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Dr. Muhammad Amin
The Editor

HUMAN RIGHTS ACT AND CHANGING APPROACH TO STATUTORY INTERPRETATION IN UK

By

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ABSTRACT

Common law along with statutes are the fundamental sources of law in United Kingdom. The interpretation of these statutes follow certain rules and guidelines developed by the Law Lords to overcome the problem of open texture of the language which prone to wide interpretations and to create certainty. Human Rights Act incorporated in the domestic law in 1998 and become part of the existing law on the subject matter. However the approach of law lords to statutory interpretation have been radically changed after the incorporation. Although their changing approach have raised questions on their legislative roles but this is debatable but judges now see themselves as legislating human rights through their interpretation of Acts of Parliament.

INTRODUCTION

Statutes are a fundamental source of law. Common law rules of interpretation have been developed by judges and have been effectively used. The main focus of this research is based upon the changing judicial attitude toward the interpretation of statutes by the incorporation of Human Right Act (HRA) 1998 in to domestic law and interpretative provisions included in it. In addition, the idea that how it redefines new parameters and limits of judicial interpretation will also be discussed. Review of the case law shows that the incorporation of HRA 1998 has changed the approach of Law Lords to statutory interpretation to a great extent. Whether this has also created a legislative role for the judiciary however is a debatable issue.

The interpretation of statutes requires certain guidelines and in a common law setup this task is entrusted to the judiciary.[1]To overcome the problem of open texture of language judges have adopted certain rules so-called rules of statutory interpretation; the literal rule, mischief rule, golden rule). These rules demand interpretation within certain parameters[2] but where the language of the statute is ambiguous, capable of different interpretations, the European teleological approach of interpretation is adopted in line with the interpretative provisions of HRA. For complete analysis of the contemporary judicial practice the European 'purposive' method of interpretation must be taken into account.[3]

It was therefore stated to firstly apply the literal approach to ascertain the intention of the Parliament, if the application results in the ambiguity then the statutes should be read in their natural, primary and technical context.[4] Modern judges also appreciate the fact that 'mischief approach'[5] of judicial interpretation is more near to 'golden approach'. Law commission[6] in its analysis stated that 'mischief approach' is more satisfactory[7]. It has been suggested that the increasing work load upon the

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[1] Lord Steyn (2004:248)

[2] Lord Searman in ***Duport steels ltd v Sirs(1980)*** stressed that judges must give thought to the intention of the legislature while interpreting the words of statutes. They are not entitled to change law to meet the idea of what justice required.

[3] The literal approach refers to the dominance of the Parliament over the courts after the establishment of doctrine of sovereignty of parliament.

[4] Twining(1992:368)

[5] An interpretative technique in which the courts see the mischief behind the enactment of particular act to ascertain the ambiguity in the given scenario.

[6] 1996

[7] Which is being very close to the European mode of interpretation 'purposive approach'

Parliament's draftsman and the demand of rule of law[8] creates a growing influence of judiciary to adopt 'purposive approach'[9]. It is pertinent to discuss the basic structure of the HRA to have an understanding of the impact that HRA has had on statutory interpretation. Section 3(1) of HRA puts an obligation on the judiciary to interpret the statutes as near as possible compatible with HRA. This demands a judicial move from 'literal approach' toward 'purposive approach'. In ***Picstone v Freeman's plc***[10] it was held that it was permissible for the court to read the words of the domestic legislation in a way to give effect to the community law.[11]Lord Griffiths put this in another way in ***Pepper v Hart***[12] where he stated "*the time goes when the courts adopted the strict literal approach the courts now adopt the purposive approach to give effect to the true purpose of the legislation*".

It is required under section 3 (1) of HRA that a legislation is to be read in a way so that it is compatible with the convention so far as it is possible to do so; judges have to keep this in consideration when adopting purposive approach and where it is not possible to give an interpretation that is compatible with the convention, higher courts may issue a declaration of incompatibility[13]. This now places an obligation on the judges to interpret primary and subordinate legislations in a manner consistent with conventional rights. This also applies to the legislations enacted before incorporation of HRA. But a question arises whether it's a general duty or is it leverage to be used in case of absurdity in the language of an act?[14]Another question arises as to what actually amounts to absurdity? And if it is a general duty then what level of duty is required? To achieve this interpretative consistency is not easy and ascertainable due to certain reasons. The whole statement "compatible in so far as it is possible" is subject to judicial and academic debate as to whether it is restrictive or expansive? [15] As far as possible this is an ambiguous part because it gave to judges the discretion to decide the level

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[8] Law must be assessable and clear to all

[9] Also see Lord Wilber force's decision in ***Royal College of Nursing of the UK v Department of health and social security*** **[1981]HL**

[10] [1998]HL

[11] Also see ***Litster v Forth Dry Dock*** **[1989] HL** and ***Three river DC v Bank of England (NO.2)*** **[1996]** for the illustration of the same point.

[12] [1993]1AllER42 at 50

[13] Section 4, HRA 1998.

[14] Compare the judgments of Scarman LJ in ***Ahmad v ILEA*** **[1977]1CR490** and Lord Lowry in ***R v Brown*** **[1994]1AC212**

[15] Marshall's arguments (1998) and hunt's arguments (1999:97-8)

of ambiguity. In this regards Lord Nicholls argued[16] "what is not clear is a test to be applied in separating sheep from the goats. What is the standard of 'possibility'? And it is hard to characterize its answer".

The case of ***Ghaidan v Godin-Mendoza***[17](relating to rights of same sex couples and breach of Article 14 of the Convention read with Article 8) provides an example of this ambiguity as to how far courts can go in interpreting legislations. The House of Lords reinterpreted the provisions of the Rent Act 1977 to include the tenant of same sex relationships, thus protecting tenancy of the claimant. In his dissenting judgment Lord Nicholls state that the effect of s.3 (1) which stated that the court may depart if the word used in the statute is ambiguous but, the difficulty lies in the fact that how far should they go. On the basis of this decision it may therefore be stated that the incorporation of HRA has had a great impact on statutory interpretation and the concepts thereto.

Even authors like Francis Bennon is of the view that incorporation of HRA in domestic law revolutionized UK's constitution. It was also argued that UK is now moving from 'agency model' toward a 'dynamic model'.[18] So where the question of compatibility arises courts no more have to take in to account the intention of the Parliament and can go beyond sometimes called 'strained construction' but rather it seems a more dynamic approach toward a dynamic model.

In ***R v A***[19] the Youth Justice and Criminal Evidence Act 1999 s.41 (1) and (3) opposed the defendant's argument to bring about pre consensual relationship's evidence. This restrained his conventional right under ECHR Article.6. Lord Steyn in this regards argued that although using the ordinary method of interpretation does not solve the problem but by using s.3 (1) 'to subordinate the niceties of language'[20]the problem can be solved. Regardless of the House of Lord's decision in ***R v A*** and ***R v Lambert***[21] **,** Lord Steyn showed his hesitation in doing so. He was of the view that it is better for the courts to give 'declaration of incompatibility' under s.4 of HRA rather than going too far in interpreting the statutes[22].

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[16] In ***Ghaidan v Godin-Mendoza*****[2004]UKHL30,at[27]**

[17] [2004]UKHL

[18] Dame Mary Arden in his article 'The changing judicial role : Human Rights, community law and intention of parliament.2008

[19] [2001]UKHL;[2001]*2AC42*

[20] Para.45

[21] [2001]UKHL37

[22] As it further stated in ***R v A***: *"S.3 does not entail the court to legislate, it task is still one of interpretation. Compatibility is to be achieved as only so far as this is possible.*

But even then he argued that judges have to be prepared to override the intention of parliament in ascertaining the requirements of ECHR[23]. Lord Hope later in ***Lambert*** stated that sometimes it seems to be necessary to 'read in' to the words of legislation. The cases of ***ReS***[24] and ***Bellinger v Bellinger***[25]represents a more restrictive approach of the law lords toward the use of s.3 (1) and their increasing inclination toward the use of s.4, declaration of incompatibility. Lord Nicholls also made clear the boundary between interpreting and legislating.[26]However, it may be noted here that seems to be a last resort for the courts to give declaration of incompatibility. On the basis of these judgments it has been argued that the plain meaning of words of the statutes cannot be ignored by raising its compatibility issues[27]. This in turn supports the statement in question, that whethers.3 (1) or s.4 is applied, the judges eventually see themselves as legislating under these HRA 1998.

In connection with the above discussion, Richard Ekins and Philip Sales[28] argued that HRA mandates rights, consistent interpretation, and does not displace the traditional understanding of interpretation that is to uphold the intention of Parliament. They went further on to state that s.3 only refers to the point as to how to confer that intention. It seems that they are reluctant to support the idea of extra discretion given in the hand of judiciary. In their view these are only the rules to bring statutes to law. They hold these as presumptions that the interpreters only adopt to infer the intention of the legislature.

Plainly this will not be possible if the legislation contain provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible. It seems to me that same result must follow if they do so necessary implication, as this too is a means of identifying the plain intention of parliament''. (at 86).

[23] The Law-Making Process by Michael Zander; sixth edition; Cambridge publishing press
Page185

[24]Ex p Anderson,[2002]UKHL

[25] [2007]UKHL46

[26]***Re S*** [2002]2 AC 291 at p 313.He argued that 'the greater the latitude with which courts construe documents, the less readily defined is the boundary. What one person regards as sensible……other regards as impermissibly creative. For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an act of parliament is likely to have crossed the boundary between interpretation and amendment'.

[27] F Klung and C O'Brien 'The first two years of the Human Rights Act' [2002] Public Law 649 at p 654

[28] Richard Ekins and Philip Sales. (2011)."**Rights-consistent interpretation and the Human Rights Act 1998".***Law Quarterly Review.*

In ***Secretary of State for home Department v MB***[29] the importance of s.3 stressed and it was discussed as to why application of section 3 is preferred over s.4.It was held that the Prevention of Terrorism Act 2005 was widely drafted and infringes article 6 of HRA, hence the House of Lords using s.3 'read in' to the words of the statute. This seems to be a counter argument to what Richard Ekins and Philip Sales argued, and it seems that s.3 gives more leeway to courts then what they thought. Lord Steyn argued that they know that s.3 demands a more teleological approach but courts must be mindful of a demarcation between legislator and interpreter. Nevertheless rightly or wrongly s.3 gives a greater insight of interpretation to judges. Cases like***Goode v Martin***[30]even authorized the use of 'read in' rules also into Civil Procedure Rules. This suggests the infringement of Lord Steyn's test in judicial practice. Moreover s.3 (2) (b) stated that use of s.4 (declaration of incompatibility) does not affect the validity of the statute, its continuing operation or enforcement[31]. One of the commentators argued that a refusal to apply s.3 as it effects parliamentary sovereignty does not constitute a good argument because it's itself the intention of parliament to protect the fundamental rights of the individual[32]. The approach in ***Ghaidan***[33] therefore seem to be legitimate because the decision was consistent with fundamental policy, but where they move beyond the scope of interpreting the policy of the legislation, court would not take the place of Parliament.

In light of the above, it appears that HRA has had a great impact on the manner in which judges approach interpretation of statutes, however this does not affect the Parliament's primary role of legislation making. Also, since it is the Parliament itself that has enacted the HRA, hence the role of legislation making is still that of the Parliament. In addition, section 3 of the HRA caters to arguments regarding the same. Nevertheless it may be stated that HRA has radically changed the previous approach of courts to interpretation; however, the fact that HRA is itself a product of UK Parliament the argument that the sovereignty of Parliament has somehow been replaced holds no weight.

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[29] [2007]HL46
[30] [2002]1AllER620
[31] Also see R V Secretary of state for transport ex part Factortame(No.2)(1991)
[32] Ibid,p.566
[33]*Supra*

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TRADE INFRINGEMENT AND PASSING OFF

By

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ABSTRACT

This article views and assesses the trademark rights protection in Pakistan. Trademark is the identification mark of any company or organization. A customer relates any trademark with the quality of products and reputation of the company that is using it. It is a distinctive name, word, phrase, symbol, logo, design, image, or a combination of these elements that identifies a product, service or firm that has been legally registered as the property of the firm. Trademarks grant the owner the right to prevent competitors from using similar marks in selling or advertising. A trademark can be used for identifying and distinguishing a particular seller's goods from others. Trademark also shows the origin of the goods i.e. a customer can identify the manufacturer and also assume about the quality of goods that all goods bearing the particular trademark are of a particular quality desired by the customers. Trademarks are widely used for the advertisement purposes also which helps to customers in associating any good with the quality, reputation and goodwill of any company. So it is very important for any organization to take precautions while allowing any one to use its trademark because the name and reputation of the company is directly associated with the trademark.

If any organization is using the registered trademark of another company without permission, that means it is not only committing a crime but also causing damage to the business of the company and damaging the brand name of that company. The organization might be using others trademark to use its market reputation and market stake to enhance its own business without extra efforts. These kinds of activities mainly fall under two heads; Infringement and Passing Off.

INTRODUCTION

Trademark is the identification mark of any company or organization. A customer relates any trademark with the quality of products and reputation of the company that is using it. It is a distinctive name, word, phrase, symbol, logo, design, image, or a combination of these elements that identifies a product, service or firm that has been legally registered as the property of the firm. Trademarks grant the owner the right to prevent competitors from using similar marks in selling or advertising.[34] There has been various new concepts have emerged in relation to trademark due to the technological revolution in the communication, media and other areas and due to the increased knowledge and perception of individuals, business enterprises are showing more interest in registering non conventional marks such as color marks, shape marks, smell marks, sound marks, advertisement slogans, trade dress etc. to capture the market.

A trademark can be used for identifying and distinguishing a particular seller's goods from others. Trademark also shows the origin of the goods i.e. a customer can identify the manufacturer and also assume about the quality of goods that all goods bearing the particular trademark are of a particular quality desired by the customers. Trademarks are widely used for the advertisement purposes also which helps to customers in associating any good with the quality, reputation and goodwill of any company. So it is very important for any organization to take precautions while allowing any one to use its trademark because the name and reputation of the company is directly associated with the trademark.[35]

If any organization is using the registered trademark of another company without permission, that means it is not only committing a crime but also causing damage to the business of the company and damaging the brand name of that company. The organization might be using others trademark to use its market reputation and market stake to enhance its own business without extra efforts[36]. But such companies are not using the exact trademark of other company but they generally go for use of similar marks and here the problem came in to existence. These kinds of activities mainly fall under two heads Infringement and Passing Off.

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[34]Colston, Catherine *Modern intellectual property laws*, Kirsty Middleton, P:466

[35]http://www.wisegeek.com/what-is-trademark-infringement.htm

[36]http://tcattorney.typepad.com/ip/

VIOLATION OF TRADE MARK

A. By infringement
B. By passing off

INFRINGEMENT

Section 29 of the Trademark Act-1999 talks about various aspects related to infringement as given in S.29(1) that a registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.

Other subsections describes that in course of the use of the trademark it is said to be infringing the rights of other company due to use of similar or identical trademark using for marketing of similar kind of goods and services or use of identical or deceptively similar trademark for any other kind of goods and services. It is further given in the Sub Section (9) of this section that the infringement can also be done by the spoken use of those words as well as by their visual representation.[37] There are certain elements of infringement of a trade mark:

1) Someone else use one's trade mark
2) Registered trade mark
3) Dilution of mark
4) Mislead others

Infringement occurs when someone else uses a trademark that is same as or similar to your registered trademark for the same or similar goods/services. Trademark infringement claims generally involve the issues of likelihood of confusion, counterfeit marks and dilution of marks. Likelihood of confusion occurs in situations where consumers are likely to be confused or mislead about marks being used by two parties. The plaintiff must show that because of the similar marks, many consumers are likely to be confused or mislead about the source of the products that bear these marks.[38]

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[37] F:\trademarks tm\Trademark Infringement & Passing Off.htm

[38] http://www.wisegeek.com/what-is-trademark-infringement.htm

Dilution is a trade mark law concept forbidding the use of a famous trade mark in a way that would lessen its uniqueness. In most cases, trade mark dilution involves an unauthorized use of another's trade mark on products that do not compete with, and have little connection with, those of the trade mark owner. For example, a famous trade mark used by one company to refer to hair care products might be diluted if another company began using a similar mark to refer to breakfast cereals or spark plugs.[39]

The concept of infringement can be explained with the help of the following case laws:

In the case ***Castrol Limited Vs P.K. Sharma***

Facts of the case: Plaintiff is the registered owner of the trademarks Castrol, Castrol Gtxand Castrol Gtx 2 in respect of oils for heating, lighting and lubricating. During the month of December 1994, plaintiffs came to know that the defendant was carrying on business of selling multigrade engine oil and lubricants under the trade mark 'Castrol Gtx& Castrol Crb' IN IDENTICAL containers as used by the plaintiffs. Plaintiff filed a suit for perpetual injunction.

Held: The user of the said trade marks by the defendants, who have no right whatsoever to use the same is clearly dishonest and is an attempt of infringement. The prayer of the plaintiff is accepted.

In ***Ranbaxy Laboratories Ltd. Vs. Dua Pharmaceuticals Ltd***.the plaintiff company manufactured drugs under the trade name "Calmpose". The defendant company subsequently floated its similar product under the trademark "Calmprose". The said two trademarks having appeared phonetically and visually similar and the dimension of the two strips being practically the same including the type of packing, the colour scheme and manner of writing, it was found to be a clear case of infringement of trade mark and the ad interim injunction granted in favour of the plaintiff was accordingly made absolute.

PASSING OFF

The specific description of passing off is not given in the trademark act but the courts have drawn its meaning from common law

[39]http://www.wisegeek.com/what-is-trademark-infringement.htm

that if the infringement of trademark done in such a manner where the mark is not only deceptively similar to the trademark of other company but also creating confusion for the customers, which ultimately results in damage for business of the company.

Taking business by presenting goods or services as someone else's is actionable at common law. The tort is known as "passing off" in the British Isles and most of the Commonwealth, "palming off" in the USA and unfair competition elsewhere. The usual remedies are injunctions, delivery up of offending items and inquiries as to damages or accounts of profits. There is an international obligation to assure effective protection against unfair competition under art 10bisof the Paris Convention.[40]

Passing off is judge made law. The modern law is to be found in a handful of cases of which the most recent are the decisions of the House of Lords in *Reckitt & Colman Products Ltd. v Borden Inc*[1990] RPC 341 and *ErvenWarnink BV v J Townend& Sons (Hull) Ltd* [1979] AC 731. In the first of those cases, Lord Oliver said, at page 406, that a claim may be brought where:

1) the claimant's goods or services have acquired a **goodwill** or reputation in the market and are known by some distinguishing feature;

2) there is a **misrepresentation** by the defendant (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by the defendant are goods or services of the claimant; and

3) the claimant has suffered, or is likely to suffer, **damage** as a result of the erroneous belief engendered by the defendant's misrepresentation.

This restatement of the elements of passing off is often referred to as the "classic trinity".

