ISLAMABAD LAW REVIEW

Vol: III Nos. 3&4
Autumn/Winter 2019

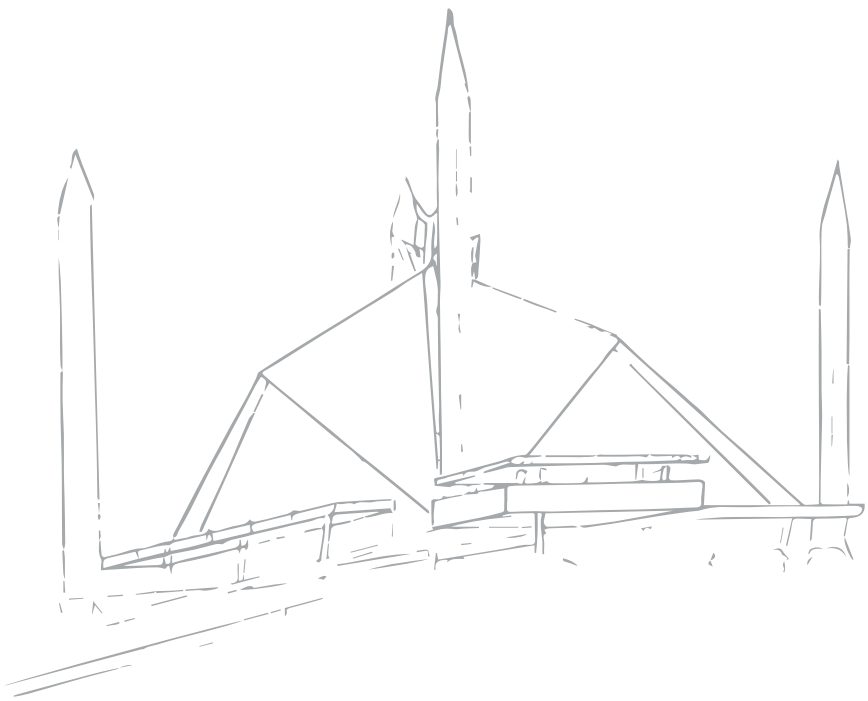
A Journal of the Faculty of Shariah and Law
International Islamic University, Islamabad

ISSN 1992-5018

ISLAMABAD LAW REVIEW

Quarterly Research Journal of Faculty of Shariah & Law, International Islamic University, Islamabad

Volume 3, Number 3&4, Autumn/Winter, 2019



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International Islamic University

ISLAMABAD LAW REVIEW

VOLUME 3

NUMBERS 3 & 4

FACULTY OF SHARI'AH & LAW
INTERNATIONAL ISLAMIC UNIVERSITY
SECTOR H-10, ISLAMABAD

Preface

The International Islamic University Islamabad provides academic services to men and women through separate campuses for each segment. The Faculty of Shariah & Law was established in Quaid-e-Azam University Islamabad in 1979 but subsequently incorporated into Islamic University Islamabad in 1980. Currently, almost two thousand students are enrolled in different programs of the Faculty of Shariah & Law and IIUI has the largest full time law faculty in Pakistan. The Faculty of Shariah & Law enjoys a respectable position among the reputed Law School/Law Faculties of reputed universities of South Asia. The Faculty offers programmes of study leading to the degrees of Doctors of Philosophy in Shariah, Doctors of Philosophy in Law, LL.M in Corporate Law, LL.M in International Law, LL.M in International Trade Law, LL.M in Human Rights Law, MS Human Rights, LL.M in Shariah (Islamic Law & Jurisprudence), MS Shariah, MS / LL.M Islamic Commercial Law, MS / LL.M Muslim Family Law, LL.B Shariah & Law and LL.B Three Years.

The Faculty of Shariah and Law is a unique centre of learning in South Asia which provides good quality education of Law, Shariah, Jurisprudence and *Fiqh* under the supervision of highly qualified teachers. This is the only Law Faculty which has twenty four academicians holding PhDs in various fields of Shariah & Law; most of them obtained their degrees of doctorates from the leading universities of the world. The faculty has prominent place in the academic world as distinguished scholars from foreign universities such as Al-Azhar and Cairo come to teach here. The Faculty provides good academic environment in which students can pursue their studies of Law and Shariah under the supervision of well qualified, dynamic and research oriented scholars who come from various parts of the world and constitute a strong faculty.

Besides, being the only institution in the country which offers a largest range of under and post grade programs in legal studies, the faculty puts ample emphasis on the Legal Research. It launched Islamabad Law Review (earlier in 2000) with a focus on the comparative research on Shariah and Common Law. The *Law Review* is a high quality open access peer reviewed Quarterly Research Journal of the Faculty of Shariah & Law, International Islamic University Islamabad. A worldly renowned author and publicist on Islamic Law, Prof. Imran Ahsan Khan Nyazee was pioneering editor of the journal. For few years ILR was unable to catch it regular frequency and had gathered a lot of backlog.

The Faculty is grateful to Arizona State University for undertaking to uplift Islamabad Law Review. The Department of Law has recently executed a project – Legal Education Support Program in Pakistan- in collaboration with Sandra O'Connor College of Law at Arizona State University, USA. Besides, establishment of Law Clinic and introduction of Legal Writing and research Course, the issue in hand of ILR is published under the project grant.

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A Legal Framework for the Jirga Community Mediation in Khyber Pakhtunkhwa

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Abstract

Generally, in the Pushtoon *community in Khyber Pakhtunkhwa (KP), neighbourhood disputes are resolved through the Jirga system which is the oldest and still one of the most typical dispute resolution mechanisms. Despite the importance of the Jirga system in ensuring the administration of justice and harmony in the* Pushtoon *community in various ways, it has also been subjected to several critisms due to its informal structures which may sometimes lead to grave injustice to the parties or violate human rights. On the other hand, there is also no specific legal framework governing the community mediation. Authors are of the opinion that the government bodies should handle the administration of justice in accordance with the existing laws in KP rather than allowing some individuals with no proper knowledge on justice to settle the dispute by making use of the traditional Jirga system within their limited intellectual capacity which at times lead to grave human rights violations and injustices. Accordingly, this paper proposes a comprehensive legal framework which covers community mediation from all dimensions by giving importance to the traditional Jirga dispute resolution methods in place in KP and also learning experiences from other suitable jurisdictions.*

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Authors gratefully acknowledge the contribution of the IIUM Research Initiative Grant Scheme (Publication) [P-RIGS] (Project No: P-RIGS18-014-0014). This research article, in fact, is an output of the said research project.

Keywords: *Jirga, Khyber Pukhankhwa. Unwritten rules Mediation elders.*

1. Introduction[1]

Community mediation is a method in which neighbourhood disputes are resolved in an amicable manner by adopting mediation process with the intention to maintain good relationships among the neighbours. In other words, it is a mediation procedure adopted by the disputants to resolve their neighbourhood disputes within their community.[2] Neighbourhood disputes may arise from following conducts such as "nuisance in the neighbourhood, trespass, family feuds, landlord and tenant issues, neighbourhood squabbles involving children, pets and animals, use and maintenance of driveways, cars, bright lights, party walls and trash disposal;[3] noisy neighbours, boundary disputes, trees and gardens maintenance with near boundary, installing CCTV cameras that straight neighbours house;[4] parking in an uncooperative way, doing renovation work which damaged neighbouring property;"[5] and so forth. Sometimes, neighbourhood disputes may escalate further and can become more serious problems if it is not well taken care of.[6]

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[1] Some parts of this article were previously published as research articles titled "'Jirga and Dispute Resolution in Khyber Pakhtunkhwa: A Critical Analysis' in *Journal of Islamic Law Review*, 15:1, (2019), 63-79;" and "The Legal Position of Community Mediation in Khyber Pakhtunkhwa: A Critical Analysis' in *Journal of Islamic Law Review*, 15:2, (2019), 241-258". This article and the abovementioned two articles are outputs of a research project granted by International Islamic University, Malaysia under the IIUM Research Initiative Grant Scheme (Publication) [P-RIGS] (Project No: P-RIGS18-014-0014).

[2] Mohammad Naqib Ishan Jan and Ashgar Ali Ali Mohamed, *Mediation in Malaysia: The Law and Practice* (LexisNexis Malaysia Sdn Bhd: 2010), pp. 157-158.

[3] Ashgar Ali Ali Mohamed, "Mediation can keep the peace between disputing neighbours" *New Straits Times* (24 April 2018) <https://www.nst.com.my/opinion/letters/2018/04/361030/mediation-can-keep-peace-between-disputing-neighbours> (accessed on 09 April 2020).

[4] Sarah Clark, "The Most Common Neighbourhood Disputes" *ProblemNeighbours* (20 August 2019) <http://www.problemneighbours.co.uk/common-neighbourhood-disputes.html> (accessed on 09 April 2020).

[5] Heizel T, "5 Annoying Things your Malaysian Neighbours Do That You Can Sue Them For" *Ask Legal*. <https://asklegal.my/p/5-things-your-Malaysian-neighbours-do-that-you-can-sue-them-for> (accessed on 09 April 2020).

[6] John Gray, Moira Halliday and Andrew Woodgate, *Responding to Community Conflict* (York Publishing Services Ltd: 2002), p. 10; Muhamad

According to the National Association for Community Mediation (NAFCM) in the United States (US), "community mediation offers constructive processes in resolving differences and conflicts between individuals, groups, and organisations. It is an alternative to avoid destructive confrontation, prolonged litigation or violence. It gives people in conflict an opportunity to take responsibility for the resolution of their dispute and control of the outcome. Community mediation is designed to preserve individual interests while strengthening relationships and building connections between people and groups, and to create processes that make communities work for all".[7] Usually, in community mediation, both disputant parties sit together in the presences of a community mediator or mediators who are neutral to the parties and they assist them to clarify the issues as well as problems, know about their opinions, and find out a settlement to the problems.[8]

The practice of settling disputes outside the courts has been part of the culture in different provinces of Pakistan in various forms. Punjabis resolve their disputes in the community through *Panchayat;*[9] Pushtoons resolve conflicts by *Jirga;*[10] Sindhis resolve disputes through *Faislo*; and Balochis resolve conflicts by *Balochi Jirga*.[11] Disputes are inevitable in all human communities and can occur among individuals, families, groups, or even nations.[12] Pushtoon community is not immune from having disputes. The

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Hassan Ahmad, Ihtesham Ullah Khan, Mohammad Naqib Ishan Jan and Nuarrual Hilal Md. Dahlan, "The Legal Position of Community Mediation in Khyber Pakhtunkhwa: A Critical Analysis", *Journal of Islamic Law Review*, 2019, Vol. 15, No. 2, 241-258, pp. 241-242.

[7] National Association for Community Mediation, "Purpose" <https://www.nafcm.org/page/Purpose> (accessed 09 April 2020).

[8] Muhamad Hassan Ahmad, n. 6, at p. 242.

[9] Abid Ghafoor Chaudhry, Aftab Ahmed, Shaheer Ellahi Khan and Sajjad Hussain, "Perception of Local Community and Biradari on Panchayat: An Exploratory Anthropological Study of Biradari in Village Saroki, District Gujranwala, Pakistan", *Advances in Anthropology*, 2014, Vol. 4, No. 2, p. 54.

[10] Sherzaman Taizi, *Jirga System in Tribal Life* (Area Study Centre, University of Peshawar: 2007), p. 3.

[11] Ghulam Hussain, Anwaar Mohyuddin and Firdous Mahesar, "Conflict Resolution Mechanism in Rural Sindh: Rationalizing Life-world of Peasants", *Voice of Intellectual Man-An International Journal*, 2013, Vol. 3, No. 2, pp. 35-36; Muhamad Hassan Ahmad, Ihtesham Ullah Khan and Mohammad Naqib Ishan Jan, "Jirga and Dispute Resolution in Khyber Pakhtunkhwa: A Critical Analysis", *Journal of Islamic Law Review*, 2019, Vol. 15, No. 1, 63-79, p. 64.

[12] Sheriff Folarin, "Types and Causes of Conflict", (2015): 1-2, <http://eprints.covenantuniversity.edu.ng/3241/1/Folarin%2025.pdf> (accessed on 09 April 2020).

common reasons for disputes among Pushtoons are exchange marriage between two families; rejection from marriage after engagement; theft; robbery; enmity; cousinhood; revenge for any personal matter; honour killing; money; loan; land; property and so on so forth.[13] Volumes of disputes are still settled through the Jirga system among Pushtoons in KP. The following discussions only focus on how neighbourhood disputes are resolved through Jirga in KP.[14]

2. Resolving community disputes through the jirga system

The origin of Jirga is not traceable in an apparent form and it is believed that it has been practiced in resolving disputes in some part of the world since time immemorial.[15] The literal meaning of Jirga is "assembly" or "gathering" of the party for the solution of a dispute and it is a type of autonomous body.[16] Jirga can be held not only at a family level but also, in a larger scale, at tribal level or national level or even at international level, for instance, among the Pushtoons of Pakistan and Afghanistan, etc.[17]

The proceeding of Jirga is held in *Hujra* (a public place),[18] mosque, and guest house or even under the shadow of a big tree. Generally, the Jirga members sit in a circle together.[19] In minor cases, the Jirga takes two or three days and, in major cases, it may take a long time. In the beginning of a Jirga, both disputant parties are given a specific time to present the problem. During the preceding of Jirga, the members of Jirga will try to understand the nature of the problem and provide the mainly mediation services between disputant parties with their best capacity. No party is given any preferential treatment and all are treated equally. Albeit the Jirga always holds in public place, the crowd is not permissible to take part or hinder the Jirga during the

[13] Sher Ahmad Wazir, "The Role of Jerga in Conflict Resolution in FATA: A Case Study of North Waziristan Agency", (M.Phil. Thesis, University of Peshawar, Pakistan Study Center, 2010), 97-106.

[14] Muhamad Hassan Ahmad, n. 11, at p. 66.

[15] John McK. Camp II, "The Athenian Agora", (American School of Classical Studies at Athens, 1986), 6.

[16] Barakatullah and Imran Ahmad Sajid, "Jirga System in Pakhtun Society: An Informal Mechanism for Dispute Resolution", *Pakistan Journal of Criminology*, Vol. 5, No. 2, (July-December, 2013): 45.

[17] John Strawson, *Law after Ground Zero*, (London, Glasshouse Press, 2017), 3; Muhamad Hassan Ahmad, n. 11, at pp. 66-67.

[18] Mughal B. Khan, Abdul R. Ghumman and Hashim N. Hashmi, "Social and Environmental Impact of Hujra", *Journal of Environmental Justice*, Vol. 1, No. 4, (2008):195-196.

[19] Barakatullah, n. 21, at 45-46.

proceedings. In the proceedings, the Jirga members give time to both parties and witnesses to present their stance regarding the issue.[20]

After hearing and investigating, the Jirga members give a neutral and acceptable solution to the dispute. Commonly, the verdicts are based on the *Shari'ah* and the local Pushtoon traditions. However, before announcing the verdict in public, the Jirga members take the consent from both parties. This practice is known as power of attorney (*Waak* or *Ikhtiar*) and, through this practice, the Jirga obligates both parties to adhere to the verdict.[21]

The Jirga system allows any party to appeal against the judgment and the unsatisfied party may even request for another Jirga.[22] If any disputant party fails to obey the decision of Jirga (called turning the face from the Jirga verdict - *Makh Arawal*), then Jirga body has the right to enforce its ruling in anyway. The Jirga can impose sanctions on the disobedient party which may be a huge fine and other punitive forms.[23] The Jirga provides safety to the oppressed and weak people. It plays a very important role in ensuring the preservation of justice and harmony in the community.[24]

For a successful Jirga, there are some basic principles to be followed in a proceeding such as transparency, freedom of expression, accountability of Jirga members, and message of harmony. [25] The Jirga can be held at any level of the society for various purposes. Mostly, commentators have divided Jirga into the following types such as Community Representative Jirga (*Ulusi* or *Qaumi* Jirga); Third Party Jirga (*Shakhsi* Jirga); and Grand Jirga (*Loya* Jirga).[26] The following discussions only focus on how

[20] Muhamad Hassan Ahmad, n. 11, at p. 68.

[21] Pashtun Archives, "Jirga - The Pashtun Judicial System", <http://pashtunarchives.blogspot.com/2012/05/Jirga-pashtun-judicial-system.html> (accessed on 09 April 2020); Muhamad Hassan Ahmad, n. 11, at p. 68.

[22] Abdul Qadir Mushtaq, Umer Yaqoob and Muhammad Usman Javaid, "Role of Jirga in Pakhtoon Society an Analysis with Special Reference to Justice Dispensation", *JPUHS*, Vol. 29, No. 2, (July-December, 2016): 14.

[23] James W. Spain, *The Way of Pathans*, (Karachi: Oxford University Press, 1972): 50-51.

[24] Pashtun Archives, n. 21; Muhamad Hassan Ahmad, n. 11, at p. 69.

[25] Fakhr-ul-Islam, Faqir, Khan and Malik Amer Atta, "Jirga: A Conflict Resolution Institution in Pakhtoon Society", *Gomal University Journal of Research*, Vol. 29, No. 1, (June, 2013): 17; Muhammad Nawaz Khan, n. 20, at 13; Muhamad Hassan Ahmad, n. 11, at pp. 69-70.

[26] Muhamad Hassan Ahmad, n. 11, at pp. 70-73.

the Third Party Jirga is used to resolve the neighbourhood disputes in KP.

