

# **PREMIER LAW JOURNAL**

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## EDITORIAL NOTE

Premier Law Journal (PLJ) is a research Journal published by Premier Research Center, Premier Law College Gujranwala in English Language. This is a 2<sup>nd</sup> volume, issue 8, which is going to be published in Dec, 2022. It is a quarterly Journal dedicated to provide original research articles in Legal Studies as well as analysis and commentary on issues related to Legal & Social Issues. This Journal brings together many of today's distinguished scholars and thinkers, practicing lawyers, teachers and students making their research available on Current Issues need to be legislated in Pakistan.

It is an interdisciplinary Journal of peer-reviewed research and informed opinion on various intellectual and academic issues in areas of Legal & Social Studies. Its readership includes Legal practitioners, policy makers, Judges, Teachers and Students of Law. The articles published in this Research Journal undergo initial editorial scrutiny, double blind peer-review by at least two experts of the field, and further editorial review.

Barrister Tarar's article presents well analyses of the role of trade liberalization in promoting sustainable development. It explains briefly in history the link of rapid development of the International trade to environmental degradation.

Umer Mehboob's article is a well account of analytical study on Section 4 of the Pakistan Muslim Family Laws Ordinance, 1961, as it put lights on dramatically alteration of the law of succession applicable to Muslims by granting to the orphaned grandchild (ren) the share that their deceased parent would have taken had she survived the propositus.

Azhar Siddique's article explains well manifold aspects relatable to the situation of export in Pakistan. After theorizing the exports performances, it circumscribes the importance of transnational exports for sustainable economy of Pakistan. The history of exports in Pakistan with special reference to export policies is discussed so that roots of problem can be identified.

Saqib's article examines well the rapid growth of technology in present scenario and infringement of copyrights in the cyber world. It would not be erroneous to say that the technological development is much faster than law. The main focus of article on analyzing the role of intermediaries, the impact of fast growing Internet technology and to determine the liabilities of ISPs and end-users; who is the real infringer.

Mian Akbar's article is a good account of analyzing the social life of women in Islam with respect to gaining gender equality in the light of Article 3 ICCPR and OIC Cairo Declaration on Human Rights in Islam. This article explains well misunderstanding of the social regulations of Islam for women life.

Areeba Athar's article nicely establish the ruling of Islam in regards of the practice of surrogacy which is the modern form of human trafficking and child selling phenomenon along-with the immortalization of human body and institution of marriage.

Saleem Shaheen's article is a good analyses of human rights of special persons in Pakistan in the light of ICT Rights of Persons with Disability Act, 2020. It is a brief account of reviewing the ICT Rights of Persons with Disability Act, 2020, which shortly tells thus this Act cater for the needs of special person in Pakistan with the complete legal package.

Dr. Muhammad Amin  
The Editor

## The Role of Trade Liberalisation to Promote Sustainable Development

**Barrister Waqas Tarar\***

**Abstract:** This article actually analyses the role of trade liberalization in promoting sustainable development. It also tells briefly in history does the rapid development of the International trade has been linked to environmental degradation. Moreover, this article presents the most of the South view on trade liberalisation and the idea of sustainable development as another indirect way by which the North intends to maintain economic and social domination in the disguise of ‘green protectionism’. Therefore, the efforts to achieve sustainable development still remains in lurch and unresolved.

**Keywords:** Trade, Liberalisation, Sustainable Development

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### I. INTRODUCTION

The rapid development of international trade since post war era has been linked to environmental degradation.<sup>1</sup> Consequently, the naturalists and environmentalists concerned with the current pattern of unsustainable development have been challenging the idea of free trade.<sup>2</sup> The Brundtland Report<sup>3</sup> while responding to this challenge, ushered a new era of ‘sustainable development’ – emphasizing the need for the integration of *economy* and *ecology*. It is somewhat a consensus that current human activity (reference is to consumption patterns) and corresponding development policies are not sustainable,<sup>4</sup> and if traditional model of development is not reformed, a ‘no-return’ point could come as early as 2042.<sup>5</sup>

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<sup>1</sup> Shawkat Alam and M Rafiqul Islam, ‘The Trade-Environment Interface: Issues Lurking Behind the North South Tensions’ (2005) 2 *Macquarie Journal of International and Comparative Environmental Law* 121, 124.

<sup>2</sup> *Ibid* 124.

<sup>3</sup> Gro H Brundtland, ‘*Our Common Future: The Report of the World Commission on Environment and Development*’ (Oxford University Press, 1987) (‘Brundtland Report’).

<sup>4</sup> Serge Killingbeck, ‘Sustainable Development – A Review’ (2018) 35 *Environmental and Planning Law Journal* 102, 107; Alam and Islam (n 1 ) 121.

<sup>5</sup> Killingbeck (n 2), 107 (data used to reach this conclusion was in the context of carbon emissions and climate change).



It is for this reason that global leaders under the guidance of WTO reached a consensus that states must pursue development, which is economically, socially, and environmentally sustainable.<sup>6</sup> However, the realization of this rather gripping goal, is still at crossroads given the North-South<sup>7</sup> tension as to how, and what pragmatic strategies should be adopted to achieve the objectives of sustainable development.<sup>8</sup> It has been argued that these differences are result of different principles and policy considerations designed to achieve these objectives and thus, inconsistent application does not let them sustain.<sup>9</sup>

Moreover, most of the South view trade liberalisation and the idea of sustainable development as another indirect way by which the North intends to maintain economic and social domination in the disguise of 'green protectionism'.<sup>10</sup> Therefore, the efforts to achieve sustainable development still remains in lurch and unresolved.<sup>11</sup>

The essay affirms the view that trade is an ally of the environment and it is the trade liberalisation resulting in strong economic growth, can truly enables us to realise the goal of sustainable development.<sup>12</sup> Against the backdrop of above-noted contentions, the essay firstly, examines the relationship of trade liberalisation and the environment using the analysis from recent international cases. Secondly, it critically examines the North-South dissonance over multilateral trade liberalisation and rather unilaterally operational policies to achieve sustainable development. Consideration is given to conflicting regimes under WTO resulting in inequitable trade liberalisation between North and South using agriculture as an

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<sup>6</sup> Gregory Maggio, 'Inter/intra-generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources' (1997) 4 *Buffalo Environmental Law Journal* 161, 170.

<sup>7</sup> The term is used interchangeably within the essay to refer to developed and developing countries respectively.

<sup>8</sup> Alam and Islam (n 1 ) 122.

<sup>9</sup> Robin K Craig and Melinda H Benson, 'Replacing Sustainability' (2013) 46 *Akron Law Review* 841, 860 – 862.

<sup>10</sup> Scott Vaughan, 'Trade and Environment: Some North-South Considerations' (1994) 27(3) *Cornell International Law Journal* 591, 600.

<sup>11</sup> Alam and Islam (n 1 ) 122.

<sup>12</sup> Shawkat Alam, 'Trade, the Environment, and the World Trade Organisation: A Developing Country Perspective on WTO Agreements Concerning Standards, Regulations, and Non-Tariff Barriers to Trade' (2006) 3 *New Zealand Year Book of International Law* 1; Alam and Islam (n 1 ) 124.

example, since most of the South has been regarded to have comparative advantage<sup>13</sup> in agriculture.<sup>14</sup> Lastly, it is analyzed and concluded that trade liberalisation can be the most effective yet enabling means to achieve sustainable development using trade liberalisation through agricultural advancement while noting that the concerns of the South are recognized beyond preambles and manifested into truly pragmatic action plans in order to preserve both inter and intra-generational equity together.

## II. TRADE LIBERALISATION AND THE ENVIRONMENT

It is recognized that trade liberalisation benefits all trading partners by increasing economic activity and creating additional wealth. Consequently, the strong economic conditions to utilize comparative advantage, which usually results in making the activity more efficient overtime with twofold environmental benefits – *direct* and *indirect*.<sup>15</sup>

Firstly, increased scale of efficiency has long been argued to *directly* benefit the environment for its enabling capacity to facilitate efficient use of both natural and available resources using various advanced Processes and Production Methods ('PPMs') to minimize environmental degradation.<sup>16</sup> In the vein, the comparative advantage of trade underlies the goal of sustainable development. In contrast, an equally valid argument is substantiated on the basis of inter-generational equity that the notion of trade liberalisation encourages the need to extinguish natural resources in order to gain comparative advantage, but what is overlooked in the process that these resources are finite and crucial for the survival of next generations and will prevent them from participating in the economic activity.<sup>17</sup> The notion of both inter and intra-generational equity (being one of the principles of sustainable development)<sup>18</sup> are therefore, in conflict with the current approaches to trade liberalisation and corresponding international instruments to date.<sup>19</sup>

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<sup>13</sup> The theory of Comparative Advantage is used as a justification of the trade liberalisations which is based on the efficient use of resources to produce where one has competitive advantage than others (Rafiqul Islam, '*International Trade Law*' (Lawbook Co. 1999) 440.

<sup>14</sup> Alam and Islam (n 1 ) 130.

<sup>15</sup> United Nations Environment Program (UNEP) '*Environment and Trade: A Handbook*' (International Institute for Sustainable Development, 2<sup>nd</sup> ed, 2005) 46.

<sup>16</sup> *Ibid* 46 – 47.

<sup>17</sup> Alam and Islam (n 2) 125.

<sup>18</sup> Brundtland Report (n 3) 43.

<sup>19</sup> Maggio (n 6) 171.

Secondly, increased efficiency *indirectly* benefits the environment through a strong civic response in regions (predominantly North), where people feel protective of their lifestyles and environment,<sup>20</sup> and use their buying power to alter both market and corporate behavior in favour of ‘green economy’ and eco-friendly products and services respectively.<sup>21</sup> This assertion however, should not be mistaken with the understanding that people living in marginalized communities (and in South) do not value their environment – they in fact depend on it.<sup>22</sup>

The indirect approach has been viewed as an effective strategy to internalize the environmental externalities into the market transactions.<sup>23</sup> However, the downside of this approach is that it comes at the cost of trade liberalisation in South and is viewed as protectionist to protect domestic trade by imposing higher environmental standards and labels by North without any consultation or notice while developing such standards.<sup>24</sup> It has continuously argued by the policy makers in South that no regard is given to the operational conditions and technological expertise of the exporting nation to comply with environmental objects and domestic policies of the importing nations.<sup>25</sup> Thus, South invests a little or no trust in idea of sustainable development since they understand this form of integration is based on protectionist motives to keep out specific imports from countries sometime with a greater comparative advantage in particular industry and to promote and protect domestic trade.<sup>26</sup> This view is well founded and is evident from the recent decision in the United States’ ‘Dolphin-Safe’ tuna labelling program<sup>27</sup>, which was ruled by the Appellate Body<sup>28</sup> to be ‘protectionist and unnecessary environmental response’ to a domestic legislative measure aimed at protecting its domestic tuna industry, and affected the trade of exporting countries such as the complainant – Mexico. The decision is also vital because it interpreted and addressed several other issues especially with eco-labelling under the *Agreement on Technical Barriers to Trade* (‘TBT

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<sup>20</sup> Handbook (n 12) 47.

<sup>21</sup> Roger D. Wynne, ‘The Emperor’s New Eco-Logos? A Critical Review of the Scientific Certification Systems Environmental Report Card and the Green Seal Certification Mark Programs’ (1994) 14(1) *Virginia Environmental Law Journal* 51, 53 – 54.

<sup>22</sup> Handbook (n 12) 47.

<sup>23</sup> Alam and Islam (n 2) 124.

<sup>24</sup> Vaughan (n 9) 600 – 601.

<sup>25</sup> *Ibid*

<sup>26</sup> Alam 2006 (n 11) 18.

<sup>27</sup> *Dolphin-Safe Labeling Standards*, 50 CFR 216.91 (2012).

<sup>28</sup> Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) (‘US — Tuna II’) [299].

Agreement’),<sup>29</sup> while adding another strain to the on-going puzzle of how to *balance* trade liberalisation and environment obligations with domestic regulations simultaneously with various international obligations under WTO.

The above-mentioned concern of the South that higher environmental standards are imposed on them without a prior notice of the technical regulations coming into force, were affirmed recently by the Appellate Body in the *United States — Measures Affecting the Production and Sale of Clove Cigarettes*.<sup>30</sup> The United States banned flavored cigarettes other than tobacco and menthol under a domestic legislation.<sup>31</sup> Indonesia being one of the biggest producer of clove cigarettes requested dispute settlement consultation with WTO against the ban. The Panel<sup>32</sup> found that the legislation was a technical regulation and United States (‘US’) violated art 2.1 of the TBT Agreement by banning clove cigarettes while keeping menthol cigarettes exempted.<sup>33</sup> The Appellate body<sup>34</sup> upheld the Panel’s finding but on different grounds (mainly failing to give notice and on the argument of national treatment), and rejected Indonesia’s claim under art 2.2 of the TBT Agreement that the legislative measure was trade restrictive than necessary to achieve legitimate objective. The Appellate Body examined the art 5.2 of the *Doha Ministerial Decision*,<sup>35</sup> which interprets the term ‘reasonable interval’ in art 2.12 of the TBT Agreement ‘not less than 6 months old’. Thus, Appellate Body upheld Panel’s finding that US contravened both art 2.12 by failing to allow 6 months interval between the publication and enforcement of the legislation and art 2.92 of the Tbt Agreement for failing to give notice to WTO

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<sup>29</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*Agreement on Technical Barriers to Trade*) 1186 UNTS 276.

<sup>30</sup> Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R, AB-2012-1 (4 April 2012) (‘US — Clove Cigarettes’) [233].

<sup>31</sup> *Family Smoking Prevention and Tobacco Control Act*, Pub L No 111-31, s 907(a)(1)(A), 123 Stat 1776, 1799 (2009).

<sup>32</sup> Panel Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/R (2 September 2011).

<sup>33</sup> *Ibid* [2.25].

<sup>34</sup> US — Clove Cigarettes (n 28) [233].

<sup>35</sup> *Implementation-Related Issues and Concerns*, WTO Doc WT/MIN(01)/17 (20 November 2001).

Secretariat and the members. Thus, it is argued that encouraging the consultation with South at policy stage could be an effective attempt towards inclusive partnership to bridge operational gap.

### III. NORTH-SOUTH DIVIDE AND SUSTAINABILITY

Most of the South views the trade-environment debate as another indirect way by which North intends to maintain its economic and social domination through protectionism.<sup>36</sup> Adjacent to the discussion in this part and at the core of the sustainable development principles, is the operation of the *precautionary* principle,<sup>37</sup> on which the protectionist approach is largely based.<sup>38</sup> The precautionary principle was first dealt by the Appellate Body in *EC-Hormones*<sup>39</sup> to examine the validity of the precautionary measure and whether the precautionary approach taken by the European Communities ('EC') was based on a general principle applicable to all cases of health and safety or was simply a context based approach, which facilitated decision making process involving risk in different contexts. The Appellate body<sup>40</sup> held that irrespective of the international status (reference to its vagueness) of the precautionary principle, the EC precautionary measure went too far and thus, EC could not rely on it to justify measures, which are otherwise inconsistent with art 5.1 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*.<sup>41</sup> Furthermore, the Appellate Body reversed Panel's findings that EC import prohibition was inconsistent with art 3.1 and 5.5 of the SPS Agreement. Although, the Appellate Body refrained from considering the arguments raised by the parties in relation to precautionary principle;<sup>42</sup> the Appellate Body however, emphasized that 'decision-makers in assessing the scientific evidence in relation

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<sup>36</sup> Vaughan (n 9) 600.

<sup>37</sup> Another important principle of sustainable development.

<sup>38</sup> Jacqueline Peel, 'Precaution, A Matter of Principle, Approach or Process' (2004) 5(2) *Melbourne Journal of International Law* 483, 487;

<sup>39</sup> Appellate Body Report, *EC – Hormones*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (16 January 1998).

<sup>40</sup> *Ibid* [124] – [126].

<sup>41</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on the Application of Sanitary and Phytosanitary Measures*) 1867 UNTS 493 ('SPS Agreement').

<sup>42</sup> *EC – Hormones* [123].

to regulatory measure, should always bear in mind that responsible and representative governments act from prospective of prudence and precaution where risks are irreversible, such as life terminating and damaging to human health'.<sup>43</sup>

It follows from this that the regulation of precautionary measure requires the assessment of the 'scientific evidence' to ascertain the level or degree of the irreversible risk, which the measure aims to protect. However, applicability of the such an assessment, appears to be somewhat ambiguous for two reasons. Firstly, scientific community is often divided in relation to a particular finding, especially in context of environment degradation. Secondly, what constitutes a 'serious or irreversible' health or environmental damage, is a question of interpretation, which Robinson argues that 'could mean different thing to so many different people... and its meaning tend to rather represent the political and philosophical views of those proposing the definition more than any unambiguous scientific view'.<sup>44</sup> This is because, the environmental standards and awareness to preserve it largely depend upon the level of economic development of the country interpreting it.<sup>45</sup>

Accordingly, a precautionary measure adopted in response to a perceived threat of serious health or environmental degradation may be economically viable and justified social as well as environmental response in the North, but in South, it may result in disproportionate economic costs and activity, which may well not be easily justified on similar grounds.<sup>46</sup> For instance (as above-mentioned), SPS Agreement promotes the assessment of enough scientific evidence to ascertain risk, it is evident that most of the Southern states lack the capacity to 'adequately access and assess the scientific evidence' at an internationally acceptable standard.<sup>47</sup> Thus, without the accesses and development of the technological and scientific expertise, South is bound to view such measures as trade-restrictive and unilateral, which is also evident from the trend that developing countries rarely seek dispute resolution consultation under WTO

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<sup>43</sup> *EC – Hormones* [124] – [125].

<sup>44</sup> John Robinson, 'Squaring the Circle? Some Thoughts on the Idea of Sustainable Development' (2004) 48 *Ecological Economics* 369, 373 – 74.

<sup>45</sup> Alam 2006 (n 11) 28.

<sup>46</sup> *Ibid*

<sup>47</sup> *Ibid* 28 – 29.

concerning TBT and SPS Agreement given the limitation to carry out various tests required to substantiate their claims.<sup>48</sup>

Although, it was one of the core objectives of the *Agreement on Trade Related Aspects of Intellectual Property Rights*<sup>49</sup> to recognise the needs of the developing countries to assist and develop a sound technological base through information sharing and technological know-how. However, even this effort by the WTO have been heavily criticised for privatising and protecting that information as well.<sup>50</sup> Southern states argue that technological assistance in this regard, could in fact enable them to develop innovative and eco-friendly PPMs, which would not only help integrate and internalise the cost of the environment, but would also help them to achieve economies of scale to compete globally whilst moving towards sustainable development through trade liberalisation.<sup>51</sup>

#### IV. IS SUSTAINABLE DEVELOPMENT POSSIBLE?

Against the backdrop of the above discussion, it is not surprising to see that why the notion of sustainable development still remains a unilateral Northern phenomenon, which has not been fully grasped and embraced by the South for various reasons (mentioned earlier), let alone its practice. As it is now well established that environment degradation is not a local phenomenon anymore considering that cross border environmental harm is real and has long been recognized as a liability for resulting damage.<sup>52</sup> Thus, it is argued that the objects of sustainable development cannot be achieved unilaterally by the North, but could be materialized efficiently together with South through equitable trade liberalisation policies. It is now asserted that a way forward in this direction could start off with the North firstly, recognizing the environmental degradation committed in the past since 20 per cent of the world's population which lives in the North, consume 80 per cent of the global natural

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<sup>48</sup> *Ibid* 29; Jurgen Kurtz, 'A Look Behind the Mirror: Standardisation, Institutions, and the WTO SPS and TBT Agreements' (2007) 30(2) *University of New South Wales Law Journal* 504, 505.

<sup>49</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C (*Agreement on Trade-Related Aspects of Intellectual Property Rights*) 1867 UNTS 299 ('*TRIPS Agreement*').

<sup>50</sup> Kurtz (n 46) 508, 510.

<sup>51</sup> Alam and Islam (n 2) 135.

<sup>52</sup> *Trail Smelter Arbitration (U.S. v Canada)* (1941) 3 U.N. RIAA 1905, 1965.

resources and is responsible for 80 per cent of the pollution worldwide.<sup>53</sup>

Secondly, it is now essential to move beyond preambles and cosmetic policies and instruments towards an equitable trade-environmental approach. A pragmatic approach should take into account the cost of this continuous over-consumption by North and limitations of the South in order to foster trade in its true sense, to end the recurring vicious cycle that leaves them with no choice but to degrade their environment in order to survive.<sup>54</sup> It is suggested that it could be achieved both effectively and efficiently by assisting them in particular areas where they already have (or have a potential of) comparative advantage to increase economic activity. Agriculture could just be that industry where most of the Southern states have comparative advantage or could develop such with complementing assistance. The success would largely depend upon the ability of the WTO and North to achieve a consensus with South, as to reduce tariffs and export subsidies on agricultural products and services.<sup>55</sup> Sungjoon Cho suggests that a successful Doha round would demand a grand and open deal on a “triangle of issues” – staring with the US reducing significantly its farm and export subsidies, the EC following with more generous cuts in agricultural tariffs, and major Southern states such as Brazil and India in return lowering their industrial tariffs.<sup>56</sup> It is noted that although such an approach could be seen as aspirational, it is doable, but shall require a firm conviction to change the shift from distortion to as means of development, which would highly likely to result in a well aligned uniform approach towards sustainable development than current countervailing practices.

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<sup>53</sup> United Nations Development Program (UNDP) Statistics cited in Alam and Islam (n 2) 135 – 136.

<sup>54</sup> Handbook (n 4) 47.

<sup>55</sup> Kurtz (n 46) 511.

<sup>56</sup> Sungjoon Cho, ‘The WTO Doha Round Negotiation: Suspended Indefinitely’ (2006) 10(22) *American Society of International Law – Insights* <<https://www.asil.org/insights/volume/10/issue/22/wto-doha-round-negotiation-suspended-indefinitely>> at 20 April 2019.



**CONCLUSION**

It is therefore, based on examined reasons and suggested policies, it is succinctly concluded that a change in unilateral 'do more' attitude to 'doable' approach, would certainly require a new philosophical mindset along with the understanding to recognize the South as a partner than a competitor in trade in order to achieve sustainable development through professed trade liberalisation while preserving both inter and intra-generational equity.

## **A Review on Section 4, Family Law Ordinance, 1961 with Special Reference to FSC'S Decision**

**Umar Mehboob\***

**Abstract:** Section 4 of the Pakistan Muslim Family Laws Ordinance, 1961, dramatically altered the law of succession applicable to Muslims by granting to the orphaned grandchild (ren) the share that their deceased parent would have taken had s/he survived the propositus. The principle of representation incorporated in the Pakistani solution contrasts with the compulsory bequest relied upon by several Middle Eastern countries to deal with the same problem, although arguably representation more closely reflects the experience and expectations of the people of Pakistan. Nearly two decades later, the Federal Shariat Court was established and endowed with jurisdiction to declare a law contrary to "the Injunctions of Islam" and thus void. Some laws, however, were specifically exempted from the Court's jurisdiction; falling within this category is "Muslim Personal Law." A 1981 decision of the appellate Court (the Shariat Bench of the Supreme Court) held that the provisions of the Muslim Family Laws Ordinance were included within the phrase "Muslim Personal Law," and were thus outside the jurisdiction of the Federal Shariat Court. This position was reversed by another decision of the appellate Court in 1993, and the provisions of the Ordinance were immediately challenged on the basis of their alleged divergence from the "Injunctions of Islam." This article reviews the provisions of section 4 of the Ordinance and examines the decision of the Shariat Court as regards this particular provision.

