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FEDERAL JUDICIAL ACADEMY
ISLAMABAD

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The Federal Law Journal (FLJ) is a peer-reviewed, open-access legal research journal dedicated to promoting high-quality scholarship in the legal and judicial fields. The journal operates under a double-blind peer review system, ensuring transparency and objectivity in its publication process. Launched with Volume I, Issue 1 in September 2022, the journal has maintained an uninterrupted biannual publication schedule. In addition to the peer-reviewed section, FLJ includes a non-peer-reviewed section that publishes essays, case comments, reviews, and other writings contributing to judicial knowledge and education.

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- To offer a platform for judges, academics, court staff, and practitioners to disseminate ideas and research
- To identify gaps in the legal system for potential reforms and contribute to the overall improvement of the justice system
- To foster a culture of judicial education and research

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- Legal academics, practitioners, and scholars from disciplines related to the administration of justice
- Law students and legal researchers

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Editorial Foreword

The Federal Judicial Academy has recently revamped its on-campus and online training activities under the guidance of the Hon'ble Chief Justice of Pakistan, Justice Qazi Faez Isa, Chairman Board of Governors of the Academy, and the Hon'ble Justice Syed Mansoor Ali Shah, Senior Puisne Judge Supreme Court of Pakistan and Advisor to the Board of Governors of the Academy. The Academy has also made efforts to improve its research journal. The External Advisory Board of the Federal Law Journal (FLJ) has been reconstituted with inclusion of international experts. This issue is divided into two sections: the peer-reviewed and the non-peer-reviewed.

In the peer-reviewed section, the first article addresses the challenges of delays in recording evidence in civil cases. The second article examines climate change from a human rights perspective which directly affects Pakistan. The third article discusses legal reforms and interpretation of laws from an Islamic perspective. All these articles are authored by judges of the District Judiciary, reflecting a growing research culture among the fraternity. The FLJ has also received several contributions from academics and jurists. The fourth article analyzes the Anti-Rape (Investigation and Trial) Act, of 2021, and proposes reforms for making it more effective. The fifth article is contributed by an international judicial educator exploring cooperation among SAARC countries in legal education. The non-peer-reviewed section includes a review of legislation pertaining to cybercrimes and a review of the recent judgment of the Supreme Court of Pakistan highlighting issues in the police investigation.

I extend my gratitude to the contributors, reviewers, members of the Editorial Board, and the Editorial Team for their continuous hard work in maintaining and improving the quality of the journal.

Hayat Ali Shah
Chief Editor

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Curbing Delays in Civil Cases: A Case for the Four-Opportunity Rule in Recording Evidence

Mudassir Maqsood[1], Sana Younas[2], Aftab Ahmad Rana[3]

Abstract

This paper examines the effectiveness of the "double warning system" experimented in a Civil Court of Punjab, Pakistan with an aim to curb excessive adjournments and expedite resolution in civil cases. By analyzing empirical data and comparing it to a traditional "last warning" approach, the study reveals that the double warning system, despite potentially leading to a higher volume of appeals, significantly reduces adjournments and expedites case resolution. The research further uncovers strategic dynamics within the appeals process, where respondents, anticipating stricter enforcement under the double warning system, choose to concede early to minimize the litigation time and costs. However, the study emphasizes that case merit remains a crucial determinant in whole process. Finally, the paper argues that the double warning system, by providing clearer consequences for delaying tactics and incentivizing timely evidence presentation,

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contributes to a more efficient and trustworthy legal system. The findings hold significant implications for a broader civil litigation reform, suggesting that implementing similar mechanisms, such as the four-opportunity rule, could effectively address the pervasive issue of excessive adjournments and promote timely justice in Pakistan's legal system.

Keywords: Adjournments, four-opportunity rule, last opportunity, civil litigation, and judicial efficiency.

1. Introduction

Judicial interventions to curb excessive adjournments in the civil trials have become increasingly important in Pakistani civil courts. Recent studies have highlighted the detrimental effects of adjournments on case backlogs, timely justice, and public trust in the legal system.[4] Thus, understanding the impact of specific judicial interventions is crucial for developing effective strategies to address this challenge.[5] This study contributes to this growing body of knowledge by examining the effectiveness of the Supreme Court of Pakistan's (SC) rulings aimed at limiting adjournments for evidence production in civil cases. While the Code of Civil Procedure, 1908 (CPC), does not specify a maximum number of opportunities for the recording of evidence, leaving it to the discretion of a court, this ambiguity in the law creates inconsistencies in practice and potentially enables dilatory tactics hindering the timely resolution of civil disputes. For instance, despite the SC's ruling in *Rana Tanveer Khan Case* that four opportunities for concluding the plaintiff's evidence by a trial court

[4] Javed, S., Iqbal, M A., & Saleem, H A R. (2023, June 29). A Critical Analysis on Causes and Effects of Baseless Adjournments in Pakistan. Pakistan Journal of Humanities and Social Sciences, 11(2), 2293-2298. http://doi.org/10.52131/pjhss.2023.1102.0528.

[5] Imran, M., Idrees, R. Q., & Saeed, M. A. (2024). Pendency of Cases in Pakistan: Causes and Consequences. Current Trends in Law and Society, 4(1), 52-61. https://doi.org/10.52131/ctls.2024.0401.0031.

was sufficient, the trial courts continued granting adjournments without substantial justification.[6] While recognizing the need for stricter enforcement, the SC, in *Moon Enterprises CNG Station case,* of 2020, emphasized the importance of clear warnings about the consequences of failing to present evidence within a specified timeframe set by a court, such as the automatic closure of evidence.[7]

This judicial intervention is crucial because the issue of delays and adjournments in civil trials not only adds to the backlog of cases but also undermines the efficiency and effectiveness of the justice system.[8] The timely resolution of civil disputes is a fundamental aspect of an efficient judicial system.[9] Excessive adjournments, where courts repeatedly postpone hearings, have been identified as a significant contributor to the delay in justice.[10] The consequences of excessive adjournments in civil trials include an increased financial and emotional burden on litigants, the erosion of confidence in the judiciary, and delays in the delivery of justice.[11] The challenge of maintaining judicial efficiency in the face of excessive adjournments is multifaceted. It involves addressing procedural issues, ensuring access to justice, and considering the impact on the overall administration of justice [12]

This study aims to investigate the effectiveness of the judicial interventions in curbing the prevalence of excessive adjournments

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[6] Rana Tanveer Khan v. Naseer-ud-din, 2015 SCMR 1401.

[7] Moon Enterprises CNG Station, Rawalpindi v. Sui Northern Gas Pipelines Limited, 2020 SCMR 300.

[8] Javed et al.

[9] Hossain, M. M. (2019). Backlog of cases-civil and criminal justice: a comparative study, Bangladesh perspective. International Journal of Human Rights and Constitutional Studies, 6(3), 214-226. https://doi.org/10.1504/ijhrcs.2019.097967.

[10] Ghosh, Y. (2018). Indian judiciary: an analysis of the cyclic syndrome of delay, arrears and pendency. Asian Journal of Legal Education, 5(1), 21-39. https://doi.org/10.1177/2322005817733566.

[11] Javed et al.

[12] Bilal, M., & Khokhar, F. (2021). Justice delayed or denied: The myth of justice in Pakistan. Journal of Law & Social Studies (JLSS), 3(2), 124-132 https://doi.org/10.52279/jlss.03.02.124132.

in Pakistani civil trials. The scope of the research will encompass an analysis of the existing legal framework, judicial decisions, and the practical implications of judicial interventions aimed at enhancing the efficiency of the civil justice system. To establish the effectiveness of the judicial interventions in curbing excessive adjournments in civil trials, this research will employ quantitative method of research. It will involve analyzing the data related to 171 decided civil cases in a specified civil court in Punjab, before and after specific judicial interventions, such as the provision of four clear opportunities for recording the evidence of a party to a civil suit and strictly enforcing the deadlines for evidence production after a final warning.

2. Literature Review

This literature review examines the legal framework governing adjournments in Pakistani civil trials, highlighting the tension between granting adjournments and ensuring expeditious proceedings. It emphasizes the court's discretion and the need for "sufficient cause," though the term itself remains undefined. Order XVII CPC, particularly Rules 1, 2, and 3, outlines the court's power to adjourn, the potential for imposing costs on unjustified requests of adjournments, and the encouragement for day-to-day hearings once evidence recording begins. Furthermore, Section 148[13] CPC empowers the court to grant adjournments specifically for filing documents or producing evidence, even if the original deadline has passed, subject to any conditions the court deems fit. Section 151 CPC also grants inherent powers to the court, which can be utilized for adjournments in exceptional circumstances. The starting point of this framework is the discretionary power vested in the civil courts. As a general rule, the grant or refusal of an adjournment during the

[13] 148. Enlargement of time. Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to, enlarge such period, even though the period originally fixed or granted may have expired.

trial of a civil matter is the sole discretion of the court.[14] This discretion, however, is not absolute and must be exercised judiciously, considering the facts and circumstances of each case.[15] But exercise of such discretion should be for a valid and justified reason and such reason must be duly established before court and recorded in writing.[16] The principles of natural justice, enshrined in Article 10-A of the Constitution of Pakistan, 1973, mandate that no party should be condemned unheard.[17] Adjournments, therefore, play a crucial role in ensuring that litigants have adequate opportunity to present their cases. However, the pursuit of fairness should not be at the expense of efficiency.

Mrs. Sadia Israr Case reflects a growing judicial consciousness of delays in litigation.[18] It highlights a developing trend towards limiting adjournments, particularly in rent and family cases. The SC has recognized the need to curb excessive and frivolous adjournments. The landmark Rana Tanveer Khan case[19] emphasized the importance of concluding trials expeditiously. The SC, in this case, stressed that courts should grant only "reasonable adjournments" and actively discouraged the delaying tactics employed by litigants. The SC refused to give further opportunity to produce evidence, and in this case, the plaintiff availed only four opportunities, with two warnings. This emphasis on efficiency is further echoed in Moon Enterprises CNG Station case, where the SC underscored the courts' duty to ensure timely justice. The Court held that adjournments should not be granted lightly and emphasized the need for proactive case management by judges.

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[14] Jamil v. Govt. of Sindh 1991 MLD 291 Sindh, Zainab Bibi v. Khuda Buksh, 1986 CLC 1076 LHC.

[15] Zahoor v. Election Tribunal Vehari, 2008 SCMR 322.

[16] Mrs. Sadia Israr v. Mrs. Afzal Yousaf, 2017 CLC Note 182 LHC.

[17] 10A. Right to fair trial. For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.

[18] Ibid 16.

[19] Ibid 6.

2.1 Judicial Discretion in Granting Adjournments

While the CPC grants judges the authority to grant adjournments,[20] this power is not absolute and is tempered by the need for efficient and timely resolution of disputes. This delicate balance is reflected in the concept of "sufficient cause" and the interpretation of the phrase "proceed to decide the suit forthwith"[21] both of which underscore the court's active role in managing cases.

2.1.1 "Sufficient Cause" - A Fluid Concept

Rai Muhammad Riaz Case[22] point out that the CPC itself doesn't define "sufficient cause". It grants Judges Discretion but also necessitates a case-by-case determination based on specific facts.[23] *Mian Abdul Karim Case* offers a helpful clarification, defining "sufficient cause" as reasons beyond a party's control, excluding negligence or carelessness. The party's diligence in pursuing the case is also considered.[24] *National High Way Authority Case* emphasizes that if a party seeking an adjournment fails to demonstrate "sufficient cause," the court should proceed without granting the request. This underscores the court's commitment to timely proceedings.[25]

2.1.2 Clarifying "Proceed to Decide the Suit Forthwith"

NIB Bank Limited Case provides that word "forthwith" means without any further adjournment yet it cannot be equated with the words "at once pronounce the judgment".[26] *Muhammad Aslam Case*

[20] Order XVII, Rule 1 and Section 148 of CPC.
[21] Order XVII, Rule 1(3) and Rule 3 of CPC.
[22] Rai Muhammad Riaz v. Ejaz Ahmad, PLD 2021 SC 761.
[23] Muhammad Arshad Naeem v. The State, PLD 2021 SC 927.
[24] Mian Abdul Karim v. Province of Punjab through District Officer (Revenue) Lodhran, PLD 2014 LHC 158.
[25] National High Way Authority through General Manager Motorway v. Haji Shah Ahmad Khan, PLD 2013 LHC 313.
[26] NIB Bank Limited v. Messrs. Pasban Agro Chemicals Company and others, 2023 C L D 1131 LHC.

also clarifies that common misconception and held that "Proceed to decide the suit forthwith" doesn't mandate an immediate judgment. Instead, it empowers the court to move the case forward without further adjournments.[27] *Fiaz Trading Corporation Case* distinguishes between the court's duty to "decide" under Order XVII, Rule 3, and "proceed" under Order XVII, Rule 1. This distinction highlights the court's discretion in choosing the appropriate course of action, which may involve steps other than immediate judgment.[28] This distinction underscores the court's authority to manage the case actively and progress towards resolution, even in the face of a party's default. The SC, in *Hasham Khan Case*, held that while a trial court can dismiss a suit for failure to produce evidence, it should first allow the plaintiff to record their statement and offer the defendant an opportunity to present rebuttal evidence, as per Rule 3 of Order XVII of the C.P.C.[29]

2.2 When Adjournment Should Be Allowed

The adjournment can only be allowed in the aid of justice and not to abuse the process of law.[30] *Sheikh Khurshid Mehboob Alam case* clarifies a crucial point: if a case is adjourned without a specific request from the plaintiff or defendant, their right to adduce evidence cannot be revoked. This protects parties from being penalized for adjournments they didn't seek.[31] *Muhammad Jamil Case* reinforces the principle that if the previous adjournment wasn't granted at the request of the party failing to produce evidence, their right to present evidence isn't automatically forfeited.[32] *Mubashir Khan Case also* provides an interesting nuance. If a "last opportunity" adjournment, even if conditional on costs, is granted without objection from the opposing party, it's treated as a regular

[27] Muhammad Aslam v. Nazir Ahmad, 2008 SCMR 942.
[28] Fiaz Trading Corporation v. WAPDA, 1995 CLC 483 LHC.
[29] Hasham Khan & others v. Haroon ur Rasheed & Others, 2022 SCMR 1793.
[30] Bashir Ahmad and others v. Malik Jehangir Khan, Member (Consolidation), Board of Revenue and others, 1992 MLD 1566 LHC.
[31] Sheikh Khurshid Mehboob Alam v. Mirza Hashim Baig, 2012 SCMR 361.
[32] Muhammad Jamil v. Mst. Inayat Begum, 2012 YLR 2658 LHC.

adjournment, and Order XVII, Rule 3, doesn't apply.[33] But *Mian Abdul Karim Case* provides that if a party has frequently sought adjournments for evidence production and fails to provide a valid reason for yet another delay, the court should proceed with the case. This reinforces the principle that Order XVII, Rule 3, can be applied even if the defaulting party doesn't explicitly request the final adjournment. The court can determine that excessive delays have occurred, regardless of who requested the specific adjournment in question. It is also because that O.XVII R.3 CPC contains no condition that the request for adjournment must have been made by the defaulting party, on last date.[34]

Messrs Mukhtar Brothers Case illustrates the courts' disapproval of improper adjournment request. Counsel's absence for supposed "compromise talks" without proper notification was deemed unacceptable. This underscores the need for genuine reasons and proper procedure.[35] *Inamur Rehman Gillani Case* acknowledges the validity of adjournments due to counsel's simultaneous engagement in a higher court, but, such requests should be made in good faith. A pattern of adjournments or attempts to obstruct justice can lead to refusal.[36] *Muhammad Aslam Case* highlights a crucial exception to dismissal. If the plaintiff is present but hasn't produced evidence, the court should offer him a chance to testify personally under Order XVII, Rule 2, preventing automatic dismissal.[37] Law also protects the plaintiff from penalties if the previous adjournment wasn't due to their actions. If the presiding officer was unavailable, the plaintiff's right to present evidence is preserved. It is because that such preceding adjournment cannot be attributed to any party.[38]

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[33] Mubashir Khan v. Javed Kamran alias Javed Iqbal, 2007 MLD 1072 LHC.
[34] Mian Abdul Karim v. Province of Punjab, PLD 2014 LHC 158.
[35] Messrs Mukhtar Brothers v. Mst. Hawa Bai Admani and 9 others, 1992 MLD 1045 Sindh.
[36] Inamur Rehman Gillani v. Jalal Din and another, 1992 SCMR 1895.
[37] Muhammad Aslam v. Nazir Ahmed, 2008 SCMR 942.
[38] Shaheen, Saleem, Rao Zohaib, Mirza Rizwan Baig, Abdullah Khan, Hafiz Ijaz, Rana Bilal, Zeeshan AbuBaker, and Muhammad Amin. 2021. "Premier Law Journal".

2.3 When Adjournment Should Be Refused

Gull Hussain Case establishes a clear principle: if a party consistently fails to produce evidence despite being granted multiple adjournments, further delays are unacceptable, potentially leading to dismissal.[39] *Inayat Begum Case* highlights that when a party's actions hinder the court's ability to proceed; invoking Order XVII, Rule 1 for dismissal is justified. This emphasizes that parties have a duty to facilitate, not obstruct, the judicial process.[40] *Umer Zeeshan Case* emphasizes that a party's deliberate or negligent disregard for court proceedings, even after being granted time, empowers the court to proceed with the suit, potentially leading to dismissal. This underscores the courts' intolerance for deliberate delays.[41] *National High Way Authority Case* presents a scenario where a party, despite their lawyer's presence being recorded, fails to produce evidence. This is deemed willful non-compliance, leaving the court no choice but to refuse further adjournments and potentially dismiss the suit.[42] Adjournment should not be granted to a party using dilatory tactics. The courts recognize that the behavior of parties and their lawyers is relevant when considering adjournments. *Tariq Manzoor Case* highlights the SC's emphasis on this factor, suggesting that a history of dilatory tactics could influence the court's decision.[43] *Settlement Authority Case* establishes that adjournments sought by proxy counsel when neither the party nor their primary lawyer is present are generally disfavored. This reinforces the importance of the parties' active involvement in the proceedings.[44] *Muhammad Hussain Case* provides a noteworthy exception. If the court itself schedules the hearing, adjournments should be refused, and the court should proceed under Order XVII, Rule 3, rather than dismissing the suit. This prevents parties from being penalized for

[39] Gul Hussain v. Muhammad Ayub, 1986 SCMR 1349.
[40] Inayat Begum v. Shah Muhammad, 2014 YLR 1797 LHC.
[41] Umer Zeeshan v. Additional District Judge, 2018 MLD 1658 LHC.
[42] National High Way Authority v. Shah Ahmad Khan, PLD 2013 LHC 313.
[43] Tariq Manzoor v. Abdul Aziz, 1986 SCMR 1688.
[44] Settlement Authority and another v. Mst. Akhtar Sultana, 1976 SCMR 401.

the court's scheduling decisions.[45] SC has discouraged the adjournment of cases on the basis of 'personal reason' alleged by the counsel of party seeking adjournment by holding that the first duty of an Advocate is to attend the court work and after doing so he may attend to his personal work.[46] Adjournment of case on the ground of illness of counsel of party can also not be allowed unless the application for adjournment is coupled with medical certificate, showing the present ailment of counsel.[47]

2.4 Adjournments During Presiding Officer's Leave

In view of Rule 5 of Order XVII, CPC, the Reader of the Court can adjourn the case and fix a date to enable the Court to fix another date for further conduct of proceedings, in absence of the Presiding Officer of the Court.[48] *Qamar Sultan*[49] *and Kamran Co. Cases*[50] emphasize the reader's duty to provide written slips to parties indicating the next hearing date. This approach ensures transparency and prevents disputes arising from miscommunication. If such requirements are fulfilled, the date fixed by the Reader shall become the date fixed for proceeding with the suit or proceedings. However, if a party was absent without a valid reason, the lack of a slip might not prejudice them.[51] SC clarifies that while the reader can adjourn, they cannot issue orders with penal consequences like dismissal under Order XVII, Rule 3. This power remains solely with the presiding officer. If the reader fails to follow proper procedure, the adjournment might be deemed invalid.[52]

[45] Muhammad Hussain v. Abdul Hameed, PLD 2019 Quetta 106.
[46] Niamatullah Khan Advocate v. Federation of Pakistan, 2022 SCMR 133.
[47] Crescent Textile Mills Limited, Haripur v. Government of Khyber Pakhtunkhwa through Chief Secretary, Peshawar, PLD 2022 SC 247.
[48] Nowsheri Khan V. Said Ahmad Shah, 1983 SCMR 1092.
[49] Qamar Sultan V. Murtaza alias Dhakee Shah, 1985 CLC 2984 LHC.
[50] Kamran Co. V. Modern Motors, PLD 1990 SC 713.
[51] Ehsan-ul-Haq v. Zulfiqar Khan, 2001 MLD 890 LHR.
[52] Muhammad Ramzan v. Khadim Hussain, 2007 SCMR 1269.

2.5 Bridging the Gap: Codifying Adjournment Rules in the CPC

Despite judicial pronouncements emphasizing efficiency, a noticeable gap exists within the CPC, which, while providing for adjournments, lacks a codified rule akin to the judicially established "four opportunity rule". This rule, limiting adjournments for evidence recording to four, exemplifies the SC's power under Article 189 of the Constitution of Pakistan to shape legal rules through precedent, particularly in areas where legislation, like the CPC, is silent. However, this power is to be exercised judiciously, recognizing the legislature's primacy in lawmaking. As cases like *Muhammad Nawaz Sharif vs. President of Pakistan*[53] and *State vs. Zia-ur-Rehman*[54] highlight, the judiciary focuses on interpreting, not creating laws, respecting the separation of powers. While the "four opportunity rule," developed through precedent, streamlines judicial processes, the legislature retains the authority to codify or amend it, maintaining the balance between judicial innovation and legislative supremacy.

This gap necessitates legislative intervention to incorporate a clear and unambiguous provision for a time-bound framework for adjournments, similar to the four-opportunity rule. Codifying this rule within the CPC would ensure its uniform application, enhance transparency, and contribute significantly to reducing delays in civil litigation. However, a valid concern arises regarding the potential ineffectiveness of relying solely on codification, as the 30 days codified rule for filing written statement is being ignored in practice. Therefore, a multi-pronged approach is necessary, going beyond mere codification to ensure the effectiveness of a time-bound framework for adjournments. This approach should include the training programs of judges to be conducted to emphasize the importance of adhering to codified rules for adjournments. Furthermore, leveraging technology like e-filing and case

[53] PLD 1993 SC 473.
[54] PLD 1973 SC 49.

management systems with automated reminders and notifications can minimize delays.[55] Finally, consistent advocacy for increased allocation of resources to the judiciary, including the appointment of more judges and court staff, is crucial to handle caseloads effectively.[56] This combined approach, addressing legal mechanisms and practical challenges, aims to create a more efficient and timely justice system in Pakistan.

3. Research Methodology

After extensive literature review of precedents and statutory law, the empirical part of this study examines the impact of a key procedural interpretation of Order XVII rule III of CPC, aimed at addressing this issue: the principle of not adjourning the case even on fourth opportunity for recording of evidence and treating the maximum of four clear opportunities for evidence recording in civil suits more than enough. This principle was established in *Rana Tanveer Khan Case* which was dismissed by trial court just one month and 26 days after start of trial.[57] It represents a significant step towards curbing excessive delays and promoting a more efficient and timely justice system. By empirically evaluating the effectiveness of this procedural intervention, this study aims to contribute valuable insights into potential solutions for a challenge faced by judicial systems globally: balancing the right to a fair hearing with the need for expeditious proceedings.

This study analyzed case outcomes in the Civil Court of Ahmad Pur Sial, District Jhang, Punjab, Pakistan, comparing cases where the "four-opportunity rule" was strictly applied with those where it was not. By examining the frequency of adjournments, the reasons for delays, and the overall time taken to dispose of cases, this study aims

[55] Abbasi, M. Z., & Khan, M. U.. Pakistan's e-court system: A leap towards a modern judicial system. *Journal of Law and Technology*, *7*, 123-145.
[56] "Improving Case Flow Management in the High Court: A Guide for Judges" by the Federal Judicial Academy, 2021.
[57] Rana Tanveer Khan v. Naseer-ud-din, 2015 SCMR 1401.

to assess the effectiveness of the four-opportunity rule in promoting efficient litigation and ensuring timely access to justice.

3.1 Research Design and Data Collection

This study employs an empirical design using primary data collected from 171 decided civil cases between January 2021 and October 2023, instituted from 2009 to 2023. The dataset comprises cases where:

The four-opportunity principle was applied: This principle, implemented in cases where issues were framed between January 2021 and October 2023, involves a double warning system. Initially, upon directing the plaintiff to present their evidence, the court categorically warned that a maximum of four clear opportunities will be granted for this purpose. Subsequently, if the plaintiff fails to conclude their evidence within the first three opportunities, a final and binding "last opportunity" warning was issued, emphasizing the strict deadline.

The four-opportunity principle was not applied: This study also incorporates cases filed since 2009 where issues had already been framed before January 2021, representing a period predating the implementation of the four-opportunity rule. In these cases, no initial warning regarding a fixed number of opportunities for evidence production was given at the commencement of the trial. Instead, courts relied on issuing a single "last opportunity" warning, often guided by the precedent set in the Moon Enterprises case.

The data collection process involved a thorough review of case files, court registers, and order sheets to extract information on the number of adjournments granted, the reasons for delays, and the overall time taken to dispose of the cases. Data was not available electronically. It was collected systematically using a standardized form to ensure consistency. Data includes Applications under Section 12(2) CPC, Applications under Arbitration Act, 1940, Disobedience Petition, Objection Petitions, Restoration Petition,

and Suits for Cancellation of Documents, Recovery of Damages, Declaration, Partition, Permanent Injunction, Recovery of Possession, Recovery of Money, Rendition of Account and Specific Performance.

3.2 Data Analysis Plan

The collected data will be analyzed using descriptive statistics and comparative analysis. The study will compare case outcomes, dismissal for non-production of evidence (DNPE), conclusion within four opportunities, between cases where the four-opportunity rule was strictly applied and those where it was not. This comparative analysis will help determine the effectiveness of the rule in reducing adjournments and promoting timely case disposal. Additionally, the analysis will explore the relationship between the number of warnings issued, evidence conclusion, case dismissals, and appeal outcomes to gain a comprehensive understanding of the principle's impact on civil litigation.

3.3 Background and Context

The issue of excessive adjournments in Pakistani courts presents a significant obstacle to the efficient administration of justice, often stemming from a confluence of factors such as procedural loopholes, dilatory litigation tactics, and inconsistent judicial enforcement of timelines.[58] A 2017 report by the International Commission of Jurists highlighted that adjournments are among the leading causes of delays in Pakistan's judicial system, impacting the right to a fair and expeditious trial. The report cited a lack of clear guidelines and accountability mechanisms as contributing factors to this problem.[59] Addressing this challenge is paramount to upholding

[58] Ullah, F. (2022, June 30). Multiple Frames of Reference: Causes of Delay in Civil Suits in Swat, Khyber Pakhtunkhwa. , 6(II). https://doi.org/10.35484/pssr.2022(6-ii)77.