The "Third Party Jirga" is formed in resolving a conflict between either two persons or families. In this Jirga, the mediators are selected from both sides and the parties have to consent for the nomination. The selected members have to be impartial in the process. Normally, the Jirga will announce a verdict. If any party fail to accept the verdict, it will then try to convince the respective party to agree to accept the decision willingly.[27] However, the Jirga also has the power to organise a *Badraga* (a volunteer security force raised to secure and protect the proceedings of a specific Jirga) for the awareness of the whole community about the process and the decision. Generally, the following steps are involved in the third-party Jirga.[28]

After occurring a dispute, one of the parties approaches a specific member of the community knows as mediators (*Jirgamar*) to explain the dispute and request for his involvement. Sometimes, both the disputant parties decide to settle their conflict through the third party. Then, the mediator moves forward and starts initial hearing from both sides. The mediators may sometimes advice the parties to include other suitable persons to the case too. Jirga mediator creates a channel of communication between the parties. If the issue is minor, then the Jirga settles down the matter easily. When the issue is a major one, then the mediator may ask the party to give their power of attorney and, normally, the parties give unconditional power of attorney to the mediator in order to decide the dispute. In serious matters, the parties may even be asked to deposit security bond. The Jirga hears the parties face to face or sometimes one after the other depending on the situation. In the process, the mediators try to express openly in front of both parties, but sometimes the parties are only told the good side of the story with the intention to search for common grounds for a settlement. After discussing and clarifying the issues presented by both parties, examining all available evidences, and applying the traditional Pushtoon code; the Jirga passes a judgment that has to be accepted by both parties. If a party views that the judgment of Jirga is injustice, then

[27] Hassan M. Yousufzai and Ali Gohar, "Towards Understanding Pukhtoon Jirga". Just Peace International (2005), 47-48 <http://restorativejustice.org/rj-library/towards-understanding-pukhtoon-jirga/6318/#sthash.xYmTcqIO.dpbs> (accessed on 09 April 2020).

[28] Muhamad Hassan Ahmad, n. 11, at pp. 71-72.

that party can convene a more suitable Jirga to meditate and review the matter.[29]

Third Party Jirga is mainly used for the resolution of dispute between two individuals or families and accordingly this type of Jirga aims to resolve the disputes among the parties without having to go to court, and generally the Jirga members can give the amicable solution. However, every party to the dispute has the right to go to court to claim their legal rights as the Jirga members should not stop any party to look for a legal redress from a court of law.[30]

3. Major issues and challenges in the jirga system

Albeit the Jirga system has been very crucial in ensuring and preserving justice and harmony in the Pushtoon community in various ways, on the other hand, it has also been subjected to the following critisms.

3.1. Unwritten nature of the jirga system

The main criticism of Jirga is that its rules are unwritten and it processes in informal manner. In resolving disputes, Jirga normally uses the religious and traditional rules which may vary from one scholar to another or from one tribe to another. Furthermore, applicable rules are not as clear as a written code for criminal and civil matters for the Jirga members to apply them to the disputes. Besides, there is no specific record of the disputes that have been settled by the Jirga.[31] Hence, the inconsistencies of the application of both substantive laws and procedural rules are widespread in all types of Jirga. In contrary, the common law system offers a court of law that is performed according to the written statutes; constructed on legal evidences; and applied the judicial precedent, i.e., *stare decisis*, for the judicial consistency. In fact, the Jirga system has been consistently practiced even by the common people those who do not have a formal legal education and it serves well in resolving disputes in the community. Of course, it could be more fruitful if the Jirga system can be formalised, to the extent it is possible, under a legal framework

[29] Hassan M. Yousufzai, n. 27, at pp. 49-50; Muhamad Hassan Ahmad, n. 11, at p. 72.

[30] Muhamad Hassan Ahmad, n. 11, at pp. 72-73.

[31] Ali Wardak, "Jirga-A traditional mechanism of conflict resolution in Afghanistan", *Institute of Afghan Study Center*, (2003): 3-4.

with the intention to offer proper structures and procedures for the purpose of rendering justice.[32]

3.2. Human rights issues in the jirga system

Another major criticism on Jirga system is with regard to the violation of human rights in some cases. Some commentators criticise that the accused person could not enjoy enough rights and sufficient time to defend oneself because the Jirga proceedings are not in line with the national legal system. Sometimes, Jirga forces one party or the other to accept and implement its decision and the parties needed to comply with it due to the social pressure from the community. There is also lack of check and balance on what the Jirga does and decides as in the mainstream State organs such as executive, legislative and judiciary. The Pakistan Supreme Court even once made a remark pertaining to Jirga and Panchayat by saying that it is the violation of the Universal Declaration of Human Rights (UDHR).[33]

The Jirga system is also under severe criticisms for the violence of human rights especially against women in some cases. Some examples of these human rights violations are noteworthy of discussing in brief in this part. In 2011, "a Jirga agreement between different political parties prohibited 18,000 registered women from voting in by-elections" in Kohistan, KP.[34] In 2013, Rubina - a 12 years old girl - was being forced by a Jirga to marry an older man in Doong Darra, Upper Dir District. She appealed to the Chief Justice of the Supreme Court of Pakistan to provide her with safety from such a forced marriage.[35] Similarly, in 2014, Amna - 11 years old girl - was forced to marry to a man elder three times her age as compensation for her uncle having raped a girl in Grilagan, Northwest Pakistan. She was one of the two girls given to the aggrieved family through a Jirga decision and finally she needed to marry the brother of the girl who had been raped

[32] Hassan M. Yousufzai, n. 27; Muhamad Hassan Ahmad, n. 11, at p. 74.

[33] DAWN News, "SC Holds Jirgas Violative of Pakistan's World Commitments", 17 January 2019, <https://www.dawn.com/news/1458038> (accessed on 09 April 2020).

[34] Zia Ur Rehman, "Sorry, you still can't vote", *The News*, (4 December 2011), <https://jang.com.pk/thenews/dec2011-weekly/nos-04-12-2011/dia.htm#2> (accessed on 09 April 2020).

[35] Nazish Brohi, "Women, Violence and Jirgas", National Commission on the Status of Women (NCSW), Islamabad Pakistan, (2016): 6, <http://af.org.pk/gep/images/publications/Research%20Studies%20(Gender%20Based%20Violence)/NB%20NCSW%20JIRGAS.pdf> (accessed on 09 April 2020).

by her uncle.[36] In 2015, a Jirga declared that women should not be allowed to vote in elections and this resulted disenfranchising over 12,000 women voters in the constituency in Darel Valley, Diamer District. The Jirga members comprised of religious leaders and candidates of political parties from the said region.[37]

Apart from the above mentioned incidents of human rights violation, the honour killing practices through the Jirga system is also very much alarming. According to the reports prepared by Aurat Foundation, the total number of 475 women in 2008; 604 women in 2009; and 557 women in 2010 were killed in the name of honour and mostly the decision was made by Jirga or Panchayat system.[38] In 2016, it is reported that more than 70 cases of honour killings were ordered through the Jirga system. These incidents happen mainly in the rural areas where rigid traditional rules are in practice. The Jirga members in those areas are not really aware of existing human rights and domestic laws.[39] Of course, there are volumes of cases that can be discussed in this part as many more cases happened in different areas of Pakistan where the Jirga system is being used to resolve disputes. These kinds of human rights violation incidents happen due to the fact that the government of the country does not have proper control over the conducts Jirga system through a proper legal framework.[40] Therefore, authors are of the opinion that it is very crucial to have a comprehensive legal framework governing all Jirga proceedings in KP.

4. A critical analysis of the legal position of community mediation in Khyber Pakhtunkhwa

At this juncture, it is pertinent to examine critically the existing laws governing the community mediation in KP before designing a comprehensive legal framework for the Jirga community mediation. Accordingly, this paper analyses the relevant legal provisions under various types of laws in order to discover the legal status of community mediation in KP.

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[36] *Ibid*.

[37] *Id*.

[38] Maliha Zia Lari, "A Pilot Study on: Honor Killings in Pakistan and Compliance of Law", *Aurat Publication and Information Service Foundation*, Pakistan, November (2011), 1.

[39] Nadia Agha and Zamir Ahmed, "Prevalence and Nature of Violence against Women in Pakistan: A Six-month Content Analysis of a Pakistani Newspaper", *Pakistan Journal of Criminology*, Vol. 10, No. 1, (January, 2018): 109.

[40] Muhamad Hassan Ahmad, n. 11, at pp. 74-76.

In 2002, the Civil Procedure Code 1908 (CPC) has been amended and encourage a court, as it deems fit and with the consent of the parties, refer a civil case to any ADR mechanism which includes 'mediation' and 'conciliation' or any other means as such.[41] Furthermore, when a case is referred to mediation, the court will wait for a mutual settlement and decide in accordance with that settlement agreement between the parties if they managed to reach to a settlement.[42] The court may further grant, on such terms as it thinks fit, the plaintiff permission to withdraw from such suit or abandon.[43] It is observed that the role of ADR mechanisms, including mediation, in the civil justice system of Pakistan has becomes quite significant after the amendment of the CPC in 2002.[44] However, despite the introduction of the court-annexed mediation under the CPC, there are no details rules which govern the conducts of mediation, the training and qualifications of mediators, and the mediation centres. In this regard, one of the Judges of the Supreme Court of Pakistan, Justice Tassaduq Hussain Jillani, mentions that: "Notwithstanding the legislative and executive measures taken, the Courts have not made use of section 89 of the CPC very frequently. There is more than one reason for this. Firstly, for any new scheme to succeed, institutional support is a *sine qua non* which has been mostly lacking. Secondly, not much has been done for training and capacity building of the judges. And thirdly, the amendments in the CPC were not followed by amendments in the rules for procedural details to invoke ADR techniques".[45]

The Family Courts Act 1964 also has provisions allowing the court to refer a case to ADR mechanisms. Only when the compromise is not possible between the parties, the Court may

[41] Section 89(A) and Order X, Rule 1(A)(III), the Civil Procedure Code 1908 (as amended in 2002).

[42] Order XXIII, Rule 3, the Civil Procedure Code 1908 (as amended in 2002).

[43] Order XXIII, Rule 1, the Civil Procedure Code 1908 (as amended in 2002).

[44] See *Messrs Alstom Power Generation through Ashfaq Ahmad v. Pakistan Water and Power Development Authority through Chairman and Another* PLD [2007] Lahore 581; *Dr. Mrs. Yasmin Abbas v. Rana Muhammad Hanif and Others* PLD [2005] Lahore 742; Muhamad Hassan Ahmad, n. 6, at pp. 244-245.

[45] Hasan Awais and Muhammad Amir Munir, "Alternative Dispute Resolution (ADR) in Trial Courts of Pakistan: A Practical Approach towards New Era of Timely Justice as a Means of 'Justice for All'", Report of 8th Judicial Conference, Law and Justice Commission of Pakistan, (2018), p. 13; Muhamad Hassan Ahmad, n. 6, at p. 251.

proceed with the trial and record evidence of the parties.[46] As in the case of the CPC, the Family Courts Act 1964 does not mention in detail how the compromise or reconciliation should be conducted between the disputing spouses. Therefore, in practice, the judge sometimes leaves the parties alone in his chamber to discuss the matter on their own. For example, in the case of *Mst. Ajminah Bibi v. Bakhtyab* R/o [2008] Wari Dir Upper KP (Civil Suit no. 26/3FC), the parties were advised to avoid traditional advocacy. Then, they opted for direct communications and the reconciliation was successful after two or three hearings.[47] This may be fine for some peace loving couples but things may also go wrong if the parties are hostile against one another.[48]

The Small Claims and Minor Offences Courts Ordinance 2002 was enacted for the purpose of providing inexpensive and expeditious disposal of small claims and minor offences. It allows the Court - at any stage of the proceedings - may conciliate, arbitrate, mediate or resolve the claim or offence through '*Salis*' (the person acting as a conciliator, a mediator or an arbitrator)[49] or any other person either on the application of any party or otherwise and also there is a possibility of 'amicable settlement' between the parties with their consent.[50] *Salis* is mainly responsible to "facilitate negotiations between the parties and steer the direction of discussion with the aim of finding a mutually acceptable solution; and assist the parties in reaching an agreement".[51] The Small Claims and Minor Offences Courts Ordinance 2002 encourages the court to refer the case for the amicable settlement which includes ADR mechanisms such as arbitration, mediation, conciliation or even any other lawful means as long as it is mutually agreed upon by the parties. Although it provides some detail guidelines such as preparing the list of arbitrators, mediators, or conciliators and their responsibilities; conducting such amicable settlement; and challenging an award or a decree on any ground; these are not enough to have an efficient arbitration, mediation, conciliation

[46] Section 10(4), the Family Courts Act 1964; Muhamad Hassan Ahmad, n. 6, at pp. 245-246.

[47] Qazi Attaullah and Lutfullah Saqib, "Tracing the Concept of Negotiation in Law, Pakistani Legal System and Sharī'ah", *Jihāt al-Islām*, 2017, Vol. 11, No. 1, pp. 53-68.

[48] Muhamad Hassan Ahmad, n. 6, at pp. 251-252.

[49] Section 2(g), the Small Claims and Minor Offences Courts Ordinance 2002.

[50] Section 14(1), the Small Claims and Minor Offences Courts Ordinance 2002.

[51] Section 2(a), the Small Claims and Minor Offences Courts Ordinance 2002; Muhamad Hassan Ahmad, n. 6, at pp. 246-247.

service as each of these ADR process needs detail rules on its conducts, trainings of personnel, and the venues to conduct such processes.[52]

The Shariah Nizam-E-Adl Regulation 2009[53] provides some informal dispute resolution methods by providing that a court may refer any civil or criminal case to '*Musleh*'[54] or '*Musleheen*'[55] before recording of evidence with the mutual consent of parties.[56] Once the case is referred as such, *Musleh* or *Musleheen* - after hearing the parties, their witnesses, and perusing the relevant documents as the case may be[57] - will have to decide the case in accordance with the *Shari'ah*[58] and submit a report to the court within the stipulated time.[59] Only when the court is satisfied with the opinion expressed by *Musleh* or *Musleheen* in accordance with the *Shari'ah*, it will announce the judgement accordingly. The parties, of course, still have the opportunity to submit objections to such report and the court will again hear the parties and decide about the correctness or otherwise of the objections.[60] If the opinion is not in accordance with the *Shari'ah*, the court will treat the opinion as null and void and start its proceedings for decision of such dispute.[61] The irony here is that, in some cases, the *Shari'ah* itself is subjected to various interpretations by numerous scholars. Accordingly, it would be difficult to apply a particular ruling if there are two or more views but somehow contradictory in relation to a particular issue. Although it obliges the court to

[52] Muhamad Hassan Ahmad, n. 6, at p. 252.

[53] The Shariah Nizam-E-Adl Regulation 2009 has been applicable to the Provincially Administered Tribal Areas (PATA) of the North-West Frontier Province, except the Tribal Areas adjoining Mansehra district and the former State of Amb. Although these areas have already been integrated into Khyber Pakhtunkhwa (KP) under the 31st Amendment of the Constitution of Islamic Republic of Pakistan 1973, the KP government decided to promulgate an ordinance to maintain this Regulation for those areas. See Pakistan Today, "KP govt to introduce ordinance to preserve Nizam-e-Adl, other regulations in PATA" (29 May 2018) <https://www.pakistantoday.com.pk/2018/05/29/kp-govt-to-introduce-ordnance-to-preserve-nizam-e-adl-other-regulations-in-pata/> (accessed on 09 April 2020).

[54] The term '*Musleh*' has an Arabic origin and literally means 'peace-maker' or 'reformer'. In this context, the person acts as a mediator for the settlement of dispute.

[55] The term '*Musleheen*' is the plural form of the term '*Musleh*'.

[56] Section 13, the Shariah Nizam-E-Adl Regulation 2009.

[57] Section 13(4), the Shariah Nizam-E-Adl Regulation 2009.

[58] Section 13(5), the Shariah Nizam-E-Adl Regulation 2009.

[59] Section 13(2), the Shariah Nizam-E-Adl Regulation 2009.

[60] Section 13(6), the Shariah Nizam-E-Adl Regulation 2009.

[61] Section 13(5), the Shariah Nizam-E-Adl Regulation 2009; Muhamad Hassan Ahmad, n. 6, at pp. 248-249.

maintain a list of *Musleheen*, there is no mention of the qualifications of a *Musleh*. In addition, the place and the conducts of mediation as to where and how the *Musleh* or *Musleheen* should settle the dispute are not well covered under the Regulation. In addition, this is only applicable to a few selected areas in KP.[62]

The Khyber Pakhtunkhwa Police Order (Amendment) Act 2015 establishes a conflict resolution body called the 'Dispute Resolution Council' (DRC) in order to settle minor cases in an amicable manner without having to go to a court of law. It empowers the Provincial Police Officer to act as a mediator for petty cases.[63] According to the official report of KP police, the DRC has disposed of 5,381 cases out of a total of 7,797 in 2018 alone.[64] In this sense, the performance of the DRC is very impressive and can be a good example for the community mediation too. Nonetheless, it does mention detail rules governing the conducts of mediation, and the training as well as qualifications of mediators.[65]

It can be observed from the above legal analyses that there is no specific legal framework governing the community mediation, the training and qualifications of community mediators, and the community mediation centres in KP. Thus, there is a need to legislate a comprehensive legal framework which covers community mediation from all dimensions by giving importance to the traditional Jirga dispute resolution methods in place in KP and also learning experiences from other suitable jurisdictions.

