspection, the obvious reasons for such a frailty were found to be the following;

[7] Premier judicial education institution of the government of Pakistan created working under Federal Judicial Academy Act, 1997 at <https://www.fja.gov.pk/overview> accessed (31/08/2022).

[8] Ibid

[9] http://www.fja.gov.pk/uploaded_files/strategic_plan_fja_web.pdf accessed 12/08/2022

Firstly, the core objective of continuing judicial education is to improve service delivery. Ideally, every capacity building activity should have been designed and executed in a manner that serve the core objective. Very little serious effort has ever been made at FJA till date. Secondly, there has been lack of coherence in capacity building activities undertaken at FJA. Every activity has been designed and executed in isolation, without its being complemented by other. In this way, the cumulative effect of the whole some was minimized resulting in minimum end product even after utilizing maximum of resources. Thirdly, at FJA, neither curriculum development nor training needs assessment has been based on proper empirical research. Similarly, there has been no mechanism for evaluation or impact study which could provide guideline for forward planning.

In order to address the above shortcomings and to revamp the entire regimen driving the judicial education, the way forward was envisioned by the Board of Governors of FJA outlined in its 41st meeting.[10] Transforming FJA into a centre of excellence in judicial education has been translated in this professional development strategy. Primary focus has been kept on addressing the above highlighted issues so as to make all capacity building activities coherent, directed to further the core objective with research back up.

4. Approval Process

Professional development strategy require intervention by the Islamabad High Court, the Lahore High Court, the High Court of Sindh, the Peshawar High Court and the High Court of Baluchistan. All the High Courts are to implement it as policy guideline approved by the National Judicial (Policy Making) Committee (NJPMC)[11]. Thus, the proposal document prepared by the FJA is contemplated to be submitted to the NJPMC for consideration and approval. Once the strategy is approved, it

[10] Held at the conference room of Supreme Court of Pakistan on 12.12.2017.

[11] National Judicial (Policy Making) Committee is the judicial policy coordination body constituted under an Ordinance (LXXI) of 2002 with Chief Justice of Pakistan as its chairman. http://www.ljcp.gov.pk/NJPMC.html accessed 15/08/2022.

shall be the mandate of FJA to execute it as per timeline and standard operating procedures to be developed in consultation with the high courts. At a later stage, it may be provided for, in the service rules following Islamabad Judicial Service Rules, 2011[12].

5. Linkage to career progression

The career courses under professional development strategy would be mandatory and linked to career progression of judicial officers and even elevation to the High Courts. No officer shall be considered for promotion without having successfully completed the prescribed level course. Nomination to such courses would be by respective High Courts on seniority basis. The courses would be graded with stipulated passing criteria. It would be quantified and would add up in the performance evaluation reports. The issue of nominations would be resolved once for all and the participation would be made more productive.

6. Training levels and duration

Professional development strategy proposes the following four level career courses for members of district judiciary;

Course	Duration	Target Audience
Judicial Management-I	08 Weeks	Civil Judges
Judicial Management-II	08 Weeks	Senior Civil Judges
Judicial Management-II	08 Weeks	Addl: Sessions Judges
Judicial Leadership Course	08 Weeks	Distt: & Sessions Judges

The courses would run concurrently throughout the year in a manner that two courses of each level (total of eight courses) would be conducted in a calendar year.

[12] The Islamabad Judicial Service Rules, 2011 https://mis.ihc.gov.pk/attachments/news/Islamabad_Judicial_Service_Rules_2011637901985134199029.pdf accessed 15/07/2022

7. Training need assessment

We need to educate the judges, not only in law but in various coexistent theories and political orthodoxies, streaming among social reformers, deconstructionists, legal academia, judicial educators, researchers and the like. Education, without having assessed its need, hardly yield any result. With this perspective, a comprehensive exercise for training need assessment (TNA) of the district judiciary would be required before designing modules for career courses. Focussed group discussions and structured surveys would be conducted for comprehensive TNA. The competence level of each target group, previously undergone trainings and the capacity vacuum would make part of TNA profile of every judicial officer. Currently, FJA is offering legal internship to law students of four public sector universities. These law interns would be engaged in the process of TNA as investigators.