[59] International Commission of Jurists.. *Pakistan: Justice delayed is justice denied - The way forward for criminal justice reform*. Retrieved from

the right to a fair and expeditious trial, a fundamental right enshrined in Article 10A of the Constitution of Pakistan and echoed in international instruments like Article 14 of the International Covenant on Civil and Political Rights. The Code of Civil Procedure, 1908 provides a legal framework for adjournments under Order XVII, which governs the procedures for granting adjournments and recording evidence. While the CPC emphasizes that adjournments should only be granted for "sufficient cause" and to promote the ends of justice, the broad discretion afforded to judges has, in practice, resulted in varied interpretations and applications of these principles, as noted Dr. Muhammad Tahir Mansoori in his 2019 article "Adjournments and Delays in Civil Litigation in Pakistan: A Critical Analysis" published in the Pakistan Law Journal.[60]

The SC has consistently recognized the detrimental impact of excessive adjournments on timely justice. In Moon Enterprises Case, the SC strongly denounced the practice of granting repeated "last opportunities" for evidence production.[61] This landmark case highlighted that such practices not only undermine the finality of court orders but also foster dilatory tactics, thereby impeding the efficient resolution of disputes. The Court underscored the importance of enforcing orders granting a final opportunity for evidence production with a clear warning of automatic closure if disregarded. Building on this precedent, the SC in *Rana Tanveer Khan Case* further crystallized the principle of not providing more than four clear opportunities for evidence recording in civil cases.[62] This "four-opportunity rule" aimed to curb the excessive granting of adjournments and ensure that parties diligently pursue their cases. This approach aligns with international best practices, as highlighted

https://www.icj.org/wp-content/uploads/2017/11/Pakistan-Justice-system-Advocacy-Analysis-Brief-November-2017-Eng.pdf.

[60] Mansoori, M. T., Adjournments and delays in civil litigation in Pakistan: A critical analysis. *Pakistan Law Journal, 50*.

[61] Moon Enterprises CNG Station, Rawalpindi v. Sui Northern Gas Pipelines Limited, 2020 SCMR 300.

[62] Rana Tanveer Khan v. Naseer-ud-din, 2015 SCMR 1401.

in the 2018 report "Efficiency and Fairness: A Global Review of Case Management Practices" by the Hague Institute for the Internationalization of Law, which emphasizes the importance of clear and enforceable timelines in civil proceedings.[63]

In line with the principles established in Moon Enterprises, the Lahore High Court took a proactive step in 2022 to ensure greater uniformity and efficiency in trial proceedings. Through a directive (Letter No. 4654/DDJ/MNT/Dy.137/22 dated 30.04.2024), the LHC mandated that all district courts under its jurisdiction implement "Moon Enterprises CNG Station Case." This rule limits the number of opportunities provided to parties for recording evidence in civil suits to a maximum of four, with the last opportunity being final and binding. The Civil Court of Ahmad Pur Sial, which serves as the focal point of this study, implemented this directive, offering a valuable opportunity to empirically assess its impact on case management and disposal of civil cases. This initiative by the LHC reflects a growing awareness within Pakistan's judiciary of the need for proactive measures to address the issue of adjournments and aligns with recommendations made by organizations like the United Nations Office on Drugs and Crime in their 2020 publication "Handbook on Case Management: A Best Practices Tool for Judicial Administrators," which advocates for clear rules and judicial training on case management techniques.[64]

Following is the year wise institution Summary of decided civil cases / Research Data. All the cases mentioned in Table 1 were

[63] Hague Institute for the Internationalisation of Law. *Efficiency and fairness: A global review of case management practices*. Retrieved from https://www.hiil.org/publication/efficiency-and-fairness-a-global-review-of-case-management-practices/.

[64] United Nations Office on Drugs and Crime. *Handbook on case. management: A best practices tool for judicial administrators*. Retrieved from https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Handbook_on_Case_Management.pdf.

decided from January 2021 to October 2023 and encompasses both contested cases and those dismissed for non-production of evidence.

Table 1

Year wise Institution Summary of Research Data														
Institution Year	**2009**	**2010**	**2011**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**	**2023**
Decided Contested. Cases	1	1	5	5	5	3	7	6	10	6	4	10	9	3
Decided DNPE Cases	0	0	0	1	0	1	4	2	5	22	14	34	13	0

4. Results and Discussion [Findings of the Study]

Table 2 provides a comprehensive analysis of 15 types of civil cases, which reveals a strong trend favoring the “double warning system” in expediting case resolution. The data, encompassing 171 cases, provides a nuanced view of the four-opportunity rule's application and its impact on litigation behavior in different case categories. While the overall numbers show that in 103 out of 171 cases, the four-opportunity warning was issued, with evidence concluding within those four instances in only 11 cases; a closer examination of individual case types reveals varying trends. For instance, "Declaration" cases, forming the largest category with 70 cases, saw the four-opportunity warning issued in 49 cases, suggesting a stricter approach in these potentially complex disputes. However, this strictness didn't necessarily translate to quicker evidence conclusion, as only 11 "Declaration" cases concluded within four opportunities, but reduced the shelf life of cases from average six-years ten-months to one-year nine-months, as discussed in Table 4.

Table 2

Sr. No.	*Nature of Case*	*Cases*	*Warning*		*Evidence concluded*		*DNPE o 4th*	*DNPE on >4t*	*Cont*	*Opportunities*		*Appeal*		*Remand*		*Appeal dismissed*	*Pending*
			Single	**Double**	**4≤**	**≥4**				**Plaintiff**	**Defendant**	**Yes**	**No**	**Statement**	**Merit**		
1	**Application 12(2)**	**8**	**7**	1	-	4	-	4	4	287	110	2	2	-	2	-	-
2	**Arbitration**	**5**	**0**	5	-	-	2	3	-	37	-	1	4	1	-	-	-
3	**Cancellation of Document**	**3**	**2**	1	-	2	-	1	2	52	24	-	1	-	-	-	-
4	**disobedience Petition**	**1**	**1**	-	-	1	-	-	1	30	5	-	-	-	-	-	-
5	**Recovery of Damages**	**3**	**3**	-	-	3	-	-	3	103	50	-	-	-	-	-	-
6	**Declaration**	**70**	**21**	49	11	23	17	19	34	1096	417	9	27	4	-	2	3
7	**Objection Petition**	**1**	**1**	-	-	1	-	-	1	13	9	-	-	-	-	-	-
8	**Partition Suit**	**4**	**1**	3	-	1	1	2	1	27	15	-	3	-	-	-	-
9	**Permanent Injunction**	**15**	**3**	12	-	2	9	4	2	33	17	2	11	2	-	-	-
10	**Recovery of Possession**	**4**	**2**	2	-	3	-	1	3	29	80	-	1	-	-	-	-
11	**Recovery Suits**	**9**	**4**	5	-	5	2	2	5	137	80	-	4	-	-	-	-
12	**Rendition of Accounts**	**3**	**2**	1	-	-	2	1	-	25	-	-	3	-	-	-	-
13	**Restoration Petition**	**1**	**-**	1	-	-	-	1	-	7	-	-	1	-	-	-	-
14	**Specific Performance**	**44**	**21**	23	-	19	14	11	19	911	431	10	15	5	-	3	2
15	**Total**	**171**	**68**	**103**	**11**	**64**	**47**	**49**	**75**	**2787**	**1238**	**24**	**72**	**12**	**2**	**5**	**5**

Examining DNPE cases, we see that "Declaration" cases again top the list with 36 DNPE cases on and after the 4th opportunity, indicating potential difficulty in obtaining evidence within the stipulated timeframe for this case type. Interestingly, despite a significant number of DNPE cases across categories, the overall appeal rate remains relatively low, with only 24 out of 96 DNPE cases being appealed. This could point to a perception of the DNPE as a justified outcome when issued after multiple opportunities or reluctance to engage in further litigation due to costs and time constraints. Out of 24 appeals, 12 were accepted on the basis of the statement of respondent expressing no objection on the acceptance of appeal, reasons of which are discussed under Table 8. Next Table illustrates the average age of both Contested and DNPE cases across different institutions from 2009 to 2023.

Table 3

Institution wise average age of cases				
Year	**Cont**	**Shelf Life of Cont Cases**	**DNPE**	**Shelf life of DNPE Cases**
2009	1	12-Years 11-Months	0	0
2010	1	13-Years	0	0
2011	5	11-Years 2-Months	0	0
2013	5	8-Years 11-Months	1	9-Years 5-Months
2014	5	7-Years 11-Months	0	0
2015	3	7-Years 3-Months	1	6-Years 4-Months
2016	7	5-Years 6-Months	4	5-Years 3-Months
2017	6	4-Years-8-Months	2	4-Years 7-Months
2018	10	3-Years 11-Months	5	3-Years 3-Months
2019	6	3-Years 6-Months	22	3-Years 3-Months

2020	4	2-Years 5-Months	14	1-Years 11-Months
2021	10	1-Year 3-Months	34	1-Year 7-Months
2022	9	00-Years 8-Months	13	1-Year 00-Month
2023	3	00-Years 7-Months	0	0

Table 3 reveals a compelling narrative about case duration and the impact of DNPE cases over the years. A striking trend is the significant decrease in the average age of both contested cases and DNPE cases from 2009 to 2023. A contested case instituted in 2009, took 13 years to resolve, while by 2023, this duration plummeted to a mere 7 months. Similarly, DNPE cases saw their shelf life shrink from 9 years and 5 months for a case instituted in 2013 (the first year with recorded DNPE data) to a mere one year in 2022. This drastic reduction suggests a positive shift towards quicker case resolution, potentially driven by double warning principle.

Another notable observation is the surge in the number of DNPE cases from 2019 onwards. While only a handful of DNPE cases were recorded annually before 2019, the number skyrocketed to 22 in 2019 and continued to rise in subsequent years. This increase was due to stricter application of the "last warning" in pending old cases, wherein the "four opportunity warning" was not given. This surge coincides with the decreasing shelf life of cases, indicating a potential link between the two types of warning. It is plausible that the increased DNPE cases, has contributed to faster contested case resolutions. While the shrinking case durations signify a positive development, the increased DNPE cases raises crucial questions, which are answered in later part of this study.

Table 4

Single Warning Vs. Double Warning								
	Contested Cases					**DNPEs Cases**		
	Cases	**Av. Age of Suit**	**Av. Age of Trial**	**Av. Adj (P)**	**Av. Adj (D)**	**Cases**	**Av. Age of Suit**	**Av. Adj**
Single Warning	42	6.10	5.30	29.16	15.23	26	3.10	16.57
Double Warning	33	1.90	1.30	6.15	3.97	70	2.30	6.59
Total	75	4.00	3.30	17.66	9.60	96	2.70	11.58

Av. = Average, Adj = Adjournment, P = Plaintiff, D = Defendant

The results comparing single and double warning systems in contested and DNPEs cases shown in Table.4 reveal a compelling narrative about their impact on case durations and court proceedings.

The analysis of contested cases reveals a stark contrast in litigation timelines between the single and double warning systems. Cases under the single warning system endured an average lifespan of 6.1 years from institution to decision, with trials themselves averaging 5.3 years. This protracted timeline is accompanied by a high frequency of adjournments, with plaintiffs averaging 29 adjournments and defendants averaging 15. In contrast, the double warning system demonstrates remarkable efficiency, achieving an average case lifespan of 1.9 years and trial duration of 1.3 years. This acceleration is mirrored in the significantly lower average adjournments, with plaintiffs utilizing 6 and defendants utilizing 4.

Examining cases dismissed for non-production of evidence reveals a similar, though less pronounced, trend. While the average age of

DNPE cases under both systems is relatively close (3.1 years for single warning and 2.3 years for double warning), the average number of adjournments granted diverges significantly. Single warning DNPE cases averaged 16.5 adjournments, while double warning cases averaged 6.5, suggesting that even in instances of eventual dismissal, the double warning system exerts greater pressure to expedite proceedings. The data strongly suggests that the double warning system contributes to a more efficient and timely resolution of cases, particularly for contested cases. This underscores the potential of stricter enforcement mechanisms in curbing delays and promoting a more efficient justice system.

Table 5

Appeals Against DNPEs Cases				
	DNPEs	Appeal	No Appeal	%age
Single Warning	26	7	19	26.92
Double Warning	70	17	53	24.28
Total	96	24	72	25

Table.5 provides the analysis of appeals against DNPEs, which reveals a noteworthy trend: despite a significantly larger number of DNPEs under the double warning system (70 vs. 26), the appeal rate is notably lower (24.28%) compared to the single warning system (26.92%). This suggests that the double warning system, while leading to more DNPEs, might also be associated with a higher likelihood of those decisions being accepted by litigants, potentially due to a perceived fairness in the process or a clearer understanding of the consequences for non-compliance.

Table 6

Fate of Appeals against DNPEs Cases				
	Appeals	Accepted	Dismissed	Pending
Single Warning	7	2	3	2
Double Warning	17	12	2	3
Total	24	14	5	5

Table.6 reveals intriguing trends in the fate of appeals against DNPEs cases when comparing the single warning system to the double warning system. Firstly, the double warning system appears to result in a significantly higher number of appeals. Out of 24 total appeals, 17 originated from cases decided under the double warning system, compared to only 7 from the single warning system. Secondly, despite the higher volume of appeals, the double warning system demonstrates a greater likelihood of those appeals being accepted. 71% (12 out of 17) of appeals under the double warning system were accepted, compared to only 29% (2 out of 7) under the single warning system. This suggests that appellate courts may be more inclined to overturn DNPEs, but analysis of grounds for appeal acceptance under Table.8 reflect that the acceptance of appeals also favor the double warning rule.

Table 7

Appeals Against DNPEs on 4th and >4th						
	DNPEs	Appeal	No Appeal	Accepted	Dismissed	Pending
4th	47	7	42	4	3	0
>4th	49	17	32	10	2	5

While the disparity in appeal rates for DNPEs issued on the 4th opportunity versus those issued later might seem to suggest a prevalence of false and frivolous decrees, a closer look reveals a different perspective. See Table 7. The low appeal rate for 4th opportunity DNPEs (15%) could indicate the effectiveness of the four-opportunity system itself. By the 4th opportunity, parties have received ample warnings and chances to present their evidence. Those facing a DNPE at this stage likely recognize their weak position and choose not to appeal, understanding the court's justification. Furthermore, the higher appeal rate for post-4th opportunity DNPEs (35%) does not necessarily imply unfair decrees but rather a strategic decision by parties to exhaust all possible avenues, even when their grounds for appeal might be weaker. This persistence could stem from a belief that court was more lenient after multiple adjournments, even if that leniency does not always translate to successful appeals. Therefore, the data might not necessarily point to a flawed system but rather a system that, while not perfect, encourages timely presentation of evidence and offers multiple opportunities for redress.

Table 8

Reason of acceptance and dismissal of Appeals				
	Appeals	Accepted		Dismissed
		Statement	Merit	Merit
Single Warning	2	0	2	3
Double Warning	12	12	0	2
Total	14	12	2	5

The data of Table 8 reveals that a substantial portion of accepted appeals (12 out of 14) under the double warning system are uncontested. On the other hand, the consistent dismissal of appeals based on "merit" across both systems emphasizes that even with procedural variations; the inherent strength of the case remains a pivotal factor in appellate outcomes. The prevalence of "statement" based appeal acceptances under the double warning system, where respondents voice no objection but with the caveat of "heavy cost" to the appellant, reveals a strategic dynamic within the appeals process. Respondents, likely anticipating the Trial court's early decision due to the stricter enforcement under the double warning system, opt to minimize their own litigation costs by conceding early. This strategy allows them to avoid further legal expenses while potentially securing cost awards from the appellant. Essentially, respondents are choosing to strategically lose the battle (the appeal) while positioning themselves to win the war (cost recovery and early decision of lis). This trend highlights a potential unintended consequence of the double warning system, where it's very strictness might incentivize a calculated response from respondents seeking to mitigate their losses rather than contesting the appeal on its merits. Despite this procedural maneuvering, the

consistent dismissal of appeals based on "merit" across both systems underscores that the underlying strength of a case remains a critical factor in appellate outcomes, even when strategic concessions come into play. Ultimately, the double warning system benefits in expediting justice and deterring delaying tactics.

It is important to note that while the double warning system might appear to lead to a higher volume of appeals against DNPE cases, a closer examination reveals a more nuanced picture. All remanded cases (12) returned with a directive for the plaintiff to receive another opportunity to present evidence. Notably, upon receiving the case file, plaintiffs in these instances successfully concluded their evidence on the very first date. This highlights that even in cases where appeals led to remands, the core objective of the four-opportunity rule – ensuring expeditious evidence presentation and trial conclusion– was ultimately fulfilled.

4.1 Advantages of the Double Warning System

i. The system demonstrably decreased the number of adjournments sought and granted in civil cases, leading to faster progression towards resolution.
ii. By curbing excessive adjournments, the double warning system contributed to a significant reduction in overall case duration, promoting judicial efficiency.
iii. The stricter consequences associated with non-compliance under the double warning system act as a deterrent against parties employing delaying tactics for strategic advantage.
iv. The system helps level the playing field between parties, particularly when one side benefits from prolonging the litigation at the expense of the other's rights. The double warning system, with its stricter consequences for non-compliance, effectively curtails the maneuvering of parties who might misuse adjournments to maintain an advantageous status quo, be it the possession of property or the enforcement

of a specific right. By imposing a clear structure and limiting adjournments, the system prevents undue prolongation of proceedings, ensuring a more equitable playing field and a faster path towards a just resolution for the party whose rights are being infringed upon.

v. The four-opportunity rule inherent in the double warning system incentivizes parties to be prepared and present their evidence efficiently within the given timeframe.
vi. Even with stricter enforcement, the system ensures that both parties have ample and clearly defined opportunities to present their case, maintaining fairness in the process.
vii. By emphasizing the importance of adhering to schedules and deadlines, the double warning system fosters a greater respect for the court's time and resources.
viii. A more efficient and just legal system, achieved through measures like the double warning system, can contribute to greater public trust and confidence in the judiciary.
ix. By streamlining cases and minimizing unnecessary delays, the double warning system alleviates the burden on court dockets, allowing judges to allocate their time and resources more effectively to other pending cases.
x. While the double warning system may initially lead to some strategic concessions to avoid penalties, the overall faster resolution can potentially translate into reduced legal fees and expenses for both parties in the long run.
xi. By promoting timely justice and discouraging procedural manipulation, the double warning system contributes to upholding the rule of law and ensuring that legal processes are fair, efficient, and serve their intended purpose.

5. Recommendations for Legal Reforms

To ensure that judicial pronouncements aimed at curbing delays translate into consistent and effective practice, legislative reform is

essential. Specifically, amending the Code of Civil Procedure to include a clear and unambiguous provision for a time-bound framework for adjournments, akin to the four-opportunity rule, is recommended.

This codified rule should limit the number of adjournments. A maximum number of adjournments for specific purposes, such as evidence recording, should be stipulated, similar to the four-opportunity rule. It should clearly define acceptable grounds for seeking adjournments, moving away from vague justifications like "personal reasons." It should bind the judges to record reasons for granting adjournments in writing, promoting transparency and accountability. Codifying the four-opportunity rule, along with other measures to streamline adjournment procedures, would be a significant step towards a more efficient, transparent, and fair civil justice system in Pakistan.

5.1 Interim Procedural Framework

While legislative amendment of the CPC is the most effective long-term solution, immediate steps can be taken to implement the principles of time-bound adjournments within the existing framework. Drawing upon the precedent set by the SC in the Tanvir Khan case, wherein SC refused to grant further opportunity (after four opportunities) and which underscores the judiciary's authority to limit adjournments for efficient case management, the following procedural framework is recommended for immediate implementation.

5.1.1. Defining an "Opportunity": An "opportunity" refers to a single scheduled hearing date designated for a specific stage of evidence presentation (e.g., examination-in-chief of a witness, presentation of documentary evidence).

5.1.2. Initial Order and Notice

- At the commencement of trial or after framing of issues, the Court shall issue a written order outlining the four-opportunity framework for each party. This order will be served on both parties, ensuring clear notice.
- The order will direct both parties to present their evidence, specifying the first scheduled hearing date as their first opportunity.
- The order will include a clear warning that, except for justifiable reasons as per the CPC, failure to present all evidence within the allotted four opportunities may lead to the Court proceeding under Order XVII, Rule-3 of CPC, including pronouncing judgment based on available evidence.

5.1.3. Subsequent Hearing Dates and Warnings

- On each subsequent hearing date designated for evidence presentation, the Court shall verbally remind the party of the number of opportunities they have availed and the number remaining. This reminder will be recorded in the court's order sheet.
- If a party fails to conclude their evidence presentation within the first three opportunities, the Court shall issue a second and final written warning when granting the fourth and final opportunity. This warning will reiterate the potential consequences of non-compliance, including but not limited to adverse orders under Order XVII, Rule-3 of the CPC.
- The same four-opportunity framework and warning mechanism shall apply to the defendant following the conclusion of the plaintiff's evidence presentation.
- In case of failure of the plaintiff or the defendant to conclude his evidence on fourth clear opportunity, the Court will

proceed under Order XVII, Rule-3 of CPC, including pronouncing judgment based on available evidence.

5.1.4. Justifiable Adjournments and Record-Keeping

- The Court retains the discretion to grant adjournments beyond the four opportunities in exceptional circumstances, strictly adhering to the principles of Order XVII of the CPC.
- Acceptable grounds for exceeding the four opportunities include, but are not limited to illness of a party or counsel, supported by medical documentation, unavoidable absence of a witness, supported by a proper application and documentation, compelling reasons (e.g., death in the family, sudden illness), force majeure events or unforeseen circumstances beyond the control of the parties, such as natural disasters or unforeseen government actions, that directly prevent court proceedings. Crucially, when granting any adjournment, the Court shall meticulously record the reasons in writing on the order sheet, ensuring transparency and accountability.

By adopting this structured and transparent approach, the Pakistani judicial system can take significant strides towards a more efficient and timely resolution of civil disputes, upholding the constitutional right to a fair and expeditious trial for all citizens.

6. Conclusion

Based on the analysis and findings presented, the “double warning system” demonstrates a significant impact on the efficiency and timeliness of case resolution in civil cases. The data indicates that this system encourages more expeditious case handling, leading to fewer adjournments and potentially a higher volume of decisions. Furthermore, the analysis reveals strategic dynamics within the appeals process. Respondents facing the double warning system

may be more likely to concede early, potentially to minimize litigation costs. However, this tactical behavior does not diminish the importance of case merit, but ensured the recording of the plaintiff's evidence on the day of receiving remanded file. Overall, the "double warning system" shows promise in curbing delays, promoting efficiency, and deterring delaying tactics in civil cases. While further research and observation are needed to assess its long-term effects and potential broader application, the empirical evidence, coupled with the principles enshrined in Order XVII of the CPC, suggests that implementing systems like the four-opportunity rule in civil litigation could contribute to a more efficient and trustworthy legal system. Such reforms hold the potential to expedite dispute resolution, reduce the burden on the judiciary, and ultimately ensure fair and timely justice for all litigants. In conclusion, the analysis of the "double warning system" in civil cases illuminates its positive impact on the efficiency of case resolution and the potential for the broader application of similar mechanisms in civil litigation. The empirical data strongly supports the adoption and implementation of such systems to expedite dispute resolution and uphold the principles of fairness and effectiveness in the legal process.

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Legal Dimensions of Climate Change and Human Rights in Pakistan

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Abstract

Climate change was considered an environmental concern for a long time. However, recent studies and dynamics have changed this conception and now environmental issue has also been considered a human crisis. It also shifts the responsibility of being a scientific matter to the political and directly linked with human rights. Accordingly, international laws, domestic laws and jurisprudence adopted by the courts and tribunals require focus on protection of human rights due to climate change rather than protection of environment only. Recent concepts have been changed and now effects of climate change are also being considered threat to human rights by the courts, tribunals and other bodies. This change has brought serious impact on the jurisprudence of law and courts. However, lack of comprehensive legal framework for these courts and tribunals is the main hurdle in dealing with climate change and protection of human rights. For the said purpose, a robust international law framework containing guidelines for domestic climate

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protection bodies, courts and tribunals must be developed to protect the human rights of individuals as the existing legal regime seems ineffective to cater the same. This study shall examine the existing jurisprudence of courts, tribunals and climate protection bodies, and challenges faced by them. It shall endeavor to suggest basic guidelines for formulating a uniform legal system inclusive to address both issues of climate change and human rights protection for every nation in the world.

Keywords: Climate change, justice, environment, human rights, courts, tribunals.

Introduction

Although international laws have been developed to some extent to protect the environment and climate change, they do not deal with each issue of the climate justice. Courts in Pakistan and abroad have adopted a jurisprudence to protect environment directly affecting human life, giving rise to climate justice. Top of the list are the USA and Australia and they have also included it in their statutory law instead of climate change contemplations.[3] So far focus of the international community is on the enjoyment of human rights at individual level and collective harm of climate change has not been paid much attention. The United Nations Office of the High Commissioner for Human Rights in 2009 also concluded that enjoyment of various human rights has been threatened by climate change though they might not be specifically violated.[4] For the first time, reference to human rights regarding climate change was referred in Paris Agreement in 2015.[5] Focus on protecting human

[3] Adeel Mukhtar Mirza, 'Environmental Rights and Case of Climate Justice in Pakistan' Strategic Studies 47.
[4] Sam Adelman, 'Human Rights in Pursuit of Climate Justice' 38(2) Wisconsin International Law Journal 172.
[5] ibid 182.

rights in respect of climate change is also important because courts are more prone to accept rights-based approaches rather than indulging into complex issues of jurisdiction, sovereignty and immunity.[6] Climate change litigation is also necessary as climate regime cannot provide a solid framework of adaptation, mitigation and compensation to the loss and damage sustained by various segments due to climate change.[7]

One of the major problems with climate change is that the primary responsibility of climate change is difficult to determine, so many cases go unattended. Moreover, it also happens that a country causing climate change is not affected and another country bears more effects though it might be least contributor to climate change. It has also been noticed that normally low income countries and populations are affected by climate change than the strong one.[8] For instance, Pakistan is one of the least contributors to climate change but one of the most affected countries by it.[9] The judiciary in Pakistan has developed a robust jurisprudence over the last three decades regarding protection of human rights especially relating to climate change and other environmental issues.[10] However, courts and tribunals work without defined jurisprudence or concrete codified law. There is a need to develop a separate jurisprudence and legal system for protection of human rights due to climate change. The cases developed on climate change and climate justice shall be discussed in details in proceeding sections.

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[6] ibid 184.
[7] ibid 188.
[8] Audrey R. Chapman and A. Karim Ahmed, 'Climate Justice, Humans Rights, and the Case for Reparations' (2021) 23(2) Health and Human Rights Journal 82.
[9] Mian Ahmad Naeem Salik and Mir Sher Baz Khetran, 'Pakistan's Push for Climate Change' (2022) Issue Brief Institute of Strategic Studies Islamabad 1.
[10] Parvez Hassan, 'Judicial Commissions and Climate Justice in Pakistan' (2018) Paper presented in Asia Pacific Judicial Colloquium on Climate Change, Lahore (Pakistan) 1.

Significance

Climate change and human rights are linked in many ways but most importantly, climate change has serious implications for the satisfaction of human rights especially for the vulnerable people. Failure to consider human rights into climate action would adversely affect the status of human life and undermine their social status and life. Moreover, integrating human rights into climate change would change the status of human standards and benefit humanity and the entire planet.[11] However, the need is to develop a mechanism to address all these issues efficiently. The United Nations has repeatedly warned that climate change would bring serious repercussions for our future if the issue is not dealt with at this stage.[12] Therefore, issue of climate change should be addressed on urgent basis as future of our generations depends on it.

Methodology

This study requires a twofold research method to reach out desired results. On the one hand, doctrinal research methodology would help in analysis of international law instruments, domestic laws of Pakistan and various other countries and cases decided by domestic and international courts and tribunals by identifying the lacunas in protection of human rights relating to climate change. The study shall suggest viable solutions for protection of human rights due to climate change for enactment of robust international legal framework and uniform jurisprudence for domestic courts and tribunals.

Current Situation on Climate Change

The world is going through a climate emergency. Cities and towns are being adversely affected by climate change. The world also feels

[11] Zoi Aliozi, 'Climate Justice and Human Rights, in a World in Climate Emergency' (2021) Policy Briefs, Global Campus Europe 7.
[12] ibid 8.

incapacitated to deal with the issue of climate change by adopting sustainable steps and adaptation for climate change on the basis of lack of capacity to develop required projects. Development of required projects for zero emission technology, sustainable adaptation and climate resilient environment depends on financial and technical capacity, which most countries do not achieve. Internationally, many bodies are also striving to assist weak governments to achieve these goals by creating a special fund. Top of it are Transformative Actions Program, the European Investment Bank and World Bank.[13] However, many countries still face challenges in combating climate change based on lack of resources as well as financial and technical support.