4.1. Legal framework for the jirga community mediation

The Jirga system is ongoing solely with the acceptance of the society in KP without any control over the conducts of Jirga through a proper legal framework. The administration of justice through the services of Jirga system would be more fruitful with the support of the government if it can be formalised, to the extent it is possible, under a comprehensive legal framework with the intention to offer proper structures and procedures in handling community disputes.[66] It is suggested to enact a specific legislation

[62] Muhamad Hassan Ahmad, n. 6, at p. 252.

[63] Article 186(A), the Khyber Pakhtunkhwa Police Order (Amendment) Act 2015.

[64] See Khyber Pakhtunkhwa Police, "Review of DRCs" <http://kppolice.gov.pk/drc/review.php> (accessed on 09 April 2020); Muhamad Hassan Ahmad, n. 6, at p. 249.

[65] Muhamad Hassan Ahmad, n. 6, at p. 253.

[66] Muhamad Hassan Ahmad, n. 11, at p. 76.

for Jirga community mediation rather than providing some rules or amendments in some other statutes. It is further recommended to include the relevant authorities that shall run the Jirga community mediation and its organisational structure in the said legislation. Accordingly, authors propose to enact a specific "Jirga Community Mediation Act" which deals with three essential components of community mediation, i.e., Jirga community mediation centre, Jirga community mediators, and standards of conducts for the Jirga community mediation.

4.2. Jirga community mediation center

First of all, the relevant ministry should establish a "Jirga Community Mediation Centre" under its administration at the High Court of KP in Peshawar. The branches of the mediation centre can be established in every district court, sub-divisional court, and police station of the province of KP for the swift, steady and secure Jirga community mediation processes. The ministry should also establish a "Jirga Community Mediation Board" at the provincial level to administer the whole Jirga community mediation system in KP. The ministry should appoint an appropriate number of qualified and experienced people with high moral standards as members of the said Board. The Board shall decide all maters with the majority vote. The Board shall elect one person among its members to be the Director in order to head the administrative matters as decided by the Board.

The Board shall provide a list of qualified and experienced people with high moral standards to act as members of the Jirga Community Mediation Board of each and every branch of the Jirga Community Mediation Centre at district court, sub-divisional court, and police station to the ministry for the approval. If it is satisfactory, the ministry shall appoint them as the members of the respective Jirga community mediation board across the province. Similarly, the respective board shall decide all maters with the majority vote in line with the directives issued to them by the Jirga Community Mediation Board at the provincial level. In the same vein, each board shall also elect one person among its members to be the Director in order to head the administrative matters. A director or member of a board, either at the provincial level or branch level, can be dismissed on the ground of any misconduct that may be prescribed under the Jirga Community Mediation Act and appoint a new director or member in the same manner.

In this fashion, each and every branch of the Jirga Community Mediation Centre has its own administrative body to carry out swift, steady and secure Jirga community mediation processes in line with the directives from the provincial authorities while maintaining the local customs in the respective tribal areas. Administratively, each and every Jirga Community Mediation Board of the branches of the Jirga Community Mediation Centre has the duty to submit a progress report and an audited financial report to the provincial Jirga Community Mediation Board that shall further submit to the ministry together with its own reports of the same nature.[67]

4.2. Jirga community mediators

In fact, a competent mediator essentially needs to have mediation training, experience in mediation, mediation skills, cultural understanding of the parties and other qualities as necessary.[68] Thus, the Jirga Community Mediation Centre at the provincial level shall establish a Jirga community mediation training institute in order to train people from respective areas in the province to become Jirga community mediators. Any interested person who possesses high moral standards and reputation in the community - such as a retired judge, a lawyer, a government official, an elder, a tribal chief, a technocrat, among others - can be enrolled to be trained as the Jirga community mediator. The training shall include modules on the theoretical understanding of the benefits and challenges of the application of mediation process to the neighbourhood disputes; the practical development of essential skills required to constructively engage in community mediation and direct participants toward the amicable resolution; and the applicable national and provincial law - including human rights laws, professional, ethical and cultural guidelines associated with the practice of community mediation. After the successful completion of the prescribed Jirga community mediation training, the provincial Jirga Community Mediation Board shall certify and accredit them as the Jirga community mediators. Apart from that

[67] See also Mohammad Naqib Ishan Jan, Mahyuddin Daud and Muhamad Hassan Ahmad, "Mediation Institutions", in Adnan Yaakob, Ashgar Ali Ali Mohamed, Arun Kasi, Mohammad Naqib Ishan Jan and Muhamad Hassan Ahmad (eds.) *Alternative Dispute Resolution: Law & Practice* (CLJ Publication: 2020), pp. 369-380.

[68] Model Standards of Conduct for Mediators 2005: Standard IV (A)(1); Muhamad Hassan Ahmad, Mohammad Naqib Ishan Jan and Seeni Mohamed Nafees, "Mediation: Standards of Conduct for Mediators", in Adnan Yaakob, Ashgar Ali Ali Mohamed, Arun Kasi, Mohammad Naqib Ishan Jan and Muhamad Hassan Ahmad (eds.) *Alternative Dispute Resolution: Law & Practice* (CLJ Publication: 2020), p. 186.

a mediator should also continue to enhance knowledge and skills related to mediation by attending educational programs and related activities.[69]

Each and every Jirga Community Mediation Board of the branches of the Jirga Community Mediation Centre shall submit a list of available certified and accredited Jirga community mediators to the provincial Jirga Community Mediation Board that shall further submit to the ministry for the approval. If it is satisfactory, the ministry shall appoint them as the Jirga community mediators of the respective Jirga community mediation centre for the particular area of the province. A Jirga community mediator can be dismissed on the ground of any misconduct that may be prescribed under the Jirga Community Mediation Act.[70] In this way, each and every branch of the Jirga Community Mediation Centre maintains a list of Jirga community mediators, certified and accredited by the provincial Jirga Community Mediation Board and further appointed by the ministry, readily available to conduct Jirga community mediation among the disputants in any particular area of KP.

4.3. Standards of conduct for the jirga community mediation

Any disputing party or a court may refer a neighborhood dispute to the respective Jirga Community Mediation Centre available in a particular area. Once the case is referred, the Director of the respective centre shall call upon both parties to conclude the "mediation agreement" with their voluntary consent and also to appoint the mediator of their choice with the mutual agreement from the list of available Jirga community mediators maintained by the centre. The number of mediator can be one or more depending on the request made by the parties. If the parties could not agree on the appointment of the mediator within 10 working days from the date of referral, the Director shall appoint, as he thinks fit, one mediator from the said list.

A mediator shall conduct the mediation only when he has the ability to mediate the dispute and the required qualifications as well as skills to meet the reasonable expectations of the

[69] Model Standards of Conduct for Mediators 2005: Standard IV (A)(2); Muhamad Hassan Ahmad, n. 68, at p. 186.

[70] See also Mohammad Naqib Ishan Jan and Muhamad Hassan Ahmad, "Negotiation: Types and Ethical Issues", in Adnan Yaakob, Ashgar Ali Ali Mohamed, Arun Kasi, Mohammad Naqib Ishan Jan and Muhamad Hassan Ahmad (eds.) *Alternative Dispute Resolution: Law & Practice* (CLJ Publication: 2020), pp. 106-110.

parties.[71] Besides, he shall take up the case only when he is ready to commit and give the full attention to the process.[72] He has to promote "diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants".[73] If it is necessary, the mediator may request police to be present during the mediation sessions for safety. The centre shall make necessary arrangement for a mediation session. The parties to the dispute shall collaborate with the mediator in all processes and provide full support in resolving the dispute within the stipulated time.

After the appointment, the mediator shall commence the mediation session at the respective centre with the adoption of the facilitative method within a period of fifteen working days from the date of referral. Nevertheless, the court may extend the time in extraordinary circumstances. A mediator shall conduct the mediation professionally in consistent with the principle of self-determination, confidentiality and impartiality.[74] A mediator shall understand that the mediation is based on the fundamental principle of self-determination by the parties and thus he has to rely upon the ability of the parties to reach a voluntary agreement without any form of coercion.[75] He has to make it clear from the beginning that mediation is consensual in nature and that the mediator is just an impartial facilitator. Therefore, any party has the right to withdraw from mediation at any time and the mediator may not impose or force any settlement on the parties.[76] The mediator shall ensure that all information available to him in the mediation proceedings are strictly confidential and will not be

[71] Model Standards of Conduct for Mediators 2005: Standard IV (A); Standards of Conduct for Mediators in Court-Connected Programs 2000: Standard IV; Muhamad Hassan Ahmad, n. 68, at p. 185.

[72] The standards of conduct for mediators prepared by The American Arbitration Association (AAA); the American Bar Association's Section of Dispute Resolution (ABA); and the Association for Conflict Resolution (ACR), i.e., the Model Standards of Conduct for Mediators 2005: Standard VI (A)(1).

[73] Model Standards of Conduct for Mediators 2005: Standard VI (A); the standards of conduct for mediators adopted by the New Jersey Supreme Court, i.e., Standards of Conduct for Mediators in Court-Connected Programs 2000: Standard VI (A); Muhamad Hassan Ahmad, n. 68, at p. 192.

[74] Muhamad Hassan Ahmad, n. 68, at p. 192.

[75] Standards of Conduct for Mediators in Court-Connected Programs 2000: Standard I.

[76] Standards of Conduct for Mediators in Court-Connected Programs 2000: Standard I (A); Muhamad Hassan Ahmad, n. 68, at p. 184.

disclosed for any reason unless the parties expressly consent to any disclosure or it is required by the applicable law to do so.[77]

Impartiality can be defined as the "freedom from favouritism, bias or prejudice".[78] A mediator shall always conduct mediation sessions in an utmost impartial manner.[79] He has to inform the parties if there is any circumstance that might create any possible bias, prejudice, or lack of impartiality[80] and, in such a case, decline to mediate as he cannot conduct the mediation in an impartial manner.[81] Even during the mediation, he always has to be careful against "prejudice or lack of impartiality due to the personal characteristics, background, values and beliefs, or behaviour of any party, or any other reason".[82] He should also withdraw from the process, at any time, if he is unable to conduct the mediation in an impartial manner.[83] Furthermore, a mediator shall avoid mediating a dispute if there is a conflict of interest either "in the subject matter of the dispute or in any relationship, regardless of whether it is past or present, personal or professional, between a mediator and any party to the dispute".[84] The mediator may also terminate the mediation session at any time if the mediator deems that the mediation will not be fruitful.

The Jirga community mediation process shall be concluded when the parties reach to an agreed settlement or any party applies to end the session. The parties shall sign a "settlement agreement" at the end of a successful mediation session. With regard to the services offered by the Jirga community mediators, the provincial Jirga Community Mediation Board can fix an appropriate amount of remuneration for them to be paid by each

[77] Model Standards of Conduct for Mediators 2005: Standard V (A); Muhamad Hassan Ahmad, n. 68, at pp. 187-189; Abdul Haseeb Ansari, Assaduzzaman Khan and Muhamad Hassan Ahmad, "Confidentiality and Public Policy in Alternative Dispute Resolution", in Adnan Yaakob, Ashgar Ali Ali Mohamed, Arun Kasi, Mohammad Naqib Ishan Jan and Muhamad Hassan Ahmad (eds.) *Alternative Dispute Resolution: Law & Practice* (CLJ Publication: 2020), pp. 79-100.

[78] Model Standards of Conduct for Mediators 2005: Standard II (A).

[79] Section 9(3), the Malaysian Mediation Act 2012.

[80] Standards of Conduct for Mediators in Court-Connected Programs 2000: Standard II (B).

[81] Model Standards of Conduct for Mediators 2005: Standard II (A).

[8282] Model Standards of Conduct for Mediators 2005: Standard II (B)(1).

[83] Model Standards of Conduct for Mediators 2005: Standard II (C); Muhamad Hassan Ahmad, n. 68, at pp. 189-190.

[84] Model Standards of Conduct for Mediators 2005: Standard III (A); Muhamad Hassan Ahmad, n. 68, at pp. 190-192.

party by considering actual expenses incurred. The mediators may waive the fee if they would like to do so. The record of all listed cases in all centres shall not be kept for more than 3 years after the accomplishment of the mediation session.

It can be observed in the proposed structure that the practice of traditional Jirga system is still well maintained while improving its composition, training and appointment of Jirga community mediators, and above all the proper standards of conducts for the Jirga community mediation. After the establishment of the Jirga Community Mediation Centre under the proposed Jirga Community Mediation Act, the disputants have the well established, enforced and accountable forum to resolve their disputes in the community. Therefore, they do need to participate in the unstructured Jirga resolution anymore as they may now settle their disagreement at the Jirga Community Mediation Centre or a court of law. The ministry also needs to prohibit any other form of Jirga dispute resolution by law for the purpose of eliminating social injustices in the society in the future.

5. Conclusion

In fact, the Jirga system would be more fruitful in resolving neighbourhood disputes if it is formalised and regulated, to the extent it is possible, under a comprehensive legal framework with the intention to offer proper structures and procedures in handling disputes in accordance with all the existing laws applicable to KP. Other jurisdictions such as Australia, Malaysia, Singapore, and the US have devolved legal frameworks to this effect and introduced the community mediation into their formal legal system. Of course, the law governing the Jirga system should be carefully crafted by giving importance to the traditional dispute resolution methods in place and also learning experiences from other suitable jurisdictions.[85] Accordingly, authors propose a structure that the practice of traditional Jirga system is still well maintained while improving its composition, training and appointment of Jirga community mediators, and above all the standards of conducts for the Jirga community mediation. Authors humbly present that it is better to allow the government bodies to handle the administration of justice in accordance with the existing laws in KP rather than allowing some individuals with no proper knowledge on justice to settle the dispute by making use of the traditional Jirga system within their limited

[85] See also Muhamad Hassan Ahmad, n. 6, at pp. 253-254.

intellectual capacity which at times lead to grave human rights violations and injustices.[86]

[86] See also Abdul Haseeb Ansari, Muhamad Hassan Ahmad and Adnan Yaakob, "Alternative Dispute Resolution: Definition and Its Development", in Adnan Yaakob, Ashgar Ali Ali Mohamed, Arun Kasi, Mohammad Naqib Ishan Jan and Muhamad Hassan Ahmad (eds.) *Alternative Dispute Resolution: Law & Practice* (CLJ Publication: 2020), pp. 28-48.

Prolific Contribution of Council of Islamic Ideology for Islamization of Muslim Family Law Ordinance 1961: An Overview

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Abstract

Family law refers to legal matters relating to marriage, divorce, legal separation, child custody and support, alimony (spousal support), adoption and related issues and no doubt that Islam has provided a solid and effective family law. Every segment of this system strives for success, sustainability and prosperity of mankind which not only the source of an effective and productive family but also for prosperous and conducive society. Pakistan is an Islamic ideological state which is established on the foundations of two-nation theory, and main purpose of its establishment is to exercise the Islamic laws in an independent state. After the establishment of Pakistan for inculcation of these objectives a constitution of Islamic Republic of Pakistan had drafted in the light of sharīᶜah *(Islamic law). Beside this, council of Islamic ideology had also formulated and the basic objectives of this counsel are particularly that, all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and* Sunnah. *Therefore, the study will highlight that Council of Islamic Ideology had prolific contribution for Islamization of Muslim family law 1961. This Council had critically analyzed the every article of Muslim family law 1961 in the light of Quran and* sunnah. *Furthermore, during this procedure many sessions had held. The Muslim family law Ordinance was taken up for the first time for consideration of the counsel in its session held on the 17 Feb, 1965 under chairmanship of Allaudin Siddiqi as counsel's chairman. In connection with the Islamization of law, recommendations were given on the Muslim family law Ordinance 1961 for the suitable amendments in the light of Quran and* sunnah. *The counsel completed its three readings up to march 1967 and final recommendations were formulated in council's session held in Lahore on 28 March 1967.*

Key Words: Council of Islamic Ideology, Islamization of Law, Muslim family law

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1. Introduction

Of all the relationships extant in human affairs the most important and intimate is that between a husband and wife. Obviously casual and informal sexual relations between any man and woman are possible. But all humanity regards such a relationship as height of aberration like any other sexual aberration. Whatever experience has been gone through by humanity through the ages in this respect no better form in this relationship has been evolved than a formal more or less permanent arrangement i.e. marriage, even have come to respect marriage as the most civilized and rewarding social association with responsibilities and obligations.

The laws that derive their origin from divine sources recognize marriage as an established form of human relationship based on human instincts which require satisfaction with added characteristics of sanctity and durability, responsibilities and obligations towards self-offspring's of such relationship. All religious societies share these values and the responsibilities of the couple are so deeply respected that some sects declare that marriages are made in heaven and cannot be ever broken. It is, however, accepted on all hands that marriage and divorce law of Islam is unique in the sense that it accepts certain instincts in man as demanding satisfaction but at the same time creative of responsibilities. Divine sanction is granted to the marriage relationship and due provision is made to control and regulate the conduct of the spouses and society in general in respect of the marriage relationship so that the responsibilities and obligations it creates are duly discharged. But again this control is exercised in simple framework, for it is obvious that human nature and human actions cannot be very tightly controlled by words. The marriage and divorce laws of Islam and so of will and inheritance were respected and implemented by the colonial rulers and very little interfered with.