RELATED CAUSES OF ACTION

The action of passing off is closely allied to the law of trade marks, the Trade Descriptions Act 1968 and Community legislation on

[40]http://www.amazon.co.uk/Passing-Off-Intellectual-Infringement-Personality/dp/6130343809

the protection of geographical designations of origin. Claims for passing off are usually brought at the same time as actions for infringement of a registered trade mark.[41]

ENFORCEMENT

Claims for passing off are brought in the Chancery Division of the High Court of Justice. The vast majority of such claims are disposed of upon an application for interim injunction. The reason for that is that the losing party either has to change its packaging or quit the market. Either way, it has much less interest in the brand by the time the action comes on for trial.

An actionable misrepresentation may also be an offence under the Trade Descriptions Act 1968. Prosecutions are brought by local authority trading standards officers. [42]ss

RISK FACTORS

Brands are among the most valuable assets of a business and the action of passing off is indispensable for their protection for two reasons. First, not every type of branding qualifies for registration as a trade mark. Secondly, no action may be brought on a mark until after registration.[43] If goodwill, misrepresentation and damage can be proved an action will lie regardless of whether the wrongdoing was intended and there is no threats action to protect those accused of passing off from intimidation of their customers.[44]

KINDS OF PASSING OFF

These are as follows

1. Extended passing off

One of the instances where passing off is actionable is the extended form of passing off, where a defendant's misrepresentation as to the particular quality of a product or services causes harm to the plaintiff's goodwill. An example of this is ***Erven Warnink v J Townsend & Sons (Hull) Ltd*** [45][1979] AC 731, in which the makers of advocaat sued a manufacturer of a drink similar but not identical to advocaat, but which was successfully marketed as being advocaat.

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[41]Lynne, Judith, The psychology behind trademark infringement and counterfeiting, Zaichkowsky, P: 19

[42]Phillips, Jeremy, Trade marks at the limit, P: 256

[43]Ibid,P**:** 256

[44]Lambert M. Surhone,Passing Off: Tort, Trademark, Common Law, Intellectual Property, Trademark Infringement, Personality Rights

[45] [1979] AC 731

The extended form of passing off is used by celebrities as a means of enforcing their personality rights in common law jurisdictions. Common law jurisdictions (with the exception of Jamaica) do not recognize personality rights as rights of property. Accordingly, celebrities whose images or names have been used can successfully sue if there is a representation that a product or service is being endorsed or sponsored by the celebrity or that the use of the likeness of the celebrity was authorized when this is not true.

2. Reverse passing off

Another variety, somewhat rarer is so-called 'reverse passing off'. This occurs where the defendant markets the plaintiff's product as being the defendant's product (see John Roberts Powers School v Tessensohn[46] [1995] FSR 947. It will be recalled that orthodox passing off entails the defendant representing that his product is the plaintiff's product. In many cases, reverse passing off can be explained under the ordinary rules: for example where a defendant may represent that he or she made goods which were in fact made by the plaintiff so as to pass off his own business as a branch of the plaintiff's.

WHAT PROBLEMS CAN PASSING OFF CAUSE?

There are a number of problems that passing off can cause your business; depending on the type of business and the extent of passing off taking place.

1. Missing Customers

If your customers are led to believe that another business is yours (or associated with you); then you may find that your customers simply vanish, using the other business by mistake. If you obtain a lot of your custom by word of mouth, then new customers searching for you may never realise that the business passing off is not you.

2. Future Custom

If your customers realise that another business has gained their custom inappropriately, they may lose trust in you and feel hesitant about using your services again. If the other business treated them badly they may go elsewhere altogether, and (If they do not realise they have used a different business) could even tell other people of their disappointment with your business.

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[46] [1995] FSR 947

3. Reputation

If your business is respected in your marketplace, the appearance of a business passing off as you could cause customers to think less of your business; especially if the passing off business provides poor quality products or services.

If the passing off business causes bad word of mouth publicity, this can cause serious damage to your image and reputation.

4. Finances

If a business is passing off as you, then your financial damage is not limited to the money from customers you lose to them and through bad publicity. Any money you spend on advertising or other promotions (e.g. Leaflets, web banners, 'pay per click' listings) becomes less effective as some of the customers you can gain may end up using the passing off company.

DIFFERENCES BETWEEN PASSING OFF AND INFRINGEMENT

As to remedy

Statutory remedy is available for infringement whereas the action for passing off is a common law remedy.[47]

1) As to identity

For infringement it is necessary only to establish that the infringing mark is identical or deceptively similar to the registered mark but in the case of a passing off action, the need is to prove that the marks are identical or deceptively similar which is likely to deceive or cause confusion and damage to the business of the company.[48]

2) Registration as to particular category of goods

When a trademark is registered, registration is given only with regard to a particular category of goods and hence protection can be given only to these goods and action of infringement would be taken but in a passing off action, the defendant's goods need not be the same, they may be related or even different.[49]

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[47]http://www.bowman.co.za/LawArticles/Law-Article~id~2132417158.asp
[48]http://www.amarjitassociates.com/index.htm
[49]http://www.bowman.co.za/LawArticles/Law-Article~id~2132417158.asp

3) As to action

For a passing off action registration of trademark is not relevant. It is based on property in goodwill acquired by use of the mark. On the other hand infringement is based on statutory right acquired by registration of trademark.[50]

4) As to goods

In case of a passing off action, the defendant's goods need not be same as that of the plaintiff; they may be allied or even different. In case of an action for infringement, the defendant's use of the offending mark may be in respect of the goods for which the mark is registered or similar goods.

5) As to confusion

Passing off action identity or similarity of marks is not sufficient, there must also be likelihood of confusion. But in case of infringement if the marks are identical or similar no further proof is required.

6) As to forum of remedy

The remedy of passing off has been found in one form or another for centuries. It is part of the common or so-called unwritten law. In contrast, the system of statutory protection of trade marks by way of the registration thereof, has, relatively speaking, not been in existence that long. The law relating to passing off was thus, put differently, made by judges, and the law relating to trade mark infringement was created by the relevant legislative bodies. The latter origin does not necessarily indicate a greater degree of rigidity insofar as the application of legislative instruments is concerned. The courts obviously interpret the legislation continuously, and in a sense the words of the statute form only a broad framework within which the judiciary functions, and "finds" the law. [51]

7) As to related rights

Rights relating to passing off are established "gradually", with use, and the central question would be when it can be said that a reputation has been acquired insofar as a specific mark is concerned. The establishment of a reputation is dependent on a number of factors, including the nature of a mark, that is, the degree of distinctiveness, sales figures, promotional expenditure on the marketing of products bearing the mark or get-up, and the period of use. Protection in terms of the Act is available immediately,

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[50]Ibid

[51]http://www.tms.org/pubs/journals/jom/matters/matters-9610.html

on registration, and is not, in the short term, dependent on use of the mark. Although the obtainment of statutory rights would seem, from this perspective, to be a more expedient way in which to obtain rights, such an observation is not borne out by reality. This is on account of the fact that the time frame within which an application will proceed to registration can be a matter of up to three or four years at this stage. This factual consideration does however not change the theoretical position.

8) As to allegation

A further difference is that in cases of alleged passing off, it is said that it is the goodwill built up through the use of a mark that is protected, whilst in instances of trade mark infringement, it is the right to the mark itself that is being protected. Flowing from this fact is a practical difference between the two remedies, namely that passing off involves a comparison of the two marks and the get-up of the products in relation to which they are used. In other words, the mere fact that a mark, whether registered or not, is used by A, does not automatically imply that he would be liable towards B for passing off. Colors and shapes or the addition of other distinctive material can thus be considered by the court to determine whether or not there is a likelihood of confusion. On the other hand, in the instance of trade mark infringement, the comparison is solely between the two marks themselves, and extraneous matter cannot be taken into consideration. In a manner of speaking, a holistic approach is adopted in passing off cases. Trade mark infringement is concerned only with the mark that has been registered, and if that mark is used by the respondent along with other distinctive material, the addition of the latter is disregarded. In line with the above, in infringement cases there is a prohibition on the use of the mark in issue, but the wording of an interdict in passing off cases rather relates to steps to be taken to distinguish the products concerned.[52]

9) As to remedy relates to a particular geographical area

Lastly, it is important to bear in mind that the remedy of passing off relates to a particular geographical area in which a reputation can be said to exist. In other words, where a mark is used in Brackenfell, it will not necessarily be possible to prevent the use of the mark in Brakpan. In the case of a registered mark, the registration will in principle be enforceable in the whole country. In summary, it appears that there are a number of

[52]http://www.amazon.co.uk/Passing-Off-Intellectual-Infringement-Personality/dp/6130343809

instances where relief in terms of passing off will achieve the rights holder's objective of the protection of his intellectual property, whilst in other instances relief in terms of the Trade Marks Act will be more appropriate.

CASE LAW THAT DIFFERENTIATE PASSING OFF AND INFRINGEMENT

In the case ***DurgaDutt Sharma V. N.P. Laboratories***, a Supreme Court judgment, the difference between the two has been laid. It was held that " An action for passing off is a Common law remedy, being in substance an action for deceit, that is, a passing off by a person of his own goods as those of another. But that is not the gist of an action of infringement. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of the exclusive right to use the trade mark."[53]

JUDICIAL RESPONSE

Courts have given several judgments in these kinds of disputes where the infringement and passing off of trademark were in question. Few of them I am discussing in this paper where courts have dealt with these questions and formulated several concepts related to them.[54]

CASES OF INFRINGEMENT

No one can use the trademark which is deceptively similar to the trademark of other company. As in the case of ***Glaxo Smith Kline Pharmaceuticals Ltd. v. Unitech Pharmaceuticals Pvt. Ltd***.[55] the plaintiff claimed that defendants are selling products under the trademark FEXIM that is deceptively similar to the plaintiff's mark PHEXIN, which is used for pharmaceutical preparations. The defendants are selling anti-biotic tablets with the trademark `FEXIM' with the packing material deceptively similarly to that of the plaintiff, whereby intending to not only to infringe the trademark but also to pass off the goods as that of the plaintiff as the two marks are also phonetically similar. The Court restrained the defendant from using the trademark `FEXIM' or any trademark deceptively similar to the trademark of the plaintiff `PHEXIN', any label/packaging material deceptively similar and containing the same pattern as that of the plaintiff.

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[53] http://www.amarjitassociates.com/index.htm

[54] ibid

[55] [MANU/DE/2840/2005]

If a party using the deceptively similar name only for a single shop and not spreading its business by use of that particular name then also that party could be stopped from using the trade name of other company. This is given in ***M/s Bikanervala v. M/s Aggarwal Bikanerwala***[56]where the respondent was running a sweet shop in with the name of AGGARWAL BIKANERVALA and the plaintiff was using the name BIKANERVALA from 1981 and also got registered it in the year 1992. Hence, they applied for permanent injunction over the use of the name AGGARWAL BIKANERWALA for the sweet shop by the defendant. Court held in favour of the plaintiff and stopped defendant from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in food articles for human consumption under the impugned trade mark/trade name/infringing artistic label 'AGGARWAL BIKANER WALA' or from using any trade mark/trade name/infringing artistic work containing the name/mark 'BIKANER WALA/BIKANERVALA' or any other name/mark/artistic work which is identical or deceptively similar to the plaintiff's trademark 'BIKANERVALA'.

If the trademark is not registered by any party but one party started using it before the other then first one would have the legal authority on that particular mark. As in the case of ***Dhariwal Industries Ltd. and Anr.v. M.S.S. Food Products***[57]where appellants were using the brand name MALIKCHAND for their product and the respondents were using the name MANIKCHAND which is similar to the previous one and both parties have not registered their trademarks. Court held in this matter that even though plaintiff have not registered their trademark they are using it from long time back and hence court granted perpetual injunction against the respondents.

Even if a company is not doing business in country, but it is a well-known company or well-known goods, then also it would be entitled to get authority over its trademark. As given in case of ***N.R. Dongare v. Whirlpool Corp. Ltd***.[58]where the defendants have failed to renew their trademark ‘WHIRLPOOL’ and in the meantime the plaintiffs have got registration of the same. In this case court said that though there was no sale in India, the reputation of the plaintiff company was travelling trans-border to India as well through commercial publicity made in magazines which are available in or brought in India.

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[56] [117 (2005) DLT 255]
[57][AIR 2005 SC 1999]
[58][(1996) 5 SCC 714]

The "WHIRLPOOL" has acquired reputation and goodwill in this country and the same has become associated in the minds of the public. Even advertisement of trade mark without existence of goods in the mark is also to be considered as use of the trade mark. The magazines which contain the advertisement do have a circulation in the higher and upper middle income strata of Indian society. Therefore, the plaintiff acquired transborder reputation in respect of the trade mark "WHIRLPOOL" and has a right to protect the invasion thereof.

CASES OF PASSING OFF

Even if the goods are not same or similar to each other, then also no one can use the registered trademark of a company for any kind of goods which may result in the harm to the business and reputation of the company which is the owner of the trademark. In ***Honda MotorsCo. Ltd. v. Mr. Charanjit Singh and Ors***[59]defendant Company was using the trade name HONDA for 'Pressure Cookers' which they are manufacturing in India and even when their application for registration of this trademark had been rejected by the registrar, they continued using it and again applied for registration and hence plaintiff has brought this plaint. Plaintiff is the well-known company having presence all over the world in the field of Motor Cars, Motorcycles, Generators and other electronic appliances. They are doing business in India in association with the Siddharth Shriram Group with the name Honda Siel Cars India Ltd. Plaintiff has established that his business or goods has acquired the reputation and his trade name has become distinctive of his goods and the purchasing public at large associates the plaintiff's name with them. The use of trademark HONDA by respondents is creating deception or confusion in the minds of the public at large and such confusion is causing damage or injury to the business, reputation, goodwill and fair name of the plaintiff. Hence court has restricted the defendants from using the trademark HONDA in respect of pressure cookers or any goods or any other trade mark/marks, which are identical with and deceptively similar to the trade mark HONDA of the plaintiff and to do anything which amounts to passing off to the goods of the plaintiff.

In the case of ***Smith line Beecham v. V.R. Bumtaria***.[60]The plaintiff applied for permanent injunction to restrain the defendant from infringing the trademark, passing off, damages, delivery etc. of its registered trademark ARIFLO, used in respect of the pharmaceutical

[59][2003(26)PTC1(Del)]
[60][MANU/DE/2890/2005]

preparations. Defendants were using the similar name ACIFLO for their product of the same drug in India. Plaintiffs were not doing business in India for the particular product and argued that since their advertisements are been published in medical journals hence they have a transborder reputation and defendants should be stopped to use the similar trademark which creating deception in customers.

Court said that mere publication of an advertisement in a journal cannot establish a trans-border reputation. Such reputation if any is confined to a particular class of people, i.e., the person subscribing to the said specialized journals and the same can't be said to be extended to the general consumers. Thus any adverse effect on the firm in such a case can't be amounted to the offence of "passing off".

Though the dispute resulted in compromise where the defendant agreed and accepted the plaintiffs' exclusive right on the use of mark i.e. ARIFLO in India and abroad and further agreed to not to manufacture pharmaceutical preparations under the mark ACIFLO or any other mark identical or similar to ARIFLO.

There are two types of remedies are available to the owner of a trademark for unauthorized use of its imitation by a third party. These remedies are:-an action for passing off in the case of an unregistered trademark and an action for infringement in case of a registered trademark. An infringement action and an action for passing off is quite different from each other, an infringement action is a statutory remedy and an action for passing off is a common law remedy. Accordingly, in order to establish infringement with regard to a registered trademark, it is necessary only to establish that the infringing mark is deceptively similar to the registered mark and no further proof is required. In the case of a passing off action, proving that the marks are deceptively similar alone is not sufficient. The use of the mark should be likely to deceive confusion. Further, in a passing off action it is necessary to prove that the use of the trademark by the defendant is likely to cause injury to the plaintiff's goodwill, whereas in an infringement suit, the use of the mark by the defendant need not cause any injury to the plaintiff. Trademark infringement laws help the trademark holders to keep awareness about infringement of trademark.

CONCLUSION

There are two types of remedies are available to the owner of a trademark for unauthorized use of its imitation by a third party. These remedies are:-an action for passing off in the case of an unregistered trademark and an action for infringement in case of a registered trademark. An infringement action and an action for passing off is quite different from each other, an infringement action is a statutory remedy and an action for passing off is a common law remedy. Accordingly, in order to establish infringement with regard to a registered trademark, it is necessary only to establish that the infringing mark is deceptively similar to the registered mark and no further proof is required. In the case of a passing off action, proving that the marks are deceptively similar alone is not sufficient. The use of the mark should be likely to deceive confusion. Further, in a passing off action it is necessary to prove that the use of the trademark by the defendant is likely to cause injury to the plaintiff's goodwill, whereas in an infringement suit, the use of the mark by the defendant need not cause any injury to the plaintiff. Trademark in fringement laws help the trademark holders to keep awareness about infringement of trademark.

So, by this discussion we can draw following inferences:

- Registered trademark is the property of the holding company and it is directly associated with the name, reputation, goodwill and quality of products of a company.
- There are very slightly differences between infringement and passing off
- A company cannot use the trademark of another company. No one can use even the similar trademark which is creating deception or confusion for the customers.
- No one can use the trademark of a company, which is well known and having a transponder reputation, even if it is not registered

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QUANTITY OR QUALITY OF WITNESSESTHEORY AND PRACTICE IN PAKISTAN

By

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ABSTRACT

Under the Roman and Common Law, the effect of evidence was governed strictly by the numerical system. Testimony was counted, not weighed, on oath being in no case sufficient. In Anglo-Saxon and Norman Times, proof was according to the importance of the case, he who had the greater number of witnesses prevailed. On the other side, a well-known and settled principle of law of evidence is that '***evidence must be weighed and not counted'.*** Section 134 of the Evidence Act, 1872(repealed) enshrined the principle in these words:*"No particular number of witnesses shall in any case be required for the proof of any act."*Underthe Evidence Act, 1872(repealed), the evidence of one witness if believed was sufficient to establish any fact. But Article 17 of The Qanun-e-Shahadat Order, 1984 has changed the wording of Section 134 of the Evidence Act, 1872 (repealed) making certain number of witnesses necessary to prove or disprove a case. Whether this change of words is affecting the intent of Section 134 of the Evidence Act, 1872(repealed) or not? This paper would analyze the effect of change of quality rule to quantity rule and finally certain recommendations will be to minimize the confusions created by the change in Section 134 of the Evidence Act, 1872(repealed).