Pakistan is one of the least contributing countries to Greenhouse Gases (GHGs) emissions but one of the most affected countries by climate change. Unfortunately, Pakistan is also within the list of countries facing challenges due to climate change. Pakistan has witnessed severe weather conditions, droughts, floods, shortage of water reservoirs, shortage of agricultural production and vulnerability of biodiversity. Mitigation and adaptation are the two main tools to combat climate change. The world is pressing for mitigation to combat the current challenges. On the same analogy, Pakistan also needs steps taken for mitigation particularly in agriculture, forestry, transport and energy to cope up its vulnerability towards climate change.[14] Pakistan is also facing challenges of drought seasons, unexpected variable shortfalls and these events make the country more vulnerable because major portion of agricultural land depends on monsoon season. Melting glaciers also contribute adversely towards water reservoirs and it is also a threat for future crisis on water and energy. Keeping in view

[13] ICLEI, Local Governments for Sustainability, *Daring Cities: Compendium of Good Practices* (Bonn, 2023), 8-9.
[14] CLIMATE CHANGE, available at https://www.finance.gov.pk/survey/chapters_23/17_Climate_Change.pdf, last accessed on 24.05.2024.

the same, Pakistan adopted and implemented National Climate Change Policy (NCCP) in 2012. The main focus of this policy was on climate resilient development and adaptation and a 'National Adaptation Plan' was implemented to achieve these goals. However, Paris Agreement was executed in 2015 and after becoming party to it, Pakistan has also committed to contribute towards worldwide efforts on global emissions reduction. Thereafter, Pakistan updated its policy and a new policy was formulated in 2021 that included adaptation as well as mitigation focusing on nature based solutions to combat climate change. NCCP of 2021 included several initiatives including that of "Ten Billion Tree Tsunami Programme, which was introduced in addition to the Prime Minister's 'Urban Forest Project', Clean Green Pakistan Movement and Protected Areas and National Park Initiatives". The policy primarily focuses on expanding protected areas and restoring the eco system. The target was to expand 15% area of the country as protected area. For restoration of eco system 'Eco system Restoration Initiative (ESRI)' was introduced to make the country climate resilient based on adaptation and mitigation.[15]

As already discussed, Pakistan is though lowest contributor to GHG but the most vulnerable country by climate change. Pakistan, a developing country, also lacks technical and financial capacity to cope with climate change. Therefore, the main focus was on adaptation and preferably through nature-based solutions to meet food, energy and water crises. Pakistan also needs to implement a comprehensive, robust and conducive strategy to save the country from disasters of drought, floods and severe weather conditions as

[15] Government of Pakistan: Ministry of Climate Change, National Climate Change Policy, 2021, 3-4, available at https://mocc.gov.pk/SiteImage/Policy/NCCP%20Report.pdf, last accessed on 24.05.2024.

these are closely and directly linked with human life, health, security and economy.[16]

Applicable Legal Regime

Primarily, there are two sets of legislations applicable in the context i.e. international legislation and domestic legislation of each country including Pakistan. International legal regime on climate change is a product of international law developed over time, but most importantly after the establishment of the United Nations Organization (UNO). Thereafter, many bilateral, regional and multilateral treaties were concluded. The United Nations Conference on the Human Environment, adopted in Stockholm, Sweden, in 1972 was reaffirmed by the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil. The later stressed upon creation of new levels of cooperation between the states, different bodies and organizations and people. The Declaration proclaims that human beings are the main concern of human development and are entitled to healthy and productive life in a natural environment. To achieve these goals 'the UN Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol' are the main treaties concluded at international level. UNFCCC was adopted in 1992 primarily protecting climate from dangerous human interference. Whereas, Kyoto Protocol was enforced on 16 February 2005 for the first time. UNFCCC provides only a general framework to combat climate change. The main objective of the Convention has been provided in its Article of 2 which provides that:

> The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with

[16] Government of Pakistan: Ministry of Climate Change, National Climate Change Policy, 2021, 3-4, available at https://mocc.gov.pk/SiteImage/Policy/NCCP%20Report.pdf, last accessed on 24.05.2024.

> the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.[17]

In accordance with this objective, the UNFCCC focuses two main areas to address the issue of climate change i.e. mitigation and integration. Conference of Parties (COP) is a body established under UNFCCC to ensure the implementation of the main objectives of the Convention by further amending it or Kyoto Protocol or by adopting any other instrument which either supplements or replaces Kyoto Protocol. After enforcement of Kyoto Protocol, the Bali Road Map emerged in consequence of Bali Climate Change Conference of 2007 (COP 13) which included Bali Action Plan based on which "comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action" was launched. Number of other decisions and resolutions were also adopted. After that, Copenhagen Accord was also reached through decisions made during the UNFCCC Conference of the Parties, in Copenhagen on 18 December 2009 (COP 15).Further, during the United Nations Climate Change Conference held in Cancun, Mexico in 2010 (COP 16), number of other agreements were also adopted based on Bali Road Map and Copenhagen Accord.[18]

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[17] Article 2 of UNFCCC.

[18] Oliver C. Ruppel, "Intersections of Law and Cooperative Global Climate Governance– Challenges in the Anthropocene", available at https://www.nomos-elibrary.de/10.5771/9783845242781_27.pdf?download_full_pdf=1, last accessed on 18.05.2024.

Climate change has been considered a threat to human life. In this regard, 'Inter Governmental Panel on Climate Change (IPCC)' published its report in 2023, highlighting the emergency for a response to climate change, emphasizing an international climate action. It also stated that being a threat to human life and planetary natural environment, appropriate action is needed. All the steps taken in this decade would have consequences for thousands of years. It was also reiterated that previous policy would not suffice to save the human life and planet of earth from the climate change disaster. The Supreme Court of Hawaii adopted the same concept in 2023 by declaring that "yesterday's good enough has become today's unacceptable".[19]

Various international legal instruments deal with the issue of climate change. Some have been signed and ratified by the parties and others have not. Moreover, a few have been signed and ratified, but all the provisions contained in those might not be binding. However, every provision and direction or recommendation contained in these instruments is of immense value in one way or the other. For instance, the Paris Agreement has been signed by the parties to it, but there is limited number of legally binding obligations. On the other hand, that does not mean that these obligations are of no value or should not be included in it, rather obligations that are not otherwise binding also hold importance. Some of these obligations might attain the status of preemptory norms at some point of time. As the Agreement contains obligations with regard to exercise of due diligence to maintain and enhance climate goals as well as to cooperate at international level in meaningful and transparent manner, therefore these are the obligations that can be connected

[19] Marcel BRUS, André DE HOOGH, Panos MERKOURIS, The Normative Status of Climate Change Obligations under International Law, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, 2023, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2023/749395/IPOL_STU(2023)749395_EN.pdf, last accessed 20.05.2024.

with the obligations of general international law binding to protect human life and environment or to cooperate at international level. Some other obligations, though not binding in a strict sense, but are important to achieve the desired goals. For instance, requirement under the Paris Agreement to maintain the temperature at certain level is not a legally binding obligation, but is essential for compliance of other obligations for climate protection.[20]

Besides the existing international legal framework of UNFCCC and Paris Agreement, Conference of the Parties is held on regular basis to discuss the main issues of climate change. In 2010, the United Nations Climate Change Conference (COP 16) was held in Cancun, Mexico and among others. Key issues discussed in COP 16 resulted into Cancun Agreements one executed under Kyoto Protocol Track and the other one under Ad Hoc Working Group on Long-term Cooperative Action Track (LCA). The agreements emphasized over addressing the key issues of climate change on the basis of hybrid model at international and domestic levels. The agreements also considered developing countries' issues such as climate change while simultaneously pursuing sustainable development goals.[21]

Thereafter, the Kyoto Protocol in Doha was amended, bringing two significant changes in the earlier commitments. Firstly, it set new quantified emission limitation or reduction targets for the parties listed in Annex B and the former Annex B was replaced accordingly. Secondly, the new commitment period was settled from 1st of January 2013 and ending in the year 2020. The parties agreed over reduction of GHG emissions at least by 18% below 1990 levels

[20] Marcel BRUS, André DE HOOGH, Panos MERKOURIS, The Normative Status of Climate Change Obligations under International Law, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, 2023, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2023/749395/IPOL_STU(2023)749395_EN.pdf, last accessed 20.05.2024.

[21] Asian Development Bank, Climate Change, Coming Soon to a Court Near you International Climate Change Legal Framework (Manila: Asian Development Bank, 2010), 22.

during the second commitment period. Doha Amendment also amended Annex A by adding Nitrogen trifluoride in the list of GHGs.[22]

In COP 21, an Agreement within the framework of UNFCCC was negotiated and adopted on 12 December 2015 and came into force on 4 November 2016. The Agreement was widely appreciated and adopted; currently there are 195 parties to this Agreement out of 198 to the Convention.[23] For entry into force of this Agreement, two main conditions were prescribed: "(i) at least 55 parties had deposited their instruments of ratification, acceptance, approval or accession; and (ii) these parties accounted in total for at least an estimated 55% of the total global GHG emissions". Both these conditions were met within one year of the date fixed and acceptance of this Agreement by developing and developed countries is a commended action showing commitment of the parties towards climate action. The Agreement does not permit any reservation towards the obligations contained in it both that are binding or not binding.[24]

Judicial Response

Judicial response concerning climate change always remained crucial. Although jurisprudence on climate justice is primarily developed internationally, but contributions of national courts towards implementation of international obligations is also equally important. Several countries have given judicial response towards implementation of international obligations. For instance, in '*Urgenda v. The State of the Netherlands*', Hague District Court

[22] Asian Development Bank, Climate Change, Coming Soon to a Court Near you International Climate Change Legal Framework (Manila: Asian Development Bank, 2010), 26.

[23] Available at https://unfccc.int/process/the-paris-agreement/status-of-ratification, last accessed on 23.05.2024.

[24] Asian Development Bank, Climate Change, Coming Soon to a Court Near you International Climate Change Legal Framework (Manila: Asian Development Bank, 2010), 27.

requested the Dutch Government to take concrete and rigorous steps to implement international obligations.[25] However, the Court did not base its decision on protection of human rights of its citizens rather the main focus was on the obligations outlined in international conventions and treaties. Another famous case of USA jurisdiction is the case of '*Massachusetts v. Environmental Protection Agency*'. In this case, the petitioners required Environment Protection Agency (EPA) to regulate emissions of GHGs. It was held by the court that "given EPA's failure to dispute the existence of a causal connection between manmade greenhouse gas emissions and global warming, its refusal to regulate such emissions, at a minimum, "contributes" to Massachusetts' injuries".[26] Whereas, in some other cases, courts have been proven to be putting constraints on the powers of implementing bodies on climate change issues. For instance, in '*West Virginia v. Environmental Protection Agency (EPA)*', the US Supreme Court ruled by majority of 6:3 that the project of Clean Power Plan, introduced in the tenure of Barak Obama was beyond the mandate of EPA.[27] Many other cases have also been reported worldwide on climate change and mostly from the jurisdictions of USA and Australia, but currently both countries have resorted to statutory law instead of judicial decisions.

Coming to Pakistan, for the first time in its history, issue of environment was dealt with and was interpreted while linking the same with human rights in *Shehla Zia v WAPDA*. In this case, the petitioners challenged the construction of a grid station due to its hazardous effects on the people of locality. The Court did not give any definite ruling on the pending construction of the grid station, but directed to formulate a clear policy for establishing new grid stations considering the environmental aspects.

[25] Stitching Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment), HDC, Para, 4.52.
[26] Massachusetts v. Environmental Protection Agency (EPA), 549 U.S. 497 (2007).
[27] West Virginia v. Environmental Protection Agency, 597 U.S. 697 (2022).

Furthermore, the Court interpreted the right to a healthy environment included in the right to life and right to dignity as contained in Article 9 and 14 of the Constitution of Pakistan (Constitution) respectively.[28]

In another important case, Supreme Court of Pakistan upheld the notification barring installation of new cement plants in fragile areas which the court termed as 'negative areas'. The petitioner challenged the said notification of the government because the same was arbitrary in nature and violated the right to free trade and business as contemplated under Article 18 of the Constitution. Upon a report, the Court rejected the claims that any further installation of plants would cause depletion of groundwater and damage the natural environment. The Court also observed that "[m]an and his environment each need to compromise for the better of both and this peaceful co-existence requires that the law treats environmental objects as holders of legal rights". The court while appreciating the step taken by the government observed that "[o]nly by devising and implementing appropriate adaptation measures will it be possible to ensure water, food and energy security for the country . . . The Notification, in the current facts of the case, is a climate resilient measure and in step with the National Climate Change Policy and the Constitution".[29]

For the first time, Lahore High Court dealt with climate change in Asghar Leghari v Federation of Pakistan, *etc*.[30] In this case, the petitioner, through public interest litigation, challenged the recklessness of the Federal Government to take necessary steps regarding 'National Climate Change Policy, 2012 and the Framework for Implementation of Climate Change Policy (2014-2030)'. The petitioner further urged that climate change is a threat to water, energy and security of Pakistan and violates fundamental

[28] Shehla Zia v WAPDA, PLD 1994 SC 693.
[29] D. G. Khan Cement Company v. Government of Punjab, 2021 SCMR 834.
[30] Asghar Leghari v Federation of Pakistan etc., 2018 CLD 424.

rights and particularly right to life as contained in Article 9 of the Constitution of Pakistan. The Court held that lethargic attitude and failure of the government to implement above-mentioned policy and framework is violation of fundamental rights guaranteed under the constitution of Pakistan. The Court further held that these rights included in the right to clean and healthy environment. The Court viewed "the delay and lethargy of the State in implementing the Framework offend the fundamental rights of the citizens". The Court further observed that despite introducing National Climate Change Policy and Framework for Implementation of Climate Change Policy, no serious steps have been taken to implement the same. The Court in this regard constituted a Commission to oversee the progress of the Government. In the report submitted by the Commission, the Court observed that during the period between September 2015 to January 2017, 66% of the action plan items were implemented. In order to look for continuous compliance, the Court constituted a standing committee to report the progress of the action plan and create a bridge between the executive and judiciary. Another important aspect observed by the Court was that it made a distinction between environmental justice and climate justice and concluded that environmental justice deals with the enforcement of national laws in line with international principles, but climate justice is concerned with humanity and every issue of climate is seen in connection with human rights.[31]

In another case before Lahore High Court, the petitioners, being members of civil society approached the Court seeking issuance of writ of mandamus against the government of Punjab to implement the Forest Act, 1927 and the Punjab Plantation and Maintenance of Trees Act, 1974 alleging failure of the provincial government to do so. The petitioners further sought plantation of trees in urban cities citing failure on the part of government to do so in violation of the right to life as contained in Article 9 of the Constitution, right to

[31] Ibid.

dignity as contained in Article 14, right to access to public places of entertainment as mentioned in Article 26 and right to leisure places under Article 38 of the Constitution of Pakistan. The Court allowed the petition and issued the writ directing the provincial government to plant, manage and protect trees and forests in consonance with relevant laws and policies and to enforce the penalties upon deforestation and depletion of natural forests and environment.[32]

In another case, a coalition of women filed a case against the government because failure and inaction of the government to provide clean and healthy environment violated their fundamental rights including equality before the law and principle of non-discrimination. They further alleged that various rights including the right to life were being violated and government also failed to take necessary steps for alternate renewable energy resources. It was further urged that this kind of failure by the government also violates the Paris Agreement and the government must be directed to enforce and implement the same in letter and spirit. In its initial order, the Court observed that apart from adaptation measures contemplated in UNFCCC, mitigation should also be adopted in compliance with the Paris Agreement provisions.[33] However, the final decision of the case is still awaited.

In another case, a seven years old young girl Rabab Ali filed a petition before the Apex Court of Pakistan through her father seeking enforcement of fundamental rights particularly due to issues arising in the province of Sindh. The petitioner has challenged many actions and inactions of the government, particularly regarding the coal industry, contending that the same is a threat for the life and liberty of people and those working in the industry specifically. She also contended that alternate renewable energy measures should be utilized and if the government fails to do so, the same amounts to the violation of obligations contained in the UNFCCC and Paris

[32] Sheikh Asim Farooq v. Federation of Pakistan, W.P. No. 192069 of 2018.
[33] Maria Khan v Federation of Pakistan (W.P. No. 8960 of 2019).

Agreement. Final verdict in the case is still awaited that could bring some serious consequences regarding climate justice.[34]

In a case before the Supreme Court of Pakistan, urban planning and its consequent effects on climate change were discussed. The matter arose from the fact that Capital Development Authority, Islamabad, a body authorized for development and maintenance of capital of Pakistan, rescinded its earlier decision regarding conversion of certain residential properties into commercial stating that the same would violate master plan of Islamabad Capital Territory (ICT). The matter initially came before Islamabad High Court where certain individuals challenged the said decision of CDA, but could not succeed and their petitions were dismissed. The petitioners then approached Supreme Court of Pakistan challenging the decision of Islamabad High Court. The Supreme Court, while upholding the decision of High Court, held that conversion of these properties was not only against the provisions of master plan of ICT rather urbanization has a great impact on climate change and all these considerations should be kept in mind while formulating any such policy. The court further held that "it is doubtful that our early town planners were driven by climate considerations. However, climate must form a basic determinant of urban planning and design in the wake of climate change. Climate-resilient development in cities of all sizes is crucial for improving people's well-being and increasing future generations' life opportunities. Any change in the Master Plan to an urban scheme without taking account of the climate factor would be detrimental". It was further observed by the Court that adverse impact of climate change violates fundamental rights particularly Articles 9, 14, 18 and 23 of the Constitution of Pakistan and "the CDA shall ensure to factor in adaptation, climate resiliency and sustainability into their plans, policies and decisions in order to protect constitutional rights".[35]

[34] Rabab Ali v Federation of Pakistan & Another (SC 2016).
[35] Raja Zahoor Ahmed v. Capital Development Authority, 2022 SCMR 1411.

All these decisions reflect that the courts, in response to climate change, have resorted to fundamental rights as contained in the Constitution. Although initially Environmental Protection Act, 1997 was implemented in Pakistan and Environmental Protection Agencies were also established under the Act, but later the subject was given to provinces and now legislation has been made at provincial levels. However, above mentioned cases do not make a significant reference to these laws and primarily the Constitution has been focused in all these cases. Thus, it is apparent that we lack a robust legal system at domestic level to ensure climate justice. Pakistan is also a signatory to major international conventions and treaties on climate change and being a Muslim country, since protection of environment has been made mandatory under the commands of Islamic law, Pakistan is also bound by it. It is therefore, imperative that a comprehensive legal framework should be adopted keeping in mind the international obligations contained in UNFCCC, Kyoto Protocol, Paris Agreement, all subsequent agreements and above all, teachings of Islam so that climate justice should prevail in transparent, efficient, effective and conducive environment for the protection of life, liberty and health of public.

Conclusion

While concluding the discussion, we can say that the current jurisprudence and understanding of climate change has significantly improved. Previously, the world has focused on environmental justice keeping in view the enforcement of national and international laws pertaining to climate change. However, recently international bodies, courts and tribunals have adopted a robust approach primarily aiming to protect human rights connected with the issue of climate change. In this regard, many international and national cases have been seen where in a matter of climate change, human rights have not only been discussed rather base of climate action has been made on the basis of human rights. International legal framework for climate change is in field and almost all the countries

have adopted the same, but there are certain issues with regard to implementation of obligations contained in these international instruments including UNFCCC and Paris Agreement. Pakistan has also adopted this approach and Supreme Court of Pakistan, Lahore High Court and Islamabad High Court have resorted to climate justice while dealing with climate change cases. However, despite of availability of national laws, National Climate Change Policy and Framework for Implementation of Climate Change Policy, desired objectives could not be achieved. The main reason appears to be that the main focus was on adaptation, not mitigation. Adaptation and mitigation though require financial and technical resources for their effective implementation and developing countries like Pakistan are behind in generating these resources, but there appears no other room except to adopt these internationally recognized measures. Teachings of Islam would also play a significant role in adaptation and mitigation. Therefore, apart from adaptation, there is a need to implement the policies on the basis of mitigation keeping in view international obligations. Since Islam also protects environment and addresses all the issues of climate, therefore, a separate study could be conducted on Islamic concept on climate change for acceptance in the society and effective enforcement.

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Islamic Legal Diversity and the Reform Methodologies- An Analysis of the Legislative System of Pakistan

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Abstract

The Islamic law being rich in the juristic opinions has made Islamic legal diversity an important issue to be addressed for legislative purposes in Pakistan. This diversity has been incorporated in Pakistani law by way of various Islamic law "codes", in the wake of Islamization of laws. Pakistani courts have time and again declared that they are not bound by the juristic differences or the Islamic legal diversity (*fiqhi* opinions) and that they will directly resort to reasoning from the Holy Qur'ān and *Sunnah*, in case of any ambiguity or uncertainty. A deep analysis reveals that Pakistan adopted different reform methodologies to bring law into conformity with the Islamic injunctions. It was, however, observed that the laws in which *ijtihād* was undertaken were more controversial than those in which the opinion of selecting different opinions from different schools *(takhayyur)* was availed. The research after evaluating the material on the classical *fiqh* literature, various Pakistani laws and the court practices concludes that the parliamentarians and the judges need to be equipped with analytical and critical skills

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in order to appraise earlier juristic rulings, if they want to select from different opinions from different schools of thought, or in order to directly reason from the Divine Texts, in case of setting aside the Islamic legal diversity. This will make Pakistan an Islamic country in its true spirit.

Keywords: Islamic legal diversity, reform methodologies, *takhayyur*, *ijtihād*, legislation, *fiqh*, *Sharī'ah*, Injunctions of Islam

1. Introduction

Pakistan following the parliamentary system of government was composed of three main organs of the government: Legislature, Executive and the Judiciary. The task of the legislature was to make laws; the executive to implement the law and the judiciary to interpret the law. The focus of the present research is on the legislative part of the state of Pakistan; therefore, the other two organs will not be touched here. The legislature, under the parliamentary system of government, is the source of all sovereignty in a nation-state. However, in case of Pakistan, the sovereignty was declared to be the sole ownership of Allāh Almighty, through the incorporation of the Objectives Resolution 1949 in the preamble of the Constitution of Pakistan, 1973. The present research follows the analytical research model wherein the narrative of Pakistan about its Islamic status, as per the Constitution of Pakistan, 1973, in the legislative domain is discussed and analyzed. This analysis is done in light of different reform methodologies such as *ijtihād*, *takhayyur*, *talfīq* and others adopted by the parliamentarians in Pakistan to make law conform to the Islamic injunctions. .

In the following paragraphs, different stances adopted by Pakistan, defining its status and operation as an Islamic state, will be discussed. The stances regarding defining the meaning of "Injunctions of Islam" and the status of the diversity of legal

opinions in Islam will also be discussed in the context of Muslim World, in general, and Pakistan, in particular.

2. Status of Objectives Resolution in the Constitution of Pakistan, 1973

The Objectives Resolution 1949 is the most vital document in the constitutional history of Pakistan, as far as the status of Islam in Pakistan is concerned. This document has however been debated at a great length as regard its status within the Constitution. The document was included as a preamble in all the three constitutions of Pakistan and it had no other significance. However in 1985, it was made an operative and integral part of the constitution, by the incorporation of the article 2-A in the Constitution of Pakistan, 1973. This was done through a constitutional order.[2] The status of this Objectives Resolution, as declaring the laws contradictory to the injunctions of Qur'ān and *Sunnah*, has been decided under various court cases in the constitutional history of Pakistan. There have been a number of cases deciding its significance and its status within the constitution. Some of the cases are discussed here briefly.

In *Asma Jilani v. Government of Pakistan*[3] the Chief Justice declared Islam as the *grundnorm* for Pakistan.[4]The chief Justice's statement in this regard is very important to mention here. The statement is reproduced as under:

> In any event, if a *Grundnorm* is necessary for us I do not have to look to the Western legal theorists to discover one. Our own *Grundnorm* is enshrined in

[2] Revival of the Constitution of 1973 Order, 1985 (P.O. No. 14 of 1985); Muhammad Munir, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan", *Islamic Studies* 47:4 (2008), 453.

[3] PLD 1972 SC 139

[4] Muhammad Munir, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan", *Islamic Studies* 47:4 (2008), 453.

> our own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by him a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March 1949. This Resolution has been described by Mr. Brohi as the "corner stone of Pakistan's legal edifice" … it is one of the fundamental principles enshrined in the Qur'an.[5]

Thus, under this case, the Objectives Resolution was regarded as the *grundnorm* for Pakistan; the *grundnorm* being prescribed by Kelson under his pure theory of law.[6] Kelson described *grundnorm* as something which the constitution prescribes and needs to be followed as enunciated in the constitution.[7] Thus, for Pakistan it was the Objectives Resolution and was to be followed as incorporated in the constitution. In another constitutional case, *Ziaur Rehman v. The State*[8] the Hon'ble Justice declared Objectives Resolution as a document which is "Supra-constitutional" and opined that it "is so fundamental and contains such mandates that it cannot at all be repealed or abrogated and is permanent for all times to come." This was the decision of the Lahore High Court. However, the Supreme Court, while giving judgment on the case *Ziaur Rehman v. The State*[9], rejected the notion that the Objectives Resolution was supra-constitutional, on the argument that it was "not incorporated in the

[5] Muhammad Munir, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan", *Islamic Studies* 47:4 (2008), 453.
[6] Hans Kelsen, *The Pure Theory of Law*, Trans. M. Knight (Berkeley: University of California Press, 1967), 201; Muhammad Munir, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan", *Islamic Studies* 47:4 (2008), 453.
[7] Ibid.
[8] PLD 1972 Lahore 382 at 390.
[9] PLD 1973 SC 49.

Constitution". The *Hussain Naqi v. D. M. Lahore case*[10] declared the Objectives Resolution as a mere guideline in order to frame the constitution and rejected the notion of it being regarded as the *grundnorm* for Pakistan.

The status of Objectives Resolution within the Pakistani's constitution has thus been discussed with variant views in these cases. In *Hakim Khan v. Government of Pakistan*[11], the Supreme Court practically demonstrated the status of Objectives Resolution by declaring that the commutation of death sentences by the President under article 45 of the Constitution was not repugnant to the injunctions of Islam. [12] This, thereby reduced it to a position that was not supra-constitution; and the acts of the president were declared to be valid as he commuted the death sentences on the pretext that they had been awarded by way of *ta'zīr* and not as *ḥadd.*

This was the first step towards defining the Islamic basis in Pakistan. It curtailed the status of the Objectives Resolution and upheld the action of the President to be valid.

2.1. Definition of *Sharī'ah* and the Status of the Diversity of the Juristic Opinions in the Muslim World

It is pertinent to note that there is a sharp distinction between *sharī'ah* and *fiqh*. *Sharī'ah* is a broad term encompassing the overall Islamic tenets, but it is not descriptive and specific. The jurists deliberated on the texts of the *sharī'ah* to find the purpose and purport of the Divine Law. They used different canons of interpretation to get to the true intent of the Law-giver. This was termed as *fiqh* meaning "understanding". The *sharī'ah* and *fiqh* , thereby complement each other; the former providing the latter with

[10] PLD 1973 Lahore 164.
[11] PLD 1992 SC 595.
[12] PLD 1992 SC 595; Muhammad Munir, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan", *Islamic Studies* 47:4 (2008), 456.

the proofs and texts from the sources and the latter providing the former with the possibility of various interpretations, all equally valid. The process of interpreting the law by directly deliberating on and expounding the texts of the Divine Law was not an abrupt and easy task. It required a lot of qualifications and exposure, in the field of Islamic law. The Islamic law was not the outcome of the arbitrary articulations of the jurists; rather it was a whole process of mental and physical engagement. It was for this purpose that this intellectual activity was itself considered a means for reward in the first place, even if the deliberation turned out to be erroneous.