It was in 1961, during the administration of filed martial Muhammad Ayub Khan that the present Muslim Family Laws Ordinance was hammered out and promulgated and since has been receiving legal protection in every regime. The Advisory Council of Islamic Ideology, as it then was, took up the matter of

consideration of Muslim Family Laws Ordinance,1961 as long before as 19th of October, 1964. It was resolved that in connection with the Islamization of Laws recommendations may be first made on the ordinance in question for suitable amendments. Consideration and discussions in the council went on till March 1967. The said council was, however, able to present to the government its final recommendations in December, 1967.

2. Establishment of Council of Islamic Ideology (CII)

Although the constitution of Pakistan was drafted much late after its establishment which has considered dark chapter in the history of Pakistan, however, the first constitute had drafted in 1956, and in its article 198(1) it has decided that

1. *whereas sovereignty over the entire universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by him is a sacred trust*;
2. *And whereas it is the will of the people of Pakistan to establish an order;*
3. *Wherein the state shall exercise its power and the authority through the chosen representatives of the people;*
4. *Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed;*
5. *Wherein the Muslim shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah.*
6. *Now, therefore, we, the people of Pakistan…. Faithful to the declaration made by the founder of Pakistan Quaid-e-Azam Muhammad Ali Jinaah, that Pakistan would be democratic state based on Islamic principles of social justice.";*[1]

It had been decided under the article that:

> *"No law shall be enacted which is repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah, and*

[1]Annual Report By Council of Islamic Ideology : 2013-2014, p.3

existing law should be brought into conformity with such injunctions.[2]

It also had suggested that for promulgation of said Constitute within one year of the Constitution Day, the President of Pakistan shall appoint a commission.

1. *To make recommendations*
2. *As to measure for bringing existing laws into conformity with the injunctions of Islam and*
3. *as to the stages by which such measures should be brought into effect and*
4. *To compile in a suitable form, for the guidance of the National and Provincial Assembles, such Injunctions of Islam as can be given legislative effect.*[3]

Unfortunately the constitute of 1956 had survived no longer and after its cancelation new constitution had introduced in 1962, but similar to previous constitution a decision had taken about the establishment of Advisory Council of Islamic Ideology in article 199. In article 204(1) of this constitute the following duties had assigned to the Council:

"To make recommendations to the Central Government and the Provincial Government as to means of enabling and encouraging the Muslims of Pakistan to order their lives in all respects in accordance with the principles and concepts of Islam, and to examine all laws in force immediately before the commencement of the constitution (First Amendment) Act, 1963, with a view to bringing them into conformity with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah."[4]

The chapter of duties of the council of Islamic ideology as laid down in article 230 of the constitution of Pakistan, 1973, is as under the article 230- (1) the functions of the Islamic council shall be-

[2] Ibid,p.4
[3]Ibid, p.4
[4]Ibid, p.5

(a) To make recommendations to parliament and the provincial assembles as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Quran and Sunnah.

(b) To advise a house, a provincial assembly, the president or a Governor, on a question referred to the council as to whether a proposed law is or not repugnant to the injunctions of Islam.

(c) To make recommendations as to the measures for bringing existing laws into conformity with the injunctions of Islam and the stages by which such measures should be brought into effect; and

(d) To compile in a suitable form for the guidance of parliament and the provincial assembles such injunctions of Islam as can be given legislative effect."[5]

Under the law of 1962 and from the notification by the ministry of law and parliamentarian affairs the first advisory council of Islamic Ideology had been established. The first chairman of this council was Mr. Justice Abu Salih Muhammad Akram, Justice Muhammad Sharif, Maulana Akram Khan, Maulana Abdul Hamid Badayuni, Maulana Hafiz Kafiyat Hussain, Dr. Qureshi and Maulana Abdul Hashimwere also the members of this council. It has declared that:

> *"All existing laws shall be brought in conformity injunctions of Islam has laid down in the Holy Quran and Sunnah, in this part referred to as the injunctions of Islam, and no law shall be enacted which is repugnant to such injunctions."*[6]

It also has declared during the interpretation of article 228 that:

> *"There shall be, constituted within the period of ninety days from the commencing day a council of Islamic Ideology, in this part referred to as the Islamic Council."*[7]

[5]Annual Report By Council of Islamic Ideology : 2013-2014, p.5
[6] Ibid,p.6
[7]Ibid

In the same article the components, structure and rules and regulations had highlighted in brief and a comprehensive methodology.

> *"The Islamic Council shall consist of such members, being not less than eight and not more than twenty as the president may appoint from amongst person having knowledge of principles and philosophy of Islam as enunciated in the Holy Qur'an and Sunnah, or understanding of the economic, political, legal or administrative problems of Pakistan."* [8]

According to the clause (3) of the article 228 it was mandatory that, Minimum two members of the council should be retired or on service judge of Supreme Court or High court. Similarly it was also mandatory to have at least one female member in the council. According the article 229, if the president of Pakistan or Governor would face any question that the current existing law is either according the *sharīʿah* ruling or have any contradiction with *sharīʿah* injunction? Then the higher authority will refer these questions towards the council. The similar condition had suggested for senate, Provisional Assembly and National Assembly as well. In article 230 the following responsibilities and duties had been discussed:

(a) *"to make recommendation to Majlis-e-Shoora(Parliament] and the Provincial Assemblies as to the ways and means of enabling and encouraging the Muslim of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concept of Islam as enunciated in the Holy Quran and Sunnah;*

(b) *To advise a house, a Provincial Assembly, the president or a governor on any question referred to the council has to whether a proposed law is or is not repugnant to the Injunctions of Islam;*

(c) *To make recommendations has to measures for bringing existing laws into conformity with the Injunctions of Islam and the stages by which such measures should be brought into effect; and*

[8]Annual Report By Council of Islamic Ideology : 2013-2014, p.6

(d) To compile in a suitable form for the guidance of Majlis-e-Shoora(Parliament] and the Provincial Assemblies, such injunctions of Islam as can be given legislative effect"[9]

3. Muslim Family Law Ordinance 1961

After partition in 1947, the legislation relating to Muslim family laws introduced under British rule continued to govern personal status.[10] In 1961 the Muslim Family Laws Ordinance was passed, drawing much criticism from religious leaders. The first Constitution was promulgated in 1956, and included a provision known as the repugnancy clause, affirming that no law repugnant to Islamic injunctions would be enacted and that all existing laws would be considered and amended in light of this provision. The repugnancy provision has been retained and strengthened in subsequent Constitutions and amendments.[11] Ministry of Religious Affair has informed the council of Islamic ideology from the following views of Ministry of Law through their letter No 17 (1)/ ADJ/79 dated 27-01-1980:

> *"The Muslim Family Laws Ordinance 1961, is utterly un-Islamic. It is against the Holy Qur'an and Sunnah. It has dared to amend the Qur'anic law to the extent of Irtidad and its existence is a slur, a blot, a bad blot on the glorious name of Islam and our Islamic country. Such legislation or even its name need not be protected. Let us clean the blot altogether by its total repeal."* [12]

Therefore, a meeting of the advisory council of Islamic ideology was held at Rawalpindi on the 19th October, 1964 under

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[9]Ibid.

[10]Perveen, D. R. (2008). Alternative perspective on "Child and Early Marriages" in Pakistan. *Understanding Adolescent and Youth RH issues in Pakistani Context; perspectives from the advocates, activists, academicians, scholars and practitioners* (p. 26). Islamabad: AGEHI Resource Centre Society for the Advancement of community Health Education and Training (SACHET Pakistan).

[11]Vardag, Z. K. (2013). *A Full Service Pakistani Law Firm*. Retrieved April 04,2014, from Pakistan Law Firm:www.pakistanilaw.wordpress.com

[12] Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983,p.35

the chairmanship of Alaudin Siddiquias chairman council. It was resolved by the council as under:

> *" In connection with the islamization of laws, recommendation may be made first on the Muslim family laws ordinance, 1961 for suitable amendments in the light of the holy Quran and Sunnah".*

Here we discuss only those sections of Muslim Family Laws Ordinance 1961which are contradictory to Islamic Family Laws:

4. Section 4: Succession

The provisions of this section may be usefully reported below for facility references:

> *"In the event of the death of any son and daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as in the case may be, would have received if alive"*[13]

Sharīᶜah Injunctions about Succession

The moving spirit behind this section appears to be the intense desire for making some provision for the orphan grandchildren of the propositus who often find themselves without any financial support after the death of their grandfather. The problem has been solved by giving them permanent place in the list of inheritors. The intention is no doubt consonance with the solitude of the Holy Quran and *Sunnah* of the Holy Prophet *(*PBUH*)* for the welfare of the orphans but the solution offered to nevertheless clearly against their injunctions. The basic principle of the Muslim law of inheritance has been laid down in verse 7 of *sura* Al-Nisa[14] and the appointed shares have been elaborated in verses 11, 12 and 177 of the same Surah, which are being

[13] Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983, p.6
[14] al-Quran 4: 7

reproduced for the fuller grasp of their Quranic distribution among various relatives of the propositus.[15] For further elucidation a reference may be made with the advantages to the following two reports from Hadiths:

(i) *Zaid(R.A) said: the children of son take the place of the son, when there is no son besides them; their males are like their males and their females are like females; they inherit and they preclude(other relatives) as they preclude; and the son of a son does not inherit with the son*[16]

(ii) *Ibn Abbas (R.A) reported, The Prophet* (PBUH) *said,* "*Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased*".[17]

4.1. Prophetic Traditions and Verdicts of the Companions

It is established from this tradition that man who is entitled to inherit personally or through a male related to the deceased is "Asbah". His share is not fixed and settled by the Quran. Son, grandson, brother, uncle and their male issues are "Asbat" whose shares are not fixed thus from amongst them whoever is closer to the deceased becomes the heir. The son compared to the grandson and the brother compared to the nephew is closer; hence the son and the brother shall exclude the grandson and the nephew.

Ibn Ḥajar al-ʿAsqalānī writes[18], "there is unanimity of *Ummah* on the point that whatever remains after the distribution of shares of the sharers, the same shall belong to the closest Asbah. The closest Asbah shall get precedence. There after precedence shall be given to the next the closest Asbah. A remote Asbah shall not be an heir in the presence of a close Asbah. an Asbah is that

[15] Al-Quran 4:14; Al-Quran 4:177; Al-Quran 4:12; al-Quran 4:11

[16]Abū ʻAbd Allāh Muḥammad b. Ismāʻīl al-Bukhārī *Ṣaḥīḥ*, *al-Bukhārī* , Laws of Inheritance (Al-Faraa'id), Chapter: The inheritance of one's grandchild, Hadith: 6735

[17] Ibid, Chapter: Inheritance of the offspring from dead fathers and mothers,

[18]Ibn Ḥajar al-ʿAsqalānī, *Fatih Al-Bari*, Chapter: Inheritance of the offspring from dead fathers and mothers, vol.12 p. 11.

male who is so related to the deceased that there is no family intervening between him and the deceased if he is alone he shall get the entire property which is left over by the sharers. "If there is no sharer the closest Asbah gets the whole." The commentator of *Ṣaḥīḥ* Al-Muslim, Imam Nawavi also writes, there is unanimity of all Muslims on the point that whatever is left after giving of (their share to) the fixed sharers belongs to the Asbah. The closet of them shall get precedence and the close next shall succeed thereafter hence the remoter Asbah shall not be the heir in presence of the closer Asbah.[19] It is also clearly reported by "Zaid bin Thabit*(R.A)* says the grandson shall not be an heir(along) with the son".[20] Another well-known commentator of *Ṣaḥīḥ al-Bukhārī Badr al-Din al-'Ayni*says in whatever Zaid*(R.A)* ha said there is no consequences on it.[21]"

Rabih has reported from Atah that Abu-Bakr *(R.A)* says that "if the father of the deceased is not present the grandfather of the deceased shall take the place of the father of the deceased, in the same way as the grandson of the deceased, in the event of the deceased not been present is what deemed to the son of that deceased".[22] It is also reported from Kharjah b. Zaidibn Thabit*(R.A)*that " only those principles and meanings in respect of the science of inheritance are reliable that have been received from Zaid Bin Thabit*(R.A)* and only those commentaries (on such principle and meanings) are reliable that are based on the interpretations of Zaid*(R.A)*from Abu- Al-Zinad."[23]

This last report continues to say that Zaid bin Thabit*(R.A)* said: " the status of the issues of the sons of the deceased son, in the absence of a son of the deceased, (himself) shall be that of the issue of the deceased. Of them the males shall be like his real male issues and female shall have the status of *Sulbi* issues. As were they (the issues of the deceased the heirs, so shall the issues of the

[19]Abu ZakariaYahyaIbnSharaf al-Nawawī , *SharahṢaḥīḥ Al-Mulim*, Book: Laws of Inheritance (Al-Faraa'id), Hadith: 1615, vol.11 p. 53.
[20] *,Ṣaḥīḥ al-Bukhārī*, Laws of Inheritance (Al-Faraa'id), Chapter: The inheritance of one's grandchild, Hadith:6735.
[21]Badr al-Din al-'Ayni, *Umdat al-Qari*, vol.1 p. 97.
[22]Abū Bakr Aḥmad ibn ḤusaynIbn 'Alī al-Bayhaqi, *Al-Sunah, Al-Kubraa*, Laws of Inheritance (Al-Faraa'id), Hadith: 12281, vol.6 p. 370.
[23]Ibid. Hadith:12291, vol. 6 p. 371

deceased issue) be the heirs and as they prevented or got prevented in the matter of the inheritance so shall these (the latter) either prevent or be preventing from the inheritance. (Where the son and the grandson of the deceased, if found together, the grandson in the presence of the grandson shall not get the inheritance. If the deceased has to more daughters the granddaughter shall get nothing except where along with the granddaughters the grandson of the deceased as well be present". Mughirah *(R.A)* has, on his own authority reported the statements of Zaid bin Thabit *(R.A)* Ali *(R.A)* and Hadrat Abdullah bin Masood*(R.A)* to the effect that the issues of the issues of the deceased in case of their not being a son of the deceased shall be considered to be the issues of the deceased if someone, therefore, leaves after his death a son and a grandson, the grandson shall get no inheritance. Similarly if the deceased leaves behind him a grandson and a great grandson and so on to the lowest degrees the lower one in presence of the higher one shall get nothing as the grandson (in presence of the son gets nothing) [24]

Therefore, the verdicts of Abu Bakar*(R.A)*, Zaid Bin Thabit*(R.A)*, Ali *(R.A)*and Abdullah bin Masood *(R.A)*are clear proof of the fact the during the days of the companions of the holy Prophet *(*PBUH*)* there was a consensus that in the presence of the closer one the remoter one shall not be the heir. Not a single assertion of any of the companion can be sited gains this position.

4.2. Recommendations of Council of Islamic Ideology (CII)

Some broad principles are clearly discernable, which are following:

(i) *Here is a clear indication of the emphases that Islam lays on the importance of the family and the protection of the interests of its members. The father, the mother, the son, the daughter, the husband or the wife, constitute the real family. They are never excluded from the scheme of inheritance via-a-vis the property of the propositus. His other relations have been relegated to the secondary position.*

[24]Ibid

(ii) The brothers and sisters get their prescribed Quranic shares when the property of Kalala is to be distributed and no otherwise.

(iii) The share of the male will be equal to that of two females.

(iv) The nearest living male relation of the propositus excludes the more remote.

(v) The children of a dead son take the place of that son only when there is no other son.[25]

Any discussion on all the details of the law of inheritance will not be relevant to issue under consideration and it is sufficient to indicate that during the last fourteen centuries or so the view of all the recognized Muslim sects has been against the principle included in section 4 of the ordinance. The unanimity of view is not without significance and cannot be brushed aside lightly. Any departure will upset the structure of this law and will also run counter to the expressed provisions of the Holy Quran and *Sunnah.* A few examples will bring the problem in bold relief:

(1) The propositus leaves behind two daughters and a son's son. Section 4 interferes with the share prescribed by the Holy Quran by allowing less than 2/3 share to two daughters, i.e one half, as the other half will go to the son's son.

(2) The propositus is succeeded by 2 daughters, a son's son and a daughter from another son. Here again the daughters prescribed share is reduced by the section 4 to 1/3. Further relying on the Quranic principle of for the male is the equal of the portion of females the *hanfi* law allows 1/9 share to the son's daughter and 2/9 to the son's son. But the section violates this principle by proportioning equal shares to both, i.e. 1/3 each.

(3) If there had been one daughter in the above case her Quranic share would be reduced by the section to 1/5.

(4) When the only surviving heirs of the propositus are a son's son and a daughter from another son, the section distributes the property between them in equal shares in

[25]Ibid

clear violation of the injunction according to which, the share should have been 2/3 and 1/3 respectively. [26]

(5) The estate of the deceased is to be divided between daughter and daughter from another son. The operation of section 4 distributes the property by allowing the granddaughter double the share of the daughter, i.e. 2/3 and 1/3 respectively. The Quranic share of the daughter has been reduced here also.

(6) If the property is to be distributed a son and a daughter of another son, both will get 1/2 share each according to the provisions of section 4, the female getting a share equivalent to that of the male. The Sharia gives the whole property to the son.