Keywords: Testimony, Evidence, Proof, Quality, Quantity

INTRODUCTION

Under the notion of administration of justice, courts of law are established for the enforcement of rights of citizens. When parties approach to courts of law for the implementation of their respective rights, courts first of all inquire into facts of every case. These facts are called facts under inquiry. About facts under inquiry the Qanoon-e-Shahadat Order, 1984 says that evidence can only be given regarding fact under inquiry and courts may allow only that piece of evidence that forms the part of fact under inquiry or that is relevant to the fact under inquiry. Main purpose of adducing evidence in a court of law is to prove or disprove a fact under inquiry, forming the real point of controversy between parties. To prove or disprove the controversial facts between litigants, oral evidence as well as documentary evidence may be used in the court of law. Oral evidence or testimony by witnesses is an important mode of proving the facts under inquiry. Article 17 of the Qanoon-e-Shahadat Order, 1984[1] requires fixed number of witnesses to prove or disprove the facts under inquiry in certain cases. Is it the number or quantity of witness important or the quality of witness to prove or disprove the case?The discussion of quantity or quality of witnesses has been in fashion since the inception of Article 17 of the Qanoon-e-Shahadat Order, 1984 as it changed the words of Section 134 of the Evidence Act, 1872 (repealed) [2]. Section 134 of the Evidence Act, 1872 contained a well-known and settled principle that ***'evidence must be weighed and not counted'*** in these words: *"No particular number of witnesses shall in any case be required for the proof of any act"*[3].Whether this change of words is affecting the intent of Section 134 of the Evidence Act, 1872(repealed) or not? This is the question to be answered in this paper with an analysis of quantity rule to show its conformity with old quality rule.

I. LITERAL CONSTRUCTION OF WORD 'WITNESS'

The word "witness" must be understood in its natural sense, i.e. as referring to a person who furnishes evidence [4]. A person, who gives testimony, narrates facts and is liable for cross examination is called a witness. According to Black's Law Dictionary, witness is "one who gives testimony under oath or affirmation (i) in person, (ii) by oral or written deposition, or (iii) by affidavit" [5]. No provision of the Qanoon-e-e Shahadat Order, 1984 or the Evidence Act, 1872 (repealed) defines the term witness. But Sections 118, 119 and 120 of the Evidence Act, 1872

(repealed) make it clear that a witness is a person, who testifies before a Court [6].

II. QUANTITY OR QUALITY OF WITNESSES IN PAKISTAN

Under the Roman and Common Law, the effect of evidence was governed strictly by the numerical system. Testimony was counted, not weighed, on oath being in no case sufficient. In Anglo-Saxon and Norman Times, proof was according to the importance of the case, he who had the greater number of witnesses prevailed [7]. Hence it may be said that the numerical requirement of proof envisaged in Islamic Law is not something new. Under the Evidence Act, 1872 (repealed), the evidence of one witness if believed was sufficient to establish any fact.

A. Quality of Witnesses

Section 134 of the Evidence Act, 1872 enshrines a well settled principle of law of evidence in these words: *"No particular number of witnesses shall in any case be required for the proof of any act"*. A number of judgments are of the view that quality not the quantity of witnesses is important to decide a case.

- In Hussain vs Zahoor Ahmed, the court observed that quality and not quantity which matters in answering whether a fact has been proved or not [8].
- The principle laid down by Article 17 is that the number and the competency of the witnesses required to prove a right or liability subject matter of a case is to be determined in accordance with the injunctions as laid down in Holy Quran and Sunnah. Witnesses, as a rule, are weighted and not counted. No particular number of witnesses is required for proof on a murder charge under Article 17 of Qanoon e Shahadat Order, 1984 [9].
- It is quality and not quantity of evidence which merits consideration. If prosecution is satisfied that its case can be proved by producing single witness then there would be no compulsion for it to produce all those witnesses mentioned in the FIR [10].
- A conviction can be based on the evidence of a solitary eye witness provided such witness is entirely trustworthy and above board [11].
- Witnesses are weighed and not numbered [12].
- Solitary witness is no impediment to base conviction [13].

- Sole testimony of a witness to be made foundation of guilt must be clear, cogent and consistent [14].
- Mere quantity of evidence nowhere matters witness as a rule are weighed and not counted [15].
- No particular number of witnesses shall in any case be required for the proof of a fact. If plurality of witnesses is requirement of conviction and cases where the testimony of any one witness is available, then in number of crimes the offender will go unpunished [16].
- It is the quality of evidence of a single witness whose testimony has to be tested on the standard of credibility and reliability. If the testimony is found to be reliable, there is no legal restriction to convict the accused on such proof [17].

All the above cases are in favor of quality rule. It is the quality not the quantity of witnesses that is important.

B. Quantity of Witnesses

Article 17 of the Qanoon-e-Shahadat Order, 1984 provides the basic rule to competency and number of witnesses to be required to prove or disprove the existence or non-existence of facts under inquiry. Article 17 of the Order describes three types of cases with respect to number of witnesses:

- Hudood Cases
- Fiscal/Financial Cases
- Other Cases

Hudood cases must be proved by the required witnesses; otherwise *hadd* shall not be imposed. Number of witnesses for ‘zina’ should be ‘four’ for ‘harabah’, ‘qazf’ and ‘intoxication’ should be ‘two’. Fiscal matters, if reduced to writing, shall be attested by two men, or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly. In all other cases, no particular number of witnesses are required to prove a right, liability or a fact, Article 17 (2) (b) lays down that a court may accept or act upon the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.

CONCLUSION

Article 17 has changed the wording of Sec 134 of the Evidence Act, 1872 without affecting its intent, and has enshrined a well-known principle that **"evidence must be weighed and not counted"**. It is the quality of the statement of witness that matters in the court. The court will not appreciate the number of witnesses if they are not relevant to the facts of the case. In other words, it is not enough to prove a fact that a number of witnesses should assert it. Proof of a fact would depend upon the character and competence of witness to give a clear and solid statement regarding the facts of the case.

The jurists agreed that the offence of zina cannot be proved with less than four male adl witnesses. They agreed that all claims with the exceptions of zina are proved by two male adl witnesses. The jurists are also agreed that financial claims are established through one male adl witness and two female witnesses because the words of Allah Almighty, “Andmake two witnesses from among your men, then if two men be not available then a man and two women such witnesses, as you like, so that either of the two women errs in memory, then the other may remind to that one” [18]. It is quality and not quantity of evidence which merits consideration, if prosecution feels satisfied that its case can be proved by producing single witness then there would be no compulsion for it to produce all those witnesses mentioned in FIR.

Though the testimony of a single witness, if believed, is sufficient to establish any fact yet as a rule of prudence, a Judge should seek corroboration of evidence to fortify himself about the guilt of the accused, if there is a very little doubt in his mind relating to the testimony of that particular witness.

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NO REVISION COMPETENT AGAINST AN ORDER WHICH IS CHALLENGEABLE IN APPEALS U/S 417(2), WHY? EXPLANATION WITH REFERENCE TO CASE LAWS

By

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ABSTRACT

Right of appeal is a constitutional and inalienable right of the aggrieved person which cannot be denied or barred by statuary provisions of any enactment. Appeal is a continuation of trail and any statutory provision which denied access to right of appeal, is against fundamental rights guaranteed by the Constitution of Pakistan, 1973. Therefore, no revision competent against an order which is challengeable in appeals under section 417(2) Cr.P.C 1898 because, appeal is an fundamentally guaranteed right of aggrieved person and it cannot be barred by statuary provisions of law or where there are no express provision in special laws. Never the less this would not then mean that an aggrieved person whether provincial Government, Federal Government or any aggrieved person is denuded of the power of filing an appeal from an Order of acquittal passed by a Special Judge appointed by such Government or for that matter such person would have no remedy of appeal against acquittal by any such Special Judge. To read as much into the provisions of Section 10 of the Criminal Amendment Act, 1958 would certainly amount to denying access to justice to an aggrieved person which would certainly be in violation of his fundamental rights as guaranteed under the Constitution particularly Articles 4 and 25 thereof and Article 10-A as an appeal is a continuation of the trial. So also, it would be seen that the Special Court/Judge is a Court inferior to the High Court and hence the High Court's revisional powers under Section 435 Cr.P.C 1898 to check the correctness, legality or propriety of any finding or order recorded or passed by an inferior Court would not stand excluded particularly as the Act itself does not exclude the same. Consequently, it would be quite appropriate to observe that any aggrieved person whether it be the Federal or the Provincial Government or an accused or a complainant could approach the High Court in appeal against either an order of conviction or acquittal or for that matter for the purpose of enhancement of a sentence passed by any Special Judge appointed under the Act 1958 and as much should be read into Section 10(1) of the Criminal Amendment Act, 1958. In this regard, it may also be observed that perhaps this was the legislative intent, as Section 10(2) of the Act ibid was added to cater for the right of the Federal Government to file an appeal against acquittal as such right was not given to it under Section 417(2) Cr.P.C 1898.

INTRODUCTION

Definition of Appeal and Scope in law

In law, an appeal is the process in which cases are reviewed, where parties request a formal change to an official decision. Appeals function both as a process for error correction as well as a process of clarifying and interpreting law.[61] Although some scholars argue that "the right to appeal is itself a substantive liberty interest" Although some scholars argue that "the right to appeal is itself a substantive liberty interest",[62] the notion of a right to appeal is a relatively recent advent in common law jurisdictions.[63] In fact, commentators have observed that common law jurisdictions were particularly "slow to incorporate a right to appeal into either its civil or criminal jurisprudence".[64] There is no definition of the word “appeal” in any statute. It can be defined as the judicial examination by a higher Court of a decision of an inferior Court. It is a legal proceeding by which a case is brought before a higher court for review of the decision of a lower court.[65] It is a legal proceeding by which a case is brought before a higher court for review of the decision of a lower court.

Appeal is a process of re-examination by a higher court of the judgment, or the order or the decision made by a lower court in a suit or in a case. Appeal is the right of entering a superior court and invoking its aid and interposition to redress the error of the court below. It is a proceeding taken before a superior court for reversing or modifying the decision of an inferior court on ground of error. The distinction between an appeal and a revision is a real one. A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way as, we find, has been done in second appeals arising under the Code of Criminal Procedure. The power to hear a revision is generally given to a superior court so that it may satisfy itself that a particular case has been decided according to law. An appeal is subject, of course, to the prescribed statutory limitations. But in the case of revision whatever powers the revisional authority may have, it has no power to reassess and reappreciate evidence unless the statute expressly

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1. https://dictionary.cambridge.org/dictionary/english/appeal accessed on 10.01.2019

[62]. Gary Stein, Expanding as per the Process Rights of Indigent Litigants: Will

[63]. See Peter D. Marshall, A Comparative Analysis of the Right to Appeal, 22 Duke J. of Comp. & Int. L. 1, 1 (2011) ("The right to appeal is a comparatively recent addition to the common law criminal process.")

[64]. Stan Keillor, Should Minnesota Recognize A State Constitutional Right to A Criminal Appeal?, 36 Hamline L. Rev. 399, 402 (2013)

[65]. M. Mahmood, Major Act,2018 (58th Edition)775

confers on it that power. That limitation is implicit in the concept of revision is a continuation of a suit or proceedings wherein the entire proceedings are again left open for consideration by the appellate authorities which has the power to review the entire evidence.[66] No distinction in appeal to Supreme Court exists whether the appeal is by a convict, a private complainant, or by a Provincial Government.[67]Right is not a natural right, it is created by statute.[68] Appeal from acquittal is not competent for offence u/S. 5(2) of 1947 PCA. Sec. 10(2) of Act 1958 provides no right of appeal to the Provincial Government against acquittal order passed by Special Judge. Right of appeal is a statutory right and unless statute provides for appeal from acquittal there is no right of appeal. Appeal by complaint dismissed.[69] In appeal from acquittal for offence u/S. 307 PPC as the accused had already undergone 2 years R.I. his conviction was maintained but he was not sent back to jail instead he was ordered to pay Rs. 50,000 to injured within one year and in default he was to suffer 2 years R.I.[70] Law applicable to appeal. A right of appeal existing on a day on which a proceeding or lies commences or prosecution is a vested right and that right is governed by the law prevailing on that day and not the law prevailing on the date of its decision. This vested right can be taken away only by subsequent enactment, if it so provides expressly or by necessary intending and not otherwise. The right of appeal is not a matter procedure but is a substantive right and there is no vested right in procedure. The procedure to be followed in the trial of an offender must be in accordance with the law of procedure in force on the date of the inception of the trial, and not the date of the commission of the offence.[71] Complaint or any aggrieved person can file appeal against acquittal in a case for offences under Azad Jammu and Kashmir Islamic Penal Laws Enforcement Act, 1974.[72] High Court has powers, in a proper case, either under section 439 or under inherent jurisdiction to quash a conviction and sentence if the ends of justice so demand.[73]

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[69]. Ashiq Muhammad v. Khuda Bakhsh, PLJ 1998 Cr.C. 565
[70]. Noor Ahmed v. Muhammad Anwar ,1993 SCMR 243
[71]. Ghazi and others, (FB) PLD 1962 Lahore, 786
[72]. Abdul Khaliq Khan v. Muhammad Afsar Khan etc, 1995 P.Cr.LJ. 391
[73]. Emperor v. Kasim 48 Cr.LJ 631 = AIR 1943 Pat. 313 Kirshana Chandra v. Emperor

Acquittal order appealable u/s 417(2-A) Cr.P.C 1898 and revision u/Ss. 435, 439 or 439-A Cr.P.C 1898

Acquittal order appealable u/s 417(2.A) and revision without availing remedy of appeal u/S. 439 (5) is not competent.[74] Aggrieved person. It appears that when Shariat was declared as governing law government thought it proper to extend right of appeal to a person aggrieved against order of acquittal. Word "Aggrieved person" has been intentionally used so as to include agencies of Government.[75] Appeal against acquittal u/S. 417 (2-A) Cr.P.C 1898 is maintainable by the aggrieved person regarding the cases which were pending trial at the time of the amendment, in order to bring this section in conformity with Islamic Injunction. The appeal can now be filed without the permission of the State i.e. the District Magistrate as it was done previously now the aggrieved party can file appeal instead of revision against acquittal contrary to previous practice). Acquittal u/Ss. 249-A and 265-K is an order of acquittal. Remedy available to the aggrieved party is appeal u/S. 417, Appeal against acquittal by any person against the order of any Court other than High Court is to be made u/S. 417(2-A) Cr.P.C 1898 within 30 days. A revision filed against order of acquittal beyond limitation period of 30 days was not competent, as it could not be treated as appeal because of being filed after 30 days and u/S. 439 (5) Cr.P.C when an appeal can be filed no revision by the party who could have filed an appeal can be entertained. No revision u/ss. 439 & 417 (1) Cr.P.C can be filed when remedy by way of appeal is available but is not utilized. Acquittal on complaint is not revisable but is appealable under section 417(2) Cr.P.C.[76] Accused had been acquitted by the Special Court constituted under the STA Act, 1975, which being a special law had override the general law. Appeal against acquittal of accused could be filed U/S 7 of the said Act by a person appointed by the Provincial Government and not by a person U/S 417(2-A) Cr.P.C 1898 which could not be equated with Section 7 of the STA Act, 1975 and appeal was dismissed.[77]

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[74]. Bahadar Khan v. State and another, PLJ 1998 Cr.C.(Q) 92

[75]. State through Deputy Director (FIA) v. Zahid Nadeem etc.(D.B.) PLJ 1996 Cr.C. (Q) 909

[76]. (D.B) PLJ 1996 Cr.C. (Q) 1865, Zahid Ali v.State; Wazir v. Muhammad Yuqub, PLD 1999 Kar. 130; PLJ 1996 Cr.C. (Pesh.) 1783, Hidayat Ullah v. Abdul Majeed and others; 1995 P.Cr.LJ 1369, Abdul Majeed etc. v. M/s. M. Ghulam Muhammad etc;Noor Gul vs STATE, NLR 1987 Cr. 470

[77]. Haji Khan Kharo V/S Muhammad Shareef & 2 Others (Karachi DB), 2001 PCrLJ 568

Section 417(2.A) Cr.Pc 1898, Appeal Against Acquittal Interpretation :

1. Term "person aggrieved" as used in subsection (2.A) of S.417 could not be interpreted liberally so as to include every person who, as a member of the society, could claim to be interested to make the society free from crime by way of getting offenders punished. System of administration of criminal justice, which was adversarial in nature provided that a person accused of an offence was presumed to be innocent unless proved guilty in a trial before a competent Court. Finding of acquittal given by a court of law strengthened the presumption of innocence in his favour. In absence of compelling reasons, finding of acquittal was not to be disturbed. Consensus of judicial opinion was that scope of appeal against acquittal was narrower than the scope of appeal against conviction and acquittal could not be disturbed simply because other view of evidence was also possible. Every enemy of an acquitted person could not be allowed to drag acquitted person in appeal on the plea that he was interested to live in a crime free society. For the purpose of filing appeal against acquittal, person aggrieved must be the person whose personal and not only general rights were affected. In a case of an offence against a person, victim and in case his death had been caused, his legal heirs and blood relations, would be the persons aggrieved for the purpose of filing appeal against acquittal. In the case of an offence against property, the owner, the possessor of the property or any other person having a right in it would be the aggrieved person.

2. Appellant being brother of deceased, would be an "aggrieved person" entitled to file appeal against acquittal of respondents from the charge of his brother's murder, but that was not the case of their acquittal from the murder charge. Respondents had been acquitted only of the charge of possessing unlicensed pistols and that too on the ground of prosecution's failure to produce witnesses and not by disbelieving the evidence. Magistrate had not recorded any evidence. Question of expressing any opinion about it would not arise. Contention of counsel for appellant that acquittal of respondents from the charge of possessing unlicensed pistol had damaged the murder case of his brother was wholly unfounded as no opinion had been expressed by the Magistrate regarding the quality of evidence. Even if Magistrate had acquitted respondents by appraising evidence, his opinion about the quality of evidence, would not have the binding effect upon trial court trying murder case. Every case had to be decided on the basis of its own record. Evidence recorded in one case, could not be used as evidence in any other case. Sessions Judge trying

murder case, being a higher court, was not expected to be influenced by any finding given by a Magistrate, a court subordinate to him. Appellant who was father of deceased, being not an "aggrieved person", in circumstances, was not entitled to file appeal against acquittal of accused. Orders of Magistrate acquitting respondents, on examination, were found to be grossly improper and illegal, even the counsel for respondents would not support them. Case property was not available before Magistrate without which witnesses could not be examined. Appeals were converted into revisions, orders of the Magistrate acquitting respondents were set aside and case was remanded to the Magistrate for its disposal according to law.[78]

No Revision Competent Against an Order Which Is Challengeable in Appeals U/S 417(2) Cr.P.C 1898 and Related Laws

The law related to appeal in code of criminal procedure, 1898is enacted as follows:

1- Appeal in case of acquittal U/S 417

"Subject to the provision of sub-section (4), the Provincial Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. (2) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf grants special leave to appeal from the order of acquittal the complainant may present such an appeal to the High Court. Pakistan: Code of Criminal Procedure 1898 (2-A) A person aggrieved by the order of acquittal passed by any Court other than a High Court, may, within thirty days, file an appeal against such order.' (3) No application under sub-section (2) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order. (4) If, in any case, the application under sub-section (2) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1)."[79]

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[78]. Khalid Hussain V/S Naveed @ Qalb Ali & 2 Others, PLD 2007 Karachi 442

[79]. M. Mahmood, Major Act.2018 (58th edition) 775

2- Article 4 and 25 of The Constitution of Pakistan 1973 and Right of Appeal U/S 417(2)

The articles 4 and 25 of constitution of Pakistan,1973 safeguard right of appeal of an aggrieved person as under:

"**4. Right of individuals to be dealt with in accordance with law, etc.**(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be and of every other person for the time being within Pakistan.(2) In particular-(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;(b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and(c) no person shall be compelled to do that which the law does not require him to do.