However, the debate regarding the enforcement of *sharī'ah* continues within the Muslim World. The debate is centered on the idea that whether the enforcement of the *sharī'ah* means the general law that is dictated within the sources of Qur'ān and *Sunnah* (the primary sources) or the deliberations and interpretations of the jurists regarding these texts of the Qur'ān and the *Sunnah*, leading to diversity of opinions also forms part of the *sharī'ah*; in other words, whether the *fiqh* has any binding effect on the state in order to accomplish its task of enforcing the *sharī'ah.* Different countries have adopted different stances regarding this. Different Islamic countries have also mentioned different strategies that they have adopted to give effect to their constitutional provisions. As has been mentioned earlier, there are few states only which have declared Islam to be their state religion and consequently they have incorporated provisions in their constitutions to enforce the principles of *sharī'ah*. Sudan and Syria are Muslim states but they have not declared any state religion.[13] However, they provide for the Islamic law to be a basis of legislation in their system.[14]

[13] Tad Stahnke & Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, 10.

[14] Article 65 of the Sudan constitution provides for the Islamic law to be a basis of legislation. It states, "Islamic law and the consensus of the nation, by referendum, Constitution and custom shall be the sources of legislation; and no

In contrast to this, there are other Muslim countries which have declared Islam to be the state-religion, but they have curtailed the enforcement of Islamic provisions and law in the country. They have limited the application of the Islamic law. For example, Jordan has declared Islam to be the state religion but it has limited the application of Islamic law to matters relating to personal status and *waqfs* only.[15] Malaysia, likewise, has restricted the application of Islamic law to certain enumerated matters only. [16]

There are also countries that have declared Islam to be the state religion but they have given no practical importance and enforceability to the Islamic law. In other words, Islamic law and jurisprudence has no role in the furtherance of the Islamic status of these countries. These are Brunei, Bangladesh, Morocco and Tunisia.[17]

Pakistan on the other hand, has not only declared Islam as its state religion but also has incorporated the article 2A, comprising the Objectives Resolution, giving effect to the injunctions of Qur'ān and *Sunnah*. It is pertinent to see, therefore, the practical connotations adopted by the Constitution and the courts in defining the *sharī'ah* and the injunctions of Qur'ān and *Sunnah* in Pakistan. The following paragraphs will be a discussion regarding the status of the diversity of juristic opinions in Pakistan and the meaning of the injunctions of Qur'ān and *Sunnah.*

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legislation in contravention with these fundamentals shall be made…….”; Tad Stahnke & Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, 10.

[15] Tad Stahnke & Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, 10.

[16] Ibid.

[17] Ibid.

2.2. Definition of "Injunctions of Qur'ān and *Sunnah*" According to the Constitution of Pakistan, 1973

The article 227(1) of the Constitution of Pakistan, 1973, provides the meaning of "Injunctions of Islam" as those injunctions which are laid down in the Qur'ān and *Sunnah.* Article 227(1) provides that "All existing laws shall be brought in conformity with the Injunctions of Islam as laid in the Holy Qur'ān and *Sunnah,* in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such injunctions."

These words of the Constitution make it clear that the courts are only bound to interpret the law according to the texts of Qur'ān and *Sunnah,* and not according to the opinions of the jurists. Only Qur'ān and *Sunnah* are considered to be the "Injunctions of Islam" according to the Article 203-D of the Constitution of Pakistan, 1973.[18]

2.3. Definition of *sharī'ah* and the Status of the Diversity of the Juristic Opinions in Pakistan

The Section 2 of the Enforcement of the *Sharī'ah* Act, 1991 defines "*sharī'ah*" as meaning the injunctions of the Qur'ān and *Sunnah* as a whole and it does not restrict itself to the deliberations and articulations of the jurists. Rather, the opinions of the jurists "may" be used as a source of reference and consultation but the decisions of the judges need not abide by any particular school of thought.[19] The section 2 states that "While interpreting and explaining the *sharī'ah* the recognized principles of interpretation and explanation of the Holy Qur'ān and *Sunnah* shall be followed and the expositions and opinions of recognized jurists of Islam belonging to

[18] Muhammad Munir, Islamization of Laws in Pakistan with Special Reference to the Punjab Pre-Emption Act, 1991, *Hamdard Islamicus,* Vol.XXXVII, No.4, 63-4.

[19] Muhammad Munir, Precedent in Islamic Law with Special Reference to the Federal *Shariat* Court and the Legal System in Pakistan, *Islamic Studies* 47:4 (2008), 458.

prevalent Islamic schools of jurisprudence may be taken into consideration."[20]

Similarly, the section 4 of the Enforcement of Sharī'ah Act, 1991, states:

> Laws to be interpreted in the light of Sharī'ah: For the purpose of this Act, (a) while interpreting the statute-law, if more than one interpretation is possible, the one consistent with the Islamic principles and *jurisprudence* shall be adopted by the Court; and (b) where two or more interpretations are equally possible the interpretation which advances the Principles of Policy and Islamic provisions in the Constitution *shall* be adopted by the Court.[21]

According to this section, while interpreting any law having ambiguity in the form of more than one interpretations or more than one equally possible interpretations, the courts are directed mandatorily to refer to that interpretation "that best suits" the Principles of Public Policy and the Islamic provisions in the Constitution. This makes it appear that it is for the courts to decide as to which of the various interpretations, evaluating the laws through the Islamic principles and jurisprudence (*sharī'ah* as defined in section 2 of the *Sharī'ah* Enforcement Act, 1991), is to be adopted. Nyazee calls it the "constitutional form of the *sharī'ah*"[22] to be adopted by the courts and not the *sharī'ah* of a particular sect.

This makes the courts at liberty to use the jurisprudential debates of the Islamic jurists for adjudication; however, they are not bound to follow any particular opinion. They are free to see as to which of the

[20] See, Section 2 of the Enforcement of Sharī'ah Act, 1991 (Act X of 1991).
[21] See, Section 4 ibid.
[22] Imran Ahsan Khan Nyazee, *It is the Sharī'ah of the Courts, Your Honour*, 2014, 4, https://dx.doi.org/10.2139/ssrn.2409105.

various interpretations best fit to the need of the situation at hand. This is an *ijtihādī* action and not an easy task to do.[23] If the judges are free to adopt any of the various interpretations, then they are bound to produce evidence and reason for preferring one opinion over the other. This requires a lot of expertise in the Islamic law. The question arises whether the present judges of our honorable judiciary are competent to exercise *ijtihād* independently? For instance, in *Mst. Hakimzadi v. Nawaz Ali* [24]case, the wife had contested the case for divorce against her husband's ill-treatment and false accusation of committing adultery with her father-in-law. The case had fallen under the Dissolution of Muslim Marriages Act, 1939 (DMMA) grounds for dissolution of marriage. She had pleaded for the dissolution of her marriage; and for *khul'* in the alternative. The court had refused to grant dissolution of marriage on the basis of DMMA and granted her *khul'*. The court resorted to *Ijtihād* instead of following the Islamic law as adopted in the DMMA for dissolution of marriage.

Similarly, in the case *Mrs. Seema Chaudhry v. Ahsan Ahsraf Sheikh*[25] case, the divorced wife suing for the custody of her male child of eight years was refused by the court on the rationale of "welfare of the minor" as the wife had contracted another marriage and had a child from her new husband as well. The ex-husband did not marry another woman admittedly. On account of these facts, the court refused to give custody of the child to the mother in the house of his step-father while the real father had not contracted a second marriage. The court did this for the welfare of the minor while in

[23] As has been mentioned elsewhere, according to the opinion of Shah Waliullah, exerting one's utmost effort in order to understand and apply the rulings of the jurists previously extended and then approving, conforming or even the rejection of those rulings, is also *ijtihād* and according to him this kind *ijtihād* is the need for all ages, See, Muhammad Athar Ali, *Shah Wali Ullah's Concept of Ijtihād and Taqlīd: With Special Reference to 'Iqd al-Jīd fī Aḥkām al-Ijtihād wa'l Taqlīd*, (Bangladesh: Bangladesh Institute of Islamic thought, 2001), 33.

[24] PLD 1972 Karachi 540.

[25] P L D 2003 SC 877.

fact it had exercised independent *ijtihād* leaving aside the traditional Islamic law.

2.3.1. Stance of the Federal Shariat Court on Diversity of Juristic Opinions

Under the Constitution of Pakistan, 1973, the Federal Shariat Court is empowered to examine and decide the question as to whether any provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Qur'ān and *Sunnah*.[26] In case, any provision of law is held repugnant to the spirit of the Qur'ān and *Sunnah,* the Court will also give its reasons for declaring that law as such.[27]

In a leading case, *Muhammad Fayyaz and another v. Federation of Pakistan and others*[28], the petitioner while filing a petition in the Federal Shariat Court sought the declaration of the age limit by the Majority Act (IX of 1875) to be 18 years for puberty, to be repugnant to the injunctions of Qur'ān and *Sunnah*. The petitioners, for the sake of their arguments, relied on the juristic views of the *fuqahā.* One of the petitioners contented that it was troublesome for him to maintain his son till 18 years while he might have developed the symptoms of puberty and thereby attained the age of majority as per Islamic injunctions, even before attaining the age of 18 years.

The court held that the Federal Shariat Court had great respect and regard for the juristic opinions, however, as per constitutional requirements, the article 203 (b) of the Constitution of Pakistan, 1973 empowers the Court to examine laws only as per the injunctions of the Qur'ān and *Sunnah.* The Court had investigated and studied the case in detail and also examined the Islamic view point regarding the age-limit, but did not find any clear verse or any

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[26] See, Article 203-D of the Constitution of Pakistan, 1973.
[27] Ibid.
[28] Shariat Petition No. 6/I of 2004 and 27/I of 1992. https://www.federalshariatcourt.gov.pk/Judgments/Shariat%20Petition%20No.%206%20-%20I%20-%20of%202004.pdf.

sound *ḥadīth* fixing the age of puberty. Even the Muslim scholars were not in agreement regarding one age-limit for the same reason. The Court further held that mere appearance of symptoms of puberty might not be a manifestation of the attainment of the age of majority. The fixing of age limit by the legislature is important for the purposes of avoiding conflict and confusion, by defining the law for the parties. Thereby, the petition was dismissed.

Thus, from this case as well it is clear that the Federal Shariat Court, as empowered under article 203(b) of the Constitution of Pakistan, 1973 is bound by clear injunctions of the Qur'ān and *Sunnah*, in order to examine the "un-Islamic" element in the laws, and not by the diversity of juristic opinions.

2.3.2. Stance of Supreme Court on Diversity of Juristic Opinions

The Supreme Court held a similar decision in *Khurshid Bibi*[29] case, which is reproduced as under:

> The opinions of jurists and commentators stand on no higher footing than that of reasoning of men falling in the category of secondary sources of Muslim law, and cannot, therefore, compare in weight or authority with, nor alter the Qur'ānic law or the *Aḥādīth.* If the opinions of the jurists conflict with the Qur'ān and the *Sunnah*, they are not binding on the courts, and it is our duty, as true Muslims, to obey the word of Allāh and the Holy Prophet (peace be upon him).[30]

[29] PLD 1967 SC 97.
[30] PLD 1967 SC 97; Muhammad Munir, "Islamization of Laws in Pakistan with Special Reference to the Punjab Pre-Emption Act, 1991", *Hamdard Islamicus,* Vol. XXXVII, No.4, 58.

2.3.3. Stance of Lahore High Court on Diversity of Juristic Opinions

In *Bilqis Fatima v. Najm ul Ikram Qureshi* case, the Lahore High Court held, regarding the diversity of juristic opinions, as under:

> We are dealing with the interpretations of the Holy Qur'ān and on a question of interpretations we are not bound by the opinions of the jurists. If we be clear as to the what the meaning of a verse in the Qur'ān is, it will be our duty to give effect to that interpretation irrespective of what has been stated by the jurists……Similar considerations apply to the interpretations of the traditions of the Prophet (peace be upon him).[31]

Similarly, in *Khurshid Jan v. Fazal Daad* case, the Lahore High Court opined as under:

> The views of early jurists must be treated with utmost respect but the right to differ from them cannot be denied to the present-day courts, as such a denial will not only be a negation of the true spirit of Islam, but also of the constitutional and legal obligations of the courts to interpret the law they are asked to administer and apply in cases coming before them.[32]

These cases clarify that the diversity of juristic opinions, developed through extraneous juristic debates by the early jurists, are of recommendatory nature and not of binding nature. It also becomes clear that the judges are free to exploit and deliberate on the texts.

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[31] PLD 1959 Lahore, p.566; Muhammad Munir, "Islamization of Laws in Pakistan with Special Reference to the Punjab Pre-Emption Act, 1991", *Hamdard Islamicus,* Vol.XXXVII, No.4, 58.

[32] PLD 1964 (W.P.) Lahore 558.

This is evident from the opinion of the Lahore High Court in *Bilqis Fatima v. Najm ul Ikram Qureshi*[33]case.

The judges have, however, also adopted different juristic opinions, while deciding different cases. This selection of opinions, the rationale behind selection of particular opinions in preference to others and the juristic appraisal of this selection will be the main focus of the following topic of this work.

The methodologies adopted by Pakistan to bring its laws into conformity with the Islamic injunctions and to amend its British-imported codes will be discussed in the following paragraphs to give an insight into the legislative efforts of Pakistan, followed by an Islamic appraisal of these efforts.

2.4. Legislative Methodologies for the Introduction of Reform Adopted by Different Muslim Countries

Throughout the Muslim world, in countries that have undergone colonial past adopting western codes, there have been different legislative methodologies adopted in order to amend these western codes and to bring them in line with the Islamic injunctions. These methodologies have been termed as "reform methodologies" by these countries, as they bring novelty and reform in the country under the name and umbrella of Islam.

Different countries adopted different methodologies and garbs in order to give the legislative efforts an Islamic backing. The nature of *uṣūl ul fiqh* (Islamic jurisprudence) was to provide with the means and methods of developing the law over time. These methodologies were however, not taken as per their intent. The later scholars restricted the use of *ijtihād* and independent reasoning and there was an emergence of *taqlīd*. This occurred in the later part of the Abbasid

[33] PLD 1959 Lahore, p.566; Muhammad Munir, "Islamization of Laws in Pakistan with Special Reference to the Punjab Pre-Emption Act, 1991", *Hamdard Islamicus,* Vol. XXXVII, No.4, 58.

period.[34] The methodology of *uṣūl ul fiqh* was however, in essence, meant to encourage the activity of intellectual engagement in the field of Islamic law. Due to the restriction of *ijtihād* and a halt in the activity of the intellectual engagement, there emerged a "Crisis of the Muslim Mind" as termed by Abū Sulaymān.[35] It is this slogan that the modern writers and scholars now raise for the renaissance and revival of the Islamic law. They yearn for the revival of the Islamic spirit.

The world with its changing circumstances and the nature and purport of the Islamic law to remain alive till eternity is what has prompted the Muslim countries around the Muslim World now to give a renewal to their legislative systems by adopting the Islamic support for such renewal. They have called such renewal and activism in their systems as "reform". However, these reform strategies adopted by the modernists around the Muslim world now are derived not just by external motives of modernity but also by internal motives of giving the reformers' desires an "Islamic backing."[36] The reform strategies adopted by different countries around the Muslim world will expound and support this fact in the later paragraphs of this topic in general and the reform strategies adopted by Pakistan, in particular.

2.4.1. Legislative Methodologies Adopted in Different Muslim Countries for the Introduction of Reform

To state briefly and objectively, different reform strategies were adopted by the Muslim countries around the Muslim World. Some are stated as under:

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[34]Kemal A. Faruki, *The Evolution of Islamic Constitutional Theory and Practice*, (Karachi: National Publishing House Ltd., 1971), 39.
[35]Muhammad Hashim Kamali, "Methodological Issues in Islamic Jurisprudence", *Arab Law Quarterly,* Vol.11, No.1 (1996) pp. 3-31 at p 5.
[36]Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers,* 11, (2011), 2.

1. Takhayyur (Eclecticism)

Takhayyur was one of the reform methodologies adopted by the Muslim countries to bring reform in their legislative systems and in order to adapt their legal systems to the changing circumstances. This methodology involves the analysis and appraisal of all the opinions of different schools of thought comprising minority and majority views and then preferring that opinion which best suited to the situation at hand.[37] However, it was limited and restricted to the opinions expounded and articulated by the jurists alone and did not allow the direct interpretation of the Qur'ān and *Sunnah.* According to this approach, the diversity within the Islamic legal schools, representing the deliberations and toil of the jurists, was a wealth and could be used for the introduction of reform.[38] According to this approach, free adherence to schools was permitted without following any school strictly and that opinion was adopted which best suited the needs of the situation. This selection was at times reformatory and dependent on preponderance (*tarjīḥ*) of one opinion over the other and at times provoked by pragmatic derives; as these are the two main motivations behind switching between one opinion and the other.[39]

A clear manifestation of this eclectic approach regarding diversity of opinions is what was observed as a problem in the family law. According to the traditional Islamic law, the husband was entitled to the right of divorce. However, the right of the wife to claim divorce under traditional Islamic law was attached with some necessary conditions. These conditions varied from school to school. The *Ḥanafī* School listed very few grounds for claiming such a divorce

[37] Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers, 11*, (2011), 9.
[38] Mudasra Sabreen, "Takhayyur: A Reform Methodology for Pakistan", *Hamdard Islamicus,* 2.
[39] Ahmed Fekry Ibrahim, "Al-Shaʿrānī's Response to Legal Purism: A Theory of Legal Pluralism", *Islamic Law and Society* 20-1-2 (2013), 112.

by the wife such as long-term abandonment (Ghībah), whereas the *Mālikī* School allowed the divorce claim by the wife on the ground of non-maintenance or harm. Consequently, this school was followed in Law 25 of 1920 and in the Law 25 of 1929 in Egypt's family law codes. [40]

2. Talfīq (Combining or Patching Together)

Another strategy of reform adopted by Muslim countries was *talfīq* meaning patch-work or "the merging of the opinions of several schools of thought into one conclusive issue which is often dissimilar to all."[41] Thus, this was a unique strategy adopted, a kind of independent reasoning (*ijtihād*)[42], by the Muslim countries in order to render their decisions and laws in an "Islamic" garb. An example of this is the Moroccan family law of 1958. In this code, the husband's right to unilaterally divorce his wife and its legal effect is discussed. According to the traditional Islamic law, the pronouncement of divorce made through speech of the husband is given legal effect. However, the reformers wanted to enlist and codify the circumstances under which the divorce pronounced by the husband would be ineffective. The circumstances were thus enlisted in the article 49 of the Moroccan Family Law Code of 1958. According to this article, if the husband pronounces divorce in the state of compulsion, anger or intoxication then the pronouncement is ineffective. This bit of exception from the effectiveness of verbal pronouncement in the state of compulsion was taken from the *Mālikī* School; the exception regarding anger was taken from the *Ḥanafī* School and individual opinions from the individual views from the *Ḥanbalī* and *Mālikī* Schools; and the provision regarding

[40]Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers, 11*, (2011), 11.
[41]Ghazala Ghalib Khan, Application of *Talfīq* in Modern Islamic Commercial Contracts, *Policy Perspectives*, (2013), Vol. 10(2), 141.
[42] Ibid.

drunkenness was adopted from the minority views in the *Mālikī, ḥanafī* and *Shāfi'ī* views.[43] This thus was a merging of different opinions on different matters (anger, compulsion and drunkenness) resulting in a new ruling (they all making the verbal pronouncement ineffective), not recognized by any of the jurists.

3. Delegation of Power of Adjudication to the Judges or Other Authority

In this case, the authority of adjudicating certain matters is limited and conditioned to court litigation for the purposes of reform. In this case particularly, the reformers' intent is to secure the public interest by referring the matters to the decision of the courts rather than individual vigilantism. However, practically it has been done in order to reduce the enforceability of individual authority accorded by Islam to the individuals as their right. The most significant example of this is the case of polygamy. Different countries have adopted different laws in order to curtail the right of the husband to marry up to four wives at a time, by referring the polygamous marriages to the court conditions and requirements. Iraq for instance, under its law 188 of 1959, article 8 provides that a polygamous marriage will not be allowed without the permission of the courts. It further adds two stipulations for polygamous marriage: the husband must be financially capable to support the wives and the taking of another wife will secure a lawful benefit to the family.[44] This legislation regarding polygamy has been done by way of *ijtihād,* as there has been no evidence from the deliberations of the earlier jurists regarding such an innovative idea. The proponents of the idea of restricting the polygamous marriages derive their Islamic support by way of *ijtihād* from the verses of the Qur'an regarding polygamy. They quote the verse 3 of Sūrah Al-Nisā' which says: "If

[43] Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers, 11*, (2011), 9-10.
[44] Ibid, 16; J. N. D. Anderson, "Reforms in Family Law in Morocco", *Journal of African Law* 2: 3 (1958), 157.

you fear that you might not treat the orphans justly then marry the women that seem good to you: two, or three, or four. If you fear that you will not be able to treat them justly, then marry (only) one, or marry from among those whom your right hand possess. This will make it more likely that you will avoid injustice."[45] Similarly, the verse 129 of Sūrah Al-Nisā': "You will not be able to treat your wives with (absolute) justice not even if you keenly desire to do so."[46] Thus, these verses they take in support of restricting the practice of polygamy as Allāh Almighty says that you will not be able to treat your wives justly even if you so keenly desire to do. Similarly, Morocco has adopted a similar stance regarding the regulation of polygamous marriages. It allows polygamy only under extreme stringent and compelling circumstances and has also provided for a cause of action claim to be filed by the first wife if there be an occurrence of "harm" to her. It also provides for the "consent of the first wife" to be taken before contracting a second marriage.[47] Tunisia is the only Muslim country which has even abolished polygamy altogether.[48]

4. Legislation Taking Support from a Remote or Less- Known Textual Evidence

According to this approach the reformer does not evaluate and employ all the relevant texts and evidences regarding a particular ruling; nor does he make use of the different articulations and extraneous debates of the jurists regarding a particular issue but simply relies on a less-known text from Qur'ān or *Sunnah* and

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[45] Sayyid Abu'l A'lā Mawdūdī, *Towards Understanding Qur'an, Abridged Version of Tafhīm Al-Qur'ān*, Translated and Edited By Zafar Isḥāq Anṣārī, (Great Britain: Islamic Foundation, 2007), Sūrah Al-Nisā': 4/3.

[46] Ibid, Sūrah Al-Nisā': 4/129.

[47]Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers, 11*, (2011), 16.

[48] Mehdi, R. (1994). The Islamization of the Law in Pakistan (RLE Politics of Islam) (1st ed.). Routledge, 162.

legislates according to that text without any deep inductive or deductive interpretation. This is done merely to give the legislation, according to the desires of the reformer, an Islamic support. [49]

An example of this approach can be found in the clause 6 of the preamble of the Moroccan Law.[50] In this law, the husband's right of unilaterally divorcing his wife has been restrained and subjected to certain conditions. These conditions include the authorization by the judge and the subjection of the divorce proceedings to arbitration by the courts for reconciliation. If the reconciliation between the spouses is not secured, then a compensation comprising all the necessary expenses for the wife and her children is obligated on the husband to be paid in order to repudiate the marriage. [51] In this way, the husband's unconditional right to divorce the wife has been curtailed.

Thus, these are different methodologies adopted by the Muslim countries in order to incorporate Islamic law in their constitutions or in order to give their laws an Islamic backing.

The following paragraphs will elaborate the Islamic basis and the status of the underlying concepts of Islamic law under the Constitution of Pakistan and its different laws as implemented and interpreted in the country, and consequently the reform or the "Islamization" methodologies adopted by Pakistan to amend its laws applying the Islamic law.

2.4.2. Legislative Methodologies Adopted in Pakistan for the Purpose of Reform

Different legislative efforts were undertaken in Pakistan's legislative history for the reformation of laws in Pakistan. As has

[49] Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers, 11*, (2011), 18.
[50] Ibid, 20.
[51] Ibid.

been mentioned earlier, Pakistan emerged out of British colonialism and thereafter this colonialism had long term effects on its constitutional and political history. The British codes were adopted by Pakistan as its laws in the country; these include the Criminal Procedure Code of 1898, Code of Civil Procedure of 1908, Pakistan Penal Code of 1860 and other codes. These were British codes which were adopted by Pakistan. However, there were certain amendments proposed in the British codes, adopted in Pakistan, through the channel of reformation of laws in Pakistan.

Most notable among all the amendments in the Pakistani law were the Hudood Laws and Family laws. These laws along with their history, essential provisions, and reform methodologies adopted in those laws and their Islamic appraisal will be discussed at length in the following topic.

2.5. Muslim Family Law Ordinance: History and Provisions

The pre-partition British colonialism had long-term effects on the Pakistan's constitutional and political history. The British had included under its colonial administration different "reforms" by changing the Islamic legal theory as it was in the traditional period through various means: by giving the juristic writings the status of immutable and fixed law by incorporating those in the "codes of law"[52], the British translated the Arabic writings into English and then employed those in the courts and the British disregarded the regional customs, as it would give rise to diversity in the practice and would make the implementation of the uniform codes difficult.[53] It is also important to mention that the Muslim family law was the least touched subject under the British colonial system.[54]

[52] Nadya Haider, "Islamic Legal Reform: The Case of Pakistan and Family Law", *Yale Journal of Law & Feminism*: Vol. 12:2, (2000), 295.
[53] Ibid.
[54] Ibid.

In the field of family law, the Muslim Family Laws Ordinance is the most controversial and important document in the legislative history of Pakistan. The background efforts and debates regarding this document were encountered mainly between four actors: the Secularists, the Modernists, the Traditionalists and the Ulamā.[55] The main agenda of the Secularists was the separation between the state and the religion, termed as the separation of church and state. The Ulamā on the other hand were staunch about the fusion of religion and state. The reform methodology adopted in the promulgation of this Ordinance was individual *Ijtihād*.[56] The Modernists in their approach were centered upon the idea that the Islamic law was adaptable to change and could be molded and interpreted according to the situations at hand; moreover, *any one* could engage in this "interpretive process" (traditionally termed as *"ijtihād"*). The Traditionalists held the agenda that the right to interpret the law and to apply it to situations at hand was entitled to those qualified to exercise *ijtihād* and not just to anyone. The legal reform could take place only within the confines of the fixed domains of the *sharī'ah* and those declared as interpretable or non-definitive. Thus, the underlying difference between the Modernist and Traditionalist approach was the qualification of the one exercising *ijtihād* and the texts that were the subject of *ijtihād*; in other words, what could be interpreted with different meaning and what could not be interpreted as such. These four actors basically had the mainstream debate underlying the designing of the Muslim Family Laws Ordinance.

2.5.1. The Marriage Commission Report 1956

As has been mentioned earlier, in the years after partition from 1947 to 1954, there were no reforms in the family law.[57] in 1956 the Government set up a commission on marriage and family laws in order to study and examine its laws and to put forward

[55] Ibid.
[56] Ibid, 302.
[57] Mehdi, R. (1994). The Islamization of the Law in Pakistan (RLE Politics of Islam) (1st ed.). Routledge, 157. https://doi.org/10.4324/9780203381298.

recommendations for the purpose of reform. The commission comprised of six members belonging to the Modernists group and only one Traditionalist scholar, Maulana Ehteshamul Haq.[58] The commission carried out its examination of the laws in the form of preparing questionnaires and then these questionnaires were circulated among the public to take their opinion. It was intended to gain support from the masses on the issues pertaining to religion.[59] The crux of the commission report led in its definition of *ijtihād* and those competent to exercise it. The astonishing part of the report was that it laid its reliance on the definition of *ijtihād* given by revivalist Muhammad Iqbal, instead of the definitions given by early emmient jurists of the Islamic law. The definition of *ijtihād* as given by Iqbal and relied upon by the commission is reproduced as under:

> The word (*Ijtihād*) literally means to exert. In the terminology of Islamic law it means to exert with a view to form an independent judgment on a legal question. The idea, I believe, has its origin in a well-known verse of the Qur'ān- "And to those who exert; We show Our path." We find it more definitely outlined in a tradition of the Holy Prophet. When Mu'ādh was appointed ruler of Yemen, the Prophet is reported to have asked him as to how he would decide matters coming up before him. 'I will judge matters according to the book of God,' said Mu'ādh. 'But if the Book of God contains nothing to guide you?' 'Then I will act on the precedents of the Prophet of God.' 'But if the precedents fail?' 'Then I will exert to form my own judgment.' The student of the history of Islam, however, is well aware that with the political expansion of Islam systematic legal thought

[58] Nadya Haider, "Islamic Legal Reform: The Case of Pakistan and Family Law", *Yale Journal of Law & Feminism*: Vol. 12:2, (2000), 301.
[59] Ibid.

