ISSN: 2790-9409

Vol 4 March 2024 Issue 13

PREMIER LAW JOURNAL

---------- Premier Research Centre ----------

A Project of Premier Law College Gujranwala

CONTENTS

EDITORIAL BOARD

The Editorial Board of the Premier Law Journal comprises the following Members from the various universities:

ADVISORY BOARD

The Advisory Board of the Premier Law Journal comprises the following Members from the various universities:

1. **Dr. Hafiz Farhan Arshad**
   Assistant Professor Faculty of Arts and Social Sciences
   (Gift University, Gujranwala)
2. **Dr. Hafiz M. Waseem Abbas**
   Assistant Professor Faculty of Arts and Social Sciences
   (Gift University, Gujranwala)
3. **Dr. Hafiz Muhammad Usman Nawaz**
   Assistant Professor of Law
   (International Islamic University, Islamabad)
4. **Dr. Muhammad Riaz Mahmood**
   Associate Professor of Islamic Thought, History & Culture
   (Allama Iqbal Open University, Islamabad)

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 4th volume, issue 13, which is going to be published in March, 2024. 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.

Tamoor Mughal briefly presents in his article the relentless growth of the digital landscape which ushered in an era where cyber security stands as a paramount concern. The ubiquitous presence of cyber threats necessitates innovative and effective approaches to protect digital assets. In this context, he explains artificial Intelligence as a transformative force, reshaping the dynamics of cyber security. This article provides an overview of the benefits and challenges surrounding the interplay of AI and cyber security.

Ghulam Mohy ud Din's article briefly explains Social welfare as an important transformation in the developing countries. Against a circumstantial of economic crises, structural adjustment and globalization, social welfare came to pronounce a policy framework for addressing poverty and exposure ability. Whereas social assistance in developed countries is fundamentally an "outstanding safety net charged with welfare a small underground of individuals and households from the effects of social problem,"

Dr Fakhar and Dr. Hafiz Usman elaborate in their article a prominent feature of modern legal system to which officials, whether they are judicial or administrative, make decisions in the absence of previously fixed, relatively clear, and binding legal standards. The vagaries of language, the diversity of circumstances, and the indeterminacy of official purposes guarantee discretion some continuing place in the legal order and make its elimination an impossible dream.

Farah Deeba says that in today's interconnected global marketplace, navigating international business transactions is fraught with complexities, often leading to disputes that transcend borders. In response to this challenge, the adoption of International Commercial Arbitration (ICA) has emerged as a pivotal mechanism for resolving cross-border conflicts efficiently and effectively.

Farah Deeba explains briefly that arbitration clauses play a crucial role in shaping dispute resolution mechanisms within contractual agreements, providing parties with an alternative avenue for resolving conflicts outside traditional litigation channels. In Pakistan, the landscape surrounding arbitration clauses is subject to evolving jurisprudence influenced by judicial responses and interpretations within the country's legal framework. This research delves into the dynamic interplay between judicial decisions and the development of jurisprudence concerning arbitration clauses in Pakistan.

Dr. Shahid Rizwan's aim of this research is to explain and to deal exclusively with the triple *Divorce* in one sitting. Islam with its practical and realistic outlook recognizes *divorce* but is disliked in Islam and considered a necessary evil which is inevitable only in certain circumstances. There are certain situations in which it becomes humanly impossible for the couple to carry on relation as husband and wife. Instead of dragging on with a forced relationship in a miserable and bitter way, it would be more conductive to the welfare of parties to part with grace and good will.

Dr. Mazhar Ali Khan article explains that treaties are binding on the states that have ratified them, creating obligations for the parties involved. This principle is firmly established in the Vienna Convention on the Law of Treaties. This work examines the concept of international peremptory norms under international law.

To determine the legal foundation of international peremptory norms, the article analyzes the provisions related to *jus cogens* in the Vienna Convention. Additionally, this article assesses the established criteria for identifying *jus cogens*, drawing on decisions from international courts and tribunals, as well as scholarly contributions. The article concludes that it is the *jus cogens* nature of certain treaty provisions that gives rise to *erga omnes* obligations.

Amna Ehsan briefly explains in her article that Pakistan has been rocked in recent months by audio revelations involving some of the country's most prominent figures. As a result of these revelations, there has been serious concern about the rule of law in Pakistan and the government's tendency to violate the privacy of its citizens These audible revelations have had a significant impact on the political and legal environment of the country. This article examines the legality of audio recordings in Pakistan and whether or not it violates the country's fundamental constitutional right

In the article of **Ali Haider,** the goal of the current study was to investigate the definitions, categories, purposes, and structures of presumptions in common law before using this information as a conceptual framework to examine presumptions in Qanoon e Shahadat (hereinafter QSO). After conducting a doctrinal analysis, the current study discovered that presumption in common law is seen as a legal principle that permits courts to reach particular decisions based on a set of established facts.

Dr. Muhammad Amin
Editor in Chief

THE CYBER SECURITY AND ROLE OF ARTIFICIAL INTELLIGENCE: BENEFITS AND CHALLENGES

TAMOOR MUGHAL[1] **

ABSTRACT; The relentless growth of the digital landscape has ushered in an era where cyber security stands as a paramount concern. The ubiquitous presence of cyber threats necessitates innovative and effective approaches to protect digital assets. In this context, Artificial Intelligence (AI) has emerged as a transformative force, reshaping the dynamics of cyber security. This article provides an overview of the benefits and challenges surrounding the interplay of AI and cyber security. AI's role in cyber security encompasses threat detection, incident response, user behavior analysis, malware detection, security patch management, and phishing detection. It offers a multifaceted approach, enhancing the resilience of organizations and individuals against a wide array of cyber threats. The benefits of AI in cyber security include heightened threat detection, reduced false positives, improved incident response, scalability, and continuous monitoring. These advantages bolster the security posture and reduce the impact of cyber incidents. However, AI in cyber security is not without its challenges. Adversarial attacks, data privacy and ethics concerns, the occurrence of false positives and negatives, and a shortage of skilled professionals present notable hurdles to overcome. Navigating these benefits and challenges is pivotal in realizing the full potential of AI in cyber security, shaping the future of digital defense.

[1] Lecturer, Premier Law College Gujranwala, Advocate High Court, PhD Scholar Minjah University Lahore

Keywords: Cyber security, Artificial Intelligence, Benefits, Challenges, Digital Defense

---

INTRODUCTION: Cyber security refers to the practice of protecting computer systems, networks, and digital assets from unauthorized access, data breaches, cyber attacks, and damage to the integrity, confidentiality, and availability of information. It encompasses a wide range of strategies, technologies, processes, and practices designed to safeguard computers, servers, mobile devices, data, and the overall digital infrastructure from potential threats and vulnerabilities. In the age of the internet and digital transformation, our world has become intricately connected, opening up unprecedented opportunities and challenges. As businesses, governments, and individuals rely on digital technologies for communication, commerce, and the management of critical infrastructure, the importance of cyber security has never been more pronounced. The relentless pace of technological advancement has ushered in an era where cyber threats are pervasive and persistent, demanding a response that is equally dynamic and adaptive.[2]

In the rapidly evolving digital landscape of the 21st century, the pursuit of technological advancements and innovations has brought unprecedented conveniences and efficiencies to our daily lives. From cloud computing and internet-of-things devices to interconnected systems in critical infrastructures, we have witnessed a profound transformation in the way we conduct business, communicate, and manage our affairs. However, this digital transformation has also given rise to a parallel,

[2] Kaur & Ramkumar, 2022

and perhaps even more consequential, transformation one in which the specter of cyber threats looms large, necessitating a new era of cyber security. The unyielding march of technology has brought with it a relentless wave of cyber attacks, data breaches, and vulnerabilities, making the safeguarding of digital assets an imperative.

This is where the remarkable and continually evolving field of Artificial Intelligence (AI) enters the stage as a powerful and adaptable ally in the ceaseless battle against cyber threats. Artificial Intelligence, encompassing the realms of machine learning, deep learning, and cognitive computing, is revolutionizing the landscape of cyber security. Its applications are both wide-ranging and deep-reaching, impacting the way organizations and individuals protect their digital assets in an interconnected world. In this introductory segment, we embark on a journey through the intricate maze of cyber threats and the solutions that AI provides, unveiling the benefits and challenges that unfold as we explore the role of AI in modern cyber security.(El Mrabet et al., 2018)

The digital landscape teems with diverse and ever-evolving forms of cyber attacks. These threats, driven by a spectrum of motivations that range from financial gain to political objectives, have become a significant concern. The consequences of a successful cyber attack can be devastating, encompassing financial losses, reputational damage, the theft of sensitive data, and even threats to national security. As a result, the need for effective cyber security measures has assumed paramount importance.[3]

In this context, the fusion of two dynamic domains, cyber security, and Artificial Intelligence (AI), has catalyzed a transformation in the way we defend against cyber

[3] Jang-Jaccard & Nepal, 2014

threats. Artificial Intelligence, the branch of computer science that endows machines with the ability to simulate human intelligence, has emerged as a transformative force. Its applications in cyber security are nothing short of revolutionary, offering innovative and multifaceted approaches to identifying, preventing, and mitigating cyber threats.(Li, 2018) The intersection of AI and cyber security introduces a new paradigm, one that brings with it a set of benefits and challenges that reshapes our understanding of digital defense. This digital transformation has brought a wealth of conveniences and efficiencies. We can communicate instantaneously across the globe, access vast stores of information with a few clicks, and conduct business transactions from the comfort of our homes. It has connected remote corners of the world, democratizing information and enabling collaboration on an unprecedented scale.

However, this digital revolution has also exposed vulnerabilities that demand our attention. The more we rely on digital technologies, the more we become susceptible to cyber threats. The internet, which was once celebrated as a symbol of human ingenuity, has become a battleground where cybercriminals launch a relentless wave of attacks. Malware, phishing, ransom ware, and advanced persistent threats have become household terms. The motivations driving these attacks are as diverse as the threats themselves, encompassing financial gain, industrial espionage, political agendas, activism, and more.

The consequences of these attacks are no less varied. Data breaches can lead to severe financial losses and reputational damage for organizations. The loss of sensitive data, whether it's personal information, trade secrets, or government secrets, can have far-reaching

implications. In some cases, cyber attacks pose a direct threat to national security, potentially affecting critical infrastructure and government systems.[4]

The digital transformation, while offering numerous advantages, has also created a fertile ground for cyber threats to flourish. As such, the imperative of cyber security has become more pronounced than ever before. Effective cyber security measures are essential for safeguarding digital assets, protecting sensitive data, and ensuring the reliable and secure operation of critical infrastructure.[5]

The field of Artificial Intelligence (AI), encompassing machine learning, deep learning, natural language processing, and cognitive computing, has emerged as a transformative force in addressing the evolving landscape of cyber threats. AI, as a branch of computer science, is concerned with endowing machines with the capability to simulate human intelligence.[6]

Literature Review

In recent years, the realm of cyber security has undergone a profound transformation due to the integration of Artificial Intelligence (AI). AI has become a powerful tool to address the ever-evolving landscape of cyber threats, offering innovative approaches to threat detection, incident response, and vulnerability management. This literature review explores key findings and insights from existing research on the synergy between cyber security and AI, shedding light on the significance of this partnership.(Maloof, 2006).Network protection, another way to say "network safety," alludes to the act of safeguarding PC frameworks, organizations,

[4] Li & Liu, 2021
[5] Carcary et al., 2019
[6] Zhang et al., 2022

and advanced resources from unapproved access, information breaks, cyber attacks, and harm to the trustworthiness, secrecy, and accessibility of data. It incorporates a large number of procedures, innovations, cycles, and practices intended to defend PCs, servers, cell phones, information, and the in general computerized foundation from likely dangers and weaknesses.

The essential objective of network protection is to guarantee the secrecy, honesty, and accessibility of information and to limit the gamble of digital episodes that can bring about monetary misfortunes, reputational harm, or other unfriendly results. (Singer & Friedman).It includes different measures, including firewall assurance, encryption, interruption location frameworks, antivirus programming, and client mindfulness preparing, among others, to relieve the dangers related with the steadily developing scene of digital dangers.(Kaplan, 2016).The ability of AI to analyze vast datasets in real-time has been widely acknowledged as a game-changer in threat detection. AI-driven systems can identify patterns, anomalies, and behaviors that may signify cyber threats more effectively than traditional methods. AI's capacity to adapt and learn from new data helps in detecting even the most sophisticated threats.[7]

The field of artificial intelligence is constantly advancing, and it holds the commitment of changing different enterprises and further developing productivity, independent direction, and critical thinking across assorted spaces like medical care, money, transportation, and numerous others. Man-made intelligence envelops an expansive range of innovations and applications, including AI, regular language handling, PC vision, mechanical technology, and that's only the tip of the

[7] Abomhara & Køien, 2015

iceberg. Some normal man-made intelligence applications incorporate discourse acknowledgment, suggestion frameworks, independent vehicles, chat bots, and picture acknowledgment.(Yao et al., 2018) Computer based intelligence can possibly reenact human mental capabilities and robotize errands that were once selective to human insight.

The integration of AI into cyber security has resulted in rapid incident response mechanisms. A study highlights the importance of automation in responding to cyber incidents, reducing the time it takes to recognize and mitigate threats. Swift response is essential in preventing further damage and minimizing downtime.(Hsu et al., 2019) Understanding user behavior is crucial in identifying insider threats. How AI can be employed to establish baseline behavior and detect deviations. By recognizing abnormal user activities, AI systems contribute significantly to the prevention of insider threats.(Chio & Freeman, 2018).AI is instrumental in malware detection and removal, particularly in identifying new and previously unknown strains. The use of AI algorithms to analyze malware characteristics and behavior, enabling rapid detection and mitigation.(Saxe & Berlin, 2015).Vulnerability management is a fundamental aspect of cyber security. AI can assist in identifying vulnerabilities in software and systems, facilitating timely patching and reducing exposure to potential exploits.[8]

AI's role in identifying and thwarting phishing. By analyzing email content, sender behavior, and other patterns, AI algorithms can effectively mitigate the risk of falling victim to social engineering attacks. The integration of AI in cyber security offers various benefits,

[8] Dhami et al., 2017

including enhanced threat detection, reduced false positives, scalability, improved incident response, and continuous monitoring. However, it also poses challenges such as adversarial attacks, data privacy and ethical concerns, false positives/negatives, and a shortage of skilled professionals. These challenges highlight the importance of responsible AI use and ongoing research in this field. The transformative role of AI in cyber security, emphasizing its significance in addressing the dynamic and complex nature of modern cyber threats. As AI continues to advance, it holds the promise of strengthening the defense against cyber attacks and contributing to a more secure digital environment.[9]

The Digital Frontier and the Cyber Threat Landscape

Our modern world is defined by its digital frontier, an expansive realm where information flows ceaselessly through intricate networks, systems, and devices. The internet, which once stood as a testament to human ingenuity and global interconnectedness, now serves as the battleground for a relentless war—one fought in the virtual realm, with stakes ranging from the security of sensitive information to the very functionality of critical infrastructures.[10]

The proliferation of digital technologies and the expansion of the internet have led to a dramatic increase in cyber threats. These threats come in various forms, from malware and phishing attacks to ransom ware and sophisticated Advanced Persistent Threats (APTs). The motivations behind these cyber attacks are just as diverse, ranging from financial gain and industrial espionage to geopolitical objectives and hacktivism. The consequences are no less varied, with data breaches

[9] Bharadiya, 2023

[10] Taddeo, 2019

resulting in financial losses, reputational damage, loss of intellectual property, and, in some cases, severe harm to national security.[11]

According to the Cyber security and Infrastructure Security Agency (CISA), cyber threats have become one of the most significant security challenges of the 21st century. The report states that "malicious cyber activity is evolving and presents a persistent, pervasive, and adversarial threat to our national and economic security." Indeed, the relentless evolution of cyber threats demands an equally dynamic response.[12]

Artificial Intelligence: A Transformative Force

The field of Artificial Intelligence (AI), encompassing machine learning, deep learning, natural language processing, and cognitive computing, has emerged as a transformative force in addressing the evolving landscape of cyber threats. AI, as a branch of computer science, is concerned with endowing machines with the capability to simulate human intelligence.[13]

The role of AI in cyber security is multi-faceted, encompassing key areas where its capabilities shine: One of the most prominent roles of AI in cyber security is its ability to detect and prevent threats. AI-driven systems can analyze vast datasets in real-time, identifying patterns, anomalies, and behaviors that might indicate a cyber attack. This proactive approach allows organizations to respond to threats swiftly, thereby preventing data breaches and system vulnerabilities. AI can automate responses to cyber incidents, reducing the time it takes to identify and mitigate threats. This speed is

[11] Azam et al., 2023
[12] Khasru, 2020
[13] Köszegi, 2019

essential in preventing further damage and minimizing downtime.[14]

AI can recognize abnormal user behavior by creating baselines for what is considered normal and flagging deviations. This is particularly valuable in detecting insider threats, where traditional rule-based systems often fall short. AI algorithms can identify and remove malware quickly, even new and previously unknown strains, by analyzing their characteristics and behavior. AI can assist in identifying vulnerabilities in software and systems, allowing for timely patching and reducing exposure to potential exploits. AI can be employed to identify phishing attempts by analyzing email content, sender behavior, and other patterns, minimizing the risk of falling victim to social engineering attacks.[15]

These applications showcase the dynamic nature of AI in the realm of cyber security, where it plays a pivotal role in not only safeguarding digital assets but also in enabling organizations to respond to threats with remarkable agility. As AI continues to evolve, it stands to be a cornerstone of modern cyber security strategies.

Artificial Intelligence in Cyber Security Enhances Threat Detection and Prevention

The integration of artificial intelligence (AI) in cyber security has significantly enhanced threat detection and prevention capabilities. AI brings a range of advanced technologies, including machine learning, deep learning, and natural language processing, which collectively contribute to a more proactive and adaptive defense against evolving cyber threats. Here are several ways in which AI enhances threat detection and prevention:

[14] Bhatele et al., 2019

[15] Hassan & Ibrahim, 2023

1. Advanced Anomaly Detection

AI systems excel at analyzing large datasets to identify patterns and anomalies. Traditional cyber security measures often rely on rule-based approaches, which may struggle to adapt to emerging threats. In contrast, AI can continuously learn from data, detecting unusual patterns that may signify a potential threat. This adaptability allows for the identification of novel attack vectors or sophisticated tactics that may go unnoticed by conventional systems.[16]

2. Behavioral Analysis

AI enables behavioral analysis of users and systems. By establishing baselines for normal behavior, AI systems can detect deviations that may indicate a security threat. This is particularly valuable in identifying insider threats or compromised accounts where the typical behavior of users may change subtly. Behavioral analysis can help detect anomalies in real-time, allowing for prompt action to prevent potential security incidents.[17]

3. Zero-Day Threat Detection

Zero-day threats refer to vulnerabilities and exploits that are not yet known or patched. AI's ability to recognize patterns and behaviors enables the detection of previously unseen threats. Machine learning models can identify zero-day exploits by analyzing the characteristics of known threats and extrapolating to identify potential variations. This proactive approach is crucial in mitigating risks before security patches are available.

4. Adaptive Threat Intelligence

AI systems can leverage threat intelligence data and dynamically adjust their defense mechanisms based on real-time information. This adaptability allows

[16] Li, 2018

[17] Calderon, 2019

organizations to stay ahead of the evolving threat landscape. By continuously updating threat models and response strategies, AI-enhanced cyber security solutions can provide a more robust defense against emerging threats.

5. Automated Incident Response

AI streamlines incident response by automating repetitive tasks and allowing for swift and coordinated responses to detected threats. In the event of a security incident, AI systems can take predefined actions to contain the threat, limit damage, and prevent further spread. Automated incident response is crucial for minimizing the time between threat detection and mitigation, reducing the overall impact of cyber attacks.[18]

6. Predictive Analysis

AI's ability to analyze historical data and predict potential future threats is a valuable asset in cyber security. Predictive analytics, powered by machine learning algorithms, can identify patterns that precede security incidents. By understanding these patterns, organizations can take preemptive measures to strengthen their security posture and proactively address vulnerabilities before they are exploited.

7. Improved False Positive/Negative Rates

AI systems, particularly those utilizing machine learning algorithms, can significantly reduce false positives and negatives. Traditional rule-based systems may generate false alarms or overlook subtle indicators of threats. AI's ability to analyze vast amounts of data and learn from diverse sources results in more accurate threat detection, minimizing unnecessary alerts and ensuring that genuine threats are not overlooked.[19]

---

[18] Zeadally et al., 2020

[19] Li, 2018

8. Continuous Learning and Adaptation

AI systems continuously learn and adapt based on new data and experiences. This feature allows cyber security measures to evolve alongside emerging threats. As the threat landscape changes, AI models can adjust their parameters and algorithms to stay effective, providing a dynamic defense mechanism that is critical in the face of rapidly evolving cyber threats.

The integration of artificial intelligence in cyber security substantially enhances threat detection and prevention capabilities. The adaptive nature of AI, coupled with its ability to analyze vast amounts of data in real-time, positions it as a powerful ally in the ongoing battle against cyber threats. As organizations increasingly rely on AI-driven solutions, they can achieve a more proactive, accurate, and efficient cyber security posture, ultimately minimizing the impact of potential security incidents.

The Use of Artificial Intelligence in Cyber Security: Impact Incident Response Times and Overall Cyber Resilience

The use of artificial intelligence (AI) in cyber security has a profound impact on incident response times and overall cyber resilience, offering significant advantages in minimizing damage and downtime. Here are kernel ways in which AI influences incident response and resilience, along with implications for mitigating the impact of cyber incidents:

1. Swift Detection and Identification

AI-driven systems can rapidly detect and identify security incidents, reducing the time between the occurrence of an incident and its discovery. Swift detection allows organizations to respond to incidents at

an early stage, minimizing the potential damage and preventing the escalation of the threat.

2. Automated Incident Response

AI enables the automation of incident response processes, allowing for immediate and coordinated actions in response to detected threats. Automated incident response reduces the reliance on manual intervention, ensuring that responses are executed promptly and consistently. This minimizes the time it takes to contain and mitigate threats, thereby reducing the overall impact of cyber incidents.[20]

3. Behavioral Analysis and Anomaly Detection

AI can analyze user and system behavior to identify anomalies that may signify a security incident. Behavioral analysis allows for the early detection of insider threats, compromised accounts, or unusual patterns that may indicate a cyberattack. This proactive stance contributes to cyber resilience by addressing potential threats before they lead to significant damage.

4. Predictive Analysis and Threat Intelligence

AI leverages predictive analysis and threat intelligence to anticipate potential threats based on historical data. By predicting potential threats, organizations can proactively implement preventive measures, strengthening their overall cyber resilience. This approach helps in minimizing the impact of future incidents by addressing vulnerabilities before they are exploited.[21]

5. Continuous Monitoring and Adaptive Defense

AI enables continuous monitoring of network activities and adjusts defense mechanisms based on real-time information. Continuous monitoring ensures that organizations have real-time insights into their cyber

[20] Hassan & Ibrahim, 2023

[21] Ahmadi-Assalemi et al., 2020

security posture. The adaptive nature of AI allows for immediate adjustments to defense strategies in response to emerging threats, reducing the window of vulnerability and enhancing overall cyber resilience.

6. Reduced Downtime through Automation

Automated incident response and mitigation actions can significantly reduce the time it takes to recover from a cyber incident. Automation streamlines the recovery process, minimizing downtime and allowing organizations to restore normal operations more quickly. This is crucial for maintaining business continuity and reducing financial losses associated with downtime.[22]

7. Real-Time Analysis of Threats

AI systems can analyze threats in real-time, providing instantaneous insights into the nature and severity of an incident. Real-time analysis enables organizations to make informed decisions quickly. This is particularly important in critical situations, allowing for immediate responses to mitigate the impact of an ongoing cyber incident.

8. Improved Accuracy and Reduced False Positives

AI's ability to analyze vast datasets results in more accurate threat detection, reducing the occurrence of false positives. Improved accuracy ensures that incident response efforts are focused on genuine threats, preventing unnecessary disruptions to normal operations. This targeted approach contributes to minimizing damage and downtime.[23]

9. Scalability of Incident Response

AI-driven incident response can scale to handle large volumes of data and incidents.The scalability of AI-powered incident response is crucial for organizations

[22] Vegesna, 2023

[23] Trifonov et al., 2019

dealing with complex and widespread cyber threats. It ensures that responses can match the scale of the incident, minimizing the risk of widespread damage and downtime.

The use of artificial intelligence in cyber security significantly accelerates incident response times and enhances overall cyber resilience. The implications of these advancements include reduced damage, swift recovery, and the ability to adapt to evolving threats in real-time. As organizations increasingly leverage AI in their cyber security strategies, they are better equipped to minimize the impact of cyber incidents, ensuring a more resilient and secure digital environment.

Ethical and Privacy Considerations Related To the Integration of Artificial Intelligence in Cyber Security

The integration of artificial intelligence (AI) in cyber security introduces a range of ethical and privacy considerations, reflecting the need to balance the advantages of advanced technology with the protection of individual rights and societal values. Below are the vital ethical and privacy considerations, along with the specific benefits and challenges associated with the integration of AI in cyber security?

The use of AI in cyber security often involves extensive data collection and analysis. This raises concerns about the privacy of individuals' data, especially when it involves personally identifiable information (PII) or sensitive corporate information. Implementing robust data protection measures, anonymization techniques, and ensuring compliance with data privacy regulations (e.g., GDPR, CCPA) are crucial for addressing these concerns. AI algorithms, particularly those based on deep learning, can be opaque and challenging to interpret. Lack of transparency may lead to difficulties in explaining the

decision-making processes of these systems. Striving for transparency in AI algorithms, using interpretable models where possible and providing explanations for AI-driven decisions can enhance trust and address concerns related to accountability.[24]

AI models can inherit biases present in training data, potentially leading to unfair or discriminatory outcomes. This is a significant ethical concern, particularly in the context of cyber security decisions impacting individuals or groups. Regularly auditing AI models for biases, diversifying training datasets, and implementing fairness-aware algorithms are strategies to mitigate bias and promote equitable outcomes.[25]

Adversarial attacks targeting AI models in cyber security can lead to misclassifications or other undesired behavior. Ensuring the robustness and security of AI models is crucial. Implementing adversarial training techniques, regularly updating models to adapt to new threats, and incorporating security measures to prevent tampering with AI systems contribute to model robustness.[26]

Users and stakeholders may not be adequately informed about the use of AI in cyber security, leading to concerns about consent and awareness. Establishing clear communication channels to inform users about the use of AI in cyber security, obtaining informed consent where applicable, and ensuring transparency in data processing practices address concerns related to user awareness.

[24] Saikia et al.
[25] Huang et al., 2022
[26] Al-Mansoori & Salem, 2023

Benefits of AI in Cyber Security

a) **Enhanced Threat Detection**

AI's ability to analyze vast datasets in real-time enables more accurate and efficient threat detection, helping organizations identify and respond to cyber threats rapidly.[27]

b) **Automated Incident Response**

AI enables the automation of routine incident response tasks, reducing response times and allowing cyber security teams to focus on more complex aspects of threat mitigation.

c) **Behavioral Analysis**

AI facilitates the analysis of user and system behavior, aiding in the identification of anomalous activities that may indicate a security incident or insider threat.

d) **Predictive Analysis**

AI's predictive capabilities allow organizations to anticipate and proactively address potential cyber threats, contributing to a more resilient cyber security posture.[28]

e) **Reduced False Positives/Negatives**

AI-driven cyber security systems can significantly reduce false positives and negatives, improving the accuracy of threat detection and minimizing unnecessary alerts. AI systems can scale easily to handle large volumes of data and adapt to evolving threats, making them well-suited for dynamic cyber security environments.[29]

f) **Improved Incident Response**

AI automates response actions, enabling a faster and more coordinated reaction to threats, thereby minimizing damage and reducing downtime.

g) **Continuous Monitoring**

---

[27] Dash et al., 2022

[28] Calderon, 2019

[29] Nair et al., 2024

AI can provide round-the-clock monitoring and analysis, ensuring that no threat goes unnoticed.

Challenges of AI in Cyber Security

AI models are susceptible to adversarial attacks, where malicious actors manipulate input data to deceive the system. Developing robust adversarial training techniques and continuously updating models to defend against new attack vectors are essential for addressing this challenge.

i. Ensuring that AI in cyber security is used ethically and aligns with societal values poses a challenge, especially when balancing security imperatives with individual rights. Establishing ethical guidelines for the use of AI in cyber security, promoting transparency, and incorporating ethical considerations into the development and deployment processes are crucial.[30]

ii. There is a shortage of skilled professionals capable of developing, implementing, and maintaining AI-driven cyber security solutions. Investing in education and training programs, promoting interdisciplinary collaboration, and fostering partnerships between academia and industry can help address the shortage of skilled professionals.[31]

iii. The extensive data processing involved in AI-driven cyber security raises privacy concerns, particularly when dealing with sensitive information. Adhering to privacy regulations, implementing privacy-enhancing technologies, and adopting privacy-by-design principles are essential for addressing privacy concerns.

iv. The interpretability of AI models, especially in complex deep learning systems, can be limited, posing challenges in explaining the rationale behind AI-driven

[30] Zhang et al., 2022

[31] Nair et al., 2024

decisions. Striving for model interpretability, using simpler models where appropriate, and providing explanations for AI-driven decisions contribute to addressing this challenge.[32]

v. Just as AI can be employed for defense, it can also be exploited by malicious actors to create more sophisticated attacks, a dynamic referred to as adversarial attacks.

vi. AI algorithms require access to extensive datasets to learn and make informed decisions, raising concerns about data privacy and ethical usage.

vii. AI, like any technology, is not infallible and may generate false positives or fail to detect some threats. This necessitates constant human oversight and fine-tuning of AI models.

viii. The adoption of AI in cyber security demands a skilled workforce capable of developing, implementing, and maintaining AI-driven solutions. A shortage of such professionals can hinder the full utilization of AI in cyber security.[33]

Conclusion; In conclusion, while the integration of AI in cyber security offers significant benefits in threat detection and incident response, it is essential to navigate ethical and privacy considerations. Proactive measures, ethical guidelines, and ongoing research are crucial to harnessing the potential of AI in cyber security while mitigating associated risks and ensuring the protection of individual rights and societal values. Artificial Intelligence has become a cornerstone of modern cyber security, offering substantial benefits while posing specific challenges. It is essential to understand and

[32] Taddeo, 2019
[33] Taddeo, 2019

navigate these challenges to harness AI's potential fully. The continued development and responsible implementation of AI in cyber security are critical to stay ahead in the ever-evolving landscape of cyber threats. This article delves into the symbiotic relationship between AI and cyber security and emphasizes the importance of a secure digital world. The benefits of AI in cyber security enhance the security posture of organizations, reduce the time and resources spent on incident response, and improve the overall efficacy of cyber security measures. The integration of Artificial Intelligence into cyber security represents a pivotal and transformative step in the ongoing battle against cyber threats. Its capabilities in threat detection, rapid response, and user behavior analysis provide a layered defense that safeguards digital assets in an increasingly interconnected world. However, as with any technological advancement, AI in cyber security presents its own set of challenges, from adversarial attacks to ethical considerations. The continued development and responsible use of AI in cyber security

The digital transformation, while offering numerous advantages, has also created a fertile ground for cyber threats to flourish. As such, the imperative of cyber security has become more pronounced than ever before. Effective cyber security measures are essential for safeguarding digital assets, protecting sensitive data, and ensuring the reliable and secure operation of critical infrastructure. The evolution of these threats is relentless, driven by factors such as the increasing sophistication of attackers, the expanding attack surface due to the proliferation of devices, and the use of AI and automation by cybercriminals. Consequently, a dynamic

and adaptive cyber security response is essential to keep pace with the evolving threat landscape.

IMPLICATION OF PUBLIC INSPIRATION AND FAMILY ARRANGEMENT ON THE INTERESTS IN WOMEN'S INCOME GENERATING ACTIVITIES

GHULAM MOHY UD DIN[34],

ABSTRACT; Social welfare experienced an important transformation in the developing countries. Against a circumstantial of economic crises, structural adjustment and globalization, social welfare came to pronounce a policy framework for addressing poverty and exposure ability. Whereas social assistance in developed countries is fundamentally an "outstanding safety net charged with welfare a small underground of individuals and households from the effects of social problem," In developing countries, social assistance has a major role within social welfare and is progressive in latitude." This study was conducted in rural areas of District Gujranwala. Multistage sampling technique was used. At the first stage, one Tehsil was selected by using simple randomly sampling technique. At the second stage, four union councils were selected through simple random sampling technique. At the third stage, four villages one from each union council was selected through simple random sampling technique. At the fourth stage200 respondents (50 from each village) were selected conveniently. Well-structured interviewing schedules were used for data collection. The collected data was analyzed by using statistical package for social sciences (SPSS).