8. Training Methodology

Since target audience of these courses would be senior judicial officers with sufficient work experience in different environments and positions, multi-pronged methodology has, therefore, been proposed. Three learning axis illustrate the overall learning process encompassed in this program:

1. Self-learning axis – each of the participants will be asked to define his personal learning objectives and proactively pursue their fulfilment.

2. Court level axis – each of the participants will work, with assistance from facilitator, to implement training insights into his own district/court.

3. Organizational axis – all the participants will work together in groups to forge systemic insights and to develop policies and implementation plans.

4. Component on research methodology and tools has been included for inculcating analytical and critical thinking.

5. Peers learning through command tasks performed in hypothetical work environment would be distinctive feature of these course.

6. Within these broad parameters, the training would be imparted through knowledge-based learning sessions, skills-based learning sessions, awareness generating sessions, participatory training methods, planning for self-development and application of what has been learnt. The training methodology spreads over the following areas:

I. Lectures: Lectures are the principal mode of a training program, to be designed as highly informative, communicative, well-calculated and interactive in the sense to ensure greater participation of the trainees.

II. Extension Lectures: In order to broaden the intellectual level of the trainees, the courses would include special lectures. These lectures are delivered by high profile academicians and professionals and thematic areas of prime importance.

III. Research Skills: It would be in the nature of group work (syndicate). Each member of a group would be required to conduct research on an assigned topic. Small exercises on comparatively smaller topics would also be arranged. Each module would contain separate syndicate research topics. An advisor/ expert would be there to help the trainees in write research papers and learn how to publish it.

IV. Office and linguistic skills: Problems are often created due to communication gap. To meet the need, experts on the subject would be invited to deliver lectures and conduct practical exercises. Modern techniques and gadgets would be used and area of official correspondence would be focused.

V. Book Review: It would be one of the distinctive features of these courses. It will enable the participants to enhance their reading and review skills for self-knowledge.

VI. Research paper: A research paper of 5000 words on an approved research proposal would be a mandatory component of each course.

VII. Presentations: Trainees would be divided into various groups. Each member of the group would be required to make an analytical and critical presentation of the lectures delivered or talk shared on daily basis. They would also be required to prepare presentations on the assigned topics.

VIII. Study circles and panel discussions: These would be arranged to develop the habit of text reading and to make the trainees aware of significance of collective study. In panel discussions, the trainees are provided with an opportunity to academically interact with a group of experts through a question answer session. These activities would help trainees to understand the causes of diversity in opinion, the significance of concurrence, the valuation of an argument and proper method of drawing an inference.

IX. Mock Trials: During the training, mock trials would be conducted for helping the trainees write order-sheets, short orders, summonses, warrants, judgments, evidence, presenting a case, fixing date of proceedings and the like.

X. Command tasks: In this part of training, the participants shall undertake specific individual as well as group command tasks so as to exhibit their leadership and managerial skills. The participants shall be asked to preside over a meeting, represent your district at a development forum, prepare annual work plan, dictate record notes, draft official communications and launch a strategic plan in a hypothetical work environment. Some visuals would also be screened so as to acquaint the participants with management communication skills.

9. Evaluation and grading

All the career courses would be graded with a minimum criterion for passing. The evaluation would be made by third party so as to ensure transparency. The participant who fails to satisfy the minimum criteria would be required to re-take the course after one year bar. Besides, at the end of the training course, the participants would be engaged in self-assessment check list of the International Consortium for Court Excellence (ICCE)[13] for evaluation of their skills. The participants shall be questioned in some areas of courts' excellence, embodying accepted court values, so as to find out the extent of their urge for achievement of goals. The exercise would in itself be a learning activity for measurement of performance. The actions/activities indicated in the check list would not be exhaustive but would be indicative, providing initial guidance. Participants will be able to identify their own actions once they get familiar with the framework[14] approach.