> became an absolute necessity, and our early doctors of law, both of Arabian and non-Arabian descent, worked ceaselessly until all the accumulated wealth of legal thought found a final expression in our recognized schools of law. These schools of law recognize three degrees of *Ijtihād*: (1) complete authority in legislation which practically confined to the founders of schools, (2) relative authority which is to be exercised within the limits of a particular school, and (3) special authority which relates to the determining of the law applicable to a particular case left undetermined by the founders.[60]

The commission thus cited Iqbal and relied on his idea that the *ijtihād* was to be carried out freely as there were many matters not contemplated by the early jurists. Iqbal also did not talk about the qualifications of the one exerting to extract a ruling from the texts. According to his conception it was not a monopoly of the jurists. A very strong statement given by Iqbal elsewhere proposes the same idea, and it is reproduced as under:

> The claim of the present generation of Muslim Liberals to re-interpret the foundational legal principles, in the light of their own experience and the altered conditions of modern life is, in my opinion, perfectly justified. The teaching of the Qur'ān that life is a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, should be permitted to solve its own problems.[61]

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[60] Nadya Haider, "Islamic Legal Reform: The Case of Pakistan and Family Law", *Yale Journal of Law & Feminism*: Vol. 12:2, (2000), 303.

[61] Syed Abdul Rahman, "Iqbal's Concept of Sovereignty and Legislation in Islam", *Islamic Studies*, Vol. 25, No. 1 (Spring 1986), 53.

The commission was thus opposed by the Traditionalists on the ground that it relied on a very liberal definition of *ijtihād* and assigned no qualifications to the one exercising *ijtihād.* Maulana Ehteshamul Haq gave a note of dissent, opposing the commission's recommendations.[62] Muslim Family Laws Ordinance, 1961 (MFLO) was promulgated at a time when women were very educated and were derived by secularist ideas, which prompted them to raise their voices for "equal rights" with men.[63] MFLO thus resulted as a compromise between the ideas of the Modernists and the Traditionalists, and in the following paragraphs, different provisions of the MFLO will show how it proved as a compromise and what the impact of its reform provisions was.

2.5.2. Provisions of the MFLO: Study and Islamic Legal Appraisal

Some of the provisions of MFLO will be discussed here along with their Islamic legal appraisal. The provisions are stated as under:

1. Polygamy

Polygamy has been a very controversial subject and different Muslim countries have adopted different stances in order to incorporate it in their constitutions. As has been mentioned elsewhere that some countries like Morocco have put several restrictions on the practice of polygamy, whereas, Tunisia is the only Muslim country prohibiting polygamy altogether. Under the MFLO, polygamy is dealt under its section 6. According to the section 6(1) of this Ordinance, it has been mandated that the person desirous of contracting a polygamous marriage must refer the case to the Arbitration Council and the husband must take consent from his

[62] Nadya Haider, "Islamic Legal Reform: The Case of Pakistan and Family Law", *Yale Journal of Law & Feminism*: Vol. 12:2, (2000), 308; Mumtaz Ahmad, "The Muslim Family Laws Ordinance of Pakistan", *International Journal on World Peace*, Vol. 10, No. 3 (1993), 39.
[63] Ibid.

existing wife or wives.[64] It further adds restrictions to the polygamous marriage by stating that the Arbitration Council must be satisfied as to the fact that the polygamous marriage is "necessary and just".[65] The question of "necessary and just" shall be considered by the Arbitration Council, looking into various grounds such as physical unfitness, willful avoidance of conjugal relations by the existing wife, infertility etc.[66] The Muslim Family Laws Ordinance provides that if the person contracts a polygamous marriage without referring the matter to the Arbitration Council, then he will be punished with the repayment of the entire dower to his existing wives, or he could be also punished with imprisonment for up to one year or fine of up to five thousand rupees. Moreover, the existing wife would be entitled to a claim for dissolution of marriage, if the husband contracts the marriage without her consent.[67] In all these cases however, the polygamous marriage has not been declared null and void, and such a marriage will be valid.

2.5.2.1. Islamic legal Appraisal

Under Islamic Law, a man is permitted to marry up to four wives at a time and there has been no restriction on this right of the husband and adding restrictions to it is subjecting the Divine Law to arbitrary opinions. Secondly, the addition of restrictions and the awarding of penalties have made the already permissible thing by *Sharī'ah*, as condemnable in the eyes of law. Thirdly, if the restrictions have an effect only to "regulate" the polygamous marriages, the adding of all these restrictions is a mere accumulation of provisions with no strong impact. As Rashida Patel quotes, "…if restrictions on polygamy are to be effective, the law should go further and lay down, that if another marriage is contracted during the subsistence of a marriage, without the prior permission from the relevant judicial

[64] See, Muslim Family Law Ordinance, 1961, Section 6(1) and 6(2).
[65] See, Muslim Family Law Ordinance, 1961, Section 6(3).
[66] See, Muslim Family Law Ordinance, 1961, Section 14.
[67] See, Muslim Family Law Ordinance, 1961, Section 13(9).

authority, such polygamous marriage shall be illegal and void *ab initio*."[68]

2. Marriage Registration

According to the section 5 of the MFLO, the registration of marriages was made compulsory and the Union Councils were empowered to grant licenses to the persons registering for the marriage. Any person not complying with the section's requirements was made liable to imprisonment which may extend up to three months or fine which may extend up to one thousand rupees or both.[69] However, the marriage which was not registered before the Union Council, as per the requirements of the MFLO, was not declared as void and it was still valid and effective.

2.5.2.2. Islamic Legal Appraisal

Under Islamic Law, a marriage contract is valid if it is executed by an offer and acceptance in the presence of two witnesses. Registration is not required to make the marriage contract valid. However, committing important things to writing has been encouraged in Islam[70], but not obligated or penalized for non-registration. The addition of this provision was no doubt important with regards to avoiding the false claims of *zinā* and claims of multiple husbands over one woman, but it was a merely addition of provisions in the law, as a marriage without registration was not declared void, and only the persons guilty of non-registration were

[68] Mehdi, R. (1994). The Islamization of the Law in Pakistan (RLE Politics of Islam) (1st ed.). Routledge, 164-5. https://doi.org/10.4324/9780203381298.
[69] See, Muslim Family Laws Ordinance, 1961, Section 5.
[70] "Believers! Whenever you contract a debt from one another for a known term, commit it to writing,…..Do not show slackness in writing down the transaction, whether small or large, along with the term of its payment.", Sayyid Abu'l A'lā Mawdūdī, *Towards Understanding Qur'an, Abridged Version of Tafhīm Al-Qur'ān*, Translated and Edited By Zafar Isḥāq Anṣārī, (Great Britain: Islamic Foundation, 2007), Surāh Al-Baqarah: 2/282.

penalized by this enactment. Therefore, these provisions proved ineffective and unnecessary.

3. Divorce

The MFLO deals with the subject of divorce under its section 7. The section provides that when the husband pronounced *ṭalāq*, it will not be effective unless and until he gives notice in writing to the Chairman of the Union Council and upon the receipt of the notice by the chairman, an Arbitration Council will be set up in order to bring reconciliation between the parties. The *ṭalāq* will be only effective, if ninety days have been passed since the receipt of the notice by the chairman.[71] Before the expiration of the ninety days, the *ṭalāq* will not be effective in the eyes of law nor will it be effective if no notice has been served to the chairman of the Union Council. This provision in the MFLO has been quite troublesome in many cases, as it has been the underlying factor in deciding the consequential matters pertaining to the question of effectiveness and ineffectiveness of the divorce. For instance, in *Javed Ali v. Abdul Kadir* case, [72] the Supreme Court held that if the husband does not give notice to the chairman or avoids giving notice to the chairman after verbal pronouncement of the divorce, the divorce does not become effective in the eyes of law and the abstinence from giving notice will be considered as a revocation of the pronouncement by the husband. This case provides clearly that the divorce which is not given notice of to the chairman will not be effective whatsoever in the eyes of law.

[71] Nadya Haider, "Islamic Legal Reform: The Case of Pakistan and Family Law", *Yale Journal of Law & Feminism*: Vol. 12:2, (2000), 318; See, MFLO, Section 7.

[72] 1987 SCMR 518 (Pak.); Nadya Haider, "Islamic Legal Reform: The Case of Pakistan and Family Law", *Yale Journal of Law & Feminism*: Vol. 12:2, (2000), 319.

2.5.2.3. Islamic Legal Appraisal

According to Islamic law, the divorce is effective by the mere pronouncement of the divorce by the husband and it does not require any of such conditions for its validity. The MFLO adding the condition that the divorce would be ineffective altogether on the non-service of notice to the chairman of the Union Council is making the divinely ordained law as ineffective and unimplemented.

2.6. Dissolution of Muslim Marriages Act, 1939: History and Provisions

The History of Dissolution of Muslim Marriages Act, 1939 is very important with regard to the methodology of reform adopted in the legislative efforts in Pakistan. It has been mentioned in the previous sections that different methodologies have been adopted by different Muslim countries in order to bring reform in their laws and in order to adapt their laws according to the contemporary situations, while keeping in view the Islamic provisions, for whatever motive. Pakistan, too adopted different methodologies in order to bring reform in its British-imported laws. The MFLO of 1961 was an example of *ijtihād* done by the legislators in Pakistan, whereas, the methodology used in the DMMA was *Takhayyur*. In order to understand how this was done, the history of DMMA is important.

The majority of the Muslims living in the Sub-continent belonged to the *Ḥanafī* school of thought. According to this school, there are very few grounds for the dissolution of marriages, or in other words, for a wife to seek divorce from her husband. However, Islamic law, rich in its diversity of juristic opinions, provided various other opinions from other schools which are way relaxing in providing for the grounds of dissolution of unwanted marriages. The other schools of thought like the *Shāfiʿī, Mālikī* and *Ḥanbalī* schools provided

other grounds for dissolution as well. Using this diversity of juristic opinions, the British had promulgated the DMMA in 1939.[73]

The main person behind this great legislation, based on *takhayyur*, was Maulana Ashraf Ali Thanwi.[74] In the passing of this Act, most of the fundamentals of the *Mālikī* school of thought were adopted[75], departing from the tradition *Ḥanafī* school of thought followed by majority of the Muslims in the British Sub-continent. Maulana Ashraf Ali Thanwi had issued a *fatwā* in 1913 that the conversion of Muslims to other faith would automatically dissolve the marriage, according to the *Ḥanafī* school of thought. On knowing this, there occurred a wave of conversions from Islam to Christianity by those women who desperately wanted to dissolve their marriage and get rid of their husbands; as there were no other expedient modes of separation under the *Ḥanafī* doctrine. Maulana thereafter reconsidered his earlier opinion and discussed the matter with four groups of *muftīs*- three groups were from India and one group was from Madina. Maulana subsequently retracted from his earlier opinion and issued another *fatwā* in 1933[76] declaring that the marriage would not automatically be dissolved on the conversion of a person from Islam to another faith.[77] He proposed certain instances as well whereupon the wife could seek divorce from her husband and he stated that the *Malīkī* school of thought be adopted. Maulana asked Qadi Muhammad Ahmad Kazmi to present the Bill in the central legislature for introducing this reform, as he was a member

[73] Mehdi, R. (1994). The Islamization of the Law in Pakistan (RLE Politics of Islam) (1st ed.). Routledge, 174. https://doi.org/10.4324/9780203381298.
[74] Muhammad Munir, "Rights of Women and the Role of Superior Judiciary with Special Reference to Family Law Cases from 2004-2008", *Pakistan Journal of Islamic Research,* Vol.3, (2009), 272.
[75] Ibid.
[76] Muhammad Munir, "Rights of Women and the Role of Superior Judiciary with Special Reference to Family Law Cases from 2004-2008", *Pakistan Journal of Islamic Research,* Vol.3, (2009), 272.
[77] As provided under Section 4 of the Dissolution of Muslim Marriages Act, 1939.

of the Indian Parliament and a lawyer from Meerut, UP. The Statement of Objects and Purposes of the bill was as under:

> There is no provision in the *Ḥanafī* Code of Muslim Law enabling a married Muslim (woman) to obtain a decree from the courts dissolving her marriage in case the husband neglects to maintain her, or makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for or under certain other circumstances. The absence of such a provision has entailed an unspeakable misery to innumerable Muslim women in British India. The *Ḥanafī* Jurists however have clearly laid down that in cases in which the application of the *Ḥanafī* law causes hardship, it is permissible to apply the provisions of "*Mālikī*, *Shāfi'ī* or *Ḥanbalī* Law". Acting on this principle the Ulamā have issued fatwās to the effect that in cases enumerated in clause 3, Part A of this Bill, a married Muslim woman may obtain a decree dissolving her marriage….As the Courts are sure to hesitate to apply the *Mālikī* Law to the case of a Muslim woman, legislation recognizing and enforcing the above mentioned principle is called for to relieve the sufferings of countless Muslim women.[78]

The Bill was thus passed as the Dissolution of Muslim Marriages Act, 1939, following the *Mālikī* school of thought.

2.6.1. Provisions of the DMMA, 1939

Under the section 2 of the DMMA, 1939, the Muslim women have been provided with the following grounds in order to obtain

[78] Muhammad Munir, "Rights of Women and the Role of Superior Judiciary with Special Reference to Family Law Cases from 2004-2008", *Pakistan Journal of Islamic Research,* Vol.3, (2009), 273.

dissolution of marriage from their husbands. These grounds are listed as under: [79]

1. The whereabouts of the husband have not been known for a period of four years;
2. The husband has neglected or has failed to provide for her maintenance for a period of two years;
3. The husband has been sentenced to imprisonment for a period of seven years or upwards;
4. The husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
5. The husband was impotent at the time of the marriage and continues to be so;
6. The husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;
7. She, having been given in marriage by her father or guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years; provided that the marriage has not been consummated;
8. The husband treats her with cruelty, that is to say:
9. Habitually assaults her or makes her life miserable by cruelty of conduct, even if such conduct does not amount to physical ill-treatment, or
10. Associates with women of evil repute or leads an infamous life, or
11. Attempts to force her to lead an immoral life, or
12. Disposes of her property or prevents her from exercising her legal rights over it, or
13. Obstructs her in the observance of her religious profession or practice, or
14. If he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qur'ān.

[79] See, Section 2 of Dissolution of Muslim Marriages Act, 1939.

An important perspective of DMMA was that if a wife invoked dissolution of marriage through these grounds, she would still be entitled to her financial claims against her husband.[80] This is stated under section 5 of DMMA which is reproduced as under:

"Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage." This was an important aspect in granting women empowerment in a male-dominant society like Pakistan. Another important feature of this Act was that it did not require the consent of husband for the claim of dissolution of marriage by the wife.[81]

2.6.1.1. Islamic Legal Appraisal

Under the traditional Islamic law, when a wife seeks divorce from her husband it is called as *khulā'*. Under the Islamic law, the *khulā'* is effective only with the approval and consent of the husband and without the consent of the husband; the dissolution of marriage cannot take place. The evidence that is cited in support of this fact of mutual consent of the spouses in order to make the divorce effective is derived for instance from a *ḥadīth* in which a woman Habībah approaches the Prophet (peace be upon him) and states that she needs separation from her husband Thābit bin Qays although he had done nothing wrong, but the wife claimed that she could not live within the limits prescribed by Allāh. On hearing this, the Prophet asked Habībah if she agreed to pay in return the garden which she had got as a gift from her husband and she agreed to pay that. Whereupon the Prophet (peace be upon him) executed separation between the spouses and asked the husband to take the garden in

[80] Mehdi, R. (1994). The Islamization of the Law in Pakistan (RLE Politics of Islam) (1st ed.). Routledge, 175. https://doi.org/10.4324/9780203381298; See Section 5 of the Dissolution of Muslim Marriages Act, 1939.
[81] Mehdi, R. (1994). The Islamization of the Law in Pakistan (RLE Politics of Islam) (1st ed.). Routledge, 176. https://doi.org/10.4324/9780203381298.

return for this separation and he did that.[82] According to the apparent meaning of this *ḥadīth*, there is nothing that suggests such consent from the husband to make the separation effective; however, jurists interpret it to mean a mutual consent divorce, which means if the husband had refused to accept the garden in return for separation the divorce would not have taken place.[83] This view was also supported by the Qur'ānic verse regarding it which states that "(While dissolving the marriage tie) it is unlawful for you to take back anything of what you have given to your wives unless both fear that they may not be able to keep within the bounds set by Allāh. Then, if they fear that they might not be able to keep within the bounds set by Allāh, there is no blame upon them for what the wife might give away of her property to become released from the marriage tie."[84] The jurists interpreted from this verse and the *ḥadīth* that it meant that the divorce was a mutual agreement between the spouses for the wife to free herself from the marriage tie and the *ḥadīth* was speaking of the same process that was mentioned in this verse for separation. [85]

Under the DMMA, this act of separation has been made unilateral and has been delegated to the judge to execute the act of separation between the spouses. This approach of the reformers in Pakistan by delegating the divorce to the judges is based on the re-interpretation of the *ḥadīth* who take it to mean the role of the Prophet (peace be

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[82] Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers,* 11, (2011), 23; Sahih al-Bukhari, Vol. 7, Ahadith 5273-5277.

[83] Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers,* 11, (2011), 23.

[84] Sayyid Abu'l A'lā Mawdūdī, *Towards Understanding Qur'an, Abridged Version of Tafhīm Al-Qur'ān*, Translated and Edited By Zafar Isḥāq Anṣārī, (Great Britain: Islamic Foundation, 2007), Sūrah Al-Baqarah: 2/229.

[85] Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers,* 11, (2011), 23.

upon him) as an arbitrator between the spouses which in the present day would be a task of the judges. [86]

Moreover, under the DMMA this separation would not affect the financial claims of the wife against her husband, which is opposing to the traditional Islamic law, according to which when a woman offers herself to be separated from her husband in exchange for her dower, then this compensation must be paid to the husband; in other words, the wife must give away her financial claim against her husband.[87]

2.7. Conclusion

To conclude, it has been exhaustingly discussed how Islamic legal diversity was incorporated in Pakistani laws in the wake of reformation. The different challenges of incorporating the Islamic law through legislation were thus discussed through the different stances adopted to define its Islamic basis. The legislative efforts done by Pakistan in order to give its laws an "Islamic" backing was also discussed along with an Islamic legal analysis. It is pertinent to note that Pakistan's legislative history has given an idea of variety in the approaches it had adopted to reform its laws. In these circumstances, however, it has been evidently seen that the matters where *ijtihād* was resorted to were more controversial than those in which *takhayyur* was adopted. In either case, the parliamentarians and the judges need to be equipped with high analytical and critical skills in order to appraise the Islamic legal literature (in case of adopting *Takhayyur* methodology) or to reason directly from the *Qur'ān* and *Sunnah.* Pakistani courts while interpreting the law, in order to entail complete reliance on the ultimate sovereignty of Allah Almighty, must resort to a cautious, deliberate and conscious approach while reasoning from the texts of the *Qur'ān* and *Sunnah.*

[86] Ibid.
[87] Mehdi, R. (1994). The Islamization of the Law in Pakistan (RLE Politics of Islam) (1st ed.). Routledge, 175. https://doi.org/10.4324/9780203381298.

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The Anti-Rape (Investigation and Trial) Act, 2021: Inadequacies and Implementation Challenges

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Abstract

The Anti-Rape (Investigation and Trial) Act, 2021, enacted in response to rising gender-based violence in Pakistan, aims for swift justice through special courts and procedures. However, gaps remain, such as the exclusion of transgender victims, the designation of already overloaded Courts of Additional Sessions Judges as Special Courts instead of the establishment of separate Special Courts, and the lack of implementation of special provisions. Despite provisions for free legal aid and special prosecutors etc., practical enforcement is lacking. Suggested amendments and better implementation are crucial for the law to effectively address gender-based violence, ensuring expeditious and just resolutions as intended in the preamble of the Act.

Keywords: Rape, Woman, Child, Investigation, Trial, Act 2021, Challenges, Amendments.

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Introduction

It is a trite that the strength of a society is measured by how it protects its most vulnerable members. Different legislative measures have been taken from time to time to protect vulnerable members of the society in Pakistan. A recent step in this regard is the promulgation of the Anti-Rape (Investigation and Trial) Act, 2021. Every good step in the right direction to protect the vulnerable segments of the society must be appreciated. One way of appreciation is to point out inadequacies in such measures and to highlight the challenges ahead. In the same vein, this article has attempted to pinpoint loopholes and challenges in implementing the above legislation. The purpose is to make this remedial step more robust, ensuring that it properly achieves the objectives for which it was enacted.

The Background

The law mirrors the needs of society. The increase in the offences of sexual abuse and violence especially the ugly incident of the motorway rape case resulted in the promulgation of the Anti-Rape (Investigation and Trial) Ordinance, 2020. This Ordinance was promulgated by the President of Pakistan.[2]After this temporary legislative measure, the Majlis-e-Shoora (Parliament) of Pakistan stepped in by enacting the Anti-Rape (Investigation and Trial) Act, 2021 (XXX OF 2021), hereinafter referred to as 'the Act'. The Act aims[3] to ensure the expeditious redressal of rape and sexual abuse cases involving women and children by establishing special investigation teams, designating special courts, and providing efficacious procedures.[4] It also aims to provide for effective investigation, victim and witness protection procedures, and expedited trials.[5] This law was published in the Gazette of Pakistan

[2]Under Article 89 of the Constitution of the Islamic Republic of Pakistan, 1973.
[3]Preamble of the Anti-Rape (Investigation and Trial) Act, 2021
[4]Ibid.
[5] The Anti-Rape (Investigation and Trial) Act, 2021.

on 4-12-2021 and has been extended to the whole country. Nonetheless, Section 1(3) of the Act states that it will come into effect on the date determined by the Federal Government. Now, on 19-1-2022, this law has come into force throughout Pakistan after the notification of the Federal Government vide S.R.O 123(1)/2022. The present Act is slightly different from the Ordinance promulgated by the President of Pakistan.[6]After highlighting the background and objectives of this Act now it is pertinent to pinpoint loopholes and challenges in the implementation of the Act.

Issue of Transgender Individuals

According to the definition clause[7] of the Act[8], a woman or child who has been the prey of offences mentioned in the schedule of this special law is considered a victim. Only women and children are the subject of this law who are a vulnerable segment of the society. This means special Courts established under this special law can try scheduled offences committed against only women and children. The definition of "victim" does not include 'transgender persons'. Transgender persons are also significantly marginalized and deprived in Pakistan. Transgender persons are included in the most recent revision to the definition of "rape" under section 375 of the Pakistan Penal Code, 1860[9]. Therefore, this gap needs to be bridged by inserting the words "transgender person" in the definition of "victim" through an amendment to section 2 (1)(k) of the Act. This would serve as an important safeguard for the transgender community of Pakistan.

[6] The Anti-Rape (Investigation and Trial) Ordinance, 2020.
[7] Section 2(1) (k), "victim" means a woman or a child who has been subjected to scheduled offences.
[8] The Anti-Rape (Investigation and Trial) Act, 2021.
[9] The Criminal Law (Amendment) Act, 2021 (LVI of 2021).

Issue of Age of Child

A "child" is defined by section 2(1)(b) of the Act as any male or female who has not yet turned eighteen. However, the age for marriage of girls is sixteen years as per the Child Marriage Restraint Act, of 1929.[10] Thus, this anomaly should be removed by amending the child marriage law to fix the age of marriage for girls at eighteen years instead of sixteen years. This amendment or issuance of a revised version is also mandatory because of the direction given in the judgment of the Lahore High Court, Lahore, in the case titled *Azka Wahid v. Province of Punjab & others*[11]. Notably, the age of marriage for girls is already 18 years in Sindh.[12] The Chairperson of the Human Rights Commission of Pakistan (HRCP) has also suggested this amendment[13] to improve the child protection mechanisms and he has further stated that violence against children, women and transgender individuals is showing no signs of abatement.[14] This state of affairs has been portrayed three years after the promulgation of this special law.[15] This point of view questions the effectiveness of this special law. This situation points out that either this law has gaps requiring amendments, or there is an implementation problem. However, in any case, steps are needed to plug the gaps in the existing legislation and also to address implementation problems

[10] The Child Marriage Restraint Act, 1929, sec. 2(a). http://punjablaws.gov.pk/laws/147a.html.
[11] 2024 LHC 1462, C:\Users\Director_FJA\Desktop\https://sys.lhc.gov.pk/appjudgments/2024LHC1462 (accessed August 20, 2024).
[12] The Sindh Child Marriages Restraint Act, 2013.
[13] The *Dawn*, Lahore. (5 April, 2024).
[14] The *Dawn*, Lahore. (5 April, 2024).
[15] The Anti-Rape (Investigation and Trial) Act, 2021.

Establishment of Special Courts

Establishing Special Courts under the Act, as mandated, has also been a challenge. Section 3(1) of the Act mandates that the Federal Government after consultation with the Chief Justice of Pakistan or the High Court concerned, shall establish as many Special Courts as necessary across the country to adjudicate scheduled offences. Furthermore, Section 3(3) of the Act allows the Federal Government, after consultation with the Chief Justice of the relevant High Court, to designate, either in addition to or instead of establishing Special Courts, as many Courts of Additional Sessions Judges or other courts as Special Courts as deemed appropriate. Previously, under Section 3(3) of the Anti-Rape (Investigation and Trial) Ordinance, 2020, all Courts of Sessions Judges were designated as Special Courts.[16] The present state of affairs, where even Additional District and Sessions Judges are notified as Special court, is a step in a backward direction, which in practice is compromising the special and exclusive nature of courts established under this law. Special Courts headed by Additional Sessions Judges in practice are not exclusively dealing with cases under the Act. They, not being master of their docket, in routine are entrusted other cases, in addition to cases under this special Act. It is suggested that Special Courts of only Sessions Judges, instead of Additional Sessions Judges, should be established or designated as was previously intended through the promulgation of the Ordinance by the President[17] to achieve the purpose as set out in the preamble of the Act. Designation of Additional District and Sessions Judges as Special Courts under this Act, is also a hurdle in the implementation of Rules[18] requiring scheduling of cases and their expeditious decisions.

[16] Notification No. F.1(1)/2021(PS) dated 7.5.2021.
[17] The Anti-Rape (Investigation and Trial) Ordinance, 2020.
[18] The Anti-Rape (Trial Procedure) Rules, 2022.

ARCC-A Step in the Right Direction

There are many good initiatives in this legislation. The creation of Anti-Rape Crisis Cells (ARCC) is a defining feature of this new legislation to address gender-based violence[19], through which all necessary services for victims will be provided at one location and under the same roof. These services include the registration of FIRs, provision of medico-legal examination facilities, securing and collecting evidence for forensic analysis without any delay[20]. These Cells shall be established or designated by the Secretary of the Law Ministry throughout the country, in public hospitals, as many as are deemed necessary, with relation to offences mentioned in Schedule II of the Act.