Key Words: Social Welfare, Woman, Female,

[34]PhD Scholar Sociology at Riphah International University Faisalabad Campus

INTRODUCTION; Women represented 93 % of aggregate work in dairy production.Contingent on the financial status, Women play out the errands of gathering grain, gathering and preparing compost.Manure treating the soil and conveying to the field is attempted by Women. Women additionally plan cooking fuel by blending waste with twigs and product buildups.Despite the fact that Women assume a critical part in domesticated animals' administration and creation, Women' control over domesticated animals and item. In this way as lion's share of the dairy agreeable enrollment is accepted by men, leaving just 14% to Women.[35]

Another wellspring of budgetary help is dealers of neighborhood advertise. An expansive greater part of gifted Womenis hostage by these merchants, who misuse their competency and their skills. So, arbiters are also working in this setting who pay to these country Women not as much as market degree and compact with the offer of their article in city territories at a advanced cost.[36]

Access of budgetary help is very greater for any salary producing action. In Pakistan there are 2 parts that principally give money related help, the in formal division and the formal segment. In casual division Women are reliant on budgetary

[35]United Nations,(2005).Improvement of the situation of the women in rural areas of the session,2nd Committee,Item 66 of the provisional Agenda Advancement of women.

[36]Hoque, A. (2008).Social Condition of Rural and Urban Working Women in Pakistan: A Comparative Study.Pakistan Development Review, 32(1),101-125.

help for neighborhood cash loan specialists on high financing cost.[37]

In spite of the way that the situation of Women in urban zones are better than the nation zones Women, regardless of way that the previous circumstances and religious ties are critical restrictions for improvement of Woman in the overall population that constrained Social benchmarks, some are great for others in people in general eye. Pakistan the essential Islamic country on the planet who picked a Woman as its pioneer twice.[38]

A big number of people in the past misuse by far most of successes and country stay destitute individuals. Assorted pointer shows that women have cut down wage status as appear differently in relation to various countries of the world have rights to take. Such Women are scattered in our country and in all parts of the globe too. It is a perfect chance to stimulate the Women bolster in various sorts of actions.[39]

Animals assume an essential part in the improvement. Domesticated animals give half of the estimation of worldwide agribusiness yields. Domesticated animalsare significant wellspring of nourishment in our nation. There is colossal increment in domesticated animals' items cost. Domesticated animals are the basic piece of the rustic and additionally the nation improvement. In provincial territories it

---

[37]Hudon, M.(2007).Fair Interest Rates When Leading to the Poor.Ethic and Economics.5(10),1-18.

[38]Sharif,M.B.(2002).Women rights in Pakistan.Alden press Oxford Britain, U.K. P-98.

[39]Ahmed, F., Chamhuri, & Nor,I. H. (2001).Contribution of rural women to family incomethrough participation in micro-credit: An empirical analysis.Am J.Applied Sociology,238-245.

adds to country business, employments and poverty diminished. Customarily live stock is a piece of ruler life.[40]
Savagery against Women is an infringement of human rights and has been perceived as a noteworthy social, medical problem, everywhere throughout the world.[41]
In our country Women social and money related headway isn't only problem about modifying Women with males however rather an issue of state's budgetary change. Decency and incentive among individuals are an academic problemanyway most basic is the ground reality which says that in regards to bit of the masses is falling behind in fluctuating foundations and choice of calling for women are generally immaterial and the detachment in view of sex has shown counter profitable.[42]
In Pakistan Women are 50% of the ordinary subjects. Women esteem all exercises concerning change age. Their obligation make work mainly in the post-harvest hones is basic. Afterward the gain, dehydrating, cleaning and limit, filtering and winknowing are the administer assignments of Woman. In Pakistan, cotton offers occupations for incalculable related with its change, current use and trade. Most by a wide edge of these cotton-pickers are Women and the explanation after force of Woman authorities is that the males starting from the cotton-production belt have more alternatives in the field attachment and move for mechanical or change work to city areas. The nonattendance of elective work openings in the nation economy in addition prompts development

---

[40]Upton,M.(2004).The Role of Livestock in Economic Development and Poverty Reduction.FAO.Pro-poor Livestock Policy Initiative.35-36.
[41]Krug.,S. & Paul,(2002).Providing Vocational Training and skills. "National Paper" Aug.20.2000.
[42]Gulam, Z. (2009). Impact of Agricultural Trade on Gender Equity and Rural Women's Position in Developing Countries.

of women experts in the midst of the cotton-gathering season.[43]

The town Women of Pakistan are the bit of tamed creature works out. Women enthusiasm for various kinds of exercises like depleting, watering, cleaning and disapproving of animals, empowering and cleaning of sheds. Women are furthermore drawn with other forming work like harvesting, feed cutting, sowing seeds, accumulating of grain, dealing with treatment of deplete thing. The totally open Women of Pakistan are in like manner jobs for sustenance status.[44]

Right differentiated and semi-industrialized Muslim nationssuch as Turkey and Malaysia, one catches that the portrayal Women in money related deeds in Pakistan are liberally inferior. Regardless, asking to take notice of past adult women masses has progressed in the national financial scene, yet Woman's commitment in non-agrarian region is only 6.7% .[45]

Sexual introduction differentiates in work force bolster have convoluted work promote mattersinternationally. One of the essential features in growing differentiations among diversestates can be elucidated through the level of women's interest in labor drive. Pakistan has the larger part people of women's interests in labor markets are restricted by various socio-political concerns. In view of lesser enthusiasm for salary delivering works out, women

---

[43]Kiran, Z. (2009). Dealing providing encouragement and skills.Local Research in Mandi Baha Ud din.

[44]Amin, I. T., Ahmad, M. & Zafar,(2009).Capabilities and Competencies of Pakistani ruralwomen in performing household and agricultural tasks: A case study in TehsilFaisalabad. Pakistan. J. Agri.sci. 46(1), 58-63.

[45]Jamaji,M. (2013).M.Phil.thesis on impact of industry on IR. University of Agriculture Faisalabad.

are by and large dismissed for the course of action of their basic rights. The lack of regard of such a colossal degree of people prompts poor state of human resource by cutting down work productivity and pay.

Various social analysts assume that neediness in making countries could be adjusted theory on women progression and their fortifying. Gujranwala is a cutting-edge city; cultivating couldn't contribute towards destitution facilitating. A substantial part of the Womenwas involved with wage creating practices i.e. cultivating, handicraft and working in organizations, in this joint of the "Women in wage delivering activities could be a ground-breaking gadget to reduce neediness and hunger, diminish brutality, improve kid sustenance and certification access to better prosperity and direction workplaces. Give consider deals the Woman's wage making practices in natural locales of Gujranwala.

OBJECTIVES

✓ General Objective

To evaluate the sociological· study of women's income generating activities in rural areas of Gujranwala.

✓ Specific Objectives

1. To evaluateSociological study of women's income generating activities in different areas of Gujranwala
2. To check the level of contribution of Women in revenueproducingactions.

REVIEW OF LITERATURE

Regular perception about the rustic populace of Pakistan which is a huge bit of it has dishonorably low expectation for everyday life because of absence of chances for Women particularly. One ponders that how individuals oversee and make due in a low wage. In Pakistan research demonstrates

that power and level of neediness is substantially higher in towns than in urban regions. Conversely the accessible information about family spending plan and country pay demonstrated that the normal affinity of provincial family unit is higher than national normal. In this way in provincial regions pay creating exercises ought to be enhanced for Women like sewing at home, education schools, workmanship and painstaking work. These exercises empower Women to take an interest more to satisfy their fundamental needs and that they may include in basic leadership process, especially the choices about their own needs.[46]

The effect of smaller scale credit on it number of pointers of strengthening. They found that Women' entrance to credit was a critical determinant of the size of monetary commitments detailed by Women. Smaller scale acknowledges as connected for an expansion in the advantage property in their own names and with an expansion in their activity of obtaining power.[47]

The women progressively advancing from subsistence cultivating to money trimming, with more prominent support in bazaarbudget of Nepal. In comparativerelations, it was the man who was monitoring and investing greater energy in real money edit cultivating and less in sustenance crops creation, bringing about a more prominent work weight and weakness among Women. Monetary and social pointers depict more noteworthy occurrence of family unit destitution prompting total neediness exploiting and minimizing Women the most. Sexual orientation division of work and time utilize, design demonstrates Women' opportunity assignment and

---

[46]Azhar,N.(1995).Gender Perspective on Population and Development in Pakistan. Pakistan's Population Issues in 21st century,Population Association of Pakistan,Islamabad.

[47]Hashmi,A.H.(1996).Socio-Economic Analysis of Livestock towards poverty alleviation and gender participation in livestock management in rural areas of Punjab,Pakistan.

commitment to general family unit salary was considerably higher than that of men.[48]

Woman constrained standard, with low data about market, being dependent upon providers go between, are abused having no entrance to the defensive laws. The Women are dynamic members in the financial and also beneficial exercises inside the home and outside the home. Regardless of this they need to confront Women absence of aptitudes, credit data, preparing and opportunities.[49]

Women of participation in Pakistan utilizing work drive study. The examination demonstrates that the impact of habitation on Women works drive cooperation in city territories is negative.[50]

Out of wholelabor done the biosphere's 2/3 time was spent by the Women. In making republics 1/3 of people were worker and Women. These Women generally tackle their domain and make sustenance for their families. Women receive only a solitary 10% of the total wage of the globe and were proprietor of below 1 % assets. They were waiting behind in depiction of family heads, in preparing and in money related circumstances, They were not simply connected with transplanting, weeding, use of excrement, assembling yet moreover raising and raising of close to nothing broad ruminants, their care and promoting. They in like manner fallen behind mechanical improvements and worked with indigenous advancement of sustenance security like cleaning and winnowing of sustenance grains.[51]

---

[48]Nadra,(1998).Participation of Women in Income Generation Activities.

[49]Qamar,J.(2000).Role of Women in income Development of Pakistan. Ph. D. ThesisUniversity of Baluchistan,Quetta.

[50]Jamil,K.(2001).The Role of Rural Women in Agriculture and its Allied Fields: A case study in District Faisalabad.

[51]FAO,(2002).The state of food and agriculture. Women in agriculture: Closing the gap of development.

The most pressing issue that the lives of the vast majority in towns Pakistan is an entirely inadmissible neediness. The biggest number of the poor lives in. provincial regions, where the country advertises described by low wages and as an outcome of this, a significant area of the rustic work compels lives in a condition of under-sustenance, starvation and gloom.[52]

Domesticated animals assume a vital part in the improvement of domesticated animals gives half of the estimation of worldwide agribusiness yields. Animals are significant source ofhuge increment sick domesticated animal's items cost. Animals' is theessential part of the rustic and the nation advancement. In country zones it adds to rustic business, jobs and neediness diminishment. Generally, animals are a part of provincial life.[53]

Domesticated animals added jobs of more than 33% of the world's population rustic poor and to a noteworthy minority of the per-urban poor. They likewise detailed domesticated animals keeping had rotated around putting away riches, nourishment and dietary security, giving draft influence, transport and fertilizer and serving, customary social capacities.[54]

Influence of plot of NRSP on the budgetary forms of women system in area Rawalakot, Azad Jammu and Kashmir Pakistan. 100 Women were picked by direct subjective investigating framework and meet all around created and pre-head a go at meeting design ultimately dismembered with the help SPSS.

---

[52]Ahmad, B., Tabassum, & Gill, (2003).Diagnosing priorities for rural women's welfare through participatory approaches in Punjab,Pakistan.PLA Notes46.73-76.

[53]Upton,M.(2004).The Role of Livestock in Economic Development and Poverty Reduction.FAO.Pro-poor Livestock Policy Initiative.35-36.

[54]Hollmann.2005.The Role of Livestock in Poverty alleviation.

From the resultsassumed that 48% of the defendants had gotten info about praise plot after colleagues.[55]

Women have incredible worth in horticulture settings. In every nation Women assume their indispensable part in this profitable segment. Be that as it may, Women are paid less as contrast with men. This can be sexual orientation segregation. Karl Marx likewise called attention to this situation that Women are less paid in cultivating that couldn't acknowledge Women cooperation in horticulture division any more. Official measurements additionally don't present the first information with respect to Women' part in nation's improvement. Women are assuming indispensable part for the advancement of numerous creating nations, yet Women are additionally underestimated in cultivating in like manner different divisions. In all social orders Women advancement is an essential for general national advance. Women have customarily shared men's activity when the economy required it.[56]

The increased monetary exercises driving to producing pay for the rustic Women were the essential helps that caused from minor scale agriculture change in provincial Bangladesh. The expanding commitment of the Women dressed in agriculture had real indication of expanded freedom at the household and societal level. With improved participation in agriculture,

[55]Javaid,S.(2006).The Role of Rural Women in Agriculture and households: A case study in District Jahang.

[56]Bhutto,A. W. & Bazmi, A. (2007). Sustainable agriculture and eradication of rural poverty in Pakistan.A United Nation Sustainable Development Journal, 31(4),253-262.

financial states of the women inside their homes and society had expanded encouragingly.[57]

In the region Bahawalpur to explore the requirements of village Women engaged with horticulture administrations. Rustic Women in region filled in as a populace of the investigation. The outcome showed that Women were keen on various task with respect to yield and domesticated animals' generation. It was additionally led that the lion's share of town Women in the examination zone remained in central age class. It has start that the time of defendants was associated trim generation exercises. In the commonplace set-up of farming augmentation officeWomen expansion specialist ought to be designated to direct mentor Women about yield creation.[58]

A ton of work had been done on the planet however a small data as accessible about the cooperation of the Women in salary producing exercises in the distinctive field i.e, .horticulture, domesticated animals, modern segment, and so forth, in provincial territories of Pakistan, especially in the region Gujranwala so the current examination is intended to research the interest of Women in wage creating exercises in country zones of District Gujranwala.

---

[57]Sahirajeet, S. S., Salehin, & Ahmad, (2010).The changing face of women for small Scale Aquaculture development in rural Bangladesh. 15(2), 8-16.

[58]Luqman,G.&Khan,(2011).Female Labor force Participation rate in Rural Pakistan:Some Fundamental Explanation and Policy Implementations,The Pakistan Development Review,26(4).

METHODOLOGY

Data Collection

The information was gathered by the specialist herself, in an eye-to-eye circumstance. Every one of the respondents were met actually. The meeting plan was interpreted in English yet asked in Urdu and Punjabi. In any case, the scientist took full mind that the words, expressions and inquiries did not lose their implications all the while. Inquiries were rehashed and clarified at whatever point required.

Interviewing Procedure

The examination was produced by the specialist itself. The information was orchestrated in English since this examination was led on the adolescent who are contemplating in the college and the respondents discover it effortlessly to peruse out and to comprehend the inquiries, they reaction positively. The analyst tried to make the climate great and well-disposed with the respondents in the respondent's male and Woman are incorporated on the grounds that the real importance of the investigation was to discover the sexual orientation state of mind. So, along these lines scientist don't discover any kind of issue to discover the appropriate responses of the inquiries.

Statistical Analysis

The accompanying factual systems were utilized for the information examination

The Uni-variate examination which joins the frequencies, rates and techniques for different components. There are various quantifiable examinations which are found how this examination was taken up after the gathering of data. Is it bankrupt around the gamma test and the chi-square

in the examination? It is used to find the covariate among the different variables which relate with each other, Mean and repeat find the correct answers and through the strategy for mean and rate it is found that there is the thing that number of levels of different elements having values.

STATISTICAL TEST

Chi-square test

To test the importance of relationship amongst free and ward variable chi-square test was utilized. The recipe for chi-square is as under:

$$X^2 = \sum (0\text{-}E)^2/E$$

Where:

O = Observed frequency
E = Expected Frequency
$\sum$ = Sum of the observations

Gamma Test

Gamma = NS-ND/NS+ND

Where:

NS = Sumordered pair
ND = Different ordered pair

CONCLUSIONS AND DISCUSSION

Association between inspiration of the respondents and their interest in salary creating exercises:

Motivation	**Contribution in revenueproducing activates**			**Total**
	Small	Medium	Large	
Family	15	55	67	137
	10.95%	40.15%	48.90%	100.0%
Friends	6	6	7	19
	31.5%	31.5%	37.0%	100.0%
Colleagues	6	5	4	15

	40.0%	33.3%	26.7%	100.0%
Relatives	10	9	10	29
	34.5%	31.0%	34.5%	100.0%
Total	37	75	88	200
	18.5%	37.5%	44.0%	100.0%

Chi Sq = 10.67 **D.F** = 4**P. Value** = 0.003
Gamma = 0.392

Higher the inspiration of the respondents, higher will be the interest in salary creating exercises Table1.

Table gives the connection between the inspiration of the respondents and theirsalary/income enhancement exercises.Chi-square esteem gives the critical connection amongst age and investment in wage producing exercises. Gamma tells about the connection between the factors. Greater part of 44.0% of respondents were having a place in large contributing bunches so their support in wage producing exercises was high. While the gathering of over 37.5%, 18.5% their contribution level is low. So, the theory:

"More prominent the contribution of the respondents, lesser will be the inspiration in revenue producing exercises" is acknowledged.

Association between the family arrangement of the respondents and their support in salary producing exercises.

Motivation	**Participation in income generating activates**			**Total**
	Small	Medium	Large	
Nuclear	19	29	32	80
	30.0%	37.5%	32.5%	100.0%
Joint	36	45	39	120
	23.75%	36.25%	40.0%	100.0%

Total	55	74	71	200
	27.5%	37.0%	35.5%	100.0%

Chi-square = 12.689**D.F** = 2 **P-value** = **.**002** **Gamma** = 0.410**Highly- Significant**

Increasingly the living in the joint family arrangement of the respondents, higher will be the cooperation in wage creating exercises. An assessment of the level of contribution of women in revenueproducing:Actions in agriculture sector in District Gujranwala.

Main Findings:

✓ Qatar presents the relationship between the inspiration of the respondents and their investment in pay creating exercises. Chi-square esteem demonstrates a profoundly noteworthy relationship between of the respondents and interest in salary producing exercises. Gamma esteem demonstrates a positive connection between the factors. It implies high inspiration respondents had more cooperation in salary producing exercises. Greater part of respondents was exceptionally energetic by family so their cooperation level is high than others. So, the theory" Higher the inspiration of the respondents, higher will be the investment in pay creating exercises "is acknowledged.

✓ Data presents the relationship between the family arrangement of the respondents and their support in wage producing exercises. Chi-square esteem demonstrates a very critical relationship between the family arrangement of the respondents and cooperation in salary producing exercises. Gamma esteem demonstrates a positive connection between the factors. 60% of respondent's interest level is high from others since they were living in the joint family framework.

So, the theory "All the more living in the joint family arrangement of the respondents, higher will be the investment in pay producing exercises "is acknowledged.

CONCLUSION; Pakistan is a farming nation so horticulture is the pillar of the economy Pakistani Women' are confronting more wholesome issues as contrast with men. For the advancement of their expectation for everyday comforts and family unit life it has to enhance Women' wage producing exercises, so they can more readily bolster their home and bolster themselves and furthermore end up free which build up their certainty.

It is presumed that significant extents of the respondents were unskilled. A large portion of the respondents had up to Rs.8000/-months to month pay. It was presumed that lion's share of the respondents performed cooking; and cleaning exercises, care for the elderly wards, horticultural exercises, vegetable picking, sewing of the garments, educating, working in material.

SUGGESTIONS

- There is a critical prerequisite of the teach people in general in by and large and guys specifically to provide approach rights to Women through instructing and preparing guys with formal and casual means since their youth stages.
- The mindfulness with respect to Women rights ought to be a piece of instructive modified.
- The working organizations ought to be set up in for rustic Women and sensible wages ought to be paid for their works.
- The religious researchers, particularly Ulma's should assume a crucial part by their proclaiming as per

Islamic musings where Women and men have parallel privileges of wellbeing, training and employments.

- Government law should lifeless the coercive and dictator mentalities against Woman.

AN INSIGHT INTO ADMINISTRATIVE DISCRETION

DR FAKHAR MAHMOOD MAKHDOOM *
DR. HAFIZ MUHAMMAD USMAN NAWAZ **

Abstract; A prominent feature of modern legal system is the extent to which officials, whether they are judicial or administrative, make decisions in the absence of previously fixed, relatively clear, and binding legal standards. The vagaries of language, the diversity of circumstances, and the indeterminacy of official purposes guarantee discretion some continuing place in the legal order and make its elimination an impossible dream. An effective and efficient system of governance depends upon the judicial supervision of administrative decision making; hence judicial review of administrative discretion is the key for the Rule of Law and administration of justice.

Keywords: Administrative discretion; Judicial Review; Rule of Law; Constitutionalism.

INTRODUCTION; The word "discretion" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore discretion cannot be arbitrary but must be a result of judicial thinking. The term in itself implies vigilant circumspection and care; therefore, where the legislature confers discretion it also imposes a heavy responsibility.[59]

Discretion in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that

[59] Muhammad Nawaz v. Muhammad Sadiq, 1995

discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection; deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and the truth, between wrong and right, between shadow and substance between equity and colorable glosses and pretences, and not to do according to the will and private affections of persons.

* Assistant Professor of Law, International Islamic University Islamabad.
** Assistant Professor of Law, International Islamic University Islamabad.

When it is said that something is to be done within the discretion of the authority, which something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humor. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to confine himself. [60]

Anatomy of Discretionary Powers

A significant phenomenon discernible in the present-day administrative process in modern democracies is the conferral of large powers on the administration to make decisions from case to case. Acquisition of more and more discretionary powers by the Administration is a demonstrable modern trend today. Every statute which is enacted by the Legislature confers some element of discretion on the administration.

Discretionary powers are also conferred through Delegated Legislation. .The main reason for vesting large

[60] (Secretary of State v. Tameside, 1977)

discretionary powers in the government and its officials is the increasing state regulation of human affairs. [61]

Literally there are ten of thousand of discretionary powers to be found in the statutes and the delegated legislation. Discretionary power may be vested in the government, a Minister, an official or an instrumentality constituted to discharge some function of the state. There seems to be no identifiable principle to determine who should be the donee of discretion in a particular situation. Perhaps, administrative expediency is the only test for the purpose. When discretion is vested in a Minister or a high official, he has to delegate the power to some official in a lower category, because it will be practically impossible for the Minister or the high official to take each and every decision by himself [62]

Some discretionary powers may have far reaching consequences as they can apply to large number of people in the community. The exercise of some discretionary powers may have profound economic consequences. The Bland Committee in Australia describes the discretionary powers in the following words. [63]

"Discretionary may, as well, depend on the existence of a series of pre-conditions being established to the satisfaction of the person having the power. These pre-conditions may relate to readily ascertainable facts, or have elements that raise intricate questions of law, embrace very vague considerations such as whether an applicant for a pension is of good character and deserving of a pension or raise questions calling for extremely a woman has been deserted without just cause.

[61] (Malik, 1991)
[62] (Davis, 1969)
[63] (Galligan, 1990)

Entitlements to some benefits may be specifically excluded, unless the person with the discretion thinks it would be unfair for this to happen. There are powers to admit or accept and to refuse or reject claims; powers to grant less than the maximum or a prescribed benefit; powers to determine degrees of disablement; powers to select beneficiaries for benefits; powers to seize and forfeit goods; powers to exempt persons from statutory obligations; powers to remit and make rebates; powers whose exercise can advance or prejudice a career, a livelihood or a cherished ambition; and there are powers whose exercise may impinge deeply on property rights, with sometimes no redress for the persons affected."

The above statement establishes the important role which discretionary powers play in the modern administrative process. An exercise of discretion may result in inconvenience to a person or may cause him great financial loss. As for example, when a trading license of an individual is cancelled by the licensing offer, the licensee has to suspend his business and thus suffer financial loss till his license is restored, if at all.

A discretionary power is a power exercisable in its discretion by the concerned authority. An official in whom discretionary power is vested has, to a greater or lesser extent, a range of options at his disposal and he exercises a measure of personal judgment in making the choice.[64] According to Davis (1969) a public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction." Thus, an official in whom discretion is vested has power to make choices between various courses of action; even if he has to achieve a

specific end he has choice as to how that end may be reached. The essence of discretion is choice. The concept of discretion involves a right to choose between more than one possible course of action upon which there may be room for reasonable persons to hold differing opinions as to which option is be preferred in a given situation.[65]

When applied to public functionaries, it (discretion) means a power or right conferred upon them by law of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others.[66]

When it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion, according to law and not humor. It is to be not arbitrary, vague, and fanciful, but legal and regular. And must be exercised within the limits, to which an honest man, competent to the discharge of his office ought to confine himself. (Sharp v.Wakefield,1891) The discretion is always coupled with a duty; it cannot be used to circumvent the obligation cast under the laws or contract governing the parties.[67]

The discretionary nature of the power is denoted by the use of such expressions as "necessary", "reasonable", "if it is satisfied", "if it is of the opinion" etc. An American scholar says in this regard. [68]When we speak of administrative discretion, we mean that a determination may be reached, in part as least, upon the basis of

[65] (Davis, 1969)
[66] (Tomlin, 2004)
[67] (Haider, 1961)
[68] (Freund, 1928)

considerations not entirely susceptible of proof or disproof. A statute confers discretion when it refers an official for the use of his power to beliefs, expectations, or tendencies instead of facts, or to such terms as 'adequate','advisable','appropriate','beneficial','compet ent,'convenient','detrimental' ,'expedient', 'fair', fit', wholesome', or their opposites. These lack the degree of certainty…. They involve matter of degree or an appeal to judgment. The discretion enlarges as the element of future probability preponderates over that of present conditions; it contracts where in certain types of case quality tends to become standardized, as in matters of safety: on the other hand, certain applications of the concepts of immorality, fraud, restraint of trade, discrimination or monopoly are so controversial as to operate practically like matter of discretion.

Ministerial viz-a-viz Discretionary Functions

As considered with the concept of discretionary power, there is the concept of ministerial power in which the law prescribes the function to be performed by the concerned authority in somewhat definite and specific terms, leaving no choice to it, and leaving nothing to its discretion or judgment.(Griffith & Street,1973) Such a function involves no investigation into disputed facts; the law imposes a simple and definite duty on the authority concerned which acts in strict obedience to the provisions of law and it can act only in one particular manner, in a given fact situation. A good example of such a function is the issue of a radio or television license. When a person fills in the required form correctly and tenders the prescribed fee, the license is issued automatically by the post office without exercising any discretion. According to Keir and Lawson (1967)

"Many of the acts performed by public authorities or public officers are done in strict obedience to rules of statute or common law which impose on them a simple and definite duty in respect of which they have no choice."

In modern times, the range of ministerial functions is comparatively much smaller while that of discretionary functions much larger. Discretion in the administration is all pervading phenomenon of the modern age. The statute book is replete with provisions giving discretion of one kind or the other to the government or its officials for various purposes.

Reasons of Growth of Discretionary Powers

There are several very good reasons for conferring discretionary powers on officials. As has already stated earlier, under the modern political philosophy of welfare state, there has been a tremendous state regulation over human affairs in all democracies. This philosophy has led to a great extension of government responsibility for providing social services. Also, the government has assumed much greater responsibility for the management of the economy. Thus, the State has enacted legislation for urban development, slum-development, planning, economic regulation etc. Public transport, health, electricity coal mining have all been brought under state control.

All this has necessitated conferment of broad discretionary powers on the government, its officials and instrumentalities. It is felt that owing to the complexity of socio-economic conditions of modern life which the Administrative Process has to contend with, a government endowed with merely ministerial powers, without having any discretionary powers will be far too inefficient, rigid, circumscribed, and unworkable. It will

not be able to take quick decisions at critical times, and will be ineffective to deal with the modern complex socio-politico-economic problems of the society. Also, at times need is felt for technical or other expertise in regulating a particular activity and it is felt for technical or other expertise will develop on a case to case basis.

To achieve these objectives viz., expedition, flexibility and expertise in administrative decision-making, it is felt that, to some extent officials must be allowed some choice as to when, how, and whether they will act. The officials ought to be given some choice in the matter of decision specific cases. The reason is that more often than not, now-a-days the administration is called upon to handle intricate problems involving investigation of facts, applying law to those facts, making of choices and exercising discretion before taking an action. Besides, a few more reasons may be cited leading to the need of conferment of discretionary powers.

The present-day problems which the administration is required to deal with are of complex and varying nature and it is difficult to comprehend them all within the scope of general rules. Most of the problems which arise are practically new, of the first impression. Lack of any previous experience to deal with them does not warrant the adoption of general rules. It is not always possible to foresee each and every problem; but when a problem arises, it must in any case to be solved by the administration in spite of the absence of specific rules applicable to the situation.

Circumstances differ from case to case so that applying one rule mechanically to all cases may itself result in injustice. There is therefore need for individualization of the exercise of power by the administration and hence the need for discretion. Statutes

make general provisions; subject to these provisions specific cases have to be decided. The administration is required to apply a vague or indefinite statutory provision to the fact-situation of each and every individual case coming before it for decision.

The circumstances and the fact situation of two cases are not often identical. All these considerations make it inevitable to vest discretionary powers in the official to take care of individual cases on their merits. Accordingly, the modern trend in Administrative Process is to vest large discretionary powers in officials which mean that they enjoy large areas of choices between alternative courses of action; they can decide whether to act, or not to act in a given factual situation, or when to act or how to act.

The legislation conferring discretionary powers does not specify clearly, definitively or articulately the conditions and circumstances subject to which, and the standards and norms with reference to which, the concerned official may have to exercise the powers conferred on him. The power to do nothing in a situation , or not to act at all, as also a significant power; it is not less important than the power to do something. As Davis (1969) observes in this connection: "all along the line an enormous discretionary power is the power to do nothing … The power to do nothing or almost nothing or something less than might be done seems to be the omnipresent power".

Justification for Safeguards

Quite often, the legislature bestows more or less an unqualified or uncontrolled discretion on the administration. The power is usually couched in broad phraseology giving a large area of choice to the administration. Usually no guidelines are laid down the

parent act as to how the discretion being conferred by it is to be exercised by the donee of the power. The legislation conferring discretionary powers in the administration is very broadly worded and does not specify clearly and definitely the conditions and circumstances subject to which and the norms with reference to which, the administration is to use the powers being conferred on it.

Any number of typical statutory provisions may be culled out from the statute book to illustrate the breadth and variety of discretionary powers conferred on adjudicatory as well as non-adjudicatory bodies. Some examples of non-adjudicatory discretionary powers have already been given earlier in this previous Chapter on inquiries and Search and administrative powers. The Statutory provisions conferring discretionary powers usually do not enunciate any policy, principle or standard subject to which the power may have to be exercised by the concerned authority in a given situation.

While broad discretionary powers may be the need of the day from the point of view of the administration, nevertheless, from the concerned individual's point of view there are a number of pitfalls in a discretionary decision-making process. Discretionary decisions seriously affect the rights and interests of the individual. There are several disadvantages in the Administration adopting a case to case approach as contrasted with the adoption of a general rule applicable uniformly to all similar cases. Where a case to case decision operates on past facts, a general rule usually avoids retroactively and operates in future so that one has prior notice of the rules applicable to him and he may thus regulate his affairs accordingly.

In a case to case approach, the concerned individual may be caught by surprise and he may not be able to adjust his affairs in the absence of his ability to foresee future administrative action. Such an approach also involves the danger of discrimination amongst individuals; there arises a possibility of individuals not getting like treatment under like circumstances. The authority may not react consistently in similar situations; it may discriminate between, and give differential treatment to, individuals in similar circumstances. The Administration is not bound to follow its own previous decisions which may give rise to inconsistency in decisions. This is subversive of the principle of equality before law.

There always exists the danger of arbitrariness and abuse of discretion on the part of the administrators as they may not act according to any norms or principles but may act according to their own whims and fancy. It is axiomatic that the broader the discretion, the greater the chance of their misuse abound. An administrator having complete freedom of action may indulge in arbitrary action thus seriously threatening individual freedom and this is subversive of the principle of Rule of Law.

In the words of Justice Douglas of the U.S. Supreme Court in United States v. Wunderlick (1951),

"Where discretion is absolute, man has always suffered . . . Absolute discretion … is more destructive of freedom than any of man's other inventions." and further:"Absolute discretion, like corruption, marks the beginning of the end of liberty". [69]

The modern government is impossible without discretionary powers. Discretionary power is a governmental tool in modern times to achieve certain

[69] (New York v. U.S, 1951)

desired objectives. e.g., for individualization of justice, but it is a dangerous tool as too much discretion may result in justice from arbitrariness and inequality. Davis (1969) has observed in this connection:

"I think the greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decision and where the imperfections of human nature are often reflected in the choices made."

In such a context, it becomes necessary to devise ways and means to minimize the dangers of absolute discretion and to ensure administrative justice to the individual. Once cannot depend on the good sense of the administration itself to use its powers properly. This brings forth the question of safeguards in order to ensure that discretion is properly exercised by the concerned authority. The question of safeguards in this area assumes crucial significance as we want "a government of laws and not of men." The importance of controlling the administration in the exercise of its discretionary powers has been underlined by many scholars.

It has been observed that it cannot be right or just minister should have unfettered discretion and that, as administrative action now-a-days touches and directly controls everyday life of every person, it is very important that there should be adequate safeguards.(Fitzgerald,1950) Wade, (1969) has observed: "wide discretion there must be in all administrative activity, but it should be discretion defined in terms which can be measured by legal standards lest cases of manifest injustice go unheeded and unpunished".

Thus the major question in the area of discretionary powers is, which safeguards exist over decision-making by an authority in the discharge of its discretionary powers? To achieve this objective, a multi-prolonged strategy has to be adopted.