25. Equality of citizens (1) All citizens are equal before law and are entitled to equal protection of law. (2) There shall be no discrimination on the basis of sex (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.[80]

3. Section 10 of Criminal Amendment Act,1958 related to appeal, revision and transfer of cases

The criminal amendment Act,1958 bars and denied right of appeal of an aggrieved person as under:
"An appeal from the judgment of a Special Judge shall lie to highest court having appellate jurisdiction in the territorial limits in which the offence is tried by the Special Judge, and the same court shall also have powers of revision. (2) Notwithstanding the provisions of section 417 of the Code of Criminal Procedure, (V of 1898),
In any case tried by a Special Judge appointed by the Federal Government under section 3, in which such Special Judge has passed an order of acquittal, the Federal Government may direct the Public Prosecutor to present an appeal to such Court as aforesaid. (3) The aforesaid court shall have authority to transfer any case from the Court of a Special Judge to the Court of another Special Judge: Provided that notwithstanding anything

[80].M. Mahmood, The Constitution of Islamic Republic of Pakistan,1973 (58th edition) pages 38,114

contained in section 526 of the Code of Criminal Procedure, (V of 1898), the Special Judge from whose Court a transfer is desired, shall not be bound to adjourn the case, but if he rejects a request for adjournment, he shall record his reasons for doing so. (4) No prosecution under this Act against any person either generally or in respect of any one or more of the offences for which he is being tried shall be withdrawn except under the orders in writing of the appropriate Government."[81]

4.Article 10.A of The Constitution of Pakistan,1973Also Grant Right of Appeal to an Aggrieved Person

The articles 4 and 25 of constitution of Pakistan,1973 safeguard right of appeal of an aggrieved person as under:

"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."[82]

The remedy to file an appeal with special leave of High Court was available to aggrieved person but instead of filing an application for leave to appeal before High Court under section 417(2), the respondent preferred a revision petition against the order of the Magistrate in the court of additional session judge. The distinguishable features in the said judgments are to the effect that in 1994 PCr.LJ 2297, the application under section 249-A, Cr.P.C 1898 was dismissed by the Magistrate and revision petition against that order was held competent. In the judgment reported in, 1984 MLD 1488, the legal point that revision powers of the Sessions Court and the High Court are concurrent has been discussed. Similarly, in the case reported in 1986 PCr.LJ 2179 the validity of proceedings before the Magistrate was challenged under sections 438 &439, Cr.P.C 1898.
The learned Sessions Judge had dismissed the revision petition in limine on the ground that the petitioners could obtain relief by invoking the provisions of section 249-A, Cr.P.C before the trial Court. On writ petition, the Hon'ble High Court held that the provision of section 249-A, Cr.P.C are impediment in his way to hear and decide the revision petition on merits: The judgment reported in 1997 PCr.LJ though to some extent is applicable to the facts of the present case, but with profound respect, this judgment is in conflict with the explicit provisions of section 439(5),

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[81]. https://ace.punjab.gov.pk , Section 10 of The Pakistan Criminal Law Amendment,1958 page 3 accessed on 10.01.2019

[82]. M. Mahmood, The Constitution of Islamic Republic of Pakistan,1973 (58th edition) page 54

Cr.P.C1898 .Also the view taken by, this Court while interpreting section 439(5) and section 417(2), Cr.P.C is different.[83]

With respect, the facts and circumstances under which the rulings were made in the said cases are distinguishable from the facts and circumstances of the instant cases. The distinguishable features in the said judgments are to the effect that in 1994 PCr.LJ 2297, the application under section 249-A, Cr.P.C was dismissed by the Magistrate and revision petition against that order was held competent. In the judgment reported in, 1984 MLD 1488, the legal point that revision powers of the Sessions Court and the High Court are concurrent has been discussed. Similarly, in the case reported in 1986 PCr.LJ 2179 the validity of proceedings before the Magistrate was challenged under sections 439, Cr.P.C 1898.

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Quashing of order against the order of acquittal of accused passed by Magistrate under S.249-A, Cr.P.C in the private complaint remedy open to the ' complainant was by way of a petition for leave to appeal before High Court under section 417(2), Cr.P.C. Revision petition before the Sessions Court against the said order of acquittal, therefore, was not competent andthe order passed by Sessions Court setting aside the order of acquittal and remanding the case to Trial Court was without jurisdiction and the same was quashed accordingly.

Revision maintainability U/Ss. 249-A, 417 & 439.A The trail Court having acquitted accused of the charge, complainant instead of availing remedy of appeal against acquittal available to him under S. 417, Cr.P.C, filed revision under S.439-A, Cr.P.C before appellate Court and the Appellate Court below, had rightly dismissed revision being not maintainable. [84]

No revision petition was competent against the said order before the Sessions Court in view of the express provisions contained in S.417

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[83]. Parvez Muzammil Keen etc. VS Muhammad Anis etc. ,2002 PC.LJ page 2072
Also the view taken by, this Court while interpreting these two 24. Sections, Section 439(5) and Section 417(2), Cr.P.C is different

[84]. 1998 MLD 1605 (Lahore), PLD 1996 Lahore 457

(2), Cr.P.C only remedy available to complainant against the aforesaid order of acquittal was to file an appeal under section 417(2), Cr.P.Cand Sessions Court's order passed in its revisional jurisdiction remanding the case to Trial Court was consequently, set aside being Coram non judice. The Court is has observed that the revision petition filed by the respondent before the learned Additional Sessions Judge against the acquittal order under section 249-A, Cr.P.C was not maintainable under the provisions of section 439(5), Cr.P.C as the respondent was having the remedy of filing an application for 1 special leave to appeal before this Court under section 417(2), Cr.P.C 1898.

The impugned judgment of the learned Additional Sessions Judge, therefore, suffers from legal infirmity, is not sustainable and liable to be quashed under the inherent powers of this Court under section 561-A, Cr.P.C 1898.[85]

[85]. State vs Hakim khan,1999 MLD 585 (Lahore)

CONCLUSION

Right of appeal is a constitutionally and fundamentally right of the aggrieved person which cannot be denied or barred by statuary provisions of any enactment. Right of Appeal is fundamental right, granted by Constitution of Pakistan 1973. Appeal is a continuation of trail and any statutory provision which denied access to right of appeal, is against fundamental rights guaranteed by the Constitution of Pakistan, 1973. Never the less this would not then mean that an aggrieved person whether provincial Government, Federal Government or any aggrieved person is denuded of the power of filing an appeal from an Order of acquittal passed by a Special Judge appointed by such Government or for that matter such person would have no remedy of appeal against acquittal by any such Special Judge. To read as much into the provisions of Section 10 of the Criminal Amendment Act, 1958 would certainly amount to denying access to justice to an aggrieved person which would certainly be in violation of his fundamental rights as guaranteed under the Constitution particularly Articles 4 and 25 thereof and Article 10-A as an appeal is a continuation of the trial. So also, it would be seen that the Special Court/Judge is a Court inferior to the High Court and hence the High Court's revisional powers under Section 435 Cr.P.C 1898 to check the correctness, legality or propriety of any finding or order recorded or passed by an inferior Court would not stand excluded particularly as the Act itself does not exclude the same. Consequently, it would be quite appropriate to observe that any aggrieved person whether it be the Federal or the Provincial Government or an accused or a complainant could approach the High Court in appeal against either an order of conviction or acquittal or for that matter for the purpose of enhancement of a sentence passed by any Special Judge appointed under the Act 1958 and as much should be read into Section 10(1) of the Criminal Amendment Act, 1958. In this regard, it may also be observed that perhaps this was the legislative intent, as Section 10(2) of the Act ibid was added to cater for the right of the Federal Government to file an appeal against acquittal as such right was not given to it under Section 417(2) Cr.P.C 1898.Therefore, it is concluded that no revision competent against an order which is challengeable in appeals under Section 417(2) Cr.P.C, because, appeal is an fundamentally guaranteed right of aggrieved person and it cannot be barred by statuary provisions of law or where there are no express provision in special laws.

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SNIPERATTACK ON ACCUSED / MURDER IN COURT: AN INCUMBANTNEED OF LIGISLATION

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ABSTRACT

This article views the increasing number of murders in our courts. This crime not only breaks the dignity of human life but also degrades the dignity of court. There is no protection to the accused in our legal system. The murder of accused in our court creates question marks on the dignity of court. The question also arises on the security of court as well as it increases the responsibility of police in order to see how illegal weapon entered in the court .It is a great example of people taking law in their hands. That's why people don't believe in the system of court. This is lacuna in our legal system .It should be filled in with an incumbent legislation in order to protect the dignity of the human life as well as the dignity of court.

INTRODUCTION

We are seeing day to day increasing number of murders in our courts. This crime not only breaks the dignity of human life but also degrades dignity of the court. There is no protection to the accused in our legal system. The murder of accused in our court creates question marks on the dignity of court. The question also arises on the security of court as well as it increases the responsibility of police in order to see how illegal weapon entered in the court. It is a great example of people taking law in their hands. That's why people don't believe in the system of court. This is lacuna in our legal system. It should be filled in with an incumbent legislation in order to protect the dignity of the human life as well as the dignity of court.

Murder in the court vehemence day to day. If we study every aspect of life, we feel that the protection and dignity of life of human being is very serious aspect of life. In Quran Allah Almighty forbids the killing of human being in several verses.

وَ لَا تَقْتُلُوا النَّفْسَ الَّتِيْ حَرَّمَ اللّٰهُ اِلَّا بِالْحَقِّ[86]

"Don't kill any soul, which God has made forbidden except in justice cause, if anyone has been killed wrongfully and intentionally, we have given his heir the authority. But let him not exceed the legitimate bounds in killing. Indeed, he has been helped"

This ayat explains that law of retaliations must be enforced as the heir of the murdered person are helped sufficiently by the provisions and procedures of the law.

يٰۤاَيُّهَا الَّذِيْنَ اٰمَنُوْا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلَى اَلْحُرُّ بِالْحُرِّ وَ الْعَبْدُ بِالْعَبْدِ وَ الْاُنْثٰى بِالْاُنْثٰى فَمَنْ عُفِيَ لَهٗ مِنْ اَخِيْهِ شَيْءٌ فَاتِّبَاعٌ بِالْمَعْرُوْفِ وَ اَدَآءٌ اِلَيْهِ بِاِحْسَانٍ ذٰلِكَ تَخْفِيْفٌ مِّنْ رَّبِّكُمْ وَ رَحْمَةٌ فَمَنِ اعْتَدٰى بَعْدَ ذٰلِكَ فَلَهٗ عَذَابٌ اَلِيْمٌ ۰۰۱۷۸[87]

وَ لَكُمْ فِي الْقِصَاصِ حَيٰوةٌ يّٰۤاُولِي الْاَلْبَابِ لَعَلَّكُمْ تَتَّقُوْنَ ۰۰۱۷۹[88]

«And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous»

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[86] ALQURAN 17:33
[87] AL QURAN2:178
[88] AL QURAN 2:179

فَبَعَثَ اللّٰهُ غُرَابًا يَّبْحَثُ فِيْ الْاَرْضِ لِيُرِيَهٗ كَيْفَ يُوَارِيْ سَوْءَةَ اَخِيْهِ ۭ قَالَ يٰوَيْلَتٰى اَعَجَزْتُ اَنْ اَكُوْنَ مِثْلَ هٰذَا الْغُرَابِ فَاُوَارِيَ سَوْءَةَ اَخِيْ ۚ فَاَصْبَحَ مِنَ النّٰدِمِيْنَ ۳۱ مِنْ اَجْلِ ذٰلِكَ ۚ كَتَبْنَا عَلٰي بَنِيْٓ اِسْرَاۗءِيْلَ اَنَّهٗ مَنْ قَتَلَ نَفْسًۢا بِغَيْرِ نَفْسٍ اَوْ فَسَادٍ فِي الْاَرْضِ فَكَاَنَّمَا قَتَلَ النَّاسَ جَمِيْعًا ۭ وَمَنْ اَحْيَاهَا فَكَاَنَّمَآ اَحْيَا النَّاسَ جَمِيْعًا ۭ وَلَقَدْ جَاۗءَتْهُمْ رُسُلُنَا بِالْبَيِّنٰتِ ۡ ثُمَّ اِنَّ كَثِيْرًا مِّنْهُمْ بَعْدَ ذٰلِكَ فِي الْاَرْضِ لَمُسْرِفُوْنَ ۳۲[89]

«Then Allah sent a crow searching in the ground to show him how to hide the disgrace of his brother. He said, "O woe to me! Have I failed to be like this crow and hide the body of my brother?" And he became of the regretful Because of that, we decreed upon the Children of Israel that whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely. And our messengers had certainly come to them with clear proofs. Then indeed many of them, [even] after that, throughout the land, were transgressors»

وَكَتَبْنَا عَلَيْهِمْ فِيْهَآ اَنَّ النَّفْسَ بِالنَّفْسِ ۙ وَالْعَيْنَ بِالْعَيْنِ وَالْاَنْفَ بِالْاَنْفِ وَالْاُذُنَ بِالْاُذُنِ وَالسِّنَّ بِالسِّنِّ ۙ وَالْجُرُوْحَ قِصَاصٌ ۭ فَمَنْ تَصَدَّقَ بِهٖ فَهُوَ كَفَّارَةٌ لَّهٗ ۭ وَمَنْ لَّمْ يَحْكُمْ بِمَآ اَنْزَلَ اللّٰهُ فَاُولٰۗىِٕكَ هُمُ الظّٰلِمُوْنَ ۴۵[90]

«And we ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed - then it is those who are the wrongdoers»

There are numerous traditions of Holy Prophet (S.A.W.W) which establish the principle that all persons are equal before the law and as such are entitled to have equal treatment and protection of law.

The accused is the favorite child of law but unfortunately these words limited to the quotation. There is no protection to the accused because day to day the murder ratio in courts is increasing. The murder of accused create a great question marks on the dignity of the court. The question arises on the security of the court. The question also arises on the responsibility of the police. How illegal weapon entered in the court? How sharpshooter/sniper entered the court, who is backbone of it? Why legislation has not been passed in the parliament? Are the security forces fail to provide protection to the accused? We see justice in last breath,

[89]Al QURAN5:31,32
[90]Al QURAN 5:45

People are taking law in their hands. People don't believe in the system of the court. More than 60 security cameras failed in performances. The sniper run away in the huge crowded. It's possible nobody to see the murderer? Why Suo moto action is not taken on this issue?

Now here we discuss certain cases of murder in courts. Where in we see great severity of the nature of these cases.

On March 12.2020 Mudasar Iqbal advocate was sitting in his chamber and was murdered in Bhalwal court.[91]

On 22-2-2020 Nabeel Yusuf, the convict sentenced to life imprisonment in a murder case in Ludhiwala Warraich area, was brought to the court for a hearing, the convict was going to be shifted to Bakhshi Khana after he was presented in court, but he was shot dead. Witnesses said the convict was targeted from the rooftop of Quaid-e-Azam Block of the sessions court, yet no trace of the shooter was found[92].

In March 11.2020Accusedappeared in the court with his father and was murdered in Dipalpur court[93]

In May 2011 Additional District and Session Judge Haji Ahmed's court in Lahore was hearing the case of two brothers, Zeeshan and Imran nazir. In that time two youths had stood up and fired him these two brother's dead at the spot. Judge lay on the ground and saved their life.[94]

On 7-1-2015Mian Rashid, a plaintiff in the murder case, along with his cousin was standing in the court when they were targeted by three assailants. Mian Rashid died at the spot while his cousin was badly injured.

On 9 Feb 2018 – One accused Aamir was killed at the spot by minor (hamza) assailants entered a session court in Lahore and opened fire. In 9-2-2019 **Unidentified assailants on Saturday gunned down a youth Bilal Azeem who had to attend a hearing in a case at a Lahore sessions court.**[95]

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[91]Dunya newspaper Gujranwala, Wednesday, March 11 ,2020
[92]https://tribune.com.pk/
[93]Dunya newspaper March 12,2020, p 2
[94]https://www.youtube.com/watch?v=K1O4S6pH2EI/https:www.citynewzlahore
10. https://www.newsone.com/https://www.youtube.com/watch?v=_p3ZUF2vg-4

On 20 February 2018, at least two lawyers were killed in a firing incident at Lahore sessions court premises. Police said that the incident of firing occurred after heated argument between lawyers over a property dispute. As a result, Advocate Rana Nadeem suffered fatal firearm wounds and died on the spot, whereas another lawyer Owais Talib, who also suffered bullet injuries, died later at a hospital.[96]

In March 28 -2018 Rawalpindi the incident of firing in Judicial complex. The additional session judge went into the chamber after hearing the firing.[97]

On 29-5-2011accusedin murder of case a session judge Abid Hussain Qureshi has taken notice of the case and demanded report from DIG operation within two hours. The judge inquired how the arms could enter the premises of the court despite the security checks. An accused in murder case was shot dead in the premises of the court. A head constable had also died along with him. [98]

Islamabad court attack on 3 March 2014, gunmen attacked District Courts Complex F8 in Islamabad, Pakistan. Eleven people were killed and twenty-five people were injured as a result of the gun and bomb attack.[99]

On 3-1-2019 brother-in-law shooting his sister- in-law in Lahore session court, who came in court for hearing?[100]

On 22-11-2019Jaranwala an accused murderer was shot dead by his rival in the premises of a court here in the Faisalabad district city during an ongoing hearing. Additional Session Judge Muhammad Naeem Saleem was hearing a case wherein Tara Gujjar, the murder accused who had been in police custody, was presented in the court. The accused, who was in handcuffs, died on the spot.[101]

[96]https://www.pakistantoday.com.pk/
[97]https://www.youtube.com/results?search_query=%23JudicialComplex/
www.newsone.tv
[98]https://nation.com.pk/
[99] Ibid.
[100]https://www.youtube.com/watch?v=GN50MrTBhQU/https://www.abbtakk.tv
[101]https://www.juridipedia.com/

In January 31, 2018, a shootout took place in Lahore Sessions Court, in which murder accused Malik Amjad Khan and his handcuffed policemen were killed while Asan was injured.[102]

In Feb 2017, Lahore session court, thirteen years old Hamza which murder the Amir who brought to the court for a hearing.[103]

on November 1, 2016, a gunman was killed and three persons were injured in firing in the Kamulkal court.