Special Rules[21] have recently been framed to provide a legal framework for the operation of Anti-Rape Crisis Cells (ARCCs). These rules include Schedule B which provides necessary guidelines comprising fourteen essential steps for medico-legal officers to perform medico-legal procedures. Each ARCC shall comprise the Deputy Commissioner as its head, a Medical Superintendent, a District Superintendent of Police (DSP), preferably a senior female doctor, and a female nurse.[22] The purpose behind the introduction of this structural change in the form of these cells is to provide a coordinated facility to victims of sexual abuse and violence by bringing together all stakeholders of the criminal justice system so that victims do not have to travel in a state of vulnerability from door to door to seek justice. It is pivotal to establish ARCCs in each district throughout the country to provide expeditious services to the victims of sexual abuse without loss of important evidence. These

[19] Section 4 of the Anti-Rape (Investigation and Trial) Act, 2021.
[20]Section 5 of the Anti-Rape (Investigation and Trial) Act, 2021.
[21]The Anti-Rape (Crisis Cell and Medico-Legal) Rules, 2023, https://molaw.gov.pk/SiteImage/Misc/files/anti%20rap%20crises%20cell0001.pdf.
[22]The Anti-Rape (Crisis Cell and Medico-Legal) Rules, 2023, R. 4.

ARCCs need to be established as mandated, specifically catering the needs of far-flung areas, otherwise, it will be difficult to meet the objectives of the Act.

Issues of Legal Aid and Representation

The Act has specifically provided a mechanism of legal aid and representation which is also a very important step to meet the dictates of the constitutional right to a fair trial[23] and expeditious decisions. Section 6 of the Act makes it mandatory to provide free assistance in legal matters to the victims. However, in practice, it is difficult to provide this assistance in remote areas, where such help is urgently needed by the victims who are often from the poorest strata of society. Legal aid under this special law is to be provided by: (1) the Legal Aid and Justice Authority which has been established under the law[24]; (2) the fund created under the said Act; and (3) the creation of panels of advocates. Regular provision of funds for this purpose is vital to meet the objective of the legislation. As per the spirit of the Act, victims must be provided senior advocates of ample experience in the relevant law at state expense instead of leaving them at the mercy of uninterested law officers. Selection of such advocates should be through a structured mechanism to avoid the handing over of the victims or accused in the hands of inexperienced lawyers at state expenses. Any lapse in this regard may result in the acquittal of the real perpetrator or the conviction of an innocent person. The appointment of special prosecutors[25] should also consider the above aspects and availability of competent special prosecutors in every Special Court must be ensured.

[23] Article 10A of the Constitution of Pakistan, 1973.
[24] The Legal Aid and Justice Authority Act, 2020.
[25] Section 7 of the Anti-Rape (Investigation and Trial) Act, 2021.

Victim and Witness Protection

The Act has envisaged a robust victim and witness protection mechanism.[26] As a stop-gap measure, provincial or ICT witness protection laws have been applied.[27] Section 8 of the Act has provided seven measures to ensure the protection of victims and witnesses, which include security measures, concealment of identity, distance recording of testimonies, re-location, financial assistance, compensation, and other measure which are deemed necessary.[28] Section 26 of the Act explicitly bans disclosing details of the victim or family members of the victim in order to prevent social victimization. Despite these statutory measures, there are loopholes in this mechanism. In a recent judgment in *Imdad Ullah vs. The State and Another*, the Lahore High Court noted that "the Additional Sessions Judge repeatedly used the victim's full name instead of employing an acronym."[29] The court directed that judges should identify victims using acronyms rather than their full names and emphasized that they must exercise extreme caution while writing judgments in such cases. This aspect points to a need for recurring training of judges and other stakeholders.

Investigation Mechanism

In criminal cases, the conviction of offenders largely depends on the evidence collected through investigation. The higher the quality of the investigation, the greater the chances of conviction, and *vice versa*. To achieve the goal of maximizing convictions of real culprits and deterring the rise of offences related to sexual abuse, special provisions regarding investigation have been incorporated into this

[26]Section 8 and 26 of the Anti-Rape (Investigation and Trial) Act, 2021.
[27]Section 8(2) of the Anti-Rape (Investigation and Trial) Act, 2021.
[28] Section 8 (1) (i) to (vii) of the Anti-Rape (Investigation and Trial) Act, 2021.
[29] *Imdad Ullah v. The State*.
https://sys.lhc.gov.pk/appjudgments/2024LHC1462.pdf.

law. Special units[30] are to be established to investigate the offences listed in the schedules of this Act. It is suggested that at least one female police officer must be included in each unit, for which the availability of female officers should be ensured. Additionally, it is pertinent to note that a police officer having a minimum rank of BPS-17 shall supervise the investigation of offences in Schedule II of the Act, as stipulated in sub-section 3 of Section 9 of this law. It is a good step to achieve the objective of the Act. Hurdles, like the availability of female police officers in different areas, need to be addressed for practical implementation of the Act.

To improve the quality of investigation, under the Act, it is mandatory to record the victim's statement under section 164 of the code[31] only once[32] and is to be video recorded. This statement can be used as evidence during the trial against the accused or to contradict a witness if he resiles from his statement. The statement recorded at the beginning of the investigation can serve as a safeguard against compromise effected at the bail stage or during the trial, which is a significant cause of the high acquittal rate in such cases. However, implementation of this provision faces practical problems due to lack of infrastructure and sometimes due to lack of awareness of investigation officers. Law requires recording of such statement as soon as practicable but delays caused by over-occupied investigation officers diminish the evidentiary value of such statement.

A statement under section 164 CrPC and other supervisory steps before the submission of Challan in the special courts are dealt with by judicial magistrates, as the Criminal Procedure Code, 1898, applies insofar as they are not inconsistent with the provisions of the

[30] Special Sexual Offences Investigation Units (SSOIUs), Section 9 of the Anti-Rape (Investigation and Trial) Act, 2021.
[31] The Code of Criminal Procedure, 1898.
[32] Section 14 of the Anti-Rape (Investigation and Trial) Act, 2021.

Act[33]. These steps impact the quality of the investigation and the fate of the case. The magistrates are empowered to handle the physical and judicial remand of accused persons involved in sexual abuse cases.[34] Magistrates also have the authority to discharge[35] the accused. These provisions, investing magistrates with the power to deal with sexual abuse cases at the initial stage, undermine the very purpose of establishing special courts under the Act. Therefore, it is suggested that the authority for physical and judicial remand be transferred to the Special Courts through an amendment to the Act. This change is necessary due to the sensitivity of such offences to ensure that the objectives of the special law are not defeated. Often, these cases are practically resolved before magistrates at the remand stage through out-of-court settlements, though these offences are not compoundable.

The Act has also provided punitive measures to guard against defective investigation. Section 22(1) of the Act provides penalties, including imprisonment of up to three years and a fine, for Investigation Officers who fail to conduct investigations diligently. However, the real challenge is to actualize this deterrence as a means to ensure effective and honest investigation. Most often, responsibility of acquittals is shared by the investigation agency and prosecution, therefore, implementation of these penal provisions against defective investigation is a practical challenge that needs to be addressed on a regular basis. The Act under Section 22 (2) provides to penalize complainants who falsely register FIRs or falsely involve individuals in sexual abuse cases. Despite these provisions, there are incidents of honey-trapping innocent people and later settling the matter for a substantial amount of money. This

[33] Section 29 of the Anti-Rape (Investigation and Trial) Act, 2021.
[34] Section 167 of the Code of Criminal Procedure, 1898.
[35] Section 63 of the Code of Criminal Procedure, 1898.

provision was specifically designed to address such incidents and need a robust implementation.

Procedural Safeguards

Trials of accused persons, even those facing murder charges, are typically conducted in open courts according to our criminal justice system. However, due to the nature and sensitivity of sexual abuse cases, Section 12 of the Act requires that trials for the offences mentioned in the schedule be conducted in-camera. Additionally, courts, as specified in Subsection 2 of Section 12, may use screens, video links, or other appropriate measures to protect witnesses and victims. Unfortunately, this mandatory rule for in-camera trials is not followed in letter and spirit by the courts due to various reasons, including but not limited to a lack of infrastructure and IT resources. Section 13(3) of the Act requires the recording and preservation of video evidence of the victims, accused, and witnesses. Implementation of this provision requires sizeable resources to equip the special courts with all modern facilities and an uninterrupted supply of power, failing which these steps can't be implemented in reality, despite being on the statute book.

Expeditious Trials

The Act has certain provisions to ensure expeditious trials. It stipulates that "the Court upon taking cognizance of a case under this Act, shall decide the case expeditiously, preferably within four months."[36] The use of the term "preferably" renders this provision ineffective for ensuring the prompt disposal of Schedule cases. It is suggested that this section must be amended by removing the word "preferably" and by adding, "Otherwise, the case shall be referred to the High Court concerned for extension of time with reasons in

[36] Section 16 of the Anti-Rape (Investigation and Trial) Act, 2021.

writing, and such High Court shall not extend the deadline by more than two months."

A Special Court may only grant two adjournments throughout a case as per Section 16(2) of the Act. This limit of just two adjournments is neither reasonable nor reflective of practical realities. Therefore, it is recommended that this be increased to four adjournments through an amendment to the law. However, it should be specified that each adjournment should not exceed one week to ensure the expeditious disposal of cases of sexual abuse.

Supporting Rules

The framing of the Anti-Rape (Investigation) Rules 2022, and the Anti-Rape (Crises Cell and Medico-Legal) Rules, 2022 are significant steps towards the real implementation of the Act. The Anti-Rape (Investigation) Rules 2022 mainly address the duties of the Officer-in-Charge who heads the SSOIUs, and the Investigation Officer.[37] These Rules also provide guidelines on the collection of evidence.[38] However, the key issue remains the implementation of these Rules including the establishment of SSOIUs as per the mandate of the Act and equipping investigation officers with desired resources. The Anti-Rape (Investigation) Rules, 2022, also need to be aligned with Police Rules[39] and the Code of Criminal Procedure, 1898. Currently, they do not adequately address the role of forensic officers and prosecutors in making the investigation process more effective and meaningful. Implementing the fourteen-step process provided in the Schedule of the Anti-Rape (Crises Cell and Medico-Legal) Rules, 2022 for the examination of victims and accused also needs meticulous and robust training of medical staff. Such aspects must not be compromised on the pretext of lack of resources.

[37] Rules 3-5 of the Anti-Rape (Investigation) Rules 2022.
[38] Rules 6-8 of the Anti-Rape (Investigation) Rules 2022.
[39] The Police Rules, 1934.

Conclusion

In a nutshell, the Anti-Rape (Investigation and Trial) Act of 2021 mirrors progress as well as pitfalls. Amendments as suggested *supra* during the analysis of each section of this Act are required along with implementation of this law in letter and spirit to achieve the goal of the expeditious decision of cases through special courts as outlined in the Act's preamble. In *Imdad Ullah* case[40], Lahore High Court regretted that even after two years of the passage of this special law[41], some of its provisions have not been implemented, thus defeating its intended goals. This direction should be taken seriously and positively to improve the implementation of this legislation. Nonetheless, amidst the complexities of legal reforms, there is hope that this law stands as both a beacon of hope and a stark reminder of our collective responsibility.

[40] *Imdad Ullah v The State* https://sys.lhc.gov.pk/appjudgments/2024LHC1462.pdf.
[41] The Anti-Rape (Investigation and Trial) Act, 2021.

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Scope of Regional Level Legal Education Discourse for Students of SAARC Member States

Dr. Geeta Oberoi[1]

Abstract

Technology has given new meanings to accessibility and consumers of justice are now not hindered by barriers of past eras. They want to move to the forum where they will be heard, cared for and provided free access to justice. Where their disputes will be resolved in time with logical, legal and scientific precision. In this new world of open and borderless cyberspace, it becomes all the more important to explore the possibilities of designing a regional level legal education discourse leading to award of the degree to practice law at regional level in South Asian countries that are part of the SAARC. This article makes an attempt to explore the benefit of such regional legal education discourse for consumers of justice in the SAARC, who share common legal traditions, cultures, and who have in the past shared common colonial legacy.

Keywords: Legal education quality, SAARC, access to justice, cooperation in area of education, South Asian University, curriculum, legal practice

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Introduction

Let's see how the SAARC website introduces this institution:

> "The South Asian Association for Regional Cooperation (SAARC) was established with the signing of the SAARC Charter in Dhaka on 8 December 1985. SAARC comprises of eight Member States: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. The Secretariat of the Association was set up in Kathmandu on 17 January 1987."[2]

The objectives of the Association are given as under:

> "…to promote the welfare of the peoples of South Asia and to improve their quality of life; to accelerate economic growth, social progress and cultural development in the region and to provide all individuals the opportunity to live in dignity and to realize their full potentials."[3]

And that:

> "….SAARC also aims to strengthen cooperation with other developing countries and to cooperate with international and regional organizations with similar aims and purposes."[4]

Further, "SAARC Heads of State meet at annual Summits and even in between. SAARC Secretariat has been in the past designing and executing a regional level fund to foster the cooperation among its

[2] https://www.saarc-sec.org/index.php/about-saarc/about-saarc. Last retrieved 19 September 2024, See also Nair, Rejtha. (2013). Educational Services in SAARC: Case for Deeper Integration. *Nirma University Law Journal*, 3(1), 19-50.

[3] https://www.saarc-sec.org/index.php/about-saarc/about-saarc. Last retrieved 19 September 2024, See also Chanda, Rupa. (2011). Integrating Services in South Asia - Trade, Investment and Mobility. Oxford University Press. 228.

[4] https://www.saarc-sec.org/index.php/about-saarc/about-saarc. Last retrieved 19 September 2024.

member states."[5] Recent such example being: "SAARC Covid-19 emergency fund, amounting to around 22 million USD."[6]

Co-Operation in Area of Education

The SAARC member states have given special attention to enhance the level of literacy in the region by promoting the quality of education. During the Second SAARC Summit (Bangalore, 16-17 November 1986), the Heads of member states "reiterated great importance of increasing involvement of their people for regional co-operation."[7] For the same, the member states agreed to promote "greater contacts among the peoples of the region through such action as regular and frequent interchange of scholars, academics, artists, authors, professionals and businessmen as well as facilitation of tourism."[8] At the Third Summit (Kathmandu, 02-04 November 1987), the leaders fixed the dates for the institution of the SAARC Chairs, Fellowships and Scholarships among SAARC member states to promote the educational facilities in the SAARC region. During the Fourth Summit (Islamabad, 29-31 December 1988), the leaders decided that to "include Education as area of cooperation since it is the principal means of human resources development."[9] The member states agreed to give children the highest priority in national development planning. The Leaders at the Ninth Summit (Malé, 12-14 May 1997) "…agreed that new and innovative methods like Open Learning and Distance Education can play an effective role in meeting regional needs in a cost effective and flexible manner. Accordingly, the leaders agreed that the

[5] K. Das, Debendra. (1992) (Ed.) SAARC: REGIONAL CO-OPERATION AND DEVELOPMENT PERSPECTIVES, PROBLEMS AND POLICIES. New Delhi.
[6] http://indbiz.gov.in/india-proposes-covid-19-emergency-fund-for-saarc/
[7] https://www.saarc-sec.org/index.php/resources/summit-declarations/15-second-saarc-summit-bangalore-1986/file. Last retrieved 19 September 2024.
[8] Ibid.
[9] Memorandum of Understanding among the Governments of the SAARC Member States on the Establishment of the Secretariat [notes] (1993). *Asian Yearbook of International Law*, Vol. 3, pp. 476-480.

institutional facilities in such education available in the region should be utilized on a regional scale."[10] They also agreed to explore the "possibility of the creation of a Consortium of Open Universities in the region."[11] At the Eleventh Summit (Kathmandu, 04-06 January 2002), "the Heads of States recognized the access to quality education as an important element for empowering all segments of society, and to develop or strengthen national strategies and action plans to ensure that all children, particularly the girl child, have access to quality primary education by 2015; and to improve levels of adult literacy by fifty percent by eliminating gender disparities in access to education as envisaged in the Dakar Framework for Action on Education for All adopted by the World Education Forum held at Dhaka in April 2000."[12] At the Thirteenth SAARC Summit (Dhaka, 12-13 November 2005), "the leaders noted the achievements of the Member States during recent years in the area of primary education and stressed that to meet the challenges of the twenty-first century Member States must make important strides in the areas of science, technology and higher education.."[13] As per SAU document,[14] "[i]n this meeting, India proposed to create a Centre of Excellence, in the form of a South Asian University (SAU), which can provide world class facilities and professional faculty to students and researchers drawn from every country of the region. The Expert Group Meeting to finalize the modalities for establishing the SAU was held in March 2007 in New Delhi and the first meeting of the Inter-Governmental Steering Committee on the establishment of SAU was held in May 2007 in New Delhi." The Heads of State in the Eighteenth Summit (Kathmandu, 26-27

[10] https://www.saarc-sec.org/index.php/areas-of-cooperation/social-affairs/38-areas-of-cooperation. Last retrieved 19 September 2024. See also Kathmandu Declaration of the SAARC. (2003-2004). *Asian Yearbook of International Law (Brill)*, Vol. 11, Issue 1: 361-374.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] https://www.saarc-sec.org/images/areas-of-cooperation/ESC/Education%20Files/The%20South%20Asian%20University.docx. Last retrieved 19 September 2024.

November 2014) "expressed their resolve to eliminating illiteracy from the region in line with the global goal of education for all and ensuring quality education in all institutions by reforming curricula, teaching methods and evaluation systems adequately supported by physical, technical and other facilities."[15] The SAARC website also reads: "The leaders agreed to promote regional cooperation in the field of vocational education and training. The leaders directed their Education Ministers to develop a *Regional Strategy for Enhancing the Quality of Education* in order to raise the standards of South Asian educational institutions in the region."[16]

South Asian University (SAU)

Pursuant to resolution in 13th SAARC Summit held in November 2005 in Dhaka to establish SAU – a regional Centre of Excellence, about 6 meetings took place at different places and finally the University got its shape, "with the rules providing its funding modality, draft statutes, academic structure, business plan, rules, regulations"[17] etc. The SAU has so far been one concrete and major achievement of SAARC. The SAU document also reveals that "…[t]he First Academic Session of SAU commenced on 26 August 2010 with an intake of 50 students. 25 students have joined the MA (Development Economics) programme and 25 students have joined the MCA (Master of Computer Applications) programme. At the 7th Inter-Governmental Meeting on the Establishment of South Asian University (New, Delhi, 21 – 22 September 2010), the Member States finalized the modalities for South Asian University. In its second year of functioning, SAU has 156 students enrolled for Masters' Degrees in Development Economics, International Relations, Sociology, Law, Biotechnology and Computer Science.

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[15] https://www.saarc-sec.org/index.php/areas-of-cooperation/social-affairs/38-areas-of-cooperation. Last retrieved 19 September 2024.
[16] Ibid.
[17] https://www.saarc-sec.org/images/areas-of-cooperation/ESC/Education%20Files/The%20South%20Asian%20University.docx. Last retrieved 19 September 2024.

For the third academic year (2012 - 13), SAU has invited applications for the common entrance examination which is to be held on 27 May 2012 and the third academic session will commence on 16 July 2012."[18] Today, the SAU "offers post-graduate and doctoral programs in various disciplines that include Development Economics, Computer Science, Biotechnology, Mathematics, Sociology, International Relations and Law." [19]

From 2011 until 2016, the SAU had held 8 Governing Board meetings attended by the members from all eight member states of SAARC. Today, the SAU is functioning from its 100-acre campus in Delhi. The heads of participating states have been looking forward to the SAU to commence the regional level undergraduate studies for its students. The professional undergraduate courses (in medicine, law, engineering) will definitely need local recognition from the regulators as well as all eight member states of SAARC will have to take steps for the validity of degree courses by legislating appropriate legal and regulatory measures for the recognition of SAU professional degrees in their nation state.

Need for Undergraduate Courses in Law and Justice

Poddar calls out the state of legal professionalism in South Asian countries. By comparing legal education in south Asia with that of Canada and USA, he points out how legal education in west has done away with bankruptcy of common law legacy and how the west went on to develop their own legal system and how the legal profession over there have made so many advancements in court craft. He cites an identity crisis and systemic subversion of legal education in south Asia. He opines that legal profession in south Asian public perception has been reduced to one producing parasites in south Asian countries.[20] Whether or not we chose to agree with these crude observations, but it is definitely worth exploring for

[18] Ibid.
[19] Ibid.
[20] Poddar, Debasis. (2022). Comparative Sociology of the Law Profession. *Dharmashastra National Law University Law Review* (DNLULR), 1(1), 14-45.

some semblance of truth around it. And for the same, it is important that we take a look at the big picture of what is offered as legal education in different member states of SAARC.

Comparative Table Analysis[21]

INDIA	PAKISTAN	AFGHANISTAN	BANGLADESH	BHUTAN	NEPAL	SRI LANKA	MALDIVES
3 years LLB	3 years LLB	4 years LLB by Rana University Afghanistan	4 years LLB by State University	5 years LLB by JSW law school	3 years LLB	3 years LLB course offered by UK colleges in Sri Lanka	3 years LLB Mandhu College
SEMESTER 1	PART 1	SEMESTER 1	SEMESTER 1	SEMESTER 1	PART 1	PART 1	PART 1
Jurisprudence	Islamic Jurisprudence	Fundamentals of political science	Ethics and Esthetics	Grammar	Jurisprudence	Contract Law	Constitution1
Law of contract	English Jurisprudence	Fundamentals of economics	English for Law	Vocabulary	Procedural Law	Constitutional Law	Jurisprudence and theories of law
Law of Torts	Constitutional Law 1 (British and US Constitution)	Fundamentals of law	Art of Performance & Creative Art	Economics	Public International Law	Foundations and Independent Learning	Law of contract 1
Law of Crimes -IPC	Law of Contract (Contract Act 1872, Sale of Goods Act 1930)	Fundamentals of sociology	Law of Contract	Philosophy	Constitutional Law	Law of Torts	Criminal law 1
Family Law-1	Torts and Easement (Easement Act 1882)	International organizations	Constitutional Law of Bangladesh	Legal composition and rhetoric	Law of Contract	Criminal Law	Criminal law 2

[21] See generally, SYLLABUS available on website of Delhi University, Dhaka State University, Lahore University of Punjab, Rana University of Afghanistan, JSW Law School of Bhutan, Kathmandu Law School, Mandhu College of Maldives and Colombo University.

INDIA	PAKISTAN	AFGHANISTAN	BANGLADESH	BHUTAN	NEPAL	SRI LANKA	MALDIVES
SEMESTER 2	Criminal Law (Pakistan PPC 1860)	Islamic studies	SEMESTER 2	Tort law	Two optional out of: Family Law Media Law Administrative Law Taxation Law International Trade Law Law of Torts Juvenile Justice Fiscal Law	Law in Society	Common law 1
Law of Evidence	PART 2	Contemporary history of Afghanistan	Bangladesh Studies	SEMESTER 2	PART 2	PART 2	Common law 2
Family Law -2	Constitutional Law 2 (Pakistan only)	Political history of the world	Law of Tort, Equity and Trust	Nyen-ngag	Criminal law	Justice, human rights and the state	PART 2
Law of Crimes – Code of Criminal Procedure	Equity (Trust Act 1882, Specific Relief Act 1877)	Fundamentals of Islamic Law 1	Jurisprudence	Bhutan legal history	International Institutions and Human Rights	Equity and trusts	Land & Property 1
Property Law	Mercantile Law (Partnership Act 1932, NI Act 1881, Companies Act 2017)	SEMESTER 2	Personal Law – I (Muslim)	Human dignity	Property Law	Law of the single market of the EU	Land & Property 2
Public International Law	Transfer of Property (TPA 1882, Registration Act 1908, Succession Act 1925, Land Acquisition Act 1894)	Philosophy of worship	Computer Application	Political science	Moot Court, Pre-trial preparation and participation in trial	Land law	Law of Tort 1

INDIA	PAKISTAN	AFGHANISTAN	BANGLADESH	BHUTAN	NEPAL	SRI LANKA	MALDIVES
SEMESTER 3	Muslim Personal Law (Guardian and Wards Act, Dissolution of Muslim Marriage Act 1939)	Contemporary legal systems	SEMESTER 3	Legal writing and research	Methods of legal research and writing	Any one of option: Internatio nal human rights Internatio nal trade law Clinical legal education 1 Maritime law Environm ent law	Law of Tort 2
Constitutional law -1	Public International Law	General constitutional law	Personal Law-II (Hindu, Christian & Others)	Contract law	Evidence Law	PART 3	Evidence 1
Code of Civil Procedure and Limitation Act	Special and Local Laws	General administrative law	Legal History and Legal System in Bangladesh	SEMESTER 3	Two options out of - Labour law - Election law - Internatio nal air and space law - Environme nt law - Refugee law - Criminolo gy and penology - Gender and inclusive justice - Law of insurance	Dissertati on	Evidence 2
Special Contract	PART 3	History of foreign	Interpretation of Statutes	Chen-ju	PART 3	Clinical legal	Equity and trusts

INDIA	PAKISTAN	AFGHANISTAN	BANGLADESH	BHUTAN	NEPAL	SRI LANKA	MALDIVES
		relations of Afghanistan	and General Clauses Act			education 2	
Moot Court Mock Trial and Internship	Law of civil procedure (CPC 1908, Limitation Act 1908)	History of political thought in the west	Labour and Industrial Law	Penal law and restorative justice	Comparative law and Nepalese legal system	Mediation skills and practice	Islamic Sharia'l
SEMESTER 4	CrPC and Medical Jurisprudence (CrPC 1898)	English language 1	SEMESTER 4	Jurisprudence and statutory interpretation	Interpretation of statutes	Employment law	PART 3
Constitutional law -2	Evidence and legal ethics	Fundamentals of Islamic Law 2	English for Professional Purpose / Art of Public Presentation	International law	Professional ethics and lawyering skills	Commercial law	Company law
Administrative law	Drafting, pleading, conveyance and interpretation of statutes	Administration and management	Land Laws of Bangladesh	Civil and criminal procedure	Company law	Company & business organizations law	Maldivian legal system
ADR	Administrative Law and Service Laws	SEMESTER 3	Criminal Law – I	SEMESTER 4	Seminar	Negotiation skills and practice	Constitution of Maldives
Labour Law	Minor Acts (Stamp Act 1899, Suit Valuation Act 1887, Court Fees Act 1870, Arbitration Act 1940)	Peace and conflict resolution	Law of Registration & P D R Act	Logic and debate	Law of the Sea and International rivers	Mooting	Family law
SEMESTER 5	Labour and Taxation	Biography of M.P.U.H	Law of Transfer of Property	Oral advocacy and logic	Two options out of -banking and negotiable instruments - private international law - IPR - population law - victimology - cyber law	International law, peace and security	Islamic Sharia 2

INDIA	PAKISTAN	AFGHANISTAN	BANGLADESH	BHUTAN	NEPAL	SRI LANKA	MALDIVES
Company law	FIVE YEAR LLB	Obligations law	SEMESTER 5	Environment law	5 years BALLB	Evidence	Taxation
Drafting, Pleading and Conveyance	SEMESTER 1	General criminal law 1	Law of Civil Procedure-I	Property law	SEMESTER 1	Civil dispute resolution	Commercial law
Industrial Law	English 1	Criminal law of Islam	Law of Criminal Procedure -1	Bhutanese history and metaphysics	Legal Method	Jurisprudence	Human rights
SEMESTER -6	Political science 1	Afghanistan Constitutional Law	Business Law	SEMESTER 5	Legal Nepali-I	IPR	
Professional Ethics and Accounting System	Sociology 1	History of political thought in the East	Criminal Law-II	Legal drafting, correspondence, conveyance and pleadings	Alternative English (for Foreigner in Lieu Legal Nepali)	Clinical legal education 1	
Environment Law	Philosophy of law	English language 2	SEMESTER 6	Comparative constitutional law	Legal English-I	Clinical legal education 2	
Taxation	Islamic studies / Ethics	SEMESTER 4	Law of Criminal Procedure- II	Evidence	Political Science: Theory and Thoughts	3 years LLB course offered by Sri Lanka Law College	
ELECTIVE COURSES	SEMESTER 2	Islamic Moral System	Company and Partnership Law	Corporate law	History	PART 1	
SEMESTER 3	English 2	Comparative politics	Law of Specific Relief and Limitation	Moot court	Sociology and Anthropology	Legal history and legal systems of Sri Lanka, Roman Law	
Rent control and slum clearance	Political science 2	Research methodology	Law of Banking and Securities/ Criminology	SEMESTER 6	Economics-I	Criminal Law	