This brings us to the question of supervision of administrative decision making. At the top is the judicial control of discretionary powers. When the legislature leaves the discretion wide open, the courts move in to lay down some norms to regulate discretionary powers to protect the individuals from the vagaries of the administration. The courts have thus responded in a creative manner to the trend of growing discretionary powers of the administration.

The courts have done so because of the feeling that uncontrolled discretionary power may lead to infringement of an individual's rights. Even when some norms or standards are laid down, the question may arise whether a particular discretionary decision conforms to these norms or standards. The general legal principle is that administrators ought not to function in excess of their power given to them by law. This is known as the Doctrine of Ultra Vires. A very notable feature of the Legal System is that it provides for several channels by following which an aggrieved person can always bring a discretionary decision before the courts for scrutiny.

A Network of Restrictive Principles

When a statute vests discretion in an authority to exercise a statutory power such authority cannot exercise the same in an unfettered manner otherwise the courts are bound to interfere in manner of exercising the discretion vested in them The principle has been extended even when the authorities have to exercise administrative discretions under certain situations. Another well-known principle

which has emerged during the years that where a statute vests discretion in the authority to exercise a particular power , there is an implicit requirement that it shall be exercised in a reasonable and rational manner free from whims vagaries and arbitrariness.

"A statutory discretion is not, however, necessarily or, indeed, usually absolute: it may be qualified by express and implied legal duties to comply with substantive and procedural requirements before a decision is taken, whether to act and how to act. Moreover, there may be discretion whether to exercise a power, but no direction as how to act. Discretion may thus be coupled with duties.[70]

The Parliament, being a law and policymaking body, has delegated most of its powers to the administrative organ of the government for the implementation of policies it has enacted. Due to these extra constitutional powers the administrative process has generated demands for judicial and other interventions so that the private rights of the citizens' could be protected from violation. This effort is a drop in ocean wherein an attempt has been made to bring together the points through which the administrative activity could be confined within the statutory limits.

A prominent feature of modern legal systems is the extent to which officials, whether they are judicial or administrative, make decisions in the absence of previously fixed, relatively clear, and binding legal standards. The vagaries of language, the diversity of circumstances, and the indeterminacy of official purposes are, as H.L.A. Hart (1961) has reminded us considerations which guarantee discretion some

[70] (Halsbury)

continuing place in the legal order and make its elimination an impossible dream. Political development calls for an internal process of decision making whose structure, both organized and unorganized, constitute a system of public order capable of realistic problem solving in pursuit of rising level of participation in all values.[71]

The internal process of decision making that is thus desired for political modernization can only be developed where constitutionalism has been accepted as a desired goal. Constitutionalism in turn, implies that the government should be limited by law. The one issue that overshadows all others in areas where the need for political development is paramount is the issue between constitutionalism and arbitrary government. The most fundamental difference is not between monarchy and democracy, nor even between Capitalism and Socialism, important though these differences are, a deeper question is whether people in these countries shall be ruled by law at all, or only by arbitrary will. [72]

The responsibility for the enforcement of public policy is entrusted to the executive branch of the government by the constitution. In practice, this responsibility is discharged by the large number of administrators who exercise power of decision making. The law and innumerable rules made under it are the source of authority for the administrators to act. The law may not be comprehensive enough to cover all the contingencies and problems which arise in the course of administration. In the absence of flexibility in the statutory provisions, the administrative activity would be paralyzed. Hence the administrative authority has to

[71] (Huntington, 1965)
[72] (McClain, 1939)

exercise a reasonable amount of discretion to adapt to its actions to the circumstances of the individual case it deals with.

The government may make rules, which it thinks expedient, to carry out the purposes of the statutory Acts, depending on the complexity of problems, and their varying nature. When the problem arises, it should be solved by the administration, even in the absence of specific rules. Thus one may observe the modern tendency to leave a large amount of discretion with various administrative authorities. Discretion implies a power to make a choice between alternative courses of action.[73]

Discretion is defined by Justice Coke as a science or understanding to discern between falsity and truth, between right and wrong, between shadow and substance, between equity and colorable glosses and pretenses, not to do according to will and private affection.[74]

Galligan (1990) is of the view that discretion is the authority to choose among alternate courses of action. But for the sake of reason, discretion consists not in authority to choose among different actions, but to choose among different courses of action for good reason. To have discretion is, therefore, in its broadest sense, to have a sphere of autonomy within which one's decisions are in some degree a matter of personal judgment and assessment.

Conclusion; An effective and efficient system of governance depends upon the judicial supervision of administrative decision making; hence judicial review of

[73] (de Smith, 1973)

[74] (Rook's Case, 1961)

administrative discretion is the key for the rule of law and administration of justice in Pakistan. Judicial control primarily means review and is based on a fundamental principle inherent throughout the legal systems that powers can validly be exercised only within their true limits.[75]

Judicial review is the very life breath of constitutionalism and rule of law. It has been given a prominent place in the legal systems of all periods. Judicial Review holds the balance of power between the individuals and government. Irrespective of conflicting ideologies and disparities in the system of governance, the accepted doctrine in the world today even for those who advocate a large measure of administrative law and adjudication by agencies and tribunals, is that there should be some kind of judicial supervision.[76]

Judicial control legitimates the application of administrative sanctions. It is a procedure for public accountability of administrative process. In the process of legitimating an administrative action, judicial review operates primarily as a check upon the administrative branch of the government and agencies operating there under. (Robson, 1964) The 21st century has witnessed that the awareness about fundamental rights is increasing day by day. The emergent human rights consciousness and movements have contributed to interrogation of the reason of the state.

An increase in technical complexity of state-craft creates a fear of excessive bureaucratization. This problem has been viewed in United States as the erosion of due process of law by the expanded discretion of executive which amplifies the general statute by its own

[75] (Galligan, 1990)
[76] (Wilson, 1892)

rule making, far removed from the effective control of the public opinion.(Strauss, 1961) In the process of administrative decision making, the executive makes an assessment of the public interest which may not necessarily reflect the legislative intent. Theoretically, legislative and executive readings of the public interest should be identical but differences in quality of human control and institutional ethos become conducive to divergent rather than identical readings.[77]

In the words of Frankfurter J. in celebrated case of Brown v. Allen (1953)

"Discretion without a criterion of exercise is authorization of its arbitrariness". It is an abuse to deal casually with rights guaranteed by the constitution even though they involve limitations on state power. In a democratic state with good governance, the executive activity takes place within a framework of rules or standards and executives must check whether their action moves within legally allowed orbit.

[77] . (Friedrich, 1946)

EMBRACING INTERNATIONAL COMMERCIAL ARBITRATION FOR EFFECTIVE RESOLUTION OF DISPUTES IN INTERNATIONAL BUSINESS TRANSACTIONS FOR SEAMLESS GLOBAL COMMERCE

FARAH DEEBA **[78]

ABSTRACT; In today's interconnected global marketplace, navigating international business transactions is fraught with complexities, often leading to disputes that transcend borders. In response to this challenge, the adoption of International Commercial Arbitration (ICA) has emerged as a pivotal mechanism for resolving cross-border conflicts efficiently and effectively. This research delves into the significance of embracing ICA as a cornerstone for facilitating smooth and seamless global commerce. Through a comprehensive examination of case studies and legal frameworks, this study highlights the inherent advantages of ICA in providing a fair and neutral platform for dispute resolution. Moreover, it analyzes the role of ICA in enhancing contractual certainty and fostering confidence among international business stakeholders. By embracing ICA, businesses can mitigate risks, streamline transactions, and cultivate a conducive environment for sustainable global trade. This research underscores the imperative for stakeholders to recognize and harness the potential of ICA as a catalyst for advancing international business transactions in an increasingly interconnected world.

[78] Assistant Professor, University of Sahiwal,
Email: Farah.law@pu.edu.pk

Key words: International Commercial Arbitration, Global Commerce, Dispute Resolution, Cross-Border Transactions, Contractual Certainty

---

INTRODUCTION; The world today as it has become more integrated; the phenomenon of globalization has caused an enormous increase in the number of international transactions. Parties to these transactions relate to different territories having diverse legal system, which create uncertainty and confusion with regard the performance of such transactions. Moreover these transactions being commercial in nature depute certain rights and obligations to the parties relating to said transactions. Courts in one country shall only adjudicate upon the matters arising within its territorial jurisdiction or where a foreign party submits itself before such courts. Moreover the process of litigation is complicated, expensive, time consuming and also bring the reputation of parties and their business relationships at risk. Therefore, a new mechanism is adopted in order to meet with the above stated complex issues, as parties, to international commercial transactions, use arbitration system, which is known as International Commercial Arbitration (ICA). ICA is now considered to be the most preferred mode to resolve the matters of international commerce. In this regard globally a convention was adopted to strengthen the International commercial arbitration system, besides certain organizations are established, which set up certain rules and regulations regarding arbitration. Moreover these organizations provide their services to convene arbitration between the parties relating to international commercial transaction in case any dispute arises. Considering the importance of

the fact, government of Pakistan has also adopted the Convention for the Recognition and Enforcement of Foreign Arbitral Awards, in its true letter and spirit. In this regard certain legislations have been approved in Pakistan namely Arbitration Agreements and Foreign Arbitral Awards Act 2011 and The Arbitration (International Investment Disputes) Act 2011. These Acts of state are considered to be the mile stones in relation for the international awards to be enforced in Pakistan.[79] In comparison to old laws, there legislations provides the courts to grant stay of suit in cases, where the agreements between the contracting parties provide the provisions for international arbitration over the matter in dispute. International commercial arbitration (ICA) has emerged as an alternative to international litigation. ICA is now considered preferred mode for settling the international dispute one of the major reason for such reference is the legislative development in many courtiers restricting the intervention by court. ICA is considered to be speedy remedy along with informal procedure, privacy, economy and an expert judgment Arbitration provides freedom to the parties as the arbitration clause is voluntary and incorporated by the mutual and free consent of parties. This Arbitration clause enables the parties to appoint arbitrators, to select law and forum of their own choice. The mechanism of settling dispute under ICA is dependent on equity and rules regarding international law of merchandise. Here the parties shall decide whether ICA shall base upon principles of equity or upon the principles of international law of merchandise.[80]

---

[79]M.Pryles, International Trade Law, 652 (1996).

[80]Exaequo et bono" is a Latin phrase meaning what is equitable and good. A person who is authorized to decide "ex aequo et bono" is not bound by legal rules and may instead follow equitable principles. Black's Law Dictionary 581, (1999).

Historical Developments:

Arbitration is an arrangement designed to carry out the resolution and settlement of disputes by any person/s to be known as arbitrator/s, with or without the intervention of courts. According to the Black's law Dictionary it is: "A method of resolving the dispute between parties by a neutral third party, agreed by the disputing parties, and whose decision shall be binding over the said parties" Arbitration is not a novel concept; its history goes back to ancient times. It was first adopted by the Greece as the disputes between various states were settled by using arbitration. Later on its usage was also prevalent in the Western Europe between 12th and the 15th centuries. Modern international arbitration embarked on with the Jay Treaty of 1794. To resolve the various disputes, the treaty was between the United States and the Great Britain, such as determination of boundary, exercise of rights over the sea by Great Britain, obligations of U.S. regarding neutrality. They decided to resolve such disputes by arbitrators from both states setting up a commission. In England arbitration system is older than the Common Law system. Its history goes back to 1224 where its usage was prevalent to resolve the commercial disputes. The English Common law courts initially discarded arbitrations and their mode of settling disputes and it was looked jealously that disputes were submitted to some extra-judicial forum. However with the passage of time courts have changed their stiff position and positively started to welcome such agreements. III. Arbitration versus Orthodox Litigation: International commercial disputes when brought before the established courts of law to adjudicate and decide the contentions are resolved by following the established Laws, rules, regulations and procedure that make the adjudication

time consuming, expensive and also damaging the business relations and business reputation. Arbitration on the other hand is considered to be a preferred mode to resolve international commercial disputes but it is also considered that it is not ideal as courts of law intervene which distort the finality of decisions. However the Jurisdictions that have enacted the laws limiting the judicial intervention have better application and usage of the arbitration and encouraging the adoption of arbitration over litigation as a preferred mode of dispute settlement.[81]

Global Growth of International Commercial Arbitration:

Following are the reasons that further explain the rational to prefer arbitration over the litigation as a mode of dispute settlement. Reasons are divided in two categories i.e. technical and structural.

Practical Factors Privacy and Confidentiality:

Parties to a commercial agreement generally try to keep their disputes arising out of their agreements private and confidential which is not possible where litigation is involved. Arbitration and its proceedings generally provide this feature of privacy and confidentiality as the disclosure of information to public or third is not necessary, and media involvement is remote. If these cannot be eliminated but still the chances of these are limited as compared to the litigation.[82]

Number of Arbitrators:

[81]"Lex-mercatoria" is a Latin term which means "Mercantile Law" Black's Law Dictionary. 923, (1999) Lando,'Lex-mercatoria in International Commercial Arbitration (1985) 34 ICLQ 747.

[82]See ANew survey of Universal Knowledge Encyclopedia Britannica, 214, Vol.2 (1964).

Here contracting parties shall have the authority and freedom to choose the number of persons, who shall determine their matter in controversy.

While there is a particular criteria for the appointment of arbitrators as any person, who is an arbitrator, must be impartial, in the sense that he must not have any relation or affection towards any party to arbitration. Moreover he must be technically an expert to adjudicate upon the matter in controversy.

Freedom as to Representation:

Under ICA, the parties shall be at liberty to make their presentation during the proceedings, by whomever they want and choose. Arbitration both under UNICETRAL or ICSID models provide certain provisions, whereby the contracting parties shall be at liberty to be represented during arbitration proceedings by a qualified practitioner from any territorial jurisdiction, or by any other person, to whom party likes.[83]

Tractability and Cost Effective:

Arbitration is unlike the Litigation where the courts during the arbitration proceedings have an established procedure which needed to be followed as summons to parties, framing of issues, conduct of evidence etc. and mode of delivering award. On the other hand arbitration provides greater flexibility to parties regarding the choice of procedure provided under different modes of arbitration i.e. ICC rules, Rules of UNICETRAL Model or the rules of ad-hoc arbitration. Arbitration provides expeditious and less costly settlement of dispute.[84]

Efficacy:

International commercial transactions involve parties from different parts of the world. Whenever any dispute

[83] See supra note, 3 at p166

[84] Id

arises concerning such commercial transactions it suffers from many handicaps and leads to difficulties in the resolution of dispute. Where such dispute arises and brought before any court it suffers lacunas such as lack of jurisdiction to adjudicate a foreign subject, state immunity, recognition of foreign judgments and many others. To sum up, litigation in international commercial disputes suffers from many difficulties that also hurdles the effective settlement of disputes. International commercial arbitration on the other hand offers much more effectiveness where the disputes are related to parties residing in different parts of the world and can be enforced properly against the defaulting party.

Consensus of Parties:

Parties to an agreement with their mutual and free consent select the mode of appointment of arbitrator which may be on the basis of neutrality, expertise of law and system and may also include other technical expertise.[85]

Operational Factors:

ICA is considered to be the preferred mode to settle the dispute as from the point of view of a person dealing in commercial activities, may be reluctant to do his business in the absence of any international judicial forum settling his disputes relating to his international commercial transactions. Moreover one may not get proper relief from his national judicature, regarding his grievance towards any international commercial transaction due to a number of limitations upon the adjudication against the foreign nationals. While trying an international dispute in

[85]United Nation Commission on International Trade Law was established by the UN General Assembly in 1966. Since then it has been working for the harmonization of International Commercial Law, Sale of Goods, Transport of Goods and Commercial Arbitration.

a national court it is also perceived that the courts lean towards party in whose jurisdiction the court situates. In today's globalized world where international trade and commerce activities and transactions have increased immensely the thought of resolution arising out of such transactions felt more of relic. Arbitration proceedings provide freedom to parties from following a particular legal system and this feature of arbitration is treasured for the settlement of dispute through parties. To create certainty in international commercial disputes, there are international rules that provides a legal framework to regulate matters impartially (e.g. of ICC). The UNCITRAL has also developed a similar set of rules to regulate arbitration. Both of these set of rules are widely accepted and adopted internationally. To deal with international investment disputes there is a specialized international organization (ICSID)[86]

To create certainty:

To create certainty and effectiveness in the determination, enforcement and finality of arbitral awards, there was convened and adopted New York Convention, Which embodied credibility and effectiveness. In 1966, UNO, set up a commission, which has endeavored to harmonize the international laws relating to commerce, sale of goods, carriage of goods by sea etc., and rules relating to international arbitration.

International Centre for Settlement of Investment Disputes:

Under the provisions of Washington Convention, In 1966, ICSID was set up. To conclude the international regime for arbitration that consists of "UN New York

[86]International Center for Settlement of investment disputes. ICSID is a specialized international organization created by the Washington Convention, which came into force in 1966.

Convention", International organization (i.e. ICSID), international rules to regulate arbitration flexibly (i.e. ICC and the UNCITRAL) that makes this regime much more neutral and convenient than litigation. With such features the arbitration has become preferred mode for the international business community.

Administrative Models of International Commercial Arbitration:

ICA is usually regulated by following two main types of models which are 1) institutional Arbitration, 2) Ad-hoc Arbitration. The Parties to a contract may choose either of these models provided by national or international institutions in case of institutional arbitration or ad hoc model.

a) Institutional Arbitration: Institutional refers to the arbitration process which is regulated under the rules and regulations of said institution, i.e. ICC or The American Arbitration Council etc. These institutions provide support, facilities and supervisory services for arbitration process. Institutional arbitrations follow specific prescribed rules for arbitration procedure to settle the dispute and also offer scrutiny of awards and handling of administrative issues efficiently and effectively.[87] This model provides a framework that is structured and the arbitration process is systematic.

b) Ad-hoc Arbitration: Ad-hoc arbitration on the other hand allows parties to customize arbitration proceedings as per their wish and does not involve any institution to provide supervision. In this model as such no set of rules is specified it is up to parties that they either can follow the established principles as provided by institutional arbitration regime or can create their own

[87]R. Folsom et al, International Business Transactions, 1145 (1999).

set of procedural rules. As the Ad hoc arbitration does not follow any specific set of rules neither there is any established institution to supervise, it may create difficulty in resolving dispute. One solution to such problems is to follow UNICITRAL rules, as these rules are suitable to be used in ad hoc arbitration. It is true that both models of arbitration provides advantages and disadvantages such as the Ad hoc arbitration provides more freedom to the parties but institutional arbitration model on the other hand make the arbitration proceedings certain and practicable.

Legislative Development in Pakistan:

Being the signatory of New York convention 1958, Pakistan adopted this convention being the Act of parliament, named as Recognition and Enforcement (AAFAA) Act 2011. With few reservations, this Act allows the court to have stayed the proceedings on suit upon any application furnished by any party to the arbitration agreement having the concern towards the matter relating to arbitration.

Additionally, Section 6 of the said Act added the directions to the judiciary in Pakistan to identify and implement the foreign award as if it has been pronounced by it. This award would be considered as award which will have the status of decree of court. Due to these clauses party in quest of enforcement of the award (usually the investor) need not spend time or money in ensuring that the local court adopts/makes the award a 'rule of court' before actually enforcing it, which would be the case had it not been for Section 6 of this Act. Thus, this Act makes the foreign award to be renowned and imposed in Pakistan relatively easier than it ever was before. What however qualifies as a 'foreign arbitral award' remains an anomaly and which we shall now

consider. A ‘foreign arbitral award’ may be determined through a variety of criteria, including most commonly through the place and forum of arbitration and choice of law in the arbitration agreement, which indicates the law which will be the governing law of arbitration.

Section 9 (b) of 1937 Act (now repealed) however, all awards under the arbitration agreements in which the governing law was to be the Pakistani law were held to be domestic irrespective of place and forum of arbitration, as evinced by Rupali case(1988, SCMR 1618)’. Whatever the arbitration proceedings are conducted outside Pakistan, in a foreign arbitral forum, yet the award in such a case was not considered to be a ‘foreign arbitral award’ and hence, its status was equal to that of domestic arbitrations according to AA 1940.

Previously the local courts had greater control to recognize and control the foreign awards as per the procedure for domestic arbitrations in Pakistan. This could entail delays as it was not mandatory for the courts in that scenario to stay legal proceedings or enforce the award as if it were its own order or judgment. In 2011 however, the Parliament being mindful of this issue, repealed the 1937 Act and deliberately omitted this restrictive legal interpretation of a foreign award in the new 2011 Act. In fact, the 2011 Act clearly states under Section 2 (e) that opens as:

“Foreign Arbitral Award means a foreign arbitral award made in the contracting state or such other state as may be notified by the federal government in the official gazette”. Hence, as the law stands, there is nothing in Pakistani legislation anymore that states that an award made under Pakistani law is not to be considered a

foreign award.[88] This intimates the willingness of the Pakistani legislature to adopt the 'seat of arbitration' criteria as opposed to the 'governing law' criteria for the sake to settle on the nature of award. Being the participant of ICSID Convention1965, Pakistan also incorporated the provisions of this convention into the Act of parliament named as Arbitration (International Investment disputes) Act 2011, whereby certain mechanism is adopted to implement the awards on the arrangement of investment disagreements.

Pakistani law has, therefore, come a long way to recognize and enforce the foreign arbitral awards and its Parliament has shown its sincerity and commitment towards positive international growth and development. This Act specifically provides that repealed enactments shall not apply to ICSID Convention (section 7). The law covers the International Convention on Settlement of Disputes by registering the awards and the award shall be affected. It binds the government unless the award is against the government. The law also enlists certain articles of convention which have the power of law. This statue comprising of 10 sections and schedule comprises of the Convention. The government has made an effort to fulfill the international obligation but it is subject to various loopholes.[89]

Global and Regional Arbitration Institutions:

Below is a summary description of the better known arbitration institutions administrating international case.

International court of arbitration of ICC:

The world's foremost organization in international arbitration the ICC, was established in 1923. Its seat is in

[88]Nida Mehmood "recent developments regarding the recognition and enforcement of foreign arbitral awards in Pakistan" available at http://http://blogaila.com last visited 02-05-2015

[89] See supra note, 3 at p 172

Paris. ICC arbitration take place each year in sum 35 different countries. The ICC court is not really a court. Arbitrators appointed for each particular case decide on the matter submitted to ICC arbitration. The role of the courts 80 or more members from 70 different countries is to monitor the arbitral process. One important and unique feature of the court is that it scrutinizes and approves arbitral awards submitted in draft form by arbitrators this quality control mechanism is a key element of ICC arbitration system. The courts secretariat consist of a permanent staff of over 40, including 25 lawyers divided into teams that monitor cases. During the year 2000 alone, the ICC court administer some 550 new cases involving parties from over 100 countries.[90]

International center for settlement of investment disputes (ICSID):

The international center for settlement (ICSID) was established by the World Bank under the 1965 convention on the settlement of investment dispute between states and nationals of other states. The convention have been ratified by some 135 states. The center's main purpose is to facilitate the settlement of investment disputes between government and foreign investments. Since 1978, the center has had a set of additional facility rules, authorizing the ICSID sacrtairiat to administer certain types of proceedings between states and foreign nationals, which fall outside the convention. (These cases may be where a party is not from a member state or where the dispute is not an investment dispute.) Proceedings need not be held at the center's headquarters in Washington. Advance consent by governments to

[90] See "Arbitration and Alternative dispute Resolution, how to settle international business disputes" International Trade Center, Trade Law Series (2001), at p 61-62

submit investment disputes to ICSID arbitration can be found in investment contracts between governments and investors as well as in over 900 bilateral investment treaties. By January 2001, the center had concluded over 51 cases, and an additional 30 cases were pending.[91]

China international economic and trade arbitration commission (CIETAC):

China international economic and trade arbitration commission (CIETAC), one of the world's busiest international arbitration centers, was established in 1954 to settle disputes between foreign companies and Chinese firms. CIETAC has set up sub commissions, including the active Shanghai commission. In 1988 CIETAC revised its arbitration rules to enable it to hear domestic disputes involving joint ventures with foreign investors and holly-owned foreign companies established in china. The total number of new arbitration filling at CIETAC during 1999, including those at its branch offices, amounted to some 1000 (approximately) cases.

International Center for Dispute Resolution of the American Arbitration Association (AAA):

Founded in 1926. The American Arbitration Association (AAA) offers a wide range of services, including education and training. In the United Sates in 1999, it administered over 140,000 disputes through its specialized rules for disputes in the areas of labor, insurance, construction, commerce, severities, etc. In 1996, AAA established the International Center for Dispute resolution in New York City, which now administers all AAA international cases. The AAA International Arbitration Rules, as revised in 2000, govern arbitrations of international disputes referred to

[91] See supra note, 16 at p 62

AAA. In 1999, its international caseload amounted to over 450 disputes.

Arbitration Institute of Stockholm Chamber of Commerce (SCC):

Arbitration Institute of Stockholm Chamber of Commerce (SCC Institute) was established in 1917 and is a separate entity within the Stockholm Chamber of Commerce. In the 1970's it became recognized by the United States and the Soviet Union as a neutral center for the resolution of East-West trade disputes. Since then, the SCC Institute has expanded its services and has administered cases involving parties from over 40 countries. In 1999, the SCC Institute administered 135 cases.[92]

London Court of International Arbitration (LCIA):

The London Court of International Arbitration (LCIA), based in London, is perhaps the longest established commercial arbitration institution, It took a major step towards internationalization in 1985, through the formation of the London Court of International Arbitration Its principal functions are the appointment of arbitral tribunals, the determination of challenges to arbitrators and the control of costs. It does not scrutinize arbitral awards. It had an annual caseload of approximately 70 by the end of 1999.

Kuala Lumpur Regional Centre for Arbitration (KLRCA):

Established in 1978 under the auspices of the Asian-African Legal Consultative Committee with the assistance of the Government of Malaysia, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) offers facilities for arbitration of business disputes within the region. The Centre applies the 1976 UNCITRAL

[92] Id at p 63

Arbitration Rules with certain modifications. An amendment to the Malaysian Arbitration Act excludes international arbitrations conducted under the Centre's rules from the supervision of Malaysian courts. The Centre offers facilities such as hearing rooms, arbitrators' retiring room, library, secretarial assistance and catering. Its reported caseload for the year 2000 was about 35.

Cairo Regional Centre for International Commercial Arbitration(CRCICA):

The Cairo Regional Centre for International Commercial Arbitration (CRCICA), like the Kuala Lumpur Centre, was established in 1978 under the auspices of the Asian-African Legal Consultative Committee, with the assistance of the Egyptian Government. The Centre's main activity is the administration of arbitration cases, both national and international. Its reported caseload for the year 2000 was about 38 cases. These concerned construction, export/import and supply cases. In 1992 the Centre opened a maritime arbitration branch in Alexandria.[93]

International Commercial Arbitration Court (ICAC) at the Russian Federation Chamber of Commerce and Industry (USSR):

Based in Moscow, ICAC (formerly the Arbitration Court at the USSR Chamber of Commerce and Industry) has several decades of experience as a prominent arbitration institution. It reported some 415 cases in 1998 involving parties from 59 countries.[94]

Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO):

Based in Geneva, Switzerland, the WIPO Arbitration and Mediation Center was established in 1994 to offer

[93] Id at p 64

[94] Id

arbitration and mediation services for the resolution of international commercial disputes between private parties. The procedures offered by the Centre are especially designed for technology, entertainment and other disputes involving intellectual property. Specifically, the Center has focused significant resources on establishing an operational framework for the administration of disputes related to the Internet and electronic commerce. Since 1999, it has been a leading dispute resolution service provider on disputes arising out of the registration of Internet domain names.[95]

The OHADA Permanent Court of Justice and Arbitration:

The 1993 OHADA Treaty ratified by 16 (mainly) west and Central African Sates provides a single unified legal framework for business law in the region. Among its institutions is the Permanent Court of Justice and Arbitration whose seat is in Abidjan, Core d'lvoire. In 1998, the OHADA Arbitration Act came into force, together with the Rules of Arbitration of the Permanent Court. In its administrative capacities, the Court manages arbitrations referred to it by the parties. It also scrutinizes draft arbitration awards. Although its arbitration activities have been in place only from 2001, it is expected to play a leading regional role in the administration of arbitration disputes in West and Central Africa.[96]

Conclusion;

In conclusion, the adoption of International Commercial Arbitration (ICA) stands as a cornerstone for enhancing the efficiency and effectiveness of resolving disputes in international business transactions. This research has underscored the pivotal role of ICA in providing a fair,

[95] Id

[96] Id at pp 64-65

neutral, and efficient platform for resolving cross-border conflicts. Through a comprehensive analysis of case studies and legal frameworks, we have elucidated the inherent advantages of ICA in promoting contractual certainty and fostering confidence among international business stakeholders. By embracing ICA, businesses can mitigate risks associated with international transactions, streamline operations, and cultivate an environment conducive to sustainable global trade. Moreover, the flexibility and adaptability of ICA make it a preferred choice for resolving disputes in an increasingly interconnected world.

As we navigate the complexities of the global marketplace, it is imperative for stakeholders to recognize and harness the potential of ICA as a catalyst for advancing international business transactions. By doing so, we can contribute to the seamless facilitation of global commerce, promoting economic growth, and fostering mutually beneficial relationships among nations and businesses worldwide. In essence, embracing International Commercial Arbitration represents a proactive step towards building trust, promoting stability, and fostering prosperity in the dynamic landscape of international business. As we move forward, let us continue to leverage the power of ICA to navigate challenges, resolve conflicts, and pave the way for a more interconnected and harmonious global economy.

NAVIGATING ARBITRATION CLAUSES: ANALYZING JUDICIAL RESPONSES AND EVOLVING JURISPRUDENCE IN PAKISTAN'S LEGAL FRAMEWORK

FARAH DEEBA** [97]

ABSTRACT; Arbitration clauses play a crucial role in shaping dispute resolution mechanisms within contractual agreements, providing parties with an alternative avenue for resolving conflicts outside traditional litigation channels. In Pakistan, the landscape surrounding arbitration clauses is subject to evolving jurisprudence influenced by judicial responses and interpretations within the country's legal framework. This research delves into the dynamic interplay between judicial decisions and the development of jurisprudence concerning arbitration clauses in Pakistan. Through a comprehensive analysis of case law, statutory provisions, and scholarly insights, this study navigates the complexities of arbitration clauses, examining their enforceability, interpretation, and impact on contractual relationships. Moreover, it explores emerging trends, challenges, and opportunities within Pakistan's legal landscape, shedding light on the evolving role of arbitration clauses in promoting efficiency, fairness, and certainty in dispute resolution. By scrutinizing judicial responses and jurisprudential developments, this research aims to provide valuable insights for practitioners, policymakers, and stakeholders engaged in the realm of commercial arbitration in Pakistan.

[97] Assistant Professor, University of Sahiwal,
Email: Farah.law@pu.edu.pk

Key Words: Keywords: Arbitration Clauses, Judicial Responses, Jurisprudence, Pakistan, Legal Framework, Dispute Resolution, Contractual Agreements,

---

I. General Background

Pakistan has The Arbitration Act, 1940 to govern its domestic arbitration proceedings and enforcements of such arbitral awards. When question of enforcement of foreign arbitration awards arises the relevant law that deals with it is The Arbitration (Protocol & Convention) Act 1937. Section 3 provides the provision to stay the legal proceedings, when arbitration is to be conducted. The concept of reciprocity is very important to recognize and enforce the foreign awards and it is important that the foreign country must have embedded the reciprocal legal provisions. Subject to the provisions of this Act, foreign awards are recognized and enforced as they have been made by the court of law in Pakistan. The Arbitration Act 1940 and The Arbitration (Protocol and Convention) Act 1937, both provide that a party to an agreement having valid arbitration clause embodied in the agreement, if decides to submit the matter before the court of law instead to opt for arbitration then there is mechanism provided to stay the proceedings of court of law. That minimizes the intervention of court in the arbitration process and also creates trust of the business community to opt for arbitration. The Arbitration Act 1940 under its section 34, states that a party when initiate judicial proceedings against the other, both being the subjects of arbitration agreement embodying the arbitration to be the preferred mode to resolve dispute, the other party against whom such judicial proceedings have been initiated can make a petition to maintain the

status quo against the proceedings initiated by the other contracting party. After its due satisfaction, the court shall refer the matter for arbitration and shall stay the judicial proceedings in this regard, until an award is submitted by the arbitrator in the court. If the court is not satisfied, it has discretionary powers not to grant the stay on the grounds that the substantial miscarriage of justice or inconvenience would be caused to parties. Similarly the Arbitration (Protocol & Convention) Act, 1937 under section 3 provides that if one party starts judicial proceedings against the other, both being the subjects of valid arbitration agreement, then court after its due satisfaction that the agreement and arbitration are operative and can be proceeded with and there is a contention to be resolved. With the recognition of The New York Convention 1958 certain changes and modifications have been observed in the legal regime of Pakistan, but the question is whether it has also changed the perspective of the courts of law in Pakistan or not? Treaties are bilateral or multilateral solemn agreements among the states. Treaties become binding in nature as its basis are found in Pacta Sunt Servanda (Promises are to be fulfilled). Under the Vienna convention on law of treaties, Article 18 provides that a state, being a party to an international treaty, shall not do anything which shall weaken the true spirit and object of such a treaty. The courts shall observe the New York Convention 1958, while recognizing and enforcing the arbitral awards, as its objective and purpose is the promotion of international trade. In cases where a Pakistani national enters into contract with a foreign national relating to international arbitration and if the same is not guarded, it would harm the long term interests of Pakistan. Other than this not honoring the international arbitration

contracts, would create an adverse opinion that there is no freedom or sanctity of contracts in the legal system of Pakistan. Before the New York Convention's ratification by Pakistan, Supreme Court of Pakistan gave a very wise and appropriate judgment that the court shall show it dynamic approach over an application u/s 34 of the Arbitration Act 1940 for the recognizance and enforcement of a foreign award. Due to development and increase in international trade, commerce, and modernization of global life style, the arbitration contracts are too common now a days to get our proper attention. Courts should uphold the sanctity and sacredness of an arbitration agreement which the parties have concluded between themselves. If we failed to recognize the said rule, then it shall damage to the interests of Pakistan in the comity of nations. In Pakistan, Travel Automation (Pvt.) Ltd is the first case that dealt with the NY Convention after implementation of the ordinance.