**Keywords:** Section 4, Family Law Ordinance 1961, Inheritance, Grandchild

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### **I. INTRODUCTION**

Inheritance rights are crucial for Muslims because distribution and control of property and assets significantly affect their ability to enjoy stable and fulfilling lives and to exercise other rights. Without assets derived from inheritance, heirs are disadvantaged, cannot lead

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independent lives, and cannot even ensure that they and their families can support themselves. Inheritance distribution is closely tied up with provisions in many Muslim family laws, and must be conceived from a just and equitable perspective in order to ensure there is fairness and justice in other aspects of family life. Although very vocal defenses of the traditional inheritance laws have been argued, these are problematic both in terms of justice and in the context of the modern era. There are a number of compelling justifications for reform that have been proposed by Islamic scholars.<sup>57</sup>

There are major Qur'anic verses on inheritance, traditional rules of inheritance derived from those verses and hadith by the major schools of law, some examples of how those rules affect child (grandson), a sample of standard defenses of those traditional rules and explanations of why the defenses are problematic, potential prospects for reform, and examples of reform efforts from various Muslim countries around the world. There is also a list of resources that can provide more information on inheritance rules, examples of how people defend the traditional inheritance rules, and ideas for reform.<sup>58</sup>

## II. THE RULE OF INHERITANCE

The verse lays down the rule relating to the law of inheritance as a corollary to some of its injunctions, which is:

لِّلرِّجَالِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ وَلِلنِّسَاءِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ مِمَّا قَلَّ مِنْهُ أَوْ كَثُرَ ۚ نَصِيبًا مَّفْرُوضًا<sup>59</sup>

*“From what is left from parents and those nearest related, there is a share for men and a share for women, whether the property be small or large, -a determinate share.”*

The two words, '*al-walidan*' (the parents) and '*al-aqrabun*' (the nearest of kin) spell out two basic principles of inheritance. The first one is the bond of birth which exists between children and their father and mother and which has been described through '*al-walidan*.' The second one is the general kinship which is the sense of the word, '*al-aqrabun*'. According to the correct interpretation,

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<sup>57</sup> Kuwait Ministry of Awqaf and Islamic Affairs. *Encyclopedia of Islamic Jurisprudence*. Vol. 3. P: 30.

<sup>58</sup> *Ibid*

<sup>59</sup> Al-Nisaa 4:7

the word, '*al-aqrabun*' covers all kinds of family relationships. This may be the mutual bond of birth as in children and their parents; or, it may be of the other kind as in general family relationships; or, these may be relations established through marital connection.<sup>60</sup> The word, '*al-aqrabun*' covers all, but parents were set apart especially because of importance. Then, this word has also established another principle of inheritance, that is, the mere fact of kinship is not enough for a claim on inheritance. Rather, it is necessary that the heir is nearest in kinship, for - if the degree of nearness or closeness were not made the standard condition - the inheritance of every deceased person would have to be, of necessity, distributed over the entire human population of this wide world. The reason is simple to understand because everyone is the offspring of one father and mother, Adam and Eve, peace be on them. Be it close or not so close, there does exist some sort of mutual relationship in everyone. When it comes to distribution of inheritance, it is, to begin with, beyond the realm of possibility.<sup>61</sup>

However, speaking academically, if such an arrangement was somehow made, the resulting distribution of property would be something like one insignificant particle for each which will be no good for anyone. So, it was necessary that, given the pivotal position of kinship in the matter of inheritance, the principle should be: If choice has to be made from a collection of different relatives, then, the nearest of kin should be preferred over the farther ones and, in the presence of the nearest, the farthest should not be given a share. However, if there are relatives who are all declared to be the nearest at the same time, even if the nature of nearness in them be different, then, all of them will deserve a share in the inheritance as the father and mother along with children, or wife etc., for they all are the nearest, though the nature of nearness differs.<sup>62</sup>

In addition to that, this very word, '*al-aqrabun*' establishes that the way men are sharers in inheritance, so are women and children, who too cannot be deprived of this right, for kinship of children, parents or any others, is the same in a boy and girl as far as the fact of being related is concerned. A boy is born to his parents and so is a girl,

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<sup>60</sup> Moududi, Abul-Aala, Sayed. *Tafheem-ul-Quran*, Tarjman-UI-Quran, Lahore, 1991.Ed: 1<sup>st</sup>. p: 324

<sup>61</sup> *Ibid*

<sup>62</sup> Kailani, Abdul Rehman, Maulana. *Taiseer-UI-Quran*, Maktbat-ul-Islam, Lahore, 2011. Ed: 1<sup>st</sup>. p: 356

who is born to them. When the right to inherit depends on being related, there is no sense in depriving a small child or a girl. Another point about the style of the Holy Qur'an is worth noticing here. Instead of mentioning the entitlement of women in a separate sentence, the Holy Qur'an could have easily merged it with the entitlement of men in a single sentence, by saying, "For men and women both there is a share...." But the Holy Qur'an has elected to mention the entitlement of both sexes in two separate independent sentences, even though it seems to be a repetition. This is to emphasize the fact that the right of women in inheritance is quite independent and is as important as the right of men.<sup>63</sup>

Furthermore, this very word, '*al-aqrabun*' also tells us that the distribution of property left behind is not based on the criterion of need: it is, rather, based on the criterion of nearness in kinship. Therefore, it is not necessary that the one more needy among the relatives should be the one more deserving of a share in inheritance. On the contrary, the one nearest in kinship to the deceased will be the one more deserving of a share in the inheritance as compared to the farther - even though, the farther may be poorer and more needy. If we set aside the principle of nearness in kinship and use the need or the beneficial effects for some relatives as the criterion, it can neither turn into a rule nor can it take the form of a settled and solid law, because any criterion, other than nearness in kinship, will inevitably be temporary as based on opinion because poverty and need or usefulness are not permanent. Conditions change. Levels change. Under such conditions, there will appear a host of claimants and those responsible for settlement would have a hard time in arriving at decision.<sup>64</sup>

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<sup>63</sup> Kailani, Abdul Rehman, Maulana. Taiseer-ul-Quran, Maktbat-ul-Islam, Lahore, 2011. Ed: 1<sup>st</sup>. p: 356

<sup>64</sup> *Ibid*

### III. SECTION 4 OF MUSLIM FAMILY LAW ORDINANCE 1961 AND ORPHANED GRANDSON'S INHERITANCE

The section 4 of Muslim Family Law Ordinance 1961 is about the succession of the grandson. It states that the grandson is entitled to the share in the grandfather's property. The wording of the section is as;

"In the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stirpes receive a share equivalent to the share which such son or daughter; as the case may be, would have received if alive."<sup>65</sup>

If this Qur'anic principle is understood clearly, the problem of an orphaned grandson's inheritance - which has been made to look like a disputed issue for no sound reason - resolves itself automatically on the basis of a categorical decision. In other words, if an orphaned grandson is more needy as compared to the son, but, in accordance with the law of '*al-aqrabun*' (the nearest in kinship), he cannot claim a share in the inheritance because he is not 'the nearest' in the presence of the son, other arrangements have been made to take care of his needs. This religious position has been opposed by none but some of the contemporary, westernized modernists. Other than these, the entire Muslim Ummah has been holding the belief, as clarified by the Qur'an and the Hadith that the grandson will not inherit in the presence of a son of the deceased, irrespective of whether his father is dead or alive.<sup>66</sup> The grandchildren may be the children of a son or of a daughter. The children of a daughter do not inherit from their grandfather, whether their mother is alive or dead. The children of a son inherit from their grandfather so long as none of the grandfather's children are alive, regardless of whether the son's father or any of his paternal uncles are alive. If any of the grandfathers Own sons are alive, then the grandsons do not inherit, regardless of whether their father is alive or dead. It is unknown in Shariah for a grandson to take the share of his deceased father, who

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<sup>65</sup> See Sec. 4, Muslim Family Law Ordinance, 1961

<sup>66</sup> Mirdawi, Ali bin Muhammad (1956). *Al Insaf fi ma'rifat Al rajeh mina al-khilaf* (in Arabic). Saudi Arabia: Al Sunnah Al Muhammadiyya. p. 304

would have taken it if he were alive. Rather the estate is to be shared out among the heirs who are alive at the time of their benefactor's death. How can we give a share to this father who died before the grandfather, then take this share and give it to (the deceased father's) children? These grandchildren who do not inherit from their grandfather because their grandfather's own sons are still alive may get something from his estate in two ways: 1— If the grandfather left something to them in his will before he died, one-third or less of the estate. This applies if he has a great deal of wealth. Some scholars regarded such a will as. The evidence for that is the verse in which ALLAH says:

كُتِبَ عَلَيْكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ إِن تَرَكَ خَيْرًا ۖ الْوَصِيَّةُ لِلْأَقْرَبِينَ  
بِالْمَعْرُوفِ ۗ حَقًّا عَلَى الْمُتَّقِينَ<sup>67</sup>

*"It is prescribed for you, when death approaches any of you, if he leaves wealth, that he makes a bequest to parents and next of kin, according to reasonable manners. (This is) a duty upon Al-Muttaqoon (the pious)"*

Shaykh Ibn 'Uthaymeen (may ALLAH have mercy on him) said: Among the things we learn from this verse are: Bequests to parents and relatives of a man who leaves behind a lot of wealth must be fulfilled, because ALLAH says: "And it is prescribed for you". The scholars differed as to whether this is abrogated by the verses on inheritance or is it is general and the verses on inheritance are specific? There are two views. The majority of scholars are of the view that it is abrogated, but the more correct view is that it is not abrogated, because it is possible to understand it as speaking in specific terms and say that the words "to parents and next of kin" apply if they are heirs, i.e., if they are heirs then no bequest can be made to them, and the shares of inheritance decreed by ALLAH are sufficient. So the general meaning of the verse still applies to those who are not heirs. Another lesson we learn is that it is permissible for a person to bequeath whatever he wants of his wealth, but this restricted by the hadeeth of Sa'd ibn Abi Waqqaas (may ALLAH be pleased with him) who said to the Prophet (peace and blessings of ALLAH be upon him): *"Shall I give two-thirds of my wealth in charity?"* He said, *"No."* He said: *"Then one half?"* He said, *"No."* He said: *"Then one third?"* He said: *"One third, and one-third is too*

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<sup>67</sup> Al-Baqra 2:180

*much.*"<sup>68</sup> Agreed upon. Based on this the bequest should not amount to more than one third of the wealth, so the meaning of the verse is restricted by the hadeeth. The obligatory bequest is that which is left by one who has left behind a great deal of wealth, because ALLAH says: *"if he leaves wealth"* As for the one who leaves only a little wealth behind, it is better for him not to make any bequest if he has heirs, because the Prophet (peace and blessings of ALLAH be upon him) said to Sa'd ibn Abi Waqqaas (may ALLAH be pleased with him: *"For you to leave your heirs independent of means is better than leaving them dependent and holding out their hands to people."*<sup>69</sup> If their uncles give them some of their shares and distribute that among them. Calculating what would have been their father's share and giving it to them when he is no longer alive is something for which there is no known basis in Shariah. Some states this is called the *"binding bequest"* and they give the children of the son who died during the lifetime of his father — i.e., their grandfather—the share that would have been their father's, so long as it does not exceed one-third of the estate, and they give the children of a daughter the share that would have been their mother's, so long as it does not exceed one-third, even if the grandfather did not bequeath anything to them. This is contrary to Shariah and does not have to be obeyed, because it is an attempt to share the role of Lawgiver with ALLAH and a transgression against the rights of the heirs. They attributed this idea to Ibn Hazm (may ALLAH have mercy on him), but it is a fabrication against him, because Ibn Hazm regarded it as obligatory to make bequests to relatives who do not inherit, which include the paternal uncle, maternal uncle and all other relatives, but they do not allocate a share of the estate to these relatives. Moreover, Ibn Hazm did not stipulate a specific amount or share, but they are doing that by giving the share of the father or mother. And Ibn Hazm said that they should be given something in cases where the grandfather has made a bequest, whereas they give these grandchildren a share even if the grandfather did not make any bequest. So what Ibn Hazm said is different from what they attributed to him. Judges should not issue such rulings, and they should realize that by issuing such rulings they are going against the law of ALLAH, may He be exalted, and taking wealth from those to

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<sup>68</sup> Sahih al-Bukhari 2742

<sup>69</sup> *Ibid*



whom ALLAH has given a right to it, and giving it to those who are not entitled to it. This is going against the ruling and laws of ALLAH. Many scholars of al-Azhar have objected to the "obligatory bequest law" and issued fatwas speaking against it. Papers have been published in the journal of al-Azhar refuting this law, and explaining how it goes against Shariah. Shaykh 'Abdullah ibn Jibreen (may ALLAH have mercy on him) was asked: *Can grandchildren inherit from their grandfather if their father died before their grandfather? If the answer is no, then why?* He replied: Grandchildren refers to the sons of the son, not the sons of the daughter. If their father dies his own father, they do not inherit from their grandfather if he has a son or sons of his own, because a son is a closer than a son's son. If the grandfather does not have any other son but he has daughters, then the grandchildren inherit whatever is left after the daughters have been given their inheritance. Similarly, they inherit their grandfather if he does not have any sons or daughters, so they take the place of his children, and each male is given the share of two females.<sup>70</sup> At this point two questions arise in our mind that are:

1 - The Quranic law states that if the deceased person leaves behind a son, the orphaned grandson cannot be a heir. Is this not unlawful and an injustice shown to orphans?

2- By disallowing the right to inheritance to the orphaned grandson, does Islam mean to leave him to his fate? What is the solution prescribed by Islam for this problem?

Answer to the above question as follows:

The Quranic law states that if the deceased person leaves behind a son, the orphaned grandson cannot be a heir. Is this not unlawful and an injustice shown to orphans? This doubt has been due to the lack approach towards the wealth of inheritance. In fact, the law which the Quran propound in this regard is seen to be the most scientific and just of all. The issue of inheritance has been addressed in the verses 11 and 12 of Surah Nisaa. The right of inheritance of the person who has neither father nor offspring has also been dealt with in the last verse (176) of this same chapter. The Islamic approach to the wealth of inheritance is derived from these verses and from the practices of the prophet in this regard. The basic postulates of this

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<sup>70</sup> Ibn, Usaiman, Saleh. *Fatawa Al- Uthaymain*. Dar-ul-Fiqr, 2002. Vol: 2, P: 187

approach are as follows. One: None has the right to a person's wealth as long as he is alive.<sup>71</sup> Two: Those of his successors who died during his own life time will not be entitled to inheritance from his wealth (The wealth of inheritance itself comes into being with the death of the person. Prior to that it is but his own wealth, never the wealth of inheritance as such).<sup>72</sup> Three: It will be only those of his successors who are alive at the time of his death who will be entitled to a share of his wealth of inheritance.<sup>73</sup> Four: Inheritance is basically allocated to close relatives. Marriage and blood relations will naturally fall into this category.<sup>74</sup> Five: Close relatives of the deceased will obstruct the right to inheritance of the more distant ones in the same line of succession. By close relation is meant parents, husbands, wives' sons and daughters. Nobody else can claim any right in the presence of these closest of relatives.<sup>75</sup> Six: The accepted standard for allocating the wealth of inheritance is the nature of one's relationship with the deceased person; never the financial condition or the requirements of the claimant himself.<sup>76</sup> Seven: in the absence of the closest relatives, or links of the deceased, the right of inheritance is then conferred upon the next link in the line of succession.<sup>77</sup> It is for this reason that if there is no father, it would go to the father's brother and if there is no son then to the grandson. In the light of these basic postulates, the offspring's of the children who had died while their father was still alive can have no legal share in his inheritance if there are others of his children who are alive at the time of his own death. The reason for this is that the right of inheritance those of the cannot reach successors in the second generation of the family tree while those of the successors of the first generation are still alive. The question here is: will this not be an injustice? The first reply to this question will be the counter-question: will it be possible to allocate the wealth of inheritance in a completely just manner with the help of mere

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<sup>71</sup> Moududi, Abul-Aala, Sayed. *Tafheem-ul-Quran*, Tarjman-Ul-Quran, Lahore, 1991.Ed: 1<sup>st</sup>. p: 324

<sup>72</sup> *Ibid*

<sup>73</sup> *Ibid*

<sup>74</sup> *Ibid*

<sup>75</sup> Kuwait Ministry of Awqaf and Islamic Affairs. *Encyclopedia of Islamic Jurisprudence*. Vol. 3. p. 30.

<sup>76</sup> *Ibid*

<sup>77</sup> *Ibid*

legislation alone? Factually, of course, no system of law - not even Islam, for that matter - can successfully implement full justice in this regard. Look at a few of the models that can serve to successfully demonstrate these facts:

1. The deceased person leaves behind two children. One is handicapped. The other is fully fit. The first cannot earn his living. The second can work and earn wealth. How will the wealth of the deceased be allocated in this case? In the interest of justice, the one who is able to earn his own living must be given a lesser share while the one who is unable to do so must be allocated a larger portion. However, can any system render this justice a law?<sup>78</sup>

2. The deceased leaves behind three children. The eldest is aged forty. He is a businessman. He started off as a co-worker in his father's business and his own enterprise has now come of age. The second is a physician. He had studied using the wealth of his father. Today he virtually mints money. The third is a lad of eighteen. A student His father died before he could attain to any position. How is the wealth to be allocated in this case? Both the elder sons earn their own income; indeed, they had started their earnings with the wealth of their father. As for the younger son he never had much from the earning of his father even when he was alive. Here, too, it will be just that the younger son should, at least, get a larger portion in the share of his father's inheritance. Is it possible to make a law that would facilitate the allocation of the inheritance wealth in this manner?<sup>79</sup>

3. The deceased leaves behind three children. One is highly successful. He is able to make piles of money. The second is a man for social service. The last one is a miser. He would save all the acquired wealth and would find his expenses to stay within stated limits. If all three were given ten rupees, the first one would convert it into twenty, the second one would prepare death, the wealth of inheritance to which he was entitled would then have to be given to his close relatives. 4. This is also the case with the share to which mothers are entitled in the wealth of their children. If the mother passes away before her son, her close relatives will then be entitled to the wealth of her son if we are to go by the preferential theory of

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<sup>78</sup> Kuwait Ministry of Awqaf and Islamic Affairs. *Encyclopedia of Islamic Jurisprudence*. Vol. 3. p. 30.

<sup>79</sup> *Ibid*

inheritance. The acceptance of the preferential theory will thus become the cause of imbalance in the order of allocation. A person has two children. Both died. One has one son and the other has two sons. According to the Islamic order of allocating the wealth of the grandfather, all three grandchildren are entitled to an equal share. However, if the preferential theory is accepted, as far as the brother less grandson is concerned, the two sons of his uncle will each receive only one half of that to which he is himself entitled. Here, it need not be said that to allocate the right of the individuals who are similarly related to the same person in different proportions will only serve to create a gross imbalance in the order of allocation. In the foregoing section, a description of the problems that arise out of accepting the preferential theory of inheritance as a law, has been provided. It was for this reason that the Quran stopped short of prescribing a law to the effect that the grandchildren are entitled to a share in the wealth of a person even while his own children are still alive. For it is necessary that all its practical difficulties must first be addressed. If the right to inheritance was provided to the grandson by way of bringing a new law to the effect, the very foundation of the Islamic law of inheritance would then come apart and would prove impracticable as well. It, thus, becomes clear to us, here, that the Quran was, indeed, revealed by Him who is well-conversant with all the possible faults and shortcomings in law.<sup>80</sup>

#### **IV. DISALLOWING INHERITANCE TO THE ORPHANED GRANDSON, THE SOLUTION FOR THIS PROBLEM BY ISLAM**

Islam's is never a collection of inheritance laws alone; it prescribes a set of social security measures too. Indeed, these two sets of laws are delicately inter-woven one with the other in fact, the very basis of inheritance itself lies in that sense of duty towards mutual security and cooperation. Ordinarily, therefore, the right of inheritance belongs to the person who duty is found to help out the one afflicted with misery and privations. The son is duty-bound to protect the father even as the father is so towards the son. The grandson is, however, not obliged to protect the grandfather if he has a son; if not, he will be duty-bound to do so. (This is also the reason why the orphaned grandson will have no legal share in the wealth of

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<sup>80</sup> Kuwait Ministry of Awqaf and Islamic Affairs. *Encyclopedia of Islamic Jurisprudence*. Vol. 3. p. 30.