(7) On the death of a propositus his property is to be distributed between his son and the son of another son. The hadith reported by Ibn Abbas *(R.A)* allows the son to inherit the whole property as he is the nearest male relation but section 4 cuts in here by giving ½ share to the son's son.[27]

Therefore, successors of a propositus claim their shares in his estate as a matter of right and not on account of their own needs. Their financial position cannot alter the course of operation of the inheritance laws. Such being the position, the provisions of section 4 can also be instrumental in allowing a rich orphaned grandchild to deprive his poor newly-orphaned minor uncle of a large share in the property of the grandfather. The intention behind the section will thus be defeated. Further, the new enactment has introduced the principle of representation which Islamic law of succession does not recognize. If once this principle is accepted even though restricting it, for the present to a limited sphere, there will, later on, appear no justification for refusing to extend it to other orphans e.g., children of a deceased brother or sister, etc. and if it is stretched to its logical conclusion it will undo the *sharīᶜ* laws, built so cautiously and painstakingly since the advent of Islam.

[26]Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983, p.8,9

[27] Ibid

Again, Islam does not recognize any category of presumptive heirs because succession opens on the death of the propositus and his property by birth and, therefore, he transmits no interest to his children on his death. This theory, therefore, unsupported as it is by injunction of the Holy Quran or *Sunnah*, evidently appears unsustainable. There is no compulsion in Islam with regard to making wills; nobody can be forced to make a will in favor of his grand-children. Further, the Holy Qur'an gives every person the right to make a will for benevolent purposes up to the extent of 1/3rdof his property. Another solution lies in making some provision for the maintenance of needy orphaned grandchildren through some other legally enforceable channel. Islam places this responsibility on the shoulders of the parental uncles who inherit their share in the property to the exclusion of such needy orphans and it is, therefore, their duty to maintain them. The majority view of the council favors the solution of making them. The majority view of the council favors the solution of making the successors of the propositus responsible for the maintenance of such orphans according to the dictates of sharia and feels that provisions of section 4 are not in according with the teachings and requirements of the Holy Quran and Sunnah (two members have dissented by maintaining that such orphans are heirs).[28]

5. Section 5: Registration of Marriages

This section deals with the procedure for the registration of marriages, appointed of *nikah* registrars, and punishments for contravention of the prescribed provisions. It is reproduced as under:

> *(1) "Every marriage solemnized under Muslim law shall be registered in accordance with the provisions of this ordinance.*
> *(2) For the purpose of registration of marriages under this ordinance, the union council shall grant licenses to one or more persons, to be called Nikah registrars, but in no case*

[28]Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983, p.8,9

shall more than one Nikah registrars be licensed for one ward.

(3) Every marriage not solemnized by the Nikah registrar shall, for the purpose of registration under this ordinance, be reported to him by the person who has solemnized such marriage.

(4) Whoever contravenes the provisions of subsection (3) shall be punishable with simple imprisonment for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both.

(5) The form of Nikahnama, the registrars to be maintained by Nikah registrars, the records to be preserved by the union councils, the manner in which marriages shall be registered and copies of Nikahnama shall be supplied to the parties, and the fees to be charged therefore, shall be such as may be prescribed.

(6) *Any person may, on the payment of the prescribed fee, if any, inspect at the office of the union council the record preserved under section (5), or obtain a copy of any entry therein*."[29]

5.1. Recommendations of Council of Islamic Ideology (CII)

The council considers that the matters incorporated in this section are of an administrative nature and do not clash with the Sharia. As regards the compulsory registration of *Nikah* it has some very definite advantages. With regard to the appointment of *Nikah* registrars some members were of the view that it would be advisable to give power of their appointment to the government, instead of the union councils, who could appoint them after careful scrutiny. But the point has not been expressed as it lies purely within the administrative discretion of the government. Moreover, it is not obligatory on the *Nikah* registrar to solemnize each and every marriage. Anybody can do so and the only obligation involved is to get such marriage registered. Maulana Vilayat Hussain while abstaining from giving his final opinion desires that the following words may be recorded.

[29]Ibid, P.11

As regards punishments prescribed in the sub-section 4 the council is not expressing any opinion implying thereby that it has no objection. However, it desires to draw the attention of the government to the punishment in this section to every person who solemnizes a marriage in contravention of the provisions of section 5(3). It is more severe than that provided for the registrar (who is expected to know the relevant rules and regulations) in rule 7(4), enacted under section 11, for contravention of any of the provisions of the ordinance. [30]

There has been no voice of dissent about these conclusions.

6. Section 6: Polygamy

This section is reproduced below:

(1) *"No man, during the subsistence of an existing marriage, shall, expect with the previous permission in writing of the Arbitration council, contract another marriage, nor shall any such marriage contracted without such permission be registered under the ordinance.*

(2) *An application for the permission under the sub-section(1) shall be submitted to the chairman in the prescribed manner, together with the prescribed fee, and shall state the reasons for the proposed marriage, and whether the consent of the existing wife or wives has been obtained thereto.*

(3) *On the receipt of the application under sub-section (2) the chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the arbitration council so constituted may, if satisfied that to proposed marriage is necessary and just, grant, subject to such conditions,, if any, as may be deemed fit, the permission applied for.*

(4) *In deciding the application the arbitration council shall record its reasons for the decision, and any party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision, in the case of west* Pakistan, to the collector and,

[30] Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983, p.11

in the case of east Pakistan, to the sub-divisional officer concerned and his decision shall be final and shall not be called in question in any court.

(5) Any man who contracts another marriage without the permission of the arbitration council shall-

(a) Pay immediately the entire amount of the dower, whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue; and

(b) On conviction upon complaint be punishable with simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both."[31]

The relevant verses of the Holy Quran which explain the purpose of marriage and the circumstances under which one or more than one wife is to be taken in wedlock are self-revealing.[32]A cursory glance at verses 4:3 and 4:129 above may lead to an erroneous impression that they are contradictory. A brief explanation is, therefore necessary at this stage. Verse 4:3 permits a polygamous marriage on the condition that justice is intended to be done and verse 4:129 merely explains that although the husband is not expected to distribute his love and affection between all his wives with equal fervor and ardor, as this is impossible in performance, yet he is also not allowed to absolutely ignore the interest of any spouse. It follows that justice means equal treatment of wives on the moral, physical and material levels.

6.1. Recommendations of Council of Islamic Ideology (CII)

Keeping the above teachings in view and prevalent misuse, in this country of the Islamic permission of polygamy, the council is of the unanimous opinion that unrestricted freedom of taking more than one wife may be suitably curtailed. Differences arose as the authority which may be considered fit for the purpose of deciding the capacity of the intending husband to do justice. They have been considerably narrowed down after intensive and careful deliberations. Two views have crystalized. The first makes

[31] Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983, p.13

[32]Al-Quran 24:33;Al-Quran 4:3;Al-Quran 4:129

the man the sole judge of his own ability of meeting the ends of justice, and allows him to act freely according to his own judgment, but nevertheless permits the state to prescribe punishments in case he ill-treats any of his wives after the polygamous marriage. The second upholds the right state to prescribe some other agency for the purpose, in order to ascertain, before the intended marriage, all facts, including the man's capability of doing justice. The mischief, if any, can thus be nipped in the bud.[33]

The first view is supported by Maulana Vilayat Hussain, although the solutions offered by them are different. Mr. Akhtar Hussain, H. Pk., advisor is also in the favor of its amended form which can be expressed more or less as follows:

> *"Section 6-If a man, during the subsistence of an existing marriage, desires to contract another marriage, he shall submit an application for permission for such marriage to the arbitration council in the prescribed manner together with the prescribed fee, and shall state the reasons for the proposed marriage. The application shall be accompanied by the declaration, that he is competent to do justice to all the wives and their children, if any."*[34]

The Council is of the unanimous opinion that unrestricted freedom of tasking more than one wife may be suitably curtailed. The members of the Council, however, differ as to who should decide the capacity of the intending husband to do justice. One view is that the man is the sole judge in this regard, whereas the other upholds the rights of the State to prescribe some agency for the purpose. Nevertheless, the members who hold the second view have proposed the following changes in the original section:

(1) *The negative form of the opening part of the section should be changed into positive form.*
(2) *The provision of permission of the first wife has been deleted.*

[33]Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983, p.14
[34]Ibid

(3) *The applicant for a second marriage should also submit a declaration to the effect that he is competent to do justice to all the wives and children.*

(4) *Criminal proceedings should be initiated only on the complaint of any of the aggrieved wives*.[35]

7. Section 7: Divorce

This section is reproduced as below:

(1) *"Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of* divorce *in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy there of wife.*

(2) *Whoever contravenes the provisions of the sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or with both.*

(3) *Save as provided in sub-section(5),* divorce *unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of the ninety days form the day on which notice under sub-section(1) is delivered to the Chairman.*

(4) *Within thirty days of the receipt of the notice under sub-section(1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.*

(5) *if the wife be pregnant at the time divorce is pronounced, divorce shall not be effective until the period mentioned in sub-section(3) or the pregnancy, whichever be later, ends.*

(6) *Nothing shall debar a wife whose marriage has been terminated by divorce effective under this section from re-marrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective".*[36]

[35]Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983,p.19

[36]Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983,p. 20

As will be noticed the section deals with the procedure for determining the time when the divorce is to become effective and prescribes a form for initiating reconciliation efforts between the estranged husband and wife. Every man is compelled to inform the Chairman, in writing of the fat that he has pronounced divorce, failing which he is liable to the punishments mentioned in sub-section(2). It recognizes only one form of divorce.

7.1. *Sharīᶜah* Injunctions about Divorce

The multiple verses of the Holy Qur'an and the relevant *ahadith* relating to divorce, *Iddat* and reconciliation are being quoted before discussing the provisions of the section.[37]Along the Quranic verses the following relevant *Ahadith* have been discussed:

(i) *IbnOmar reported that the Apostle of Allah said: The most detestable of lawful thing near Allah is divorce.*[38]

(ii) *Rokanah b' Abu Y-azid(R.A) reported that he gave his wife Sohaimah and irrevocable divorce, and he conveyed it to the Messenger of Allah and said: By Allah, I have not intended but one (divorce). Then the Messenger of Allah asked: have you not intended but one (divorce)? Rokanah (R.A) said: By Allah, I did not intend but one (divorce). The Messenger of Allah the returned her back to him. Afterwards he divorced her for the second time at the time of Omar and the third time at time of Osman (R.A).*[39]

(iii) *Abdullah-b-Omar (R.A), reported that he divorced his wife while she was under menstruation Omar mentioned it to the Prophet (*PBUH*). The Prophet (*PBUH*) became enraged at it and said: Take her back and keep her, till she becomes pure, and then menstruates and then becomes pure. If it appears to him to divorce her*

[37]Al-Qur'an 4: 35; Al-Qur'an 2:299;Al-Qur'an 2:231;Al-Qur'an 65:1;Al-Qur'an 65:2;Al-Qur'an 2:236;Al-Qur'an 33:49;Al –Qur'an 2:228;Al-Qur'an 2:226 and 227;Al-Qur'an 65:4;Al-Qur'an 65:4;Al-Qur'an 2:234; Al-Qur'an 2:230

[38]Abū 'Abdillāh Muḥammad ibnYazīd Ibn Mājah al-Rab'ī al-Qazwīnī, *Sunan Ibn Mājah*, The Chapters on Divorce, Hadith:2018

[39]Ibid, Hadith:2051

afterwards, let him divorce her while she is pure before he touches her. This is the period of waiting which Allah enjoins for the divorce of women.[40]

(iv) *Mahmud b'Labeed(R.A)reported that the messenger of Allah (*PBUH*)was informed about a man who gave three divorces at a time to his wife. Then he got up enraged and said: are you playing with the Book of the Almighty and Glorious Allah while I am (still) amongst you? So much so that a man got up and said: Shall I not kill him?*[41]

The rules quoted above give the inevitable impression that current law needs drastic changes for bringing it in conformity with the Islamic provisions. Although it has been enacted with the intention of restraining the husband from pronouncing *divorce* in an arbitrary manner, and this intention accords with the injunctions of the Holy Qur'an and *Sunnah*, yet the solution offered militates against such injunctions.

7.2. Recommendations of Council of Islamic Ideology (CII)

The general view of the Council has, therefore, been to evolve a procedure by which the husband is not given a free and unfettered hand in this matter and the principles of *Sharia* are also not violated. Sub-section (1) read with subsection (4) envisages conciliatory proceedings after the pronouncement of divorce whereas verse 4:35, already cited above, declares that they should precede such a pronouncement. This, naturally, is the proper time for patching up differences between the parties because none of them has by then taken an unequivocal stand. The task becomes more difficult, if not impossible, when actual pronouncement of divorce has already hardened feelings of estrangement, and wounded pride has prepared the ground for a show-down. It has, in these circumstances, been decided to recommend that the man should give a notice to Chairman of his intention to pronounce divorce.

[40]*Ṣaḥīḥ al-Bukhārī* ,Book of Divorce,Chapter: "O Prophet! When you divorce women, divorce them at their 'Idda and count their 'Idda.", Hadith:5251

[41]*Abū `Abdar-RaḥmānAḥmadibnShu`ayb al-Nasā'ī, Sunanal-Nasā'ī*,The Book of Divorce, Chapter: It Is Up To You, Hadith:3410

It has been further noticed that sub-section (4) provides for the setting up of an Arbitration Council for the purpose of bringing about a reconciliation between the husband and the wife and that according to the Rules made under the ordinance all decisions of the Arbitration council shall be taken by majority, and where no decision can be so taken, the decision of the Chairman shall be the decision of the Arbitration council. The Advisory Council is of the view that proceedings under the section should be for reconciliation only, and not for Arbitration where some decision has to be taken. The words "Arbitration Council" may, therefore, be replaced by "Reconciliation Council" which will be competent to only declare whether reconciliation has succeeded or failed. In the case of a failure the husband will be at liberty to take whatever action he likes.

In the beginning free and frank discussions were inevitable in the context of the provisions of this section on such controversial subjects as **Talaq-e-Bida (**if someone gave three talaqs in single meeting against sunnah then also all the three talaqs shall take place, but the person who gave talaq shall be sinful due to his non-sunnah practice**)**, i.e; *Ḥalāla* and the time when the period of Iddat [waiting period] starts and ends. But in view of the final proposals mentioned above, their recapitulation now will be merely of an academic interest. Sub-section (3), (5) and (6) have become automatically redundant. These subjects, in relation to different Muslims sects, may be allowed to be governed by their own interpretations of the *sharīᶜ* principles.

The above decision necessitates a change in the punitive part of the section as well. The person intending to divorce his wife must not take any further step, in connection with divorce, after giving notice to the Chairman of his intention of pronouncing divorce, and before the conclusion of the reconciliation proceedings, if he does so he must be punished. The pronouncement of divorce before giving the required notice about his intention must also be made punishable. With these ends in view, the following decision has been taken unanimously.

8. Conclusion

To conclude, Islamization of laws in Pakistan has been severally explained as revival of Islam, as implementation of the vision of Pakistan formulated as Objective Resolution in 1949 passed by the Constituent Assembly soon after its independence in 1949. It is justified as requirement of Sovereignty of God and Supremacy of Sharia as principles of Islamic State. It is also described as Policy of the state in 1973 Constitution and along this, Council of Islamic Ideology had also formulated and the basic objectives of this counsel are particularly that, all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and *Sunnah*. Therefore, Muslim family laws ordinance was taken up for the first time for consideration of the council in its session held on the 17thFeburary, 1965 at Rawalpindi under the chairmanship of Alaudin Siddiqi as council chairman. When Ministry of Religious Affair has informed the council of Islamic ideology from the following views of Ministry of Law through their letter No 17 (1)/ ADJ/79 dated 27-01-1980, that Muslim Family Laws Ordinance 1961 is utterly un-Islamic and is against the Holy Qur'an and *Sunnah*. It has dared to amend the Qur'ānic law to the extent of *Irtidād* and its existence is a slur, a blot, a bad blot on the glorious name of Islam and our Islamic country. Such legislation or even its name need not be protected. Let us clean the blot altogether by its total repeal." Then the council took up this ordinance for consideration in its various sessions held during the year 1965-66 under the chairmanship of Alaudin Siddqias council chairman. This Council had critically analyzed the every article of Muslim family law 1961 in the light of Quran and *Sunnah*. The council completed its three readings up to March, 1967 and final recommendations were formulated in council's session held. The above recommendations for amendments in the ordinance were finally approved by the Council in its session held at Dacca on 28th November, 1967 and were submitted to Government in the following month.

Islamization of Laws: The Role of media; from an impediment to facilitator

Ambreen Abbasi*

Abstract

Islam is one the fastest growing religion today but at the same time most criticized from different aspects of its basic tenets and code. To develop a system based on Islamic principles or governed by Shariah*, many efforts are made by different Muslim countries including Pakistan. How far the success they achieved is a question of fact. In case of Pakistan the reformation of society on the tenets of Islam has consumed successive generations of Pakistani Muslims ever since the onset of Pakistan movement that till this day continues. Islimzation of laws in isolation cannot target the society at large or cannot be a comprehensive approach unless other factors are also made part of this process in which society needs to be educated enough not only in legal education but also basic Islamic education. To get the intended results for (social reform) reform of education whereby compulsory Islamic and basic legal education must be part of the policy along with the focus on the ways and means or methodology is a very crucial aspect in this process.*

1. Concept of Islamisation

The term Islamizationhas been defined by Sayed Abu al Mududiin his seminal work "*Talimat*" as "*critical analysis of the western humanities and sciences to recast them in accordance with the teaching of Islam*". Syed Maududi was writing in reference to knowledge, however, his idea can be equally applicable to any facet of life where adherence to Islam is a motivation. Syed Muhammadal Naquib al Attas in his book Islam and Secularism explained Islamaisation as "*liberation from clutches of westernization and secularization*."[1]

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[1] Islamization of knowledge .chapter 1. p6 available athttp://shodhganga.inflibnet.ac.in/bitstream/10603/55470/7/07_chapter%201.pdf Last accessed on 28-12-18

A very comprehensive explanation of the term is given by Professor Omer Hassan Kasule as "*It is a process of recasting the corpus of human knowledge to conform to the basic tenets of aqidat al tauhid. The process does not call for re invention of the wheel of knowledge but calls for reform, correction, and re orientation. It is evolutionary and not revolutionary. It is corrective and reformative.*"[2]

Hassan Dzilo argues that Islamaisation cannot be treated as singular action but is a collection of diverse actions and approaches that are required for a variety of ideas to take root ranging a wide variety of subjects of Islamic epistemology, ethics, and methodology, cultural or traditional aspects depending on the relevant situation or framework. [3] While A.C.S Peacock goes further to state that "*Islamisation is a phenomena involving conversion of cultural and social aspect to the tenets and ideology Islam*".[4]

The Islamaisation when used in reference to legal regimes would therefore require similar transition to the Islamic ideology. In societies such as ours where a colonial history has largely colored the legal system a western hue, therefore Islamisation of Pakistan's legal system would essentially entail shearing it off the common law practices and reintroducing Islamic Legal principles. Laws play a critical role in propelling the society and culture towards this conversion. However, bringing about a change in existing laws with an aim to make them compatible with tenets of Islam cannot be taken independently or in isolation.