"The learner judge observed, After the enforcement of Ordinance XX of 2005, radical changes have been made in law and discretion of court which was available under section 34 of the Arbitration Act, 1940 apparently is no more available to court. The question on which earlier, while exercising discretion under section 34 of the Arbitration Act about convenience or inconvenience of the parties, availability of evidence on a place other than the place of arbitration, whether to stay proceedings or not, was within the discretion of the court. However, while dealing with the matter under section 4 of the Ordinance XX of 2005 court has no such discretion except where cases fall within exception categories mentioned in the section itself….Under section 4(2) of the Ordinance, 2005 pre-condition for refusing stay, of

the proceeding is that is not valid in the eye of law. This stance shows that the courts do recognize and enforce foreign awards in Pakistan, which is acknowledgment of the change that has taken place with regard to the foreign arbitration." [98]

II. Enforcing Foreign and Domestic Awards:

So far as Pakistan is concerned, there is a huge difference between the domestic and overseas award of arbitration both are enforced under split laws.

a) Domestic Award:

When a domestic contract is made between the parties to resolve any difference through arbitration under Act 1940, parties have the right they may send the matter straight away to the chosen arbitrators, or the court, if finds the arbitration agreement between the litigents, shall, on its own motion or on the application defendant, may refer the matter for arbitration , before filing the written statement and the arbitrator shall conclude and submit his award to the parties or the court as the case may be. When award is submitted to the court, then the parties subject to this award shall be provided opportunity of being heard and prove any of his grievance towards the award so submitted in the court. After concluding all the matter concerning to the award, the court shall either provide effect, set aside or shall remand the said award to the arbitrator for review. While giving effect to the award or setting the award aside, the court shall pronounce its judgment and decree in this regard.

b) Foreign Award:

Under the law relating to enforcement of foreign awards, it is stated that these shall be enforced against the defaulting party in the same manner as the judgments and

[98] See "Travel Automation (Pvt.) Ltd. V. Abacus International (Pvt.) Ltd. " 2006 CLD 497

decrees of courts in Pakistan are enforced. While Article V of the said laws provides the grounds on which the foreign awards shall not be enforced and recognized by the courts in Pakistan.[99] The grounds of refusal are as following:

i) Incapacity of Parties: If any of the contracting party was suffering from incapacity at the time of contract, then such an award shall not be enforced in Pakistan.[100]

ii) Validity of Agreement: If the arbitration agreement is not valid in the country, where the award shall be enforced or where the award is made, then it shall not be recognized and enforced.[101]

iii) Notice of Arbitrators: It the parties to the notice shall not be given the proper notice of the proceedings of arbitration by the arbitrators, then the said award shall not be enforced.[102]

iv) If the Award does not cover the matter in controversy, then the said award shall not be enforced or recognized.[103]

v) The appointment of arbitrator/s or procedure adopted by them to convene the proceedings is contrary to the express provisions of the agreement.[104]

---

[99] A.K Bansal "International Commercial Arbitration Practice and Procedure Enforcement of Foreign Awards" (2012) at p 811

[100] See supra note, 2 at pp811-812, also see Article V (1) (a) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

[101] See supra note, 2 at pp811-812, also see Article V (2) (a) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

[102] See supra note, 2 at pp811-812, also see Article V (3) (a) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

[103] See supra note, 2 at pp811-812, also see Article V (4) (a) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

[104] See supra note, 2 at pp811-812, also see Article V (5) (a) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

vi) The award has not attained finality, because the law under which it is made has been repealed or otherwise suspended.[105]

It is pertinent to mention here that the awards may be refused by the courts on the ground that the subject matter of arbitration is incapable of being arbitrated because the law of the land requires so or it is against the public policy to arbitrate over such a matter.[106]

III. Case Law Development:

The importance of using the arbitration clause can be best seen and appreciated by courts while making their judgments, where they have appraised the use of arbitration in commercial disputes. In recent past decision,[107] Supreme Court of the United Kingdom upheld the version of lower courts regarding the enforcement of award given by arbitrators. In Dallah V. Government of Pakistan, where the facts state that an award was given by International Chamber of Commerce Arbitral Tribunal in favour of Dallah a real estate development company of KSA and against a trust as set up by Government of Pakistan. The award stated that the trust was to pay US $ 20.5 Million to Dallah as the compensation etc. Here the Supreme Court of United Kingdom, firstly acknowledged the decision made by the lower court on the ground that all the parties are bound by the decisions of arbitration as set up by the agreement between the parties. Secondly on technical grounds, Supreme Court declared that the arbitration tribunal's decision is defective for want of jurisdiction. More over this case is important in a sense that it provides us a way

---

[105] See supra note, 2 at pp811-812, also see Article V (6) (a) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

[106] See supra note, 2 at p812

[107] Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan, (2010) UKSC 46.

to sort out the difficulties associated with the enforcement of an award, when it is made against a non-party to the arbitration agreement. This case is considered as rare example of a refusal by the English Courts to uphold an award under the provisions of New York Convention. It also provides a solution to the problems of investors which they have to face while contracting with States or States owned entities. While entering into commercial contracts, it is necessary to seek legal advice on its local capacity to enter into contracts and also ensure that the counterparty remains accountable for the duration of the contract.

In a renowned case (Federation of Pakistan V. Al-Farooq Builders), Sind High Court has appreciated the degree of deference accorded to arbitration by saying that in case of arbitration, the arbitrators are considered to be the judges in all respects. While (In President of Islamic Republic of Pakistan V. Syed Tasneem Hussain Naqvi) courts do not show bias towards the arbitral awards and they must they must try to uphold the awards instead to obliterate it. Courts have discretion to wipe out such awards where sufficient evidence has been on record that the arbitrator acted in a way that was beyond the scope of the reference or where arbitrator is guilty of misconduct or the award violates set principles and the norms of law.

More over In 1Meredith Jones & Co through Attorney vs. Usman Textile Mills, An the legality and effectiveness of an award given by an arbitrator can be challenged, only when it finds any provision stated in Section 30 of Arbitration Act 1930. Where an award is challenged under Section 30 of the Arbitration Act, 1940 in a court of law, then said court is not acting as a court of appeal against the said arbitral award. Whereas Section 30 of the Act opens the grounds to challenge an

award as following: a)-misconduct of arbitrator, and b)-where the proceedings are not conducted on merits.While in Pakistan, the courts have also adopted the approach not to enforce an award on the ground of consciousness regarding their jurisdiction. Such as in a leading case, Supreme Court has decided that 1Hitachi Limited vs. Rupali Polyester's and others the Supreme Court held that Pakistani courts cannot be divested from the jurisdiction that was otherwise vested in it. The court was observed that the jurisdiction of a court cannot ousted by an arbitration agreement. Moreover foreign arbitral award must come up with the statutory provision as prevailing in Pakistan.

In a renowned case where a person is seeking to enforce the award given under foreign arbitration, said award must have to comply with the Sindh Chief Court Rules. In case of noncompliance or part compliance of the rule the application to enforce foreign arbitral award may be turned down to remove the deficiency and comply properly within the limitation as provided under law. In this case produced the original or authenticated copy of award as required by the rules. Later on original award was produced to which court recognized and held that the award was rightly made. Grounds to challenge the award were taken by the defendants but court held that no such material for satisfaction of the court is brought on record hence the objections were turned down and the foreign arbitral award was enforced. It was further held that in cases of enforcement the court act only as an executing court and it can not go beyond this scope.

Islamic Republic of IranShipping Lines through Attorney vs. Hassan Ali & Co Cotton (Pvt.) Limited, 2006 CLD 153.[108]

In the case of Manzoor Textile Mills Ltd, the facts state that a foreign firm entered into the contract in question with an arbitration clause that if any dispute arises recourses is available at arbitration forum to which the plaintiff defeated and submitted the dispute before the court. The court declared that one cannot be carelessly relieved from his liability or commitment, which he has made in the contract. It is responsibility of the courts to attract sanctity to the contracts. To earn honorable place among other nations of the world. When any contract is made then not only the states but also the individuals of such states are required come up with their promises Manzoor Textile Mills Ltd. V. Nichimen Corporation and 2 others[109]when an arbitration clause having been incorporated into the contract expressly and the parties are aware of the consequences of such clause then one cannot leave the same. The enforcement of foreign arbitral awards notwithstanding of such case laws and favorable judicial views lacks in consistency and persistence. Most of the times parties to international arbitration agreements challenge the same in the national courts and show hesitation in submitting themselves before the agreed international arbitration forum.

In HUB Co. case[110] court declared that one of the contracting party making illegal activities in a commercial transaction, cannot be the subject of arbitration, as it is a matter of public policy, which can only be adjudicated by the courts of the country where

[108] Islamic Republic of IranShipping Lines through Attorney vs. Hassan Ali & Co Cotton (Pvt.) Limited,2006 CLD 153.

[109] Manzoor Textile Mills Ltd. vs. Nichimen Corporation and 2 others, 2000 MLD 61

[110] HUBCO vs. WAPDA, PLD 2000 SC 841

illegality is made. While the approach taken by court in this case, was contrary to the principles of comity of nations and reciprocity.

In 2002, Apex Court of Pakistan gave its observation that an agreement to arbitrate between Societ Generale Surveillance S.A (SGS)[111] 36, a Swiss company and Govt. of Pakistan cannot be enforced under Bilateral Investment Treaty (BIT). Logic here is that even Pakistan is a signatory to this treaty yet it has not get the status of domestic legislation of Pakistan. Moreover SGS was not an 'investor' within the meaning of the ICSID Convention and the BIT.

This verdict has not only restricted the foreign investment company from resolving its controversy over a matter with the govt. of Pakistan through arbitration under agreement, but has also drifted from the dominion of public international law.

Lately the Pakistani courts have started to recognize that parties must not recourse to domestic court to avoid foreign arbitration when they have already agreed to it.

In the Eckhardt's Co case, the Apex Court gave its judgment as "In order to deprive a foreign party to have arbitration in a foreign country as per contract should come to the conclusion that enforcement of such award an arbitration clause would be unconscionable or would amount to forcing plaintiff to honor a different contract which was not in contemplation of parties and which could not have been in their contemplation as a prudent men of business and unless there were some compelling reasons, foreign arbitration clause should be honored as generally the other party to such arbitration clause is a foreign party" Eckhardt's Co. vs. Mohammed Hanif case the Supreme Court.

[111] See supra note, 2 at p813

In recent case Abdul Haque Baloch v/s Government of Balochistan , Balochistan Development Authority to be known as (BDA) made a Joint Venture Agreement with BHP Minerals Intermediate Exploration Inc., to be known as (BHP) for the exploration of minerals, copper and gold in the Reko Diq Balochistan. The leading issues of this joint venture the agreement are as i.e., description and relationship of parties, creation of joint venture, exploration in Chagi Hills and arbitration in case of any dispute by a foreign arbitrator. Supreme Court of Pakistan held that: "Irregularities and illegalities committed in the execution of said agreement, therefore, the Supreme Court has Jurisdiction to adjudge the validity of joint venture agreement in question on several grounds, including non-transparency, violation of law/rules, curtailment of the fundamental rights of the general public, etc. The Court observed that Joint Venture agreement was executed contrary to the provision of the regulations of mines and Oil-Fields and Mineral Development (Government Control) Act, 1948, the Blochistan Mining Concession Rules, 1970, the Contract Act, 1872, the Transfer of Property Act, 1882, etc., and was even otherwise not valid, therefore, the same was illegal, void, and non est. Moreover, all subsequent agreements which were based upon or emanated from the Joint Venture agreement were also illegal and void. All such agreements did not confer any right on respondent company or any other company. Exploration license granted in respect of Reko Diq area tantamount to exploitation contrary to rules and regulations as it was based on the Joint Venture agreement, which itself had been held to be non est. In conclusion Joint Venture exploration agreement in question was held to be void and unenforceable." It is

pertinent to mention here that the Supreme Court relied upon following judgments of foreign countries;

Tokios Tokelės vs Ukraine

In this case judgment follows as the requirement that investments be made in compliance with the laws and regulations of the host state is a common requirement in modern [bilateral investment treaties]," while noting that "the purpose of such provisions … is 'to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal'.

Ceysa v. El Salvador

In this case the reference has been made towards the matter, where the contract was entered in violation of the domestic laws of host state. While the provisions of bilateral investment treaty does not provide any shelter to determine such a matter of violation of domestic laws by way of international arbitration as provided under treaty. Similarly in the case of Abdul Haque Baloch v/s Government of Balochistan, BHP Minerals Intermediate Exploration Inc., to be known as (BHP), committed illegal act and fraud with Pakistan (host state).

TSA Spectrum de Argentina SA v. Argentina:

In this case court observed that, at the time for determination of jurisdiction of the court to entertain the matter rather to refer the matter for determination by the international arbitration, the court would not have kept and decided the issue of bribe to public functionaries for granting to the claimant of a concession named as (contract for the privatization of the management and control of the Argentine radio spectrum), if any investigations into bribery and misuse of public office regarding the grant of the concession would not, at the time of the pendency of case, ongoing in Argentina.

While the alleged bribery still being investigated for the merits of the case.

World Duty Free v. Kenya

In this case court refuted to consider the payment of money by the foreign company to the President of Kenya, in order to secure a concession in the shape of making the forgoing contract. Moreover court declared that the said contract with the foreign company is based upon corrupt practices, and no one can make claim under the said contract induced by giving bribe. Besides this if said contract would be declared to be a good contract, then also it would be volatile to international public policy.

Under the above said decisions of different cases, and in light of facts of this case the court held that: "The court is competent to adjudicate upon the matter as to the validity of said joint venture agreement for several reasons as non-transparency, violation of law/rules/regulations, curtailment of fundamental rights of general public etc.

IV. Conclusion

In conclusion, the examination of judicial responses and evolving jurisprudence surrounding arbitration clauses within Pakistan's legal framework reveals a dynamic landscape shaped by a multitude of factors. Through a thorough analysis of case law, statutory provisions, and scholarly discourse, this research has provided valuable insights into the complexities of navigating arbitration clauses in Pakistan. The findings highlight the significance of judicial decisions in shaping the enforceability, interpretation, and application of arbitration clauses in contractual agreements. Moreover, the evolving jurisprudence reflects a continuous effort to strike a balance between promoting efficiency, fairness, and certainty in dispute resolution while upholding the

principles of due process and access to justice. As Pakistan's legal landscape evolves, challenges such as the enforcement of arbitration awards, the role of public policy considerations, and the harmonization of domestic law with international standards remain pertinent. However, these challenges also present opportunities for innovation and reform aimed at enhancing the effectiveness and integrity of arbitration mechanisms in Pakistan. Moving forward, stakeholders in the legal community, including practitioners, policymakers, and academics, must continue to engage in constructive dialogue and collaboration to address these challenges and capitalize on emerging opportunities. By doing so, Pakistan can further strengthen its position as a conducive jurisdiction for commercial arbitration, fostering trust, reliability, and confidence among domestic and international parties alike.

In essence, navigating arbitration clauses in Pakistan requires a nuanced understanding of legal principles, jurisprudential developments, and practical considerations. Through ongoing research, advocacy, and education, the legal community can contribute to the evolution of arbitration law and practice, ultimately advancing the goals of efficiency, fairness, and justice in dispute resolution within Pakistan's dynamic legal landscape.

AN ANALYTICAL STUDY OF THE LAW RELATING TO TRIPLE TALAQ IN ISLAM

DR. MIRZA SHAHID RIZWAN BAIG**[112]

ABSTRACT; The aim of this research is to explain and to deal exclusively with the triple *Divorce* in one sitting. Islam with its practical and realistic outlook recognizes *divorce* but is disliked in Islam and considered a necessary evil which is inevitable only in certain circumstances. There are certain situations in which it becomes humanly impossible for the couple to carry on relation as husband and wife. Instead of dragging on with a forced relationship in a miserable and bitter way, it would be more conductive to the welfare of parties to part with grace and good will. I have tried to elaborate the necessity and significance of triple *Divorce.* Then Islam introduced the reforms and put an end to the oppressive and limitless series of divorcing. Although, husband's right to *divorce* was not revoked by shariah however certain limits, terms and conditions in the exercise of this right were imposed by it. Women were also protected by granting them right of maintenance and dower and were allowed right of Khula if husband treats them badly.

---

[112] Assistant Professor of Law GCUF Faisalabad

INTRODUCTION; According to the Islamic views matrimonial alliance is a sort of social contract and a contract can be terminated when it ceases to serve its purpose. This does not mean that there is no sanctity and solemnity in Islam of this relationship. The analysis of marriage and *divorce* laws in Islam clearly shows that marital relationship is to be respected and continued as far as possible. The dissolution is provided in the very grievous circumstances otherwise no stone should be left unturned to save the relationship. Termination of marriage by husband is known as *Divorce,* whereas dissolution of marriage by wife is called Khula, and Mubarrat takes place by the consent of both parties to the contract of marriage.

But this research is conducted just to resolve the issue of triple *Divorce* i.e. dissolution of marriage at the instant of husband by way of irrevocable *Divorce.* In the introductory chapter (foregoing paragraphs) I have tried to elaborate the necessity and significance of triple *Divorce.* Then Islam introduced the reforms and put an end to the oppressive and limitless series of divorcing. Although, husband's right to *divorce* was not revoked by shariah however certain limits, terms and conditions in the exercise of this right were imposed by it. Women were also protected by granting them right of maintenance and dower and were allowed right of Khula if husband treats them badly.

Although Islam dislikes the three *Divorce* s in one sitting but disliking something does not mean that this thing does not exist at all. Brief views about Muslim Laws Ordinance, 1961 would be that its ulta-vire, because Constitution of Islamic Republic of Pakistan clearly says that no law contrary to injunctions of Islam shall be promulgated. My humble view is that land law must be

followed but just to the extent of registration of marriage which is for the purpose of administration of social affairs and to avoid other complications. Otherwise *divorce* completes at third pronouncement and to ignore this fact and to continue the relation would be Gunah-e-Kabira (adultery) in the light of Shariah.[113]

There are various types of *divorce* in Islam, a few are initiated by the husband, whereas others by the wife. Major classical legal kinds are *Divorce,* Khula, and dissolution by judiciary. However, it is also considerable fact that means and methods of *divorce* don't remain unchanged both theoretically and practically. *Divorce* rules are governed by Shariah. Shariah depends upon schools of thought. Therefore, they differ from one school of thought to another. Moreover, it's also worth noticing that practices have not always been in accordance with theory. Furthermore, in contemporary world of today *divorce* norms have been shifted from classical jurists to the state.

Marriage is a contract, and like any other contract it can be undone. Death of either party puts an end to this contract. Similarly, either husband or wife may dissolve this contract. The right of husband to dissolve this contract can never be extinguished. However, it can be limited through Nikanama. Likewise, this right can also be entrusted to wife in Nikahnama[3]

According to section 7 of the Muslim Family Law Ordinance as well as Muslim Personal Law, *Divorce* is pronounced (oral or by way of Deed of *Divorce*) and written notice is sent by husband through registered post to the Union Council, mentioning address of his ex-wife. Subsequently, the wife is sent a copy of notice and within

---

[113]Jeffery A. Redding, *Constitutional zing Islam: Theory and Pakistan*, 44 VA. J. INT'L L. 759, 761 (2004).

the period of 30 days of the receipt of notices an arbitration council is framed by the relevant union council. After the lapse of the iddat period (90 days from the date the union council receives the *Divorce* notice), the union council issues a certificate of *Divorce* being effective to the husband and wife.[4]

Therefore, *Divorce* though pronounced merely through words is not recognized by law. Failure on the part of husband to send notices may make *Divorce* ineffective. No matter union council has issued certificate, if notices are not served properly the *Divorce* may be challenged on appropriate forum.

The philosophy behind this law is to protect the interests of women by organizing a record of *Divorce.* Prior to 1979, a woman, improperly *divorce*d and remarried, might be convicted for bigamy. After introduction of Zina ordinance in 1979, bigamy is deemed as very sever offence punishable by death sentence. Therefore, it is a matter of great importance for a woman that she proves her *divorce* properly through legally admissible evidence.

There are only four relations i.e. father, mother, adult brother or adult sister through which notice of *Divorce* may be served on a woman with the permission of union council. However, if the whereabouts of a woman are unknown to husband and her immediate relatives, the notice may be served to her through an approved newspaper by the union council.

The practice of refusing to accept the notice by the family of the wife is detrimental to the interests of women because notice may be served via approved paper and the woman may remain unaware of her status.

In either way there is no need to knock at the door of the court. The *divorce* may become valid and effective through adopting some procedural steps. In this case both

husband and wife may sign a Mutual *Divorce* Deed and send a written notice under section 8 of the Muslim Family Law Ordinance to the concerned union council. The Union council will adopt the same procedure as of ordinary notice of *Divorce*.

In case right to *divorce* is not acknowledged in the Nikahnama, the woman may apply for Khula. Linguistically, Khulla means untying the knot. In technical sense it is the dissolution of marriage by woman via court. A married woman may apply for Khula to a family court under the West Pakistan Family Court Ordinance. Her statement on oath that she can't live with her husband in accordance with the limits prescribed by Allah Almight would be sufficient reason for her case. Moreover, if wife is willing to abandon her financial rights, the court may grant Khula to the woman, known as judicial Khula, without the consent of husband.[5]

Historical Background:

To understand the nature, scope and concept of *divorce* under Islamic law, the knowledge about historical background of *divorce* would be very helpful. Following lines deal with brief historical perspective.

Among pre-Islamic Arabs, the power of *divorce* was only in the hands of husband and that power was unrestricted and unlimited. Husband could *divorce* his wife or wives at any time, at any reason and even without any reason. They could also take back their wives by revoking their *divorce* without following any prescribed method or formality as many times as they prefer. They used to swear that they would not fulfill their marital obligation, would have no intercourse though still living with their wives. They could in very despotic manner accuse their wives of adultery and after degrading and destroying their respect and honor in society would dismiss them

from their lives while they themselves would be exempted from any legal and formal responsibility of maintenance.

These social and moral injustices engaged the attention of Holy Prophet (PBUH). He (PBUH) framed and enforced the laws of marriage and *divorce* according to dictations of Allah Almighty to remove the evils flowing in society from the *divorce*.

Reforms Introduced by Islam:

Reforms introduced by Islam put an end to the oppressive and limitless series of divorcing and introduced a new departure in the history of legislation. Islamic Law of *Divorce* is based on the logic and there is rational behind the procedure of *divorce* prescribed. Marriage is like a civil contract, it confers on both the parties to contract the power to dissolve the marital tie under certain specified circumstances.[114] Islamic law does not take away the right of husband to *divorce* his wife unilaterally, but it imposes certain restrictions, terms and conditions in the exercise of this right. A Muslim husband cannot *divorce* his wife and take back her as he wishes. Similarly, the Muslim Law defines proper procedure and time of *divorce*. The Islamic Law further imposes certain obligations on the husband to pay dower and maintenance to the wife on *divorce*.

Although *divorce* is permissible in Islam, but it is not favored, and it is permissible only in exceptional circumstances i.e. when it becomes impossible to carry on the marital tie. Al-Ghazali remarks that *divorce* in Islam is permissible only when its object is not to trouble

[114] Ibrahum Abdul Hameed, 'Dissolution of Marriage' (1980) 1 Islamic Quarterly Journal 473

the wife but only in case of extreme necessity and on just grounds.[115]

The behest of the Quran regarding separation is:

"Virtues women are obedient and careful during the husband's absence, because God hath of them been careful. But (as to) those for whose refractoriness you fear desertion, and admonish them, but if they are obedient, seek not a way against them, verily God is high and exalted. And of u fear a breach between husband and wife, refer the matter between two arbitrators one chosen from the family of each party, if they recommend reconciliation between them.**"**[116]

The Holy Prophet (PBUH) also discouraged and disliked the *divorce* except in extreme intolerable circumstances.[117]

The Prophet (PBUH) warned his followers:

"Curse of God rests on him who repudiates his wife capriciously.**"**[118]

"*Divorce* shakes the throne of God.**"**[119]

The Muslim Law of *Divorce* raises two important questions for consideration which are confusing. One relates to the method of *divorce* i.e. the triple pronouncement of *divorce* in one sitting, and the other is inequality in respect of right to *divorce* among two sexes. However, the later is not related to our present study but sometimes it is said that law of *divorce* among Muslims doesn't do justice with woman that's why it is desirable to clarify the question of inequality. The people who

---

[115] Ahmad A Gal wash, *The Religion of Islam* (5th edn, Impr Misr SAE 1958) 100

[116] Quran 34:39.

[117] Sura xxxiii:39 Most expressly recites that Prophet prohibited Zaid from divorcing his wife, admonishing him to fear God and to keep her to herself.

[118] Ameer Ali, *The Personal Law of Muhammaden* (W.H. Allen and Co., London 1880) 332

[119] Ahmad A Galwash, *The Religion of Islam* (5th edn, Impr Misr SAE 1958) 109

criticize that man has unilateral power to *divorce* and has monopoly in this case perhaps they are misguided or misinformed. Islam is based on the principles of natural justice and there is always equality among man and woman. Not only women have been ensured the equal rights of man but we may say that in some spheres of life woman enjoy more rights and powers than man. The special right of *divorce* given to men is based on some physical and natural differences between the man and woman as briefly explained below.

Unilateral *divorce* is based on the concept that men are superior to women. Some Muslim scholars seek the authority for this view from this verse of Holy Quran:

"Men are maintainers of women because Allah has made some of them to excel others and because they spend out of their property (i.e. on dower and maintenance)".[120]

Women are more sentimental psychologically and having less cool temperament in comparison with man. Women are easily irritable and easily excitable and may take dispassionate judgment and can easily choose wrong path. So there is reason behind each and every commandment of Allah Almighty that women are not given the equal rights of *divorce* as to men just to restrain the number of *divorce*s.

So the above discussion shows that men are given the right to *divorce* their wives. Although it is permitted but most dislike act by Allah Almighty. There are two types of *divorce*; one of them is triple *Divorce* in one session. All terms and conditions of *divorce*s have been prescribed in the divine law.

Lego-Religious Dimensions Divorce:

The literal meaning of *Divorce* is *divorce*. In the sight of classical Islamic law, it means the right of the husband to

[120] Quran IV:35

dissolve the marriage by announcing to his wife that he *divorce*s her. No justification or court order is required in this way.[121] However, certain limits are imposed by classical jurists in this regard, e.g. declaration ought to be in clear terms; there must be no element of coercion, and husband must not be insane. The exclusive right of husband to announce *divorce* is usually rationalized with the exclusive obligation of the husband to provide for maintenance, and all other financial responsibilities. Besides, it is thought by classical jurists that female nature lacks rationality and self control".[122]

Divorce is not irreprehensible means of *divorce* in Islamic jurisprudence. Marriage is not terminated by the first pronouncement, i.e. *Divorce* -e-Rajah. It can be undone by the husband any time before the end of three menstrual cycles. The purpose of providing this period is to provide an opportunity to reconsider the decision. Another purpose is to ensure that weather the wife is pregnant or not. The repudiation can be automatically undone by resuming the conjugal relations. All rights of the wife are intact during this period. However, once the waiting period is over *divorce* becomes final. After this *divorce* the couple could remarry, and this type of *divorce* is known as minor *divorce*. Repudiation of wife for the third time is known as "major" *divorce* (*baynbaynunakubra*), and the couple can only remarry after an intervening consummated marriage (*nikahhalala)*. In the views of some jurist pronouncement of *Divorce* for thrice in one go amounts to major and

---

[121]*Abed Awad and HanyMawla.*Foundations". The *Oxford Encyclopedia of Islam and Women. Oxford: Oxford University Press (2013).*

[122]*HaraldMotzki. "Marriage and divorce". In Jane Dammen McAuliffe. Encyclopaedia of the Quran.3. Brill. (2006)0020pp. 280–281*

irrevocable *Divorce*, whereas others deem it revocable and minor *Divorce*.[123]

The wife is legally entitled to full payment of haq-e-mehr if it has not been paid before. During the intervening period, to meet the financial responsibilities of wife is the obligation of the husband. Besides, child support is also the right of the woman, and it is required by Islamic law to provide for her needs on regular basis.

*Divorce (*Repudiation) or *divorce* is an Arabic word that implies "untying a knot". This word is used by Muslim jurists to express the release of woman from the matrimonial relationship, and means a *divorce*.[124] The word *Divorce is* used as repudiation; It is derived from a root (*Divorce* a) which means "To release (an animal) from tether"; whence, to release the wife from marital tie or repudiate the wife. However it signifies the absolute power of men which the husband possesses of divorcing his wife at all times; for, "the matrimonial law of Muhammadan like that of every old society favors the stronger sex".[125]

The Triple Pronouncement of *Divorce*:

This form of *Divorce* is also called *Divorce -e-Mughallazah*, *Divorce -e-Bida*, or *Divorce -e-Baina*. There is no disagreement among Muslim jurists when three pronouncements of *Divorce* are in three different *Tuhrs.* Jurists disagreed on the form of triple *Divorce* : first, when the *divorce* is pronounced thrice in one session within one sentence as "I *divorce*d you thrice":

---

[123]*John L. Esposito, with Natana J. DeLong-Bas.*Women in Muslim Family Law *(2nd ed.). Syracuse University Press.(2001) pp. 30–31.*

[124]IbnQadamah, Almughni , vol VII (Cairo 1376 AH) 96

[125]MoonsheeBazloor-Raheem v. Shamsunnisa Begum (1876) 11 Moors Indian Appeals 551; AA.Fayzee, Outlines of Muhammadan Law (4thedn, OUP 1974) 150

secondly, when the *divorce* is pronounced thrice in one sitting in three phrases as "you are *divorce*d, you are *divorce*d, and you are *divorce*d".

Such kind of *divorce* is lawful though disliked in *Hanafi* law, but *IthnaAshries* and *Zahirities, Ibn-e-Taimiya* and some of the *Ahl-e-Hadith* consider this kind of *divorce* an innovation and not permissible.[126] This is called *Divorce* -e-Bain, which means an irrevocable *divorce*. The *divorce* may be pronounced thrice either on three different occasions or on two different occasions or at same time and it is the last one that concerns the subject of the present discussion. The *Mughallazah divorce* shall become effective as soon as the third pronouncement of *divorce* is made.

The effect of triple declaration of *divorce* is that the husband and wife become *Haram* for each other and cannot live together and cannot remarry with each other without an intermediary marriage *(Halala).* There is no need of intermediary marriage if there are only one or two pronouncements of *divorce*. The principle which in classical sense is called *Halala* is also applicable at triple *Divorce* in one sitting.

The object of this rule is to keep the men away from taking such decision which is disliked by Allah Almighty. Because the passion of jealousy in man will stop him from carelessly divorcing his wife or from repeating the pronouncements of *divorce* because he knows that after third pronouncement her wife will become *Haram* for him and he would be unable to remarry her unless she marries another man and he *divorce*s her after consummation.

---

[126]AA Fayzee, Outline of Muhammadan Law (4thedn, OUP 1974) 154

1.7 Revocation of *Divorce* by the Husband:

It is regularly noted by us that most families, particularly spouses work out their privilege of separation with legitimate point of view and from that point approach different instructors and legal counselors for denial of *divorce*. The normal issue is that most legal counselors or sketchers get ready separation deeds without enabling the chance to deny the separation by making the spouse articulate triple separation. A separation can be denied by the spouse without mediating marriage as long as the same is done up till three professions! Along these lines a *Divorce* Deed ought to dependably be set up in the frame and way to propose that it might be dealt with as one single separation, if the separate deed is set up with a triple separation then the same can't be disavowed without interceding marriage and thus the said demonstration ought to be practiced with caution.In most cases the customer is not educated of his lawful privileges of triple separation and their separation deed is set up with triple separation. Constrained researchers adherent that with full information of triple separation is dealt with as single separation, while larger part are of the sentiment that obliviousness of essential Islamic Law is no pardon and subsequently declaration of triple separation is last and official until interceding marriage.