On January 24, 2017, two people were killed and four were injured in a firing at Dipalpur court in Kawakara. Two brothers were killed, while two persons were killed and one injured in shootings in Sheikhupura court on December 20, 2017.[104]

February 23rd, 2020.The convict had shot dead Farooq Othi four years ago. He was recently sentenced to life imprisonment by the sessions court in the case. The CPO formed teams to arrest the killers under the supervision of Civil Line SP Waseem Dar.[105]

Shocking double-murder at Lahore sessions court unidentified gunmen sneaked into the courtroom of the Additional District and Session judge on early Saturday and fled away after killing two under trial accused, creating worst panic in the otherwise highly-guarded area during rush hours. Its means security forces vague in the matter to provide safety to the citizens. Nobody knows what happened in the next moment of life.

No doubt an accused is a favorite child of law, but keeping in view the shape of scale and justice, the complainant is also not to be denied of justice of the court.[106]

All that may be necessary for the accused is to offer some explanations for the prosecution evidence and if the same appears to be reasonable even though not beyond doubt and to be consistent with the innocence of the accused, he should be given the benefit of it.[107]

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[102]https://www.youtube.com/watch?v=56rXvDmDC48/https://www.24NewsHD
[103]https://www.youtube.com/watch?v=O8SnUFVXPgg/ http://www.city42.com
[104]http://www.city42.com
[105]https://tribune.com.pk/
[106] 200 MLD220
[107] PLD2005 S.C63

An accused has a right to life unless a judgment of the court passed against him for the execution of the sentences of the court following his conviction of a crime. This is the meaning of the article 2 of the European convention of human rights. The article follows as 'Everyone's right to life shall be protection by law. No one shall be deprived of this life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary'.[108]

John Bowers says about this article;

"The convention encompasses a positive duty upon the state to take adequate measures to protect life. This is of obvious relevance to the health and safety obligations"[109]

T.H.Jones writes about attack on accused;

"This question rises in relation to attacks which produce fear rather the actual injury whether the victim has to be conscious of the attack made upon him. Must have been personally aware of the menaces and threats to his safety"?[110]

The burden of proving the actus reus of murder and the requisite men's re-arrest son the prosecution. 'Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt.[111] The ILC's Drafts statute for an international criminal court was revised substantially during a series of meeting of diplomatic delegation prior to the Rome conference. In facts, the Rome conference virtually replaced the drafts statute with the ICC statute that is much more extensive in term of content.[112]

Prison security Act 1992 maintains the conduct of accused and prisoner which saves them from any fictitious act inflicted on them. The section 1 of this act explains this phenomenon as follows

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[108]See article 2, European convention of human rights
[109]Bowers john, employment law and human rights, sweet &Maxwell ,London 2001.p 31.
[110]T.H.Jones, criminal Law, W.Green/sweet & Maxwell Edinburgh 1996,p 184.
[111] L .B.Curzon, criminal Law sixth Edition, Them& Hand books series
[112] Kriangsak kittichaisaree, InternationalCriminallaw?P55

For the purpose of this section there is a prison mutiny where two or more prisoners, while on the premises of any prison, engage in conduct which is intended to further a common purpose overthrowing lawful authority in the prison. For the purpose of this section the intention and common purpose of prisoners may be inferred from the form circumstance.[113]

International criminal law has provision to rehabilitate morally conduct of accused as a quotation from an international criminal law has been quoted here

While the concept of just desert is by no means new, it is only in the last few decades that it has begun to assume a position of critical importance in criminal law thinking. Until then, belief in the possibility of crime reduction and enchantment with the rehabilitative ideal had held sway for much of this century. The 'just deserts' movement began in the 1970s in the United States and was primarily the result of two related factors. Firstly, there was the demise of the rehabilitative ideal and mounting skepticism as to the efficacy of sentencing for deterrent purposes and secondly, there was growing concern at the extent of sentencing disparity.[114]

Here we make certain suggestions to legislate on the impediment of the murdering in the court. There should be proper security system launched on the gate of session courts. The visitor must be provided a visiting card. The visitors should be properly checked. Their names and purpose of entry should be biometric recorded on the gate. Only the people involved in the cases and matters should be allowed in the court. The entrees and exits must be separate in two gates. The court buildings must have wall boundaries. The clerks, sweepers librarian, steno, alhmad must also carry the cards. Because in the court the clerk's staff do not carry card and they are not going on checking process. The advocates must also carry cards and because in this way any person wear the court dresses in the court. The security staffs must have fully ready weapons. The proper planed schedule should be issued which protect the accused and witness from the enemy. without these suggestions we cannot control the critical security situation of the court.

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[113]P.R.Glazebrook, statutes on criminal Law 1996-7,p224

[114]C.M.V.Clarkson, understanding criminal law , sweet & Maxwell 2001.p275

Defence of alibi would be quite shaky and inconsistent when defence suggested to solitary eye-witness of murder occurrence in cross examination that accused was not armed with klashinkov nor he was present at wardat. Held, suggestion to eye-witness that accused was not armed with klashinkov amply support fact that accused as well as complainant were present at site of occurrence.[115]

[115]NLR 1998 S.D.48

CONCLUSION:

This article concludes the great severity of the nature of the murder in our courts. This crime not only breaks the dignity of human life but also degrades the dignity of court. There is no protection to the accused in our legal system. The murder of accused in our court creates question marks on the dignity of court. The question also arises on the security of court as well as it increases the responsibility of police in order to see how illegal weapon entered in the court. It is a great example of people taking law in their hands. That's why people don't believe in the system of court. This is lacuna in our legal system. It should be filled in with an incumbent legislation in order to protect the dignity of the human life as well as the dignity of court.

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ISLAMISATION OF PENAL LAWS AND MISCARRIAGE OF JUSTICE

By

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ABSTRACT

The processes of vigorous Islamisation of the penal laws of Pakistan took place in the era of General Zia-ul-Haq in 1979. The purpose was to bring major operative laws of the country in line with the injunction of Islam by following the road maps of Islamic nations like Saudi Arabia, Iran etc. The inclusion of Islamic provisions in the laws that were majorly influenced and drafted by the British drafters before the partition of the subcontinent resulted into running of two parallel systems of justice and hence created a conflict between the “traditionalists” and “non-traditionalists”. This amalgamation of Islamic provisions in a nation where almost all the laws have developed on secular lines resulted in to great human rights violations and miscarriage of justice by placing women victims in a very difficult position.

INTRODUCTION

Shortly after coming into power, General Zia-ul-Haq 1979 took extensive measures to Islamize the legal system of Pakistan since then Islamisation[116] is a popular topic in Pakistan- the subject of newspaper, speeches and articles. But even way before since the establishment of Pakistan in 1947 there has been a conflict between the "traditionalists" and "non-traditionalists" over whether an Islamic order should be enforced in the country or whether it should be allowed to develop along the secular lines as a modern nation. Although being a difficult question for the purposes of "Islamisation" this research direct light on three central issues. Firstly the historical impact of Anglo-Saxon[117] laws on the development of Pakistani domestic laws. Secondly the Islamisation of criminal statutes resulted in miscarriages of justice and human rights violations. And lastly the possible reforms in this particular area.

It is difficult to understand the Islamisation process and phenomenon instability in Pakistan if we divorce the process from the historical perspective in which the domestic laws of Pakistan evolved. The inconsistency and instability in the application of law in last three decades has been considered of immense importance to relate legal system with political, economic and social processes especially with reference to the development in the third world countries.[118] Even way before British Empire the application of shariah law was not rigid and there was still a room for customs. British rule bring in the common law traditions but the common law they brought in was not in pure form it was intermixed with the Islamic traditions and came to be known as Anglo-Muhammadan law. The centralization and unification of the legal system was important for the British rule.

This was seen as a condition of progress toward a modern nationhood, and law and legal institutions were seen as the best mean to achieve this end. In start the British penetration in Islamic law was slow

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[116].The phrase "Islamisation of law", according to Al-Muhairi, is used in Islamic countries to refer to the official programme of replacing laws of 'western origin' with laws based on 'Islamic' sources. This term connotes wider meaning in case of Pakistan. It is not confined to the replacement of western codes with Islamic ones but includes the making of new institutions of state, laws, and even Constitutions, in consonance with the injunctions of Islam.

[117].These laws refer to as written rules and customs that existed during the Anglo-Saxon period in England. After the end of British rule in the subcontinent and partition (colonization) of Pakistan these laws become part of Pakistan Penal Code 1860 and Code of Criminal Procedure 1898.

[118].Dunn, 1971.

but during the latter part of the 18th century the Islamic criminal justice[119] was replaced by the British.[120]Islamic law in this era was interpreted along the lines of British thinking.[121] This uniformity provided at the cost of imposing rigid Islamic rules but the British acted as if Islam consisted of universal rules negating their diversity.[122] In short their textual approach toward Islam was inadequate. The legal pathology results in to a gap between the 'state law' and 'popular practice' which underline the ineffectiveness of the legal system and presents two systems with different values.[123]

Having once been part of British Empire Pakistan inherited the British Anglo-Saxon legal traditions.[124] Islam in itself does not provide the concept of an Islamic state; it defines the concept of the society.[125] From the very beginning it was the plan of the *ulema* that Islamic law would be the law of land in Pakistan. This was the reason that all the three constitution of Pakistan contained clauses that all the laws of the country must be in accordance with Quran and Sunnah. In other words the controversy between the "traditionalist"[126]and "modernist" even affected[127] the framing of constitution of Pakistan (1947-1956). With the development of national states it becomes immensely important for the

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[119].Islamic legal rules were retained in the Personal status cases involving Muslims. However these rules interpreted by the by British judges or by indigenous judges with British training.

[120].Fisch, 1983.

[121].Liebesny, 1953: 502-3.

[122].Micheal Anderson (1989: 13) criticized their policy in the following words "The presumption that a single set of rules could apply to all persons professing adherence to Islam violated both Islamic theory and South Asian practice. Hasting had subsumed all indigenous legal arrangements under two categories Hindu and Muslim. From the outset this binary categorization was inadequate to contain the diversity of legal life on the subcontinent. Not only did it fail to acknowledge the distinction between Sunni and Shia – and the differences between the schools within each. It also fails to address adequately the practice of many groups that adopted an electric approach to Islam".

[123]. Rudolph, L. & S., 1965.

[124]. See Saeed Ahmad v. Mahmood Ahmad, PLD [1968] Lahore 520 at 524. In this case Justice ANWAR-UL-HAQ, Judge of the Lahore High Court who pronounced the judgment, clearly with this regard submitted that "…as we in this country have inherited the English judicial system and the English concepts of law, both municipal and international, the practice obtaining in England and other Anglo-Saxon countries should be held to prevail in Pakistan as well."

[125]. Engineer, 1980; 1984.

[126]. Like Ahmed Ishtiaq 1987 and Maulana Maududi 1980.

[127]. Fazrul Rahman says that such conditions led to ambiguity in the legislation and is dangerous in its consequences "because it affect the entire concept of 'Islamic law' which is to govern the lives of all citizens". (1971:7).

Muslims to define 'Islam' as the ideology of the state. Such a need can be seen in actions like changing the syllabus during Islamisation. Pakistan has been under a military dictatorship for more than half of its history. Every time when the government changes, dominant ideology changes which in turn result in to different attitudes of the courts[128]. But the era under General Zia-ul-Haq was important. In his rule he promulgated many Islamic laws under presidential orders and these were the first set of 'Islamic' statutes to be incorporated in to a previously mixed legal system of British common law and Muslim personal law. The 8th amendment in the constitution, made in 1985, validates all the laws made during this martial law. They cannot be challenged in any court of law. Thus the period of Islamic revivalism which popularly known as Islamisation started in 1977. Ideological conflicts were common in this era as to the application of criminal law. And Islamic law was interpreted by courts in various ways.

The Islamisation[129] of Criminal laws in Pakistan therefore resulted into miscarriage of justice. This issue will deal with the largescale Islamisation of penal laws in Pakistan that began from 1979. This includes the enactment of major criminal legislations[130]and creation of a Federal Shariat Court[131]. There is a great disagreement as to whether severe punishments under the hadood ordinances are Islamic or un-Islamic and

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[128]. Hoebel, 1965.

[129]See Butti Sultan Butti Ali AI-Muhairi, 'Islamisation and Modernization within the UAE Penal Law: Sharia in the Modern Era', Arab Law Quarterly, 35, 1997. According to Al-Muhairi of 'Islamisation of law' is used in Islamic countries (Islamic states are those whose Constitutions declare it to be Islamic or Muslim) to refer to the official programme of replacing laws of 'western origin' with laws based on 'Islamic' sources. But according to Tahir Wasti in "Islamic Law in Practice: The Application of Qisas and Diyat Law in Pakistan" the term in Pakistan having a wider meaning. In Pakistan it not only means the exclusion of western laws but also tend the institutions to make laws in line with Islamic injunctions.

[130].Through certain presidential decrees regarding the Hadd crimes and the execution of penalty of flogging, in this regard particularly Offences of Zina (Enforcement of Hudood) Ordinance 1979 andOffences of Qazf (enforcement of hudood) 1979. Lahore: Lahore Law Times Publications, n.d.87pp. The decrees are discussed in: Kennedy (1988), Kennedy (1991), and Patel (1986), 36-62.

[131]. Formed under Article 203. This court in place to examine whether the laws of the country being in line with injunctions laid down in Sharia (Holy Quran and the Sunna). Article 203D of the Constitution of Pakistan stipulates that 'the court, at the request of the citizen or the government, must carry out this examination and can rescind any law or provision which it finds repugnant to the injunctions of Islam'.

also the Hadood Ordinances has been inconsistent in the application of hadd[132] punishment, and has not been effective in reducing crime.[133]

Women are especially affected by this Islamisation of law in Pakistan.[134] Women are no longer allowed to appear as witnesses in had cases and the law of evidence makes their testimony worth half a man.[135] Identification of few cases in this area can clearly illustrate the aspect of miscarriage of justice and human rights violations with regard to women. In 1982, fifteen year old Jehan Mina became pregnant as a result of a reported rape but due to lack of for eye witnesses she was convicted of zina because of illegitimate pregnancy.[136]Her child was born in the prison.[137] Again in 1985 a similar type of case evidences the outcry of the inefficiency of the new law. Safia bibi a sixteen year old, nearly blind domestic servant reported that she was repeatedly raped by her employer and his son as a result she got pregnant. When the case went to trial due to lack of evidence, as she was only witness against them, the case was dismissed. Safia at that time was unmarried and pregnant, was charged

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[132]. See ABDUL REHMAN I. DOI, SHARI'AH: THE ISLAMIC LAW 220 (1984). He explained the word had as an Arabic expression which means prevention, restraint or prohibition, and for this reason, this is arestrictive or prohibiting Ordinance or a statute of God concerning the lawful and unlawful things.

[133]. Rubya Mehdi points out that Hadd punishments are merely symbolic, but "their very existence has a negative effect "(p.155). Moreover she clarifies the opposition to this law on the part of modernists and especially women.The latter, as evidenced by the review of the rape and zina punishments, end up with every rough of the Islamic criminal law stick.

[134]. In case of honor crimes this can be seen in the famous school teacher Mukhtara Mai case in Pakistan. In 2002 she was repeatedly gang raped by four men in the village of Meerawalla and then forced to walk home naked after the horrifying ordeal. And the whole of the village witnessed the rape outside the hut while she was screaming for help and mercy. The Mastoi tribal council allegedly ordered the rape for the punishment of a crime committed by her brother; he was accused of having sexual relations with a woman of the higher Mastoi tribe.Deciding that the boy had impugned the honor of the tribe by engaging in sexual relations with its female member, the tribal council ordered that Mai be raped in order to restore its honor. It was later discovered that the accusation against Mai's brother was fabricated by members of the Mastoi tribe in order to cover up their own sodomization of the boy. In 2005 all the accused with the exception of one got acquittal on the basis of lack of evidence. And these acquittals clearly and shockingly against the principles of criminal justice system and fundamental rights enshrined in the constitution of Pakistan, 1973.

[135] It can further be argued that the government also shown an inconsistent approach as regarding to the fact that when to appeal to ijtehad and when apply a strict interpretation of law.

[136]Jehan Mina v. The State, P.L.D. 1983 Fed. Shariat Ct.183 (Pak)

[137] See Rubya Mehdi, The offence of rape in the Islamic law of Pakistan, 18 INT'L J. Soc. & L.19, 26 (1990).

with zina and convicted on this evidence.[138] Short of conviction women have also been held under extended custody on charges of zina when they alleged rape.[139] As an example in July 1992 a women named Shamim, a twenty one year old mother of two children lived in Karachi reported that she was kidnapped and raped by three men. Instead of arresting the perpetrators police arrested her on the charge of zina when her family could not post the fee set for her release. In the custody she reported that she was repeatedly raped by two police officers and one unnamed person in six days.[140] A large number of women have reported these similar custodian rapes.[141] These police action and inaction in rape cases considered as an instrumental element led to miscarriage of justice and human rights granted under the constitution of Pakistan 1973. This also discourages women to report cases.[142]

These set of cases also include the situations in which the perpetrator himself was a police officer and the chances of perusing a case against him was impossible. This can be seen in Shahida Parveen case

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[138] See SafiaBibi v. The State, P.L.D. 1985 Fed. Shariat Ct.120 (Pak) she was sentenced to fifteen lashes, three years imprisonment and a fine. Public outrage led the appellate court to set aside the punishment. See Rashida Patel, SOCIO-ECONOMIC POLITICAL STATUS AND WOMEN AND LAW IN PAKISTAN 25-26 (1991); Ayesha Jalal, THE CONVENIENCE of SUBSERVIENCE: WOMEN AND THE STATE IN PAKISTAN, IN WOMEN, ISLAM AND THE STATE 102 (DenizKandiyoti ed., 1991); Mehdi supra note 25 at 19, 24-26; ShahidRehman Khan, UNDER PAKISTAN'S FORM OF ISLAMIC LAW, RAPE IS A CRIME – FOR THE VICTIMS, L.A. TIMES, 25 MAY 1986, at 27 (reporting bibi case and other similar cases).

[139] See ASIA WATCH AND WOMEN'S RIGHT PROJECT, HUMAN RIGHTS WATCH, and DOUBLE JEOPARDY: POLICE ABUSE OF WOMEN IN PAKISTAN 41-60 (1992).

[140] See AMNESTY INT'L PAKISTAN: TORTURE, DEATHS IN CUSTODY AND EXTRAJUDICIAL EXECUTIONS 11-12 (1993).

[141] Supra note 25, at 27 (1990) citing report by attorney Asma Jahangir of the 15 incidents in which the police rape the women in detention between 1988/89; Seminar Adultery and Fornication in Islamic Jurisprudence: Dimensions and Perspectives, 2 Islamic and Comp. L.Q. 267, 286-87 (1982), Tahir Mahmoud the conveyer noting that the "case of rape…..in private (include that committed by the policemen) are alarming on an increase in the [Indo-Pak] subcontinent."

[142] See Amnesty Int'l, Pakistan the pattern persists: Deaths in Custody, Extrajudicial executions and Disappearance under the PPP Government 35 (1995) (reporting an incident from January 17, 1994, gang rape of five women, stating that the police pressured the women to file the case for robbery rather than of rape and conceal it; Supra note 27 at 11-12 (citing Shamim and similar ImamatKhatoon case) indicated that in 1992 2000 women were in the jail awaiting for the trial of Zina. Also see supra note 26, at 69 it has been indicated that many women acquitted after long trials.