10. Reporting and impact studies

Impact study is an integral part of evaluation process. The impact study of the courses would be quantitative research which would determine impact of the initiative on service delivery by the justice system. The research would be based on empirical data of defined variables transformed into useable statistics. Structured surveys on a large sample would be used for data collection. The research wing of the FJA would undertake the study six months after successful execution of at least one course of each level.

11. Forward planning

FJA shall circulate its annual training calendar well before commencement of calendar year. The nominating bodies shall plan nominations accordingly. Once the strategy is successfully

[13]Provided by International Consortium for Court Excellence, Singapore, https://www.courtexcellence.com/resources/self-assessment accessed 01/09/2022

[14] The Framework of International Consortium for Court Excellence, Singapore https://www.courtexcellence.com/resources/the-framework accessed 01/09/2022

implemented and rolled out, FJA will take up the case for necessary amendment in its Act[15] so as to give it degree/diploma awarding status. Successful completion of all four level courses would be made equivalent to degree in judicial studies while single level course would be graded as a diploma in judicial management. The National Judicial Education Coordination Committee (NJECC)[16] would be activated for oversight and policy assistance.

12. Faculty development

Development of faculty has always been a cumbersome job. Being part of professionalization plan, the training activities could not be solely undertaken either by academia or professionals. It would require a blend of various mind sets so as to get diversity and versatility. FJA may evaluate the professionals and training experts in this regard. Creation of a permanent judicial education cadre is proposed, which may include both professionals and academicians.

13. Linkages with academia

FJA would be required to link up with scholars and institutions of higher education as well as sister professional training academies. The professional exchange programmes of the FJA with National Police Academy, the FIA Training Academy, the provincial Judicial Academies, the Shariah Academy Islamabad, the Justice Academy Turkiye, the Department of Judicial Administration, Maldives are directed to this objective. Opportunities for training courses for FJA faculty and funding there for, may be explored using various fora. Linkages with academia would also include on-line collaboration with digital libraries and recourse centres. Legal internship programme of the FJA is a step in this direction.

[15] Federal Judicial Academy Act, 1997 (ACT No. XXVIII of 1997)
[16]Constituted for oversight of judicial education in 39th meeting of the Board of Governors of FJA, held on 17,01.2015.

14. Securing foreign scholarships

Arrangement may be made with world's most prestigious scholarship awarding bodies for securing scholarships for district judiciary to study abroad. This would not only provide opportunities of international exposure to the district judiciary but would also contribute towards its professional development. The British Council, Pakistan, managing The Chevening scholarships, the AusAID, managing Australian development scholarships and the United States Educational Foundation in Pakistan, managing the Fulbright scholarships, may be persuaded to award at least 10 scholarships to district judiciary each year. Nomination for such scholarships may be made by the Chairman of Board of Governors FJA on recommendations from respective high courts, based on the performance of officer in level courses, the service record and judicial performance.

10. Child Adoption Among Hindus and Muslims: A Comparative Study of Pakistan Prospective

MUHAMMAD SAJID KHAN[1], M. ASGHAR ALI MAHAR[2]

1. INTRODUCTION

Adoption has become one of the most contentious subjects, particularly in Pakistan. The topic of adoption has piqued the public's interest, owing to a shift in societal paradigms and the laws that control it, wherein Hindu families have no legal remedial measures.