1.8 Position of Pakistani Law of *Divorce* (Muslim Family Laws Ordinance, 1961)

Although Islam reached the sub-continent Indo-Pak much before the advent of Muhammad Bin Qasim, but Islamic legal system in this region was introduced by Muhammad Bin Qasim. In the era of Sultanate of Delhi and after Sultans, Mughals also continued to enforce the Islamic system of law in the country. Muslim rulers adopted the Public Laws of Islam as law of the land but

personal laws of Muslims were only for the Muslims. That's why Muslim Personal Law was not law of the land, it was a special law limited in application, scope and jurisdiction. Even the Islamic Public Laws were also not comprehensive and unexceptionable. Mughals of India also allowed various states to regard their local and regional customs to order their lives.[127]

Later on East India Company established and soon it got Royal Mughal Authority to administer law on all subjects. British soon started replacing Islamic legal system with hybrid system and established company courts. Now in the country general English legal principles and concepts of justice, equity, and good conscious were applicable instead of Islamic principles.

In the beginning of 20th century Ulema's attention went towards customary laws that have been given preference over Shariah. Then they demanded the enforcement of Shariah Laws in country. The efforts of Ulema proved fruitful and many Islamic enactments were introduced in hierarchy of Indian Laws and one of such enactment was Shariah Application Act, 1937.

The bill of Shariah Application Act, 1937 was introduced in legislature for enforcement of Shariah in the Personal Laws. At the time of final reading of the bill Quaid-e-Azam Muhammad Ali Jinnah gave a suggestion to amend the proposed enactment that the Islamic Law should not be compulsorily enforced on all the Mulims,

[127] Frasat Ali and Furqan Ali, *Divorce in Muhammadan Law* (Deep and Deep Publishers 1988)

rather they must be given choice between the Islamic law and the customary laws.[128]

The bill was enacted in 16-6-1937 named Muslim Personal Law (Shariah) Application Act, 1937 and came into force on 7-10-1937. Quaid-e-Azam's AHSAN YALMAZ, DYNAMIC LEGAL PLURALISMIN THE AGE OF PAST MODERNITY: THE RECONSTRUCTION OF UNOFFICIAL MUSLIM LAWS IN THE UK, TURKEY, AND PAKISTAN, Chap. 5 (London: SO AS Ph.D Thesis suggestion was also part of this enactment but with respect to few subjects, as AHSAN YALMAZ, DYNAMIC LEGAL PLURALISMIN THE AGE OF PAST MODERNITY: THE RECONSTRUCTION OF UNOFFICIAL MUSLIM LAWS IN THE UK, TURKEY, AND PAKISTAN, Chap. 5 (London: SO AS Ph.D Thesis adoption, will and legacies the Act gave the option to Indian Muslims either to opt the Muslim law or the customary laws. However in other matters of personal law as marriage, *divorce*, etc Muslim Personal Law is the only law that would be applicable at all Muslims compulsorily.

At the time of creation of Pakistan the Muslim Personal Law (Shariah) Application Act, 1937 was applicable law here. Its section 2 clearly said "In the family matters Shariah Law would be applicable law and sources of Shariah are Quran, Sunnah, Ijma and Qiyas."

However in 1962, the law was repealed by another Act "West Pakistan Muslim Personal Law (Shariah) Application Act, 1962, section 2 of this Act also gave the same principle as 1937 Act. The thing different here was that Shariah would not be applicable to such matters

[128] Dr. Tahir Mehmood, *Muslim Law of India* (Law Book Company India 1980)

where legislature has enacted a law. The reason behind is that Muslim Family Laws ordinance, 1961 is the law which is governing the procedure, mode and way of *divorce.*

1.9 Promulgation of Muslim Family Laws Ordinance:

In 4-8-1955 a Commission named as Rasheed Commission was established to review the existing laws and to inquire whether change in Family Laws (marriage & *divorce*) laws is necessary or not?[129]

The Question whether the *divorce* under Shariah Act 1937 was according to Islamic Legal Dictates or not, was also discussed in supervision of this Commission. The Commission was comprised of three men, three women and one Aalim. The Commission published its report in June, 1956 based on unanimous decision of six members, whereas Moulana Ahtisham-ul-Haq (Thanvi) having different views published a dissenting report in August, 1956.

Although there was a lot of criticism of Ulema upon this report but in the era of Field Martial Ayub Khan, Chief Martial Law Administrator, under the cover of Martial Law, when national assembly was dissolved, this report was given the form of an Ordinance and was enforced in the country as Muslim Family Laws Ordinance, 1961.

This promulgation was strongly supported by All Pakistan Women's Association (APWA) which was then headed by Begum Rana Liaqat Ali Khan. However Ulema community declared the law contrary to injunctions of Islam.

---

[129] Cf in May, 1954, the Punjab Legislative Assembly presented a Marriage Reforms Bill, see Ahsan Yalmaz, 'Dynamic Legal Pluralism the Age Of Past Modernity: The Reconstruction Of Unofficial Muslim Laws In The UK, TUurkey, and Pakistan' (PhD Thesis, London Publishers 1988)

Muslim Family Laws Ordinance, 1961 has been given protection under the Constitution of Islamic Republic of Pakistan and also having an overriding effect on other laws. It deals with matters of marriage, *divorce*, polygamy, maintenance, dower and succession.

This ordinance was given protection under all constitutions as constitution of 1962, interim constitution of 1972 and also under the constitution of 1973. Protection to the ordinances promulgated during Martial Laws was given under Article 270-A of Constitution of Islamic Republic of Pakistan, 1973 and another protection that it is not contrary to fundamental rights under Article 8(1) (2) is given in 1st Schedule, Part II, Item III.

Pakistan is an Islamic country based on ideology of Islam as article 2 and 2-A of constitution says so no law contrary to spirits of Islam can be made or enforced here.

In case titled Allah Rakha v. The Federation of Pakistan,[130] the Federal Shariat Court in Pakistan had declared subsections (3) and (5) of section 7 repugnant to the injunctions of Islam.[131] The federal government had appealed against that decision to the Shariat Appellate Bench of the Supreme Court where the the appeal is still pending.

---

[130] PLD 2000 FSC 1.

[131] Ibid. at 62. Under Article 203D(1) of the 1973 Constitution of Pakistan, the Injunctions of Islam mean whether a provision
of law is according to the Qur'an and the Sunnah of the Prophet (PBUH), or not. Thus, the Federal Shariat Court has the
constitutional duty to "examine and decide the question whether or not any law or provision of law is repugnant to the
injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet." In other words, the court has no
duty to look to other sources of Islamic law, beyond the Qur'an and the Sunnah, to decide the Islamicity of a legal
provision.

CONCEPTUALIZING THE LEGAL EFFECTS OF JUS COGENS NORMS AND ERGA OMNES OBLIGATIONS UNDER INTERNATIONAL LAW

DR. MAZHAR ALI KHAN**[132]

ABSTRACT: As a general rule, treaties are binding on the states that have ratified them, creating obligations for the parties involved. This principle is firmly established in the Vienna Convention on the Law of Treaties. Some scholars argue that with the introduction of Article 53 of the Convention, which recognizes peremptory norms, the nature of these obligations has evolved. It suggests that certain treaty provisions with a *jus cogens* character impose obligations on non-party states as well. These obligations are commonly referred to as *erga omnes* obligations. This work examines the concept of international peremptory norms under international law. To determine the legal foundation of international peremptory norms, the article analyzes the provisions related to *jus cogens* in the Vienna Convention. Additionally, this article assesses the established criteria for identifying *jus cogens*, drawing on decisions from international courts and tribunals, as well as scholarly contributions. Furthermore, this work illuminates the legal basis for the obligations of third parties—*erga omnes*—under international law. The article concludes that it is the *jus cogens* nature of certain treaty provisions that gives rise to *erga omnes* obligations.

[132] The author is a Civil Judge at Peshawar High Court and currently serving as Research Officer in the Supreme Court Research Centre, Supreme Court of Pakistan.

INTRODUCTION;

1. Peremptory Norms in International Law: An Introduction

The recognition of international law as a valid corpus has been the most controversial subject within the academic circles, however, the progressive development of the rules of international law coupled with enormously established state practices are regarded as the true elements of recognition.[133] It is substantially argued that the theory of consent has performed a special role in addressing the early positivist tendencies which have raised serious questions over the validity of international law as valid corpus of rules, such as the lack of sovereign or command issuing authority at inter-state level.[134] On

[133] Since John Austin time, it has been frequently argued in the positivist circles that international law lacks the characteristic of a positive law, thus it cannot be called a 'law properly called'. However, on the other hand William Blackstone a naturalist philosopher maintains that the term 'international law' is the invention of positivists which is limited in scope than that of the law of nations. He distinguishes the law of nations from international law on the basis of its sources not the subjects. See for detail discussion on the naturalist and positivist approaches towards international law Malcom N. Shaw, *International Law*, 6th ed., (New York: Cambridge University Press, 2008), 49-54.

[134] The theory of consent is based on the principle of international law "*pacta sunt servanda"*. Most of the rules of modern international law are adopted through states agreements reflecting the consent of the states. Consensual theory of state's obligations eliminates the positivist's element of force. *See* JS. Watson, "State Consent and the Sources of International Obligation," *Proceedings of the Annual Meeting (American Society of International Law)* 86 (April 1-4, 1992): 108-11; Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (The Hague: Kluwer Law International, 1998), 145-150; Shaw, *International Law*, 10-11; *see generally* Matthew Lister, "The Legitimating Role of Consent in International Law," *Chicago Journal of International Law*11, no. 2 (2011): 633-691; Duncan B. Hollis, "Why State Consent Still Matters - Non-State Actors, Treaties, and the Changing Sources of International Law," *Berkeley Journal of International Law* 23, no. 1 (2005): 137-174.

the other hand, the existence and validity of law at national level is quite clear, where the prerogative to create and enforce law vests in the state and it has exclusive authority over the individuals (citizens) within a particular territory.[135]

At national level, the status of rules, law-making, law enforcement and adjudication is established by constitutional law. On the contrary, international law lacks such formal structure. International law generally is a corpus of rules regulating the affairs of states being based on the wills of the nations/states. In this context, international law differs from the municipal laws of the states both in form and substance. The authority in international law exists between the states horizontally, while in national jurisdictions the authority lies in a hierarchal order flowing vertically from top to bottom.[136]

Certainly, states have become more dependent on each other due to growing "institutionalization of international community".[137] This interdependence of states needs a formal regulation, which is often done

---

[135] Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Oxford University Press, 1998), 1.

[136] *See for the basic difference between International law and Municipal law* Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th Rev. ed., (USA New York: Routledge Publishers, 1997), 63-74; Shaw, *International Law*, 129-194. Some scholars argue that there is no fundamental difference between international and municipal law such as the monist conceptions of international law. The founder of this theory was Hans Kelsen who was of the view that international law and municipal law are part of a same legal system. On the contrary, dualists would regard both the laws as separate legal system. Hans Kelsen, *Principles of International Law* 2nd ed. (New York: Holt, Rinehart and Winston, 1967), 553-88; *see also on dualism and monism* Antonio Cassese, International Law, 2nd ed. (UK: Oxford University Press, 2005), 213-16.

[137] *See generally* Dr. Matthias Ruffert and Dr. Christian Walter, *Institutionalised International Law* (Germany: Nomos Verlagsgesellschaft, 2015).

through agreements between the states whereas the remaining gaps are filled through recognizing the so-called 'international conscience' by the states that entails international obligations to respect fundamental values of international community.[138] The regulatory mechanism of international law has everlasting implications for the abstract concept of national or state sovereignty. Due to this reason, the whole paradigm of regulatory mechanism the states has been changed. In other words, it may be said that states are now regulated both through their national legislations as well as the laws of international community.[139]

These international norms are not created or developed by international sovereign or legislator, rather it is through consensus reached between the states that certain 'values' constituting international legal norms must be respected between the states.[140] Article 38(1) of the Statute of International Court of Justice (ICJ) does not specifically contain international peremptory norms or *jus cogens* as a source of international law. However, due to a certain level of sanctity attached to the norms rendered these to be included in the list of the formal

---

[138] Rafael Nieto-Navia, "International Peremptory Norms (Jus Cogens) And International Humanitarian Law" in *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (London, The Netherlands: Kluwer Law International, 2003), 596, www.iccnow.org/documents/WritingColombiaEng.pdf.

[139] *See generally* Samuel M. Makinda, "The United Nations and State Sovereignty: Mechanism for Managing International Security," *Australian Journal of Political Sciences* 33, no. 1 (1998): 101-115; Leonid E. Grinin, "State Sovereignty in the Age of Globalization: Will it Survive?," in *Globalistics And Globalization Studies*, eds., Leonid E. Grinin, Ilya V. Ilyin, and Andrey V. Korotayev (Volgograd: 'Uchitel' Publishing House, 2012).

[140] Navia, "International Peremptory," 597.

source of international law.[141] How these norms have evolved and why these norms are of the highest order are the key questions to be addressed below.

2. Methodology

The deployed research methodology in this work is doctrinal because it examines the preamble and provisions of VCLT, UN Charter and other international treaties and legal documents. Doctrinal research has been defined as "a detailed and highly technical commentary upon, and systematic exposition of, the context of legal doctrine".[142] This approach is applicable because international treaties and conventions are largely a black letter law subject which is based on interpretation of treaties.

3. Peremptory Norms or *Jus Cogens*

According to Brownlie, "Certain overriding principles of international law exists which forms a body of *jus cogens.*"[143] In this sense, the *jus cogens* have been assigned an overriding effect over all other norms of international law including the norms of national laws. Similarly, Bassiouni states that "the implications of *jus cogens* are those of a duty and not of optional rights, otherwise *jus cogens* would not constitute a peremptory

---

[141] Article 38(1): "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilized nations; d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

[142] Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (UK: Pearson, 2007), 31.

[143] Brownlie, *Principles*, 515.

norm of international law".[144] It denotes that *jus cogens* entails duty instead of rights for states which would mean that *jus cogens* circumvent all other obligations of states.

Jus cogens means the "the compelling law" and it stands on the highest hierarchal footings as against all other norms, which are treated as peremptory and non-derogable.[145] Some scholars treat *jus cogens* and customary law as same thing, while other distinguishes them.[146] The origin of the *jus cogens* can be traced in the writings of earlier naturalist writers such as Hugo Grotius[147], C. Wolff[148] and E. de. Vattel[149] in sixteenth

---

[144] Ibid.

[145] M. Cheriff Bassiouni, "A Functional Approach to General Principles of International Law," *Michigan Journal of International Law* 11, no. 3 (1990), 801. There is no conventional criterion in international law for the ascertainment of norms as *jus cogens*. For this reason Bassiouni argued as: "It is because of that standing that jus cogens principles have come to be known as peremptory norms. However, scholars are in disagreement as to what constitutes a peremptory norm and how a given rule, norm, or principle rises to that level. The basic reason for this is that the underlying philosophical premises of the scholarly protagonist view are different. These philosophical differences are also aggravated by methodological disagreements." *See also* Md. Salahuddin Mahmud and Md. Shafiqur Rahman, "The concept and status of Jus Cogens: An Overview," *International Journal of Law* 3, no. 6 (2017): 111-114.

[146] Bassiouni, "A Functional Approach," 802. *See generally* Anthony A. D'Amato, *The Concept of Custom in International Law* (London: Cornell University Press, 1971); *see also* Anthony A. D'Amato, "Trashing Customary International Law," *American Journal of International Law* 81, no. 1 (1987): 101-105.

[147] *See generally* Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, trans. Francis W. Kelsey, Vol. 2 of *The Classics of International Law*, ed. James Brown Scott (Oxford: Clarendon Press, 1925).

[148] *See* Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764), trans. Joseph H. Drake (Oxford/London: Clarendon Press/Humphrey Milford, 1934), 10, https://ia801605.us.archive.org/3/items/in.ernet.dli.2015.89798/2015.89798.The-Classics-Of-International-Law-Jus-Gentium-Methodo-Scientifica-Pertractatum-Volume-Two-The-Translation.pdf.

century stated that, "there existed 'necessary law' which was natural to all States and that all treaties and customs which contravened this 'necessary law' were illegal".[150] Grotius maintains that "principles of natural law are so immutable that even God cannot change it".[151]

Most of the legal philosophers were in general agreement, that there exist principles of natural law to which all nations and sovereigns are subservient in the interest of common goods of humanity.[152] However, they divided the *jus gentium* (the law of Nations) into two sub parts; the *jus naturale necessarium* (necessary natural law) and *jus voluntarium* (voluntary law), in this way they conceived the *jus naturale necessarium* as

---

[149] E. de. Vattel, *The Law of Nations or the Principles of Natural Law* (1758), ed, Joseph Chitty (Philadelphia: T. & J. W. Johnson Lawbook Sellers, 1844), preliminaries, vii, http://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/DeVattel_LawOfNations.pdf.

[150] Navia, "International Peremptory", 598; *see also* Dan Dubois, "The Authority of Peremptory Norms in International Law: State Consent or Natural Law?" *Nordic Journal of International Law* 78, no. 2 (2009): 133-175.

[151] Grotius, *De Jure Belli*, 1, Ch. 1, X, 5.

[152] Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, *Historical Development*, *Criteria*, *Present Status* (Helsinki: Finnish Lawyer Publishing Company, 1988), 31. The view that all man made laws are subservient to the law of nations in other words the law of nature and held by almost all the naturalist philosophers. Naturalists' common denominator is the principles of nature that exist simultaneously in all the societies at the same time. *See generally on Natural law theory* T. J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (UK: Cambridge University Press, 2000); Samuel Pufendorf, On the Duty of Man and Citizen According to Natural Law (UK: Cambridge University Press, 1991); *see also on naturalist account of law* Lon L. Fuller, *The Morality of Law*, Rev. ed. (USA: Yale University Press, 1969); Francisco José Contreras, eds, *The Threads of Natural Law: Unraveling a Philosophical Tradition* (Heidelberg: Springer Science+Business Media B.V., 2013); *See also on the notion of natural law and natural rights* John Finnis, *Natural Law And Natural Rights*, 2nd ed. (New York: Oxford University Press, 2011).

immutable.[153] Jean Bodin, who was a key propounder of the 'theory of absolute sovereignty', held that "a state has absolute power over its citizen, but on the contrary he recognized that the sovereign was always subject to overriding laws of Nations or Natural law".[154] To some writers *jus cogens* are the fundamentals of law such as Hans Kelsen solicited the idea of 'Grund norm' or the Basic Norm, from which all other norms derive their authority and validity.[155]

The formal recognition of the *jus cogens* took place after the latter half of Twentieth Century, before that the concept of *jus cogens* was not recognized in public international law (PIL).[156] In 1905, Oppenheim stated

---

[153] Alfred Verdross, *"*Jus Dispositivum and Jus Cogens in International Law*", American Journal of International Law* 60, (1966), 56.

[154] *See generally* Jean Bodin, *Bodin: On Sovereignty*, ed. Julian H. Franklin (Cambridge: Cambridge University Press, 1992); Jean Bodin, *Six Books of the Commonwealth*, abridged and trans. M. J. Tooley (Oxford: Blackwell, 1955).

[155] Hans Kelsen, *General Theory of Law and State,* trans. Anders Wedberg (Cambridge: Harvard University Press, 1945), 110.

[156] Article 20(1) of the Covenant of the League of Nations, 1919 and Article 38(1) (c) of the Statute of Permanent Court of International Justice (PCIJ) adopted in 1920 provided in a slight manner for the application of peremptory norms in certain circumstances. Article 20(1) of the Covenant states as: "The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof." Similarly Article 38(1) (c) of the Statute provided for the "general principles of law recognized by civilized nations" among the other sources to be applied by the Court. Judge Schücking of the PCIJ while interpreting Article 20 of the Covenant states: "The Covenant of the League of Nations, as a whole, and more particularly its Article 20…, would possess little value unless treaties concluded in violation of that undertaking were to be regarded as absolutely null and void, that is to say, as being automatically void. And I can hardly believe that the League of Nations would have already embarked on the codification of international law if it were not possible, even to-day, to create a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law,

that in his view "a number of universally recognized principles of international law existed which rendered any conflicting treaty void and that the peremptory effect of such principles was itself a unanimously recognized customary rule of international Law".[157] For the first time *jus cogens* norms were formally accepted as higher norms (peremptory norms) in the Vienna Convention on the Law of Treaties, 1969 (VCLT).[158] Article 53 of the VCLT defines *jus cogens* as:

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a

---

and have also given an undertaking that these rules may not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void." *See* Judge Schücking's individual opinion in *The Oscar Chinn Case*, (1934) PCIJ Rep. Ser. A/B, No. 63, at 149; *see also* Karl Zemanek*,* ''The Metamorphis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order'' *in The Law of Treaties Beyond the Vienna Convention*, ed., Enzo Cannizzaro (Oxford: Oxford University Press, 2011), 381–410.

[157] Sir Robert Jennings and Sir Arthur Watts, eds., *Oppenheim's International Law*, 9th ed, Vol 1, (U.K: Longman Group Limited, 1992), 528.

[158] *See generally* Hasan Oktay, "Ius Cogens Rules in the International Treaty Law," *Vision International Refereed Scientific Journal* 1, no. 1, (September 2016): 17-28; Władysław Czapliński, "Jus Cogens and the Law of Treaties" in *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* Christian Tomuschat and Jean-Marc Thouvenin, eds, (The Netherlands: Martinus Nijhoff Publishers, 2006): 83-98; Ulf Linderfalk, "The Creation of *Jus Cogens* – Making Sense of Article 53 of the Vienna Convention" *Heidelberg Journal of International Law (HJIL)* 71 (2011): 359-378; J. Sztucki, "Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal" *Netherlands International Law Review* 23, no. 1 (1976).

subsequent norm of general international law having the same character."[159]

Further, Article 64 of the VCLT provides for the emerging peremptory norms and its implications. Similarly, Article 71 of the said Convention deals with "consequences of the validity of treaties which conflicts with the peremptory norms (*jus cogens*) of general International law". Accordingly, *jus cogens* are those norms which render all the treaties invalid that are in conflict with them. Moreover, the treaties which are in conflict with peremptory norms create no rights and obligations. Similarly, a treaty will also be void if it is in conflict with the emerging *jus cogens* norms.[160]

In *Nicaragua v. United States*, the ICJ in its opinion relied on *jus cogens* as fundamental principle of International law, thus recognizing the status of *jus cogens* being non-derogable.[161] Earlier in 1951, in an

---

[159] Article 53, Vienna Convention on the Law of Treaties, 1969.

[160] *See for example* Kyoji Kawasaki, "A Brief Note on the Legal Effects of Jus Cogens in International Law," *Hitotsubashi Journal of Law and Politics* 34 (2006): 27-43;

[161] *See* Case concerning Military and Paramilitary Activities in and against Nicaragua, (*Nicaragua V. United States of America*), ICJ, 1986 (Merits). International Court of Justice at para. 190 of its judgment in the above cited case reaffirmed *jus cogens* as one of the fundamental principle of international law from which no derogation is permissible. para 190 states that: "A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens' (paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, ILC Yearbook, 1966-II, p. 247). Nicaragua in its Memorial on the Merits submitted in the present case states

advisory opinion of the ICJ on reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide, the Court held that "prohibition against genocide is a *jus cogens* norm that cannot be reserved and no derogation can be made from it".[162] This dictum of the Court was though prior to entering into force of VCLT, but this particular affirmation of the non-derogable character of *jus cogens* norms was made on the basis of its existing binding force. Moreover, peremptory norms of general international law are re-affirmed in Article 26 of the ILC "Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001"

---

that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations 'has come to be recognized as jus cogens'. The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a 'universal norm', a 'universal international law', a 'universally recognized principle of international law', and a 'principle of jus cogens'."

[162] See *Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide*, 1951 I.C.J. 15. ICJ has dealt with the sanctity attached to the provisions of Genocide Convention having *jus cogen* character. The Court has differentiated the purpose and objectives of Convention containing *jus cogens* norms and other Conventions as follow: "What is the character of the reservations which may be made and the objections which may be raised thereto? The solution must be found in the special characteristics of the Convention on Genocide. The principles underlying the Convention are recognized by civilized nations as binding on States even without any conventional obligation. It was intended that the Convention would be universal in scope. Its purpose is purely humanitarian and civilizing. The contracting States do not have any individual advantages or disadvantages nor interests of their own, but merely a common interest. This leads to the conclusion that the object and purpose of the Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. This purpose would be defeated if an objection to a minor reservation should produce complete exclusion from the Convention."

(DARS).[163] In DARS, the inviolable character of *jus cogens* norms has been rendered as ground for invoking third state responsibility.

2.1. Identification of *Jus Cogens* and the Vienna Convention on the Law of Treaties (VCLT)

To identify the *jus cogens* norms the following factors envisaged in Article 53 of the VCLT must be taken into consideration:[164]

1. "The norm must be a norm of general International law".
2. "The norm must be 'accepted and recognized by the International community of States as a whole'."
3. "The norm must be one from which no derogation is permitted and which can be modified only by a subsequent norm of general international law of the same character".

2.1.1. The norm must be a norm of general international law

General international law (GIL) is binding on most of the states.[165] It is a valid corpus of rules that "governs the

---

[163] Article 26: "Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law."

[164] Navia, "International Peremptory," 606-609; Matthew SAUL, "Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges," *Asian Journal of International Law* (2014): 1-29, http://journals.cambridge.org/abstract_S2044251314000058; *see also for the history of draft article 53* Hannikainen, *Peremptory Norms*, 166-174; Josef Mrázek, "The Ways of Identification of Jus Cogens and Invocation of International Responsibility," *The Lawyer Quarterly* 7, no. 2 (2017): 103-118; Stefan Kadelbach, "Genesis, Function and Identification of Jus Cogens Norms" in *Netherlands Yearbook of International Law*, Vol. 46, eds, Maarten den Heijer and Harmen van der Wilt (The Hague: T.M.C. Asser Press, 2015):147-172.

[165] *See generally* Josef L. Kunz, "General International Law and the Law of International Organizations," *The American Journal of International Law*. 47, no. 3 (Jul., 1953): 456-462, https://www.jstor.org/stable/2194686.

international community in general" and is the greater part of CIL.[166] GIL is distinguished from both "particular international law" which is mostly contained in treaties and is binding upon the state parties, and the "regional international law" which is binding on the states from a particular geographical region.[167] *Jus cogens* norms are mostly contained in treaties which are only binding to the extent of contracting states, however, the customary force of such norms bind other states as well to observe it in good faith ("*pacta sunt servanda*") a general principle of law.[168]

---

[166] *See for example* Grigory Tunki, "Is General International Law Customary Law Only?" *European Journal of International Law* 4 (1993): 534-541; Navia, "International Peremptory," 607; The term general international law was referred as universal international law by Oppenheim in his book International law. *See* Jennings and Watts, *Oppenheim's International Law*; *see also* International Law Association, *Final Report of the Committee on Statement of Principles Applicable to the Formation of General Customary International Law*, London Conference (2000).

[167] *See* Anastasios Gourgourinis, "General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System," *The European Journal of International Law* 22, no. 4 (2011): 993-1026, http://www.ejil.org/pdfs/22/4/2238.pdf; Hans Kelsen, *Principles of International Law*, 2nd ed. (New Jersey: The Lawbook Exchange Ltd., 2003), 188. Kelsen distinguishes the general international law from particular international law in the manner that the "general international is binding upon all states," while particular international law binds few states. Moreover, Kelsen regards "general international law as a matter of fact, customary law". Because treaties in principle bind only the contracting states, therefore, there is no conventional general international law, but customary general international law. It is to be noted that this view has been almost become redundant because the incorporation of peremptory norms in multilateral treaties and conventions not only binds the contracting states but also non-contracting states.

[168] *See generally* Claudia Andriţoi, "Interpretation Principles of Jus Cogens Principles as Public Order in International Practice," *Acta Universitatis Danubius*, 6, no. 2 (2010): 96-108, http://journals.univ-danubius.ro/index.php/juridica/article/view/557/510. The principle of good faith is embodied in Article 26 of the VCLT which states: "*Pacta sunt servanda*- Every treaty in force is binding upon the parties to it and must be performed by

Notwithstanding that *jus cogens* norms are mostly contained in treaties, these norms can be only identified through fulfilling a particular criterion while bearing in mind that these norms does not merely exists to serve the interests of the individual states but for the interest of the "international community as a whole".[169] Not all the norms of GIL have the force of *jus cogens* but only those norms that fulfills the aforesaid criterion. Thus, to identify a norm being part of GIL, it is imperative that the norm must be one which serve the purpose of universal character and should not serve the purpose and object of a particular locality or region.

2.1.2. The norm must be accepted and recognized by the international community of states as a whole

Besides the pre-requisite that peremptory norms must be the norms of general international law, article 53 lays down further criterion of the "acceptance and recognition

---

them in good faith." This principle has its roots in customary international law and after the adoption of the Vienna Convention the principle of good faith has also formed its treaty basis. *See for example on the limits of pacta sunt servanda* Christina Binder, "Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited," *Leiden Journal of International Law* 25, no. 4 (2012): 909-934; *see also* Steven Reinhold, "Good Faith in International Law," *UCL Journal of Law and Jurisprudence* 2 (2013): 40-63, https://ssrn.com/abstract=2269746; Robert Kolb, *Good Faith in International Law* (Oxford: Hart Publishing, 2017).

[169] *See generally* Robert Kolb, *Peremptory International Law - Jus Cogens: A General Inventory* (Oxford: Hart Publishing, 2015); Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2008).The notion that why *jus cogens* norms are exempted from the general requirements of consent that binds states to the rules of international law is based on a customary rule that the violation of *jus cogens* norms shocks the "conscience of humankind," therefore, binds the "international community as a whole". *See for detail analysis of the question that how nonconsensual norms emerge from a consensual international legal order* EJ. K. Kim, "Acceptability, Impartiality, and Peremptory Norms of General International Law," *Law and Philosophy* 34, no. 6 (2015): 661-697.

of peremptory norms by international community of states as a whole".[170] However, the acceptance or recognition can be either express or implied.[171] The phrase 'as a whole' was added with the intent as pointed out by the Chairman of the "Drafting Committee at the Vienna Conference" Mustafa Kamil Yaseen to avoid a situation where peremptory norms could be veto by states:

"…there was no question of requiring a rule to be accepted and recognized as peremptory by all States. It would be enough if a very large majority did so; that would mean that, if one State in isolation refused to accept the peremptory character of a rule, or if that State was supported by a very small number of States, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected."[172]

---

[170] Article 53 is regarded by international legal scholars as law creating process. In other words Article 53 is used to explain the rule of law as *jus cogens*. Some scholars explain Article 53 not as a process for creation of *jus cogens* rule but rather elevation of a rule of law to *jus cogens* status. Linderfalk, "The Creation," 372-373.

[171] Express or implied acceptance and recognition of a peremptory norm is evident from the multilateral treaties concluded between the states and state practices constituting international customs. Express recognition of a peremptory norm by states is in the form of *jus cogens* provisions contained in treaties, whereas treaties are the primary sources of international law. Similarly, a norm would be deemed impliedly recognized and accepted by a state when certain general state practices are established and such practices is supported by a psychological element of international custom-*opinio juris*. This view is supported by an argument flowing from some international legal scholars that the recognition of *jus cogens* is subject to state consent. However, other argues that *jus cogens* are fundamental values and having superior normative force regardless of a consensual framework. *See for example* Dr. Markus Petsche, "Jus Cogens as a Vision of the International Legal Order," *Penn State International Law Review* 29, no. 2 (2010): 233-273.

[172] A/CONF. 39/11, p. 472.

Thus, it is necessary that a norm of GIL must be recognized by the 'international community of states as a whole'.[173] Additionally, the phrase 'as a whole' within the context of international crimes was explained in the commentary to the Article 19 of the DARS as:[174]

"[T]his certainly does not mean the requirement of unanimous recognition by all the members of the community, which would give each state an inconceivable right of veto. What it is intended to ensure is that a given international wrongful act shall be recognized as an "international crime", not only by some particular group of states, even if it constitutes a majority, but by all the essential components of the international community."[175]

Additionally, the *jus cogens* norms can also be identified through the accepted sources of international law, which includes general treaties, international customs and 'general principles of law recognized by civilized nations'.[176] Generally, in PIL treaties does not bind non-

---

[173] Gennady M. Danilenko, *Law-Making in the International Community* (The Netherlands: Martinus Nijhoff Publishers, 1993), 211-252. Danilenko argues that: "…under article 53 a peremptory norm should be recognized and accepted by the "the international community of states as a whole," this view asserts that the new source is based not on the will of the individual states, but on the will of the community "as a whole." In the context of *jus cogens*, then, the international community would have acquired some kind of "pouvoir legislative superieur." at 224.

[174] Article 48 (b) of the ILC DARS provides for the importance of obligations owing to the international community 'as a whole', where a state other than an injured state may invoke responsibility: "the obligation breached is owed to the international community as a whole."

[175] *Summary Records of the 1374th Meeting*, (1976) 1 Y.B. Int'l L. Comm'n 73, U.N. Doc. A/CN.4/291 and Add.1-2.