1994.[143] Although the examination report evidenced the fact that she was raped by more than one person but even then, police refused to file their case.[144] Cases such as these resulted from the natural and unfortunate application[145] of Zina Ordinance and widely covered by western media.[146] The issues are also a primary topic in women and human rights globally,[147] and stir up an expected share of frustration, anger, defensiveness, and arrogance from all sides. The questions over here are that, firstly, whether the Zina Ordinance serve the fundamental purpose of justice and, secondly, whether they accurately articulate the Islamic law on rape? It follows that by including other offenses within its ambit, such as rape, the Zina Ordinances had exceeded Islamic law. The threat of large scale demonstrations against any government willing to contemplate the repeal of the Zina Ordinance is, however, not the only reason for its continued application. An additional, powerful reason behind the resilience of the Zina Ordinance is rooted in the nature and legitimacy of the state of Pakistan itself.[148]

The women movements stated to take the issues at peak level. The women's movement's criticism of the Hudood Ordinances found support from an unlikely quarter, namely the Council of Islamic Ideology[149]. The

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[143] In which two police officers broke into the house locked the children in a separate room and rape their mother.

[144] Supra note 30 PATTERN PERSIST'S article at 14.

[145] The change of membership of the Federal Shariat Court has not prevented it from exercising a moderating influence on the application of the Islamic criminal laws. This is one of the conclusions of a study of the decisions of the Federal Shariat Court. [Kennedy (1988)].

[146] See e.g. Mary Curtius, Report Blasts Global Abuse of Women's Rights; 'Conflict Zone' Governments Found to be Worst Offenders, BOSTON GLOBE, Mar. 8, 1994 at 2; Mark Fineman, Pakistan Women Fear New Islamic law May Blunt Struggle For Rights, L.A. TIMES, July 2, 1988, at pt.1, 5.

[147] See e.g. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES for 1993 1370, 1382 (1994); Amnesty Int'l, Amnesty International Report 1994 232-233 (1994).

[148] A complete repeal of the Zina Ordinance would be tantamount to the removal of an Islamic law from the legal system, thus violating the constitutional duty to enable all Muslims to order their lives individually and collectively in accordance with Islam. See CONST. OF THE ISLAMIC REPUBLIC OF PAK. Arts. 227-3, http://www.pakistani.org/pakistan/constitution/part9.html

[149] Initially called the "Islamic Advisory Council," it became the Council of Islamic Ideology under Article 228 of the 1973 Constitution. Article 230 defines the functions of the Islamic Council as follows: To make recommendations to the National Parliament and the Provincial Assemblies "as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Quran and Sunnah," to advise the legislature and the executive on the Islamic vires of any

first serious reform initiated by General Pervez Musharraf. At the end of 2006, he signed into law the Protection of Women (Criminal Laws Amendment) Act.[150] The reform does not abolish the ordinance therefore short fall of the human rights community demands but does much to address the injustices and hardships caused by the old Zina ordinance. Rape is therefore no longer governed by the Zina Ordinance or by any other Islamic criminal law. There is little doubt that much needs to be done in order to make Pakistani law responsive to the needs of women.[151] The Zina Ordinance has now been reduced to a largely symbolic measure[152], unlikely to wreak havoc with women's lives. Removing this last vestige of Islamic law from the area of sexual offenses would be difficult: Only a new constitution could free Pakistan from the obligation to have a legal system which is in accordance with the injunctions of Islam.

And lastly the misuse of laws concerning Qisas[153], Diyat and Zina offences frequently resulted in cases of miscarriage of justice. The concept has its roots in Sharia and can be traced from the injunctions in Quran in

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proposed legislation, to make recommendations as to the measure for bringing existing laws into conformity with Islam, and finally to "compile in a suitable form, for the guidance of [Parliament] and the Provincial Assemblies, such Injunctions of Islam as can be given legislative effect."

[150] Protection of Women (Criminal Laws Amendment) Act (2006) (Pak.).Writing in 2005, Rudolph Peters concludes a chapter on Pakistan's Islamic criminal laws as follows: [T]he Pakistani way of enforcing Islamic criminal law has been careful and controlled, except with regard to the blasphemy laws directed against the Ahmadiyya sect. Mutilating punishments and death by stoning have not been inflicted; only flogging was frequently practiced....We must conclude [t]hat in Pakistan, as in Libya, the introduction of the hudood had a highly symbolic character and did not result in a drastic change of the penal system. [RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY 160 (2005)]

[151] Nevertheless, the Protection of Women (Criminal Laws Amendment) Act cannot be dismissed as a mere window dressing undertaken to satisfy a Western audience.

[152] But see JAHANGIR, Asma (2006) What the Protection of Women Act does and what is left undone, In *State of Human Rights in 2006*, Human Rights Commission of Pakistan, Lahore, Pakistan. In which she argued that Protection of Women Act 2006 is an important step in minimizing the injustice done by General Zia's Islamisation drive. However, the Act retains the overall framework introduced by Zia. And also JUSTICE MAJIDA RIZVI, Interview July 2008, *Herald*. In which he points the three major shortcomings in the Protection of the Women Act of 2006.

[153] See M.CHERIF BASSIOUNI, Quesas Crimes in CHERIF BASSIOUNI, ED., THE ISLAMIC CRIMINAL JUSTICE SYSTEM 203 (1982) The word derived from an Arabic word qassa meaning 'he cut or he followed his track in pursuit, and it comes therefore to mean the 'law of equality' or equitable retaliation for the murder already committed'.

Surah 5:45 and Surah 4:92. The Arabic term Qisas, as used in the Quran, is translated as retaliation[154] or equality. It can be described as "equality in retaliation". It is derived from its verb root Qisas, which means: he followed, after his track or footsteps. Another derivative is Qisas, which means storyteller-one who follows the track of past generations. In Islamic law the expression retaliation is termed Qisas because it follows the footsteps of the offender, perpetrates on him an injury, as a punishment, exactly equal to the injury, which he inflicted upon his victim, but no more.[155] In Islamic and Arab traditions Diyat (blood money) is the fine paid by the killer or his family or clan to the family or the clan of the victim. In Quran and Hadith it has been directed to pay Diyat both for intentional and unintentional murders. Although the Quran specifies the principle of Qisas but prescribe that one should seek compensation rather than retaliation. Although in pre-Islamic Arabia Diyat paid in any other form rather than cash, but after the advent of Islam and in Sharia it must be paid in cash.[156] This is to avoid possible fraud on the part of criminal. Pakistan had proclaimed itself an Islamic State after the formation of Sharia Courts in 1978.[157] These courts run parallel to the existing Supreme Court of Pakistan and Federal Shariah Courts this is to ensure the fact that no law should be contrary to Islam.[158] After the formation of the Shariah Courts, “various laws were challenged on the basis of their conformity with the Koran and Sunnah, including those parts of the Penal Code

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[154]Pickthall, Mamaduke, The Meaning of the Glorious Quran: An Explanatory Translation, London, 1930.

[155] There are two types of qisas crimes.The first is the penalty inflicted for intentional homicide, while the second refers to the penalty for inflicting intentional personal injury. The later form is sometimes referred to as qawad. See MOHAMED S. ELAWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 71 (American Trust Publications 1982). However, for the purposes of this research, which focuses mainly on the penalties available for intentional wounding, the term qisas will be used to refer to both types of crimes and their respective punishments.

[156] There is also a debate in Sunni schools as to the amount of Diyat in case of Dhimmi (non-Muslims). Under Shafi school of law it must be 1/3rd of a Muslim and under Maliki school it must be ½ of a Muslim. But noticeable point over here is that this position is not retained by the Ordinance.

[157] Are Knudsen, License to Kill: Honour Killings in Pakistan 10 (Chre Michelson Institute Development Studies and Human Rights, Working Paper No. 1, 2004), available at
http://www.cmi.no/publications/file/?1737=license-to-kill-honour-killings-in-pakistan

[158] See also ASIA PACIFIC FORUM ON WOMEN, LAW AND DEVELOPMENT [hereafter APWLD], An Asia Pacific Regional Overview on Harmful Traditional and Cultural Practices related to Violence against Women and Successful Strategies to eliminate such Practices, at 5(2005), available at
www.unescap.org/esid/GAD/Events/EGM-VAW2007/Background%20Papers/Regional%20Overview%20on%20HTCP.pdf

dealing with murder and bodily hurt."[159] Even though Islam do not allow murder (including honour killing) or the false accusation of adultery, the long held custom of killing women for honour combined with Islam's "male-dominated interpretations of concepts like female chastity and male authority reinforce[d] an Islamic culture of male dominance."[160] This dominance also having influence on the justice at lower court level mainly consisted of men.[161]

Hence, following the Supreme Court Shariat Appellate Bench's 1989 decision, Federation of Pakistan v. Gul Hassan, where the court found that certain sections of the Pakistan Penal Code (PPC)[162] and the Criminal Procedure Code (CrPC) concerning murder and bodily hurt contrary to Islam, the Qisas and Diyat Ordinance was introduced.[163] Here it is sensible to point out the fact that in English law there is a difference between civil wrong and criminal wrong but "Qisas and Diyat Ordinances essentially place the choice of prosecution wholly in the hands of the victim or her heirs, rather than the government"[164]. The passing of the Ordinance also affect the handling of the honour killings by the judiciary because most of the people involved in the murder were their heirs. Furthermore, the Qisas and Diyat Ordinance encompassed with exceptions and offense distinctions, particularly when it is known that the offender was a family member. As a result even now, the Ordinance is criticized within "Pakistani legal circles and in the press for being extremely confusing"[165]. Hence, the ordinance gives a great influence to the honour crimes by providing the accused a way out. Human Rights Watch defines honour crimes as "acts of violence, usually murder, committed by male family members against female family members who are perceived to have brought dishonour upon the family".[166] Women under this serve as a

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[159]Sohail Akbar Warraich, 'Honour Killings' and the Law in Pakistan (Lynn Welchman& Sara Hossain eds., Zed Books 2005) at 83-84.

[160]Mazna Hussain, "Take My Riches, Give Me Justice": A Contextual Analysis of Pakistan's Honor Crimes Legislation, 29 HARV. J. L. & GENDER 223, 233 (2006) at 237.

[161] Supra note 43, Knudsen, at 10. They often reached discriminatory verdicts that punished women while absolving men in situations where murder victims were accused of offenses like adultery or promiscuity.

[162] Chapter 16 related to offences affecting human body.

[163] See Federation of Pakistan v. Gul Hasan Khan, P.L.D. 1989 SC 633.

[164] Supra note 46, Hussain, at 232.

[165] See HUMAN RIGHTS WATCH, CRIME OR CUSTOM?VIOLENCE AGAINST WOMEN IN PAKISTAN (1999), available at http://www.hrw.org/reports/1999/pakistan/.

[166] Human Rights Watch, Integration of the Human Rights of Women and the Gender Perspective: Violence against Women and "Honor" Crimes, Intervention Before the 57th

vessel of honour for their guardians however they do not possess honour of their own.[167] A woman is not in the sole control of her honour but it is a combination of community norms and societal policing schemes. Typically, a close family member executes the honour killing. According to the Human Rights Commission of Pakistan, 1235 of the 1339 individuals accused of honour killings between 1998 and 2002 were members of the victim's family: 462 brothers, 395 husbands, 217 relatives, 103 fathers, and 58 sons.[168] Common causes of honour crimes are the accusations of adultery or unchaste behaviour, termed Zina offences. The study start from April 1999, Samia Sarwar was shot and killed in her attorney's office as she was filing for divorce from her abusive husband.[169] On several occasions court of the view that honour killers are murderers and violate the fundamental rights enshrined in art.9 of the Constitution of Pakistan.[170] The ordinance in short left the murderers to honour killing without the fear of punishment.

The 'modernist'[171] sees the need for codifying Islamic criminal law in light of modern day developments, "[o]otherwise Islamic law is just a mockery as we know from the experience of Pakistan"[172]. This issue therefore discusses the need of reforms particularly in the area of remaining part of Zina Ordinance and role of Diyat in criminal prosecutions by the State.Many reforms in light of this were instigated to cure these problems especially in the era of General Pervez Musharraf through Criminal (Amendment) Act 2005. Under section 311[173] of

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Session of the U.N. Commission on Human Rights (Apr. 6, 2001), available at http://www.hrw.org/press/2001/04/unoral 12_0405.htm.

[167]RadhikaCoomaraswamy, Violence Against Women and 'Crimes of Honour', Preface to HONOUR, at xi, xi (Lynn Welchman& Sara Hossain eds., Zed Books 2005).

[168] U.N. Econ. & Soc. Council[hereafter ECOSOC], Commission on Human Rights, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, E/CN.4/2005/NGO/12, at 3 (Jan. 27, 2005) (written statement submitted by the Asian Indigenous and Tribal Peoples Network, a NGO in special consultative status), available at http://aitpn.org/UN/61st-G0510559.pdf.

[169] The murder was perpetrated by her own parents, who felt that she had tarnished their honor by seeking a divorce, even though they knew that her husband had violently abused her throughout their marriage. [Yolanda Asamoah-Wade, Women's Human Rights and "Honor Killings" in Islamic Cultures, 8 BUFF. WOMEN'S L.J. 21, 21-22 (1999)].

[170] Muhammad Akram Khan V. The State, P.L.J. 2001 SC 29.

[171] Such as Rubya Mehdi.

[172] P.155 Rubya Mehdi

[173] Notwithstanding anything in s.309 or s.310, where all the wali do not waive or compound the right of Qisas court may having regard to the facts and circumstances of the case, punish an offender with death or imprisonment for life or for a term of imprisonment up to 14 years as tazir.

Pakistan Penal code the Criminal Amendment 2005 make the discretionary term of imprisonment not less than 10 years. Moreover a proviso was added in 2005 in s.302 clause (c) of PPC which make honour killing a crime and tried under clause (a) and (b) of the same section.[174] Although the statutory regime seem to be very effective but it does not correspond to the present situations in Pakistan. Recently in Raymond Davies case Diyat was accepted by the family and he was released.[175] Again the Shahzeb case brings the PPC provisions in limelight. The accused was pardoned by the family in the name of Allah and result into aggressive public debate on the pro and cons of this law.[176] PPC make honour killing a crime but the recent statistics not in line with this development.[177] In the light of above it can be concluded that Zina Ordinance and Qisas and Diyat Ordinance abolished in its entirety to have a uniform criminal justice system. And secondly S.311[178] and S.302 effectively enforced in the light of justice by the courts of law.

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[174] Even if the accused acquitted under the exceptions of s.306, 307 and 308 of PPC court have the discretion under s.311 to impose discretionary term of years up to 14 years and not less than 10 years.

[175] Several write ups appeared on it in national and international media.

[176] The offender is still in jail and tried under S.7A of Anti-Terrorism Act. But the noticeable point over here is that their continuous appeals to transfer their case (see: http://www.dawn.com/news/1050830/sc-rejects-jatois-appeal-for-transfer-of-shahzeb-murder-case) from Terrorism to PPC can arguably see as an evidence of a loophole or a leeway in the present PPC laws.

[177] See http://tribune.com.pk/story/309279/675-honour-killing-victims-in-pakistan-hrcp/. According to Human Rights Commission Pakistan 2010 710 women were killed in the name of honour and 960 by Amnesty international see http://www.amnesty.org/en/region/pakistan/report-2010. In its annual report, the Human Rights Commission of Pakistan said at least 943 women were killed in 2011 for damaging their family name (http://www.telegraph.co.uk/news/worldnews/asia/pakistan/9160515/1000-Pakistani-women-and-girls-honour-killing-victims.html). The number marks an increase of more than 100 on 2010. In 2012 the number goes up to 913 honor killings in Pakistan (http://hrcp-web.org/hrcpweb/wp-content/pdf/AR2012.pdf).

[178] Application of s.311 of PPC with regard to Diyat see http://dawn.com/news/1043236/pros-and-cons-of-qisas-and-diyat-law

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CAN IHSAN BE DEVELOPED AS A LEGAL PRINCIPAL FOR ESTABLISHING NEW ERA OF HUMAN RIGHTS?

By

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ABSTRACT

The concept of Ihsan has been studied in Islamic literature in two contexts, tassuwaff and morality. Although, it is related to the core of heart form where all the virtue emerges. However, the pure linking of the term "*Ishan*" with the *tassuwu*f departs it form rights perspective which is a complete form of Islam. As we see in the *tassuwuf* history, the *mutasuwufeen* isolated from the society and they remained cut off from the society to solve the problems facing in the social, economic and political structure. It is obvious form the prophet's tradition that the *Ihsan* is used in the matter of right. The angel Gabriel asked the prophet, what is Ihsan? The prophet replied: "you worship Allah with this belief that you are seeing Allah, if this belief does not exist, then you must have confirmed belief that Allah is seeing you "The worship of Allah is a matter of right. Allah has rights over men thatthey worship him and not worship other than Allah. Likewise, people have rights among each other's. So they are bound to dispense with rights of Allah and rights of others with strong belief that Allah is overseeing their performing of duties and rights, if they don't do so, Allah is fully overseeing them, and he is strongly able to punish them against the infringement of rights. That's why the term "*Ihasn*" has been used in the Quran in rights perspective. This Article will assess the legal worth of principle of Ihasn in addition to its usage as a moral principle in Islamic literature.

Keywords: *Ihsan, Tassuwuf, Morality, Human Righs,*

INTRODUCTION

The concept of Ihsan has been studied in Islamic literature in two contexts, tassuwaff and morality. Although, it is related to the core of heart form where all the virtue emerges. However, the pure linking of the term "*Ishan*" with the *tassuwuf* departs it form rights perspective which isa complete form of Islam. As we see in the *tassuwuf* history, the *mutasuwufeen* isolated form the society and they remained cut off from the society to solve the problems facing in the social, economic and political structure. It is obvious form the prophet's tradition that the *Ihsan* is used in the matter of right. The angel Gabriel asked the prophet, what is Ihsan? The prophet replied:"you worship Allah with this belief that you are seeing Allah, if this belief does not exist, then you must have confirmed belief that Allah is seeing you"[179]

The worship of Allah is a matter of right. Allah has rights over men thatthey worship him and not worship other than Allah. Likewise, people have rights among each other's. So they are bound to dispense with rights of Allah and rights of others with strong belief that Allah is overseeing their performing of duties and rights, if they don't do so, Allah is fully overseeing them, and he is strongly able to punish them against the infringement of rights. That's why the term "*Ihasn*" has been used in the Quran in rights perspective. This Article will assess the legal worth of principle of Ihasn in addition to its usage as a moral principle in Islamic literature.

ى رَبُّكَ اَلاَّ تَعْبُدُوْا اِلاَّ اِيَّاهُ وَبِالْوَالِدَيْنِ اِحْسَانًا[180]

(And your Allah has decreed that you worship none but Him and that you be dutiful to your parents.)