inheritance). It is, furthermore, the duty of the grandfather to protect the children who have lost their father. Indeed, the Quran views the meal for himself and his poor neighbor, the third would have two meals with it. Should the wealth of inheritance be divided equally between the three? That would not be justice. But here it is not practicable to implement justice through the normal process of law. Here, it becomes clear that it is not possible for mere laws and regulations to implement justice in all respects in the case of inheritance and other economic problems. In all such problems Islam does not prescribe solutions depending solely on laws alone. Indeed, it seeks to create a situation wherein justice can be established in such matters by heightening the moral consciousness of man and by encouraging the showing of mercy and kindness to those undergoing tribulations. Why a law cannot be made which would then enable the orphaned grandson to have the right to inheritance as well? In fact, the creation of such a law would then destroy all the foundational premises which Islam puts forward in the matter of inheritance. There is only one way in which the orphaned grandson can be allowed the right to inheritance. Imagine that the deceased son to be still alive. Project his children as the representatives of the deceased person. Then allocate the wealth that was to be given to the-dead son amongst his children. A person has two children. The elder one has three and the younger one has two children. The elder one died while the father was still alive. When the father himself passed away, only the younger son reminded alive. There is one thousand rupees as the wealth of inheritance. The younger son takes five hundred. The remaining five hundred is divided amongst the three children of the deceased elder son. This, in general, is the usual order of allocation. How practicable is this order of preference in the Islamic system of inheritance? It should not be forgotten that if the preferential theory is applied anywhere within the system of inheritance, it will become imperative to apply it throughout the whole as well. How correct will be this procedure? Examine the matter. Observe a few of the issues involved: 1. The husband has a right in the inheritance of the wife. If they have children his right will be one fourth, and, if not, his will be one half. Assume now that the husband passed away before his wife. Here, if the preferential theory was to be accepted, the father, mother, the children through other wives, of the husband all will be entitled to share in the inheritance of his wife. 2. This is also the case with the

rights of the wife in the inheritance wealth of her husband. If the death of the wife precedes that of the husband, her share will then have to be given to her mother, father and other relatives as well. 3. Fathers are also entitled to a share in the wealth of their children. Assume that the father passed away before his son. The father, however, has other children as well. Even if the son himself has children, if the father is alive even after his indifference shown to orphans as being tantamount to the very denial of religion itself. "Seest thou one who denies the Judgement (to come)? Then such is the (man) who repulses the orphan (with harshness), I, "Therefore treat not the orphan with harshness." "Treat with kindness your parents and kindred, and orphans" The Quran teaches that it a grievous sin to usurp the wealth of the orphans. "To orphans restore their property (When they reach their age), nor substitute (your) worthless things for (their) good ones; and devour not their substance (by mixing it up) with your own. For this is indeed a great sin." "And come not nigh to the orphan's property, except to improve it, until he attains the age of full strength," The prophet had taught never to do anything that would in any way infringe upon the respect that is due unto the orphans. Muhammad (PBUH), who had given the glad tidings that the one who protects the orphans will enter into Paradise in his company, had also forewarned that one of the greatest of sins is the misappropriation of the wealth of the orphan. It is, in itself, the duty of every Muslim to protect the orphans who have no family ties, whatsoever. Then does the duty of the Muslim in protecting those of the orphans who are actually related to him need any further recommendation? The responsibility of protecting them mainly rests with the grandfather. In the event of the grandfather's demise, it is the paternal uncle who must then assume the responsibility of guardianship. It is the grandfather who protects the orphaned grandson. He is provided with all his requirements by the grandfather. He is well-aware of all his problems and difficulties. He is also alive to the knowledge that his grandson is not entitled to any share in his wealth. He has the right, however, to keep aside a good portion of his wealth for the protection of his grandson. It is for such reasons that the Quran has made wassiyat compulsory. Wassiyat is the wealth bequeathed which becomes the property of the person in whose name it is made with the death of the person who actually makes it. The Holy Quran has given great importance to the institution of Wassiyat. "It is prescribed, when death

approaches any if you, it he leave any goods, that he make a bequest to parent and next of kin, according to reasonable usage; this is due from the God-fearing." It can be seen that the prophet recommended the making of the bequest in view of the expectancy of, and preparedness for, the arrival of one's own death which can happen at any time.<sup>81</sup> Indeed, the messenger of God had greatly encouraged the practice of Wassiyyat. He had also discouraged the avoidance of it.<sup>82</sup> From this, it may be inferred that Islam gave Prime Importance to the system of Wassiyyat. A person has the right to allocate up to one-third of his total wealth as Wassiyyat. For whom, then, is Wassiyyat meant? The prophet had taught that Wassiyyat is not meant for one's immediate successors. "There is no Wassiyyat for the successors"<sup>83</sup> for whom, then, is the Wassiyyat meant to be? That has to be of course decided by the person who intends to make it himself. The verse of the Quran<sup>84</sup> quoted above makes it clear that it must be made to those closest of relatives who come next to the immediate successors. This will, very importantly, include the orphaned grandson. The grandfather has the right to allocate any amount of his wealth to his grandsons. He can give away any amount of his wealth for the purpose while he lives. He can even give one-third of his total wealth as Wassiyyat. The condition that is to be fulfilled is that charity and Wassiyyat must not be so allocated that the rightful owners and other dependents, who are rendered poor and helpless, are not denied their rights. This is what Islam has done in the case of the orphaned grandson. The responsibility for his protection was entrusted to his grandfather; and after the death of his grandfather to his paternal uncle. The grandfather was thus given the complete freedom to allocate as much of his wealth as was necessary for assessing, and fulfilling, the needs of his grandson. For it is the grandfather who, more than anyone else, knows best all concerning him? The grandfather was thus given the right to make a Wassiyyat of up to one third of his wealth for him as well as for others stricken with poverty and privations. It was also particularly prescribed that it was only after this wealth of the Wassiyyat was allocated that the remaining portion could be used by the successors

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<sup>81</sup> Sahih al-Bukhari 2742

<sup>82</sup> Ahmed, Tirmidhi, Abu Dawood

<sup>83</sup> Ahmed, Tirmidhi

<sup>84</sup> Al- Baqra 2: 180

as the wealth that was to go as inheritance.<sup>85</sup> It was further prescribed that if, when orphans become entitled to possess wealth, they are yet to come of age, the close relatives are to be entrusted with its safe keeping and when they do attain to maturity, it is to be handed over to them.<sup>86</sup> The Quran has also made the instruction to the effect that if the grandfather makes no Wassiyyat, the relatives of the orphan, or orphans, including the paternal uncle, should allocate a lawful share as bequest for them at the time of distributing the wealth of inheritance.<sup>87</sup> Law has its own methodology. Islam seeks to abide by that methodology. However, it also handles the problems associated with the orphaned grandson without the strangulating confines of the law. Islam accomplishes this by heightening the moral consciousness of man. Indeed, in such matters that would be the most practicable way as well.

#### **V. FSC's ORDER TO MAKE CHANGES IN FOUR SECTIONS OF MUSLIM FAMILY LAWS ORDINANCE, 1961**

The court delivered its judgment in 38 petitions challenging Sections (share of orphan in the heritage of grandfather), 5 (registration of Nikah), 6 (polygamy) and 7 (divorce) of the Muslim Family Laws Ordinance. The hearing of petitions regarding controversial sections of the Muslim Family Laws Ordinance was continuing since 1993.

The Section 4 of the Muslim Family Laws Ordinance was declared repugnant to the injunctions of Islam as direct inheritance out of grandfather's heritage is not provided for the orphan in Islam. The existing provision in the law held repugnant to the injunctions of Islam shall cease to have effect from the 21st of March 2000. Section-4 had redressed this manifest unfairness by giving them their deceased parent's share. In striking it down, the court has taken the orthodox view that grandchildren are not among the prescribed hierarchy of legal heirs of their grandparents and, consequently, cannot inherit from them by right.

But the court, too, could not ignore the traumatic situation which had necessitated section-4 in the first place. Islam lays great stress

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<sup>85</sup> Moududi, Abul-Aala, Sayed. *Tafheem-ul-Quran*, Tarjman-UI-Quran, Lahore, 1991.Ed: 1<sup>st</sup>. p: 324

<sup>86</sup> Al-Nisaa 4:6

<sup>87</sup> Al-Nisaa 4:8-9



on the protection of orphans by society. This being the injunction for any orphan, it is a travesty of justice to inflict deprivation on those within the family. To prevent that, the Federal Shariat Court has devised a twofold recipe. It has counseled grandparents to leave behind a will in favor of orphaned grandchildren (not exceeding the entitlement of their deceased parent). Realizing that there may not be a will by the grandparents, the court has advised the government to enact a law to the effect that such a will "shall be deemed to have been created".<sup>88</sup>

## CONCLUSION

To conclude I would like to say that section 4 of the Pakistan Muslim Family Laws Ordinance, 1961, dramatically altered the law of succession applicable to Muslims by granting to the orphaned grandchild (ren) the share that their deceased parent would have taken had s/he survived the *propositus*. The principle of representation incorporated in the Pakistani solution contrasts with the compulsory bequest relied upon by several Middle Eastern countries to deal with the same problem, although arguably representation more closely reflects the experience and expectations of the people of Pakistan. Nearly two decades later, the Federal Shariat Court was established and endowed with jurisdiction to declare a law contrary to "the Injunctions of Islam" and thus void. Some laws, however, were specifically exempted from the Court's jurisdiction; falling within this category is "Muslim Personal Law." A 1981 decision of the appellate Court (the Shariat Bench of the Supreme Court) held that the provisions of the Muslim Family Laws Ordinance were included within the phrase "Muslim Personal Law," and were thus outside the jurisdiction of the Federal Shariat Court. This position was reversed by another decision of the appellate Court in 1993, and the provisions of the Ordinance were immediately challenged on the basis of their alleged divergence from the "Injunctions of Islam." This essay reviews the provisions of section 4 of the Ordinance and examines the decision of the Shariat Court as regards this particular provision.

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<sup>88</sup> The Federal Shariat Court, on Jan 5, 2000, declared some articles of the Muslim Family Laws Ordinance 1961 as un-Islamic and directed the President of Pakistan to take steps to amend the Family Laws on share of orphan in grandfather's property, registration or Nikah, polygamy and divorce to bring provisions in conformity with the injunctions of Islam.

## IMPORTANCE OF ENHANCING PAKISTAN'S EXPORTS

**Azhar Siddique\***

**Abstract:** This article encompasses manifold aspects relatable to the situation of export in Pakistan. After theorizing the exports performances, it circumscribes the importance of transnational exports for sustainable economy of Pakistan. The history of exports in Pakistan with special reference to export policies is discussed so that roots of problem can be identified. The legislature in this regard had not been lagging behind as it had contributed the sector with legislation the same has been discussed including few special legal provisions directly relevant. Important commodities and buyer countries have been referred. At the end impacts with hindrances and way to overcome the limitations have been reflected. The main intent of this article is to understand the importance of exports in Pakistan, by encompassing its export products, effects of less export and way forward with special reference of governing laws and policies and their practicability regarding increase in exports.

**Keywords:** Pakistan, Export, Enhancing, Importance

### I. INTRODUCTION

The British economist David Ricardo presented “the theory of Comparative Advantage” tells a country produces some merchandises more and cheap than other country, becomes rich in that product, so bargain of the artefacts (import and export) would be win win situation for every republic. This theory explains that variations in technology, resource, demand and presence of government rules and economies of scale are the five fundamental reasons of trade between the nations.<sup>89</sup> So, it would be fair to say that high export rate is harbinger of good economy and basis of international trade which is again determined by the trade policy of the country. Ukraine war, covid lockdown affected the world

\*Deputy Director (Legislative Drafting Unit), Senate of Pakistan. 9th National Parliamentary Development Course.

<sup>89</sup>Who Is David Ricardo and What Is He Famous For? "Investopedia", accessed on 29 November, 2022. <https://www.investopedia.com/terms/d/david-ricardo.asp#:~:text=Ricardo's%20widely%20acclaimed%20comparative%20advantage,as%20compared%20to%20other%20nations.>

economy.<sup>90</sup> Pakistan depends on the exports to make foreign income, boost currency and pay back its debts.<sup>91</sup> Some elements that affect the exports are economic conditions, industrial policies, export supply, various sectors of economy and time to time governmental policies. Two school of thoughts to export model first the neoclassical approach and the Keynesian approach are the determinants of export supply. Neoclassical approach transpires that export supply is essentially determined by the relative prices and production capacity. Keynesian economist's title that export supply largely depends on domestic demand pressure. Many economists opine that change in the domestic demand may leave effects on export growth directly by affecting the availability of goods for exports, and these effects are not covered implicitly by the changes in the prices relatively.<sup>92</sup>

## II. HISTORY OF EXPORTS IN PAKISTAN

Immediately after partition, Pakistan faced acute scarcity of raw material which was previously purchased from Bombay and Calcutta, which in turn resulted in propelling Pakistan on package of quick national mechanization. Until start on 1960s state policy was to provide incentives to national entrepreneurs, decrease export taxes, remove constraints on imports of different sectors of agriculture which not only increased exports but also helped agriculture to progress. 1970s was era of unrest and the deep rooted economic structure of 1960 became shaky. Government tried to alleviate poverty by introducing various policies but due to several

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<sup>90</sup> WAR SETS BACK THE GLOBAL RECOVERY, April 2022, accessed on 29 November, 2022.

<https://www.imf.org/en/Publications/WEO/Issues/2022/04/19/world-economic-outlook-april-2022>

<sup>91</sup> <https://pide.org.pk/blog/how-to-increase-exports-for-pakistans-sustainable-economic-growth/#:~:text=Pakistan's%20economic%20growth%20of%20Pakistan,the%20balance%20of%20payment%20deficit.>

<sup>92</sup> Artus, Jacques R., February 1973. "The short-run effects of domestic demand pressure on export delivery delays for machinery," *Journal of International Economics*, Elsevier, vol. 3(1), pages 21-36, accessed on 29 November, 2022. <https://www.sciencedirect.com/science/article/abs/pii/0022199673900044>.

causes, failed<sup>93</sup>. From 1980s till late 1990s there was low export rates even lesser than 1970s.<sup>94</sup>

Government of Pakistan in its trade policy of 1994-1995 encompassed industrialization in wake of free global trading system, availability of raw materials, machineries, reducing administrative issues, easy procedures, technology development, building research and human resource, continuity in policy planning etc.<sup>95</sup>

The Ministry of Commerce (MOC) has prepared the Strategic Trade Policy Framework (STPF) 2020-25 with key elements like simplification, automation and exemption of duties and taxes on exports, accessible energy reasonable price in accordance with market price of region, backing of export initiatives, established mechanism to reduce policy execution loopholes.<sup>96</sup>

### III. ROLE OF LEGISLATURE IN EXPORTS

Constitution of Pakistan guarantees Freedom of Trade, Business or Profession under article 18. Under article 160 (3) (ii) & (iii) NFC makes recommendations to the President regarding taxes on goods imported, exported and export duties on cotton. Different legislation regarding exports are Export Processing Zones Authority Ordinance, 1980, The Ports Act ,1908, Karachi Port Trust Act - 1886, Port Qasim Authority Act - 1973, Gwadar Port Authority Ordinance - 2002, Territorial Waters and Maritime Zones Act - 1976, The Customs Act, 1969, Foreign Exchange Regulations Act

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<sup>93</sup>Anne O. Krueger, Hal B. Lary, Terry Monson, and Narongchai Akrasanee, eds , Trade and Employment in developing Countries, Volume 1: Individual Studies, University of Chicago Press, 1980. 291 - 340. accessed on 30 November, 2022. <https://www.nber.org/system/files/chapters/c8736/c8736.pdf>

<sup>94</sup> The Pakistan Development Review Vol. 37, No. 4, Winter 1998 Papers and Proceedings PART II Fourteenth Annual General Meeting and Conference of the Pakistan Society of Development Economists Islamabad, January 28-31, 1999 Published by: Pakistan Institute of Development Economics, Islamabad. accessed on 30 November, 2022. <https://www.jstor.org/stable/i40056823>

<sup>95</sup>Trade policy review Pakistan, "WTO", February 1995, accessed on 30 November, 2022. [https://www.wto.org/english/tratop\\_e/tpr\\_e/tp1\\_e.htm#:~:text=The%20Trade%20Policy%20announced%20by,raw%20materials%2C%20intermediates%20and%20machinery.](https://www.wto.org/english/tratop_e/tpr_e/tp1_e.htm#:~:text=The%20Trade%20Policy%20announced%20by,raw%20materials%2C%20intermediates%20and%20machinery.)

<sup>96</sup> Strategic Trade Policy Framework (STPF) 2020-25, "TDAP, Ministry of Commerce, Government of Pakistan,," accessed on 30 November, 2022. <https://tdap.gov.pk/wp-content/uploads/2022/01/STPF-2020-25-1.pdf>

1947, Foreign Private Investment (Promotion and Protection) Act 1976, and Board of Investment Ordinance, 2001 are in field.

The Export Promotion Bureau, was established in 1963 as an attached department of the Ministry of Commerce. EPB supported around 20,000 exporters, 2000 trade delegations and provided mechanism of commercial courts with the help of judiciary for dispute resolution between exporters and importers. But due to its evolving bureaucratic mechanism, need was felt to overhaul the organization, hence TDAP was established under the Trade Development Authority of Pakistan Ordinance, 2006.

The vision of authority is to focus the exports by its promotion in an innovative and harmonizing way by joint ventures. It also assists the market access by improving image of Pakistan.<sup>97</sup>

#### **IV. PAKISTAN'S EXPORTS 2021 BY COUNTRY**

Top export destinations of commodities from Pakistan in 2021:(USD million Dollar)<sup>98</sup>

<b>Export Destinations</b>	<b>Jan-March FY21/22</b>
United States	1,715
United Arab Emirates	805
China	758
United Kingdom	553
Netherlands	452
Germany	439
Bahrain	416
Spain	342

<sup>97</sup>Annual Analytical Report On External Trade Statistics of Pakistan FY 2020-21,” TDAP, Ministry of Commerce, Government of Pakistan,” accessed on 30 November, 2022. <https://tdap.gov.pk/about-tdap/>

<sup>98</sup> Pakistan Trade Perspective JAN - MAR 2022, TDAP, Ministry of Commerce, Government of Pakistan,” accessed on 30 November, 2022. <https://tdap.gov.pk/wp-content/uploads/2022/05/Final-Trade-Perspective-Q3-2021-22-6th-May-2022.pdf>

Italy	328
Afghanistan	303

**Exports structure Pakistan 2021 by commodity groups:<sup>99</sup>**

COMMODITIES	UNIT	JULY - JUNE, 2020-21	
		QUANTITY	VALUE IN THOUSAND US\$
GRAND TOTAL			25,304,143
A. FOOD GROUP			4,392,117
01 Rice	MT	3,684,907	2,041,729
02 Fish & Fish Preparations	MT	184,543	414,606
03 Fruits	MT	975,165	480,032
04 Vegetables	MT	950,367	319,506
06 Tobacco	MT	12,756	35,959
08 Spices	MT	23,503	92,985
09 Oil Seeds, Nuts and Kernals	MT	87,176	94,133
10 Sugar	MT	-	-
11 Meat and Meat Preparations	MT	95,648	331,640
B. TEXTILE GROUP			15,399,072
13 Raw Cotton	MT	594	807
14 Cotton Yarn	MT	390,565	1,016,969

<sup>99</sup> Pakistan Trade Perspective JAN - MAR 2022, accessed on 30 November, 2022.

15 Cotton Cloth	TH.SQM	993,597	1,921,001
16 Cotton Carded or Combed	MT	50	65
17 Yarn Other than Cotton Yarn	MT	14,358	33,369
18 Knitwear	TH.DOZ	177,288	3,814,999
21 Tents,Canvas & Tarpulin	MT	40,263	110,389
22 Readymade Garments	TH.DOZ	37,247	3,032,801
25 Other Textile Materials	--		632,491

### **Exports contribution in homeland**

It can be said that Economic advancement of nation primarily depends on the Exports. In Pakistan, exports have following impacts:

- The exports would cater for the employment opportunities in Pakistan.
- Exports increase productivity capacity the companies which yield export product are 25% more fertile than the those which do not export.
- Exports provide Pakistan with foreign currency.
- Exports increase foreign direct investment resulting in more industrialization.
- Exports create opportunity for Pakistan to compete in global market which is 258 times bigger.<sup>100</sup>

### **Reasons of low exports in Pakistan**

Immediately after inception of Pakistan there was marked decrease in export due to stoppage of availability of raw materials from the areas which were now part of India like Calcutta etc. Further avoidance of devaluation of currency made trade balance disproportionate. the extraordinary expensive business operation made trade uncompetitive. The population boom and lacking the sensibility of converting human drain in to human resource, expensive tariffs and discouragement by no backing mechanism

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<sup>100</sup> Strengthening Exports is Critical for Pakistan's Sustained Economic Growth, "The World Bank", October 28, 2021. accessed on 1<sup>st</sup> December, 2022. <https://www.worldbank.org/en/news/press-release/2021/10/28/strengthening-exports-is-critical-for-pakistan-s-sustained-economic-growth>

added fuel to fire.<sup>101</sup> Other includes absurd policies, inconsistent growth trends, low penetration in global markets and lack of resilient infrastructure and unimproved technologies. etc.<sup>102</sup>

### **Factors responsible for low exports in Pakistan:**

- Exports are meager due to the lesser prices in the world on account of standing bulk of trade. However, the non-oil supplies rates are stabilized somewhat.
- In Pakistan, basic features and wrong strategies such as import replacement rather than export upgrade has factually been followed upon.
- The principal export, i.e. of cotton yarn, cloth and value-added textiles establish almost 60 per cent of our total exports are still over-reliant. However, many of the exports are from the agricultural sector or by small and medium originalities etc. have taken a big hit in the last years.
- Over taxation of inputs, lack of access to infrastructure, especially electricity and gas, and restricted availability of credit from commercial banks on certain sectors have caused the low exports moreover, our exports have staggered because they can no longer compete in the international market due to an overvalued rupee.
- Elucidating the fast progression in imports in 2016-17, the government specified that this is mainly owing to the expansion in equipment importations, particularly for schemes related to the China-Pakistan Economic Corridor (CPEC). Several import-substituting industries within Pakistan have been powerless to contest and the size of key imports has gone up by anywhere between 18 and 56 per cent for different items. Such giant surges are unequalled for many imports.<sup>103</sup>

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<sup>101</sup> Zafar Aziz Chaudhry, Pakistan's Failure to Export Technology, "daily times", OCTOBER 7, 2022. accessed on 1st December, 2022. <https://dailytimes.com.pk/1008481/pakistans-failure-to-export-technology/>

<sup>102</sup> Shahid Sattar, How to increase exports for Pakistan's sustainable economic growth?, "Pakistan Institute of Development Economics", 2021. accessed on 2<sup>nd</sup> December, 2022. <https://pide.org.pk/research/how-to-increase-exports-for-pakistans-sustainable-economic-growth/>

<sup>103</sup> Dr Hafiz Pasha, What has caused Pakistan's alarming trade deficit?, "herald" 24 Jul, 2017, 2nd December, 2022. <https://herald.dawn.com/news/1153812>



### Way forward for enhancement of exports

- Incentive in development of software etc. as it requires less infrastructure and investment than making a machinery.
- Facilitate the industries to make product at par with international standards so that demand can be increased for example global ratio for MMF to Cotton is 70:30, whereas, Pakistan's is 30:70 due to the dearth of incentives.
- There is dire need to enhance small and medium business enterprises to get advantages like craftsman, and domestic revenue.
- The rules, laws, regulations, policies related to export should be simple and easily understandable. More over the red tapism must be avoided by taking various steps like one desk or developing an app etc.
- The units which provide more and quality exports must be given special subsidies then those who are below the minimum level cannot misuse the facilities meant for performers so that the country gets benefit.
- Withdraw custom duty/sale tax on the import of raw materials (i.e cotton & polyester) short in supply for industry consumption.
- Liquidate all Textile Industry refunds of sale tax, income tax, and process refunds is their imbursement through commercial banks rather than through the Federal Board of Revenue (FBR). These banks in turn can seek repayments from the State Bank of Pakistan.
- Allow LTFF to indirect exports & building of infrastructure for garment plants.<sup>104</sup>
- Export policy should be revisited by making novel policies in accordance with the new sectoral realities so that the export sector of the country may be expanded and as in order to safeguard the economic prosperity of the country on ecological basis.

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<sup>104</sup> How Can Pakistan Increase Exports For Sustainable Economic Growth? "Iqbal Institute of Policy Studies", 2nd December, 2022. <https://iips.com.pk/how-can-pakistan-increase-exports-for-sustainable-economic-growth/>

- It is recommended that the government must provide an encouragement to value-added synthetic goods exporters so that increase in the export sector of the country may be insured.
- There should be stability in price ratio of inputs and industrial material to secure the balance in the production of value-added products.
- There should be positive role of provincial governments for the supply of food items, including rice, fruits, and fish along with special concessions to farmers in the pre-production stage to augment the agricultural yields and to produce the surplus for exports.
- Pakistan needs to secure its balance of payments position urgently. Pakistan essentially should more vigorously exploit the openings created by the GSP+ status granted to us by the European Union along with the chances obtainable by China-Pakistan Free Trade Agreement and the South Asia Free Trade Area (Safta) agreement. Fresh bazaars need to be advanced especially in Central Asia, Iran and Turkey.<sup>105</sup>

## CONCLUSION

The study of “importance of enhancement of exports in Pakistan” aims to realize the fact that our country contains trivial exports. This is universally acknowledged that our country is replete with natural resources i.e. agriculture, mineral and marine. Our policies must revolve around the utilization of these natural resources in collaboration of technology use. Whenever all these resources shall be processed technologically it shall lead towards the surplus manufactured articles and those articles should be amenable for exports, consequently export of Pakistan will rise even beyond the desired optimum level.