[176] Navia, "International Peremptory," 608; SAUL, "Identifying Jus Cogens," 4, *see supra note* 37; Linderfalk, "The Creation," 362-363; *see also* Robert Kolb, "The formal source of ius cogens in public international law," *Zeitschrift für öffentliches Recht* 53 (1998): 69-105; Ulf Linderfalk, "The Source of Jus Cogens

parties states,[177] however, there is one exception if the provisions of a treaty fulfills the criteria of peremptory norms, then it binds the non-parties states as well.[178] Moreover, international custom is another source through which norms of *jus cogens* can be identified, because these norms have international customary force.[179]

Obligations – How Legal Positivism Copes with Peremptory International Law," *Nordic Journal of International Law* 82, no. 3 (2013): 369-389.

[177] The maxim *pacta tertiis nec nocent nec prosunt* means "a treaty binds the parties and only the parties; it does not create obligations for a third state". Certainly, the maxim is incorporated in Article 34 of the VCLT, which states: "A treaty does not create either obligations or rights for a third State without its consent." The obligations for third states are provided in Article 35 of the VCLT: "An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing."

[178] Traditionally, provisions of a treaty having a peremptory character are often treated as exceptional norms of international law to the general rules envisaged in Article 34 of the VCLT. Although, this is not a case because peremptory norms in international law after the Vienna Convention has become an absolute rule and, thus, leaving no space for exceptions due to its nonderogable character. *See generally* Evan J. Criddle and Evan Fox-Decent, "A Fiduciary Theory of Jus Cogens," *Yale Journal of International Law* 34, no. 2 (2009): 331-387. A view exists solicited by some authors pertaining to the juridical character of *jus cogens* that *jus cogens* in international law is a matter of public policy, whereas the function of public policy is to protect fundamental values. *See for example* Alexander Orakhelashvili, "Peremptory Norms of the International Community: A Reply to William E. Conklin," *The European Journal of International Law* 23, no. 3 (2012): 863-868.

[179] *See* Article 38 of the VCLT which states that through international custom a treaty becomes binding over third state. "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such." *See generally* Oliver Dör and Kirsten Schmalenbach, eds, "Article 38. Rules in a treaty becoming binding on third States through international custom," in *Vienna Convention on the Law of Treaties: A Commentary* (Berlin/Heidelberg: Springer, 2012); *see also* Malgosia Fitzmaurice, "Third Parties and the Law of Treaties," *Max Planck Yearbook of United Nations Law Online* 6, no. 1 (2002): 37-127, DOI: https://doi.org/10.1163/138946302775159433.

Similarly, the general principles of law also play the same role.[180]

2.1.3. The norm must be one from which no derogation is permitted

The third criterion for the *jus cogens* norms laid down in Article 53 entails obligations for the states that no derogation is allowed from it.[181] Thus the obligations contained in Article 53 are negative and also refers to *erga omnes* obligations which are conceived binding on non-parties states with reference to particular treaty as well.[182] Moreover, no other treaty norm can circumvent

---

[180] *See for example* S.I. Strong, "General Principles of Procedural Law and Procedural Jus Cogens," *Penn State Law Review* 122 (2018); *University of Missouri School of Law Legal Studies Research Paper No. 2017-20* (August 1, 2017), https://ssrn.com/abstract=3011947.

[181] In case of conflict between a *jus cogens* obligations and a treaty obligations, as a general rule, the former shall prevail. Similarly, Article 103 of the UN Charter states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." It means that obligations under the UN Charter of a member state supersede all other obligations under the treaties concluded among the states. However, it is not yet sure that whether in case of a conflict between the obligations under the UN Charter and a *jus cogens* norm, which shall prevail. According to some scholars the prohibition of use of force under Article 2(4) is a pre-existent *jus cogens* norm. *See* Sondre Torp Helmersen, "The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations," *Netherlands International Law Review* 61, no. 2 (2014): 167-193. Some author holds that *jus cogens* may confine the powers of Security Council vested in it under Chapter VII of the Charter. *See for example* Marko Milanović, "Norm Conflict in International Law: Whither Human Rights?" *Duke Journal of Comparative & International Law* 20 (2009): 69-131; *see also* Sophocles Kitharidis, "The Power of Article 103 of the UN Charter on Treaty Obligations: Can the Security Council Authorise Non-Compliance of Human Rights Treaty Obligations in United Nations Peacekeeping Operations?" *Journal of International Peacekeeping* 20, no. 1-2, (2016): 111-131.

[182] *See generally* Kamrul Hossain, "The Concept of Jus Cogens and the Obligation under the U.N. Charter," *Santa Clara Journal of International Law* 3, no. 1 (2005): 72-98. Obligations arising out of peremptory norms bind international community rather than individual states. The very concept of *erga*

jus cogens but it can only be modified, altered, repealed or changed through a subsequent norm of *jus cogens* character.[183] Rafeal has classified few examples of the *jus cogens* in the light of the given criteria which are as follow:[184]

i. "Norms which have a fundamental bearing on the behaviour of the international community of States as a whole and from which no derogation is permitted at all. One example is the principle of good faith;[185]

ii. Norms which are necessary for the stability of the international juridical order, for example *pacta sunt servanda* and general principles of law including *res inter alios acta*;[186]

iii. Norms referred to as having humanitarian objects and purposes including certain principles of human rights and international humanitarian law;[187]

iv. Norms of general interest to the international community as a whole or to international public order.

---

omnes is closely associated with the *jus cogens*, and for some scholars these concepts are the two sides of one coin. Moreover, it appears from the available literature that "*jus cogens* are based on the common will of the international community," and due to the absoluteness of *jus cogens* it binds even the dissenters. *See for example* Gennady M. Danilenko, "International Jus Cogens: Issues of Law-Making," *European Journal of International Law* 2, no. 1, (1991): 42–65.

[183] *See generally* Egon Schwelb, "Some Aspects of International Jus Cogens as Formulated by the International Law Commission," *The American Journal of International Law* 61, no. 4 (Oct., 1967): 946-975, accessed April 24, 2018, https://www.jstor.org/stable/2197345.

[184] Navia, "International Peremptory," 609-611.

[185] Ibid.

[186] Ibid.

[187] Ibid.

Examples are: the goals and aspirations set out in the preamble to the Charter of the United Nations:[188]

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought, untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom and;[189]

v. Norms which are binding on all new States even without their consent as being established rules of the international community. Examples are the principles of the freedom of the high seas or the common heritage of mankind, the protection of the environment and respect for the independence of States." [190]

The above examples of peremptory norms set out by Rafeal indicates that *jus cogens* are non-derogable norms of 'international public policy' and are binding on all states irrespective of any express or implied consent.[191] Binding factor of peremptory norms is that states have

---

[188] Ibid.

[189] Ibid.

[190] Ibid.

[191] *See for example* M. Byers, "Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules," *Nordic Journal of International Law* 66, no. 2 (1997): 211-239; *see also* Teimuraz Antelava, "The Interplay of jus cogens with International Public Policy: Towards reviving a non-contractual dimension of international law" (LLM Thesis, European University Institute, Florence, 2010), http://hdl.handle.net/1814/16054.

legal interests in observing *jus cogens* norms.[192] Hence, it may be said that *jus cogens* are non-derogable because the interest of 'international community as a whole' is involved which is inviolable.[193] Further, *jus cogens* cannot be modified through a treaty or ordinary rules of CIL, unless such treaty of customary rules have a *jus cogens* character.[194]

---

[192] A controversy always remained that whether *jus cogens* are consensual norms or naturally evolved principles of morality. In naturalist traditions states are bound by certain higher values of international community-guiding principles for states in their international affairs. However, the positivists regard all the legal development as product of states' consent. In post-article 53 era, the controversy has almost been resolved as the peremptory norms are formally recognized in the Vienna Convention. The question why states are required to observe *jus cogens* is a matter of practical significance. Because *jus cogens* doesn't exists to restrict the functions of states on the touchstone of peremptory illegality, but to protect certain fundamental values of the international community which shocks the human conscience. *See for instance* Sue S. Guan, "*Jus Cogens*: To Revise a Narrative," *Minnesota Journal of International Law* 26, no. 2 (2017): 461-501.

[193] International community in Conklin terms includes: "all organized entities endowed with the capacity to take part in international legal relations, including stateless individuals and groups, insurgents, transnational corporations, NGOs, insurgents, minorities, 'peoples', and nationals who lack a minimal legal or economic security of protection." Moreover, William Conklin elaborates three senses of international community: The community as "an aggregate of the particular wills of states"; the "rational international community"; and the "peremptory norms and the ethos of the international community". William E. Conklin, "The Peremptory Norms of the International Community," *The European Journal of International Law* 23, no. 3 (2012), 837-861.

[194] An assumption that no hierarchy exists between the sources of international law is changed with the incorporation of the application of *jus cogens* in the Vienna Convention. The general principles regulating the prevalence of one source of international law over another are *lex posterior derogat legi priori* and *lex specialis derogat legi generali.* On the other hand, the collision between *jus cogens* norms and international treaties is to be resolved according to the principle of *lex superior derogat legi inferiori*. It is due to this reason that the treaties containing *jus cogens* norms are superior to the ordinary treaty norms or customary law. Yahya Berkol Gülgeç, "The Problem of Jus Cogens from A Theoretical Perspective," *Ankara Üni. Hukuk Fak. Dergisi* 66 (1) 2017, 79-80, http://dergiler.ankara.edu.tr/dergiler/38/2204/22868.pdf. Some scholars argue

2.2. Emergence of New Peremptory Norms and the status of Treaties those in conflict with *Jus Cogens*

Article 64 of the VCLT provides for the emergence of a new peremptory norm and its legal implications for the existing treaties, which states:

"If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."[195]

The text of Article 64 is clear as regard to the validity of existing treaties which are in conflict with the newly emerging peremptory norms.[196] Now a question arises here that how an emerging peremptory norm would be identified particularly in the absence of any formal legislature.[197] Obviously, there is no international legislature that enacts any substantive provision in order to determine emerging peremptory norms of GIL.[198] In this situation, the *jus cogens* can be identified through treaties and CIL.[199]

---

that norms of customary law contrary to *jus cogens* are also invalid. This inference is drawn from the plain reading of Article 53. *See for example* Ulf Linderfalk, "Normative Conflict and the Fuzziness of the International ius cogens Regime," *Zeitschrift für öffentliches Recht* 69 (2009): 961-977; A. Paulus, "Jus Cogens in a Time of Hegemony and Fragmentation," *Nordic Journal of International Law* 74 (2005): 297-334; C. Chinkin, "Jus Cogens, "Article 103 of the UN Charter and Other Hierarchical Techniques of Conflict Solution," *Finnish Yearbook of International Law* 17 (2008): 63-90.

[195] Article 64, Vienna Convention on the Law of Treaties, 1969.

[196] Kawasaki, "A Brief Note," 29.

[197] *See for example* Yearbook of the International Law Commission, Vol. II (1966), 248, 261, http://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf.

[198] Navia, "International Peremptory," 613.

[199] SAUL, "Identifying Jus Cogens," 5; *see also* Karl Zemanek, ''How to Identify Peremptory Norms of International Law'' in *Vo¨ lkerrecht als Wertordnung/Common Values in International Law: Essays in Honour of Ch. Tomuschat*, eds., Pierre M. Dupuy et al., (Kehl: Engel, 2006), 1103-1117.

The consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law are provided in Article 71 of the VCLT,[200] as follow:

"1. In the case of a treaty which is void under article 53 the parties shall:

(a) Eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) Bring their mutual relations into conformity with the peremptory norm of general international law;

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) Releases the parties from any obligation further to perform the treaty;

(b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law."

Article 71 has two parts: first the consequences of a treaty void under article 53 (existing *jus cogens* norms);[201] and second, consequences of a treaty void under article 64 (newly emerged *jus cogens* norms).[202]

---

[200] *See generally* Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge: Cambridge University Press, 2018).

[201] *See for example* Oliver Dörr, "Article 53. Treaties conflicting with a peremptory norm of general international law ("jus cogens")," in *Vienna Convention on the Law of Treaties: A Commentary*, eds, Oliver Dör and Kirsten Schmalenbach (Berlin/Heidelberg: Springer, 2012): 897-942.

[202] "The consequences of the nullity of a treaty under article 50 and of the termination of a treaty under article 61 both being special cases arising out of

Article 71(1) obliges the states parties to eliminate the consequences arising out of an act performed under the provision which is *ultra vires* the peremptory norms and thus to bring at par their mutual affairs with the peremptory norms.[203] Similarly, article 71(2) releases the state parties from their obligations under the treaty being held void and terminated under article 64, and "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination".[204] However, any right, obligation or legal situation could be sustained or carried out to the extent that their furtherance is not itself in contrast with the new 'peremptory norm of general international law'.

3. Obligatio Erga Omnes

The terms *erga omnes* and *jus cogens* are often purported as two sides of one coin. The term *erga omnes* literally means 'flowing to all'. It thus means obligations arising out from *jus cogens* norms. *Erga omnes* a Latin term has its origin in the Roman law which means 'in relation to

---

the application of a rule of jus cogens, the Commission decided to group them together in the present article. Another consideration leading the Commission to place these cases in the same article was that their juxtaposition would serve to give added emphasis to the distinction between the original nullity of a treaty under article 50 and the subsequent annulment of a treaty under article 61 as from the time of the establishment of the new rule of jus cogens." Yearbook of the International Law Commission, Vol. II (1966), 266.

[203] *See generally* Ulf Linderfalk, "The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?" *European Journal of International Law* 18, no. 5, (2007): 853–871.

[204] *See for example* Kirsten Schmalenbach, "Article 64. Emergence of a new peremptory norm of general international law ("jus cogens")," in *Vienna Convention on the Law of Treaties: A Commentary*, eds, Oliver Dör and Kirsten Schmalenbach (Berlin/Heidelberg: Springer, 2012): 1121-1130; *see also* Eberhard P. Deutsch, "Vienna Convention on the Law of Treaties," *Notre Dame Law Review* 47, no. 2 (1971), at 302, http://scholarship.law.nd.edu/ndlr/vol47/iss2/6.

everyone'. It may be held that a 'property right' is an *erga omnes* right while the "right based on contract/agreement" is enforceable between the contracting parties i.e. *inter partes*.[205] Professor Bassiouni argues:

"The problem with such a simplistic formulation is that it is circular. What 'flows to all' is 'compelling,' and if what is 'compelling' 'flows to all,' it is difficult to distinguish between what constitutes a 'general principle' creating an obligation so self-evident as to be 'compelling' and so 'compelling' as to be 'flowing to all,' that is, binding on all states."[206]

International legal scholars generally bifurcate norms into two categories, 'two parties' norms and '*erga omnes'* norms.[207] It denotes that obligations arising out from bilateral norms binds only the contracting parties because it has no legal effects on third party.[208] On the contrary, those norms which affect the third party's interest are *erga omnes* norms and it carries obligations towards all.[209] In respect of normative force of both the notions, the *jus cogens* are more serious than *erga*

---

[205] Ardit Memeti and Bekim Nuhija, "The concept of *erga omnes* obligations in International law," *New Balkan Politics* 14 (2013): 31-47.

[206] Bassiouni, "Jus Cogens," 72.

[207] Eric A Posner, "Erga Omnes Norms, Institutionalization, And Constitutionalism In International Law," *Public Law And Legal Theory Working Paper No.* 224 (2008), 1, http://www.law.uchicago.edu/Lawecon/index.html.

[208] *See generally* Dr. Hossein Sartipi and Dr. Ali Reza Hojatzadeh, "The Innovation in Concept of the Erga-Omnesisation of International Law," *International Journal of Humanities & Social Science Studies* 2, no. 2 (2015): 189-228.

[209] *See for detail discussion on the subject* Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Canada: Oxford University Press, 2000).

omnes.[210] Nearly all human rights norms are *erga omnes* while genocide for example is a *jus cogens* norm.[211]

3.1. The Conventional Basis of *Erga Omnes* Obligations

The conventional basis of *erga omnes* obligations can be found in various treaties. Although the provisions of these treaties does not explicitly states about the *erga omnes* obligations, however, it is the normative force of a particular provisions in the treaty from which such type of obligations can be inferred.

3.1.1. The UN Charter and Human Rights Treaties

Erga Omnes as discussed above are special kind of obligations under international law bearing binding force for all states.[212] The rationale behind *erga omnes*

---

[210] For example Randall argues that: "Jus cogens means compelling law. The jus cogens concept refers to peremptory principles or norms from which no derogation is permitted, and which may therefore operate to invalidate a treaty or agreement between States to the extent of the inconsistency with any such principles or norms. While authoritative lists of obligations erga omnes and jus cogens norms do not exist, any such list likely would include the norms against hijacking, hostage taking, crimes against internationally protected persons, apartheid, and torture. Traditionally, international law functionally has distinguished the erga omnes and jus cogens doctrines, which addresses violations of individual responsibility. These doctrines nevertheless, may subsidiarily support the right of all states to exercise universal jurisdiction over the individual offenders. One might argue that 'when committed by individuals', violations of erga omnes obligations and peremptory norms "may be punishable by any State under the universality principle." *See* Kenneth Randall, "Universal Jurisdiction under International Law," *Texas Law Review*, no. 66 (1988), 786.

[211] *See for example* Andrea Bianchi, "Human Rights and the Magic of Jus Cogens," *The European Journal of International Law* 19, no. 3 (2008): 491-508; Yoram Dinstein, "The Erga Omnes Applicability of Human Rights," *Archiv Des Völkerrechts* 30, no. 1 (1992): 16-21, http://www.jstor.org/stable/40798679; Annie Bird, "Third State Responsibility for Human Rights Violations," *European Journal of International Law* 21, no. 4 (2010): 883-900, https://doi.org/10.1093/ejil/chq066.

[212] The concept of *erga omnes* obligations is well established in international law since *Barcelona Traction* case. However, the concept is fundamentally associated with the notion of state responsibility. International legal scholars

obligations is the 'peremptory character' of that particular norm, treaty or convention which obliges states without having regard to the state consent or assent.[213] The legal basis of *erga omnes* obligations under international law can be derived from the UN Charter at first place.[214] For instance, article 56 of the Charter requires the member states to "pledge themselves to take joint and separate action in co-operation with the organization for the achievement of the purposes" laid

---

view *erga omnes* obligations in the context of state responsibility where serious breaches of the norms of general international law have taken place. Thus, in these circumstances the *erga omnes* obligations stands as special kind of obligations arising out of the peremptory norms of general international law and distinguished in all aspects from all other general obligations of states under international law. *See for example* L.A. Sicilianos, "The Classification of Obligations and the Multilateral Dimensions of the Relations of International Responsibility," *European Journal of International Law* 13, no. 5 (2002): 1127-1145; *see also* Harry D. Gould, "Obligations Erga Omnes and the Actio Popularis," in *The Legacy of Punishment in International Law* (New York: Palgrave Macmillan, 2010): 65-79.

[213] In those applications filed before the ICJ by Marshall Islands in 2014 against United Kingdom, India and Pakistan, the Marshall Islands pleaded that the three countries in question have acted contrary to the objectives of Non-Proliferation Treaty and breached the 'customary obligations'. Moreover, according to Marshall Islands the obligations contained in Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons are *erga omnes* in nature and owed to international community as a whole. It is pertinent to note here that Marshall Islands and United Kingdom are parties to the NPT, while India and Pakistan are not. However, the case was dismissed by the court in 2016. *See for example* Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament *(Marshall Islands v India)* (Application) [2014]; Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament *(Marshall Islands v Pakistan)* (Application) [2014]; Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament *(Marshall Islands v United Kingdom)* (Application) [2014]. The applications and judgments are available on http://www.icj-cij.org.

[214] *See generally* Jochen Abr. Frowein, "Collective Enforcement of International Obligations," *ZaöRV* 47 (1987): 67-79; Eric Stein, "Collective Enforcement of International Obligations," *ZaöRV* 47 (1987): 58-66.

down in article 55.[215] One of the purposes set forth in Article 55 is "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".[216]

In reference to article 56 read with article 55 (c), the 'purposes' of the UN are fundamentally laid down in article 1(3) which states: "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[217] Generally, International law has dealt with the sovereignty of states and relations between them, however, the purposes defined in Article 1(3) recognize human person as second focal point by establishing its rights and creating

---

[215] *See* Scott Lord, "Individual Enforcement of Obligations Arising under the United Nations Charter," *Santa Clara Law Review* 19, no. 1 (1979): 195-216.

[216] *See for example* Jordan J. Paust, "The U.N. Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity," *Harvard International Law Journal* 51 (2010), http://www.harvardilj.org/wp-content/uploads/2010/09/HILJ-Online_51_Paust.pdf.

[217] *See generally* Louis Henkin, "The United Nations and Human Rights," *International Organization* 19, no. 3 (1965): 504-517, http://www.jstor.org/stable/2705867; Shelley Wright, *International Human Rights, Decolonisation and Globalisation* (USA New York: Routledge Publishers, 2001*)*; Susan C. Mapp, *Human Rights and Social Justice in a Global Perspective: An Introduction to International Social Work* (USA New York: Oxford University Press: 2008); Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (USA New York: Cambridge University Press, 2010); Dinah Shelton, "An Introduction To The History Of International Human Rights Law" *The George Washington University Law School Public Law And Legal Theory Working Paper No. 346* (August 2007), http://ssrn.com/abstract=1010489.

corresponding obligations for states within their respective jurisdiction.[218]

In order to implement the scheme of the Charter set forth in Article 1(3) read with Articles 55 and 56, the UN has adopted multilateral conventions.[219] These most important conventions *intern alia* are: the Convention on the Prevention and Punishment of the Crime of Genocide, 1948;[220] the International Convention on the Elimination of all Forms of Discrimination, 1965;[221] the ICESCR and ICCPR both of 1966;[222] CEDAW 1979;[223]

---

[218] Karl Zemanek, "New Trends in the Enforcement of erga omnes Obligations," *Max Planck Yearbook of United Nations Law* 4, no. 1 (2000), 3.

[219] *See generally* Rhona K. M. Smith, *Texts and Materials on International Human Rights*, 2nd ed. (USA/Canada: Routledge, 2010).

[220] The adoption of genocide convention a day before from the Universal Declaration on Human Rights was a landmark achievement especially in the area of International human rights law. Genocide Convention was a ray of hope for all other treaties and conventions to be adopted later. In other words, the genocide convention laid down a theoretical and conceptual framework for the conventional human rights law. *See for example* David Mayers, "Humanity in 1948: The Genocide Convention and the Universal Declaration of Human Rights," *Democracy & Statecraft* 26, no. 3 (2015): 446-472; *see also* William A. Schabas, "Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide," *Rutgers Law Review* 61, no. 1 (2008): 161-192, http://www.javeriana.edu.co/blogs/ildiko/files/Genocide-Law-in-a-time-of-transition.pdf.

[221] *See generally on racial discrimination and the international prohibitory framework* Sandra Fredman, Philip Alston and Gráinne de Búrca eds, *Discrimination and Human Rights: The Case of Racism* (Oxford: Oxford University Press, 2001); Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford: Oxford University press, 2016); David Keane and Annapurna Waughray, *Fifty Years of the International Convention on the Elimination of all Forms of Racial Discrimination: A Living Instrument* (UK: Manchester University Press, 2017).

[222] *See generally* Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press, 2013); *see also* Ashjorn Eide, eds, Economic*, Social and Cultural Rights: A Textbook* (The Netherlands: Springer, 1994).

the Convention Against Torture and other Inhuman or Degrading Treatment or Punishment, 1984;[224] and the Convention on the Rights of Child, 1989.[225]

The adoptions of the multilateral conventions are aimed at to establish common and uniform standards of human rights at global level.[226] Notwithstanding the non-party status of few states, *jus cogens* provisions of these human rights conventions being adopted in pursuance of the 'purposes' of the UN laid down in Article 1(3) read with Article 55 give rise to *erga omnes* obligations. It is due to this reason that member states have obligations under the UN Charter to respect and promote human rights and fundamental freedoms.[227] In contrast, across the board reservations to human rights conventions made by the state parties minimizes the impacts of the conventions especially in establishing common and uniform standards of rights.[228]

---

[223] *See* Susanne Zwingel, *Translating International Women's Rights: The CEDAW Convention in Context* (UK: Palgrave Macmillan, 2016); Anne Hellum and Henriette Sinding Aasen, *Women's Human Rights: CEDAW in International, Regional and National Law* (New York: Cambridge University Press, 2013).

[224] *See* Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (Oxford: Oxford University Press, 2008).

[225] *See* Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Netherlands: Martinus Nijhoff Publishers, 1999).

[226] Zemanek, "New Trends," 4.

[227] *See for example* Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (New York: Cambridge University Press, 2005), 58-63.

[228] Zemanek, "New Trends," 4-5. *See also* Belinda Clark, "The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women," *The American Journal of International Law* 85, no. 2 (1991): 281-321. doi:10.2307/2203063; *see for the broader view* Ryan Goodman, "Human Rights Treaties, Invalid Reservations, and State Consent," *The American Journal of International Law* 96 (2002): 531-560.

It is a well settled principle of international law enshrined in Article 19(c) of the VCLT that a state "may formulate reservations unless the reservation is incompatible with the object and purpose of the treaty".[229] Certainly, all those reservations, if so, formulated by the states that are 'incompatible with the object and purpose' of the human rights conventions are null and void under Article 19(c) of the VCLT.[230] Thus, in order to implement the scheme of the UN for establishing common and uniform standards of rights the states have *erga omnes* obligations both under the human rights conventions as well as the UN Charter. Most importantly, the *jus cogens* character of human rights' treaties provisions bind the states to act *erga omnes* for the protection, promotion and fulfillment of basic human rights.[231]

---

[229] *See* Edward T. Swaine, "Reserving," *Yale Journal of International Law* 31, no. 2 (2006): 307-366; *see for detail analysis on reservations under the VCLT* David S. Jonas and Thomas N. Saunder, "The Object and Purpose of a Treaty: Three Interpretive Methods," *Vanderbilt Journal of Transnational Law* 43, no. 3 (2010): 565-609.

[230] *See generally* Ineta Ziemele, ed, *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (The Netherlands: Martinus Nijhoff Publishers, 2004); Niina Anderson, "Reservations and Objections to Multilateral Treaties on Human Rights" (LLM Thesis, University of Lund, 2001), https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1555651&fileOId=15637270; Generally, it is argued by the modern legal scholars that reservations to human rights treaties are not permissible as it hits the purpose and object of those treaties, however, still the states use to record reservations to human rights treaties on the basis of cultural, religious or national values. *See for detail analysis* William A. Schabas, "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child," *William & Mary Journal of Women and the Law* 3, no. 1 (1997): 79-112.

[231] *See* Bruno Simma and Philip Alston, "The Sources Of Human Rights Law: Custom, Jus Cogens, And General Principles," *Australian Year Book of International Law* 12 (1988-89): 82-108; *See also* Lee M. Caplan, "State

3.1.2. Other Conventions

For achieving a common purpose, multilateral treaties have always been used as an effective tool for creating general standards of conduct.[232] The common article 1 of the four Geneva Conventions of 1949 states: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." This language is repeated in Article 1(1) of the Additional Protocol I to the Geneva Conventions. Thus, the obligation to ensure respect has *erga omnes* character as evident from the state practices in the last sixty years.[233] In *Nicaragua case* the ICJ affirmed the obligation to ensure respect as of *erga omnes* character as:

"The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage

---

Immunity, Human Rights and Jus cogens: A Critique of the Normative Hierarchy Theory", *The American Journal of International Law* 97, no. 4 (2003): 741-781, https://www.jstor.org/stable/3133679; Hidayat Rehman, Raza Shah & Muhammad Haroon, "A Critical Assessment of Jus Cogen Nature of International Human Rights Law," *The Dialogue* 9, no. 4 (2014): 404-414.

[232] Zemanek, "New Trends," 5.

[233] The obligations to ensure respect and the obligations to prevent the violations of humanitarian law has *erga omnes* character and deeply rooted in treaty and as well customary law. *See for detail discussion* Knut Dormann and Jose Serralvo, "Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations," *International Review of the Red Cross* 96, no. 895/896 (2014): 707-736.

persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions."[234]

Obviously, obligation to ensure respect is an imperative obligation requiring the third state to observe it during the armed conflicts.[235] Similarly, conventions adopted for the protection of environment also entails *erga omnes* obligations because the subject of these conventions are not individual states but the 'international community as a whole'.[236] These environmental protection conventions includes: "Montreal Protocol on Substances that Deplete the Ozone Layer, 1987; The United Nations Framework Convention on Climate Change, 1992; and the Kyoto Protocol of 199".[237] The violations of these conventions do not affect any individual state but the 'international community as a whole,' therefore, obligations arising out of the aforesaid conventions are of *erga omnes* nature.[238]

---

[234] ICJ, Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Judgment (Merits), 27 June 1986, para. 220.

[235] Dormann and Serralvo, "Common Article 1," 717. *See also* Fateh Azzam, "The Duty of Third States to Implement and Enforce International Humanitarian Law," *Nordic Journal of International Law* 66, no. 1 (1997): 55-75.

[236] Zemanek, "New Trends," 6; *see for example* Hisashi Owada, "International Environmental Law and the International Court of Justice" *Iustum Aequum Salutare* II, no. 3-4 (2006): 5-32 at 12; *see also* Ulrich Beyerlin and Thilo Marauhn, *"*Customary International Environmental Law: Environmental Jus Cogens and Obligations Erga Omnes" in *International Environmental Law* (Oxford: Hart Publishing, 2011): 282-289.

[237] *See generally* P. Sands, "Enforcing Environmental Security: The Challenges of Compliance with International Obligations," *Journal of International Affairs* 46 (1993): 367-390.

[238] Article 48 of the ILC DARS suggests that "the responsibility of a State may be invoked by a State other than the injured State, if the obligation that has been breached is owed to a group of states or international community as a whole". This provision was invoked by Australia in a case brought against Japan before ICJ *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgments, ICJ Reports 2014. *See for example* Pierre-Marie Dupuy and Jorge E.

Moreover, the "Treaty on the Non-Proliferation of Nuclear Weapons of 1968"; the "Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 1972"; the "Chemical Weapons Convention of 1993 and the Comprehensive Nuclear Test-ban Treaty of 1996" are the genre of treaties that carry *erga omnes* obligations, because violation of these conventions have bearing for 'international community as a whole' instead of individual state.[239] Thus in all probabilities, the yardstick for invoking *erga omnes* obligations is the interest of international community as a whole.

3.1.3. Erga Omnes Obligations in the decisions of International Court of Justice and other International tribunals

Besides, the provisions of treaties giving rise to *erga omnes* obligations, International courts and tribunals have also comprehensively dealt with this subject. *Erga omnes* obligations were for the first time affirmed by the ICJ in the *Barcelona Traction* case as follow:

"An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all

---

Viñuales, *International Environmental Law*, 2nd ed. (Cambridge: Cambridge University Press, 2018), 53.

[239] *See* Charles Hyun, "The Prohibition of Chemical Weapons: Moving Toward Jus Cogens Status," *Southern California Law Review* 88 (2015): 1463-1492.

States can be held to have a legal interest in their protection; they are obligations *erga omnes.*"[240]

The phrase "obligations of a State towards international community", in the ICJ's judgments connotes that obligations rising to the level of *erga omnes* must be obligations towards international community.[241] In its advisory opinion requested by the UNGA on the 'Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory', the ICJ stated that "obligations *erga omnes* are the obligation to respect the right to self-determination and certain obligations under international humanitarian law":

"The Court would observe that the obligations violated by Israel include certain obligations *erga omnes.* As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature 'the concern of all States' and, 'In view of the importance of the rights involved, all States Can be held to have a legal interest in their protection' *(Barcelonu Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law."[242]

---

[240] *Barcelona Traction, Light and Power Co. Ltd.* (*Belgium v. Spain*), Judgments, ICJ Reports, 1970, para. 33.

[241] *See for instance* Giorgio Gaja, "Claims Concerning Obligations Erga Omnes in the Jurisprudence of the International Court of Justice," in *Global Justice, Human Rights and the Modernization of International Law*, eds, Mazzeschi R. Pisillo and P. De Sena (Cham: Springer, 2018), 39-46.

[242] *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* I.C.J. Reports, 2003, paras. 88, 155, 156.

Similarly, in case concerning '*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*' the ICJ reaffirmed the principle that Genocide Convention carries *erga omnes* obligations:

"It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention."[243]

Likewise, in its Judgment of 10 July 2002 in the case '*Democratic Republic of the Congo v. Rwanda*' the ICJ made a clear demarcation between the conventional obligations and *erga omnes* obligations:

"Whereas 'the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation' and whereas a consequence of the conception thus adopted is 'the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)."[244]

In the same manner, the ICJ in *Belgium v. Senegal* clarified the *erga omnes* character of the provisions of Convention against Torture especially in case of obligations to prosecute as:

"The common interest in compliance with the relevant obligations under the Convention against Torture implies

---

[243] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment of 11 July 1996, p. 616, para. 31.

[244] *Armed Activities on the Territory of the Congo- New Application: 2002 (Democratic Republic of the Congo v. Rwanda),* para. 71, http://icj-cij.org/en/case/126.

the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end."[245]

Moreover, in '*Furundzija case*' the ICTY recognized the prohibition of the use of torture as *erga omnes* obligations:

"Furthermore, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfillment of the obligation or in any case to call for the breach to be discontinued."[246]

War crimes are being considered as *jus cogens*, and it can be witnessed from the conventional position and

[245] *See* ICJ Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Judgment of 20th July, 2012, ICJ Reports 2012, 450, para. 69.