In Pakistan, there is no specific law for the adoption of a child, Muslim Personal Law does not govern Hindu children, and since that though Islam does not recognize the adoption while that no prohibition on the adoption of a child existed[3], and that Pakistan is also not a Hague Adoption country and no child is adopted in Pakistan, there is no adoption authority in Pakistan; nonetheless, guardianship proceedings become inevitable so adopting a child is a lengthy, difficult, and legally complex procedure.[4] The Guardians and Wards Act of 1890, as particular, regulates minors' rights and interests in Pakistan. The term adoption being alien to Pakistani law, under the Guardians and Wards Act of 1890, its process is carried out in the name of the custody of the child's person. The adoptive parents file an application with the court under section 7 of the Act, and in the event of a child with known paternity, they name the biological parents of the child as respondents, who normally sign a consenting statement in favour

[1] Senior Civil Judge (Family Division) Muzaffargarh.
[2] Civil Judge/ Research Officer, Legal Research Cell, Sindh High Court, Karachi
[3] Nadra Authorities In the matter of Suo Motu Case No. 12 of 2010, heard on 22nd June, 2011,2015 GBLR 38, Supreme Appellate Court
[4] Mrs. Ingrid Pereira and another v. VIth Additional District Judge, Karachi South and 2 others, PLD 2012 Sindh 208

of the adoptive parent. In Islamic law, adoption is not a recognised form of filiations[5].

The adoption differs with guardianship. The Guardians and Wards Act, 1890 of 1890 allows for adoption to be done in the guise of guardianship. The guardian of a person/custodian (e.g., mother or friend) has no financial duty to support the child/ward out of his or her own pocket in guardianship. The true or natural father will be responsible for the child's upkeep. Nonetheless, under section 22 of the aforementioned Act, the guardian of the individual might be charged with the child's/ward's care.

According to Pakistani law, prospective adoptive parents may not be appointed guardians of Muslim children, and Non-Christen may not be assigned guardians of Christen children, however, a Non-Muslim could not be given custody of a deserted or parentless child or a child whose parentage was not known from an orphanage, or otherwise, Child born in nonMuslim family, could be adopted by a Muslim and his custody was to be regulated according to Pakistani law.[6] Unless there is evidence to the contrary, a child abandoned at an orphanage is assumed to be a Muslim. Adoption is, in general, a communal concern because it lacks official legislation. But outside of the family courts, people frequently choose informal adoptions based on their beliefs. However, in Western nations, such informal adoptions do not meet the standards for giving an adopted kid an immigration visa.[7] As a result, prospective adoptive parents must follow their own country's immigration laws as well as the restrictions of Pakistan's colonial Guardians and Wards Act of 1890.

The purpose of this research is to respond to the following questions: What if a Hindu family wants to adopt a parentless child abandoned somewhere or a Muslim new-born baby? Is

[5] Asad Ali Khan, Principles and practice of adoption law in Pakistan, United Kingdom Immigration Law Blog, available at: https://asadakhan.wordpress.com/2020/09/06/principles-and-practice-of-adoption-law-in-pakistan/ accessed on 05-01-2022

[6] See f.n 1. ibid.

[7] Miss Nancy Ruth Bany v. District Judge, Islamabad and another, PLD 2011 Islamabad 6

guardianship a viable alternative to adoption? What are the differences between Islamic and secure law in terms of the adoption concept? With the objective of highlighting the pressing need for the appropriate statute to identify the adoption which has been invoked informally, which could prejudice the not only rights but life at stake of infants.

For this comparative study under the qualitative methodology, the legal rulings, jurists', and religious scholars' opinions have been sought for this purpose; now, surveys or interviews are being conducted.

2. Concept of Adoption in Hindu Law

Adoption has been considered as a fresh birth; a word sanctioned by Hindu Law Theory. The term "adoption," inherited from Dharamsastra's uncodified Hindu laws, notably Manusmriti. In Manusmriti, adoption is defined as "taking someone else's son and nurturing him as one's own." In India by introducing the word "kid" instead of "son," the Hindu Adoption and Maintenance Act, 1956 has broadened the scope of "adoption." A kid can be either a girl or a boy, and not just a son.[8] To adopt a kid, you must be a Hindu and have the financial means to do so. A Hindu male who intends to adopt a kid must comply with Section 7 of the act, while a Hindu female who wishes to adopt must follow Section 8 of the same.[9] The Hindu Adoption and Maintenance Act, 1956 lays forth a series of requirements that must be followed in order for an adoption to be legitimate. For example, a Hindu man or female who wishes to adopt a son must not have a live son, grandson, or even great-grandson at the time of adoption.