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<sup>105</sup> Dr Pasha, What has caused Pakistan's alarming trade deficit? 2nd December, 2022.

## **Liability of Online Service Providers and the Impact of Rapid Growth of Internet the Online Infringement Issues**

**Saqib Zaheer Cheema\***

**Abstract:** The paper examines the rapid growth of technology in present scenario and infringement of copyrights in the cyber world. It would not be erroneous to say that the technological development is much faster than law. The main focus of paper is to analyze the role of intermediaries, the impact of fast growing Internet technology and to determine the liabilities of ISPs and end-users; who is the real infringer. It is very hard to watch the user's activities on the Internet and novel changes in technology makes it challenging to even trace a primary infringer. The online issues that are going on will get complicated in future. The universal mechanism of intellectual property rights are still baffling with the definition of various rights that is provided to the copyright owners and ironically saying the answer would be available for these complexities when the massive infringements of protected work take place. Current scenario is very complex as on the one hand it deals with the question of freedom of expression whereas on the other hand issues of law of torts and IPR are also at stake. Although, the developed states are trying to capture the monster but still need to improve the legislation procedure.

**Keywords:** Index Terms- ISPs (Internet Service Providers), Infringement, Intermediary, Liabilities, Internet, computer, Network, USA, UK, Rapid Growth.

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### **I. INTRODUCTION**

In 1991, Senator Al Gore in his book "Infrastructure for the Global Village" suggested that in the coming years new technology would rephrase all the legal ideas of originality, ownership, property, intellectual freedom and privacy. He pointed out that officials would have to take these upcoming issues into account and one would have to take appropriate steps that enabled the economic and intellectual opportunities of the latest technologies to be realized. Currently, the involvement of internet is increasing rapidly in our life. The internet has revolutionized the whole system of communication, in particular

reading, selling and advertising. Companies prefer to advertise and sell their products online rather than any other method and web-sites are set up for this purpose e.g. EBay.co.uk, Amazon.com, and Auto-traders.com etc. It is impossible to deny the success of British band 'Arctic Monkeys'. They achieved their overwhelming success due to the use of the internet. They have focused on the idea of using online file sharing and this made them a global phenomenon. They have released their music world wide and therefore they became successful in capturing the attention of audiences from various parts of the world. A positive aspect of reaching to such a global audience is that it brings together the people of different cultures through music. Another important development is the introduction of virtual universities e.g. American International University-Bangladesh, Canadian Virtual University, Intercultural Open University, Virtual University of Pakistan, Virtual Global University (VGU), International Virtual University UK etc. The students can attend the lectures without their physical presence in that place through video conferencing.

Despite such a transformational change of the world and making such positive impact on the lives of people it brings some negative points along with the positive ones. The critics of information technology argue about the legality of sharing online information suggesting that there is a need to put limits on the process as it is anticipated that legal problems will be caused and privacy issues will arise. The misuse of the internet has caused some serious legal issues which seem to overshadow the positives it brings to the society. On one hand it can promote a band to the whole world but on the other hand it has opened the doors for illegal downloading of music. This has caused severe problems in the field of copyrights and patent. This situation has become so serious that in 2008 the music band U2 had to issue a personal statement to prevent their fans illegally downloading music. Secondly there is a problem of criminal people hacking the financial information of others carrying out online transactions. This is causing huge losses to the people as their information is misused. Now there is urgency among the jurists to design the law in order to protect the people from cyber-crimes. The whole debate revolves around the subject of liabilities of ISPs in the, especially, UK and USA, with a comparative study of both systems the U.S approach seems to be less rigid as compared to the UK. Both USA and UK have a similar legal approach with some

slight differences. The liabilities of Online Service Providers in respect of online infringement are the chief focus of this paper.<sup>106</sup>

### **Copyright law**

Starting from the sixteenth century, copyright has developed safeguards to cover a wide range of works from printing to digital material. Copyright extends to all sorts of work; irrespective of quality, subject to some fundamental requirements. Tables, compilations and code-books came within copyright during the nineteenth century. The twentieth century is regarded as a flourishing period for copyright law as its ambit extended to cover literary works (works generated by computers as well), musical, dramatic photograph, films, broadcast, recording, sounds, cable programs, compute; programs and all programs created or stored or produced with the help of computer. The idea of copyright is supported by the judges who acknowledge and sympathize with the principle of rewarding a "person's labor, skill and effort". As Peterson J commented in *University of London Press Ltd V University Tutorial press Ltd* [1916]: "...What is worth copying is prima facie worth protecting" As the title indicates copyright protects works from being copied without the approval of the original creator. Moreover, copyright not only deals with copying of material but also it deals with question of making an adaption of work; such as displaying work in public, broadcasting and copying of work. The Copyright Act sets out some restricted acts which only the owner of the copyright can do or authorize with regard to his work. In fact, the owner is usually the person who creates the work except when he is in course of employment; the employer will be considered the owner of that work unless or otherwise agreed. "The Copyright, Design & Patent Act 1988 usually talks in terms of the creator of a work being the 'author' of the work". Therefore, an individual who creates a piece of music is the author of the music and in the same way a photographer is the author of his work. According to section 9 of Copyright, Design & Patent Act 1988, in the case of sound recordings, films and digital works, the author would be the person who formulates the essential arrangements for creation of the work, so an owner of a piece of work generated

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<sup>106</sup> Clough, Jonathan (2010). *Principles of Cybercrime*. Cambridge University Press. p. 221.

automatically by a digital device would usually be the individual who supervises or arranges the computer which generates it.<sup>107</sup>

## II. COMPUTER AND COPYRIGHT

Digital technology has modernized human life from the last quarter of this century, directly or indirectly, but copyright law has only just come to terms with technology. The previous source of copyright law, Copyright Act 1956, said nothing about the development of computer technology as it was at an early stage when this act came into force. With the passage of time, the digital technology developed rapidly, and a need was felt to include computer programs within copyright protection, resulting in an amending piece of legislation introduced as the Copyright (Computer software) Amendment Act 1985. The Act ensured that programs and work generated with the aid of computer, by computer or stored in a computer were protected by copyright. Moreover, the Copyright, Design & Patent Act 1988 strengthened the law related to computer programs and consolidated the work formulated with the help of computer or generated by computer, by every means. Works created by or with the assistance of computer were protected in the earlier law but there were some complexities in identifying the author of the work for the purpose of copyright.<sup>108</sup> For instance, for a newspaper competition known as 'Millionaire of the Month', random numbers chosen by computer were decided to be protected by copyright in *Express Newspaper plc. V Liverpool Daily Post & Echo plc.* [1985]. It was claimed that there was no human author and, resultantly, the numbers selected by the computer were not entitled to claim for copyright protection. However, these arguments were rejected and announced childish by Whitford J., who declared:

*"This claim is as silly as saying that a pen could be the author of literary work"*

The human effort can be found either in the form of a person who puts data into the computer to generate output or in the work engaged in writing the program used or a combination of both. Section 9(3) of Copyright, Design & Patent Act 1988 deals particularly with computer produced dramatic, musical, literary or

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<sup>107</sup> Sinnreich, Aram (2013). *The Piracy Crusade: How the Music Industry's War on Sharing Destroys Markets and Erodes Civil Liberties*. University of Massachusetts Press. pp. 94–118.

<sup>108</sup> Act of 6 January 1897, ch. 4, 29 Stat. 481-82.

artistic works and states that the author is the person by whom the essential arrangements were made for producing the work. Simply, the individual who has control over the computer is the author of any sort of 'computer-generated' work. Section 178 of CDPA explains as:

*"A work as 'computer-generated' when it is generated by a computer in circumstances such that there is no human author of the work".*

However, this concept makes the situation complex because, in several incidents of works generated with the aid of computer, it will be difficult to state with any assurance whether the work has a human author.

### III. INTERNET AND INTERMEDIARIES

The internet has extended rapidly from the APRANET (Advance Research Project Agency Network) into an advanced network system that can be accessed with a computer by everyone. Thus the APRANET provided a way of creating a network system. The main reason behind the invention of this innovation is to create numerous networks of multiple starting with the pioneering packet switching network, and later on, packet radio networks, Packet satellite networks and other networks. Academia and governmental bodies have also been influential and contributed significantly in the development of internet based Communication.<sup>109</sup>

“The Internet’s pace of adoption eclipses all other technologies that preceded it. Radio was in existence 38 years before 50 million people tuned in’ TV took 13 years to reach that benchmark. Sixteen years after the first PC kit came out; 50 million people were using once. Once it was opened to the general public, the Internet crossed that line in four years.” Quote from U.S. Department report “The Emerging Digital Economy”.

It is important to note that the cyber network systems are established without any human intervention. The link of one consumer to another consumer through the internet is made possible by the packet of data sent to each. Therefore, an automatically generated network extends and bonds all together. However, this modern communication system has entirely revolutionized the world of information technology. It is noteworthy that all of this

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<sup>109</sup> Miriam Bitton (2012) *Rethinking the Anti-Counterfeiting Trade Agreement's Criminal Copyright Enforcement Measures*. The Journal of Criminal Law & Criminology 102(1):67–117

information goes through intermediary systems following different ways and at different times without any specific sequence.

Several intermediaries are involved in the transforming of data through digital devices. These stakeholders can be divided into two sections for the purposes of this research.

The parties to the exchange: those who at the end of the transmission are either senders or recipients.

Online services providers (Intermediaries): all the computers which pass the information on the packets to the parties.

Online service providers can further be categorized into two sections; websites and internet service providers (ISPs). Websites can be defined as a set of images, web pages, videos or different other electronic means that can be accessed by using the Internet. Internet service providers (ISPs) give access to the internet by using dial up or other source of communication. Internet Service Providers and websites perform a significant role in the course of modem communication. Internet service providers establish connection between sender and receiver to maintain the communication and the websites provide access to the data. Currently, the intermediaries have become significant actors in the communication process and legal issues against service providers have increased. There have been a number of cases against ISPs recently such as the sale of pirated movies, music, images and other related issues.

#### **IV. INTERMEDIARY LIABILITY AND COPYRIGHT INFRINGEMENT**

The birth and expansion of the internet has developed a new way of business and services e.g. social networking websites (Facebook, Twitter, LinkedIn, Badoo, Bebo, hi5 etc.), search engines and online market places (EBay, Amazon, Auto-trade etc.). Sometimes end-users of these online services could infringe copyright. Practically speaking, these infringing acts may be hard to trace as to do so requires substantial financial resources and may have occurred in different jurisdictions. Therefore, the protection of intellectual property rights against infringers can be complicated and costly. That is why, the attention of copyright owners has shifted from taking action against end-users to online service providers who allow and facilitate the infringements. One of the issues that have remained debatable for a long time is the conflict between right holders and online service providers about the unlawful



downloading and uploading of music. The industry remained remarkably successful against the likes of Napster and Pirate Bay who served as a vehicle to infringe copyrights. Currently, ISPs are considered responsible for infringements, as they provide access to the internet.

**Reasons and counter reasons put forward for holding ISPs liable are as follows:**

1. A reason to hold ISPs responsible for the misconduct of their users is, their 'Authority' to suspend the users' websites and e-mail in case of violation. They have also got the power to report such abuse to the help lines, such as those of right holders and concerned authorities. However, in the UK, under Data Protection Act, ISPs are not allowed to disclose the identity of their subscribers except in a few cases, which are firstly, by the order of the court and secondly, where the subscribers themselves allowed them to do so. Keeping in view the above circumstances it is assumed that a copyright owner cannot sue the infringer directly without the support of the ISP, as the identity of infringer cannot be located without their help. So only if the owner can force the ISPs to disclose the names of an infringer will the ISP be able to divest itself of liability. When ISPs monitor the transaction of subscriber to check the copyright infringement, it is not only a violation of subscriber's rights but it affects ISPs business model.
2. Another reason for holding ISPs responsible is their capacity to reproduce the material on their own server when the subscriber uploads it. This view never seems to be strong as it has been decided that 'temporary electronic copies' are excluded from the ambit of 'copies'. The reaction of ISPs was vigorous in response to the views, in which they are regarded liable for the acts of their subscribers. They put the defense that their position is more like a postman, who delivered letters unaware of the fact that a particular letter is having a defamatory statement. Their role can be further compared with Telephone Company which cannot be held responsible for the obscene calls of the users. Moreover, by imposing liability on ISPs the probable growth of Internet would be restricted.
3. A further reason for holding ISPs responsible for infringements is that they are better able to pay.
4. Some reasons for holding an ISP liable are dependent on their 'knowledge of the activities of the subscribers'. For example, if ISPs are aware of the infringements done by the users then they would be

considered liable by the courts for such an activity of the users. However, they are under an obligation to remove such material soon after the action came in their notice. Practically speaking, there are various reasons for which ISPs cannot take the responsibility of their users' infringements. As there are countless transactions that are completed with the help of ISPs, it is not possible in practice for ISPs to check the content that passes through their networks. Again it is expensive and difficult for ISPs to regulate the content that is used by countless users. Then again it becomes difficult for ISPs, just because of the instant nature of the content, to verify, amend and scrutinize it. As stated by William Foster, ISPs are similar to common carriers in that they have no control over which members of the public use their facilities ,or the content , members of the public choose to transmit.'

5. A further example of whether to hold an I SP liable is dependent on circumstances relating to the two processes in internet communication, the process of 'providing the contents' and that of 'transferring the contents'. It is considered justified to hold ISPs responsible in the former situation, but not the latter when done by the subscribers. They are considered to be liable if they directly copy the 'protected material' as evidence, if ISPs make it possible for the subscribers to get the latest songs from their website, they are responsible for infringements. But they would not be responsible for the acts of subscribers when they share such unlawfully downloaded copies of the material with one another. 6. One of the latest viewpoints is that ISPs should be considered responsible for direct copyright infringement where they deal with 'automatic data flow and conduct a human screening process of objects posted to the websites they host. But inspire of human screening, it is difficult to control copyright infringement absolutely. But this fact makes the position of ISPs more strong that ISPs involved a person to scrutinize for violation. To gather with above mentioned efforts, the very terms and conditions of ISPs for subscribers is regarded as a compact proof of their efforts to stop the copyrights infringement. Keeping, in view all the efforts, it would be unjustified to hold ISPs liable for the acts of their users. But still this matter is debatable. Internet Service Providers are liable for primary infringement where they directly violate the rights of real owners. For instance, if an Internet Service Provider gives access to infringing material kept and preserved on its own server without valid permission. The

United States approach has been to find Internet Service Providers (ISPs) strictly liable for primary infringement although this has been a controversial. Before the existence of the Digital Millennium Copyright Act 1998, in order to determine the liability of ISPs, the courts only depended on copyright law but some courts viewed ISPs as being strictly liability. In 1996, immunity was provided to online service providers under Communication Decency Act 1996.<sup>110</sup>

The United States has also developed a secondary liability for Internet Service Providers making them contributory or vicariously liable for infringements. The contributory and vicarious liability theories have developed by the US courts through different cases (Napster, Sony Corp. etc.) especially when 'Internet Service Providers' were held liable.<sup>111</sup>

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<sup>110</sup> Ram D. Gopal and G. Lawrence Sanders. "International Software Piracy: Analysis of Key Issues and Impacts". *Information Systems Research* 9, no. 4 (December 1998): 380–397.

<sup>111</sup> Edwards, Lilian; Waelde, Charlotte (2005). "Online Intermediaries and Liability for Copyright Infringement" (PDF). Keynote paper at WIPO Workshop on Online Intermediaries and Liability for Copyright, Geneva. World Intellectual Property Organization (WIPO). p. 9. Retrieved 1 September 2010.

## CONCLUSION

There is still a considerable distance between law makers and technology in this area. The swift growth of digital world has not only made it simple to access the internet, but has also given rise to numerous problems. There appears to be no doubt that copyright owners should receive protection for their work and this protection is clear in certain areas. What seems to be unjustified is holding ISPs liable for the misconduct of their users. It is really difficult for them to keep a record of the activities of the subscribers. Then there should be a harmonizing balance system to check the rights and liabilities of ISPs in relation to the matters of copyright on the internet. It is time to adopt at least three primary steps to protect the users on internet. Firstly, the law makers will have to pay attention on territorial issues and need to revise territory. The previous approach regarding territorial application is now not applicable in present complex and continuous developing world. So, there is need to redefine the territory. Second thing which need to do is harmonization between legislatures and IT experts, it will be the basic source to bring masses close to each other through internet. The harmonization means not only the harmonization between different laws makers but also need to minimize the differences between traditional thinkers and technology specialists. Thirdly and finally, various campaigns of mass awareness will be helpful to bring society in conformity with laws. One important fact that needs to keep in mind that future prospective of human civilization completely depends on controlled internet growth.

## **Social Life of Women in Islam: An analytical Perspective on Gender Equality, in the Light of Article 3 ICCPR and OIC Cairo Declaration**

**Mian Muhammad Akbar Javed\***

**Abstract:** This article actually discusses the women human rights, especially the focus of the study is on the gender equality in Shari'ah law. Islamic perspective on this issue is the least understood and most misrepresented by west and at times by some Muslims scholars as well. Due to the predominant local culture practice in different parts of the world and the actions of some Muslims be liable to reinforce wrong perceptions of the Islamic perspective. Gender equality in Shari'ah law is the major issue of this study and it will be tackled with different angles to explaining the sources of Shari'ah law that provide the foundations for Islamic view on gender equality. The issue of gender equality is important, relevant to current era.

**Keywords:** Women, Human Rights, Gender, Equality, Shari'ah

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### **I. INTRODUCTION**

Gender equality and Islamic law: brings a large debate among western and Muslim scholars in the fields of human rights in general and women's rights in particular. Certain areas in Islamic law are perceived to be incompatible with universal standards of women's rights and gender equality especially in the areas of divorce, polygamy, child custody, inheritance and women a witnesses. Debates and writings on the subject are increasing and are diverse in their perspectives. These problems are enhanced by the tendency to treat some juristic interpretations as if they were identical with Islam. In this study, a examining eye is being put on the different kinds of women human rights such as spiritual rights, social rights, economic rights, and political rights, effectively summarizing the role of women in Muslim society. When writing or speaking about the Shari'ah position on any issue, one ought to clearly differentiate between the normative teachings of Islam and the diversity of cultural practices dominant among its supporter that may or may not be consistent with those teachings. This study discuss the normative teachings of Islam with regard to the standing role of women in

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society as the criteria by which to judge the practice of Muslims and to evaluate their compliance with Islam. First of all, the study goes to examine the Article 3 of ICCPR, which represents the western approach on gender equality, then to take an examining eye on the article 6 of the DHR1, which represents the Islamic approach on gender equality. The article 3 of ICCPR states, the states to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.'<sup>112</sup> And the article 6 of the OIC Cairo Declaration on Human Rights in Islam states that:

- a) "Woman is equal to man in human dignity and has rights to enjoy as well as duties to perform; she has own civil entity and financial independence, and the rights to retain her name and lineage.
- b) The husband is responsible for the support and welfare of the family."<sup>113</sup>

Now after examining the both approaches, the question is, could there be a common ground in both traditions on the issue. In the further discussion, the Islamic view is being put on gender equality and outlining the position of Islamic law regarding the status of woman in society. The gender equality is discussed here under four broad heading: equality in spiritual rights, equality in social rights, equality in economic rights and equality in political rights.

## **II. EQUALITY IN SPIRITUAL RIGHTS UNDER SHARI'AH LAW**

The first primary source of the Shari'ah law Qur'an provided clear cut evidence the women is completely equal with men in the sight of God in terms of her rights and responsibilities and women have the same human spiritual nature.

The Qur'an states, 'O mankind! Reverence your Guardian — Lord, Who created you from a single person ( nafs-in-waahidah), created, of like nature, his mate, and from them two scattered (like seeds ) countless men and women-reverence Allah through Whom you demand your mutual ( rights ), and reverence the wombs( that bore

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<sup>112</sup> Article of the International Covenant on Civil and Political Rights, adopted Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966

<sup>113</sup> Article 6, 'The Cairo Declaration on Human Rights in Islam', adopted and issued at the ninetieth Islamic Conference of Foreign Ministers in Cairo on 5 August 1990

you): for Allah ever watches over you....,<sup>114</sup> Both men and women alike are recipients of the 'divine breath,' because they are created with the same human spiritual nature. Indeed, as the Qur'an states, Allah originated them both from a single person or 'one soul' (nafs-in-waahidah). All has invested both genders with inherent dignity and has made men and women, collectively, the trustees of Allah on earth. According to Qur'an woman is not blamed for Adam's mistake for eating from the forbidden tree. On the contrary the Qur'an describes Adam and Eve as equally responsible for their sin in the garden, never singling out Eve for blame. In one verse in fact Adam especially was blamed.<sup>115</sup> Men and women have the same religious duties and responsibilities. Each human being shall face the consequences of his or her deeds. The Qur'an states that, 'every soul will be (held) in pledge for its deeds.'<sup>116</sup>

### III. STANDARD FOR SUPERIORITY

The primary sources of Shari'ali law, the Qur'an and The Sunnah are quite clear about the issue of claimed superiority or inferiority of any human male or female. The superiority of human according to Qur'anic verse is, "O mankind! We created you from a single (pair) of a male and female, and made you into nations and tribes, that you may know each other. Verily the most honored of you in the sight of Allah " is) the most righteous of you. And Allah has full knowledge and is well acquainted (with all things).<sup>117</sup> There are very observations about this verse, which may be helpful important few foundation of spiritual and human equality before Allah. It begins by ' tracing the addressing not only Muslims but also the whole of mankind irrespective of their gender and their national or religious backgrounds. As such, it is a universal declaration to all human beings. It states that there is only One Creator of all humanity. As such there is no room for arguments of superiority based on one are having been created be a superior or chosen people. Nor is there any basis for a caste system based on some having been created in a way, which is different from others or is superior such as Jews and Brahman in Hinduism.<sup>118</sup> As Prophet Muhammad explained, "you

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<sup>114</sup> The Holy Qur'an, 4:1

<sup>115</sup> The Holy Qur'an, at 20:121

<sup>116</sup> Ibid, at 74:38, 4:124; 16:97

<sup>117</sup> Ibid, at 49:13

<sup>118</sup> Donnelly, J., 'Human Rights'

all belong to Adam, and Adam was created from dust." In the process of human reproduction there is no superiority or inferiority, kings and paupers, males and females, are created from what the Qur'an describes as 'despised fluid.' The verse states that all human beings are created, in the Arabic words (min thakarin wa- untha) which can be translated literally as of male and female. Each component of the pair is as necessary and as important as the other and hence is equal to him or her. The wording of this verse has been commonly translated as 'from a (single pair of) male and a female,' referring to Adam and Eve. This serves as a remainder to all mankind that they belong to the same family, with one common set of parents. Variations in gender, languages, and ethnic backgrounds and, by implication, religious claims, do not provide any basis for superiority or inferiority. The final thing, which mentioned in this verse, is the most significant and relevant to the topic at hand is the clear categorical statement that the most honored person in the sight of Allah is the one who is most pious and righteous. This prevents any other basis for superiority including gender.