1.1. Historical perspective

Islamization of laws in Pakistan is not a recent phenomenon. The concerns on the issue can be traced back to creation of Pakistan and even before independence [5]. Since the very inception of

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[2] Omer Hassan Kasule Concept of Islamization, *mafhuumislamiyyatalmaarifat.*Available athttp://omarkasule.tripod.com/id40.html

[3] HasanDazilo, Concept of" Islamization of knowledge" and its philosophical implication. Islam and Christian -Muslim relation.Taylor and Francis online. 22 Jun 2012, Volume 23 .2012 , 247-256 . available at https://www.tandfonline.com/doi/abs/10.1080/09596410.2012.676779

[4] A.C.S Peacock. Islamization.A comparative perspective from history. Abstract. Edinburg university press.

[5] The controversy between modernists and fundamentalist regarding English educational systems considered a danger to Islam and Muslim life and development of madrasa system , establishment of Deoband in 1867 can be amongst the relevant issues. In the history of Pakistan the

Pakistan (a Muslim homeland) the proper role of religion in the political system remained controversial.[6] The prolonged debate between[7]Islamic activists, committed to growth and promotion of Islamic law and practices in various sphere of national life on one side and the Islamic modernists who opted or preferred for the restrictive role of religion in state affairs on the other and in some cases advocated advancements based on secular lines of the west.[8]

The question as to Islamic or modern national state and the idea of Islamic ideology remained open to all sorts of different interpretations often resulting in disagreements.Despite these disagreements the common point remained that Islam must play a major and basic role in the life of Pakistan whatever approach maybe followed[9] as the idea of its origin and rationale of its pre partition India, must give significance and purpose to Muslim people.[10] Keeping the constitutional history in view, from the very first constitution that took nine years to be formulated was consumed by the debate on the Islamic provisions was one of the major contributor in the delay[11]. Objective resolution was passed by the first constituent assembly in 1949 which was incorporated in the first constitution of 1956, as basic directive principles for a new state containing

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role of sir Sayyid Ahmad Khan, AbulKalamAzad ,AllamaIqbal, MaulanaMaududi and many others can be part of the same context.

[6] Erwin I.J.Rosenthal. Islam in the Modern National state.Islamic Republic of Pakistan. Section 1, Constitutional issues 181-286 Cambridge University Press 1965. Online available 2014.

[7] Some other controversial terms like "fundamentalists or secularist", "modernists and traditionalists" extremists and like are used by writers in different phases, contexts/works.

[8] Charles H. Kennedy . Repugnancy to Islam: Who Decides? Islam and Legal Reform in Pakistan. The International and Comparative Law Quarterly, Vol. 41, No. 4 (Oct., 1992), pp. 769-787. Cambridge University Press on behalf of the British Institute of International and Comparative Law .

Stable URL: http://www.jstor.org/stable/761030.

[9] An Islamic or Muslim state , a state strictly based on traditional Islamic system or modern state based on contemporary laws, adapted from western codes or a state partially western and partially Islamic.

[10]Rosenthal.Islam in the Modern National state.Islamic Republic of Pakistan. 203-4

[11]Kennedy . Repugnancy to Islam: Who Decides? Islam and Legal Reform in Pakistan.769

> The Government of Pakistan will be a state ... *Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed; Wherein the Muslims of Pakistan shall be enabled individually and collectively to order their lives in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah….*

Since then these basic provisions remain nearly unchanged in the later constitutional history of Pakistan. However, implementation remained a problem. Recommendations of Basic Principles Committee then established[12] for the purpose were not fully incorporated in the first constitution rather a very vague and weak[13] version of recommendations was included in the first constitution of 1956[14]that brought noticeable change. A short lived constitution was abrogated in 1958 resulted from a military coup and martial law by General Ayub Khan changed the scene.[15] Another episode of status of Islam in the state continues as prior to adoption of The2nd constitution of 1962 favored the modernist version of Islam.[16]The outcome of the third constitution in 1973 was largely similar with modernists' version of Islam taking the driving seat disappointing the earlier efforts of the Islamic activists. However, the debate continued on the sidelines and conservative elements kept up their efforts which became refined and wide-ranging by early 1980s.[17] Political scenario changed dramatically that led to the ousting of Prime Minister Zulfikar Ali Bhutto in 1977 on the basis that his administration had forsaken Islam, by the coalition of opposition followed by a military coup

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[12]GOP, Report of the Basic Principles Committee (1952), Ch.3, nos.3-8., GOP, Report of the Basic Principles Committee as Adopted on the 21st September 1954 (1954).

[13] The Constitution of the Islamic Republic of Pakistan (1956), Arts.25, 28, 29 and 198.

[14]Rosenthal.Islam in the Modern National state. Islamic Republic of Pakistan.209-35

[15]Kennedy . Repugnancy to Islam: Who Decides? Islam and Legal Reform in Pakistan.770

[16] ibid

[17] They advocated for the introduction of hudood laws in criminal laws, revision of criminal laws regarding bodily hurt. They also demanded for changes in procedural laws on admissibility of evidence and oath taking , and restructuring of Muslim Personal laws inter alia procedure of divorce ,inheritance, maintenance and dower,. Furthermore the rules of child custody and laws on preemption. The elimination of Riba was one of major area of economic aspect of state system including banking and trade especially international trade.

led General Zia-ul-Haq to powerin July imposing martial law again in the state.[18] With Zia in power, the regime demonstrated far more flexibility to the demands of Islamic activists because of his personal partiality. However Zia treaded carefully and choose a path of gradual policy changes that aimed at "Islamaisation" of Pakistan's polity. [19] Amongst the core reforms was, the Federal Shariat Court[20] (1980-85) Zia's policy of slow graduation to Islam led to its complicated jurisdiction. It was granted jurisdiction in cases.

> *"i) Appellate and revisional jurisdiction over convictions or acquittals from district courts in cases of newly promulgated Islamic criminal laws (hudood);*[21]
> *(2) Exclusive jurisdiction to hear "Shariat petitions" brought by citizens of Pakistan or the federal or provincial governments challenging "any law or provision of law" as repugnant to the Holy Quran and Sunnah;*
> *(3) Exclusive jurisdiction to examine "any law or provision of law" for repugnancy to the Holy Quran and Sunnah."*[22]

The appeals from the judgments were made subject to appeal to the ShariatAppellate Bench of Supreme Court[23] and more importantly the element of slow and steady Islamisation was taken subject to art 203 B which restricted the jurisdiction of FSC , provided

> *"law includes any custom or usage having the force of law but does not include the Constitution, Muslim personal law, any law relating to the procedure of any court or tribunal, or until the expiration of ten years from the commencement of this chapter, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure."*

These exclusions from FSC's jurisdiction and interpretation by superior courts made it toothless for many important areas which needed much instant legal reform like judicial review of

[18]Kennedy . Repugnancy to Islam: Who Decides? Islam and Legal Reform in Pakistan.771

[19]Ibid.772

[20]1985 Constitution, Arts.203-A to 203-J.

[21] Art. 203dd

[22] 1985 Constitution, Art.203-D(1).

[23] Art. 203F

cases on Muslim family Law Ordinance 1961,[24]exclusion of Fiscal laws excluded from the court's jurisdiction all the cases or issue related to financial interest or Riba.[25] This slow and steady approach of Zia was coupled with the higher judiciary's reluctance to take an active role in interpretation of laws vis-a-vis Islam thwarted desires of rapid conversion of the system. However, after restoration of democracy and constitution, the future of Islamisation found new impetus when Article 2 A was introduced in the 1973 constitution with provision that "*Muslims shall be enabled to order their lives in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah*". Giving a room to the courts to assume a significant role to play in the process of islamization.[26] Since 1985 Superior judiciary through a series of cases have started evaluating laws for their repugnancy to Islam. Some argue that the Judiciary has become *"largely through default the primary locus of legislative authority in the State.*[27]

2. What does Media mean?

Media is a Late Latin term which has developed over the years to signify numerous forms of communication and speech. It includes every broadcasting and narrow casting like newspapers, magazines ,TV radio, telephone, fax ,billboards and internet, face book wattsapp, fax, instagram, twitter ,YouTube and many more, all means of mass communication. It also includes data storage, and data material (depending on recording methods) diskettes

[24]Federation of Pakistan v. Mst. FarishtaPLD 1981 Sc 120.n Al-Haj Sheikh v. MahmoodHaroon, Minister of Religious Affairs P.L.D. 1981 SC 334; , SaeedullahKazmi v. GOP P.L.D. 1981 SC 627.

[25] See e.g. Essa E.H. Jafar v. Federation of Pakistan P.L.D. 1982 FSC 212; Md. Sadiq Khan v. FOP P.L.D. 1983 FSC 43; Ibrahim Bhai v. Government of Pakistan Shariat Petition ("SP") 6/K/83; and SarfarazHussain v. Federation of Pakistan SP 1/K/82. These decisions were reversed by the FSC in Oct. 1991 by Mahmood-ur-Rehman Faisal v. Secretary, Ministry of Law SP 30/1/90. The latter case ruled that riba in all of its manifestations was "repugnant to Islam" and ordered revisions in 20 relevant federal laws. The FSC claimed jurisdiction to decide the case on merits as Art.203-B's exclusion of consideration of financial matters for "ten years" had expired on 1 July 1990.

[26]The constitution of Pakistan Art. 2A

[27]Kennedy . Repugnancy to Islam: Who Decides? Islam and Legal Reform in Pakistan.787.

,tapes , disks , microfiche ,CDs and DVDs.[28] Almost all other ways and means used for education, information, entertainment, Business advertising or anything one can think of , can be spread through. It include all kinds of broad or narrow casting ranging from television radio, internet [29] Internet-based media can be simply electronic versions of the print media. The so called new media has made the very crucial social changes all over the globe and media related sites such as Twitter and Face book, for example, have played a significant role by social networking as sources of news and information in even third world countries. The most significant example is the recent disturbance in the Arab world.[30]

3. Role and functions of Media

Just as there is no monolithic 'media' unit, so is the case with the role that it plays. Indeed, the role of a particular part of the media is very much determined by a series of factors relating to the nature of the media itself, in particular the substance of the media (news or current affairs versus light entertainment) and the means used (print, broadcasting or internet based). Thus the media plays a number of different roles in society, including being informative, educational or entertaining. [31] Media in its different shapes engage a very high portion of our daily time special leisure time, on average 25hours a week only on TV only besides other social media activities like whatsapp, instagram, newspaper magazine and cinemas. Even in children similar kinds of activities are recorded whereby friends and family and schools were considered as most important socializing influence. The function generally media play whether it be a social cultural political or religious or economical aspect is very significant. Mass and social media now is one of the basic sources of information for individual and society at the same time. Media also play a

[28] "Media Definition", http://www.businessdictionary.com/definition/media.html. Last Accessed 5-07- 2016.

[29] V.Vijayalakshmi, K.Priyanka, &V.Swetha, Impact of media on society: a sociological perspective. Bodhi International Journal of Research in Humanities, Arts and ScienceVol.4 Special Issue 1 January 2018 ISSN: 2456-5571, 69-72

[30] The role of Media and Press freedoms in society.Media law handbook for southern Africa, 1(2012) 11-12, Available at http://www.kas.de/wf/doc/4212-1442-2-30.pdf. Last Accessed 5th August,2016

[31] Ibid

significant role in political and democratic processes of a country .By educating masses it can help in democratic functions of state by informing public policies and their outcomes, making people aware. Whether media paying a constructive role or destructive, it has a huge effects on human life which needs a special attention.[32]

3.1. Effects/Impact of Social/ Mass Media

Human behavior and thinking leading to habits and attitude gets affected by multiple things and media in this age is one of the tools for such an action causing a complex social change. Media has two sides positive and at the same side negative on the social lives thereby changing social behaviors or approaches from pre-birth to after death. Sociological change can be affected by exposure to media leading to alteration of social behaviors and beliefs as different theories on mass communication media highlight and there are a number of theories that provide great insight to these changing powers of the media such as the Agenda setting theory, the cultivation theory, social learning theory, play theory or uses and gratification theory.[33]

Mass Media in Pakistan has shown great proliferation in the last one and half decade.[34] The TV news is the most effective tool of information today especially in Pakistan. The literacy rate is very low in Pakistan and print and electronic media help people to understand the situation often by criticizing the governments activities of violating the rules or the Constitution or of being unaccountable to public for the their polices causing poverty , unemployment, law and order situation and role of opposition.[35]

From economics side attached to media has also contributed towards its development, advertisement / commercials brought

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[32] V.Vijayalakshmi,et'al., Impacts Of Media On Society: A Sociological Perspective. 69-72

[33] Ibid

[34] M. Rehan Abbas Chaudhry, Role of Media, http://cssexam2013.blogspot.com/2013/01/essay-role-of-media.html. Last Accessed on 25th November 2015.

[35] Amir Jahangir, Maria Gulraize Khan and Qurut-ul-AinHussain, " Situaltional Analysis Of
Right to Information in the communication & Information Sector in Pakistan",10. Available at http://unesco.org.pk/ci/documents/situationanalysis/Situational_Analysis_of_RTI_in_Pakistan.pdf. Last Accessed 2nd December 2015

big money to media market. Furthermore the abundance of media provided employment opportunities. Also the infrastructure, modern state of art studios, equipments, and communication facilities [36] have revolutionize the public alerts. Strengthening Democracy is an outcome of media as for instance the live coverage of parliament proceeding or activities of politicians. Besides the positive above one can also highlight negative impacts of the media which is a major concern for our purpose. The most important of them is moral vacuum and westernization in our family systems. The Indian and western cultures invaded our media and seeping into our society. Our dramas and commercials are depicting purely alien values and causing a huge loss to our religious and national identity. They glamorized everything they depict causing a moral vacuum. Our young or so called modern generation is going away from the reality of our social and religious values. Unethical material, scenes or photographs are shown spreading obscenity and vulgarity leading to national misidentification. Unnecessary open discussion on every/ anything is causing great loss to our young generation Family life is at stake as we are giving more time to TV and less to our kids and other socialization, moving towards the isolation which can be disastrous for any society. Projecting in its most rated programs like morning shows, family planning, love story dramas, hi-fi living style are very negatively exaggerated and unrealistically approached which is not based on ground realities. The ability or the power it can use to educate nation has been greatly ignored. People of Pakistan are, not educated enough yet to understand the negative manipulation or twisting facts of media. A famous quote that "lies spoken 100 times become greater than a truth" is summary of our media's approach. [37]

Pakistani media is also blamed for not developing or projecting our national image rather humiliating it, our national language losing its originality and becoming similar Indian language. Even at times we are promoting Indian language and stars in our ads and specially the cartoon corrupting our children mind with Indian cultures and values which is against the preservation of our national or regional languages. Our media policies lack such an ability to promote national image which should be strongly countered rather it is blamed for negative overwhelming negative exaggeration. The breaking news and

[36] Video conference, fax, electronic data transfer chat mobiles etc.

[37] Amir Jahangir, etal' "Situational Analysis of Right to Information in the communication & Information Sector in Pakistan".

headlines, the race among all the channels sensationalize the issue / accidents/incidents (at times unauthentic or without confirmation and inaccuracy) which not only create confusion by too much of information but demoralize and induce discouragement among our nation.[38]

The term ethics has come lately to mean learning to make rational choices between good and bad, what is morally permissible action and what is not. Further it means distinguishing among choices, all may be morally justifiable, but some more than others. The key word is Rationality. The codes of ethics may vary from society to society or country to country but all the codes have some common articles and clauses to great extent.[39]If laws and ethics are for everyone, then, media is no exception. Ethics are moral rules or guidelines or about how professional communicators should act in circumstances where their action may have negative effects over others and laws do not dictate behavior. A press freedom or independence of media signifies an open society based on the democratic traditions but like all freedoms it should not be used as license to kill rather subject to some limitations pro to the integrity of the state national unity, upholds the national laws of the land and positively contribute towards social welfare subject to moral and religious values.[40] A lot of work needs to be done in media regulation and policies and their strict implementations. It is the strongest and fastest way to create the social political, economic or cultural changes in any society. The significance of media not only as source of information but also a platform of interconnectivity of our human and national affairs cannot be ignored especially in this age of globalization. It can be used as force to bring agreement on vital issues prevalent in our country like security, education (particularly legal and religious) and health. *"Media is a double edged sword. It has its benefit and vices."*[41]

[38]Ibid.