الطَّلَاقُ مَرَّتَانِ فَاِمْسَاكٌ بِمَعْرُوْفٍ اَوْ تَسْرِيْحٌ بِاِحْسَانٍ [181]

(The divorce is twice, after that, either you retain her on reasonable terms or release her with kindness.)

In the above mentioned both verses, the term "Ihsan" is used in rights perspective. In the first verse, Ihsan is a right of parent and in the second verse; Ihsan is the right of wife. Taking the term" *Ihsan*" in purely isolation sense as it is linked with tassuwuf, it will not give the sense of right. By doing so, the people totally to be sit in isolation from the rights context as it has been happened in the *tassuwuf* history.

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[179].Muslim 2 : 4
[180].Qur'an 17:23
[181] Al-Baqarah 2:229

Imam Samarqandi explains *Ihsan* in rights, duties and obligations perspective. He says that Ihsan is "performing duties, obligations and rights with sincerity for Allah deepen in the heart of a person"[182]

Secondly, the term "Ihasn"is used in moral perspective in Islamic literature. In Islamic literature, Ihsan morally means that people do something good in favor of others for which they are not bound to do. It means that *Ihsan* is their moral duty. It is an additional thing over rights. If a man does *ihsan* in favor of someone. He must be thankful to the person doing *Ihsan* because he is doing an additional duty for which he was not bound to do. In this sense, *Ihsan* is a thing very additional to right. If we take *Ihsan* just in a moral perspective or a very additional thing to right or a moral right, then what are the basis other than ihsan behind the rights of weak class of people such as the rights of women, the rights of children and the rights of the persons with disabilities. Why a quota system legally reserved in employment for disabled persons, if ihsan is just a moral duty of society to provide disabled persons with jobs. Why do disabled persons demand their jobs as a legal right? What is the legislative ground behind the legalization of the rights of disabled persons in the Quran and sunnah.

Allah Almighty says in the Quran:
[183] اِنَّ اللّٰہَ یَاْمُرُ بِالْعَدْلِ وَ الْاِحْسَانِ

(Verily, Allah orders to do Al-Adl and Al- Ihsan.)

Here in this verse Allah orders people to do Al-Adl and Al-Ihsan. For performing these two acts, there would be two situations: Firstly, to do Al-Adl and Al –Ihsan simultaneously. Secondly, to do Al Adl and Al-ihsan separately. An example to understand first situation is that someone pays someone Rs. 15,000 as a wage payment for the services he rendered. It is Al–Adl and if he pays Rs.5000 more as an extra amount over the wages, it is Al-Ihsan. In this situation, Al–Adl and Al–Ihsan are being done simultaneously and Al-Ihsan is used in moral sense.

Sayyad Abual ala modudi elaborates Al-Ihsan as a great morality;

> "To give someone more or extra over his right and remained safely agreed and contended over receiving less than his right is an additional thing over Al-Adl that is called Al-Ihsan. Al-Ihsan has greater Importance than Al-Adl in the society. If Al-Adl is a

[182]Samarqandi,Nasar ibn Muhammad ibn Ahmad, *Tafseer Samarqandi baharululoom*,Darulkutab al- ilmia, Berut.V:2 P:241
[183].An-Nahl 16:90

> foundation of society, Al-Ihsan is a beauty and complement of the society. Al-Adl saves the society from injustice; Al-Ihsan fills in the society the loving sweet. No society can be existed only on the basis that every man in the society all the way measures what he receives. All the time, he plans how to receive his right and ignores the right of other due to him. He receives more than his right and gives other less than his right".[184]

The example in second situation, it is an Al-Adl that all the people must compete on open merit for getting jobs and employment. No special seats can be reserved for any class of people. Disabled persons are unable to compete on open merit because of their weakness in their bodies. According to Al–Adl their employment needs cannot be fulfilled. AL–Adl is unable to help out the disabled persons in providing them with jobs. By acting upon Al-Adl, they would be left back in race of life. Now what should to do? By strictly sticking to Al-Adl, should they be left unhelpful? This difficult situation has been handled out in this verse, as the disabled persons should be provided with jobs and employment by reserving their seats from the open merit on the basis of Al-Ihsan. The rule extracting from this verse is "whatever cannot be given by Al-Adl, it should be given by Al-Ihsan" here in this case, Al-Ihsan can be used as a theory in legal context.

As a state law or international labor law consider the allowances as a separate part of salary and wages.

> "wages" means all remuneration, capable of being expressed in terms of money, which would if the terms of the contract of employment, express or implied, were fulfilled, be payable, whether conditionally upon the regular attendance, good work or conduct or other behavior of the person employed, or otherwise, to a person employed in respect of his employment or of work done in such employment, and includes any bonus or other additional rem- unration of the nature aforesaid which would be so payable and any sum payable to such person by reason of the termination of his employment, but does not include___ (a) the value of any house-accommodation, supply of light, water, medical attendance or other amenity, or of any service excluded by general or special order of the 4 * * * 5[Provincial Government]; (b) any contribution paid by the employer to any pension fund or provident fund ; (c) any travelling allowance or

[184]Modudi, abual ala, Sayyad. *Tafheemul Quran*, V:2 P:565

the value of any travelling concession ; (d) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment ; or (e) any gratuity payable on discharge.[185]

If Islamic jurists try to look out the basis for the allowances as a separate part of salary or wages of a person in the Quran. They may find that the allowances as a separate part of wages fall within the context of Al-Ihsan in the Quran.

[186] اِنَّ اللهَ يَاْمُرُ بِالْعَدْلِ وَ الاِحْسَانِ

(Verily, Allah orders to do Al-Adl and Al- Ihsan.)

The wages are the prices for the services the employee rendered, therefor, these are given on the basis of Al-Adl and allowances, an extra amount over wages for any additional need of an employee that are given on the basis of Al-Ihsan.

Women are physically weak in proportionate to the men's physical structure. Therefore, Islam grants them rights over the men. The children's rights exist because of their childhood weakness. They need too much focused attention of their elders and states toward their growth. Disabled people have also rights because of their disability which is a physical weakness and an obstacle in their normal living. Now, the question arises, is their weakness a reason for granting them rights? Weakness on the basis of Al-Ihsan(if we take it in merely moral sense) can compel someone to give something to them. Weakness of a person or a class of persons may attract someone to give them something or not. It is totally depending upon kindness of a person, weather he gives or not. It cannot compel him to give. So the right of weak class of people does not fall under the heading of *ihasn* taken merely in moral sense. Inevitably, the concept of Al-Ihsan should be taken in the legal sense in order to assign the rights to weak class of people.

The Holy Quran itself categorizes the Ihsan in moral and legal domain. The Ihsan with mother is a moral and Ihsan with wife is legal. The mother cannot go to court to get a decree for maintenance and expenses demanding from her son because she has a moral Ihsan (moral right) while, on the other hand the wife can go to court to get a decree for maintenance and expenses demanding from her husband because Ihsan assists her in legal sense.

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[185].Seethe Payment of Wages Act, 1936 , Section 2(Definitions), Sub Clause VI

[186] An-Nahl 16:90

The Sunnah establishes legal quality of Ihsan as establishing the rights of week class of people. The Holy Prophet ﷺdivided the khaiber lands into 36 parts, of which he set aside 18 parts for collective benefits and requirements of the Muslims and distributed the remaining 18 parts among the army.[187] In this case what rule was established? Sayyad abu ala modudi says: "actually here in this way the Prophet ﷺ established a rule of Ihsan forthe ruler of the Muslims whenever a territory of non-Muslims comes under his control by fighting, he may let it kept with baitul mal to produce its fruits and benefits to the poor class of people on the basis of Ihsan, as the Holy Prophetﷺ retained 18 parts of khaiber lands with baitul mal just to distribute its benefits to the poor class of people"[188]

Now, we see how the rights of week class of people have been established on the basis of the *Ihsan* uring the regime of the caliph Umar. It was the time when many countries were annexed to Islam, the Companions of the prophetﷺ were faced with the problem what should they do with the lands of Iraq and Syria conquered by them? Should these lands be considered in the nature of ghanimah or fai? After the conquest of Egypt, Zubair demanded distribution of the whole land of Egypt just as the Holy Prophetﷺ had distributed the khaiber's lands. About the conquered lands of Syria and Iraq. Bilal insisted on the distribution of all the lands among the fighting forces just as the spoils are distributed. On the other hand, 'Ali gave opinion to leave these lands in possession of the peasants so that they continue to remain a source of income for the Muslins. Muadh bin jabal said: If you distributed these lands, these will pass into the hands of those few people, who have conquered them. Then when these people pass way and their properties pass on to their heirs and there is left only one woman or only one man from among them, nothing might remain for the future generation to meet their needs and even to meet expenses of safeguarding the frontiers of the Islamic state. Therefore, you should so settle things that the interests both of the present and of the future generations are equally safeguarded. In the light of the companion's opinion Umar calculated and found that if the lands of 'Iraq were distributed, each individual would receive two or three peasants on the average as his share. Thereupon he arrived at the judicious opinion that those lands should not be distributed. Thus, the reply that he gave to those who demanded their distribution was as follows: Do you want that for the people who come afterwards there should remain nothing?[189]

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[187] Abu dawood

[188] Abul ala, modudi, Sayyad, *Tafheemulquran*, V:5 P:398

[189] Yaqoob ibn Ibraheem, Abu Yosuf. Kitab ul khiraj.

He called on a meeting of the companions and said to them;

"I have given you this trouble so that you may join me in shouldering the trust that has been put in me for governing your affairs. I am one of you, and you are the people who affirm the truth today. Every one of you has the option to agree to or differ from what I say. I do not wish that you should follow my desire. You have the Book of Allah, which states the whole truth. By God, if I have said something which I want to enforce. I have no object in view except the truth. You have heard those who think that I am being unjust to them and want to deprive them of their rights, whereas I seek Allah's refuge that I should commit an injustice. It would be vicious on my part if I withheld from them something which actually belonged to them and gave it to another. But I can see that no other land after these conquered lands is going to fall. Allah has given the lands of the Persians and their peasants in our possession. I have distributed the booty taken by our armies among them after the deduction of the khums (one fifth), and I am hesitating to distribute the rest which yet remains. But as for the lands, my opinion is that I should not distribute them and their peasants, but should levy revenue on the lands and jizyah on the peasants, which they should always pay, and this should be the fai for the common Muslims and their weak class of people and the armies of today and for the generations yet to come".

The debate went on for two or three days. The companions remained in discussion with the caliph Umer, but nothing could be decided. At last, Umer rose and said: I have found an argument in the Book of Allah, which is decisive in this manner. Then, he recited the following verse of Surah Al-Hashr,

وَ الَّذِيْنَ جَاءُوْ مِنۢ بَعْدِهِمْ[190]----------

"The people of this day only are not entitled to receive a share in these lands bestowed by Allah, but Allah has joined with them also those people who will come after them."

After recitation of the verses from the surah Al-Hashr(6-10) the caliph Umar said to the companions;

"Then, how can it be that we should distribute the fai lands which are meant for all"?

Actually, all this was the process of establishing rights of weak class of people on the basis of*Ihsan*.

[190] Al-Hashr 59:09

The motive and fervor were the kindness and sentiments of mercies(*Ihsan*) for the weak class of people in the heart of caliph Umar which forced him to remain in the long discussion and consultation with the companions and ultimately, he succeeded in establishing the rights of the weak class of the people.

The concept of *Ihsan* can also be studied in the English legal system. In the Anglo- Saxon times, as well as in the early days of the development of common law, justice was administered by local Courts, presided over by laymen, who owing to their ignorance of legal principles, had to depend blindly on precedents. They were thus incapable of coping with the progress of the nation. The judges instead of moving with the progress of the people, preferred to remain where their ancestors were, and opposed any attempt to introduce any new juristic idea.[191]

There was, moreover, no action of ejectment. The lack of remedies was felt chiefly in the class of personal actions. Torts were without any legal remedy, unless accompanied by violence. The judgment, given in favor of the plaintiff, was a recovery of the land, or a recovery of the chattels, or a recovery of a sum of money. There was no room for specific performance, injunction, appointment of receiver, or such other complete relief. At common law, there were a fixed number of forms and actions. A suitor could expect relief only if he could come in within any of these forms. The progress of society and civilization necessitated the recognition of new rights and remedies, for which a more elastic system was required. This led to the introduction of a separate jurisdiction for Equity. Lord Talbot summed up the relation between law and equity nicely; "equity is not part of the law, but a moral virtue, which qualifies moderates and reforms the vigor, hardness and edge of the law; and is a universal truth"[192] Equity is thus supplementary law. The Court of Chancery supplemented the Common law Courts, in three ways (i) by creating new rights, e.g., the right to enforce a trust. (ii) By inventing new remedies, e.g. specific performance of contracts, and injunctions to restrain or stay. (iii) By adopting a 'new procedure *e.g.* compelling the defendant to give evidence, etc.[193]

In the days of Edward 1, there were three great Courts in existence; the Court of king's Bench, the Court of Common Pleas and the Court of Exchequer. Of these three courts, the Exchequer Court was not only a

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[191]Naveed, Abbas, *Principles of Equity*, Punjab law book house, Ed 2018,P:6-7
[192]Dudley v. Dulley (1705) 24 E.R. 118]
[193] B.M Gandhi, Equity, *Trust Specific Relief ACT*, Kausar Brothers, P:9-10

Court of law, but was also the Secretariat Department of the Government called the Chancery. The head of the Chancery was the Chancellor who was what may be called the king's Secretary of State for all departments, at that time he was not a Judge, but had a close connection with the administration of justice. The Chancellor came to be more directly connected with the administration of justice. From the earliest times, the king, who was conceived to be the foundation of justice, had an indefinite jurisdiction in extra ordinary cases. When a person did not expect a fair and impartial trial from the ordinary Tribunals, or where the law Courts were incompetent to grant relief, the only course open to the aggrieved party was to petition to the king, who decided the case with the help of his council. Afterwards, when, from the pressure of affairs of State, as well as from the large number of such petitions, it became inconvenient for the king personally to exercise this jurisdiction which was called "the prerogative of grace"the work of disposition of such petitions dispatched to the Chancellor, who was not only what may be called the king's Prime Minister, but was also a very learned member of the council. The Chancellor decided such cases, not according to the technicalities of the Common law, but according to justice, equity and good conscience.[194]

Here having briefly studied the development of legal history in England, we are seeing that common law was unable to provide the people with complete relief. Therefore, they had to recourse to the king for getting relief. The king had no basis for granting them relief other than equity and good conscience that is in the words of Lord Talbot "a high moral virtue" that can in comparative be seen as Al-*Ihsan* in Islamic law. The jurisdiction of the king for granting relief was "the prerogative of grace" that is *Ihsan* of the king for which he was not bound to grant but he did so as a grace(*Ihsan*) over his nation. As the equity introduced new rights and remedies, likewise the *Ihsan* in Islamic law could be basis for introducing and establishing new rights and remedies extending to somewhat from morality into legality.

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[194]Snell's *Principles of Equity*, Ed, 27th P:6

IMPLEMENTATION OF ILO WAGES CONVENTIONS IN PAKISTAN

By

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ABSTRACT

This article views and assesses the implementation of ILO wages conventions in Pakistan. Before going into core discussion, two things are ascertained. First, the origin, nature and establishment of international Labor organization as it is fundamental source of Labor laws in the world. Second; the impact of ILO on the development of Labor laws in Pakistan. ILO has passed proximately 8 basic wages conventions. It is particularly viewed in this article to what extent these conventions are complied with in Pakistan. As there are so many evidences from the reports of ILO committee of experts that ILO wages conventions have not been complied with in ratifying states. This situation is same with the Pakistan. Wages have not been specified and paid as up to the ILO wages conventions. In order to prove this statement, several quotations have been cited from the HRCP's reports. The quotations from the reports of expert's committee of ILO have also been given to evidence it. The wages of home based women workers have also been discussed. ILO reported that those women and children who are working in people's homes in Pakistan are hidden workers. They are not paid their wages as up to the ILO wages conventions and have not been given legal benefits attached to their job and salaries under the Labor laws. Pakistan has yet to ratify the ILO convention 177 on home based workers. Likewise, there is a large number of Pakistanis who migrate from Pakistan to other countries in search of jobs. The reason behind it that ILO wages conventions and standards have not been complied with in Pakistan. The Labourers and employees are paid wages unstandardized at the minimum wages conventions of the ILO.

Keywords: international Labor organizations, Labour, wages, conventions, implementation, Pakistan.

This article views and assesses the implementation of ILO wages conventions in Pakistan. Before going into core discussion, it is necessary to ascertain two things; first; the origin, nature and establishment of international Labour organization as it is fundamental source of Labour laws in the world. Second; the impact of ILO on the development of Labour laws in Pakistan.

INTRODUCTION

In 1919, A Labor commission detailed in Paris through a peace dialogue among League of Nations and this commission proposed to establish an international Labor organization, the responsibility of which is to settle down the Labor disputes and issues. Therefore, on the recommendations of the Labor commission, in 1919, the ILO appeared as a world Labor forum to structure internationally Labor policies, conventions and recommendations.

Dr. Werner Sengenberger[195] Writes down about the purpose of international Labour organization;

The International Labor Organization (ILO) was founded in 1919 as part of the Treaty of Versailles. It is approaching its centenary. In 1946, it became the first specialized agency of the United Nations. The ILO embodies a vision of universal, humane conditions of Labor to attain social justice and peace among nations. The contemporary expression of this vision is the Decent Work Agenda.[196]

International Labour organization has a history of one hundred years. It comprises three characters; governments, employers and employees.[197]In 1946,ILO has become a constituent unit of united Nations. The basic function of ILO is to protect the rights of Labourers and maintain international Labour standards. Until now, ILO has passed 189 conventions and 202 recommendations, which have been ratified by 185 states.[198]

What are basic principles of ILO? Chandra Roy writes about these principles.

The founding documents of the ILO included a Charter of Labour during the peace Treaty of Versailles based on the following principles. Abolition of Child Labour, Adequate wages, Equality of treatment, Equal

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[195].Dr. Werner sengenberger has been Director for ILO employment strategy department, Geneva. He remained also director for ILO international institute for Labor studies. In 2001 he retired from directorship of these institutions. after retirement, he joined UN Labour agencies as adviser.

[196]. Sengenberger Werner, *The International Labour Organization*, Friedrich Ebert Stiftung Ed, 2012, p:9

[197]. Missions and Objectives, ILO, http://www.ilo.org/global/about-the-ilo/ mission-and-objectives/lang--en/index.htm

[198]. Alphabetical List of ILO Member Countries, ILO, http://www.ilo.org/ public/english/standards/relm/country/htm (last time Visited: 02/01/2019)

pay, Inspection systems, Labour should not be seen merely as a commodity or an article, of commerce, Reasonable working hours, Right of association.[199]

Dr Amit Kumar Singh[200] writes about the objective and purposes of ILO in his research article.