3. Concept of Adoption among Muslims

Adoption is not a new notion; it has existed since the beginning of time as part of the religious laws. Adoption was not prohibited in Islam since it was determined to be in the best interests of humanity and the Muslim community around the world.

[8] Introduction to Hindu law, available at: https://blog.ipleaders.in/hindu-law-notes/#Adoption accessed on 06-012022
[9] The Hindu Adoptions and Maintenance Act, 1956

Adoption was a continuation of a popular ritual in the Arab peninsula, hence few great examples of adoption from history are10.

The Holy Prophet (PBUH) maintained the tradition by adopting Zaid bin Harisa, a slave provided to the Holy Prophet by his wife Hazrat Khadija (R.T.A), and referring to him as Zaid-bin-Muhammad.[11] The Holy Prophet (PBUH) commanded that Hazrat Hamza's daughter be handed up to HazratJaafar (R.T.A). A friend of the Prophet (PBUH), Hazrat Abu Huzifa Bin Atba bin Rabeea Bin Abd Shams, adopted one child, Salim bin Ma'qal, and married his niece to Salim bin Ma'qal. As an orphan, the Holy Prophet (PBUH) was adopted and raised by his uncle, Hazrat Abu Talib. Even throughout the life of his father Abu Talib, Hazrat Ali, a cousin of the Prophet (PBUH), was in the custody of the Holy Prophet himself. According to the Holy Quran, the Holy Virgin Mary (PBUH) was adopted by her uncle, Holy Zakaria (PBUH) and The Holy Moses (P.B.U.H) was adopted by Pharaoh and his wife Ayesha.[12]

Similarly, an adopted child is considered equal to a conceived child under Hindu law. Under the old Hindu law, only males were allowed to be adopted. The collective belief was that one would go to hell, called "Poota," if they died without a son. Only the male child could prevent the father from entering Poota.[13] According to Hindu Law, adoption is considered a new birth, which is a word sanctioned by the Hindu Law philosophy.

The theory itself is based on the principle of complete separation of the adopted child from his birth family and substitution into the adoptive family as if he were born there. For all purposes, accurate or logically applicable, the adopted child relinquishes

[10] Dr. Mr. Muhammad Aslam Khaki, Consultant in Sharia Law, See f.n 1.ibid.
[11] Ibn Sa'd, ibid, V. 3, p. 42; Ibn Athir, ibid, V. 2, p. 225; Ibn Hajar, ibid, V. 1, p. 563. and al-Ahzab, 5, 40. and
al-Ahzab, 5.and Ibn Sa'd, ibid, V. 3, p. 43; Bukhari, Sahih, V. 3, p. 174; Muslim, Sahih, V. 3, p. 131.and
Bukhari, ibid, V. 3, p. 303.
[12] See f.n 1.ibid.
[13] Hindu adoption law BY LEXLIFE INDIA POSTED ON MARCH 24, 2020, available at: https://lexlife.in/2020/03/24/hindu-adoption-law

his natural family and all associated with it as if he were civilly dead or had never been born into the family. Ever male Hindu can legally adopt a son if he is of sound mind, has reached the age of discretion, and has no natural or adoptive son, grandson, or great grandson living at the time of adoption.

The existence of a son who has given up his Hindu religion or lost his caste is not a barrier to the father adopting another son. The doctrine of relation back is applicable in Hindu adoption, where it is widely established that an adopted son obtains all of the father's rights, which are traceable back to the day of the adoptive father's death.