[39] Muhammad RiazRaza et al, "Code of Ethics and Laws for Media in Pakistan". *Asian Journal o social science & Humanities*,2(1) (Feburaray 2013) :306-10. Available at http://www.ajssh.leena-luna.co.jp/AJSSHPDFs/Vol.2(1)/AJSSH2013(2.1-33).pdf. Last Accessed 4th August,2016.

[40] Ibid.

[41] Abbas Chaudhary, *Role of Media*.

3.2. Media and Religion

Religious affiliation affects every step of human life as it is based on beliefs. Islam is one of little fastest growing religion in the world. Due to digital advancement like all other things engulfed religions around the world are also one part that impacted Muslim social life involving religious practices, preaching , issuing fatwa's virtual communities not only in the Muslim majority states but diasporas though platforms like face book, twitter, and You Tube.[42] This led to debate on the impact of social media among the scholars, particularly Arab world, on the ground that social media can change the people religiosity and piety practices. It is argued by some that the impact will be more intense on the conservative or traditional environment as compared to liberal environments. For a few voices [43]condemn the use of the digital media on the ground that media propagate lies, trading accusation and can devastate relationships in the offline world of many Muslim families and even consider it incompatible with the Shariah especially twitter. On the other hand many preachers and scholars admit the affectivity and efficiency of media.[44]

These digital platforms introduced a new pattern to the practice of religious practices including the issuance, dissemination and practice upon the beliefs, emerged as new

[42]In the Arab world, Face book is the leading social networking Web site, with 45,194,452 users. Twitter follows with 2,099,706 users. The Arab region is second to the United States when it comes to the number of YouTube daily views. With 90 million video views per day, Saudi Arabia has the world's highest number of YouTube views per Internet user

[43]Abdul Aziz Al Shaikh, Grand Mufti in Saudi Arabia, advances a critical stance toward social media platforms such as Facebook and Twitter

[44]Islam and Social Media. Encyclopedia of social media and politics volume 1.DOI: 10.4135/9781452244723.n299} In book: Encyclopedia of social media and politics, Publisher: SAGE Publication, Editors: In K. Harvey (Ed, Encyclopedia of social media and politics. (Vol, pp. 737-741). January 2014 Thousand Oaks, CA: SAGE Publication, pp.737-741

platform, mosques or madrasas and also evolved phenomena of what some say Facebook fatwas or F fatwas that further leads to commentary and feedback from many sectors including religious authorities, intellectuals secularized or ordinary Muslims or young believers and converts. Social media has now become an important source of information including religious for many in the Muslim world and new media culture emerging causing a great impact on global Muslim consciousness. Not only preachers or scholars but normal ordinary Muslims, when they start twitting or sharing on any such forum, *Quranic* verse or *hadith*s specially during *Ramdhan* which has become a part of Ramadan religious rituals and habits. The occasion of Hajj tweet feeds is now an important practice offering a sense of virtual spirituality for their families. Social media has become an important tool for spread of word of Allah but also safeguarding from the criticism or attack by the opponents, as we have seen in cases of Denmark cartoon controversy, or US burning the Quran copies or controversial anti-Islam movie clip of "Innocence of Muslim", created Facebook pages and other forum to defend and triggered the Muslim mobilization globally and countries like Pakistan, Jordan Egypt demanded to delete the film from You tube platform. Social media has created a Islamic popular diplomacy, on the other side many websites are created to promote the violent version of Islam in form of terrorism , Al Qaida , Hamas , Hezbollah and like emergence of e jihad or digital activism , hacking and cyber-attacks are some recent examples .Use of Media for Islamic militant movement or for political purpose either nationally or internationally is a common feature in the modern era, an efficient tool for distributing political messages and mobilizing political activities by supporters. Although current rise of Islam is magnificent and role of media is crucial for gain or regain position in the complex social world. Islamisation through digitization or Islamisation of digital world is blessing from one side and challenge from other. Interpretation of Quran was domain of *ulema* but this concept is under attack and consequently became a contested domain for unqualified masses.[45]

4. Media and Legislation.

The significant role of media in the social context is something which can be denied but the part it plays in law making process or its influence , is not very much apparent. Media is not a direct

[45] Ibid.

actor in law making or in legislation process but the media attention can influence the behavior of legislators and the contents of laws indirectly specially in wake of technological advancements. It is generally agreed fact that the contact between journalist and parliament members and government authorities, as complex interactions and the relations of political and media actors is a reciprocal one. The media coverage on the policy issue generally falls in the political agenda setting phase. As shown by various studies that media can set and influence the policy agenda by diverting attention of policy maker to policy problem and its tentative solution. This interactive behavior has ultimately a legislative outcome, as policy makers and parliamentarian closely follow what media reports on the topic. The consensus is that media attention indeed trickles into legislative process indirectly. [46] Incident-driven exposure served as a basis for questions and was purposefully used by parliamentarian in legislative debates to authenticate and demonstrate their stances. Consistent and forceful media coverage of an issue can contribute towards introductionof a new law or amendments in an existing one.[47]The media, when used appropriately and proficiently, can be an influential ally and contributor to an improved outcome.[48]It can run efficient campaign by different professionals or sect of societies for their relevant cause as we have seen in election campaign by the parties, family planning, dam funding and traffic rules. Apart from legislation domestic issues effecting society directly and actions by the governmental departments at local level can be highlighted through media. Naqeeb and Zainab murder cases, use of fake medication by the hospitals and recent cases in health sector, strikes by the doctors and many other issues acquired government attention to take appropriate legal steps in the relevant areas. There evidently are a great number of prospects to use the media to persuade legislation and legislative initiatives.[49]

[46]LotteMelenhorst. The Media's Role in Lawmaking: A Case Study Analysis. The International Journal of Press/Politics2015, Vol. 20(3) 297–316.Reprints and permissions:sagepub.com/journalsPermissions.nav. DOI: 10.1177/1940161215581924.

[47] ibid

[48] Shelov SP[1] The Use of Media impact on legislation.Abstarct. 1995 Aug;24(8):419-20, 4225.Available at https://www.ncbi.nlm.nih.gov/pubmed/7478773

[49] Ibid

4.1. An overview of media legislations in Pakistan

The development in area of media in Pakistan in last decade has made significant social and political changes. Pakistan Electronic Media Regulatory Authority (PEMRA) is significantly contributing as catalyst of socio political change in the society.[50]The list of the directly or indirectly operational media and information laws in Pakistan is given below.[51]Most of these are enacted after 2002 as a result of liberalization of media and satellite channels boom in Pakistan.

Our focus will be on PEMRA regulations and some major penal laws providing for anti-Islamic activities by the media in different contexts.

1. Baluchistan Freedom of Information Act 2005
2. Code of Criminal Procedure 1898.[52]
3. Contempt of Court Ordinance of 2003
4. Copyright Ordinance 1962 as amended
5. Defamation Ordinance of 2002
6. Freedom of Information Ordinance of 2002
7. Intellectual Property Organization of Pakistan Ordinance 2005
8. Motion Picture Ordinance of 1979, motion Picture (amendment) Ordinance
9. Broadcasting Cooperation Act 1973
10. Pakistan Electronic Media Regulatory Authority (PEMRA) of 2002 and Pakistan Electronic Media regulatory Authority (amendment) Act 2006/7.
11. Pakistan Telecommunication (RE-Organization) Act 1996
12. Printing Presses and Publications Ordinance 1988.
13. Press, Newspapers, News Agencies and Books Registration Ordinance 2003 and PNNABRO (Amendment) 2007

[50]http://pakobserver.net/detailnews.asp?id=110074

[51] Imran Ahsan Khan Nyazee, "Media Laws in Pakistan", (Islamabad: Federal Law House ALSI Law outlines, 2009) , 56-59.

[52] Section.99A power to declare certain publication to forfeited and issue search warrants for the same. Section.99B Application to High court to set aside order for forfeit .

14. Press Council Ordinance 2002
15. Press and Publications Ordinance (PPO) 1988
16. Sindh Access to Information Ordinance of 2006.

4.2. Rules and Regulations

1. Censorship of Films Rulles1980;
2. Code of Conduct for Media Broadcasters/Cable TV operators;
3. Copyright Rules 1967;
4. Freedom of Information Rules, 2004;
5. PEMRA Cable Television (Operations) Regulations of 2002;
6. Pakistan Electronic Media Regulatory Authority Rules (PEMRA), 2009/2;
7. Pakistan Electronic Media Regulatory Authority (Media Ownership and Control) Regulation of 2002.
8. Pakistan Electronic Media Regulatory Authority (Council of Complaints Organization and Functions) Regulations of 2002; and
9. PEMRA (TV/Radio Broadcast Operations) Regulations of 2002.

The Pakistan Electronic Media Authority (PEMRA) , an independent body established by the Government in 2002 with the aim to monitor the end the state monopoly, licensing of the private Television and Radio stations and oversight the programs and advertisement produced.[53] It is regulated by PEMRA Ordinance 2002, PEMRA amendment Act 2007. PEMRA Rules 2009 and PEMRA Regulations. Violation of the Ordinance, Rules and Regulation can lead to shut down / suspension of channels or cable operator[54] . The independence of PEMRA is in question in many ways as the Federal Government is authorized to issue policy directive to PEMRA.[55] The special law dealing with regulations of the airwaves of the country, PEMRA Ordinance 2002, provides for the establishment of 12 member panel, and the chairman[56] , of the Authority "*responsible for regulating the*

[53]Code of Conduct and PEMRA Rules 2009.

[54] PAKISTAN ELECTRONIC MEDIA REGULATORY AUTHORITY ORDINANCE 2002 PEMRA (AMENDMENT) ACT, 2007 (ACT NO.II OF 2007) S,27. The Code of Conduct (Schedule A) defines the parameters for programming contents.

[55]PEMRA Ordinance 2002, S 4.

[56]PEMRA Ordinance,2002,S, 6.

establishment and operation of all broadcast media and distribution services in Pakistan."[57]It aims to "*improve standards of information, education and entertainment" and "ensure accountability, transparency and good governance by optimizing the free flow of information."*[58]The authority is further mandated [59]to "*regulate distribution of foreign and local TV and radio channels in Pakistan."*

The PEMRA Ordinance composed of 40 sections provided details and dealing with multiple issue of procedures and process and qualification for the grants of licenses for broadcasts and distributions. It explains terms and conditions and restrictions on broadcast and distributions service license. [60] Furthermore the Ordinance provides for the establishment of "Council of Complaints" and the procedure for complaints against the licensee.[61]Although dealing with all major aspects of the relevant field however, beyond the preamble, no provision for the citizen's Right to Information exists. The Ordinance ignored what it was aiming at, to ensure accountability, good governance and transparency. [62] With the exception of PNNBR Ordinance specifically dealing with registration of press newspaper books and new agencies, and PEMRA Ordinance for the regulation of private electronic/broadcast media including TV, cable and radio, most of these laws are applicable to all kind of media. [63] In addition to the laws listed above, some others are listed below, used to deter the freedom of information or against the journalists or editors and publications or relevant Penal provisions in cases of anti-Islamic activities.[64]

1. The Officials Secret Act of 1926, (a colonial law used to detain and prosecute editors and journalists);
2. The Security of Pakistan Act of 1952 (used to close down press, impose prior censorship, and stop publication.);

[57]PEMRA Ordinance,2002,S 4(1)

[58] Preamble of the Ordinance, PEMRA Ordinance,2002.

[59] PEMRA Ordinance,2002,S ,(2).

[60] PEMRA Ordinance,2002,S, 20,25

[61] PEMRA Ordinance,2002,S, 26

[62]Right of Information and Media Laws in Pakistan CPDI. 11

[63]Muhammad AftabAlam CPDI ,8.

[64]Rehman , "Press Laws and Freedom of Expression", *Sapana, South Asian Studies,* 12(Mediand Peace in South Asia, 2006. Lahore free media Foundation): 266-277

3. Maintenance of Public Order Ordinance 1960 (prohibits publication, prior censorship, and close press down, force disclosure of sources);
4. Pakistan Penal Code1860 (listed below, sections that may directly or indirectly relevant)[65]
    - Section 123-(A) of Pakistan Penal Code (PPC) allows prosecution of anything prejudicial to safety or ideology of Pakistan
    - Section 124-(A) of PPC applies to sedition.
    - Section 153-(A) promoting enmity between different groups, etc.
    - Section.153(B). penalizes incitement of students disturbing public order and can be used against the press or political activities.
    - Section 292 of PPC prohibits sale, publication or exhibition of obscene books.
    - Section 293. Sale etc. of obscene objects to young person.
    - Section 294. Obscene acts ad songs.
    - Section 295 (A) deliberate and malicious acts intended to outrage religious feeling of any class by insulting its religious belief and or religion.
    - Section 295(B) Defiling ,etc. of Holy Quran.
    - Section 295(C) Use of derogatory remarks, etc in respect of Holy Prophet (SAW.
    - Section.296. Disturbing religious assembly.
    - 298. Uttering words etc, with deliberate intent to wound the religious feelings.
    - 298(A) Use of derogatory remarks in respect of holy personages.
    - 298(B)(i) misuse of epithets , description and titles , etc reserved for certain holy personage or places (applies to Lahori and Qadianis group)
    - 298(C) Person of Quadiani group calling himself a Muslim or preaching or propagating his faith. (Qadianai and Lahore group)
    - Section 469 Forgery for the purpose of harming reputation.
    - 499 Defamation
    - 500. Punishment for the Defamation.
    - 501. Printing or engraving matter known to be defamatory
    - 502. Sale of printed or engraved substance containing defamatory matter.

[65]Imran Ahsan Khan Nyazee.Media Law in Pakistan, 58.

- 503. Criminal intimidation (including defamation of reputation).
- 506. Punishment for criminal intimidation.
- 507. Criminal intimidation by an anonymous communication.

5. Section 295-C of PPC known as the infamous blasphemy law has been applied to journalists;
6. Section 99 A of the Criminal Procedure Code gives executive powers to prescribe publications.

Most recently the Cyber Crime Act can also be relevant for our purpose. Even abundance of laws could not serve properly to achieve the purpose. The mandate given to the PEMRA needs a fresh review from religious perspective.

6. Conclusions

Islam is one the fastest growing religion today but at the same time most criticized from different aspects of its basic tenets and code. To develop a system based on Islamic principles or governed by Shariah, many efforts are made by different Muslim countries including Pakistan. How far the success they achieved is a question of fact. In case of Pakistan the reformation of society on the tenets of Islam has consumed successive generations of Pakistani Muslims ever since the onset of Pakistan movement that till this day continues. Islimzation of laws in isolation cannot target the society at large or cannot be a comprehensive approach unless other factors are also made part of this process in which society needs to be educated enough not only in legal education but also basic Islamic education. To get the intended results for (social reform) reform of education whereby compulsory Islamic and basic legal education must be part of the policy along with the focus on the ways and means or methodology is a very crucial aspect in this process.

Media in the present time can be a determining factor for this purpose but subject to the policy the higher authorities may adopt. Positive use of media in all shapes in political and social process can be very useful tool. The present situation prevalent in media is more inclined to a culture that is antagonistic to Islamic values that in some cases is a direct promotion of the western thoughts and culture. Religious education in the garb of TV shows that aim at generating ratings is forwarding a

confused and often contrary to Islam thoughts thus spreading confusion in the minds of the masses. A comprehensive policy for Media is necessary to get a speedy result. Omar Ksule while talking about reform of disciplines outlines a methodology to achieve Islamisation in the broadest sense. And the principle enunciated by him in this context can equally be applicable on reforming the Laws and legal system in Pakistan. The first principle in his thoughts is the de-europisation of paradigms on which a discipline is based. In case of law this paradigm is based on Common law and therefore it is extremely important that instead of Common law and latin legal Maxims the basis is to be reformed by granting the foundational status Shariat and Islamic jurisprudence. The second principle relates to reconstruction of the disciplines to conform to Quran's universal guidelines. In case of Media this universal guideline is *Amr bil Ma'roof wata nhaanil Munkir.* These two basis paradigm shifts in Law and Media can truly alter the direction of Islamisation of the society in General and of the laws through media in particular.[66]

[66] http://omarkasule.tripod.com/id40.html

Constitutional Interpretation: An Appreciation of Living Constitutionalism from Pakistan's Perspective

Asmatullah Kakar*

Abstract:

This article analyses 'living constitutionalism approach' to interpretation of constitution. In doing so, first the two traditional forms of constitutionalism i.e. political and legal constitutionalism are reviewed. Thereafter, the discussion on the theoretical regime of interpretation is reflected so as to determine the appropriate approach of Constitutional Interpretation. Moreover, the emerging trends in the courts of Pakistan in favour of 'living constitutionalism' and progressive and dynamic interpretation of the constitution are also analyzed. Finally, the discussion as aforesaid is leading to the conclusion that dynamic interpretation is the most appropriate mechanism for realization of the purposes of living Constitutionalism.

Key Words: Constitutionalism, Political Constitutionalism, Legal Constitutionalism, Originalism, Living Constitutionalism, Dynamic Interpretation.