#### **IV. QAWWAMAH: SUPERIOR OR PROTECTOR**

In chapter number 4 verse number 34, the Qur'an states, 'men are the maintainers (qawwamun) of women because God has made some of them Excel others, and because of what they spend of their wealth'.<sup>119</sup> Some interpreters of the Qur'an mistakenly translate the Arabic word 'qiwamah' (responsibility for the family) with the English word superiority. Although the Qur'an makes it clear that the sole basis for superiority of any person over another is piety and righteousness, not gender as we already mentioned in above section. In *Ansar Burney v. Federation of Pakistan*<sup>120</sup> the court examined in detail passages in the Qur'an and Hadith and reviewed a number of Qur'an commentaries on the precise meaning of the Arabic word and declares that 'men are maintainers, protectors over women'. Various translations had been recorded for this word including, 'rulers' masters' 'holders of sovereign power' 'persons have authority' but the court held that many of them were inaccurate. And held that Qawwam means a provider, supporter or furnisher for another with the means of subsistence. It also means manager, care taker, custodian or guardian. Abdullah Yusuf Ali's translation of the word

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<sup>119</sup> The Holy Qur'an, 4:34

<sup>120</sup> All Pakistan Legal Decisions, (1983), Federal Shari'ah Court, 73



'qawwamah' as protector was considered to accord with the subsequent part of the toot to the effect that men spend of their property to support women. The superiority of any is not about the natural proficiency of one and the deficiency of another but is only on account of the responsibility for maintenance. It must follow then that who does not maintain his wife cannot be 'qawwamah'. The court observed 'or one who exercises full dominion over the life and property of a woman cannot be in accordance with the Qur'anic injunctions. The absence of women as Prophets or messengers of Allah in Prophetic history is due to the demands and physical suffering associated with the role of messengers and Prophets and not because of any spiritual inferiority attributed to women. A common question raised in the west is whether a Muslim woman can be ordained as a priest However, most of the common 'priestly' functions such as religious education and spiritual and social counselling are not forbidden to Muslim women in a proper Islamic context. Woman, however, may not lead prayers (except for other women), as Muslim prayers involve prostrations and body contact. Since the prayer leader is supposed to stand in front of the congregation and may move forward in the middle of crowded rows, it would be both inappropriate according to Shari'ah and uncomfortable for a female to be in such a position and prostrate, hands knees and forehead on the ground, with rows of men behind her. A Muslim female may be an Islamic scholar. In the history of Islam, there are many examples of female scholars who taught both genders. In terms of religious obligations such as the daily prayers, fasting, poor due (zakat) and pilgrimage woman is no different from man. In some cases women have certain advantages over man. For example the women are exempted from the daily prayers and from fasting during her menstrual periods and forty days after childbirth. She is also exempted of fasting during her pregnancy and when she is nursing her baby. It is clear that in terms of spirituality and humanness, both genders stand on equal footing before Allah. It is clear also that nowhere in the primary sources of Islam do we find any basis for the superiority of one gender over the other. Human misinterpretations, culturally bound opinions or manipulations are not matching with what Islam teaches. The full equality of all human beings before Allah is beyond doubt. This equality should not be confused, however, with role differentiation in the spirit of cooperation and complimentary.

## V. EQUALITY OF SOCIAL RIGHTS

In this section we will discuss the social rights of women under two main heading: woman's human rights as a daughter and women's human rights as a wife in Islamic societies, but the focus of the study will be woman human rights as a wife.

### **Woman Human Rights as a Daughter**

Despite the social acceptance of female infanticide among some Arabian tribes the Qur'an forbade this custom and considered it as a crime like murder. The Qur'an states, 'and when the female (infant) buried alive is questioned for what crime she was killed.'<sup>121</sup> The Qur'an further explains the unwelcoming attitude of some parents upon hearing the news of the birth of a baby girl, instead of a baby boy: 'When news is brought to one of them of (the birth of) a female (child), his face darkens and he is filled with inward grief! With shame he hides himself from his people because of the bad news he has had! Shall he retain her on (sufferance and) contempt or bury her in the dust? Ah! What an evil (choice) they decide on!'<sup>122</sup> It is the reality of the human attitude toward the birth of baby girl, which shows Qur'an in the above verse. Despite all the advancement of this era and after hundred documents of human rights we could not change the attitude of the people and this practice still carry on in the different part of the world with different names and shape. According to the teaching of Shari'ah the parents are duty bound to support and show kindness and justice to their daughters. The Holy Prophet Muhammad says, 'whosoever has a daughter and does not bury her alive, does not insult her, and does not favor his son over her; Allah will enter him into Paradise. And in another saying of the Prophet says, 'Whosoever supports two daughters until they mature, he and I will come on the Day of Judgment as this (and he pointed with his two fingers held together)'. A crucial aspect in the upbringing of daughters that greatly influenced their future is education. Education is not only a right of female child, I will discuss this issue in later under heading woman education rights, but also a responsibility of parents to provides the equal opportunities to get education, to male and female child.

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<sup>121</sup> The Holy Qur'an, at 81:8-9

<sup>122</sup> Ibid, 16:58-59

### **Woman Human Rights as a Wife**

According to Shari'ah marriage is based on mutual peace, love and compassion, and not the mere satisfying of human sexual desire. The Qur'an clearly indicates that marriage is sharing between the two halves of the society, and that its objectives, besides perpetuating human life, are emotional wellbeing and spiritual harmony. Its bases are love and mercy. The most impressive verses in the Qur'an about marriage is, And among His Signs is this, that He created for you mates from among yourselves that you may dwell in tranquility with them, and He has put love and mercy between your (hearts); verily in that are signs for those who reflect.<sup>123</sup> According to Shari'ah Law women came to marry anyone without their free consent. The female has the right to accept or reject marriage proposals. Her consent is a prerequisite to the validity of the marital contract. According the teaching of Prophet a woman has the right to accept or reject her marriage, 'it is reported that a girl came to the Prophet of Allah and asked that her father had forced her to marry without her consent. The Prophet of Allah gave her the choice\_ (Between accepting the marriage and invalidating it)" Another version of the report states that "the girl said: 'Actually, I accept this marriage, but I wanted to let women know that parents have no right to force a husband on them.'<sup>124</sup> The ruled for married life in Islam are clear and in harmony with upright human nature. In consideration of the physiological and psychological make up of man and woman both have equal rights and claims on one another. The Qur'an thus states, 'And they (women) have rights similar to those (of men) over them, and men are a degree above them.'<sup>125</sup> The husband is responsible for the maintenance, and protection of the family, within the framework of consultation and kindness. The mutuality and complementary of husband and wife, does not mean subservience by either party to the other. Over and above her basic rights as a wife comes the right, which emphasized by the Qur'an and is strongly recommended by them teaching of Prophet. The Qur'an states, 'but consorts with them in kindness, for if you hate them it may happen that you hate a thing wherein God has placed much good.'<sup>126</sup> In this regard the Prophet

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<sup>123</sup> The Holy Qur'an, 42:11

<sup>124</sup> See, Ahmad, Hadith no., 2469; Ibn Majah, Hadith no., 1873

<sup>125</sup> The Holy Qur'an, at 2:228

<sup>126</sup> Ibid, 4:19

says, 'the most perfect believers are the best in conduct and the best of you are those who are best to their wives.'<sup>127</sup>

### **Is there any room for family violence in Shari'ah law?**

By reviewing women's status in existing Muslim societies one could argue that women are suppressed and treated as inferior to men. Although women's rights in non-Muslim societies are not totally fulfilled oppression of women's rights in Muslim societies is unique in that it is primarily done in the name of Islam. The different cultures and societies within Islamic territory claim that certain discriminatory practices are related with Shari'ah law and that there personal status laws, are based on Shari'ah law. By doing so Muslim societies give a sacred justification for any discrimination or inequality already in existence or that could be stipulated in the future. Although, the socioeconomic, political and cultural realities in different Muslim societies around the world, are vary considerably. These variations have given rise to different interpretations and different practices of the sources of the Shari'ah law. So any discussion relating to women in Muslim societies has to take Islamic law into consideration to show that ether Islam does or does not give women certain rights what is clear in the Qur'an is that men and women have equal religious duties, rewards, and punishment before God. Nevertheless one can fine many instances of discrimination against women in contemporary Muslim legislation, such as the penal codes regarding 'honor crimes'.<sup>128</sup> Not only does the Qur'an make no mention of such crimes but also these penal codes actually run against the spirit of Shari'ah law and justice. It has been apparent that the advocates of human rights in Islam are inspired to reach a perception or resolution that would revoke injustice, remove oppression against women and defuse any chance of treating women unjustly in the name of Islam, considering their inherently inequitable status in several cultures and places around the world. Also, their relative physical weakness, their emotional and physical attachment to their children, the state of poverty, illiteracy and the lack of development which collectively affect women the most, and the common abuse of human rights due to autocracy are all important factors threatening their rights and status.

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<sup>127</sup> Inb-Habal, Hadith No., 7396

<sup>128</sup> See for details, "honor killing in Pakistan", Amnesty International Constable, "In Pakistan, Women Pay the price of 'Honor', Washington Post, May 8, 2000, "Case Study' Honor Killings and Blood Feuds

In this context, we will discuss the issue of family violence' and its place in the Shari'ah law. Accordingly, it is incumbent to start tackling this subject from the deep-rooted Islamic principles of human dignity, liberty, and responsibility, human's status as the chosen vicegerent (khalifah) of God, and the legitimate right of self-determination. By all means, any system of human relations that is inconsistent with such foundations does not represent the Islamic spirit, objectives or purposes; and should be scrutinized to diagnose the flaws, which contradict with or breach on the essential human rights and responsibilities. First of all we examine some saying of the Holy Prophet about the treatment of families then we will discuss the issue under discussion. The Holy Prophet says, 'the most faithful amongst the believers are the ones with the best morals and the best of you are also the best for their families'. "An individual of you continues to flap his wife as a slave and is not ashamed to keep cuddling her;" "so many women who come by Muhammad's family complain about the abuse of their husbands, and those are not the best of you." The Prophet himself set the highest example of kindness, compassion, grace, and benevolence. "He has never extended his hand to strike a woman, or a servant or anything else saves if he is to struggle in the cause of God."

The issue of family violence strongly arises a propose the structures of the family and human relations and receives exceptional interests because it is referred to in a Qur'anic text and because its historical and traditional interpretations were purported by most people to denote slap, flap, flog, beat, strike, punch, etc. This would definitely involves a strong sense of pain and humiliation regardless of the extent of the physical suffering itself which may vary, according to some fatawa, (a legal opinion given by a jurist consultant, called mufti, on a particular issue) around few strokes with a siwak (tooth brush) stick or a pencil.

Thus, this chastisement is more like a reproach or an expression of discontent and annoyance rather than an expression of humiliation and pain. The Qur'anic text that refers to the issue is, "Men are the protectors and maintainers of women, due to what God has given the one more (strength) than the other and due to the sustenance, they provide from their own means. Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what God would have them guard. As to those women on whose part you fear disobedience and recalcitrance, (first :) admonish them, (next:)

refuse to share their beds, and (last:) chastise them (lightly); but if they return to obedience, seek not against them any means of annoyance: for God is Most High, Great (above you all). If you fear a rift between them twain, appoint two arbiters: one from his family and another from hers; if they wish for peace, God will bring about their reconciliation: for God has full knowledge, and is (utterly) acquainted with all things."<sup>129</sup> In order to correctly comprehend this text it is necessary to construe the above text in light of other related texts, such as "When you divorce women, and they fulfill the term of their ('Iddah), either take them back on equitable terms or set them free on equitable terms; but do not take them back to injure them, (and/or) to take undue advantage..."<sup>130</sup> If we read the above verses in the light of the collective injunctions of Shari'ah and the overall Prophetic traditions, as-Sunnah, we find that the real spirit of the matrimonial relations is shaped by the sentiments of affection, compassion and the obligations of support one another, so that the governing factors in such relations are affection, compassion love and mercy. In extreme cases, and whenever greater harm, such as divorce, is a likely option, it allows for a husband to administer a gentle pat to his wife that causes no physical harm to the body nor leaves any sort of mark. It may serve, in some cases, to bring to the wife's attention the seriousness of her continued unreasonable behavior. As we approach the issue of women chastisement and the injury, pain and disgrace, which it entails, we need to bear in mind that suffering, fear and anxiety result in hate, isolation and lack of concern. Meanwhile, love, deference and trust result in charity, dedication and passion. Thus, we realize the motivation behind the inquiry for the real sense of chastisement its implied consequences of humiliation and pain, and the place of this issue in the concept of marriage relations in Islam, especially, with regard to the arrangements designated to promote acquaintance and love amongst spouses and to solve their problems. This issue is highly significant, considering the reality of social relations in the contemporary Muslim society where women are exposed to practices of moral and physical cruelty which attempt to find justifications in the misreading of certain antiquated fatawa<sup>131</sup> that grant the husband, as

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<sup>129</sup> The Holy Quran, 4:34-35

<sup>130</sup> Ibid, 2:231

<sup>131</sup> Fatawa means a legal opinion given by a jurist consultant (mufti) on a particular issue.

the head of the family, an expansive mandate in the family matters. Such perception of family relations ignores the established foundations of this institution, i. e., compassion, solidarity, cooperation and integration. The significance of such texts should not be misperceived, taken out of context, or exploited so as women and family are not deemed as a mere property of men. When one examines the above said verse of the Qur'an, he can be able to foresee an inherent problem in the understanding of the Arabic root verb 'daraba' (to chastise, used in the above said verse), in the Qur'anic text, as to imply: suffering, humiliation and physical pain, as a means of interaction among adults, or to force the wife to accept to her husband's will, or to force her into obedience and loyalty, regardless of the extent of that pain and suffering. The underlying assumption of this situation stipulates that the Muslim wife, as in certain religions and cultures, has no way out of the wedlock no matter what and will never be able to obtain a graceful release or an equitable divorce without the consent of her husband. Accordingly, she ought to be subjugated or compelled to put up with her husband's harsh association and to comply with his dictates. In this particular context, chastisement as suffering, humiliation and physical pain seems to become an effective means to resolve the problems.

However, we have definite and solid convictions that the above representation does not subscribe to the principles of Shari'ah which establish the family structure on affection and compassion, support its solidarity and unity, maintain its identity, and preserve the lineage and background of its members. Thus, the family membership in Islam is by choice; it does not tolerate coercion, repression or abuse; and each spouse has the right to depart the matrimonial association and terminate the marital relationship, especially, when it becomes adverse or hostile one. At least, separation is less damaging situation for all family members than a relationship of hate, discord and bitterness. In these circumstances, Shari'ah grants the husband the right to seek talaq (divorce) and grants the wife the right to seek khula (discharge). For resolving marital dispute, there is two routes mention in the above said Qur'anic text: one is to resolve any marital dispute between spouses without the intervention of or mediation from any third party. This route is to be initiated and pursued by the husband and should proceed through three steps: admonish them (the disobedient wives), refuse to share their beds, and eventually chastise them.

Second, when the above route fails to bring about peace and reconciliation, both spouses should seek arbiters from their respective families in order to help them handle their separation, to advise them and to prescribe remedies for various problems, in accordance to verse. In contrast, the view of some jurists, as characterized in their fatawa, does not necessarily follow that line of thinking; especially, when they stipulate that chastisement should not exceed twenty or forty strokes, whether they scatter on different parts of her body or not injure organs or not, cause a bone fracture or not, and whether she will survive them or not. Despite all these clarification, they must have think about the purpose of 'daraba' (chastisement) if the purpose of daraba is punishment then we cannot get this with tooth brush so they must have think about the other meaning of the text. The idiom of daraba used for different meaning in Qur'an. In my view the preferable meaning are Should we examine the above citations, we will note that the root verb daraba takes several symbolic suggestion which signify to isolate, to separate, to depart, to distance, to exclude, to move away.<sup>132</sup> The above perception of the idiom daraba (to chastise) is consistent and familiar with the actual Prophetic tradition and practice as attested in the narrative, which relates that the Prophet moved away from his wives when they resisted after their demands of better living were denied. The Prophet resorted for a month and offered them the choice to obey him, to accept his manner of living and to hold together accordingly or to release them from the wedlock and to separate gracefully.<sup>133</sup>

Throughout this experience, the Prophet had never inflicted any injury, pain or insult on anyone of them. Should there be a divine ordinance of corporal or psychological discipline as a strong solution, the Prophet shall be the first one to mind and to proceed with such cure. Hence, when the consorts of the Prophet realized the gravity of the matters, sensed the wrath of their own families, and missed the prophetic association and intimacy; together, all that was enough to bring them back to rationale, to return them to the grace of obedience, and to become content with the Prophet's lifestyle as he favored. So, when his consorts rebelled and disobey him, the

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<sup>132</sup> The Holy Quran, 16:76, 112:66:11, 43:57

<sup>133</sup> See for the details, The Holy Quran 33:28-29: and for the complete details of the incident in Sunnah, See, Al-Bukhari No. 5395; Al-Muslim no. 2704; Al-Tirmidhi no. 3240, Musnadd al-Imam Ahmad, no. 24588



Messenger of God moved away from their residences and secluded himself for a month so as to help them realize the consequences of their disobedience, without inflicting any physical injury or psychological pain. As a result, the understanding of daraba (to chastise) in the actual practice of the Prophet is to seclude, to move away and to distance himself from them. That is consistent, on one hand, with the psychological nature of the matter; on the other hand, with the common intuition of various Qur'anic usages of the root verb daraba (to chastise) and its abstractions, and derivatives. Furthermore the Qur'anic text does not provide daraba to denote the physical or corpora punishment rather it uses the word 'jalada' (to lash, to whip, to flog,)<sup>134</sup> the Qur'an outlines an enlightened step and a wise approach for the husband and wife to resolve persistent conflict in their marital life: In the event that dispute cannot be resolved equitably between husband and wife, the Qur'an prescribes mediation between the parties through family intervention on behalf of both spouses. So we can say there is no room for family violence in Shari'ah law and under no circumstances does the teaching of Qur'an and Sunnah encourages, allow or ignore family **violence** of **physical** abuse. Therefore, we have to re-examine our perception of the family structure within the context of today's reality, so as to avoid tensions and conflicts in the family relations and to re-establish the concepts and values that enable each member of the family to pursue her/his prospective role and to complement the roles of other members.

### **Divorces Is A Last Resort**

According to Shari'ah law, men and women both of them can use divorce as a last resort to dissolve their marriage tie. Forms of marriage dissolution include an enactment based upon mutual agreement, the husband's initiative, the wife's initiative (if part of her marital contract), the court's decision on a wife's initiative (for a legitimate reason), and the wife's initiative provided that she returns her marital gift to her husband (khula) Islam gives women the right to divorce on several grounds if good relations between the spouses become unbearable and impossible. The Prophet denounced divorces, "Of all the things that Islam has permitted, divorce is the most hated by Allah." The four schools of Islamic jurisprudence have agreed that "divorce is makruh (disapproved) when is not

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<sup>134</sup> See, The Holy Qur'an 24:2

essential. If there is no harm anticipated either to one's self or one's wife, and there is still some hope of reconciliation. In this section I will explore the equality of right of both husband and wife to divorce, with emphasis on the means by which the wife can do so.

### **Men's Right to Divorce**

Divorce is generally referred to as 'talaq' meaning 'repudiation.' Talaq comes from the root *tallaqa* meaning to release a human Being from any obligation incumbent upon him. Talaq is the husband's right to divorce his wife by making a pronouncement that the marriage is dissolved, however this power could be delegated, as will be discussed later. In Islamic law, talaq (divorce) can be categorized into two forms: talaq al Sunnah, which is consistent with the Prophet's teachings, and talaq al bid'aa, which is considered an innovation that does not follow the Prophet's teachings. Talaq al Sunnah has two subcategories, talaq Ahsan and talaq Hasan. The former is the most authentic divorce. I will discuss only talaq ahsan and compare with talaq al bid'aa for the understanding of the discussion. In talaq al Sunna, the husband utters a single pronouncement of divorce and then abstains from sexual relations with his wife for a period of three months known as the period of *iddah*.<sup>135</sup> This *iddah* time provides a room for reconciliation and reconsideration of the husband's decision. At the end of this *iddah* period the divorce will be irrevocable. Thus, if the man wants to remarry the wife after the *iddah* period, it will be as if he is marrying her for the first time by a new marriage contract and a new dowry. Furthermore, if the husband has divorced his wife three times, it is unlawful for him to remarry her for the fourth time unless she has married and divorced another man in the interim. In the talaq al bid'aa divorce, the husband may pronounce the three times: I divorce you I divorce you, and I divorce you, at same time. The separation then takes effect definitively after the woman has, fulfilled her *iddah*. The *thalath* (three times) repudiation during the period of *iddah* known as talaq al bid'aa has no support in the Qur'an and Sunnah. Not only that, but it is against the whole philosophy behind

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<sup>135</sup>In Shar'ah 'Iddah' means a period of waiting for women from remarriage after the death of her husband or after her divorce from her husband. Iddah differs from case to case such as in the case of a divorced woman who still menstruates, it is three menstruations cycles. The *iddah* of a woman who has passed the age of menstruation is three months.

the iddah period because it ruins any chance for reconciliation. Most classical jurists acknowledge that even though the husband enjoys unilateral right to divorce, it is not an absolute right and there are some restrictions; for example, there has to be a reason for the divorce and each talaq at Sunnah has to be uttered once at a time. However, there is some disagreement among jurists on whether or not the absence of a reason, or using talaq at bidaa/thalath, will render the divorce invalid. All four schools of law have acknowledged that this form of divorce is sinful but still valid, and this as Esposito, reflects the power of social custom and its infiltration into Islamic law.<sup>136</sup>

### **Women's Right to Divorce**

The classical schools of jurisprudence have agreed on the following ns by which the wife can obtain a divorce. Delegated Talaq or Talaq Tafwid: under this talaq a wife has the right to divorce only if the husband has delegated this right to her. This delegation can take place before or after the marriage and, hence, can be included in the marriage contract. This delegated form of talaq is known, as the right of women to divorce at will. However, it is worth mentioning that this kind of divorce does not deprive the husband of his original right to exercise divorce. The right of a woman to khula (woman right of divorce) is based on her sacrifice of part or all of her dowry to her husband to get a divorce. The husband cannot return to her without her consent. In this regard the Qur'an permits a wife to request a khula from her husband if she fears he will be cruel or desert her. "If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best."<sup>137</sup> There are precedents for this kind of divorce. The wife of Sabit bin Qais came to the Prophet and said, "O, Prophet of God, I don't find any fault in Sabit, son of Qais in his manners or in his religion, but I don't like to be faithless in my faith, that is, I would not Play the hypocrite." The Prophet said, 'will you restore to Sabit the garden he gave you?' she said yes. The Prophet then said to Sabit, "take back the garden and divorce her at once." Another incident in the Prophet's tradition reveals the spirit of gender equality regarding divorce. The Prophet felt sorry

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<sup>136</sup> John, I., Esposito, 'Women in Muslim family law', (1982), Syracuse University Press, at 32

<sup>137</sup> The Holy Qur'an, 4:128; 2:229

for Buraria's husband and appreciated his live for her. So he went to her and asked her to go back to her husband. She asked the Prophet, 'Are you ordering or interceding? He answered that he was interceding. She said, 'then I am not going back. Divorce by judicial authority: the schools of law differ considerably in the number and kinds of grounds available to women who wish to divorce.<sup>138</sup> Breach of conditions in the marriage contract: marriage in Islam is a contract and divorce is the dissolution of that contract. Therefore, the marriage contract can include any condition that the couple approves, and any breach of the clauses included could be a basis for divorce. Having discussed the rights of men and women regarding divorce in Shari'ah, it is worthy to note that, though the Qur'an originally gave man the right to divorce, there is an emphasis in many Qur'anic verse on the importance to be just, to fear God in any decision. However, in classical Islamic jurisprudence, this positive spirit of the Qur'an was not reflected and no major restrictions were posed on the right of men to divorce.