4. Rules of Adoption under Muslim Law:

The rules of adoption under Muslim Law are as under[14]:

1. The identification of biological parents is not concealed by adoptive parents.
2. The knot of the kid with his actual parents is never disconnected.
3. The adoptive parents are not authorized to incorporate their names in the column of parentage.
4. Inheritance of adopted kid always belongs to his biological parents.
5. Adopted parents are under obligation to provide maintenance to adopted child which includes food, clothing, lodging, medical facilities and other

[14] Vijaysinh G. Sodha, ADOPTION RIGHTS AND ISLAMIC JURISPRUDENCE, available at https://ijrar.org/papers/IJRAR19J3209.pdfm accessed on 25.08.22.

necessary expenses of a child from birth till his puberty.[15]

5. The Gaps between Islamic and Secular Law.

When it comes to the rights and responsibilities of the adopted kid, there is a significant gap between Islamic and secular law.

In secular law, an adopted child has the same rights as a biological child, including maintenance, a car, inheritance, marriage prohibition, and identity, whereas in Islam, adoption is limited to the provision of maintenance and care (Kifalah) by the adoptive parents, as the concept of adoption in Islam is that of Kifalah and patronage rather than true parentage.

In secular law, an adopted kid is required to serve his or her relationships and identify with his or her adoptive parents, but this is not the case in Islam. The real/natural parents' identity is maintained by the adopted kid. He/she inherits from his/her original parents and also benefits from his/her adoptive parents' property, and inheritance through gifts and 'wills.' Adoption of a Muslim infant by non-Muslim parents is not prohibited in principle, although it is subject to several restrictions. The home environment has no bearing on the decision to follow a certain faith. Holy Moses grew up at Pharos' house. In Pakistan, there is no formal adoption legislation. Adoption is done under the name of Guardianship by filing a Guardianship application under

[15] Dr. Mudasara Sabreen, Maintenance of child in Pakistan: A Much-needed legislation, available at https://sahsol.lums.edu.pk/law-journal/maintenance-child-pakistan-much-needed-legislation, accessed on 25.08.22.

Section 7 of the Guardians and Wards Act, 1890. The Guardians and Wards Act of 1890 prohibits non-citizens from adopting a child to ensure the kid's welfare. However, in the event of adoption, the child must be brought before the court regularly since the court retains parental jurisdiction and power and can review its judgment even after the adoptive parents receive a guardianship certificate. In Islam, the notion of guardianship is not the same as the concept of adoption. It also differs from the secular/European understanding and legislation of adoption in that adoptive parent residing in the United Kingdom or European nations must re-register their adopted kid according to the country's requirements.

The Edhi Foundation places around 250 new-borns and children for adoption every year[16]. Over 23,320 new-borns and children have been given to childless couples and families thus far. Although new and current data have been uploaded due to the COVID-19 situation,[17] data until 2010 revealed that over the previous decade, two hundred thousand (200,000) children were adopted each year. According to the Intercountry Adoption Bureau of Consular Affairs of the United States Department of State, the following number of children have been adopted from Pakistan by American residents:[18]

[16] Children Services, available at https://edhi.org/children-services/, accessed on 25.08,22
[17]https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-CountryInformation/Pakistan.html accessed on 06-01-2022
[18] See f.n.5 ibid.

Year	Number of children
2010	41
2009	33
2008	47
2007	35
2006	47
2005	22
2004	31
2003	24
2002	25
2001	24
2000	20
1999	30
1998	24
1997	13
1996	17
1995	02

6. Categories of Adoption

Based on how they are raised or adopted in society, adopted children may be divided into three following categories:

6.1. Adoption of Orphans Based on Their Needs

Children are adopted by their blood relations with the promise of providing them with better living situations in this sort of adoption. These children are frequently dopted while they are young to adjust to their adoptive family's lifestyle and have a better education and quality of life. In most cases, such infants are adopted by educated, financially secure relatives who live in large cities or European nations. They might be childless or not.

6.2. Adoption by Childless Parents

Children are adopted on a welfare-to-utility basis at a very young age in this sort of adoption. Because the adoptive parents are frequently childless, they raise the youngsters as their own children. These youngsters are given homes, and in exchange, they benefit them by assisting them with work or household chores.