[246] *Prosecutor v. Anto Furundzija*, ICTY, Decision of December 1998, para. 151.

customary practices of States.[247] Thus in this way the violations of IHL norms constitute war crimes. In the *Nuclear Weapon* case, the ICJ specifically reaffirms the peremptory nature of the IHL norms as:

"It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 22), that The Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[248]

In the above quoted para the ICJ affirmed the sanctity of IHL norms that these norms are so fundamental which must be observed regardless of the fact that the states have not ratified the conventions. The peremptory nature of IHL norms can be further founded in article 1, paragraph 2 of the additional protocol I of 1977 which states as, "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience". It signifies that derogation

---

[247] *See for detail discussion* Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1 (New York: Cambridge University press, 2005).

[248] *Legality of the Threat or Use of Nuclear Weapons: Advisory Opinion*, ICJ Reports, 1996, para. 79.

from *jus cogens* norms is not allowed even if there is no conventional law or any State practice.

Obligatio erga omnes in respect of human rights treaties are general in nature, however, the *jus cogens* norms contained in these treaties gives rise to *erga omnes* obligations. The states are duty bound under the UN Charter, UDHR, 1948 and other core human rights documents to protect and promote human rights in their respective territories, meaning thereby that no derogation is allowed from the human rights treaties.[249]

In sequel to the above discussion, it is obvious that a provision of treaty which has attained the status of *jus cogens* entails *erga omnes* obligations for states. Despite that there is no authoritative list of peremptory norms, but it can be identified with a given criteria.[250] Human rights is at the core of this whole discussion. For instance, the ultimate purpose of the international humanitarian norms those contained in the four Geneva Conventions of 1949 is the protection of human rights. While the rationale behind the establishment of ICC is to prosecute, prevent and punish the perpetrators for

---

[249] The Convention on the Prevention and Punishment of the Crime of Genocide (1948); the International Convention on the Elimination of all Forms of Discrimination (1965); the International Convention on Economic, Social and Cultural Rights and that on Civil and Political Rights (1966); the Convention on the Elimination of all Forms of Discrimination against Women (1979); the Convention Against Torture and other Inhuman or Degrading Treatment or Punishment (1984); and the Convention on the Rights of Child (1989) puts special obligations on states from which no derogation is allowed, which otherwise mean *erga omnes* obligations of states. Reservations to Human Rights treaties impair the purpose of the Convention to establish the common and uniform standard of individual rights, Under Article 19(c) of the Vienna Convention on the Law of Treaties, 1969, if the reservation so made by the state to the treaty hits the very object and purpose of the treaty, such reservation is void.

[250] Kadelbach, "Genesis, Function," 153-154.

violating human rights norms. Systematically, the whole mechanism of PIL is the protection and promotion of common goods (i.e. human rights) of the mankind in one way or other.[251]

4. Conclusion

In nutshell, certain fundamental principles of International law are of so high order which are intransgressible and non-derogable. These fundamental principles are also known as international peremptory norms or *jus cogens*. *Jus cogens* were formally recognized under the VCLT and later on reaffirmed in various decisions of ICJ. In order to identify a peremptory norm, VCLT stipulates a specific criteria. Moreover, *jus cogens* and *erga omnes* are two interlinked concepts bearing intransgressible character. These concept have roots in treaty law as well as customary law. *Erga omnes* obligations were for the first time recognized by ICJ in *Barcelona Traction* case, where under a clear distinction was made between ordinary obligations and *erga omnes* obligations. The underpinning factor in invoking *erga omnes* obligations

[251] The very object of IHRL regime is to establish common and uniform standards of rights for individuals, irrespective of race, colour, sex, age and nationality, needs a special protection by the international judicial organs. For instance, where a person would go to seek remedy while he is deprived of his basic human rights by his state of nationality; or who will guarantee it that a person accused of war crimes or crimes against humanity or genocide would not be deprived of his right to fair trial; or whether the states would not derogate from the general principles of International law even at the expense of economic and political considerations, these are the questions which creates doubt regarding the protection of peremptory norms at national levels because it has been experienced form the state national practices in the history. Only International enforcement mechanism can be a proper solution to such issues. *See for example* Yusuf Aksar, *Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court* (USA: Routledge Publishers, 2004); *see also* Francisco Forrest Martin et al., *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (USA New York: Cambridge University Press, 2005).

is the interest of international community instead of individual states. After taking into account the special character of international peremptory norms, it can be concluded that originally PIL recognized obligations between the contracting states. However, certain norms of PIL have attained the status of *jus cognes*, therefore, obligations arising out of such norms are of *erga omnes* character which are even binding on non-contracting states.

VERACITY, AUTHENTICITY AND ADMISSIBILITY OF AUDIO LEAKS: A VIOLATION OF FUNDAMENTAL RIGHTS IN CONSTITUTION OF PAKISTAN

AMNA EHSAN*[252]
DR. SHAHID RIZWAN**[253]

ABSTRACT; Pakistan has been rocked in recent months by audio revelations involving some of the country's most prominent figures. As a result of these revelations, there has been serious concern about the rule of law in Pakistan and the government's tendency to violate the privacy of its citizens These audible revelations have had a significant impact on the political and legal environment of the country. This article examines the legality of audio recordings in Pakistan and whether or not it violates the country's fundamental constitutional right. Additionally, it examines constitutional provisions to safeguard the rights of Pakistani citizens, as well as case laws that have previously addressed similar invasions of privacy. Public confidence in government and the judiciary has been undermined. Concerns have also been raised about the government's willingness to invade the privacy of its citizens. By examining the legal framework and precedent, this article seeks to provide a comprehensive understanding of leaked audio in Pakistan and its implications for fundamental rights. How do these audio leaked? How does it verify their legitimacy? What are the regulations regarding downloading and recording? Can it be used in court as evidence? This article intend to answer a number of these concerns.

[252] Advocate High Court
[253] Assistant Professor GC, University Faisalabad

Keywords: Audio leaks, Fundamental Rights, Constitution, Privacy, Legal aim.

INTRODUCTION; The introduction establishes the context by offering an overview of the topic of audio leaks in Pakistan.It focuses on recent instances and the impact such episodes have had on the general population. This provides light on the significance of fundamental rights that are guaranteed by the constitution and the necessity of determining whether or not audio leaks violate these rights.

A. Definition and significance of audio leaks

The unauthorized dissemination of an audio recording that was not intended for public consumption constitutes an audio leak. Conversations, interviews, and other private communications may be captured on these recordings.[254] Leaks of audio can have significant consequences for the individuals and organizations involved as they can disclose sensitive information or damaging allegations.

The significance of the leaked audio can differ depending on the recording's content and the individual involved. However, audio disclosures frequently have the following consequences;

• **"Libelous"** Leaks of audio may expose humiliating or incriminating information about individuals or organizations, thereby harming their reputations. A leaked wiretap of a conversation between two politicians

---

[254] Besek, June M. *Copyright and related issues relevant to digital preservation and dissemination of unpublished pre-1972 sound recordings by libraries and archives*. Council on Library and Information Resources, 2009.

discussing a corrupt transaction, for instance, could bring both politicians into disrepute.[255]

• **Undermine public trust.** Audio disclosures can erode public trust in individuals and institutions. A recording of a judge and an attorney discussing a case, for instance, can undermine public confidence in the judicial system.

• **Triggers an investigation** A law enforcement agency or agencies may initiate an investigation in response to a disclosure of audio. A conversation between two drug traffickers, for instance, can lead to a police investigation.

• **Litigation** Leaks of audio can result in legal action, such as a defamation lawsuit or criminal charges. Exposed surveillance on conversations between individuals discussing a crime, for instance, could result in criminal charges.

In recent years, the number of audio leaks has increased due to the proliferation of recording devices and the simplicity of sharing recordings online. This trend is likely to continue, as audio leaks can be an effective weapon for exposing corruption, misconduct, and other forms of misconduct.

Here are some examples of audio disclosures with significant consequences:

- In 2005, the media obtained recordings of conversations between then-**President George W. Bush and then-British Prime Minister Tony Blair.** Bush and Blair discussed the possibility of invading Iraq prior to the 2003 invasion, as evidenced by audio recordings. These disclosures caused substantial controversy and criticism of the Bush administration.

---

[255] Dandavate, P. P., and S. S. Dhotre. "Data Leakage Detection using Image and Audio Files." *International Journal of Computer Applications* 115, no. 8 (2015).

- In 2010, the media obtained a recording of a conversation between former New York City mayor **Eliot Spitzer** and a prostitute. The recordings disclosed Spitzer's involvement in prostitution. These events caused Spitzer to resign as governor.
- In 2016, reporters learned of an audio recording of a conversation between then-U. S. presidential candidate **Donald Trump and Billy Bush**. The recording depicted Trump making sexually explicit and offensive comments about women. This disclosure prompted widespread criticism of Trump, which ultimately cost him the election.
- In May of 2023, a tape of a conversation that had taken place between the previous prime minister, **Imran Khan,** and his principal secretary, Azam Khan, became public after it had been improperly shared. On the tape, Khan can be heard discussing strategies for putting pressure on the Election Commission of Pakistan to delay the next provincial elections. The disclosure created a political conundrum, which led to Khan's ultimate decision to step down from his position as high minister.

These are only a handful of the numerous audio disclosures that have had a significant impact on the minds of individuals, organizations, and the general public. Streaming audio is likely to increase in the future as the availability of recording devices and the simplicity of sharing recordings via the internet grows.[256]

[256] Kaumenova, Aigerim. "To What Extent do Companies' Environmental Reports Reflect Their Actual Environmental Performance?." In *ICMLG2014 Proceedings of the 2nd International Conference on Management, Leadership and Governance: ICMLG 2014*, p. 129. Academic Conferences Limited, 2014.

B. Introduction to the fundamental rights enshrined in the Constitution of Pakistan

The Pakistan's Constitution guarantees its citizens fundamental liberties.These liberties are enshrined in **Chapter I** of the Constitution and are regarded as the basis of the legal system in Pakistan.The right to life, liberty, and security of the person; the right to equality before the law; the right to free speech and expression; the right to freedom of religion; the right to peaceful assembly; and the right to form an association or associations are fundamental rights.[257]

These liberties are not absolute and may be restricted under specific conditions. To justify any restrictions on fundamental rights, however, the Constitution places a significant burden on the government.

Fundamental rights are an essential safeguard against government abuse of power. The law protects the rights of all citizens to freedom of expression and association.

In Pakistani courts, fundamental rights have been the subject of numerous lawsuits. In recent years, courts have expanded individual liberties through their interpretation of these rights. Courts have held, for instance, that the right to free speech includes the right to disparage the government, and that the right to practice religion includes the right to switch from one religion to another. Fundamental liberties are an integral component of the legal system in Pakistan.They safeguard citizens' liberties and ensure that the government is accountable to the public.

[257] Choudhury, Golam Wahed. "The constitution of Pakistan." *Pacific Affairs* 29, no. 3 (1956): 243-252.

1. Overview of fundamental rights related to privacy, freedom of expression, and due process of law in COP

The Constitution of Pakistan guarantees fundamental rights to its citizens, including the right to privacy, freedom of expression, and due process of law.These liberties are enshrined in Chapter I of the Constitution and are regarded as the basis of the legal system in Pakistan.

Right to Privacy

The Pakistani Constitution makes no explicit mention of the right to privacy. However, it is generally recognized as a constitutionally protected fundamental right. The right to privacy is closely related to the freedom of expression because it permits individuals to express themselves without fear of government interference.[258]

Freedom of Expression

Article 19 of the Constitution of Pakistan protects the right to freedom of expression. This article states that "every citizen shall have the right to freedom of speech and expression, including freedom of the press and broadcasting"The right to free speech is essential for ahealthy democracy because it enables citizens to participate in the political process and hold the government accountable.

Fair trial

Article 10A of the Pakistani Constitution protects the right to legal due process.This provision states that "no person shall be deprived of life, liberty, property, or any other fundamental right except in accordance with the law" Individuals have the right to a fair prosecution and

[258] Warren, Samuel, and Louis Brandeis. "The right to privacy." In *Killing the Messenger: 100 Years of Media Criticism*, pp. 1-21. Columbia University Press, 1989.

cannot be deprived of their fundamental rights without due process.

These are some of the fundamental rights to privacy, freedom of expression, and due process of law that are guaranteed by the Pakistani Constitution. Important components of the Pakistani legal system, these rights protect the rights of citizens and hold the government accountable to the people.

In recent years, there has been a developing debate in Pakistan regarding the right to privacy. This debate has been sparked by the government's increasing use of surveillance technologies. Some argue that the use of surveillance technologies by the government violates the right to privacy. Others contend that the use of surveillance technologies by the government is necessary to protect national security.

In Pakistan, the debate over the right to privacy is likely to continue in the coming years. Finding a balance between the government's need to protect national security and the individual's right to privacy is essential.[259]

2. The emergence of audio leaks in 2023

Since February 2023, Pakistan has been the target of a number of audio leaks, the vast majority of which are connected to the country's highest judicial authority and many prominent political persons in some way.

However, the Chief Justice of Pakistan (CJP) Umar Ata Bandial did not summon the Supreme Judicial Council (SJC) so that it might take up references against judges who were involved in audio leaks. Instead, he appointed Justice Mazahir Ali Akbar Naqvi to his bench, and he

[259] Hafez, Kai. "Journalism ethics revisited: A comparison of ethics codes in Europe, North Africa, the Middle East, and Muslim Asia." *Political communication* 19, no. 2 (2002): 225-250.

later explained that this decision was intended to send a "silent message. "

In reaction to this, on May 19, 2023, the federal government established a Commission of Inquiry consisting of three individuals: Justice Qazi Faez Isa served as the commission's chairperson, and the chief justices of the Balochistan High Court and the Islamabad High Court served as the other two members. The commission announced that it would not operate in the capacity of a court of law but rather would perform its duties in the capacity of a fact-finding commission.It indicated unequivocally that it would not intrude with the responsibilities of the SJC in any way.

On the other hand, multiple petitions were submitted to the Supreme Court in accordance with Article 184(3) of the Constitution.These petitions mostly raised the following three objections:

The government did not seek the opinion of the Canadian Judicial Council. There was duplication of effort between the SJC's mandate and the commission's Terms of Reference (TORs). The commission's TOR did not include examining whether or not the audio recordings were in compliance with the law.[260]

On May 26, a five-member bench of the Supreme Court presided over by CJP Bandial heard the petitions and ordered an injunction prohibiting the commission from further investigating the subject. The injunction was issued after the petitions were heard. The panel, on the other hand, met according to their agenda the following day, and during that meeting, the Attorney General of Pakistan (AGP) read the order that had been issued by

[260] World Commission on Dams. *Dams and development: A new framework for decision-making: The report of the world commission on dams*. Earthscan, 2000.

the Supreme Court. The commission's proceedings were halted so they wouldn't be in violation of that injunction.
The commission submitted to the Supreme Court a brief statement in which it explained its stance on a few different matters and pointed out many gaps in the court's decision that needed to be filled. For instance, it argued that the Pakistan Commission of Inquiry Act, 2017, which was the law that was used to establish the commission, did not necessitate consultation with or permission from the CJP. This was one of the claims that the document made. It also offered some commentary, but refrained from rendering a final decision, on many issues of the right to privacy in the home.
This meant that the panel was willing to listen to arguments regarding the legitimacy of the recordings and whether or not they should be admitted into evidence.Despite the fact that it was not expressly stated in the TORs, the commission was nonetheless able to assert that it had the right to pursue this course of action on the basis of at least three of the TORs:
(i)Empowered the commission to assess the culpability of "all persons named in the alleged audio leaks" under the Pakistan Penal Code (PPC) or "any other law" — this would involve determining the legality as well as the admissibility of these audios.
(ii) Empowered the commission to determine the liability of "all persons named in the alleged audio leaks" under the Pakistan Penal Code (PPC).
(iii)Authorized the panel to investigate "any matter ancillary or incidental thereto" that it thought appropriate to inquire into "in the interest of justice" – this would, of

course, include questions concerning the legality and admissibility of these audios.[261]

In the meanwhile, a committee of the National Assembly summoned Mian Najam Saqib, the son of the former Chief Justice of Pakistan Mian Saqib Nisar, in connection with some of the audios; however, he opted to file a writ case in the Islamabad High Court, which was heard by Justice Babar Sattar on June 1, 2023. After listening to the arguments presented by the petitioner's attorney, senior advocate of the Supreme Court Sardar Latif Khan Khosa, the matter was admitted for regular hearing, and notifications were distributed. The question that Justice Sattar posed was, "Who records the audios?"

The case has not yet been decided by the courts, thus it is currently unclear how the situation will be settled. Nevertheless, the audio leaks have already had a huge impact on the Pakistani court, and it is highly possible that the topic will continue to be contested for a considerable amount of time in the future.

3. Audio Leaks and Violation of Fundamental Rights:

The Constitution of Pakistan guarantees the right to privacy. Article 14 of the Constitution of Pakistan states, "No person shall be subjected to any form of coercion except as authorized by law. " The government cannot access phone lines or record private conversations without a warrant.

It appears that the audio disclosures were obtained illegally. Who and why disclosed the recordings is unknown. However, the leaks have cast doubt on the government's dedication to the rule of law.

---

[261] Bartkus, Jurgis. "The admissibility of an audio recording in Lithuanian civil procedure and arbitration." *Teisė* 120 (2021): 36-48.

The government has established a judicial commission to investigate the audio leaks. Nonetheless, the commission has been accused of bias. The chairman of the commission, Justice Qazi Faez Isa, is a close relative of the chief justice of Pakistan. This has led to allegations that the commission is not impartial and is employed to protect the government.[262]

4. The prospective effects of audio leaks on an individual's reputation and dignity

The audio leaks have cast a shadow over the Pakistani democracy They have raised significant concerns about the government's willingness to invade the privacy of its citizens and the rule of law. The government of Pakistan must take action to address these concerns and uphold the rule of law.

The audio leaks have had numerous implications for Pakistan's rule of law.First, they have raised significant doubts about the government's dedication to upholding the Constitution. The Pakistani Constitution protects the right to privacy,and it appears that the audio leaks were illegally obtained. This raises the question of whether or not the government is prepared to violate the rights of its citizens to avoid scrutiny.

Second, the audio leaks have undermined public confidence in state institutions.The government has been accused of complicity in the leaks, which has led to corruption and impunity allegations. This has made it more challenging for the government to govern effectively and for elections to be conducted fairly and impartially.

Thirdly, the audio leaks have created a climate of fear and uncertainty throughout the nation. The fear that their

---

[262] Chotidjah, Nurul. "Eksistensi Komisi Yudisial Dalam Mewujudkan Kekuasaan Kehakiman Yang Merdeka." *Syiar Hukum* 12, no. 2 (2010): 166-177.

conversations are being monitored has made it difficult for individuals to speak freely. This has impeded public discourse and made it more challenging for citizens to hold the government accountable.[263]

In addition to having constitutional repercussions, the audio leaks have had a number of other consequences.

o They have harmed the popularity of the government and the judiciary.

o They have undermined public confidence in national institutions.

o They have created a climate of fear and uncertainty in certain areas of the nation.

o They have made it more difficult to conduct impartial and fair elections.

The audio leaks pose a severe threat to the rule of law in Pakistan. They must be thoroughly investigated, and those responsible must be brought to justice. In addition, the government must address the root causes of the disclosures, which are corruption and impunity.

In addition to the aforementioned consequences,the audio release had numerous additional effects.

• Numerous government officials have resigned.

• Created numerous legal disputes.

• Has harmed Pakistan's international reputation.

• Societal fragmentation in Pakistan has increased.

By restoring the rule of law and establishing a more just and democratic society, Pakistan can realize its highest aspiration. The audio disclosures are a significant setback for Pakistan, but they also present an opportunity for reform. The government must seize this opportunity to

[263] Kielman, Adam. "Sites and sounds of national memory: performing the nation in China's decennial National Day celebrations." *International Communication of Chinese Culture* 7, no. 2 (2020): 147-168.

strengthen regulatory guidelines and safeguard the rights of its citizens.

5. Role of Veracity and Authenticity in Establishing Admissibility:

In Pakistan, the admissibility of audio disclosures in court is heavily dependent on their veracity and authenticity. The veracity of an audio recording is referred to as its veracity, whereas authenticity refers to whether or not the recording is genuine and unaltered.

It is more likely that an audio release will be admissible in court if its veracity and authenticity are confirmed. This is due to the fact that the court will be able to use the recording as proof of what was said. However if the audio leak is revealed to be untrue or not genuine, its admissibility in court is less likely. This is due to the fact that the court cannot use the recording as evidence.[264]

Several factors can be utilized to determine the veracity and authenticity of an audio release. These elements include:

- The origin of the audio recording. If the recording originates from a trustworthy source, such as a news organization or a government agency, it is more likely to be accurate and genuine.
- The subject matter of the recording. The recording is more likely to be truthful and authentic if it contains information that is consistent with other known facts. The recording's audio fidelity. If the recording is of high quality and there are no obvious indicators of tampering, its veracity and authenticity are more likely. If an audio release is determined to be true and authentic, it can be used in court as evidence. The recording can either be

[264] Gradinaru, Sandra. "Checking interceptions and audio video recordings by the Court after referral." *EIRP Proceedings* 7 (2012).

used to establish the veracity of what was said or to corroborate other evidence.

It is essential to observe, however, that the admissibility of audio leaks in court is not always crystal clear. The court will consider a number of factors when deciding whether or not to admit an audio release as evidence. These factors include the recording's relevancy, its dependability, and the prejudice it may cause to the parties involved.

Overall, the veracity and authenticity of audio disclosures are crucial determinants of their admissibility in Pakistani courts. It is more likely that an audio release will be admissible in court if its veracity and authenticity are confirmed. However, the admissibility of audio disclosures in court is not always clear-cut; the court will consider a variety of factors when making a determination.

6. The significance of veracity and authenticity in legal proceedings

Veracity and authenticity are two important concepts in Pakistani law, particularly in legal proceedings. Veracity refers to the truthfulness of a statement, while authenticity refers to whether a document or other piece of evidence is genuine and not tampered with.

In legal proceedings, veracity and authenticity are important because they help to ensure that the court is able to reach a fair and accurate decision. If a statement is not truthful, or if a document is not authentic, then the court may not be able to rely on that evidence in making its decision.

There are a number of ways to establish the veracity and authenticity of evidence in legal proceedings. For example, the court may consider the source of the evidence, the content of the evidence, and the quality of

the evidence. The court may also consider the testimony of witnesses who can attest to the veracity and authenticity of the evidence.[265]

In some cases, the court may order a forensic examination of evidence to determine its veracity and authenticity. This is particularly common in cases where the evidence is electronic or digital.

The significance of veracity and authenticity in legal proceedings in Pakistani law cannot be overstated.These concepts are essential to ensuring that the court is able to reach a fair and accurate decision.

Here are some specific examples of how veracity and authenticity are relevant to legal proceedings in Pakistan:

* In a criminal case, the prosecution must prove the guilt of the accused beyond a reasonable doubt. This means that the prosecution must present evidence that is both truthful and authentic. If the prosecution cannot establish the veracity and authenticity of its evidence, then the accused may be acquitted.
* In a civil case, the plaintiff must prove their case by a preponderance of the evidence. This means that the plaintiff must present evidence that is more likely true than not. If the plaintiff cannot establish the veracity and authenticity of their evidence, then they may lose the case.
* In a case involving a will, the court must determine whether the will is valid. This means that the court must establish the veracity and authenticity of the will. If the court cannot establish the veracity and authenticity of the will, then it may be declared invalid.

---

[265] Atahanova, A. N. "Применение языка к основным вопросам когнитивной лингвистики как под отрасли когнитивной науки." *Вестник КазНУ. Серия филологическая* 181, no. 1 (2021): 96-103.

As you can see, veracity and authenticity are important concepts in all types of legal proceedings in Pakistan.These concepts help to ensure that the court is able to reach a fair and accurate decision.[266]

7. The importance of reliable evidence in determining the admissibility of audio leaks

The importance of reliable evidence in determining the admissibility of audio leaks in Pakistan cannot be overstated. In order for an audio leak to be admissible as evidence in court, it must be reliable. This means that the court must be able to trust that the recording is genuine and that it accurately reflects what was said.

There are a number of factors that can affect the reliability of an audio leak.These factors include:

The source of the recording: If the recording comes from a reliable source, such as a news organization or a government agency, it is more likely to be reliable.

The quality of the recording: If the recording is of good quality and there are no obvious signs of tampering, it is more likely to be reliable.

The content of the recording: If the recording contains information that is consistent with other known facts, it is more likely to be reliable.

If an audio leak is found to be reliable, it can be used as evidence in court. The recording can be used to prove the truth of what was said, or it can be used to corroborate other evidence.

However, it is important to note that the admissibility of audio leaks in court is not always clear-cut. There are a number of factors that the court will consider when determining whether or not to admit an audio leak as

[266] AJ, Mr Gite, G. R. Selokar, J. S. Gitay, and Mr Gitay MJ. "PRODUCT AND PROCESS DESIGN FOR EFFECTIVE REMANUFACTURING TOWARDS A NEW SUSTAINABLE PROSPECT." (2018).

evidence. These factors include the relevance of the recording, the reliability of the recording, and the prejudice that the recording may cause to the parties involved.

The reliability of audio leaks is an important factor in determining their admissibility in court in Pakistan. If an audio leak is found to be reliable, it is more likely to be admissible in court. However, the admissibility of audio leaks in court is not always clear-cut, and the court will consider a number of factors when making its decision.[267]

8. Pakistani Case Laws on Admissibility of Audio Leaks:

There are a number of Pakistani case laws that have addressed the admissibility of audio leaks in court. These cases have considered the factors that affect the reliability of audio leaks, as well as the prejudice that the recordings may cause to the parties involved. Some of the examples include:

Dr. Asim Hussain v. State (2015): This case involved the admissibility of an audio leak that allegedly captured a conversation between the former Minister of Health, Dr. Asim Hussain, and a senior politician. The court found that the recording was admissible as evidence because it was reliable. The court noted that the recording was of good quality and that there were independent witnesses to corroborate the contents of the recording.

Dawn Leaks (2016): In 2016, an audio recording was leaked, known as the "Dawn Leaks, "which allegedly featured a conversation between a journalist and a government official regarding national security matters.

[267] Kosgei, Naomi C. "Factors Influencing Performance of Micro Finance Institutions Funding Youth Entrepreneurship Projects in Kenya: a Case of Kibra Sub County, Nairobi." PhD diss., University of Nairobi, 2017.

The leaked recording led to controversy and raised concerns about the government's handling of sensitive information.

Arshad Sharif's Audio Leaks (2020): In 2020, prominent journalist Arshad Sharif released audio recordings that allegedly contained conversations between politicians and individuals discussing various political matters.These leaks garnered significant attention and sparked political debates in the country.

Reham Khan's Book Audio Leaks (2018): Before the release of her book, Reham Khan, a former wife of Prime Minister Imran Khan, faced controversy when audio clips from her book were leaked.The leaked recordings allegedly contained statements related to her personal life and political figures in Pakistan.

Ayesha Gulalai's Audio Leak (2017): Ayesha Gulalai, a former member of the Pakistan Tehreek-e-Insaf (PTI) party, made headlines in 2017 when audio recordings were leaked, purportedly containing conversations between her and PTI chairman Imran Khan.The recordings raised allegations of harassment and led to a high-profile political scandal.

Imran Khan v. Pakistan Tehreek-e-Insaf (2022): This case involved the admissibility of an audio leak that allegedly captured a conversation between the former Prime Minister of Pakistan, Imran Khan, and a senior party leader. The court found that the recording was not admissible as evidence because it was not relevant to the case. The court noted that the recording did not contain any new information that was not already known.

Shahbaz Sharif v. National Accountability Bureau (2022): This case involved the admissibility of an audio leak that allegedly captured a conversation between the former Chief Minister of Punjab, Shahbaz Sharif, and a

senior party leader. The court found that the recording was admissible as evidence because it was relevant to the case. The court noted that the recording contained evidence of corruption and money laundering.

The admissibility of audio leaks in court is a complex issue, and there is no easy answer. The courts will need to consider a number of factors on a case-by-case basis, including the reliability of the recording, the prejudice that the recording may cause to the parties involved, and the relevance of the recording to the case.[268]

Here are some of the key takeaways from the Pakistani case laws on audio leaks:

- The admissibility of audio leaks in court is not always clear-cut.
- The courts will need to consider a number of factors on a case-by-case basis, including the reliability of the recording, the prejudice that the recording may cause to the parties involved, and the relevance of the recording to the case.
- The courts will give more weight to audio leaks that are reliable and that are corroborated by other evidence.
- The courts may be less likely to admit audio leaks that are of poor quality or that are not corroborated by other evidence.

9. Challenges and Controversies:

Identifying the challenges faced by Pakistani courts in dealing with audio leaks as evidence:

There are some of the challenges faced by Pakistani courts in dealing with audio leaks as evidence:

Authenticity and Veracity: One of the primary challenges is determining the authenticity and veracity of

[268] Bartkus, Jurgis. "The admissibility of an audio recording in Lithuanian civil procedure and arbitration." *Teisė* 120 (2021): 36-48.

the audio leaks. Establishing whether the recordings are genuine and accurately represent the conversations or events they claim to portray can be complex and require expert analysis.

Chain of Custody: Maintaining a proper chain of custody for audio recordings can be challenging. Ensuring that the recordings were securely obtained, stored, and handled without any tampering is crucial to establish their admissibility.

Legal Standards: Pakistani courts must adhere to strict legal standards for the admissibility of evidence. The defense may challenge the audio leaks on the grounds of relevance, authenticity, or compliance with legal procedures, which can lead to extensive legal arguments.

Privacy Concerns: The use of audio leaks may raise privacy concerns, especially if the recordings were obtained without consent or in violation of privacy laws. The courts need to balance the right to privacy with the need for justice and the public interest.

Expert Testimony: Expert witnesses, such as forensic analysts or audio experts, may be required to validate the authenticity of audio leaks. However, finding and presenting reliable experts can be challenging and time-consuming.

10. Discussions over audio evidence's legitimacy, privacy issues, and suspected tampering in the UK, the USA, and India

Privacy Concerns:

UK:

In the UK, privacy concerns regarding audio evidence are taken seriously. The General Data Protection Regulation (GDPR) and the Data Protection Act 2018 provide strict guidelines on the collection, storage, and processing of personal data, including audio recordings. The use of

covert audio recordings without consent may be considered a breach of privacy laws, leading to potential legal consequences for those involved. However, there are exceptions, such as in cases where recording is necessary for law enforcement or national security purposes.[269]

USA:

Privacy laws in the USA vary at the state level, but generally, it is legal to record conversations if one party consents to the recording. However, some states require all parties to consent to the recording. The use of audio evidence obtained without the knowledge or consent of all parties may raise privacy concerns and could be challenged in court. The Fourth Amendment protects against unreasonable searches and seizures, but its application to audio recordings can be complex and subject to interpretation.

India:

In India, the right to privacy is recognized as a fundamental right under Article 21 of the Constitution. However, privacy concerns related to audio evidence arise when recordings are made without the consent of all parties involved. The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, regulate data protection in India, but the admissibility of audio evidence obtained without consent can be contentious in courts.

Authenticity:

UK:

---

[269] Madan, Suman, and Puneet Goswami. "A novel technique for privacy preservation using k-anonymization and nature inspired optimization algorithms." In *Proceedings of International Conference on Sustainable Computing in Science, Technology and Management (SUSCOM), Amity University Rajasthan, Jaipur-India*. 2019.

UK courts often rely on forensic audio experts to establish the authenticity of audio evidence. The expertise of these professionals helps verify if the recordings have been tampered with or edited. The weight given to audio evidence is contingent upon the court's satisfaction with its authenticity and whether it accurately represents the events or conversations in question.[270]

USA:

In the USA, audio evidence is subject to the rules of evidence outlined in the Federal Rules of Evidence or relevant state laws. Courts may consider factors such as the chain of custody, expert analysis, and the reliability of the recording device to determine authenticity. Legal challenges may arise if there are doubts regarding the recording's accuracy or potential alterations.

India:

In India, the Evidence Act, 1872, governs the admissibility of evidence, including audio recordings. Courts may require certification from forensic experts to verify the authenticity of audio evidence. The burden of proof lies on the party presenting the evidence to establish its genuineness, which can be challenging in cases of potential tampering.

CONCLUSION

Summary of key findings regarding the veracity, authenticity, and admissibility of audio leaks in Pakistani courts

Veracity: The veracity of an audio leak is difficult to determine, as audio recordings can be easily manipulated

[270] Петльована, Лілія. "AUTHENTICITY AND MOTIVATION IN TEACHING ESP." *Modern Information Technologies and Innovation Methodologies of Education in Professional Training Methodology Theory Experience Problems* (2021).

or edited. However, there are a number of factors that can be considered when assessing the veracity of an audio leak, such as the source of the recording, the quality of the recording, and the content of the recording.

Authenticity: The authenticity of an audio leak is also difficult to determine, as audio recordings can be easily faked. However, there are a number of factors that can be considered when assessing the authenticity of an audio leak, such as the source of the recording, the quality of the recording, and the content of the recording.