### **Polygamy in Shari'ah Law**

Polygamy in Islam is a very controversial issue. It is an expression of how patriarchal interpretation can overcome and dominate. The following paragraphs analyze the Qur'anic text pertaining to polygamy, the different interpretations of the text, and the reason of revelation as well as illustrate how this issue is completely misused in contemporary male- dominated societies. Polygamy associating with Islam, as if it were introduced by it or is the norm according to its teachings, is one of the most persistent myths perpetuated in Western literature. Islam did not introduce polygamy; it was widely predominant in pre Islamic societies. It was common at that time for a man to have any number of wives without any limitation at one time. Islam did not outlaw polygamy, as did many other peoples and religious communities; rather, it regulated and restricted it. It is neither required nor encouraged, but simply permitted and did not outlaw. Polygamy is mentioned in the Qur'an in only one verse: "And if ye fear that ye shall not able to deal justly with the orphans, marry women of your choice, two, or three or four;

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<sup>138</sup> In *Khurshid Bibi v. Muhammad Amin*, the Supreme Court of Pakistan held that the court had authority to enforce Khul even against the will of the husband whenever the judge apprehended that a harmonious married state as envisaged by the Quran would not be possible. All Pakistan Legal Decision, (1967), Shariah Court 97.

but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice".<sup>139</sup> This verse does not enjoin polygamy or deem it an absolute right of men, but rather it permits polygamy only in specific circumstances. Moreover, polygamy whether the husband can be just to his wives or not if he cannot be fair to his wives and treat them equally, then he may marry only one. Hence, polygamy appears to be the exception, while monogamy is the rule. In this context Mohamad Abdou argues that 'Polygamy permissible only when the husband is able to take equal care of all of his wives and to give to each her rights with impartiality and justice. He also says that the welfare of a society is superior to the satisfaction of sensual desire of its individuals, since the condition that all of one's wives must be treated with perfect equality is most difficult to satisfy. He argues that it is clear that Qur'an recommendation is towards monogamy.<sup>140</sup> However, polygamy is misused by men and is not perceived as conditional and exceptional but rather as an absolute right and a privilege. Some classical jurists, like Imam Shafie, interpret the last portion of the verse to mean that polygamy should be restricted.<sup>141</sup> It is important to understand the context of this verse to clarify how polygamy is restricted to an exceptional situation. This verse was revealed after the fatal battle of 'Uhud' in which there was a large number of male Muslim casualties, thus increasing the number of widows and orphans for whom protection was required. In this context, some verses of this Sum (chapter of Qur'an) were introduced to protect the widows and children of the martyrs. Hence, 'allowing the survivors to take additional wives was a way of providing the widows and orphans with some physical and financial protection. In another interpretation, a contrast is drawn between a man's fear of doing injustice to orphans by taking or misusing their fortune and subsequently an unlimited number of women without treating them justly and equally. [Shaban, at 346-471] in this case, Muslim men are urged to do justice to women by only marrying up

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<sup>139</sup> A. Yusuf, Ali, 'The Holy Quran, Translation and Commentary, 4:3

<sup>140</sup> Asghar, Ali, Engineer "The Rights of Women in Islam", (1992), Sterling Publishers, Delhi, p: 157-158

<sup>141</sup> Munshir, Hosain, Kidwai, 'Women under Different Social and Religious Law: Buddhism, Jadasim, Christianity and Islam', (1976) Seema Publications, New Delhi, 103

to four and only one if they cannot guarantee justice among more, just as the men must do justice to the orphans. Therefore, the logical conclusion is that you may marry only one wife. Although the concept of justice that is used in these two verses is not clearly defined in the Qur'an, the commentators of the Qur'an unanimously interpret justice in this context to mean equal treatment in respect to food, clothing, and housing. However, some Mutazillite extend the scope of equal treatment to include love and tenderness, which makes it impossible to accomplish.<sup>142</sup> There is a continuing debate in the Islamic world over polygamy. The Modern scholars insists it is inappropriate today while traditionalists insist it is a Muslim male's rights and that the world of God as recorded in the Qur'an may not be changed.<sup>143</sup> Classical jurists have listed several circumstances under which men can marry more than one wife, among them is when the wife is sterile or sick or in times of wars when the percentage of women is much higher than that of men. It is critically important to point out with regard to polygamy that all parties involved have options. Men may choose to remain monogamous. A proposed second wife may reject the marriage proposal if she does not wish to be party to a polygamous marriage. A prospective first wife may include in her marital contract a condition that her prospective husband shall practice monogamy. If this condition is mutually accepted, it becomes binding on the husband. Should be later violate this condition, his first wife will be entitled to seek divorce with all the financial rights connected with it. If such a condition was not included in the marital contract, and if the husband marries a second wife, the first wife may seek khula (divestiture), Hence, we cannot say that the Shari' ah favor men in the issue of polygamy.<sup>144</sup>

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<sup>142</sup> Muhammad Sharif Chaudry, 'Human Rights in Islam', (1993) p:155

<sup>143</sup> Jan, Goodwin, 'Price of Honor: Muslim Women lift the Veil of Silence on the Islamic Word', (1994) 34

<sup>144</sup> While the Qur'an allowed polygamy, it did not allow polyandry. Its practice raises thorny problems related to the lineal identify of children and the law of inheritance, both important issues in Islamic law. In the case of polygamy the lineal identities of children are not confused. They all have the same father and each of them knows his or her mother. In the case of polyandry, however, only the mother is known for sure. The father could be any of the husbands of the same wife. In addition to lineal identity problems polyandry raises problems relating to inheritance law such as which of the children inherits of shares in the estate of a deceased probable father?

## VI. EQUALITY OF ECONOMIC RIGHTS

Islamic law grants women the right of independent ownership, which was deprived before Islam and after the revolution of Islam also. According to Islamic law women right to her money, real estate or other properties is fully acknowledged. This right undergoes no change whether she is single or married. She retains her full rights to buy, sell, mortgage or lease any or all her properties. It is nowhere suggested in the law that a woman is a minor simply because she is a female. It is also noteworthy that such right applies to her properties before marriage as well as to whatever she acquires thereafter.

### **The right to possess personal property**

As regard the right to possess property, men and women are equal in the eye of Shari'ah law. A woman in Islam is a sui juris. She can acquire and own property exclusively to herself. She can buy and sell the property in her own right. In fact she has a complete independent character in his behalf so Shari'ah law the basic right to personal possession of property applies equally to males and females. The Shari'ah law recognizes the full property rights of women before and after marriage. They may buy, sell or lease any or all of their properties at will. Her shares is completely hers and no one can make any claim on it, including her father and her husband. The husband of a married woman has no right to interfere with her property, nor is she required to obtain permission from him when dealing with her own assets she may appoint her husband as her representative if she wishes and may terminate his representation as and when she please. The wife's freedom in regard to financial transactions is indicated in the Quranic verse declaring that, 'men are entitled to what they have earned and women are entitled to what they have earned.'<sup>145</sup> It will be of interest to note that property, which belongs to the in England till 1883 after marriage all property, which belongs to the woman transfer to her husband so the married women, could not acquire properties in their own name exclusively.<sup>146</sup> In Islamic law financial security is assured for women. They are entitled to receive martial gifts without limit and to keep present and future properties and income for their own

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<sup>145</sup> See, The Holy Quran, 4:32

<sup>146</sup> See, Kris Inwood and Sarah Van Slighthenhorst, 'The Social Consequences of Legal Reform: Women and Property in Canadian Community

security, even after marriage. No married woman is required to spend any amount at all from her property and income on the household. In special circumstances, however, such as when her husband is ill, disabled or jobless, she may find it necessary to spend from her earnings or savings to provide the necessities for her family. While this is not a legal obligation, it is consistent with the mutuality of care, love and cooperation among family members. The woman is entitled also to full financial support during marriage and during the waiting period ('iddah) in case of divorce or widowhood. Some jurists require, in addition, one year's support for divorce and widowhood. A woman who bears a child in marriage is entitled to child support from the child's father. Generally, a Muslim woman is guaranteed support in all stages of her life, as a daughter, wife and mother or sister. The financial advantages accorded to women and not to men in marriage and in family have a social counterpart in the provisions that the Qur'an lays down in the laws of inheritance, which afford the male, in most cases, twice the inheritance of a female. The Qur'an states in this regard, "to men (of the family) belongs a share of that which parents and near kindred leave, and to women a share of that which parents and near kindred leave, whether it be a little or much a determinate share." Now the question arises, why does woman have half share in inheritance? Males inherit more but ultimately they are financially responsible for their female relatives: their wives, daughters, mothers and sisters. Females inherit less but retain their share for investment and financial security, without any legal obligation to spend any part of it, even for their own sustenance (food, clothing, housing, medication, and etcetera). Her share in most cases is one-half of the man's shares with no implication that she is worth half a man. It would seem grossly inconsistent after the overwhelming evidence of woman's equitable treatment in Islam, which was discussed in the above said pages to make such an inference. This variation in inheritance rights is only consistent with the variations in financial responsibilities of man and woman according to the Islamic law. Man in Islamic societies is fully responsible for the maintenance of his wife, his children and in some cases of his needy relatives, especially the females. This responsibility is neither waived nor reduced because of his wife's wealth or because of her access to any personal income gained from work, rent, profit, or any other legal means. Women on the other hand are far more secure financially and



are far less burdened with any claims on her possessions. Her possessions before marriage do not transfer to her husband and she has no obligations to spend on her family out of such properties or out of her income after marriage.<sup>147</sup>

### **Equality in Employment Opportunities**

There is no clear text of Shari'ah law that forbids women from seeking employment whenever there is necessity for it. Especially in positions which fit her nature best and in which society needs her most. Moreover there is no restriction on benefiting from women's talents in any field. No jurist of Islamic jurisprudence is able to point out a clear text in the Qur'an or Sunnah that categorically excludes women from any lawful type of employment except for the headship of the state, which will be discussed in the coming last section of this chapter. When we speak equality in employment opportunities, it means that all citizens are equally treated if they meet the required conditions for employment to government offices and other public sector opportunities. The notion equality of opportunities in every field has come under the scrutiny of Supreme Court of Pakistan and the case of *Shrill Munir v. Government of Punjab*,<sup>148</sup> is the major example of this field. This was a ret petition under article 25 of the constitution of Pakistan. Before we discussed the case, it is better we considered what is the article 25 of the constitution. Article 25 states as follows:

(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 alone.

(3) Nothing in this article shall prevent the state from making any special provision for the protection of women and Children."

Under she above said article the petition arose when girt students applying to medical colleges in Punjab were denied admission to these institutions on the basis that scats reserved for them were filled up. Therefore even though on merit these girl students were entitled to places, the same were given to male students on the plea that girl students were only entitled to seats reserved for them and no more. The girls' plea was that this was a violation of article 25 of the

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<sup>147</sup> Abd al-Ati, Hammudha, 'Islam in Focus'm (1997), Amana Publications, p:117-118

<sup>148</sup> *Shrin Munair v. Government of Punjab*, All Pakistan Legal Decision, (1990), SC 295

constitution, as well as a misapplication of the affirmative action measures outlined in the constitution. In this case the court held, "clause 2 of article 25 prohibits distinction on the basis of sex alone. However, the very next clause 3 controls the rest of article 25 by providing that "nothing in this article shall prevent the state from enacting any special provision for the protection of women and children." It implies, therefore, that while the difference on the basis of sex can be created and maintained, it shall be done only in those cases where it operates favorably as a protective measure for and not against women and children. The field of measure for and not against women prohibition, of adopting sex, as a criteria for making a distinction, is thereby reduced to only that category wherein sex is adopted as a standard for discriminating against females generally and against males only if it is not as a measure protective of females..... in interpreting constitution and also in giving effect to the various legislative measure, one distinction has to be consistently kept in view and it is that classification based on reasonable considerations is permissible and not violate of the principle.<sup>149</sup> Before this case there was another case similar in nature entitled *Mussarat Lima Usmani etc. v Government of Punjab*, in this case the Salaam, J., held, ' the provision is clear, categorical and unambiguous altogether. It laid down that all are equal, there shall be no discrimination on the basis of sex alone and that the state may make law for the protection of women. All are not equal, man and woman, neither man nor woman shall be discriminated against; laws may be made for the protection of women not against them.<sup>150</sup> *Naseem Firdous v. Punjab Small Industries Corporation* is a best example of male dominated authority who tried to deprive her right of equal opportunity in employment, on the basis of sex discrimination. In this case the petitioner, already employed by the Punjab Small Industries Corporation in 1977 and promoted to the position of Assistant Director and from applying for the position of (design) in 1983 was proven' designer in the same department as the advertisement of the vacancy was restricted to ' male only applicants. The plea of the employers was that the position of designer was essentially a 'male' job and this statement was made regardless for

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<sup>149</sup> Ibid, p: 309

<sup>150</sup> *Mussarat Uzma Usmani etc v. Government of Punjab*, All Pakistan Legal Decision, (1987)

the fact that the petitioner, a woman was already performing that very job for close to a decade. The court held the, the justification of the employers as conflicting with the equality of citizens under article 25 and hence invalid/illegal. In the above cited cases the courts elaborate the notion of equality of genders and declared that men and women are equal in the eye of law.

Furthermore, the rights of women and children protected under clause 3 of the above said article.

### **Women's eligibilities as a Judge (Qadi):**

In this section we will discuss the issue, can a woman work as a judge under Islamic law. In classical Islamic literature, the jurists have different opinions about this issue. According to Abu Hanifah, founder of Hanafite School of thoughts, women can be worked as a judge in civil matters. Although Ibn Jarir said that a woman can be worked as judge in all cases.<sup>151</sup> This issue has come under the scrutiny by the Supreme Court of Pakistan in *Ansar Berney v Federation of Pakistan*.<sup>152</sup> In this case the petitioner filed a suit to challenge the appointment of women judges in the courts of Pakistan and argued that Islam required the privacy of women so their appointment as judges was conflicting to the injunctions of Islam and was in violation also of article 203 (d) of the Constitution of Pakistan. The petitioner argued that since the testimony of two women is equivalent to that of one man, at least two female judges would be required to decide a case. The court rejected this proposition and held that acceptance of the counsel's argument would mean that no judge (qadi) sitting alone could decide a civil or criminal case. According to the rule, in cases other than that of adultery, in which four eye witnesses are required, to prove the offence, at least two male witnesses are required to prove the offence about property, as well as the crimes of hudud and Qadis. If the argument of the counsel were taken to its logical conclusion, it would follow that the number of judges to decide a case would have to correspond with the number of witnesses required to prove it. The court then examined in details passages in the Qur'an and Hadith relating to the issue and held that there is " no express or even implied restriction on the appointment of a female qadi in the Qur'an

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<sup>151</sup> Baderin, M. A., 'International Human Rights and Islamic Law', (2005), Oxford University Press, at p. 180

<sup>152</sup> *Ansar Burney v. Federation of Pakistan*, All Pakistan Legal Decisions (1983) Federal Shari'ah Court 73

and Sunnah', and the matter therefore fell within the subject of ibahah and the legal maxim that " what is not prohibited by the Holy Qur'an and Sunnah is permitted, and the burden of proof that anything is prohibited is on the person who claimed it to be so". So it can be said that there is nothing anything in the teaching of Qur'an and Sunnah, which prohibited the women to appoint as a qadi (judge)

## **VII. EQUALITY OF POLITICAL RIGHTS**

In this section we will be discussed two important issues: first is equality before law and second is women's participation in political life. In this section we will also discuss the Shad'ah position in regarding women as a leadership or head of the State.

### **Equality before the Law**

According to Shari'ah law both genders are entitled to equality before the law and courts of law. In Islamic law men and women receive the same punishment for crimes such as theft, murder and injury. Women do possess and independent legal entity in financial and other matters. One legal issue is widely misunderstood by some westerns and also some Muslims, the testimony of women in the court of law. A common but wrong belief is that as a rule, the worth of women's testimony is one half of men's testimony. A survey of the teaching of the Qur'an and Sunnah relating to testimony does not validate this claim as rule. Most Qur'anic references to testimony do not make any reference to gender. Some references fully equate the testimony of males and females. One reference in the Qur'an distinguishes between the witness of a male and a female. The main Qur'anic reference on this occurs in the verse 2:282 and this verse concerning period loans and financial obligations that are deferred to a future date. It is useful to quote this reference and explain it in its own context and in the context of other Qur'anic references to testimony: "O you who believe! When you deal with each other in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties: let not the scribe refuses to write: as Allah has taught him, so let him write: Let him who incurs the liability dictate, but let him fear his Lord, Allah, and not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable himself to dictate, let his guardian faithfully. And get two witnesses out of your own men, and if there are not two men, then a man and two women, such as you choose for witnesses so that if one of them errs,

the other can remind her. The witnesses should not refuse when they are called on (for evidence). Disdain not to reduce to writing (your contract) for a future period, whether it be small or big: it is more just in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves, but if it be a transaction with you carry out on the spot among yourselves, there is not blame on you if you reduce it not to writing, But take witnesses whenever you make a commercial contract; and let neither scribe nor witness suffer harm. If you do (such harm), it would be wickedness in you. So fear Allah; for it is Allah that teaches you. And Allah is well acquainted with all things."<sup>153</sup> For resolving the misunderstanding about the issue, it is necessary to verify the above said verse with the context of other Qur'anic verses in order to prevent common misinterpretations. This reference cannot be used as an argument that there is a general rule in the Qur'an that the worth of a female's witness is only half the male's. This presumed rule is voided by the Qur'anic verse 24: 6-9, which explicitly equates the testimony of both genders on the issue at hand. The context of this passage relates to testimony on financial transactions, which are often complex and laden with business terminology. The reason for variations in the number of male and female witnesses required is given in the same passage. No reference is made to the inferiority or superiority of one gender's witness or the other's- The only reason given is to corroborate the female's witness and prevent unintended errors in the perception of the business deal. The Qur'anic to two women and being equivalent to one man in testimony only envisages the prevailing conditions in numerous societies, past and present, because women generally did not heavily involved in commercial transactions and in market actives As such, they may not be completely cognizant of what is involved. Therefore, corroboration of a woman's testimony by another woman who may be present ascertains accuracy and, hence, justice. It would be unreasonable to interpret this requirement as a reflection on the worth of women's testimony, as it is the only exception discerned from the text of the Qur'an. The Shari'ah permits the testimony of one woman and credits it as a full proof in matters in which women's familiarity and understanding is considered to be superior to that of men such as family matters, pregnancy and child birth etc. Islam does not

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<sup>153</sup> See, The Holy Quran, at 2:282

discriminate between the sexes. Since the Qur'an does not impose a prohibition on female testimony, and because the circumstances of female literacy and familiarity with business and commerce have changed, female testimony may be admitted in any combination. For giving testimony is an act of merit because it advances the cause of justice and the discovery of truth, and no unnecessary restrictions should be imposed on it. The duty of a judge is to assess the worth and credibility of a given testimony regardless of the gender of the Witness. The witness of a literate female is certainly far more worthy than the witness of an illiterate male with no education or experience.

### **Participation in Political System**

Any fair investigation of the teachings of Islam or into the history of Islamic civilization will surely find a clear evidence of women's equality with man in what we say today political rights. This includes the right of election as well as the nomination to political offices. It also includes women's rights to participate in public affairs. In the history of Islam, there are many examples of well-known women who participate in serious discussions and argued even with the Holy Prophet. There is sufficient historical evidence of participation by Muslim women in public issues, in lawmaking, in an administrative position, in scholarship and teaching, and even in the battlefield.<sup>154</sup> Such involvement in social and political affairs was conducted without the participants' losing sight of the complementary priorities of both genders and without violating Islamic guidelines of modesty and virtue. The general rule in political life is participation and collaboration of males and females in public affairs in the eye of Qur'an is that, 'the believers, men and women, are protectors, one of another: they enjoin what is just and forbid what is evil, they observe regular prayers, practice regular charity, and obey Allah and His apostle. One of them will ALLAH pour His mercy: for ALLAH is exalted in power, Wise.'<sup>155</sup>

### **Woman as a Head of the State**

As for women's eligibility to public office such as the office of the head of states, prime minister, judges, governors and the head of the public grievances tribunal commentators have held that only the first

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<sup>154</sup> I see for details, Nadvi, A., Sulaiman, Heroic Deeds of Muslim Women, 4<sup>th</sup> ed. (1995), Islamic Publications, Lahore

<sup>155</sup> See, The Holy Quran, at 9:7

one is reserved for men but the rest are them equal for men and women. The in textual authority quoted in support of this view is that, " men are e maintainers of women because God has made some of them excel others, and because of what they spend of their wealth."<sup>156</sup> we have already discussed the verse in various places previously. But the reality is that, there is no exact text in the Qur'an or Sunnah that precludes women from any position of leadership, except in leading prayer, Due to the format of prayer, as explained earlier in section spiritual rights. There is no evidence from the Qur'an to prevent women from headship of state. Some may argue that according to the Qur'an men are the protectors and maintainers of women. Such a leadership position for men in the family unit implies their exclusive leadership in political life as well. This analogy, however, is far from conclusive. Some argue that since women are excluded from leading the prayer for a mixed gathering of men and women, they should be excluded from leading the state as well. This argument however overlooks two issues: leading the prayer is a purely religious act and, given the format of Muslim prayer and its nature, it is not suitable for women to lead a mixed congregation. Leading the state, however, is not a purely religious act but a religiously based political act. Exclusion of women in one instance does not necessarily imply their exclusion in another. Even the matter of whether women may lead prayer is not without exception. Prophet Muhammad asked a woman by the name of Umm Waraqah to lead her household in prayer, which included a young girl, a young boy, and a mu'azzin (caller to prayer--who is always male). He leads public prayers on some occasions and constantly travels and negotiates with officials of other states (who generally are men). Such heavy and secluded involvement of women with men and its necessary format may not be consistent with Islamic guidelines related to the proper interaction between the genders and to the priority of womanly functions at home and their value to society. Reports show that the Holy Prophet solicited counsel from his wives on issues of public concern. The Holy Prophet's A'ishah, Corrected the companions of the Holy Prophet in respect of the transmission of Hadith that she found to be repugnant to the Holy Quran. When the companions differed on a matter they referred the case to A'ishah. Once the Caliph Umar ibn al —Khattab

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<sup>156</sup> See, Ibid, at 4:34

wanted to fix a quantitative limit on dower. A woman stand and argued with the Caliph and has said that you cannot fix this because it's a right of woman which granted by God and cited the Quranic verse in support of her argument. The Caliph agreed with the woman and stopped thinking about it. In the day of Hudybiyyah, when the companions of the Holy Prophet disagreed with his decision about agreement, the Holy Prophet Muhammad consulted his wife, Umm Salamah on this issue and acted on her counsel. We can say this occasion the wife of the Prophet played a role as chief advisor of the head of state. Furthermore the Prophet's widow A'ishah demanded punishment for the assassins of the slain Caliph Uthman and led a military contingent in the Battle of the Camel. Women's eligibility for public office is also endorsed by the fact that the Caliph Umar ibn al- Khattab appointed a woman by the name of Shifa bint Abd Allah as the officer of market inspection in Median.<sup>157</sup> Hamidullah a well-known scholar of Islam considered this issue as, "in every epoch of Islamic history, including the time of the Prophet, one sees Muslim women engaged in every profession that suited them. They worked as nurses, teachers, and even as combatants by the side of men when necessary, in additions to being singers, hairdressers, cooks, etc. Caliph Umar employed a lady, Shifa bins Abdullah as inspector in the market at the capital (Madinah) as Ibn Hafar (isabah) records. The same lady had taught Hafsah, wife of the Prophet, how to write and read. The jurists admit the possibility of women being appointed as judges of tribunals, and there are several examples of the kind. In brief, far from becoming a parasite, a woman could collaborate with men, in Muslim society, to earn her livelihood and to develop her talents.<sup>158</sup> Evidence thus shows that women were not excluded from public life, and any restrictions that were subsequently imposed on them were partly due to circumstantial developments that did not command normative and undisputed validity in the Shari'ah. There is no textual ruling in the Qur'an and Sunnah to deprive women of their political rights. It can be said that men and women are equal in Shari'ah law in regard to the essence of human dignity, reward and accountability for personal conduct, and matters pertaining spiritual rights, social rights, economic rights

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<sup>157</sup> All these historical event and incident examined in the case, Ansar Barney a. Federation of Pakistan (1983) by the Federal Shariah Court Pakistan.