6.3. Unclaimed Babies

This category includes children that are the result of culturally unacceptable or unlawful relationships. These are typically left in unsupervised regions by their parents in order to disguise their guilt. Such children are referred to as "NALBU" (illegitimate children) in Pakistan's northern regions, such as Gilgit Baltistan, and are tossed into a NULLAH (water channel, especially a dry one) to meet their fate of death. One such nullah in Skardu is known as Nalbu' Nallah (meaning illegitimate children's nullah), which is named after the method it is used for, which is to get rid of illegitimate offspring. Organizations such as Ceena and Edhi are striving to prevent such killings by implementing the "Jhola Scheme," which focuses on nurturing unclaimed children and then passing them over to adoptive parents who are looking for them.

7. Can a Non-Muslim Adopt a Muslim Child

Unless the biological parents were Hindus or the kid was abandoned at Mandar or Gurdwara, a Muslim new-born of C category could never be handed to a Hindu prospective parent. In these circumstances, however, if a Muslim is allowed to live, he might not be abandoned at a religious place for Hindus, so long as an exception is attached to it. It's possible that the youngster is Hindu.[19] Otherwise, each abandoned child is persuaded to be Muslim, and the Muslim infant could never be placed in a Hindu's care. However, as previously stated and explained in the Guardian and Ward Act of 1890, a Hindu family can adopt a new-born child from Category A or B.

However, Supreme Appellate Court of Gilgit Baltistan answered the question that There is no barrier for non-citizens or non-Muslims to adopt or seek custody of a Muslim child. In Islam, adoption is limited to the provision of maintenance and care (Kifalah) by the adoptive parents. Adopting a kid is a noble deed in Islam, considered one of the highest acts of piety. Adoption of a Muslim infant by non-Muslim parents is not prohibited in principle, although it is subject to several restrictions. In Pakistan, there is no formal adoption legislation. Adoption is done under the name of Guardianship by filing an application under Section 7 of the Guardians and Wards Act, 1890.[20]

Yet, changing the parentage of an adopted kid is severely forbidden. When an adopted child reaches the age of majority, he or she has the option of choosing the nationality of his or her adoptive parents or actual parents. Adoption of a kid by a non-Muslim without proof may result in a child's conversion to non-Muslimism. A child born into a non-Muslim family can be adopted by a Muslim.

[19] Dr.Shahid Iqbal and another v. Public at large and another, 2012-14 GBLR 81 (G.B Supreme Appellate Court)
[20] See f.n.1.ibid.

Under Muhammadan law, custody of a male or female child can be given to relatives on the paternal or maternal line in the order of prohibited degree relationship.[21] However, there is nothing to prevent a person from applying to the court under the Guardians and Wards Act, 1890. Adoption in Islam has no legal consequences. Adoption of children by natural children of adoptive parents is not forbidden unless they are related to each other to a prohibited degree, however, adopted child would become mehram to the family, if he or she was breast fed by adoptive mother before the age of two years.[22] In terms of love, affection, and general conduct, adoptive parents may treat their adopted child as if he or she were their biological child.

CONCLUSION

The study concludes that according to Pakistani law, guardianship does not confer the right to expand that right through adoption, as it has been identified in India and the West Counties. It is assumed that this is a communal issue that is directly proportional to the aspirant prospective parents' faith. Due to the lack of statutes, Hindus have lost not only their right to adopt according to their beliefs, but the infants from a chance of having family or care which fortune brings on them.

At that age, feeding a religion less new born is a holistic human deed that can complete a family in need of a baby while also producing a well-educated, responsible future generation for the country. Every year, the Edhi Foundation promises to place 250 babies and children for adoption. Childless couples and families have received over 23,320 babies and youngsters. Until 2010, foreigners adopted 200,000 children from Pakistan, but no one knew what conditions they were placed in due to a lack of proper legislation. As a result, there is an urgent need to recognize adoption through appropriate legislation.

[21] Mariam Bibi through AbidaParveen v. Naseer Ahmed and 2 others, PLD 2015 Lahore 336

[22] Jamshed v. Saleemuddin and 4 others, PLD 204 Sindh 120