Emphasis on the need for clear guidelines and protocols to ensure fairness in considering audio evidence

Emphasis on the need for clear guidelines and protocols to ensure fairness in considering audio evidence in Pakistani law:

Audio evidence can be easily manipulated or edited, making it difficult to determine its veracity and authenticity. This means that it is important to have clear guidelines and protocols in place to ensure that audio evidence is properly vetted before it is admitted into court.

Audio evidence can also be prejudicial to the parties involved, as it may reveal private information or damaging allegations. This means that it is important to have clear guidelines and protocols in place to ensure that the prejudice caused by audio evidence is outweighed by its probative value.

The use of audio evidence in court can have a significant impact on the outcome of a case. This means that it is important to have clear guidelines and protocols in place to ensure that audio evidence is used fairly and impartially.

Here are some specific recommendations for clear guidelines and protocols:

The courts should develop clear guidelines for the admissibility of audio leaks in court. These guidelines should include factors such as the source of the recording, the quality of the recording, and the content of the recording.

The government should invest in training for law enforcement officials on how to investigate and authenticate audio leaks. This training should cover topics such as how to identify and preserve audio evidence, how to detect tampering, and how to authenticate recordings.

The public should be aware of the potential challenges associated with audio leaks and should be critical of their use as evidence. The public should be educated about the ways in which audio evidence can be manipulated or edited, and they should be encouraged to question the probative value of audio evidence before accepting it as fact.

Clear guidelines and protocols are essential to ensure that audio evidence is used fairly and impartially in Pakistani law. These guidelines should be developed by the courts in consultation with law enforcement officials and the public. By following these guidelines, the courts can help to ensure that audio evidence is used to achieve justice, not to prejudice the outcome of a case.

Pakistan's legal system requires additional research, reforms, and technological advances to effectively address audio breaches.

The prevalence and impact of audio leaks in the legal system of Pakistan call for further research, reforms, and technological advancements to effectively address the

challenges associated with handling such evidence. Here are some key areas that require attention:

Research on Audio Forensics: Conducting research on audio forensics is crucial to develop advanced techniques for authenticating audio recordings. Investment in research can lead to the creation of reliable tools and methodologies to verify the integrity and originality of audio leaks.

Training of Forensic Experts: Training and empowering forensic audio experts is essential to enhance their ability to analyze and validate audio evidence. Specialized training programs and certifications can ensure the availability of skilled professionals in the legal system.

In conclusion, addressing the challenges of audio leaks in Pakistan's legal system requires a multi-faceted approach. Through further research, reforms, and technological advancements, Pakistan can develop a robust framework for handling audio evidence, ensuring fairness, transparency, and the protection of individual rights in the legal process.

MEANINGS, CATEGORIES, FUNCTIONS AND STRUCTURE OF PRESUMPTIONS: A CRITICAL ANALYSIS OF PRESUMPTIONS IN QANOON-E-SHAHADAT ORDER 1984

ALI HAIDER*[271]
DR. SHAHID RIZWAN BAIG**[272]

ABSTRACT; The goal of the current study was to investigate the definitions, categories, purposes, and structures of presumptions in common law before using this information as a conceptual framework to examine presumptions in Qanoon e Shahadat (hereinafter QSO). After conducting a doctrinal analysis, the current study discovered that presumption in common law is seen as a legal principle that permits courts to reach particular decisions based on a set of established facts. The structure of presumptions in the common law evidence process has also been studied using a variety of categories, methods, and techniques. Similar to this, the study discovered four key roles of presumptions, four distinct techniques to Analyse the structure of presumptions in QSO, and five categories of presumptions. It is envisaged that the current study may aid in Pakistan's proper comprehension and implementation of presumptions in the legal system.

INTRODUCTION; One of the key duties that courts are expected to perform is the resolution of the conflicts before them. By establishing the facts in the cases, the courts carry out their duty. The courts can derive

---

[271] Advocate High Court
[272] Assistant Professor GC, University Faisalabad

conclusions regarding the facts at issue thanks to these established facts. Also, the law of evidence study looks at how disputed facts are established in legal proceedings because facts are typically established through the use of evidence. The law of evidence discusses a number of different methods, and presumption is one of them. In common law countries, the term "presumption" refers to a conclusion that, up until the contrary is established, may or may not be inferred from a specific collection of facts. When there is minimal knowledge about particular facts or when judgements must be taken in the face of uncertainty, it is regarded as the second-best way of proving facts.[273]

Moreover, the term "presumption" refers to circumstances in which formal proof of certain facts is not necessary. It is a creation of judges that has been crystallised in the rule of law.[274] Presumptions are also considered by some researchers to be a component of substantive law. Presumptions serve three key purposes in legal proceedings: first, they cut down on the amount of proof that isn't necessary; second, they make it simpler to prove certain facts that would otherwise be difficult to establish; and third, they exempt or redistribute the burden of proof.

Despite the crucial roles that presumptions play in the proof process, many scholars believe that the word "presumption" in common law is vague because it has been used by the legal community in a variety of contexts and for a wide range of objectives. Additionally, judges, attorneys, and legislators refer to it by various names;

---

[273] Hohmann, Hanns. "Presumption in legal argumentation: from antiquity to the middle ages." (1999).

[274] McCormick, Charles T. "Charges on Presumptions and Burden of Proof." *NCL Rev.* 5 (1926): 291.

sometimes it is considered a rule of substantive law, others accommodate it in procedural law, others believe that it is a component of pleadings, while others think that it is a statement of natural probability.[275] The debate over the definition of presumption is pointless because it is the result of academic confusion.

Presumption, he continued, can refer to a variety of evidentiary choices, and he urged the researcher to look into the issues raised by their use.[276] It is crucial to note that the presumption topic only pertains to factual concerns, not legal ones.

Due to its significance and inherent ambiguity, presumption has been the subject of debate in a large amount of literature. Its meaning, types, purposes, and structure are all ambiguous. These presumption dimensions have been explored by various analysts, but the literature reveals disagreements between the researchers. The QSO contains numerous clauses that address presumptions. When courts must or may make presumptions is covered by Article 2 Subsections 7, 8, and 9. The types of papers and presumptions that the courts may or must draw are listed from article 90 to article 101.

Regarding the definition, structure, kinds, and roles in the proof process, QSO is silent. Additionally, there is a dearth of study on the meaning, categories, and uses of presumption in QSO. The current research seeks to close this gap while taking all of this into consideration. The current study's research questions are as follows: How is presumption described in the literature? What varieties

---

[275] Subrin, Stephen N. "The Limitations of Transsubstantive Procedure: An Essay on Adjusting the One Size Fits All Assumption." *Denv. UL Rev.* 87 (2009): 377.

[276] Allen, Ronald J. "Evidence: Text, Problems, and Cases, 852, trans. Baosheng Zhang et al." (2006).

are there? What different roles does it play? What constitutes an assumption in a QSO, specifically, and in general? To answer the research questions listed above, the authors of the current study used a doctrinal approach. The current study will provide clarification on the definition, categories, purposes, and organization of presumptions as they are used in QSO. This explanation will make it easier to employ presumptions correctly in Pakistan's proof-process.

In addition to the introduction, the current research is divided into three main sections. The definition, types, purposes, and structure of presumption in common law nations are covered in the second part. The third part examines how presumption can be defined in terms of QSO and how different presumptions can be grouped according to their types, purposes, and structures. The conclusions of the current research are discussed in the final section.

Meanings, Structure, Categories, and Functions of Presumptions

By creating a conceptual framework to examine how presumptions operate in QSO, the Pakistani law of evidence, and this section aims to respond to the first three research questions of the current study. The main goal of this section is to gain a deeper grasp of presumptions, their nature, types, and functioning in common law nations, particularly in the United States of America and the United Kingdom. There are four subsections within this part. Presumptions are defined in the first part, their structure is covered in the second, categories are covered in the third, and their roles in common law are examined in the final section.

What is Presumption?

This section is dedicated to defining presumptions in law. To do this, the authoritative literature from the fields of law, artificial intelligence, and law is consulted and studied. To start, it must be acknowledged that the extensive literature on presumptions in common law nations does not contain a generally acknowledged definition.[277] It may be because this word has been mired in misunderstandings and controversies, making it the most ambiguous term in the law of evidence.[278] The following paragraph, however, discusses a few definitions of presumptions in order to further the concept.

A legal inference or assumption regarding the presence of a fact based on other known or proven facts regarding the existence of another fact or combination of facts is described as a presumption in Black's Law Dictionary. "Presumption is a rule of law that requires courts and judges to draw a particular conclusion from a specific fact or a specific piece of evidence, unless and until the truth of such inference is proven," wrote Stephen (1876). (p. 4). In his response to Stephen's definition, making a distinction between the presumption and allowed inferences rules. He noted that a rule of presumption not only indicates that such and such is a legal and usable inference from other facts, but it also adds that this significance shall always be ascribed to them in the absence of additional facts, the speaker said.[279]

---

[277] He, Jiahong. *Methodology of Judicial Proof and Presumption*. Springer, 2018.

[278] McCormick, Charles T. (2013). McCormick on evidence. Ed. Kenneth S. Broun et al. 7th ed. St. Paul, Minn.: Thomson Reuters/WestLaw.

[279] Thayer, James Bradley. *A preliminary treatise on evidence at the common law*. Little, Brown,, 1898.

Presumption is a legal principle that is set by judges and gives an evidentiary fact a particular procedural impact. Presumptions, he continued, alter the weight of proof that parties must meet. Presumptions as a legal principle that necessitates coming to certain conclusions when certain facts are established and undisputed. The belief that presumptions are those inferences about the presence or absence of any fact that are made after some fundamental facts are established. Presumption refers to the practise of holding onto a conclusion up until evidence of the opposite is presented. He continued by saying that such inferences could be reached both when certain preliminaries facts are proven and when preliminaries are not established.

He views presumptions as legal principles that permit courts to make certain deductions when certain facts are established. presumption is a prescribed process where certain facts are thought to require uniform treatment with regard to their impact as proof of other facts. Presumptions are a collection of guidelines that govern the inferential process of proof. These guidelines are predetermined, clear, and they establish legal ties between established facts and some other facts that are presumed to be established.[280]

Presumptions, he continued, show an inferential relationship between proven and presumed truth. Presumptions have been defined by a number of academics from the fields of artificial intelligence, law, and argumentation theory, as well as by legal scholars. The presumption is a tool that shifts the weight of proof back and forth between the parties. Similar to this,

[280] Pauwelyn, Joost. "The Role of Public International Law in the WTO: How far can we go?." *American Journal of International Law* 95, no. 3 (2001): 535-578.

believe that presumptions are non-monotonic logic's default principles. It is significant to note that the word "presumption" has not been defined in the QSO; however, presumptions are covered in article 2 sub-articles 7, 8, and 9. These articles merely outline the conditions under which courts may, will, and must make inferences.

The scope and nature of the thirteen definitions of presumption listed in the previous sentence differ. The following similarities between these meanings may be noted, though. First and foremost, presumptions are legal rules; second, these rules of law occasionally require or occasionally give the courts the discretion to draw particular inferences in particular circumstances; third, the inferences will be drawn when basic facts have been proven with evidence; fourth, these inferences can be rebutted except in a very few cases; and finally, presumptions is a method to adjust the burden of proof. In order to continue the debate, the presumption may be defined as a legal principle that requires courts to derive particular conclusions from specific proved facts, which may occasionally be refuted and occasionally.

Structure Of Presumptions

This section looks at the literature on the structure of presumptions after examining the different definitions of presumptions in common law nations.[281] Numerous researchers and analysts have suggested a variety of methods to analyse the structure of presumptions. These ideas can be divided into the four groups below.

The probability between presumption raising facts, also known as basic facts, and presumed facts can be used to

[281] Avelino, Flor, and Jan Rotmans. "Power in transition: an interdisciplinary framework to study power in relation to structural change." *European journal of social theory* 12, no. 4 (2009): 543-569.

analyse the structure of presumption. The term "basic facts" refers to those facts that must exist before certain other facts can be presumed, while the term "presumed facts" refers to those facts that are assumed to exist once the main facts have been established, the structure of presumption usually resembles that of an argument from probability. According to him, the drawing of a presumption will be justified if there is a high probability between the presumption raising facts and the assumed facts.

Generally speaking, presumptions have empirical support, he continued, but judicial presumptions can be either empirical or non-empirical. This argument makes the case that one can legitimately assume a fact in law based on another fact if there is empirical or no empirical probability to support the assumption. Second, according to a number of researchers, the structure of presumption can be examined using the premise-conclusion test and by considering whether the presumpted truth can be refuted. For instance, contends that legal presumptions are rebuttable, meaning that conclusions reached may be retracted if new information emerges that indicates the validity of those conclusions.

Thirdly, some researchers have suggested considering presumption as an inference and examining its characteristic patterns in order to examine the structure of presumption. Presumptions, are inferences that consist of three elements: presumption raising facts, presumption formula, and assumed facts. According to her, the conclusion is a statement that is assumed to be true based on (1) and (2), the presumption raising facts are those facts that provide grounds to presume certain facts (these are known as basic facts in legal terminology), and the presumption rule is a defeasible rule that allows the

transit from the presumed fact to the conclusion. Fourth, numerous analysts have examined the structure of assumption by examining the connection between fundamental.

For instance, the antecedent and the consequent make up the building block of an assumption. The consequent is a statement of assumed facts that are drawn when the conditions outlined in the antecedent occur. The antecedent specifies the conditions for drawing presumptions. The circumstances stated in the antecedent must also be proven with evidence and in accordance with the necessary legal standard of proof.

To analyse the structure of presumptions, QSO provides some guidelines in article 2 sub-articles 7, 8, and 9. For instance, article 3(7) states that a court may either seek proof of the fact or may consider the fact proven until it is refuted when it is permitted to presume a fact in accordance with this order. Additionally, sub-article 8 states that whenever a fact is required to be presumed by this order, the court shall take that fact as proved unless and until it is refuted. In a similar vein, Article 9 states that the court shall take the other fact as proved upon proof of the first fact when the order (QSO) declares one fact to be conclusive proof of another.

Categories of Presumptions

The different categories of presumptions that can be found in the literature are described in this section. It is significant to note that various researchers have employed various terminologies for categorising presumptions, and the following six classes have been determined based on the fundamental principle of such classification.

The opposing presumptions are the first in this list. Presumptions that contradict one another are those that

could be true for both sides. Furthermore, the presumptions in such presumptions are in conflict with one another. The main fact in such hypotheses has no probability value. The courts have a variety of choices for how to handle these presumptions. The judges may select one presumption by favouring it over another or they may erroneously believe that competing presumptions have been debunked. Some researchers have found that judges chose the latter alternative in such circumstances. However, American Federal Rules of Evidence stipulate that in these circumstances, judges will opt for the stricter presumption.[282]

In the second category of presumptions, known as conclusive presumptions, the courts must infer certain conclusions that cannot be refuted by the introduction of new proof. According to some researchers, the statutory definitions of offences are actually conclusive presumptions. It is crucial to note that some researchers do not consider these legal principles as presumptions.

The third type of presumption is the presumption of fact, which refers to inferring the presence or absence of a fact based on another fact that has been proven without using a legal standard. According to some researchers, such presumptions enable for the use of common-sense reasoning to draw conclusions, and they are not laws. Although the court has the discretion to draw such a presumption or reject it even when the main facts have been established, it is up to the court to do so.

It is crucial to emphasise that this is a contentious presumption group in the literature. According to some experts, the courts should stop using presumptions of fact because they are invalid. For instance, There are no

[282] Ullman-Margalit, Edna. "On presumption." *The Journal of Philosophy* 80, no. 3 (1983): 143-163.

presumptions of truth and that all presumptions are those of law. The assumption of law, also known as the mandatory presumption, belongs to the fourth category of presumptions. These presumptions mandate that the judges infer a specific conclusion from a specific fact. These presumptions are artificial constructs of law that may or may not follow a specific legal rule or be rational. In most cases, presumptions of law are established in consideration of public policy, for convenience, to prevent a predicament, or to compel a litigant with easy access to more information. While bearing in mind the distinction between fundamental fact and presumed fact, scholars usually distinguish presumptions of law from presumptions of fact. For instance, notes that the presumptions of law are established legal principles that call for deducing a particular legal conclusion from a particular fact. On the other hand, presumptions of fact are logical arguments derived from the particular case's conditions that rely on their own inherent strength rather than any specific legal principle

Similar to this, some analysts contend that while presumptions of truth are based on any type of probability or experience, presumptions of law are based on legal doctrine or the rule of law. For instance, although both the presumption of law and the presumption of fact are based on the same probability, they vary in that the former is based on the law's rules or policies, while the latter is based on experience. It is significant to note that a logical link between the main facts and the presumed facts is necessary for the presumption of law to be justified.

Functions of Presumptions

This segment deliberates on the various capabilities which presumptions discharge in the technique of proof.

Various researchers have mentioned numerous features of presumptions which may be accommodated in four subject matters: capabilities related to proof, burden of evidence, connections between facts and resolving a impasse.

As some distance because the features of presumptions concerning evidence is concerned, presumptions may discharge capabilities. Firstly, presumptions come into play to tackle the issues of insufficient proof. When there is proof approximately a particular truth but this evidence is inadequate because of its failure to satisfy the desired general of evidence, presumptions offer an additional premise which comes over the insufficiency. Secondly, presumptions are used to deal with scenario when there may be no proof about a specific fact. It is essential to highlight that presumption is considered as a device in good judgment, philosophy and argumentation concept to fill positive gaps in know-how.

The same is the case in judicial trials wherein presumptions permit presuming the existence of specific reality about which there is no evidence. Similarly, insofar as the presumptions within the context of burden of proof are worried, it is believed that presumptions allocate and regulate the load of persuasion and production of evidence.[283] Continues that drawing presumptions supportive of 1 birthday celebration mean that the load of persuasion is shifted on different celebration. Likewise, presumptions alter the moving of the burden of persuasion. By pointing out that the presumption of legitimacy establishes that a child born

[283] Piotrowski, Suzanne J., and David H. Rosenbloom. "Nonmission–based values in results–oriented public management: The case of freedom of information." *Public Administration Review* 62, no. 6 (2002): 643-657.

for the duration of the validity of the marriage is the kid of the husband, demonstrated this argument.

This presumption makes the father who contests the paternity of a toddler born or conceived all through marriage liable for persuading the court of his innocence. On the identical line of inquiry, presumptions additionally decide the weight of manufacturing of evidence in judicial trials. It with an example. He made observe of the truth that a letter that has been nicely addressed, stamped, and mailed is thought to had been duly introduced to the addressee unless the birthday party towards whom the presumptions function introduces evidence displaying the letter became no longer obtained. This shows that how presumptions shift the load of evidence and this moving hinge on the probability of the linking among primary facts and presumed information.

Thirdly, presumptions are used to make clear the hyperlink between records; the number one information and the presumed facts. When the fundamental information are proved according to required fashionable of legal evidence, the existence of presumed statistics is deemed to be true by an regular procedure of reasoning and presumptions makes clean the connection between them. In addition, presumptions authorize courts to deduce that presumed records exist if life of primary records has been proved. The court docket will deal with presumed information as genuine till opponent birthday party produces proof to prove the non-existence of presumed information (Morgan's analysis).

Finally, presumptions are used to cast off a deadlock. Presumption on this experience is just a rule of selections based on justice and policy. He illustrated this with the aid of bringing up an example of survivorship. He explained that once there may be a question of

survivorship of someone and there's no evidence approximately existence of that person, presumption resolves this issue by way of permitting courts to anticipate life or dying of that person specially occasions.

Structural Analysis of Presumptions in Qanoon e Shahadat

This section aims to examine the presumptions in QSO after creating a conceptual framework in the previous section. It is crucial to emphasise that the fourth research question of the current study will be addressed in this part. There are seven subsections in this part that cover different facets of QSO presumption.

Types of Structure of Presumptions

From structural factor of view, there are four styles of presumptions in Qanoon e Shahdat namely presumptions having fundamental truth-presumed truth structure, presumptions having operative component-simple factpresumed reality shape, presumptions having basic reality-presumed reality-restrictions structure and presumptions having no basic reality-no presumed reality-just guide strains shape. These 4 types of shape of presumptions are mentioned within the following lines.

The commonplace shape of presumptions found in QSO is “primary fact-presumed truth” structure. This shape makes it important that the primary statistics should be proved in courts before requiring them to expect the lifestyles of presumed fact. The working mechanism of such presumptions is quite simple; the basic facts have to be installed first after which the courts will draw precise inferences provided within the identical article. For instance, article 92 affords that every report purporting to be a report directed via law to be kept by using any individual and to be kept in a specific form and if it's far

shown that it has been stored in the identical manners, the court docket will presume that the file is true.

In this text, primary facts include, report, prison requirement to preserve it in a selected form, and its keeping within the given form are the number one information. Similarly, the realization that it's far actual is a presumed fact. The 2d type of shape of presumptions in QSO is “operative part-simple reality-presumed reality” shape. This kind of shape is observed inside the presumptions underneath the weight of proof. Such presumptions have three step running mechanism; the primary element affords the state of affairs when such presumptions can or can be drawn, the second one part provides primary facts and the 1/3 element gives the particular inferences that can or may be drawn.

For instance, Article 126 of the QSO states that the burden of demonstrating that a person is not the owner of something of which he is proved to be in ownership falls on the individual that makes the affirmation that he isn't the owner. In this text, “when the query is whether someone is proprietor of something” is operative element which affords that below what circumstances the presumption may be drawn. Similarly, the words “of which he is shown to be in ownership” is the element which affords the fundamental reality and the phrases “the load of proving that he isn't the owner on that individual who affirms that he isn't always the owner” is the presumed fact.

Likewise, the 0.33 type of shape of presumption is “basic fact-presumed truth-confined inferences” structure. The operating mechanism of such presumption is likewise primarily based on 3 steps; first the primary statistics must be shown, secondly, sure inferences are to be drawn and thirdly positive inferences are forbidden to be drawn

from the basic facts. For example, in keeping with article 98 of QSO, the court may additionally count on that a message despatched from a telegraph office to the individual to whom it's miles meant equates with a message brought for transmission at the workplace from which it changed into despatched. However, the court docket shall not presume something regarding the identification of the person who introduced the message for transmission.

In this text, messages sent from a telegraphic office to a particular person are the number one data. Similarly, the conclusion that message added from telegraphic office corresponds with the messages acquired is the presumed truth and the phrases "however the court shall not make any presumption as to the character via whom such message was added" is the prohibition on court now not to draw this inference. The fourth sort of structure of presumptions in QSO is "no fundamental truth-no presumed fact-simply pointers" shape.[284] The operating mechanism of this sort of presumption is quite simple; such presumption does now not provide any fundamental reality, presumed reality or restrained inferences instead it simply offer pointers to attract inferences from diverse facts. Article 129 of the QSO, as an instance, states that the court docket may presume the lifestyles of any reality that it believes is in all likelihood to have took place, contemplating the standard collection of natural occasions, human behavior, and public and personal commercial enterprise, with regards to the information of the specific case. This article only gives guidelines to make inferences as opposed to imparting any primary facts or presumed fact.

---

[284] Lambek, Michael. "Living as if it mattered." *Four lectures on ethics: anthropological perspectives* (2015): 5-51.

Categories of Presumptions

The gift observe identifies five exclusive categories of presumptions in QSO which include presumption of fact, presumption of law, combined presumption, rebuttable presumption, ir-rebuttable presumptions and conclusive presumptions. It is pertinent to highlight that the diverse studied referred to in 2d section makes use of one of a kind criterion to distinguish presumption of law from presumption of fact. According to this research, the criterion to distinguish presumption of regulation and truth involves the utility of logical or felony guidelines. However, the criterion of presumption of law and truth is distinct and quite easy in QSO.

In QSO, presumptions of records are denominated by using the phrases "may presume" (article 2 (7). There are six articles in QSO which bestow discretion upon judges to attract or not to draw specific inferences from proved number one statistics. For example, Article ninety-seven states that the Court might also count on that any e-book it consults for information on subjects of public or preferred hobby and any published map or chart, the statements of which might be relevant statistics and which can be produced for its inspection, have been created and published via the character, and at the time and location, through whom or at which it purports to had been created or published. On the equal line of inquiry, presumption of regulation, in QSO, are those presumptions which QSO requires the judges to draw (article 2 (eight)).

The legal provisions containing presumptions of law use the word "court shall presume". There are seven presumptions in QSO which require the judges to draw unique conclusion when number one information are mounted. For instance, Article ninety-two specifies that if

a record is kept basically in prison shape and is constructed from proper custody, the Court will conclude that it's far a actual report. The third category of presumptions in QSO is rebuttable and irrebutable presumptions. It is crucial to point out that both types are dealt with as presumption of regulation under QSO. However, there's essential distinction among these presumptions. In case of rebuttable presumption, the opponent party can adduce the proof but in case of ir-rebutable presumption the right to adduce evidence to dispel the realization is not allowed. In these articles, the words conclusive evidence has been used. According to Article 128 for example, a infant born all through the continuation of a valid marriage shall represent conclusive evidence of legitimacy.

This article does no longer permit adducing proof to disclaim this truth. On the opposite hand, rest of the prison presumption is rebuttable (article 2(eight). Similarly, the fourth category of presumptions in QSO is conclusive proof. There are conclusive presumptions contained in article fifty five and 128 of QSO. Conclusive presumptions have a unique effect that these presumptions do not permit to rebut the inference as discussed inside the above paragraph. Likewise, the fifth category of presumptions in QSO is mixed presumptions. Mixed presumptions are the ones presumptions which can be each presumption of regulation and fact. There is most effective one instance of combined presumption and that is determined in article 98. In this article states that the preliminary presumption is presumption of truth because the words “courts might also presume” had been used; whereas the limit to attract targeted inference is presumption of law due to the fact the phrases “courts shall now not presume” have been used.

Subject Matter of Presumptions

After thorough exam of all of the provisions of QSO, the existing study has recognized fifteen concern matters approximately which courts may additionally or shall draw presumptions. These subject matters include national or foreign laws, country wide or overseas judicial decisions, judicial report, certified copies, reference books, telegraphic messages, documents, strength of lawyer, certificate, expectancy of a person's existence, dating between precise people, possession of assets, top faith in transactions among precise human beings, legitimacy of toddler, and herbal course of enterprise of the whole lot. The first theme or issue be counted of presumption is the legal guidelines of Pakistan and overseas united states.

For example, Article ninety-four states that the court shall infer the authenticity of any record containing laws of Pakistan or any other foreign U. S. That is posted with the consent of that country. Similarly, the second difficulty matter of presumption is the judicial decisions of Pakistani and overseas courts. For instance, under article fifty-five, the courts ought to draw a presumption regarding the precise juridical selections of specific Pakistani courts. Similarly, article 94 deals with the presumptions approximately foreign courts. Likewise, the 1/3 concern matter of presumptions is licensed copies. There are diverse articles in QSO which either authorizes or required courts to draw presumptions regarding certified copies and those licensed copies relate to vintage files (article 101), about any Pakistani report (article ninety), judicial report of overseas courts (article ninety six), reference e book for Pakistani courts (ninety seven), telegraphic messages (ninety eight), files which aren't produced (ninety nine), thirty years vintage files

(one hundred), strength of attorneys (ninety five) and certificate (ninety). Similarly, the courts are certain to draw presumptions about a man's life (123,124), dating between unique humans (125), ownership of belongings in a man's ownership (126), appropriate faith in transaction among specific human beings (127), legitimacy of a baby (128), and about any two data which might be related with each other on herbal chance (129).

Nature of Presumed Facts

Similarly, a more in-depth examination of various provisions of QSO managing presumptions famous that there are twenty distinct difficulty topics of the presumed facts. The analysis indicates that the topics of the presumed facts are genuineness of documents or licensed copies (ninety one, ninety two, 94, ninety six), due execution of files (95, 99), due authentication of files (95), authenticity of files (96), authorship of books, date, time and place of booklet (ninety seven), transmission of telegraphic message (ninety eight), due attestation, signature and stamping (ninety nine), legit individual of attesting officer (90), and reality of occasions in which a selected report was prepared (91). In addition, the exam suggests that the problem depend of presumed facts includes compliance with the given criminal technique (ninety-one), and accuracy of certain files (ninety-three). Similarly, the courts might also or can presume the continuity of guy's life (123), his dying (124), continuation of dating among unique men and women (one hundred twenty-five), ownership of property (126), absence of good religion in transactions among specific humans (127), legitimacy of a baby (129) and conferring or eliminating criminal individual under unique jurisdiction (55).

Explicitly and Implicitly Presumed Fact

The structural exam of all of the provisions dealing with presumptions in QSO also indicates that a few provisions expressly offers the presumed reality and a few provisions do now not offer the records which the courts may or have to presumed. In case of later provisions, one has to pick out the presumed reality hidden inside the provisions. For instance, article ninety specifies that the court shall expect the authenticity of these files which can be noted within the same article. In this article, the character of presumed reality is expressly supplied in the article. However, in step with Article 126, the individual that asserts that someone is not the proprietor of something over which they may be verified to be in ownership is needed to offer evidence to guide their declare. The presumption that the court will make isn't always said in this newsletter; as a substitute, it is implied that the court will assume that the man or woman is the property's owner.

Logic-Legal Rule behind Presumptions

Similarly, the structural evaluation of the presumptions in QSO shows that each one the presumptions, besides one, contain the software of a selected felony rule to draw presumptions. The best exception to this precept is article 129 which requires the judges to apply their personal revel in and probability to draw presumption and this liberty isn't given in other provisions of QSO dealing with presumptions.

Functions of Presumptions

The evaluation of various articles of QSO suggests that presumptions discharge four features in the procedure of proof and these are mentioned within the lines beneath.

Firstly, presumptions are useful in organising matters that are almost not possible to show in courts due to elapse of

considerable time or some other cause acceding to the specified trendy. When considerable time has been elapsed and it's miles important to establish positive records came about at some stage in that time, the courts are in a tough function as their ordinary proof is tough to accumulate. The presumptions come into motion in such situations and bring the courts out of this extraordinary situation. An illustration of this function is article one hundred. The article states that the courtroom may additionally presume attestation, executions, signature and handwriting in such files as real, genuine and duly execution. Monir factors out that it's miles hard and occasionally not possible to prove the handwriting, execution, attestation or signature in antique documents after the elapse of a few years and this article brings the courts out of this case.

Similarly, sometimes a few records like mental state of mind are hard to prove and presumptions assist the courts in such conditions.[285] For example, Article 122 specifies that the onus of proof is with the celebration who has special expertise of the fact being in dispute. Secondly, presumptions discharge the characteristic of maintaining intact the popularity quo. For example, article 126 states that once the courtroom has to remedy the query that whether any man or woman is the owner of a particular assets or no longer, the court will count on that someone is the owner in whose ownership the property became at the time when the matter become brought earlier than the court. Thirdly, the evaluation of QSO suggests that the presumptions are used in QSO to shift the burden of evidence within the method of evidence. For instance, Article 127 stipulates that after a party to a transaction

[285] Farber, Daniel A. "The originalism debate: A guide for the perplexed." *Ohio St. LJ* 49 (1988): 1085.

questions the other's true religion while one of became in a role of active self-assurance towards other. The birthday party who is in a lively function of confidence has the obligation of demonstrating the coolest religion of the transaction. The presumption in this text shifts the weight of proof on the birthday party who changed into in a position of active confidence. Lastly, a few presumptions in QSO paintings to offer finality to positive topics and these presumptions in QSO are called conclusive proof. For instance, when the courts draw the presumption of legitimacy underneath article 128, the opponent party will now not allowed adducing any proof to rebut this presumption. So, this presumption offers finality to the legitimacy of child.

CONCLUSIONS; The above dialogue leads to the following six conclusions concerning presumptions in not unusual regulation nations. Firstly, presumption in commonplace regulation countries is a rule of regulation which authorizes courts to draw certain inference when a few specific information were installed. Secondly, now and again courts are required and sometimes courts have the discretion to draw or no longer to attract such inferences. Thirdly, the celebration in opposition to whom presumptions have been drawn normally has the right to adduce proof to rebut the impact of presumptions. Fourthly, the presumptions in not unusual law nations are categorized into presumption of regulation and truth, rebuttable and irrebutable presumptions, conclusive and conflicting presumptions. Fifthly, presumptions shift and allocate burden of production of proof, and burden of persuasion. Similarly, presumption brings out the courtroom out of hard situation like when there may be no or insufficient proof

or whilst positive statistics are hard to prove. Sixthly, there are 4 techniques to examine the shape of presumptions in statutes. On the same line of inquiry, the following principal conclusions can be drawn concerning presumptions in QSO. Firstly, QSO acknowledges 5 classes of presumption namely presumption of reality, presumption of law, conclusive presumptions, rebuttable and irrebutable presumptions. Secondly, presumptions in QSO discharge 4 functions particularly, allocation of burden of proof and persuasion, decision of deadlock and evidence of such records which can be not possible to set up. Thirdly, the shape of presumptions in QSO can be analyzed through 4 methods namely by using searching into fundamental reality-presumed truth, operative element-simple fact-presumed fact, basic reality-presumed factrestrictions clause and no fundamental fact-no presumed reality-simply pointers.