<sup>158</sup> Hamidullah, M., 'Introduction to Islam', (1982), at p: 139



and political rights because the Holy Qur'an states, " And women have rights similar to those that men have over them in a just manner."<sup>159</sup> The implication of all this is clearly the equality of the sexes and it sustains the conclusion therefore that the primary sources of Shari'ah law: the Holy Qur'an and Sunnah rejects the inherent inferiority or superiority of one sex over the other.

#### **VIII. A BRIEF COMPARISON BETWEEN WESTERN AND ISLAMIC APPROACH**

The people in the West have the habit of attributing every good thing to themselves and try to prove that it is because of them that the world got this blessing, otherwise the world was steeped in ignorance and completely unaware of all these benefits. Now let us look at the question of human rights. It is very loudly and determinedly claimed that the world got the concept of basic human rights from the Magna Carta of Britain; though the Magna Carta itself came into existence six hundred years after the dawn of Islam. But the truth of the matter is that until the seventeenth century no one even knew that the Magna Carta contained the principles of Trial by Jury; Habeas Corpus, and the Control of Parliament on the Right of Taxation. If the people who had drafted the Magna Carta were living today they would have been greatly surprised if they were told that their document also contained all these ideals and principles. They had no such intention, nor were they conscious of all these concepts which are now being attributed to them.

As far as my knowledge goes the Westerners had no concept of human rights and civic rights before the seventeenth century. Even after the seventeenth century the Philosophers and the thinkers on jurisprudence though presented these ideas, the practical proof and demonstration of these concepts can only be found at the end of the eighteenth century in the proclamations and constitutions of America and France. After this there appeared a reference to the basic human rights in the constitutions of different countries. But more often the rights which were given on paper were not actually given to the people in real life.

In the middle of the present century, the United Nations, which can now be more aptly and truly described as the Divided Nations, made a Universal Declaration of Human Rights, and passed a resolution against genocide and framed regulations to check it? But as you all

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<sup>159</sup> See, The Holy Quran, at 2:228

know there is not a single resolution or regulation of the United Nations which can be enforced. They are just an expression of a pious hope. They have no sanctions behind them, no force, physical or moral to enforce them. Despite all the high-sounding ambitious resolutions of the United Nations, human rights have been violated and trampled upon at different places, and the United Nations has been a helpless spectator. She is not in a position to exercise an effective check on the violation of human rights. Even the heinous crime of genocide is being perpetrated despite all proclamations of the United Nations. Right in the neighboring country of Pakistan, genocide of the Muslims has been taking place for the last twenty-eight years, but the United Nations does not have the power and strength to take any steps against India. No action has even been taken against any country guilty of this most serious and revolting crime.

The second point which I would like to clarify at the very beginning is that when we speak of human rights in Islam we really mean that these rights have been granted by God; they have not been granted by any king or by any legislative assembly. The rights granted by the kings or the legislative assemblies, can also be withdrawn in the same manner in which they are conferred. The same is the case with the rights accepted and recognized by the dictators. They can confer them when they please and withdraw them when they wish; and they can openly violate them when they like. But since in Islam human rights have been conferred by God, no legislative assembly in the world, or any government on earth has the right or authority to make any amendment or change in the rights conferred by God. No one has the right to abrogate them or withdraw them. Nor are they the basic human rights which are conferred on paper for the sake of show and exhibition and denied in actual life when the show is over. Nor are they like philosophical concepts which have no sanctions behind them.

The charter and the proclamations and the resolutions of the United Nations cannot be compared with the rights sanctioned by God; because the former is not applicable to anybody while the latter is applicable to every believer. They are a part and parcel of the Islamic Faith. Every Muslim or administrators who claim themselves to be Muslims will have to accept, recognize and enforce them. If they fail to enforce them, and start denying the rights that have been guaranteed by God or make amendments and changes in them, or

practically violate them while paying lip-service to them, the verdict of the Holy Quran for such governments is clear and unequivocal: "Those who do not judge by what God has sent down are the disbelievers." (Kafirun). 5:44

The following verse also proclaims: "They are the wrong-doers (zalimun)" (5:45)

While a third verse in the same chapter says: "They are the evil-livers (fasiqun)" (5:47).

In other words this means that if the worldly authorities regard their own words and decisions to be right and those given by God as wrong they are disbelievers. If on the other hand they regard God's commands as right but wittingly reject them and enforce their own decisions against God's, then they are the mischief-makers and the wrong-doers. Fasiq, the law-breaker, is the one who disregards the bond of allegiance, and zalim is he who works against the truth. Thus all those secular authorities who claim to be Muslims and yet violate the rights sanctioned by God belong to one of these two categories, either they are the disbelievers or are the wrong-doers and mischief-makers. The rights which have been sanctioned by God are permanent, perpetual and eternal. They are not subject to any alterations or modifications, and there is no scope for any change or abrogation.

## CONCLUSION

This article concludes the specific equality of genders under Shari'ah law, demonstrating the roots of claim in the secular modern and traditional Islamic legal notions. In fact, there is an increasing volume of literature unearthing the roots of human rights within diverse cultures of the world. They are all well justified in their efforts while there is no justification for the ideological claims to monopolize human rights. Protecting basic human rights must be the objective of all legal systems. The legitimacy of the political authority and the law should be judged by their conformation with basic human rights. Individuals should not defer their moral capacity to their superiors and therefore always judge laws and rules from the perspective of human rights. These are some of the principles one may also derive from classical Islamic law. They are ancient yet still speak to us. The concept of equality of all human beings is not of so recent origin in jurisprudence as described by various authors and jurists of west. From a comparative study of the legal history and jurisprudence we find that the concept of equality of human beings was for the first time given and firmly practiced by the Holy Prophet. Therefore, it can be traced as far back as 1400 years, i.e. much before the Magna Carta, 14th amendment of American Constitution Universal Declaration of Human Rights and the theories of the scholars of seventeen to twenty centuries. The last Sermon of the Holy Prophet is a landmark in the history of mankind, which recognizes the inalienable rights of man human conferred by Islam.

## **Enlightenment of Islamic Shari'ah Rulings upon Negation of Bioethics of Surrogacy**

**Areeba Athar\***

**Abstract:** The aim of this article is to establish the ruling of Islam in regards of the practice of surrogacy which is the modern form of human trafficking and child selling phenomenon along-with the immortalization of human body and institution of marriage. The method of procreation is of privatenature among a husband and his wife which should not involve a 3rd or 4th party. Because of the lack of a clear and binding legislation on surrogacy in majority of the Muslim states, this article represents as a source of moral decision making on surrogacy and its impacts on the protection of progeny and genealogical connections within the society.

**Key Words:** Protection of progeny, Prohibited, Human Trafficking, Foster Motherhood, Sharia'ah Law.

### **I. INTRODUCTION**

In literal sense, surrogacy means "substitute". Legally, surrogacy can be defined as "an arrangement for bringing a child into the world by hiring a woman to bear the child of the contracted couple or person in her womb in return of financial aid. This method involves a third-party, the surrogate mother, with consent, to become pregnant for the intended parents who cannot conceive a baby for various biological cognition and after delivering the baby to the parents, she is set free of all the duties and responsibilities to the child and its family. It could be calculated that a surrogate mother is directed to forsake her parental authority upon that child after she has delivered it to the parents."<sup>160</sup>

The method of surrogacy is divided into two manners; Traditional Surrogacy and Gestational Surrogacy are two types of surrogacies. The "Traditional Surrogacy" entails the surrogate mother's egg being used to conceive by natural or artificial insemination. "Gestational Surrogacy," on the other hand, refers to the implantation of an embryo in the womb of a surrogate mother by IVF.

Surrogacy is the outcome of ART (Assisted Reproductive Technology), which provides the assistance to overcome the fertility

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<sup>160</sup> Schwartz L, Preece PE, Hendry RA. Medical ethics: a case-based a Post SG, editor.

issues. It is one of the most low-tech treatment to overcome the infertility.

Couples look to surrogacy when the wife is biologically unavailable to reproduce or the wife is unwilling to go through the process of giving birth as it has consequences of its own and is very painful too. Similarly, this practice is open for single males too but it is of very low rate.<sup>161</sup> This technique also gives hope to the post-menopausal ladies or biologically infertile women to conceive a child.<sup>162</sup>

Surrogacy can be of compassionate nature or used for trade purposes. The former involves the willfulness of the surrogate mother to deliver the child to the intended parents as a gift, while the latter involves financial aid meant to be given to the surrogate mother by the intended parents in order to compensate her for delivering the child.<sup>163</sup>

## II. ISLAMIC BIOETHICS ON SURROGACY

Whenever regulating a legal ruling, Muslim jurists always keep in view the following purposes of Islamic law, also called *Maqasid-al-Shariah*:

- Hifz-ala-al-Din / Protection of Religion
- Hifz-ala-al-Nafs / Protection of Life
- Hifz-ala-al-Nasl / Protection of Progeny
- Hifz-ala-al-Aql / Protection of Wisdom
- Hifz-ala-al-maal / Protection of Wealth

These purposes are comprised of the basic human necessities to lead a working life.<sup>164</sup>

The purpose of law most closely related to Surrogacy is *Hifz-ala-al-Nasl*. It is also the latest shari'i issue which is being administered by Islamic jurists and has created a chaos among the society whether Surrogacy is allowed in Islam or not because there is no clear ruling on it in the Quran or Ahadiths.

Islam very perspicuously negates the concept of Surrogacy. Islamic bioethics have specified already that sperm donating practice is

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<sup>161</sup> Bioethics for students: how do we know what's right: issues in medicine, animal rights and the environment.

<sup>162</sup> Munson R. Reproductive control: in vitro fertilization, artificial insemination and surrogate pregnancy.

<sup>163</sup> Pence GE. Classic cases in medical ethics.

<sup>164</sup> Kasule OH. Medical jurisprudence between originality and modernity.

unacceptable within Islamic boundaries and surrogacy is the clear cut form of sperm donation which involves a foreign element to enter the womb of woman not genetically or legally related to the sperm donor which in turn paves a way for lineage mixing.

An Islamic scholar named Mufti Sheikh Ahmad Kutty has served the fact that Surrogacy process involves the introduction of the sperm of a male into a female to whom he is not married automatically transgress the boundaries of Allah.<sup>165</sup>

The term Boundaries of Allah can be explained through the chapter-23 verse-7 of the Holy Quran<sup>166</sup>:

*“And who are mindful of their chastity, [not giving way to their desires] with any but their spouses or what their right hands possess”: for then, behold, they are free of all blame, whereassuch as seek to go beyond that [limit] are truly transgressors.”*

### **III. LEGAL & ETHICAL PROBLEMS RAISING FROM SURROGACY**

Surrogacy has a number of concerns associated with it. Let's consider a case of Gestational Surrogacy in which the surrogate is married. In this situation, the resultant child will legally be that of the surrogate's husband even if the sperm was donated from another man. Here, she is not only carrying the embryo but she is also using her womb as donation. As a result, she is giving birth to the child but is not legally entitled to the status of mother. Consequently, the identity of the resultant child will be a dilemma for the society and he'll be considered illegitimate because the contracting father has not entered into the institute of marriage with the mother. Even if we say that the husband of surrogate mother has permitted his wife to go through the respective process, then the religion of Islam will prohibit this situation on the grounds that no man's semen is permitted to touch the fetus that is product of the other man and thus, how will a legal perspective be created to refrain a husband from exercising his legal sexual rights upon his wife?<sup>167</sup>

Let's consider another case of Gestational Surrogacy where the surrogate mother is unmarried. Islam clearly negates the entrance of the semen of any man into the uterus of a woman who is unmarried. In this situation, the resultant child will be illegitimate as the

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<sup>165</sup> Kutty A. Does Islam Allow 'Surrogate Motherhood'?

<sup>166</sup> The Glorious Qur'an, Chapter 23, Verses 5-7

<sup>167</sup> F. Al-Ahram Weekly On-line. 17-23 May 2001, Issue No. 534.

intending father has not entered into the contract of marriage with the surrogate and the surrogate mother as well as the intending father would be backlashed for committing adultery. They'd face moral and ethical difficulties in survival in the society and would be punished for committing adultery too, most probably. Even if they're not punished, how would they maintain their respectful reputation among the society?

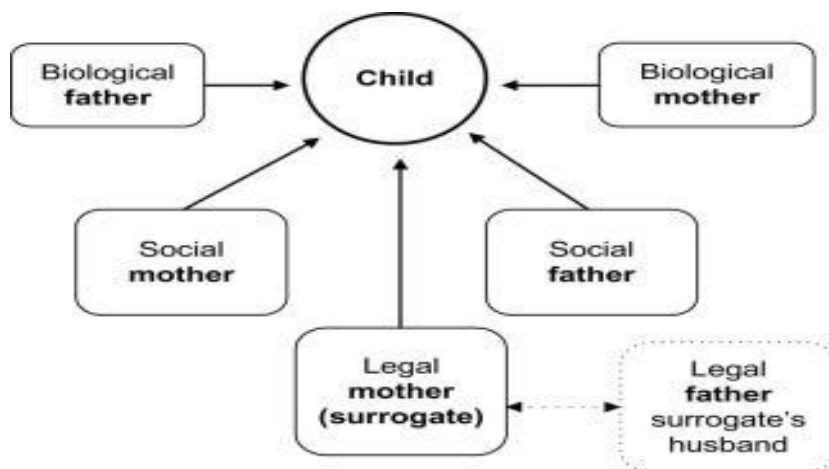
Islam gives every person the right to definite parentage. In the process of Surrogacy, the child will obviously be confused and often questioned about whom his mother is, either the one who conceived the child or whose egg was donated which will in turn destroy him mentally as well as emotionally and he will be distributed into a variety of parentage.

The basic purpose of Islamic law is to protect the lineage and society. It serves the rules of reproduction to avoid the mixing of genes. Surrogacy is a very major cause of mixing of genes which is alarming for the protection of heredity and pure progeny. It emphasizes that every child is given the right to relate to a known father and a known mother but surrogacy automatically rejects this right of the child as the real parentage is not obvious for the surrogate children. Also, marriage is a contract among a husband and his wife only and no such third party is allowed to interfere in the legal, emotional and sexual relations of a married couple whether providing an egg, a sperm or a uterus. Thus, sperm donation, egg donation and Surrogacy are not allowed in Islam.<sup>168</sup>

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<sup>168</sup> Serour GI. Reproductive choice: a Muslim perspective. In: Harris J, Holm S, editors. The future of human reproduction: ethics, choice and regulation.





The Council of the Islamic Fiqh Academy holding its third session, in Amman, Hashemite Kingdom of Jordan declared that surrogacy is prohibited under the Islamic values because of the dilemma being caused in lineage and loss of motherhood. (11)

In addition, the Quran clarifies that a child's mother is just the one who gives birth to him and no one else. In Quran, chapter-23 verse-2 states that:

*None can be their mothers except those who gave them birth.)*<sup>169</sup>

So, the surrogate mother can claim to be the mother of the child even if she is impregnated with the sperm or egg of the intending parents. She can assert her legal and parental rights over the child, and she can even refuse to give the contractual parents' custody of the child. So, how could the ovum donor lady proclaim to be the mother of the child since she neither carried it in her womb nor gave birth to it?

#### **IV. SURROGATE MOTHERHOOD & FOSTER MOTHERHOOD**

In recent researches, some Muslims have asserted that surrogate motherhood can be related with the foster motherhood which is permitted in Islam. They present the logic that in foster motherhood, the mother is nourishing the child by providing him with the food and nutrients and same is happening in the surrogate motherhood where the child stays in the womb of surrogate mother and feeds and nourishes the child. They present this ideology referring to *Qiyaas*.

<sup>169</sup> The Glorious Qur'an, Chapter 58, Verse 2.

But, thereasoning derived from Qiyaas could not be relied upon as the medicinal technology in present times is different and homologous.

They say just like in foster motherhood, the child is transferred to the wet nurse who will breastfeedthe child and develops the relation of foster hood with the child by virtue of suckling. Similarly, in surrogate motherhood, the donor mother or parents are the real parents as they are genetically linked with the child and the woman who is carrying and giving birth to the baby will be the fostermother to the child.<sup>170</sup>

If answered straight, then this reasoning is faulty. Because in the foster motherhood, the woman or wet nurse is not exposed to the sperm of the father. The child is conceived by its biological parents, who are legally married, and the wet nurse hired has no ties to the child's father. Otherwise, in a contract based on surrogate motherhood, the surrogate hired is artificially saturated with the sperm of the intending father which develops a relationship among the intending father and contracting mother. Also, the foster mother only suckles the child for a certain time and does not form a biological relationship with the child. But, a surrogate mother is considered to be the real mother of the child as explained in Islam which creates a biological, emotional and genetically relationship with the child.

## **V. SURROGACY LEADING TO SOCIAL & LEGAL QUESTIONS**

The approach of Islamic bioethics prohibits Surrogacy because it meddles with the definite progeny. According to Islamic Shariah, if an activity is negating any of the purposes of Shariah law then it is prohibited. There is zero permissibility rate for surrogacy in Islam as the evils which will raise up from this will overcome any good releasing out of it.

Through surrogacy, there can be the outrage of situations hazardous to the families opting for respective treatment. There are many questions raised regarding the social and legal perspective of surrogacy. For example, if the marriage of adopting parents breaks, what judgments would be made regarding the custody of the

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<sup>170</sup> Ethics of Surrogacy: A Comparative Study of Western Secular and Islamic Bioethics

surrogate child? Hence, Islamic Sharia'ah is rightful in prohibiting surrogacy to avoid such complications.

In commercial surrogacy, when one is spending money, he expects value from the other party. Generally, when the surrogated child comes into the world with some physical, genetical or congenital disease, the parents are highly disappointed. Either the intending parents blame the surrogate mother for giving birth to a defected child, or the surrogate mother might blame the donor parents for donating a defected sperm or ova. As a result, the child becomes a reject just likerotten fruit in the fruit basket lying in a supermarket. Is it not reasonable that the child is being regarded as an object rather than a human in this circumstance? So, is surrogacy not abandoning the basic human decency and natural flaws? So, it is senseless to permit such treatment at all.<sup>171</sup>

Islam has always ordered to form the families based absolutely on biological grounds. When a child is brought into the world through surrogacy, the other children being born through the samewomb will automatically formulate the relationship of siblings among each other. Thus, such children are not mindful of their proper lineage and might end up being in a half-sibling marriage which is an alarming hazard for the society.<sup>172</sup>

Furthermore, inheritance of property becomes a big issue in regards of surrogacy. When a woman bears a child for another person, she becomes the biological mother of that infant, and her spouse becomes the biological father as well. The other siblings being born from the same womb or same sperm would form a sibling relationship among each other. Such relationships have the right of inheritance upon their properties. It will cause a huge dilemma and the distribution of property would be impacted at a large scale, disturbing the whole institute of family and progeny, negating the purpose of *Hifz-ala-al-Nasl* as well as *Hifz-ala-al-Maal*.<sup>15</sup>

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<sup>171</sup> Krimmel HT. The case against surrogate parenting

<sup>172</sup> Pence GE. Classic cases in medical ethics.

## CONCLUSION

The discussion above clearly depicts that the process of surrogacy involves the dehumanization of human reproduction by letting down the womb to be used for commercial purposes through buying or even renting. First of all it violates the moral value, dignity and respect which Allah bestowed to man and woman by claiming them to be *Ashraf-al-Makhlوقات*. Secondly, the woman agreeing to enter in the surrogate contract automatically agrees to forsake the exercise of any right upon the child born which is an insult to the glorious motherhood phenomenon.

Surrogacy is just a modern name for human trafficking and child selling procedures. It is also negating the protection of progeny and protection wealth thus Sharia'ah law prohibits this process.

## **Human Rights of Special Persons in Pakistan: An analytical study of The ICT Rights of Persons with Disability Act, 2020**

**Saleem Shaheen\***

**Abstract:** This Article assess and reviews the ICT Rights of Persons with Disability Act, 2020. This Act passed by the National Assembly for the ICT Capital territory. Previously, there was an ordinance promulgated by Gen. Zia-Ul-Haqq in 1981 titled as “Disabled Persons (Employment and Rehabilitation) Ordinance, 1981”. This Ordinance obtained its legal effectivity and applicability to the whole of Pakistan through the 8<sup>th</sup> Amendment in 1985. Actually ICT Rights of Persons with Disability Bill, 2020 was put in the National Assembly as a result of protesting voice of persons with disabilities who were on the roads for certain years. Disabled Persons (Employment and rehabilitation) Ordinance, 1981 was insufficient to cater for needs of persons with disabilities. It was a dire need in the country to improve this ordinance through making a legislation on the subject. The ICT Rights of Persons with Disability Act, 2020 tried to do this job but unfortunately, this legislation was very hastily made and didn’t reach at the stage where the rights of persons with disabilities come into complete conformity with the Islamic injunctions, Provisions of the Constitution of Islamic Republic of Pakistan, 1973 and the UNO Convention on the Rights of Persons with Disabilities. This Act seems to be a policy rather than an enactment. It needs to revise and make it bring in line with UNO Convention on Rights of Persons with Disabilities.