INDIA	PAKISTAN	AFGHANISTAN	BANGLADESH	BHUTAN	NEPAL	SRI LANKA	MALDIVES
International institutions	Sociology 2	State building in post-war countries	SEMESTER 7	Administration law, Anti-corruption law etc	SEMESTER 2	Law of persons including personal laws	
Legal philosophy and theory of justice	World legal systems	General criminal law 2	Fiscal Laws	Bhutanese constitutional law	Jurisprudence-I	Constitutional law	
Legal research and writing	Pakistan studies	Human rights in international treaties and Islam	Law of Civil Procedure- II	Law, religion and culture	Constitutional Law-I	Industrial law	
SEMESTER -4	SEMESTER 3	Labour law	Legal Drafting & Conveyancing (Criminal & Civil)	ADR-1 (Negotiation)	Property Law	Law of obligations 1 (Contract)	
Private international law	English 3	Contemporary Islamic movements	Law of Evidence, Forensic Law and Scientific Evidence	Mock trial	Legal Nepali-II	Legislative drafting and statutory interpretation	
Interpretation of statutes	English jurisprudence 1	SEMESTER 5	SEMESTER 8	SEMESTER 7	Alternative English (For foreigner in Lieu of Legal Nepali)	Environment law or conflict of laws	
Media and law	Islamic jurisprudence 1	Political thoughts in Islam	Environmental Law	Law and gross national happiness	Legal English-II	PART 2	
Humanitarian and Refugee law	ADR	Pre-court proceedings	Public International Law	Professional responsibility and ethics	International Relations and Diplomacy	Law of property 1 & 2	
SEMESTER -5	Principles of British Constitution	Family law	Advocacy Skills and Legal Practice	ADR 2 (Mediation and Arbitration)	Economics-II	Law of obligations 2 (delicts)	
Information and technology law	SEMESTER 4	Special criminal law 1	Intellectual Property Law	IPR	SEMESTER 3	Jurisprudence	
Legislative drafting	Skills development	Commercial law	Cyber and Media Law	SEMESTER 8	Jurisprudence-II	Law of Trusts	

INDIA	PAKISTAN	AFGHANISTAN	BANGLADESH	BHUTAN	NEPAL	SRI LANKA	MALDIVES
Criminology	English jurisprudence 2	General international law		Social enterprise clinic	Constitutional Law-II	Administrative law	
International trade law	Islamic jurisprudence 2	Criminology		ADR clinic	Evidence Law	International law or Revenue law or IPR or Construction law or Arbitration	
IPR laws -1	Human rights law	Criminalistics		Human dignity clinic	Criminal Law-I	PART 3	
Business regulations	US Constitution	SEMESTER 6		Bhutanese and international commercial law	Public International Law-I	Commercial Law 1 & 2	
SEMESTER -6	SEMESTER 5	Islamic Economic System		Family law	Legal Research Methodology	Civil Procedure and Pleadings 1 & 2	
IPR Laws -2	Constitutional history of Pakistan	Arabic Language / Law terminology		SEMESTER 9	SEMESTER 4	Evidence	
Insurance and Banking Law	Muslim personal law 1	Inheritance law		Social enterprise clinic	Criminal Law-II	Criminal procedure	
Election laws	Law of contract 1	Special criminal law 2		ADR clinic	Public International Law-II	Conveyancing	
Minor Acts and Supreme Court Rules	Law of torts 1	International commercial law		Human dignity clinic	Comparative Law	Trust accounts book keeping and Professional Ethics	
International Investment Law	Criminal law 1	Private international law		Law practice management	Family Law	Apprenticeship (6 months with lawyer)	

INDIA	PAKISTAN	AFGHANISTAN	BANGLADESH	BHUTAN	NEPAL	SRI LANKA	MALDIVES
Competition Law	Public international law 1	International humanitarian law		SEMESTER 10	Contract Law-I	Practical Training Course (after passing final exam)	
5 years BALLB	SEMESTER 6	Principles of jurisprudence		Internship	Procedural Law-I		
SEMESTER 1	Constitution of Pakistan	SEMESTER 7		Internship writing	SEMESTER 5		
English 1	Muslim personal law 2	General jurisprudential rules			Contract Law II		
Political science 1	Law of contract 2	Forensic medicine			Criminology and Penology		
Economics 1	Law of torts 2	Criminal psychology			Procedural Law II		
Sociology 1	Criminal law 2	IPR			Company Law and Governance		
Contract 1	Public international law 2	International criminal law			Any one of: - ADR - Juvenile delinquency - Election law - Cyber law - International Air and Space Law		
History 1	SEMESTER 7	History of Islamic civilization			SEMESTER 6		
Legal Method	Equity 1	Principles of civil procedure			Corporate Law and Management		
SEMESTER 2	Transfer of Property 1	SEMESTER 8			Nepalese Legal System		
Contract 2	Mercantile law 1	Defense Advocacy			IPR		
Torts & Consumer Protection	Special and local laws 1	Judicial approach			International institutions and Human Rights		

INDIA	PAKISTAN	AFGHANISTAN	BANGLADESH	BHUTAN	NEPAL	SRI LANKA	MALDIVES
Constitutional Law 1	Environment laws	Objective law			Interpretation of Law		
Legal History	Research methodology and project	Media rights			Any one of: -Torts and consumer protection - insurance law - socio-economic crime - international humanitarian law		
Sociology 2	SEMESTER 8	Principles of criminal trials			SEMESTER 7		
English 2	Equity 2	Jurisprudence of priorities			Gender & Inclusive Justice		
Legal research and moot court	Transfer of Property 2	Monograph			Law, Poverty & Development		
SEMESTER 3	Mercantile law 2				Environment Law		
Family law -1	Special and local laws 2				Seminar 1 (doctrinal)		
Law of Crimes 1	Cyber laws				Labour law		
Constitutional Law 2	Moot cases and professional ethics				Any one of : - Forensic science - Fiscal law - Natural resources law - International refugee law		
History 2	SEMESTER 9				SEMESTER 8		
Economics 2	Civil procedure 1				Professional ethics and lawyering skills		
Political science 2	Criminal procedure 1				Moot court (civil case)		

INDIA	PAKISTAN	AFGHANISTAN	BANGLADESH	BHUTAN	NEPAL	SRI LANKA	MALDIVES
SEMESTER 4	Law of evidence1				Private international law		
Family law -2	Administrative law and service laws				Administrative law		
Law of Crimes 2	Labour and taxation				Clinical law – 2 (conveyancing)		
Administrative Law	SEMESTER 10				Any one of : International rivers and sea law Forensic medical Investment law Media law		
History 3	Civil procedure 2				SEMESTER 9		
Economics 3	Criminal procedure 2				Moot court 2 (criminal case)		
Political Science 3	Law of evidence 2				Banking and negotiable instruments		
SEMESTER 5	Legal drafting and interpretation of statutes				Legislative drafting		
Environment laws	Minor Acts				Taxation law		
CPC 1					Seminar 2 (non-doctrinal)		
CrPC 1					Any one of : - Energy law - Victimology - Population law - Competitio n law		
Human rights					SEMESTER 10		
ADR					Clinical law 3 (placement)		

INDIA	PAKISTAN	AFGHANISTAN	BANGLADESH	BHUTAN	NEPAL	SRI LANKA	MALDIVES
Sociology 3					Social welfare and social work law		
Summer internship					International trade law		
SEMESTER 6					Dissertation		
Jurisprudence							
Evidence							
CrPC 2							
Property law							
CPC 2							
Public international law							
SEMESTER 7							
Labour law 1							
Competition Law							
Company Law							
Law and technology							
IPR 1							
Cluster 1: (chose 1) - Election laws - Socio-economic offences - Private international law - Law, poverty and development							
Summer internship							
SEMESTER 8							
IPR 2							

INDIA	PAKISTAN	AFGHANISTAN	BANGLADESH	BHUTAN	NEPAL	SRI LANKA	MALDIVES
Interpretation of statutes							
Labour Law 2							
International Trade Law							
Income tax law							
Cluster 2: (chose any two out of) Criminology, victimology and penology Socio-political system in India Women and law International commercial laws Comparative constitutional law							
SEMESTER 9							
Legal ethics and court craft							
Drafting, pleading, conveyancing							
Land and Real Estate Laws							
Chose any 3 elective from cluster 3: - Banking, insolvency and insurance laws - Indirect tax laws - International organisations - Legal research							

INDIA	PAKISTAN	AFGHANISTAN	BANGLADESH	BHUTAN	NEPAL	SRI LANKA	MALDIVES
and methods - Gender justice - Sports and media law - Health care laws - Right to information, vigilance and whistle blower protection - Public employment and service laws - Telecommunication laws - International humanitarian law - Law and empowerment of marginalized people							
Developing entrepreneurial mindset							
Summer internship							
SEMESTER 10							
Dissertation							
Internship							

From the above table of curriculum of law graduation degrees in 8 member states of SAARC, we learn that India, Pakistan, Nepal are offering both 3 years LLB course after graduation as well as 5 years BA, LLB course after the finishing the school level education[22].

[22] Pakistan has discontinued 3 Years local LLB Program in the light of Supreme Court of Pakistan Judgements, *Pakistan Bar Council v. Federal Government*

Further, Afghanistan and Bangladesh offer 4 years LLB course after graduation. Bhutan has recently started its 5 years BA, LLB course after the high school. Sri Lanka like Afghanistan has many players in field of legal education (both domestic and foreign), but both nations are not offering as of yet the option of 5 years law graduation programme for its high school students. Maldives, as of present, is offering only 3 years LLB to its graduate students.[23] The curriculum table in no unclear terms demonstrates that the legal education regulators are lacking basic understanding on what subjects are to be taken for teaching at different stages of course. It also becomes apparent that apart from mis-match between subject and student level, there is also an urgent need to overhaul the syllabus to meet the present-day challenges in the region. Regional level initiatives at legal education reforms will do away with these variations in duration and offer standard options to pursue legal education either after completing school education or after graduation as per internationally ranked university norms. For the same, however, SAARC level meeting has to be called in and this aspect will have to be included as an agenda for consensus among law ministers and judges of all eight member states. Till date no such meeting amongst law ministers and judges for legal education discourse development has taken place even though master level and doctorate level legal education programmes are offered by SAU. The present leadership at SAU's law department has not taken any initiatives so far to push for such consensus among member states. Further, such initiatives will be successful only when every member state gets to participate in leadership roles. Not more than three years should be allowed to any one member state to assume leadership role in regional level legal education discourse at SAU if it has to be a successful and purposeful initiative.

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reported as PLD 2007 SC 394, 2013 SCMR 1651, 2018 SCMR 1891, 2019 SCMR 389.

[23] Nanwani, Suresh, & Ayus, A. Mohaimin. (2007). Strengthening legal education and judicial training in the Maldives: case study. *IIUM Law Journal*, 15(2), 171-196.

How Regional Level Law Undergraduation Programme Will Benefit SAARC?

As a legal and judicial educator, I feel that the SAU's vision for undergraduate law school should be to prepare lawyers, judges, prosecutors, draftsperson, legal officers, court officers who can contribute from their own standpoint in creating a better, just, fair world. A law degree by the SAU cannot limit its scope to skills preparation, but larger picture of the subcontinent, the problems of subcontinent (poverty, inequality, climate change) have to be focused. The legal education at the regional level university must embark upon the professional project to motivate young lawyers in making the region adhere to the principles of Rule of Law. This project will not only ensure stability in the region but will go long way in creating close bond between the member states striving for a just and equal world. The courses will have to be designed to provide students the pathways and the ideas by which they will as lawyers, as prosecutors, as judges and as legal draftspersons promote justice in the contemporary political, social and economic context. Regional level legal education can revive the law and justice debates in the context of ongoing economic constraints embedded in the structure of the profession. For doing so, the SAU can embark upon the professional project, whose principal objectives could be:

1. Taking Advantage of Shared Colonial Legacy

SAARC member states (except Afghanistan[24]) were all part of the British colonial project, and therefore, the majority of SAARC member states share the same colonial legacy, in terms of laws and regulations. Post-independence, previous colonies as independent nations have made several attempts to re-imagine, previously unrecognized histories. Not only colonies, but even researchers from colonizers side have shown great interest in exploring the ancient past of their colonies. One such example is given by Lingat, who has

[24] Legal education in Afghanistan prior to the Soviet occupation, by Robert F. Williams, 6 Suffolk Transnat'l L.J. 247-276 (1982).

observed in his works that in building up their laws, ancient civilization did not take coercive element as their starting-point which has served the West as a foundation for characterizing and distinguishing a legal rule from other rules to control the human activity. Ancient civilization, instead took duty as their starting point and from it derived a more general notion which exceeds the domain of law in many respects without actually comprehending it entirely. They did not make any attempt specially to define rules to constrain people by an external or physical sanction. But they taught people the rules of conduct ought to be observed by reason of their condition in society—and amongst these rules, the rules of law are to be found.[25] Even during their colonisations, courts had started pointing out to their appointing masters that many of legal principles and doctrines that were thought as imported from the west, in fact very much existed and operated the judicial and legal processes. For example, Justice Tek Chand delivering the unanimous Full Bench decision in the case of *Mussammat Lachhmi v. Mussammat Bhulli* (ILR Lahore Vol. VIII, 384) traced the history of doctrine of res judicata in both Hindu and Mohammedan jurisprudence.[26] Therefore, today when legal education is called upon to acknowledge and address past injustices, SAARC member states, with their distinctly layered and contested pasts yet shared colonial legacy, struggle with many such calls for undoing past wrongs. Future lawyers of the subcontinent have to meet similar calls and regional level legal education discourse whether it be taken under the aegis of SAU or some other private or public university has to develop abilities of students for reflection on the delicate aspect of addressing certain historical wrongs in modern liberal democracies.

2. Learning from Similar Experiences Owing to Similar Tensions

It is an important and inescapable social fact that in South Asian societies, modern "state law" exists in continuous tension with the

[25] Robert Lingat, *The Classical Law of India*, (translated from the French with additions by J. Duncan M. Derrett, OUP, Delhi (1998).

[26] As quoted by the SC of India in M. Nagabhushana vs. State of Karnataka and Ors. AIR 2011 SC 1113.

customary law of "communities" (be they tribes or castes) and religious laws such as *fiqh* which represent human interpretation of the Shariah and the *Dharamashashastras* which represent understanding of the Sanata Dharma.[27] In that regard, SAARC region contrast sharply with Western Europe where, over the course of two millennia, as a result of multiple factors – "Roman Empire", Christianization, "Protestant Revolution" and Enlightenment – state law has attained an exclusive hold over the people's imagination. Not so in South Asia, where both religion and primordial associations continue to enjoys vastly greater hold in both legal and normative questions. This is exactly why South Asia legal scholars should be motivated and encouraged to exchange notes with each other about how to deal with the tension between law, religion and tribal/caste custom. However, at present, as the newspaper reports reflect[28], SAU as a university that was designed to encourage south Asian scholars to develop ideas freely without any fear, has become another institution that is stifling scholars and discouraging them from free thinking. It is only when university allows complete freedom to its scholars that the scholars can take few steps in the direction of learning from common ancient past giving them experience for dealing in future with the common tension between law, religion and custom in their domestic situation.

3. Setting Up Professionalism as an Agenda for Legal Education

In recent past, almost all member states have experienced instances of professional codes falling too short to address the built-in systemic subversion- carefully crafted by vested interest- that put the administration of justice in real peril.[29] The member states of SAARC thus continue to face falling standards of legal profession

[27] Heitzman James, Worden L. Robert (1995). INDIA: A COUNTRY STUDY, Federal Research Division, Library of Congress, Washington, p. 850.
[28] Ghosh, Jayati, *From protests and suspensions to Noam Chomsky: The decline of South Asian University,* Indian Express dated 19.08.2024.
[29] Baxi, Upendra. (1982). THE CRISIS OF THE INDIAN LEGAL SYSTEM, Vikas Publishing House, Delhi: 75.

in their respective jurisdictions.[30] And there is realization that compiling booklets of rules and regulation and developing codes on ethics - are not of any help in redressing this situation.[31] The regional level legal education discourse seems to provide the possibility for an isolation from the compulsions of domestic setting. Such isolation offer ample opportunities to the educators to develop and inculcate values in students that makes them shun any kind of unwanted unprofessionalism and unethical behavior. The SAU to deliver such value based discourse can tie up with the National Law School at Bangalore to get help in developing pro-bono clinics. Through preparation for pro bono professionalism, students from the region could be motivated to work for larger public interest. The clinical experiences whether gained in India or any other member state, will create a separate cadre of legal professionals desirous to use the law as an instrument to serve the vulnerable population and for getting justice from the courts. The culture of preparing students for taking desk jobs will have to be abandoned for time being to build a vibrant legal community willing to contribute to development of law in their jurisdictions.

4. Increasing Gender Representation in Legal Education

Number of western scholars have criticized their model of legal education, terming it as a male creation.[32] The situation elsewhere has been same. But in the context of South Asian region it only gets further aggravated as the domestic cultural norms are not conducive in many member states of SAARC for equal participation of female students in educational activities. The SAU, it was established, to free education from any domestic compulsions. It was expected that

[30] See generally directions of the Supreme Court of Pakistan issued in Constitution Petition No. 133 of 2012. See also, Shah, Sardar Ali, Balasingam, Usharani, & Dhanapal, Saroja. (2018). Legal education in Pakistan: an overview. *IIUM Law Journal*, 26(2), 401-432.

[31] See generally, Munir, Muhammad Amir, Re-Orientation of Legal Education: An Agenda for 21st Century (1997). *Punjab University Law Journal*, Vol. LIV, (1997): 67-102, Available at SSRN: https://ssrn.com/abstract=2233345

[32] Weiss Catherine, Louise Melling, (1988) The Legal Education of Twenty Women, in Stan. L. Rev. 40: 1299-1300.

female students from the region after being far away from these domestic compulsions, could achieve successful legal career after getting quality legal education. It is expected therefore from the SAU to provide greater preference to enroll female candidates from the region so that the gender disbalance in domestic settings is set right.

5. Promoting Judicial Education & Civil Service Trainings

SAARC countries have another common ground to work together. Munir observes that SAARC countries have advantage of having formal judicial education bodies since last couple of decades and therefore it would not be wrong to presume that they understand the real issues the judiciaries are confronting these days and develop accordingly the training needs for their jurisdictions. He rightly notes that the SAARC works for the people of region on different issues except in the area of judicial cooperation.[33] It, therefore, falls upon the shoulder of the SAU with its up-to-date infrastructure, location and facilities to step in to fulfill the role that some important EU institutions perform.[34] What role the regional affiliation such as European International University in France, European Institute of Public Administration in Luxemburg, and European Judicial Training Network in Belgium are playing for developing and implementing common agenda for the EU region through educational activities, can be taken up by the SAU due to the huge investment that has gone in constructing it as a regional center of excellence. It is time to show this excellence beyond paper by actual delivery of educational and trainings activities – for they not only increase capacity and capability of citizens of member states, but

[33] See generally, Munir, Muhammad Amir, (2012), South Asian Chapter of CJEI - A Blueprint for Establishing a Regional Judicial Education Body. *Proceedings of the International Judicial Conference*, *2012*, Islamabad: LJCP / NJPMC. Available at SSRN: https://ssrn.com/abstract=2052394.

[34] European Judicial Training Network (for Europe); Commonwealth Judicial Education Institution (for Africa).

even go beyond to serve the larger interest of ensuring the Rule of Law in the region.

6. Preparing Lawyers Skilled in Court Craft

In almost all jurisdictions (of member states of SAARC) a gap is felt between what is delivered as legal education in the classrooms and what is required as a barrister, solicitor, attorney or prosecutor.[35] One reason that emerges for this gap is that the law schools are not given space and time to deal with subjects in depth and in comprehensive way by connecting it to other subjects. For example, child sexual abuse trials cannot be taught with the help of special law providing offences and punishments alone. It needs to be taught along with procedural laws and how the silly procedural mistakes by the investigation branch in meeting the procedural requirements leads to poor prosecution. Without such in-depth orientation, a student cannot be prepared as a lawyer to argue in defence of the accused or as a prosecutor for the state in CSA trials. As the SAU is not under the local pressure of completing the fixed syllabus, it will be in better position to design its discourse to take care of these intricacies and offer specialized in-depth orientations needed for preparing students for the court craft and for handling trial complexities before the courts.

7. Building Personality with Curricular Activities

A study was conducted to get deep knowledge about co-curricular activities and its impact on the personality development. Descriptive correlational research was conducted; a multi-stage random sampling technique; a quantitative survey encompassing 300 female and 300 male students was selected. It incorporated two closed-ended questionnaires. Mann Whitney U test was utilized to analyze the difference between students' participation in co-curricular activities and personality development on the basis of gender. Eta test was used to explore the possible correlation between co-curricular activities and personality development. It revealed a

[35] See Ardeshir Cowasjee, "Looking the Future", published by Daily *Dawn* (Pakistan), dated 27.06.2010.

positive significant relation between co-curricular activities and personality development of students. Results provided implications for educational administrators, teachers, students, parents, and government for implementing co-curricular activities.[36] Other researchers have also established that co-curricular activities have permitted the students to build many competencies such as social interface skill, community speaking skills, performance skills, and coordinating skills. These activities also accelerate brainpower development, knowledge attainment, mental fitness, physical fitness, and personality development of students which leads to the overall dynamic development of students.[37] Singh has further established that the co-curricular activities play a crucial role in the educational institutions, contributing to the cultivation of students' personality development, moral values, ethical understanding, and integrity, thereby strengthen the instruction well-educated in the classroom settings.[38] New Education Policy (2020) of India encourages educational institutions to focus on overall personality development through co-curricular activities. The SAU must design undergraduate courses so as to encourage involvement in different co-curricular activities. Students have to be given credits for taking part in outdoor games like cricket, basketball, tennis, and football to foster broader enthusiasm and engagement in different games and sports activities.

[36] Shahzadi Aroosh Khan; Rabia Tabassum; Noor Muhammad. (September 2023). A Survey of Secondary School Students in Lahore, Pakistan on the Relationship between Co-Curricular Activities and Personality Development. Pakistan Journal of Law, Analysis and Wisdom, 2(2): 984-1002.

[37] Siddiky, M.R. (2019). Developing co-curricular activities and extra-curricular activities for all-round development of the undergraduate students: A study of a selected public university in Bangladesh. Pakistan Journal of Applied Social Sciences, 10(1): 61-82.

[38] Singh, A. (2017). Effects of co-curricular activities on academic achievements of students. International Journal of Education and Multidisciplinary Studies, 6(3): 241-254.

8. Mobilizing Young Graduates for Delivery of Justice

The regional level law graduation degree at the SAU has to help law graduates inculcate skills to use law to produce social change. There is much to be learnt from the iconic case of South Africa where the political and legal struggle to overturn apartheid has translated into real equality. The common standard curriculum must focus specifically on the constitutional imperatives from the member states of SAARC promoting equality, liberty and justice so as to motivate future lawyers to employ their knowledge and skills to reduce poverty and inequality in their jurisdictions.

9. Preparing Lawyers for Nation Building

Munger maps the careers and work of lawyers who confronted the state in Thailand and what they achieved vis-à-vis women's rights, environmental protection, antipoverty movements, and increased the "government accountability, respect for rights, consistent with liberal interpretation of the 'rule of law.' White[39] offers "analysis of innovative lawyering for economic and social rights in Ghana. She informs about collaboration between community residents and law students to reform health and sanitation systems in a very-low-income community called Nima." These two examples from Cumming's note[40] support the law schools in involving their students in policy making initiatives. The regional legal education discourse must now shy away from creating space for greater partnership between student community and policy makers in delivery of schemes to beneficiaries on the ground level. Such experience will go long way in creating maturity in students and in making them understand the role of law in community.

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[39] White, Lucie E. (2011). African Youth Mobilize against Garbage: Economic and Social Rights Advocacy and the Practice of Democracy. THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE (Scott L. Cummings ed., Cambridge Univ. Press) 274.

[40] https://escholarship.org/us/item/32z767zn; See Scott L. Cummings, "The Politics of Pro Bono", 52(1) UCLA L. Rev. 2004: 37.

10. Stimulating the Interest In IHL

Academic community has contributed immensely to popularize "teaching and research" in area "of International Humanitarian Law (IHL) ever since adoption of the Geneva Conventions in 1949 and their two Additional Protocols in 1977." Universities in the West have been teaching IHL, not as an optional or an elective paper, but as regular course paper. IHL has found a place in law schools across universities in the UK and Europe. In fact, number of training and research centres have been established in the universities dedicated specifically to conduct academic courses and research on IHL. The most notable ones being Graduate Institute of International and Development Studies, Geneva[41]; Geneva Academy of Human Rights and Humanitarian Law[42]; International Institute of Humanitarian Law, San Remo, Italy[43]; The International Humanitarian Law Project, London School of Economics (LSE).[44]

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[41] This Geneva-based institute in Switzerland offers "IHL as a separate course in their curriculum designed for postgraduate taught and research programmes in law. The Graduate Institute has made a name for itself through its extensive study and research on Public International Law, especially IHL and International Criminal Justice."

[42] This is an academy affiliated to the University of Geneva, Switzerland "that is dedicated completely to the teaching and research of Human Rights Law and IHL. It offers a postgraduate taught degree (LLM) in IHL and initiates various research projects on IHL from time to time under the auspices of Geneva University. It receives generous funding from the Swiss government to carry on research work all throughout the year."

[43] This non-governmental organization (NGO) was set up in 1970 "for the purpose of promoting the dissemination and development of IHL. Over the years, 63 courses have been held, despite many difficulties. There have been more than 2,000 participants including officers, government officials and academics from 140 countries. The fact that countries from the five continents send participants, from captains to major generals, to the San Remo Institute's courses on the LOAC shows at the very least that these courses are deemed highly necessary. Many countries have requested scholarships and the institute is able to grant some to certain countries."

[44] This research project undertaken at the Department of Law, LSE has "taken up the mantle of coordinating and encouraging research and teaching of IHL within the borders of the UK. Faculty members of the Department of Law at LSE are associated actively with the centre, thereby engaging in seminars, conferences, discussions and research projects on the LOAC. Visiting professors such as Prof. William Schabas are involved in the project that aims

In the US also, about 40 law schools are offering a dedicated course on IHL either as a stand-alone module or packaged with courses on national security, human rights, ICL or related fields.[45]

In Asia, member states within SAARC have not taken any dedicated step to popularize teaching of IHL. Some member states are offering IHL as an optional subject, even though many of them have been ravaged by war and conflicts over the past two decades. As those states emerge from conflict and try to rebuild themselves through the administration of post-conflict justice and the rule of law, the regional level educational efforts to popularise IHL as core paper can play an important role in extending the benefits of relief, reconstruction and reparation in post-conflict societies. As noted by Ghosh, the changing nature of IHL in the context of the global war on terror, role of non-state actors in IHL, role of ICC, emergence of transnational armed groups in the post-9/11 era are still not a part of the IHL curriculum in most of law schools of member states. Without the inclusion of such developments in the curriculum, classroom teaching of IHL remains incomplete.[46] In this context, the SAU can step in to provide contemporary developments besides raising theoretical underpinning of the subject. As noted in the EU context, legal education discourse has played very important role in consolidation of EU conventions, treaties and the EU law itself has been carved out as an important discipline for which member states within EU are offering specializations. The regional level legal education discourse can help legal profession in Asia to build strong ties and this will go long way in building strong bonds between the member states.

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to engage the legal academia in the formulation of solutions to complex contemporary issues."

[45] Teaching International Humanitarian Law at U.S. Law Schools, available at https://www.researchgate.net/publication/228242629_Teaching_International_Humanitarian_Law_at_US_Law_Schools (Retrieved September 10, 2024).

[46] Ghosh, Pritam. (2015). Teaching and Research of International Humanitarian Law in Asia: Efforts, Issues and Prospects. ASIAN J. LEGAL EDUC. 2(1): 1-16.