The primary objective of action in the ILO is the creation of the international Labour standards in forms of Resolutions and Recommendations. Resolutions are international treaties and instruments, which generate legally binding responsibilities on the nations that ratify those nations. Recommendations are none –binding but better set out guidelines orienting countrywide policies, procedure and help in developing actions. Labour law control matters, such as, remunerations, Labour employment, and conditions of employment, trade union, industrial and Labour management relations. They also include social legislations regulating such a characteristics reimbursement for accident triggered to a worker at work place, maternity benefits fixations of minimum wages, and distributions of company's profit for the organization's workers etc. Most of these acts regulate rights and the responsibilities of employee.[201]

ILO has specified working time hours for Labourers first time in history. It also gave Labourers the right of making union. This right of Labour union generated the right of protest for Labourers. Michael Sommer[202]writes in this regard.

Many historic achievements are due to the ILO-including for example, the 8 hours' workday, the right to unionisation, and as a consequence thereof, the right to strike.[203]

ILO has made Wages and Labor standards and specified the rights of Laborer's. United nation and European social charter have conceded

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[199]. Roy, Chandra, *The international Labour organization*, Minority Rights group international (MRG)2002, UK, p:4

[200]. Dr Amit Kumar singh has been head for business management department, Sri Vishwnath P.G College, Sultan pur, U.P India. He also remained professor in business management department, university of Mizoram, India.

[201].Amit Kumar Singh,*Impact of ILO on Indian Labour Laws*, International journal of research in management & Business studies(IJRMBS 2014)Vol:1 issue 1 Jan March 2014

[202]. Michael Sommer has been chairman for German confederation of trade union (DGB). He has written the foreword of Dr werner's book "The International Labour Organization".

[203].*Ibid*, p:9

these Labor rights and standards as human rights. Dr Werner writes about these Labor rights and standards.

The main subject areas of the international Labour standards in clued the fundamental rights at work, which are contained in the eight so-called core Labors standards of the ILO. These are freedom of association and the right to organize, the right to collective bargaining, the abolition of child Labor, the prohibition of workplace discrimination, as well as the mandate for equal for men and women for work of equal value.[204]

Dr Sengenberger Werner writes more about Labor rights and standards.

The remaining ILO Convention are also part of international law and refer to substantive (in ILO, jargon technical) standards for the Labour market, working hours and rest period, workplace health and safety, particularly vulnerable workers, and collective Labour relations and social dialogue.[205]

ILO consists of two parts, one is legislative and second is administrative. The legislative part is called international Labour conference. Its session is held in every year in the month of June. ILC is also called the world parliament of Labour. In both parts there are half seats reserved for member states and other half for employers and employees. The legislation of ILO appeared in the form of its conventions which are considered as a source of international Labor laws and also international Labour standards.[206]

ILO has passed different wages conventions. G.P Politakis[207]writes about wages conventions.

Labour Clauses (Public Contracts) Convention, 1949 (No. 94). Labour Clauses (Public Contracts) Recommendation, 1949 (No. 84) – Protection of Wages Convention, 1949 (No. 95) the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173), which revises Article 11 of Convention No. 95. Protection of Wages Recommendation, 1949 (No. 85). Minimum Wage Fixing Convention,

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[204]. *Ibid,* p:9
[205].*Ibid,* p:9
[206].*Ibid,* p:9
[207]. G.P Politakis is an expert for international Labour laws. He was a member of the experts committee of ILO for making and drafting Labour standards which were published at the 75 years anniversary of ILO.

1970 (No. 131). Minimum Wage Fixing Recommendation, 1970 (No. 135). Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173). Protection of Workers' Claims (Employer's Insolvency) Recommendation, 1992 (No. 180). Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects.) Minimum Wage-Fixing Machinery Convention, 1928 (No. 26). Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99). Minimum Wage-Fixing Machinery (Agriculture) Recommendation, 1951 (No. 89)[208]

ILO has an impact over the development of Labour laws in the world as the ratifying states are bound to follow the policies of international Labour organization. There are 185 member states of ILO. These states legislate their Labour laws as up to the ILO Labour conventions. The ILO Labour conventions are so helpful in protecting the rights of Labourers and employers.

Dr Amit Kumar Singh's statement supports this view.

International Labour organization supports countries to lure their own set of Labour legislations for the well conduct of Labour class, and the preservation of their rights.[209]

There are 8 basic wages conventions which protect Labourers and their wages. These 8 wages conventions are actually the human rights of Labourers. Dr Amit Kumar Singh says that these wages conventions have laid great positive effects on Labour legislations in ratifying states.

The eight Core Conventions of the ILO (also called fundamental human rights conventions) are: Forced Labour Conventions (No.29), Abolition of Forced Labour Convention (No.105), Equal Remuneration Convention (No.100), and Discrimination (Employment Occupation) Convention (No.111). Freedom of association and protection of right to organized Convention (No.87), Right to Organized and Collective Bargaining Convention (No.98). Minimum Age Convention (No.138), Worst Forms of Child Labour Convention (No.182).[210]

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[208].Politakis G.P *International Labours standards,*International Labour office CH.1211 Geneva. First addition 2002, p:232

[209].Singh, Kumar, Amit, Impact of ILO on Indian Labour Laws. International journal of research in management & Business studies(IJRMBS 2014)Vol:1 issue 1 Jan March 2014

[210].*Ibid*

In subcontinent, the development Labour laws started in the period of British colonization. The British political and economic movements and concepts have been basis for the development of these laws. In the binging it was very difficult for the British institution to manage and solve the problems of workers and their unions because of having no Labour laws. Therefore, in order to overcome the Labour problems, the Labour laws began to be developed. Likewise, the textile industry started to expand, the British Indian government has been forced to making Labour laws for industrial units in India. Dr Amit Kumar Singh writes about the historical origins of Labour laws.

In the initial phases it was very difficult to get adequate regular Indian workers to run British organizations and hence Labour law became essential. The Factories Act was first time introduced in 1883 because of the pressure carried on the British parliament by then textile tycoons of Manchester and Lancashire. Thus, we acknowledged the first requirement of eight hours of work for Labour. The abolition of child Labour.[211]

In the 19th century the small industrial units started its working in the hometowns and the possibilities of new jobs have risen. People started to migrate from rural areas to urban areas. The employers gave less wages to the employers and made for them prolong working hours. Therefore, for this reason, the British Indian government had to make Labour legislation. This Labour legislation started in 1881. Dr Amit Kumar Singh confirms this statement in these words;

"During time, in lack of any control on organization's Labour by the state, the employers were very less concernedfor the need of their workers: wages were very low, very long working hours and unsatisfied factory the employee's employment conditions. The situation led to the depiction of a large number of Labour legislations beginning since the year of 1881. These Labours".[212]

In subcontinent, these Labour laws were developed. Factories act 1881, workmen's compensation Act 1923, Payment of wages 1936, Employment of Children Act 1938, Trade Dispute Act 1929, Trade Union Act 1926, Benefit Maternity Act 1939. Dr Amit Kumar Singh says that ILO has great effect over the development of these Labour laws.

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[211].Op.cit

[212].Amit Kumar Singh, Impact of ILO on Indian Labour Laws.International journal of research in management & Business studies(IJRMBS 2014)Vol:1, issue 1 Jan March 2014

Most of the labour legislations in India are before independence. The ILO guidelines provided basic principles on which most of Labour legislations were drawn. By observation on various amendments and enactments in Labour laws it can be easily seen that the ILO have a countless impact on the Indian Labour Laws. A large number of Laws were passed to incorporate the guidelines of the resolutions of the ILO.[213] As there are so many evidences from the reports of ILO Committee of experts that ILO wages convention have not been complied with in ratifying states. This situation needs also to be examined weather the ILO wages conventions have been fully complied with in Pakistan or not. Here it is also overviewed weather the wages in Pakistan have been specified and paid as up to the ILO wages conventions. Human rights commission of Pakistan writes in its report, 2015 that there are so many Labourers and employees who have been deprived of their minimum wages. The report says as follows.

Due to weak regularity mechanisms and non-compliance of Labour law, a large number of workers remained deprived of minimum wage in the year 2015.According to the latest Pakistan Labour Force Survey, the national average monthly wages were Rs13,154. The survey noted 17.17 per cent of workers getting Rs5,000 and 41.31 per cent between Rs 5,000 to Rs 10,000 per month as salary. Wages of a small percentage of workers_18.21 per cent _ranged between Rs10, 000 Rs to 15,000. About one –fourth (24.31per cent) earned Rs 15,000 or above.[214]

Labor force survey also describes the disparity in the wages.

Significant wage differential existed between sectors as reported in the LFS. Agriculture was the lowest paid occupation, with average monthly wages amounting to Rs.6, 327.The highest-paid sector was banking and financial services where a worker earned Rs 37,978 per month on a average. Wage differential for employment status was even greater: a manager earned Rs 52,300 per month compared to elementary occupation who earned Rs 8,228 _ about seven-fold difference. Gender wage differential and rural-urban difference were also very high, indicating growing inequality[215].

There are so many complaints of nonpayment of wages. In this regard HRCP says in its report, 2015;

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[213].*Ibid*

[214].See the Report on state of Human rights in Pakistan 2015, Published by Human Rights Commission of Pakistan (HRCP) Latiffi Printers, Lahore, March 2018, p:6

[215].*Ibid,* p:6

"The most basic right at workplace is timely payment of wages. Violation of this right remained as rampant in 2015 as ever. In many instances, this violation was committed by the government agencies.

There was a report (February to October) from Bajaur Agency, Quetta, Hyderabad and Karachi above non-payment of wages to Lady Health Workers and workers engaged in polio vaccination campaigns. In June, more than 140 employees of the Punjab Revenue Authority protested against non-payment of their salaries. In July, the daily wages employees of the Capital Development Authority (CDA) protested non-payment of three months' salaries. Thousands of employees of Karachi Metropolitan Corporation (KMC) had petitioned the Sindh High Court (SHC) in 2013 over not being paid their salaries and pensions on time. In July, the court directed the local government sectary and the KMC to ensure payment of salaries and pensions. In August, employees of the Karaka Municipal Administration staged a demonstration over delay in the payment of salaries. In August, the employees of Karachi Dental and Medical College boycotted work over non-payment of salaries for three months.[216]

Now here, certain quotations from the HRCP reports of 2017, are taken which tells us about the nonpayment of minimum wages rates in Pakistan. The industries and other institutions hesitate to pay the minimum wages rates to their Labourers and employees. The report says as follows.

The minimum wage for unskilled workers, announced by the federal and provincial governments at the time of the annual budget presentation, was never implemented for the majority of employees as most industries and commercial establishments were still reluctant to pay even that wage. For the fiscal year 2017-18 this rate has been fixed at Rs.15, 000 per month, only Rs 1,000 above the last fiscal year. It is a known fact that the majority of industrial and commercial establishments do not pay the minimum wage and there is no effective government mechanism to enforce it.[217]

In the said report, it is mentioned that the women workers in health department, have not been paid their minimum wages rates which make up their bread.

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[216].*Ibid*, p:7

[217].See the Report on state of Human rights in Pakistan 2017, Published by Human Rights Commission of Pakistan (HRCP) Latiffi Printers, Lahore, March 2018, p:192

In another research study on 'Socio-economic impacts of delayed wages on lady health workers and their families 'it was found that 68% of the households of LHWs reported having a member with a major disease. According to the findings of Salman Kazi, an assistant professor at PAF-Karachi Institute of Economics and Technology, the average reported family income of LHWs was Rs23,682 with an average budget deficit apparently standing at Rs5,885 per month, which necessitated borrowing from local retailers.[218]

Visually impaired people protested in support of their job and wage demands. The HRCP report, 2017 says as follows;

"Visually impaired people from across the Punjab held a series of protests in support of their demands. In March, the visually impaired took out a protest rally in Dera Gazi Khan against non-payment of salaries which they said had been pending for four months. In Lahore, protest were held in October and December calling for the proper implementation of the three percent quota for employment, an increase in the quota, regularization of the jobs, and increase in salary".[219]

The employees of Pakistan steel mills have also faced the problem of nonpayment of their wages.

Current and retired employees of Pakistan Stills mills (PSM) remained on protest against non-payment of their salaries, dues and pensions. PSM has been virtually non-functional for over two years. The fate of over 12,000 employees hang in the balance as the management has been unable to pay salaries for months and Government of Pakistan is reluctant to cover those costs.[220]

In December 2017 the employees received their salaries for the month of August and September 2017.The release of salaries depends on decisions being taken by the federal cabinet. The Sindh High Court ordered that accumulated dues outstanding since 2013 for 850 retired employees, estimated to be around Rs3.43 billion, should be paid by 7 December.[221]

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[218].*Ibid,* p:194
[219].*Ibid,* p:195
[220].*Ibid,*p:196
[221].*Ibid,* p:196

In May 2017, in Khaadi textile many employees have also been deprived of their jobs because they were protesting in favor of minimum wages.

In May 2017, social media was flooded with posts and new about the protests of workers who had been terminated by the textile garment manufacture Khaadi. The textile brand had allegedly fired 32 workers after they tried to from a union and demanded the minimum wage.[222]

ILO reported that home based woman workers are neither legally protected at their job place and nor they are paid their minimum wages rates. The ILO report says as follows.

Highlighted the vulnerability of home-based workers. The majority of them are women and they lack legal protections and access to collective bargaining. Their wage rates are generally set by middlemen and they are 'chronically and significantly underpaid.[223]

ILO also reports that 5 million home based workers are also deprived legal benefits.

It is estimated that there are 5 million home-based workers and they are deprived of all legal benefits available under the Labour laws. Pakistan has yet to ratify the ILO Convention 177 on Home-Based Work.[224]

There is a European union report which shows that ILO Labor conventions have not complied with as yet in Pakistan.

The report says: Implementation remains a problem for all laws and policy areas in Pakistan. For the Labour laws a system of a Labour inspection has been put in place, with adoption of a Labour inspection policy and Labour protection policy in 2006, but result have been limited. Only about 340 Labour inspectors cover the entire Pakistan and they have been accused of corruption and of collusion with employers.[225]

There is a large number of Pakistanis who migrate from Pakistan to other countries in search of jobs. The reason behind it that ILO Wages

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[222].*Ibid,* p:197

[223].See ILO report published in 2017, Pakistan's Hidden Workers: Wages and conditions of home-based workers and informal economy

[224].*Ibid*

[225].See the EU's first report released in 2016 expressed dismay over the non-implementation of ILO Conventions.

conventions and standards have not been implemented in Pakistan. The Labourers and employees are paid wages unstandardized at the minimum wages conventions of the ILO. In this regard, a quotation from the report of ministry of Labour and manpower to be noted down.

According to the Export of Manpower analysis 2016 report, compiled by the Bureau of Emigration & Overseas Employment, a total of 946,571 Pakistanis went abroad for job purposes in 2015, which was the highest number in the history overseas workers in a particularly years. The half year emigration statistics indicate that the majority of the workforce (144,193 or 55%) went to the UAE, followed by Saudi Arabia (77,600 or 30%) and Oman (23,841 or 9%).[226]

Here to be noted down another important point weather the employees and Labourers are paid their wages as up to the ILO minimum wages convention. ILO specifies a minimum wage as a wage which meets basic needs of Labourer and his family. ILO report says as follows.

Minimum wage may be understood to mean the minimum sum payable to a worker for work performed or services rendered, within a given period, whether calculated on the basis of time or output, which may not be reduced either by individual or collective agreement, which is guaranteed by law and which may be fixed in such a way as to cover the minimum needs of the worker and his/her family, in the light of national economic and social conditions.[227]

The minimum wage is more explained in the ILO committee of experts.

As was observed by the 1967 Meeting of Experts, the concept of the minimum wage "contains three ideas: (a) the minimum wage is the wage considered sufficient to satisfy the vital necessities of food, clothing, housing, education and recreation of the worker, taking into account the economic and cultural development of each country [...]; (b) the minimum wage represents the lowest level of remuneration permitted, in law or fact, whatever the method of remuneration or the qualification of the worker; (c) the minimum wage is the wage which in each country has the force of law and which is enforceable under threat of penal or other appropriate sanctions. Minimum wages fixed by collective agreements made binding

[226].See the Report on the Export of Manpower analysis 2016 , compiled by the Bureau of Emigration & Overseas Employment

[227]. See ILC, 79th Session, 1992, Report III (Part 4B), para:42, p:13

by public authorities are included in this definition".[228]

In the light of above two statements of the ILO committee of experts, it is envisaged that the standard of minimum wage is the wage amount is such as meets the basic needs of the Laborer and his family. Now it is overviewed weather the ILO minimum wages standards are complied with in Pakistan or not. For this purpose, only two basic pay scales (1st and 22) which are redesigned in Pakistan in 2017 are examined.

BPS Minimum pay	INCR	Maximum pay
19,130 290	17,830	
2282,380	5,870	164,560[229]

The disparity and difference in wages for both basic pay scales (1st and 22) is about Rs. 146,670 while the employees of both basic scales purchased the wheat flour and medicine at the same rates.

In the financial budget, 2015 the minimum wage rate to be noted down.

The minimum wages was raised from Rs.12000 to 13,000 in 2015 by the federal Government. The provincial governments of Punjab, Sindh and Baluchistan raise the minimum wage to Rs13, 000 in their budgets for 2015-2016.Sindh notified the raise in November, Punjab in August.[230]

In 2017 the minimum wage rate for unskilled workers was determined not more than Rs.15000.[231] in Pakistan the minimum wage rate in the basic pay scales are not determined as up to the ILO minimum wage standards and conventions. The Supreme Court expressed its discontent on the wages in Labor sectors.

In April, a two-judge bench of the Supreme Court, in a sou motu notice about the payment of minimum wages by the federal and provincial governments, sought reports from all the four provincial Labor secretaries on the volume and the status of the complaints of non-payment of minimum wage and measure taken by the provincial governments.[232]

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[228].See Schedule, 2017 for Basic Pay scales of the civil servants, Annexure -1 office Memorandum No.F.1(3) imp/2017-500, Dated 03-07-2017

[229]. See Schedule of wages Rates, 2017, (Annex-A) Vide Notification.Ro, (Tech) FD 2-2/2016, Dated 28th December 2017

[230]. *Ibid*

[232].See the Report on state of Human rights in Pakistan 2017, Published by Human Rights Commission of Pakistan (HRCP) Latiffi Printers, Lahore, March 2018, p:192

CONCLUSION

This article concluded with this point that ILO wages conventions have not been completely complied with in Pakistan. Wages are not specified and paid as up to the ILO wages conventions. The wages given to employees and Laborers are not such that meet the basic needs of the Laborer and his family. While the minimum wage criteria set out in the ILO minimum wage convention is wage which fulfill the basic needs of the Laborer (housing, clothing, food, medicine and education). It is very dire need for Pakistan government to legislate wages laws and reconsider the Labor laws in Pakistan and make them fully complied with the ILO wages conventions as the Pakistan is the ratifying state to the ILO conventions. Pakistan should also legislate on the home based working women and children as they are not being paid their wages as up to the ILO wages conventions and have not been given legal benefits attached to their job and salaries under the international Labor laws. Pakistan has yet to ratify the ILO convention 177 on home based workers. So the Pakistan should immediately move to ratify the ILO convention on home based workers.

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