**Keywords:** Disability, Constitution, Convention, Ordinance, Rights, Legislation

### **I. INTRODUCTION**

The women have rights as they are half of population of the world. Since the very beginning of human history, the women have been oppressed in every society. The children have rights as they are a generation of future. The Capital invested on children can never be gone waste as a capital of today invested on them will come with a double capital tomorrow. Women and children all are very

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the society and its development. That's why their rights are necessary to be protected but the rights of persons with disabilities, why are necessary? While they are not beneficial to the society on part of their disability. Even they are not beneficial for their families. Unfortunately they are burden on their families. They also can't perform any material service for their family and country. Secondly, it is against justice to get a certain percentage of income of certain class of people in the term of taxes and spend it on other class of people. What we may answer this question in a logical way? In answer to all these questions, we may say that the society the more upholds moral goals and values, it goes more grow. The society as a whole bears burdens, hurdles and restrictions, it creates in itself an ability and power to develop. The person who have a limitation in his body, he can serve the family and country in a better way if he has been rehabilitated. As it is a common practice, the people don't throw the electronics items if they are defective or they become out of order and remained un-useable for them. They get these items repaired and make them re-useable. Likewise, the human's with disabilities are rehabilitated and tried to remove any physical and mental defect in them through rehabilitation process and are made useable for the society. You can chose a difference in both persons, one is a worst criminal person in a society and other is a blind or a physically disabled but is a very pious man, who is better, first person or second one?

All persons have sufficiency and insufficiency naturally. ALLAH Almighty created all persons with different abilities. The one has an ability, the other has not that ability. This sufficiency and insufficiency of men doesn't mean a disability and nor it makes someone superior and someone inferior. It also doesn't have a barrier in delivering rights and duties but it emphasizes to perform the duty. The thing which makes a person disabled, that is giving a person a sense of disability socially. If the rights and duties are to be performed because of insufficiency and sufficiency. The society will not have an element of disability socially.

The Disability is a means of creating a positive motion in a society. When non-disabled persons who are idle and lazy in a society see the persons with disabilities to work hard, they get an inner power to work and grow. The society which makes the persons with disabilities useful citizens, actually, it makes itself useful. It is almost seen a common phenomenon in people that a person has a

disability in his body, he can do have an alternative ability in his body. The society can benefit from his alternative ability.<sup>173</sup> Having an introductory words, we come to our core topic “ICT Rights of Persons with Disability Act, 2020; A legislative review”. As the ICT Rights of Persons with Disability Act, 2020 in its preamble ensures the rights of persons with disabilities to bring in line with the Islamic injunctions, provisions of the constitution of the Islamic Republic of Pakistan and the UNO Convention on the rights of persons with disabilities.<sup>174</sup> Therefore, it is necessary to review and analyze this act in the light of these three angles. This act is also viewed technically to see what Legal drawbacks it has and also to see does it have conformity with Islamic Injunctions, Constitution, 73 and UNO Convention on disability rights. It is a factual fact that unless we don’t have a brief overview of disability legislations made in the near past in the world, we can’t analyze and review the legislation we made in our country in 2020. Therefore, before we go to proceed on our core issue. We come to take a brief overview of disability legislations in the UK, USA and Pakistan.

## **II. A BRIEF OVERVIEW OF DISABILITY LEGISLATIONS IN THE UK, USA AND PAKISTAN**

In the 19<sup>th</sup> and 20<sup>th</sup> century, the legislations for persons with disabilities were made in the UK. For example, Mental Deficiency Act, 1913 passed to set out arrangements for dealing with those considered to be 'mentally defective': 'idiots', 'imbeciles', 'feeble-minded persons' and 'moral imbeciles' (defined in section 1). It is principally concerned with the provision of appropriate accommodation for them. The role of local education authorities is referred to in sections 2, 30 and 31. They are required to ascertain and certify the children aged 7 to 16 in their areas who are 'defective' and would 'not benefit from instruction in special schools or classes' (section 31).<sup>175</sup>

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<sup>173</sup> See the introductory pages of the book written by the author titled as “Disability Rights; Problems and Solutions” Ed. 1<sup>st</sup>, Maktbah-Al-Qalam, (2009), p; 27-31

<sup>174</sup> See for instance, the preamble of the Bill “ICT Rights of Persons with Disabilities” passed by the National Assembly of Pakistan in 2020.

<sup>175</sup> Mental Deficiency Act, 1913 comprises 28 chapters, actually this act made to further and better provision for the care of feeble-minded and other mentally defective persons and to amend the Lunacy Acts. [15<sup>th</sup> August 1913.] Currently,

The Poor Law Amendment Act, 1834 was not directly related to persons with disabilities but its effect extended to them. As it was an 'Outdoor relief' (assistance provided outside of a workhouse) that was withdrawn unless a person was unable to work due to old age or 'infirmity'. Those who were 'able-bodied' but unemployed could not draw state support unless they entered a workhouse, where they earned their keep. Workhouses also housed the sick, 'mentally ill', unmarried mothers, the elderly and 'the infirm'. The government's intention was to make the experience of being in a workhouse worse than the experiences of the poorest laborers outside of the workhouse. This policy was to become known as the principle of 'less eligibility'. The Poor Law Commission was replaced by the Poor Law Board in 1847, with the intention of improving accountability to Parliament. Workhouses and Boards of Guardians were abolished in 1930 by the Local Government Act 1929, and their powers and responsibilities were passed to local and national government bodies.<sup>176</sup>

In the mid of 20<sup>th</sup> century, the England passed the Disabled Persons Employment Act, 1944. In the 1975, the British Government improved the social environment in their country and enhanced the Mobility Allowance. The British Government took a further step to improve the Disabled Persons Employment Act, 1994. However, in the 1995, the British Government replaced this Act with Disability Discrimination Act, 1995. In the 1995, the British Government also celebrated an anniversary of Disabled Persons Employment Act, 1944. The British Government eliminated the element of discrimination against Persons with disabilities in the society through Disability Discrimination Act, 1995.

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<sup>176</sup> The Royal Commission into the Operation of Poor Laws, chaired by the Bishop of London, launched an investigation into the administration of the Poor Laws in 1832. The commission reported back in March 1834, concluding that poverty was being perpetuated by the provision of Poor Law relief. This conclusion led the commission to recommend that all able-bodied people and their families should stop receiving relief. The recommendations of the commission formed the basis of the Poor Law Amendment Act 1834, dubbed the 'new Poor Law', which overhauled the system of providing support to the poor in August 1834. The Act grouped local parishes into Poor Law unions, under 600 locally elected Boards of Guardians. Each of those boards had its own workhouse



In 2010, the UK Government passed the equality Act. In the equality Act 2010, a person is defined as having a disability if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his ability to carry out normal and day-to-day activities.<sup>177</sup> The Act states that a person discriminate against a disabled person if he treats that person unfavorably because of something arising in consequence of his disability, and he cannot show that the treatment is a proportionate means of achieving a legitimate aim.<sup>178</sup>

Section 20 of the Act makes provisions regarding the requirement to make reasonable adjustments for disabled people in relation to public services and functions;

The duty comprises three requirements which apply where a disabled person is placed at a substantial disadvantage in comparison with non-disabled people. The first requirement covers changing the way things are done (such as changing a practice), the second covers making changes to the built environment (such as providing access to a building), and the third covers providing auxiliary aids and services (providing special computer software which are a different nature of services).<sup>179</sup>

USA has evolved the last century for disability rights. However, in the very beginning the campaigning of disability rights started from the ideology that disability equates to weakness.<sup>180</sup> At this stage, the disability was a personal issue and political regime didn't support the individual with disabilities.<sup>181</sup> In 1960s the civil rights movements started and disability advocates joint this movement. These movements gave the individuals with disabilities to fight for their rights.<sup>182</sup> As a result of disability

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<sup>177</sup> See Section 6. UK Equality Act 2010.

<sup>178</sup> *Ibid*, Section 15.

<sup>179</sup> Explanatory Notes to the Equality Act 2010, P: 25.

<sup>180</sup> Fleischer & Zames, Doris & Frieda (2001). The Disability Rights Movement: From Charity to Confrontation. Temple University Press.p:9

<sup>181</sup> *Ibid*

<sup>182</sup> See a report on "A brief history of the disability rights movement and disability discrimination" prepared by Disability Rights Centre Staff, 2004-2010. Bancroft Library, University of California, Berkley. P: 1-28

movements, the Americans with Disability Act was passed in 1990.<sup>183</sup> Meanwhile, on a global scale, the United Nations has established the convention on rights of persons with disability.

In Pakistan, first time in legislative history in 1981, the president of Islamic Republic of Pakistan promulgated an ordinance about employment and Rehabilitation of Persons with Disabilities named as Disabled Persons (Employment and Rehabilitation) Ordinance, 1981. As an Ordinance it has its effectivity for six months but the 8<sup>th</sup> amendment in the Constitution, 1973 made the status of this ordinance as a permanent legislation? This Ordinance comprises three pages including a preamble and 22 sections as a whole. After 1981, in Pakistan there has not been any legislation on the subject and have not improved and updated this ordinance. This ordinance had many drawbacks and shortcomings in the Disability Rights perspective. As a part of this Ordinance and in continuance of disability legislation in Pakistan the Government of Pakistan has passed the bill of Rights of persons with disability in 2020. The drawbacks and shortcomings in previous legislations should have to be removed through the new legislation but unfortunately the previous legislation has not to be improved through the ICT Act. The Rights of Persons with Disability Act, 2020 seems to be just a formality and dust thrown in the eyes of persons with disabilities. As this Act has been abruptly come into force as the result of protest of persons with disabilities. Now we review this legislation parallel with the ordinance, 1981

### **III. THE DISABILITY DEFINED IN THE ACT**

ICT Rights of Persons with Disability Act, 2020 defines disability as;

““disability” means a long term physical or mental condition that limits a person's movements, senses or activities and shall include physical, mental, intellectual and developmental disorders or sensory

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<sup>183</sup> Befort & Donesky, Stephen & Tracey (2000). “Reassignment under the American Disability Act: Reasonable Accommodation, Affirmative Action, or Both?” University of Minnesota Law School. P:1-10

impairments which in interaction with participate fully and effectively in day to day performance and interaction with others on an equal basis”<sup>184</sup>

This definition is not a full-fledged definition expressing the disability as a whole. What does mean by “a long term” in this definition? For how long if disability lasts it would be considered as a disability. For how many months or how many years, the term “long term” includes. This definition doesn’t explains “the adverse substantial effect of disability”. If the word “substantial” is not used in the definition than the very least disability can fall into the definition of disability.

#### **IV. THE RIGHT OF POLITICAL PARTICIPATION**

ICT Rights of Persons with Disability Act, 2020 prescribes the Right of Political Participation of persons with disabilities as;

“Persons with disabilities shall have full right to participate in the political activity in the country including exercising right of vote and right to be elected to an elected body”.<sup>185</sup>

Although, this section gives persons with disabilities right to exercise the vote and right to be elected to an elected body but this section ignores a basic political perspective. As it is a common perception that parliament of a country has a representation of people from different areas and different classes of people. The minorities have their specified seats in parliament to represent themselves. The women have also a reserved quota of seats in the Parliament. The people from tribal areas have also their specified seats in the Parliament. Why this particular political presentation of people from different areas and classes? The one class of people from a specified area of a country doesn’t understand the problems and issues of other area and class of people. It is just as a patient who knows the intensity of his disease. The non-patient doesn’t know what pain and disease is? The minorities know their problems

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<sup>184</sup>See Section 2 for definition clause “disability” ICT Rights of Persons with Disability Act, 2020.

<sup>185</sup> See Section 16. ICT Rights of Persons with Disability Act, 2020.

and issues. The women asquint with their problems. The people of tribal areas know their conditions and problems. Likewise, the persons with disabilities know their problems and issues. Therefore, it is necessary to reserve seats for them in the parliament as they have been given a quota in the employment. We have also an example of political participation from the Islamic history. The Prophet ﷺ appointed Abdullah-ibn-Umm-e-Maktum (a blind companion of the Prophet ﷺ) a Governor of Madinah in his absence when he ﷺ traveled to Makkah for performing Ummrah in 6<sup>th</sup> hijri. Abdullah-ibn-Umm-e-Maktum also performed the function of Imam in Madinah Mosque in the absence of the Prophet ﷺ.<sup>186</sup>

## V. THE RIGHT OF EMPLOYMENT

Disabled Persons (Employment and Rehabilitation) Ordinance, 1981 Section 10/1 says about the right of employment as detailed in the quota system:

“Not less than one percent of the total number of persons employed by an establishment at any time shall be disabled persons”<sup>187</sup>

ICT Rights of Persons with Disability Act 2020, Section 24 says about the right of employment as detailed in the quota system:

“Not less than one percent of the total number of persons employed by an establishment at any time shall be persons whose names have been registered with the Council or its designated office of the area in which such establishment is located and against whose names in the register maintained under section 23 an endorsement exists to the effect that they are fit to work”<sup>188</sup>

In both legislation the previous and new one, we see the percentage of employment of persons with disabilities remained same (one percent). While a period of forty years (1981-2020) exists in both legislations. Has the number of persons with disabilities not increased in the population of country in forty years? Does this one

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<sup>186</sup>Mubarak Puri, Safi-ur-Al Rahman, *Alraheeq-ul-Maktum*. Maktabah Al-Salfiyah, Lahore, Ed 1995. P;459

<sup>187</sup>See Section 10, sub section 1, Disabled Persons (Employment and Rehabilitation) Ordinance, 1981.

<sup>188</sup> See Section 24, ICT Rights of Persons with Disability Act, 2020.

percent quota proportionate to the estimate of ten percent of the number of whole population of a country as entailed by WHO?

ICT Rights of persons with Disability Act, 2020, section 10/3 says:

“The government shall reserve an employment quota as prescribed by the Federal Government to be periodically reviewed, at various levels for persons with disabilities in government departments, institutions, entities and corporate entities owned and managed by the government and the concerned department shall implement the allocated quota.”<sup>189</sup>

This section seems apparently that the quota percentage would be reviewed periodically but the question is here that why didn't upraise the one percent quota according to the population of persons with disabilities. The more better way was firstly to upraise the one percent quota according to the number of persons with disabilities of the whole population of the country so that the gap between 1981 to 2020 in respect of the number of persons with disabilities to be filled in and then secondly, the section 10/3 of ICT Rights of Persons with Disabilities to be inserted.

Another loophole and technical fault of this legislation is to be seen in section 25

“Establishment to pay to the Fund.- An establishment which does not employ a person with disability as required by section 24 shall pay into the Fund each month total sum of money it would have paid as salary or wages to a disabled person had he been employed”.<sup>190</sup>

This loophole and technical fault was existed in Disabled Persons (Employment and Rehabilitation) Ordinance, 1981, Section 11

“An establishment which does not employ a disabled person as required by section 10 shall pay into the Funds each month the sum of money it would have paid as salary or wages to a disabled person had he been employed”.<sup>191</sup>

We see in both sections in both legislations that if any establishment does not want to employ a person with disability, shall pay into the

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<sup>189</sup> See Section 10, sub section 3, ICT Rights of Persons with Disability Act, 2020.

<sup>190</sup> *Ibid* at Section 25, sub section 1.

<sup>191</sup> See Section 11, sub section 1, Disabled Persons (Employment and Rehabilitation) Ordinance, 1981.

fund each month the sum of money it would have paid as salary or wages to a disabled person had he been employed. The previous and new legislation made the right of employment of a person with disability as a discretion of the head of the institution. He may or may not employ a person with disability. Both legislation put the right of employment of the person with disability totally at the disposal and discretion of the head of the institution. Both sections 25 and 11 of the new and old legislation respectively make the right of employment non-obligatory and create a question of choice in the hand of the head of the institution. If he doesn't like to employ a person with disability or he doesn't have a person of his own choice, he will deposit the wages of vacancy into the fund and left the vacancy vacant. He doesn't feel any burden of this situation as he is not paying into fund from his own pocket.

In fact, the loophole in both sections is a great barrier in the way of exercising the right of employment for persons with disabilities. The dangerous element of both these sections is that the right of employment of a person with disability may be gone on the prejudice of the head of the institution as the question of choice rises here.

## **VI. BOARD OF ASSESSMENT AND DISABILITY CERTIFICATE**

Disabled Persons (Employment and Rehabilitation) Ordinance, 1981, Section 12/2 is about issuance of disability certificate.

“The Provincial Council shall, if it thinks necessary, cause each disabled person registered under sub-section(1) to be assessed as to the nature of his functional disability and also as to his aptitude and the nature of work he is fit to do by a medical officer authorized by it in his behalf or by such assessing board consisting of not less than one medical officer as it may appoint, and the medical officer or, as the case may be, the assessing board shall submit its report to the Provincial Council in such form as may be prescribed by the <sup>192</sup>[Government].”<sup>193</sup>

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<sup>192</sup>Substituted by the Disabled Persons (Employment and Rehabilitation) (Amendment) Act 2012 (XIII of 2012), for the words “Provincial Government”.

<sup>193</sup>See Section 12/2, Disabled Persons (Employment and Rehabilitation) Ordinance, 1981,

Medical Officer is a member of assessing board. He is off course, a medical specialist but he doesn't have any skilled knowledge in disability studies. Therefore, it is not possible for a person to give an opinion on any specialized issue unless he has got a knowledge of that specialized area through a specialized degree. There has not been setup any criteria in this section to assess the disability. Sometimes, the person has a very low nature of disability which doesn't affect his day to day performance, gets a disability certificate.

## **VII. NATIONAL COUNCIL FOR THE RIGHTS OF PERSONS WITH DISABILITIES**

ICT Rights of Persons with Disability Act, 2020, Section 21/1 strengths and reconstitute the National Council for the Rehabilitation of disabled persons and make this council stand reconstituted as the council of rights of persons with disabilities. This council consists of sixteen persons including Chairperson and Vice Chairperson with fourteen members. Three of them are persons with disability. The following is the structure of the National Council for the Rights of Persons with Disabilities;

“A Minister -in-Charge; Chairperson, Vice Chairperson Secretary of the Division allocated with business of this Act; two members from the Senate, one each from government and the opposition; Members; Two members from the National Assembly one each from government and the opposition one representative from Ministry of Information, Broadcasting, National History and Literary Heritage not below the rank of Joint Secretary one representative from Ministry of Finance, Revenue and Economic Affairs not below the rank of Joint Secretary, one representative from the Division allocated with business of education not blow the level of Joint Secretary, one representative from the Division allocated with the business of poverty alleviation and social safety not below the rank of Joint Secretary, an officer not below the rank of a Joint Secretary of the Division to which business of this Act stands allocated, chairman, Capital Development Authority (CDA), chief Executive or

Head of National Institute of Rehabilitation Medicine (NIRM). Three persons with disability.<sup>194</sup>

The Chairperson, Vice Chairperson and members of the council belong to different departments of the state. The function of the council is to manage and supervise the administration of rights of persons with disabilities. They also representatives of persons with disabilities. Chairperson and Vice Chairperson and other members belonging to different departments of the state, have already a huge burden on their heads to manage and administer their own departments. How can it be possible for them to bear a burden of another department (the rights of persons with disabilities)? In this way, can they do justice with their jobs? Off course, if they don't express the feeling of extra burden over their job verbally but they have ill feeling about this extra burden in their heart. Secondly it is also injustice with them to take the services for which they are not payed. Thirdly, this council comprises only three members with disability. This thing force us to think keeping in view the proverb "that a person who have a pain in his body, he knows what a pain is"? The persons who haven't any disability, how can they know what disability is? Therefore, the section 21 has a technical drawback and fault to make the council comprises proximately 90% representation of non-disability element in the council.

### **VIII. ICT RIGHTS OF PERSONS WITH DISABILITY ACT, 2020 SEEM TO BE A POLICY RATHER THAN AN ACT**

ICT Rights of Persons with Disability Act, 2020 seem to be a policy rather than an Act. This act where it entails the services or rights in its sections, it uses the terms "Shell Ensure, Shell take measures, Shell take necessary steps, Shell establish, May set up" These terms are often used in a policy rather than in an Act. Secondly, there is no any time framework or time limits for Provision of services to persons with disabilities. As we note in section 7;

"The government as well as the private sector shall take necessary measures towards allowing ease of access to the persons with disabilities to public buildings, hospitals, recreational facilities, public transport, streets and roads for which the old

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<sup>194</sup> See Section 21, ICT Rights of Persons with Disability Act, 2020.



buildings and vehicles shall be appropriately modified and new buildings and vehicles shall be built conforming to appropriate standards in conformity with guidelines developed by the Council:

Provided that the government shall ensure accessible washrooms, toilets and bathrooms with all the facilities and necessary accessories”.<sup>195</sup>

The section 7 has six total number of sub-section. All these sub-sections entails the right of ease of access and mobility but there has not been entailed any time framework or time limit for provision of these services. What will make bound the services providers in public and private sectors to provide these services up till this time (month/year). Section 7 has an ambiguity in this Act.

#### **IX. REDESIGNING THE DISCRIMINATION CLAUSES IN THE CONSTITUTION OF 1973 IN ORDER TO BRING THE DISABILITY RIGHTS IN LINE WITH THE PROVISIONS OF THE CONSTITUTION OF 1973**

As it is claimed in the preamble of ICT Rights of Persons with Disability Act, 2020 that all issues related to disability should come in line with the Provisions of the constitution of the Islamic Republic of Pakistan. In order to obtain this objective, it is a dire need to redesign the discrimination clauses in the constitution of 1973. Clause 25 is about equality of citizen. Its sub clause says about discrimination.

“(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”.<sup>196</sup>

The Clause 26 sub clause 1 says about discrimination in respect of race, religion, caste, sex, residence or place of birth.

“In respect of access to places of public entertainment or resort not intended for religious

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<sup>195</sup> See Section 7, ICT Rights of Persons with Disability Act, 2020.

<sup>196</sup> See Article 25, sub clause, 2. The Constitution of Islamic Republic of Pakistan, 1973

purposes only, there shall be no discrimination against any citizen on the ground only of race, religion, caste, sex, residence or place of birth”.<sup>197</sup>

The Clause 27 sub clause 1 says about discrimination in respect of services and employment.

“No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth.”<sup>198</sup>

The above mentioned clauses of the constitution of Islamic Republic of Pakistan says about non-discrimination against any person on the basis of race, religion, caste, sex, residence or place of birth. There is no mention of discrimination on the basis of disability in these clauses. It is therefore, necessary to redesign the discrimination clauses in the constitution of 1973 by inserting the word “disability” in order to bring the disability rights in Pakistan in line with the provisions of the constitution.

## CONCLUSION

As there have been a protest of persons with disabilities in the country for the last certain years. The federal government has very hastily enacted the bill of ICT Rights of Persons with Disability Act, 2020 as the result of that protest. Actually, this act is a dust thrown in the eyes of the persons with disabilities or just it is a “dalasa” consolation to the persons with disabilities. We may say that this enactment is a “tikki Taaffe” given to the persons with disabilities and they have been happy with this “tikki Taaffe”. There is a dire need to remove technical drawbacks and short comings in this Act and revise this enactment.

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<sup>197</sup> *Ibid* Article 26, sub clause, 1

<sup>198</sup> *Ibid* Article 27, sub clause, 1