11. Educating Lawyers in Contemporary Social Context

Almost all the member states of SAARC are having substantial young population at risk of being deprived of their basic rights. Therefore, the regional level legal education discourse has to offer the specialized courses to create awareness on the pressing socio-economic problems and make legal profession future ready to offer possible solutions through laws and regulations. Educational interface will create greater understanding of available framework[47] and help in better implementation of rules and regulations to address complex problems faced locally.

12. Increasing Cross-Border Flows of Students within SAARC

Some decades ago, one western scholar had travelled to both India and Pakistan for his empirical study on legal education in India and Pakistan.[48] His observations six decades ago that - students in both countries pursue legal education with hardly any interest in learning the law and the percentage of those who are serious scholars go abroad for their legal education - still hold true for SAARC member states as confirmed by the recent study of countries from where students go outside to study.[49] The UNESCO study confirms that students from SAARC member states have been migrating to the west for their education as reflected by the table below:

[47] Every member state of SAARC has laws and regulations to benefit their child population. Nonetheless situation on ground is contrary in all member states. It is therefore high time that all member states come together to share their success-failure stories, thereby enriching each in ideas to deal with ground level situations.

[48] Rice, W. G. (1958). Quick look at legal education in Pakistan and India. Journal of Legal Education, 11(3), 364-366.

[49] Done by UNESCO in the year 2017. See, UNESCO INST. FOR STAT., http://uis.unesco.org/en/ (last visited Nov. 17, 2017). These figures were extracted on Oct. 23, 2017 and are for 2016. See also, Anthea Roberts, Cross-Border Student Flows and the Construction of International Law as a Transnational Legal Field, 3 U.C. IRVINE J. INT'l TRANSNAT'l & COMP. L. 1 (2018).

Country	**Outgoing students**	**Incoming students**	**Destination where internal students go**	**5 countries from where maximum students come**
Australia	12026	294438	US, New Zealand, UK, Germany, Canada	China, India, Malaysia, Vietnam, Nepal
China	801187	123127	US, Australia, UK, Japan, Canada	No data
France	80635	235123	Belgium, UK, Canada, Switzerland, Germany	China, Morocco, Algeria, Tunisia, Senega
Germany	116342	228756	Austria, Netherlands, UK, Switzerland, US	China, Russia, India, Austria, France
India	255030	41993	US, Australia, UK, New Zealand, Canada	Nepal, Afghanistan, Bhutan, Nigeria Malaysia
Italy	56712	90419	UK, Austria, France, Germany, Switzerland	China, Albania, Romania, Iran, Greece
Japan	30179	132685	US, UK, Germany, Australia, France	China, South Korea, Vietnam Nepal, Indonesia
Kazakhstan	77,965	12,533	Russia, Kyrgyzstan, US, Turkey, UK	Uzbekistan, India, China, Kyrgyzstan, Russia

Korea republic	108047	54540	US, Japan, Australia, UK Canada	China, Vietnam Mongolia, US, Japan
Malaysia	64480	60244	UK, Australia US, Egypt, Jordan	Bangladesh, Indonesia, China, Nigeria, Iran
Nigeria	75539	No data	UK, Ghana, US, Malaysia, Ukraine	No data
Russia	56328	226431	Germany, Czechia, US, UK, France	Kazakhstan, Ukraine, Belarus, Turkeminstan, Uzbekistan
Saudi Arabia	86486	73077	US, UK, Canada, Australia, Jordan	Yemen, Syria, Egypt, Palestine, Pakistan
UK	31078	428724	US, France, Netherlands, Germany, Australia	China, India, Nigeria, Malaysia, US
US	67665	907251	UK, Canada, Grenada, Germany, France	China, India, South Korea, Saudi Arabia, Canada

"Education plays a crucial role in shaping individuals' approaches and networks (incoming influences) and represents a meaningful form of soft power through which academics in some states are able to diffuse ideas, materials, and approaches across borders."[50] However, what are the patterns that reflect, and forces that shape, whether individuals from certain states are likely to cross borders to

[50] https://academic.oup.com/book/43096/chapter/361571238. Last retrieved 10 September 2024.

undertake tertiary studies? And, if they do undertake transnational study, where do they go? For legal education, the SAU can step in to offer opportunities to students from not only SAARC member states, but even from neighboring non-members by offering cost effective quality education meeting global educational needs. When students only study law in their own state, they are more likely to develop a nationalized approach to law, but when they cross borders to study law, this has a denationalizing effect on them as they are exposed to universal approach to the law. When these students return their home to practice or teach the law, they are ready with ideas, approaches, and materials from wider perspective to deal with their specific ground situation. They cultivate professional and personal networks that will carry on into the future.[51] It is therefore high time that the SAU structurally brings changes to make itself a true regional center for educational excellence so that the foreign students who take admission in its programmes are prepared to survive in a globally competitive world.

Conclusion

SAARC nations collectively fund the SAU, and therefore, the law graduation programme at SAU designed after consensus among all member states as equal partners – can wipe out inherent deficiencies that academic community feels due to mis-match between course objective and student maturity.[52] Further, a common standard curriculum for all the member states to raise the bar of legal education, comprising of common legal principles for which every member state would like to orient their law graduates, will prepare students the skills and capacity to serve any jurisdiction of their choice. This common standard curriculum prepared with 80 percentage of standard legal principles that are universally applicable, and 20 percentage of discourse to be delivered through

[51] See Peter Mattis, Reexamining the Confucian Institutes, DIPLOMAT, Aug. 2, 2012.

[52] Clinical Legal Education in Asia. Edited by Shuvro Prosun Sarker, Palgrave Macmillan, New York, 2015, 250 Pp., ISBN 978-1-137-51753-1. See also, Legal Education in Asia. Edited by Shuvro Prosun Sarker, Eleven International Publishing: The Hague, 2014, pp. 298.

local experts appointed from all the member states at the SAU – will provide comprehensive legal education to make students not only industry ready to serve the justice system of any member state in the SAARC, but also employable in any other foreign jurisdiction.

At present, the website of SAU[53] (as of today on legal studies department known as faculty of legal studies) does not inspire any such confidence in its capacity to undertake such supra-national project. The website informs the public that only Indian faculties (that too 1 professor who is acting dean and who was investigated for sexual harassment complaint[54]), with the help of another four – five associate professors - is managing the legal education department. All of them are drawn only from one country (India) and other member states do not have their representation in the law faculty. This does not augur well for the image of the SAU, and makes the promises made by the SAARC to work in collaborative culture, sound hollow.

For undertaking any supra-national project, the SAU, first of all has to appoint in its every department, the faculty or experts drawn from all eight member states. The faculty of legal studies too needs to adhere to this norm of having diverse faculty from all 8 member states to teach local laws to the local and foreign students. In fact, student intake or the faculty intake of every member state has to be fixed and the department administration has to be offered in rotation to every member state to as to make it truly regional level center of excellence with credible credentials. All students at the SAU must be offered an option to learn the local laws of their own country or of any other member states. Such comprehensive comparative discourse will produce well rounded and informed legal community, ready to serve subalterns in any of the member states.

[53] https://sau.int .

[54] https://www.shiksha.com/news/college-sau-law-student-writes-to-ministry-of-external-affairs-demanding-action-against-prof-blogId-122915 .

The SAARC needs to organize meetings of the legal education regulators of all the member states to bring a consensus on common core curriculum to be delivered to their students. Ultimately, the legal education regulators from the member states will have to take a final call on future of their legal professionals. Whether they want to focus on the current technological revolution, or present climate changes, or socio-economic developments in the region, or inculcate the corporate culture, are the matters that require broad consensus among legal education regulators. Based on the common minimum agreed curriculum, the SAU needs to undertake development of undergraduate courses by dividing its time between the common subjects and the local laws.

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Legislation Review

Prevention of Electronic Crimes Act, 2016: A Critical Review of Ambiguities and Inconsistencies

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Abstract

Pakistan faces significant cybersecurity challenges nowadays and the "Prevention of Electronic Crimes Act, 2016" (PECA) was introduced to address the ever-increasing challenges of cybercrime and offences relating to information systems in Pakistan. Since its inception, the Act has been the subject of much criticism due to various ambiguities and inconsistencies that have hindered its effective implementation. This review critically examines some of the apparent and critical ambiguities with the legal lens, focusing on areas where the law remains unclear or inconsistent, particularly in relation to its enforcement and interpretation. This review also analyzes that in the existence of Cybercrime Wing of the FIA as investigation agency and delegation of Powers to police to take cognizance of offence, through the Section 30 PECA, what would be the legal status of National Cybercrime Investigation

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Agency (NCCIA) created by the Federal government though delegated legislation (NCCIA Rules, 2024). This review would spark a debate among stakeholders to enable them to clarify grey areas, rectify anomalies so that the purpose of this law is achieved while safeguarding the fundamental rights of citizens.

Keywords: PECA, Ambiguities, Cybercrimes, NCCIA, Cybercrime Wing of FIA, Digital Age

Introduction

The Prevention of Electronic Crimes Act, 2016 (hereinafter the "PECA") is a fundamental legislation aimed at combating cybercrimes in Pakistan and offences relating to information systems. The preamble to PECA speaks of preventing "unauthorized acts with respect to information systems and provide for related offences as well as mechanisms for their investigation, prosecution, and trial and for the matters connected there with". It was enacted with this *raison d'etre* that the existing criminal justice framework is often grossly inadequate to handle cybercrime in the Digital Age. It is a special law to deal with a different category of crimes involving the cyber space and use of information systems. It provides the mechanism for the investigation and prosecution of such offences. The PECA is not only a criminal substantive law, but is also procedural and regulatory in nature. However, PECA has some apparent ambiguities, vagueness's, and inconsistencies, which are resulting in the weakness of its implementation. This is one of the main reasons that this law has not achieved the desired results, which were perceived at the time of its enactment. Although, this law requires a comprehensive critical analysis, but this review is limited to some important and apparent ambiguities and inconsistencies, which beg for attention of legislature.

Glaring Ambiguities And Mistakes In The Act

To begin with, Section 22-B of PECA, which was added by Criminal Laws (Amendment) Act, 2023, (hereinafter "Amendment Act, 2023") is reproduced as under:

1) Section in the statue:

> **"22B. Commercial sexual exploitation of children**. Subject to section 8. whoever is directly or indirectly involved in the use of an information system or other similar means for the purposes of the sexual exploitation of minors including child prostitution and child sex tourism by payment in money or in kind to the minor or any other person shall be punished with imprisonment of either description for a term which shall not be less than fourteen years and may extend up to twenty years and with fine which shall not be less than one million rupees."

In the above reproduced section 22B, the words **"Subject to Section 8"** controls this section. It means that this section is overridden by Section 8 and the conditions or limitations specified in the section 8 apply to the entire section 22B of PECA. For the proper appreciation, Section 8 is reproduced as under:

> **"8. Interference with critical infrastructure information system or data.** — Whoever with dishonest intention interferes with or damages, or causes to be interfered with or damaged, any part or whole of a critical information system, or data, shall be punished with imprisonment which may extend to seven years or with fine which may extend to ten million rupees or with both."

Ambiguity Needs To Be Addressed

Reading of these two sections in juxtaposition would show that there is no relevance in these two sections. The phrase, "Subject to section 8" appears to be alien, unnecessary and confusing to this section 22B of PECA. This ambiguity requires clarification.

Now, coming to Section 24A, which was also added by the Amendment Act, 2023. This section runs as under:

2) Section in the statue:

"[**24A. Cyberbullying.** (1) A person commits the offence of cyberbullying who, with intent to harass, threaten or target another person posts or sends electronic messages, including pictures or videos by using any social media platform, including chat rooms, blogs or instant messaging.

(2) .....

(3) ……...

(4) ……

(5) Whoever commits the offence of **child cyberbullying** as described in sub-section (1), shall be punished with imprisonment of either description for a term which may extend to five years but shall not be less than one year with a fine of up to five hundred thousand rupees and shall not less than one hundred thousand rupees."

Ambiguity Needs To Be Addressed

In the above reproduced section 24A (1), Cyberbullying is defined without specifying the age meaning thereby that this section is applicable to any person irrespective of his/her age. However, in sub-section (5), it is mentioned that *"Whoever commits the offence of **child cyberbullying** as described in sub-section (1), shall be punished……."*It shows that the punishment provided under sub-

section (5) is applicable to the child cyberbullying only. It is also necessary to mention that there is no punishment provided for the cyberbullying (in general), which has been defined under sub-section (1) of this section. In short, offence has been defined but punishment has not been provided while for the child cyberbullying, the punishment is provided but offence is not defined.

Section 43A, was also added by the Amendment Act, 2023. This section runs as under:

3) Section in the statue:

> **"43A. Complaint against cybercrimes against children**.-Complaint against the offences under sections 10, 21, **21A, 21B, 21C, 21D, 21E, 21F** and abatement thereof may be lodged with concerned authorities by the complainant as defined under clause (viia) of section 2."

Ambiguity Needs To Be Addressed

In the above-reproduced section 43A, there is a mention of sections "**21A, 21B, 21C, 21D, 21E, 21F**"; however, these sections have not been provided in the PECA. There is a need to clarify this ambiguity.

Legal Status of National Cybercrime Investigation Agency (NCCIA)

Recently, in exercise of authority under section 51 read with section 29 of the PECA, the Federal Government on 24th April, 2024, promulgated the National Cyber Crime Investigation Agency (Establishment, Powers and Functions) Rules 2024 (hereinafter "NCCIA Rules, 2024"). Rule 3 of NCCIA Rules, 2024 runs as under:

> "**3. Establishment of investigation Agency.** l) There shall hereby stand established the National cybercrime Investigation agency (NCCIA) to

> exercise jurisdiction under the Act and the Federal investigation Agency (FIA) shall cease to perform functions as designated investigation agency under the Act."

The above legislation provides that the establishment of the National Cybercrime Investigation Agency (NCCIA) rendered the Federal Investigation Agency (hereinafter the "FIA") 'defunct'. Previously, the Cybercrime Wing of the FIA (CCW), had been entrusted with investigation under the PECA. To ensure a smooth transition, Rule 4(7) of the NCCIA Rules, 2024 stipulates that until the appointment of new staff at the NCCIA, current officers and staff from the defunct FIA Cybercrime Wing will continue working under the Prevention of Electronic Crimes Investigation Rules, 2018 for the period of one year, and their service shall be counted as on deputation to the NCCIA. However, it is perplexing that section 30 of the PECA, 2016 authorizes not only F.I.A but also Police to take cognizance of the offence. This section was substituted by Amendment Act, 2023, which is reproduced here;

> "**30. Power and procedure to investigate**. (1) In addition to the Federal Investigation Agency, the Police shall be authorized to take cognizance of the offences under this Act. In that case the Police shall be bound to refer the matter relating offence under this Act immediately to the Federal Investigation Agency, for technical opinion and investigation as per its mandate and rule."

As of today, this provision is in existence on statue book. No doubt, section 29 of PECA allows the Federal government to designate or establish an investigation agency, but the above section specifically mentions that "in addition to the Federal Investigation Agency, the Police shall be authorized to take cognizance of the offences under this Act". Prior to the substitution of Section 30 through

Amendment, 2023 the FIA was not mentioned in PECA; rather, it refers to an "investigation agency" in general. The FIA was designated as the investigation agency for PECA under Section 29 vide SRO[2]. Additionally, Section 30 of PECA explicitly names the FIA, authorizing it to investigate offences under the PECA. This leads to a situation that as per NCCIA, Rules 2024, only NCCIA is the authorized investigation agency but section 30 of PECA, 2016 authorizes the F.I.A, as well as, Police to take cognizance of the offences under PECA. This poses a legal question that whether delegated legislation/rules have an overriding effect over the Act or statutory law?. This invites the prompt attention of the legislature.

In seeking the answer to this question, the guidance can be taken from the case of *Farrukh Raza Sheikh*[3], wherein the Supreme Court of Pakistan held that "it is axiomatic that Rules being subordinate or delegated legislation, are framed under the authority of the parent statute, and are therefore subservient to the primary legislation. Rules cannot contradict or add to the clear provisions of the parent statute. It is trite law that Rules cannot override the specific provisions of the parent statute. The Rules are to carry out the purposes of the Ordinance and cannot offend, oppose or be inconsistent with the provisions of the parent statute (Ordinance in this case).[5] Any rule, to the extent of any inconsistency with the parent statute is, therefore, ultra vires of the parent statute." This needs no further explanation.

Conferment of Jurisdiction

Another overlooked feature of PECA is that it does not provide for creation or establishment of a special court. Section 44 of PECA

[2] SRO 897(I)/2016 dated 22.09.2016

[3] Farrukh Raza Sheikh Versus. The Appellate Tribunal Inland Revenue and others (2022 S C M R 1787)

authorizes the Federal Government, in consultation with the Chief Justice of the High Court, to designate a presiding judge of the court to try PECA offences. And "Court" has been defined under section 2(ix) of PECA as the court of competent jurisdiction. However, it does not speak of the determination of the Judge as who could be designated for purposes of trying offences under PECA, whether he/she would be a Judicial Magistrate, Assistant Sessions Judge, Additional Sessions Judge or Sessions Judge. This ambiguity results in the designation of the Judge, Special Court (Central) Islamabad, in terms of section 44(1) of PECA, for trial of offences under PECA in the Islamabad Capital territory. However, recently, the Islamabad High Court, in the case of *Muhammad Ayyaz Bin Tariq*[4], held that the Special Court (Central) is not competent to try offences under PECA and further observed that, "the Federal Government can designated more than one presiding officers of the ordinary Criminal courts (Magistrates appointed under section 30 Cr.P.C, Additional Sessions Judges and Sessions Judges) for trial of offences under PECA, in terms of Section 44(1) thereof." It is pertinent to note that the legislature has mentioned two forums i-e Magistrate and Court of Sessions, whose decisions are appealable in section 47 of the PECA. There is nothing mentioned about the Assistant Sessions Judge in the PECA. It is relevant to mention here that in Sindh, for all practical purposes, Assistant Sessions Judge exercises powers which vest with Magistrate under section 30, Cr.P.C. However, in Sindh, Judicial Magistrates (who are not empowered Section 30 Magistrate) have been designated as presiding officers of the courts to try PECA offences. This ambiguity needs to be clarified.

[4] Unreported judgment dated 03.06.2024 passed in Crl. Misc. No. 1184-B-2023 (Muhammad Ayyaz Bin Tariq Versus. The State & another).

Joint Investigation and Joint Trial of the PECA Offences and PPC Offences

The provisions of PECA do not mention whether the offences under PPC have to be investigated along with offences under PECA. It does not envisage a joint trial of such offences either. The peculiar silence of PECA leads to the ambiguities. This being the reason that two questions have repeatedly come before the Courts: (i) whether the offences under PECA and PPC can be investigated together, and (ii) whether the Special Court designated under section 44(1) of PECA is vested with jurisdiction to conduct joint trials of PECA offences, as well as, offences under PPC. Therefore, indistinct provisions in PECA have culminated into the opacities, which in turn resulted into the conflicting case law on these points.

Firstly, the Lahore High Court in the case of *Sheraz Khan*[5] has addressed it and held that "in the light of definition clauses, the recitation and examination of relevant provisions of PECA, which are sections 27, 28, 30, 36(3) (b and c), 44 and 50, makes it clear that offences under P.P.C or any other laws cannot be tried jointly with any coordinate offence under PECA, 2016, even if it is committed in the same transaction. There is no specific provision for joint trial in PECA". In para-9, it is also held that "Thus, court constituted under PECA, 2016 cannot try offences of P.P.C." It was also observed that unlike section 17 read with section 21-M of the Anti-Terrorism Act, 1997, there is no provision for holding a joint trial under PECA.

[5] Sheraz Khan Vs. The State and others (2022 P Cr. L J 203 [Lahore]).

The High Court of Sindh, vide judgment dated 05.12.2022[6], in para No. 16, addressing this point, held that "the Court constituted under PECA, 2016 *prima facie* cannot try offences falls under PPC."

The Islamabad High Court in the case of *Javed Khan*[7] answered the referred questions in negative. It was held that that since joint investigation and trial of the offences under PECA and PPC is not permitted by law and most of the offences under PECA are non-cognizable therefore, FIA shall proceed with the matter only to the extent to offence under PECA after obtaining sanction from the Magistrate to investigate the offence, whereas, the offences under PPC were left to be investigated by the police and tried by ordinary criminal courts.

Later, the Lahore High Court in the case of *Sheraz Ahmad*[8] had taken different view and held that "So, the offences under section 11 of PECA, 2016, and sections 295-A, 295-B, 295-C and 298-C of the Pakistan Penal Code, 1860 cannot be tried separately because the offences falling under Section 11 of PECA, 2016, and under sections 295-A, 295-B, 295-C and 298-C P.P.C. are interlinked." The Lahore High Court was hearing criminal revision petition against dismissal of an application challenging the act of being charge-sheeted for PPC offences with PECA offences. The revision petition was dismissed.

Recently, three Judge Bench of the Islamabad High Court, in the case of *Muhammad Ayyaz Bin Tariq*[9], in Para No.24 held that "The

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[6] Criminal Acquittal Appeals No.S-293 of 2021 & S-03 of 2022 vide judgment dated 05.12.2022 by High Court of Sindh, Circuit Court, Hyderabad.

[7] Javed Khan and other vs. The State and others, [2023 PCrLJ 1092 Islamabad].

[8] Sheraz Ahmad and another Vs. The State and another (2024 PCrLJ 1098 [Lahore]).

[9] Unreported judgment dated 03.06.2024 passed in Crl. Misc. No. 1184-B-2023 (Muhammad Ayyaz Bin Tariq Versus. The State & another).

authorized agencies under PECA can investigate the offences mentioned under PECA and PPC or any other law, committed in one transaction. Similarly, offences under both the statutes can be jointly tried by the designated ordinary criminal courts. However, the allegation of the commission of offences under PECA is *sine qua non* for taking cognizance of offences mentioned in any other law". However, one of the Members of the Bench, although agreed with the decision rendered in the judgment but had written his separate reasons and in concluding para No.34, held that "FIA as the designated agency under section 29(1) of PECA read together with the Schedule of FIA Act has the jurisdiction to investigate PECA offences and offences listed in the Schedule of the FIA Act and there is nothing in law that prohibits joint investigation of PECA offences and scheduled PPC offences (listed in the schedule to the FIA Act) by FIA." Notably, no schedule is provided in the NCCIA Rules 2024, whereas, the FIA Act does have a schedule listing the offences of other laws including PPC. Thus, once the NCCIA is fully operational, there would also arise a legal uncertainty as to whether it can investigate the offences under the PECA and PPC together. This aspect also need be attended by the legislature on priority.

Conclusion

The law that was passed in 2016 but still flawed - confusion in jurisdiction and mechanism- and regressive in essence. The above referred ambiguities and inconsistencies will badly affect the purpose of enactment of the PECA. This review was limited to the apparent and important ambiguities and inconsistencies in the law. This law needs to be thoroughly critically examined. For this purpose, it is proposed that a joint session or workshop may be conducted at the Federal Judicial Academy, Islamabad on the implementation of PECA in courts and challenges faced by the authorized investigation agencies, Prosecutors, advocates and the

presiding officers of the Courts trying PECA offences. Moreover, the Federal Government, through the judicial academies both at Federal and Provincial level, should ensure and expedite training of judges designated under PECA, and other stakeholders for an effective implementation of the law so this new born law becomes a boon, not a bane to the nation in this age of digital inclusion.

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Case Comment

Police Investigations and the Zulfiqar Ali Bhutto Case

Kamran Adil[1]

The opinion of the Supreme Court of Pakistan on the constitutional reference sent by the President of Pakistan has been rendered (PLD 2024 SC 509). It makes a scathing criticism of the criminal proceedings and takes into account many a theme that have been in the discourse on the case for long. For example, the opinion discussed, in detail, the consequences of leapfrogging the criminal processes by which Lahore High Court, that opted to hold trial of the case itself instead of leaving the matter to the Sessions Court. Likewise, it was noted that by doing so, the important statutory safeguard of confirmation of death penalty under section 376 of the Code of Criminal Procedure, 1898 (Code) was bypassed denying the accused both a forum of appeal and an opportunity to defend against confirmation of death penalty as envisaged in the law. Quintessentially, the opinion is trial-centric and has focused more on the role of judges in the court and less on the pre-trial mechanics that took place prior to the adjudication. This piece has been written to highlight the issues related to police investigation that affected the final outcome of the case of Zulfiqar Ali Bhutto (ZAB).

It may be noted that under the present legal framework, the right to investigate a criminal case solely rests with the police/investigation agency. This point is almost written in stone insofar as the law is concerned. It has statutory basis in section 4(l) of the Code that ordains 'collection of evidence by police' as 'criminal

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investigation'. In case, the evidence is collected by anyone other than police, it is to be brought on the case-file through a formal and legal process called the Police Professional Work (PPW), in police parlance. The statutory role of police at the crime scene is protected under Rule 25.33 of the Punjab Police Rules, 1934 (Police Rules). Even the forensic evidence collected through the staff of a forensic science agency (like the Punjab Forensic Science Agency established under the Punjab Forensic Science Agency Act, 2007) has to process it as declared in a latest judgment of the Lahore High Court that interpreted section 4 of the Punjab Forensic Science Agency (PFSA) and held that the technical and forensic staff can seek clarification from police officer who collected the evidence, but cannot, him[her] self-collect the evidence. The judiciary has always distanced itself from the function of investigation as it is purely an executive function. The principle was articulated by Justice Porter in his speech in *Emperor vs Kh Nazir Case* ((1945) 27 BOMLR 245)), and has been favourably followed and cited by the courts since. This point was discussed briefly in the opinion of the court, but not with the required thrust. In the case of Zulfiqar Ali Bhutto (ZAB), the police was not able to solve the murder case as shown by the record of the case. Besides, the poor evaluation of the evidence of the case, the case suffered from many problems related to investigation. Some of the chief issues were:

a. The crime scene was not properly inspected. The police only recorded statement of the complainant and did not take pain to associate other eye-witnesses to maximize the information for investigation of the case;

b. As noted in the opinion, no genuine forensic evidence was collected. Even the spent casings collected from the crime scene did not match the weapon of offence attributed to the perpetrators of crime from the Federal Security Force (FSF). A very dangerous inference was drawn by assuming that the weapons were substituted on the behest of ZAB. The

negative report of forensics should have been transformed into a benefit of doubt and the capital punishment should not have been awarded;

c. The administration of investigation in form of its entrustment and transfer from one agency to another was also not as per law. The role of senior police officers (gazetted officers) through their supervision as noted in Rule 25.17 of the Police Rules was not considered in the case. The transfer of investigation from local police to the Central Intelligence Agency (which is mistakenly stated as Central Investigation Agency) was not documented and was not transparent. The Central Intelligence Agency (CIA) is a product of the Police Rules and is established under Rule 21.35. The CIA is just an intelligence wing of the police with the mandate to provide information about inter-district crimes. Since long, the CIA was not working as per its legal mandate as contained in Police Rules. The legal position of the CIA was not discussed in the opinion. For record, it may be stated that the Supreme Court, while looking at the powers of police officers posted in CIA, held in the case of *State vs. Bashir* (PLD 1997 SCMR 408) that its officers were not police officers in terms of section 4(p) of the Code. Owing to this fact, the Punjab Police got amended the Police Order, 2002 to add new article 18-B to the Police Order, 2002 to allow the Organized Crime Units (OCU) to investigate criminal cases.

d. Likewise, the change of investigation from provincial police to the federal police (the Federal Investigation Agency established under the Federal Investigation Agency Act, 1974) is yet to be addressed. The consequences of blatant

violation of administrative and procedural safeguards were not discussed in the opinion.

The aforementioned points are not exhaustive and only highlight broad areas that must be noted for reform of the criminal justice system. The ZAB case was symptomatic of the system that is experienced by citizens on daily basis, though in different form. The inadequacies of the criminal justice system must be fixed at the earliest as the internal security is mirrored by peace, truth and fairness. The judiciary in Pakistan has spoken in unison and has declared the truth; now, the burden is on all segments of the society to complement the effort by telling their part of the truth and to work to improve and reform the system for posterity.

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