1. Introduction:

Generally Constitutionalism may be defined as a 'belief in constitutional government'.[1] The idea of Constitutionalism is associated with the doctrine of 'Limited Government' advocated by John Locke and utilized by the founders of American Constitution.[2] The restraint on the government justified on the premise that the government should and must not be unbridled in which case it shall lead to tyranny or authoritarian rule. Such

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[1] Bazezew, Maru, "Constitutionalism", *Mizan Law Review*, Vol. 3, No. 2, September 2009, pp. 358-369.

[2] Wil, Waluchow, "Constitutionalism", *The Stanford Encyclopedia of Philosophy*, (Edward N. Zalta Edn.: Spring 2018), Available at: (https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/).

restraint is only possible through entrenchment of the basic rules in the *texted document* known as constitution supplied with hard processes of bringing amendments in the same.[3] In other words the actions of the politicians (legislators) concerned with the making of laws and the state officials concerned with the implementation of laws shall be assessed in the light of the pre-fixed rules. Most importantly, the legislature shall and must be checked in its law-making powers and be controlled if deviates from the supreme rules upon which the community is founded.[4] Hence, it requires an independent and neutral judiciary to undertake the above mentioned tasks. The Court is conceived as a guardian of the constitution in which capacity it checks the government in its actions in the touch stone of the constitution. While doing so the Court is required to interpret the provisions of the constitution frequently. There exist several approaches as to how the Court should interpret the law. These approaches may be categorized mainly into two models namely, Agency Model and Partnership Model of Interpretation. In constitutional arena these approaches are advocated more or less by originalists and living constitutionalists respectively.

In this work I will first analyze the two traditional approaches to constitutionalism i.e. Legal and Political Constitutionalism by comparing the two and making out an argument that the Political Constitutionalists have been failed to present a coherent system, hence, legal constitutionalism, supporting entrenchment of the constitutional rules, is still the foundational belief in constitutionalism. However, the discussion on the most contentious topic of judicial review is out of the preview of this work. Presumably taking Legal Constitutionalism as the basic tradition, I will then analyze the regime of interpretation generally and of constitutional provisions particularly. In doing so, a comparison shall be undertaken between the originalists and the living constitutionalists so as to identify the appropriate approach in interpreting constitutional provisions.

[3] Zabokrytskyy, Ihor, "Rule of Law and Constitutionalism: Modern Approaches", *The Advanced Science Journal*, Vol. 2015, Issue 6, pp. 49-51.

[4] Barber, N.W. "Why Entrenchment?", *I.CON* 14, (2016), pp. 325-350

2. Constitutionalism and its two traditions

Constitution, among the constitutional writers, may be defined in two senses distinct from each other. In the first sense, it means 'the nature of a country in reference to its political conditions', whereas, in the second sense, constitution means 'a law that concerns itself with the establishment and exercise of political rule. In other words, constitution in the first sense means the attitude, conditions and character of the political life of a country while in the second sense it refers to a set of rules under which the political rule is to be realized in a country. To put it in a simpler way, it may be said that the constitution in the first sense is descriptive and in second sense is normative.[5] The school who believes on the definition of the constitution in the first sense is called as Political Constitutionalism and the school which refers to the second sense of the constitution is called as Legal Constitutionalism. The doctrine of Constitutionalism states that 'the government's authority is determined by a body of laws or constitution. Constitutionalism has been understood by some scholars as limited government[6] which sometimes depicts a *minimal or less government*. However, this is not a generally pursued conception. The more general conception lies in the belief that 'constitutionalism seeks to prevent arbitrary government.' Arbitrariness means the willful government by the ruler at his discretion and to pursue his own interests instead of the interests of the persons being ruled.[7] Constitution is also understood in a

[5] Laughlin, Martin, *'The Political Constitution Revisited',* LSE Working Paper, 18/2017, Law Dept. London School of Economics and Political Science, Available on:

http://eprints.lse.ac.uk/87572/1/Loughlin_Political%20Constitution_Author.pdf.

[6] This commonly existing sense of the constitutionalism is called the Negative Constitutionalism which deals with 'limited government' idea. Whereas, Barber and other have popularized a new interpretation of constitutionalism known as 'Positive Constitutionalism' which implies that constitutionalism means that state have competent institutions to apply the rule of the government effectively and the said institutions are responsible to people in their working. *See* Barber, N.W., *The Principles of Constitutionalism,* (Oxford: 2018), Oxford University Press, pp. 2-9.

[7] *See* for example, Bellamy, Richard, "Constitutionalism" (September 13, 2010). *International Encyclopedia of Political Science*, B. Badie, D. Berg-Schlosser and L. Morlino, eds., IPSA/Sage, Forthcoming. Available at SSRN: https://ssrn.com/abstract=1676321.

more abstract sense as 'an overarching legal framework that determines relationships of the different levels of law and of the distribution of powers among their institutions.[8]Constitutionalism is a by-product of the Roman idea of Mixed Government and after passing through the currents of Montesquieu's doctrine of *Separation of Powers* which was mechanically blended in the US Constitution, has reached to a matured level in the present day world.[9]

With the passage of time the Political Constitutionalism split into two groups[10] which I may, for the purpose of this article, name as Hard and Soft Political Constitutionalism. This split is based on the approach of the writers to the nature of the entrenchment[11] of the principles upon which the political life of a country revolves. The writers who believe in Hard Political Constitutionalism are antagonist of any sort of entrenchment of political behavior, whereas, the authors of the Soft Political Constitutionalism, though agree to some extent, on the entrenchment of the political attitude of a country, however, they refuse the role of the Court in modifying the constitutional rules through the medium of judicial review. In other words, Soft Political Constitutionalists are agreed with the stance of the Legal Constitutionalists, in opposition to Hard Political Constitutionalists in entrenchment of the rules of political life, whereas, it is agreed with the claim of the Hard Political Constitutionalists that the Court should not be permitted to modify the constitutional principles through judicial review, a stance opposed to the stand of Legal Constitutionalists. The Legal

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[8] Adams, Maurice et. al (editors), *Constitutionalism and the Rule of Law'.* (New York: Cambridge University Press, 2017), p. 3

[9] *See* for example, Richard Bellamy.

[10] Political Constitutionalists have already been divided into 'radical' and 'moderate' factions. This divide is peculiar to the approaches of the concerned theorists as to the acceptability of the role of 'judicial review'. The writers who negates the concept of 'judicial review' altogether are grouped in radical school and the authors who subscribe to the view that 'judicial review' may only be justifiable in cases of administrative law but not in constitutional matters are grouped in 'moderate school' of Political Constitutionalism. *See* for example; Craig, Paul Philip, *Political Constitutionalism and Judicial Review,* (November, 2014), Available at: http://ssrn.com/abstract=1503505.

[11] Generally 'entrenchment' may be described as 'making it difficult for a rule to be altered or changed. *See* for example; N.W. Barber *infra* n. 4.

Constitutionalists believe that not only the rules of the political life of a country be entrenched but also the Court being the guardian of the constitution shall guard the constitutional provisions so entrenched from all sort of encroachment by the legislature. In other words, the Legal Constitutionalists believe both in the entrenchment of the constitutional provisions as well as the use of Judicial Review by the Court.

Legal Constitutionalism is founded on two related claims. The first one is that a society is capable of reaching upon the substantive outcomes[12] that should tend to secure the democratic ideals of equality among the citizens. The second claim upon which Legal Positivism is based is that the judicial processes are more reliable to identify these outcomes than the democratic process.[13]

The central idea in constitutional debates is the *role of law in democracy.* In the backdrop of the debates on constitution, the challenge posed by the Political Constitutionalism to the traditional approach i.e. Legal Constitutionalism has carved out the way for further constitutional discussions. Though the origin of the Political Constitutionalism is not new, however, it was passionately articulated in the recent times by Richard Bellamy in the introduction of his book.[14] He says that:

> The legal constitutionalist's attempts to constrain democracy undercut the political constitutionalism of democracy itself, jeopardizing the legitimacy and efficacy of law and the courts along the way. For a pure legal constitutionalism, that sees itself as superior to and independent of democracy, rests on questionable normative and empirical assumptions—both about itself and the democratic processes it seeks to frame and partially supplant. It overlooks the true basis of constitutional

[12] These 'substantive outcome' means the concept of human rights, which has grown into the conception of fundamental law.

[13] Bellamy, Richard, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy,* (New York: Cambridge University Press, 2007), p. 3.

[14] Minkinen, Panu, "Political Constitutionalism verses Political Constitutional Theory: Law, Power and Politics" *I•CON* (2013), Vol. 11 No. 3, 585–610

> government in the democratic political constitutionalism it denigrates and unwittingly undermines.[15]

Though some factions of Political Constitutionalism negate the concretization of the political behavior of a country, however, majority of the constitutionalists including Soft Political Constitutionalists do agree on entrenchment. The dominant argument of the Legal Constitutionalists as to the entrenchment of the political behavior is, as aforesaid, safeguard the populace from the abuse of power of the rulers. This premise brings with certain other principles of constitutionalism like the concept of 'fundamental rights', 'rule of law', 'separation of power', 'independent and impartial judiciary' and on the top of all the 'judicial review'.[16] The entrenched, right-focused and judicially oriented (that is to be pleaded in a court of law) constitution is necessary for the purpose of ensuring 'stable and accountable government, obliging, legislatures and executives to operate according to the established rules and procedures'.[17]

Now as the common theory and the global practice exhibits the standpoint of Legal Constitutionalism, hence, it is necessary to understand the ways in which the entrenched principles or the constitutional principles be interpreted.

3. Originalism and Living Constitutionalism: The Interpretive Beliefs

It is pertinent to mention that the principles upon which the political life of a country is founded must be upheld by all the stakeholders involved in the business of the political rule of that country. In case of any doubt or dispute as to a matter related to political rule, there must be existing an independent authority in shape of Court so as to settle the doubt or dispute permanently and avoid chaos.[18] However, it may not be possible unless the

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[15] Quoted by Ibid.

[16] See for a deeper understanding of these enumerated principles, Richard Bellamy.

[17] Bellamy, Richard, "Constitutionalism" (September 13, 2010). *International Encyclopedia of Political Science*, B. Badie, D. Berg-Schlosser and L. Morlino, eds., IPSA/Sage, Forthcoming, Available at: SSRN: https://ssrn.com/abstract=1676321

[18] *See* for example, Martin Laughlin.

constitutional principles be expressly stated and entrenched. When the Court is faced with the question of elucidating the meaning of the language of the constitution; whether abstract or normative, there would be two possibilities. First, the language may plain and clear and may not require innovation on the part of the Court, therefore, in such a situation, the Court shall have no other option but to give that plain and clear meaning to the language. For instance, when a constitutional provision provides that: "The Senate shall consist of one hundred and four members….."[19] Here the Court cannot do innovation and increase the membership of the Senate from one hundred and four to one hundred and five. The problem occurs when the language of the constitution is not so plain or clear. For instance, the Constitution of Islamic Republic of Pakistan while enumerating the qualification for membership of Majlis-e-Shoora (Parliament) provides that:

> "A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora Parliament unless- … sagacious, righteous, non-profligate, honest or amen."[20]

Here the words, 'sagacious', 'righteous', 'non-profligate', 'honest' and 'amen', are all either ambiguous or vague and do not have a clear and unequivocal meanings. Moreover, even the best legislators while authoring a constitutional text can only articulate some of the future events and will only vaguely anticipate others or even will not foresee them all together. However, sometimes even if they may foresee a future event they may choose not to address it. Therefore, to tackle these types of problems which pose questions on the legality of the actions, officials would try to explain the concrete constitutional provisions in light of abstract language. But when they reach at a position where they cannot afford further delay, they would appeal for formally amending the text.[21] It is pertinent that the rate of the amendments would have been numerous in every written constitution if the

[19] Article 59 (1) of the Constitution of Islamic Republic of Pakistan.

[20] Article 62 (1) (f) of the Constitution of Islamic Republic of Pakistan.

[21] Reference may be made to Pakistan, where only in a period of 47 years (from 1973 when the Constitution was adopted) twenty five amendments have been brought so far. In India one hundred and four amendments have brought in the Constitution of 1948.

constitutional entrenchment; resulted in the rigidity, did not exist. Hence, the Court, if faced to interpret the like provisions, would be required to carry a laborious task to elucidate the meaning of the constitutional language if suffered from any of the above mentioned or the like problems.[22] The constitutional theory suggests that every country, within its constitutional framework and social, economic and political conditions, has adopted different course specific to its conditions in determining the meanings as aforesaid. However, there are two contradictory traditions in constitutionalism that serve to answer the question that how should the Court interpret an equivocal constitutional language, the 'originalism' and the 'living constitutionalism'.

Originalism is an approach to constitutional interpretation which preaches that valid course for a Court is, while interpreting the constitutional language, to discover the original meaning of the text.[23] Originalism may be defined as "judicial interpretation of the Constitution which aims to follow closely the original intentions of its drafters."[24] However, the 'intentionalism' approach has become obsolete long ago. But originalism did not disappear and has adopted other shapes which may be categorized as 'Academic Originalism', 'Judicial Originalism' and 'Political Originalism.[25] Most popular of the new form is 'public meaning' approach' which says that the Court shall assign the meaning to the constitutional language as was understood generally by the public at the time the constitutional text was

[22] Raz, Joseph, On the Authority and Interpretation of Constitutions: Some Preliminaries, appeared in Alexander Larry's edn., *Constitutionalism: Philosophical Foundations*, (Cambridge: Cambridge University Press, 1998), p. 159.

[23] Murphy, Walter, *Constitutional Interpretation as Constitutional Creation,* The 1999-2000, Harry Eckstein Lecture, UC Irvin, CDS Working Papers. Available at: *https://escholarship.org/uc/item/850266jm*

[24] Oxford Dictionary 2004.

[25] 'Academic Originalism' has following types: 'Intentionalism', 'Public Meaning', 'Original Methods', 'Original Law', 'Judicial originalsim' is also known as 'Eclictic Originalism' and 'Political Originalism' is known as 'Rhetorical Originalism'. *See,* for example, Lawrence B. Solum, *Supra* n. 26.

framed.[26] Scalia agreeing[27] with Chief Justice Marshal of US on the textual interpretation quotes a statement of Justice Marshal:

> "Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the little claims a degree of notice, and will have its due share of consideration."

To Scalia, Chief Justice Marshal was supporting and not deviating from the original understanding of the text. Therefore, Chief Justice Marshal and Scalia along with others are the supporters of textual interpretation.[28]

All forms of the originalism are agreed upon the idea of 'fixed and restrained'. They believe that the meanings of all the words included in the constitution have been fixed at the time of the framing of the constitution and therefore, a deviation is restrained or innovation is prohibited and the Court is only required while interpreting the constitutional language to discover those meanings.[29]

However, originalism is suffered from several deficiencies. First, they believe that the authors of the constitution had shared or contributed *a single unified intent* but as put by Kenneth A. Shepsle, on the intentionalism in matters of ordinary legislation which is also correct in constitutional interpretation, 'Congress is a 'They' not an 'It"[30], which means that the framers or founders of the constitution is not a single body, rather it is composed of several individuals. To this end Forrest McDonald argued that:

> "[I]t is meaningless to say that the Framers intended this or the Framers intended that: their positions were diverse and, in many particulars, incompatible. Some had firm, well-rounded plans,

[26] Solum, Lawrence B., *Originalism verses Living Constitutionalism: Conceptual Structure of the Great Debate,* Northwestern University Law Review, Vol. 113, No. 6, (2019), pp. 1243-1296.

[27] He writes "This book takes the same position" (i.e. of Chief Justice Marshal), Scalia, Antonio, Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts,* (US: 2012), Thomson/West, p. xxii.

[28] Ibid., pp. xxi-xxii

[29] Lawrence B. Solum.

[30] Shepsle, Kenneth A., "Congress is a "They" not an "It": Legislative intent as Oxymoron", *International Review of Law and Economics*, Vol. 12, Issue 2, June 1992, pp. 239-256.

> some had strong convictions on only a few points, some had self-contradictory ideas, some were guided only by vague ideals. Some of their differences were subject to compromise; some were not."[31]

Second, the originalists are of the view that the intention may be gathered from the historical documents say for example records of the parliamentary debates. However, it may also not be possible as *those records, simultaneously voluminous and incomplete, are replete with contradictory claims, and the founders themselves often changed their minds about what had been in their minds*.[32] The most vital challenge for the originalists lies in perplexity that how can the present generation be controlled by the intent of the previous generation, different in social, political and economic conditions particularly when the founders failed to make their intention clear even to the generation they were living in.[33]

Joseph Raz has rightly opined that instead of listing interpretive methods and techniques, one should start with the questions that: 'Why is interpretation so central to constitutional adjudication?' One answer to the question he provides is that "it (constitution) is in need of reform, adjustment and development in order to remove shortcomings it always had or shortcomings that emerged as the government or the society that it governs changed over time."[34] This answer best illustrates the doctrine of living constitutionalism. Living constitutionalism is the interpretive method which preaches that the constitutional language be interpreted in a manner so as to advance, reform and supply the lacuna in the constitution and to fill the gap between the successive generations. Hence, this method is focused mainly on the *idea of constitutional change*.[35] The living constitutionalism, like originalism, has several forms for instance, 'constitutional pluralism', 'moral readings', 'common law constitutionalism', 'popular constitutionalism' etc. However, the central idea shared by the forms is that the court should interpret the constitutional language in a manner that may advance or cause a healthy change

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[31] Qoated by Walter Murphy.
[32] Ibid.
[33] *Ibid, See* also Joseph Raz, p. 159
[34] Ibid., p. 177
[35] Lawrence B. Solum.

in the constitutional management of the country. Change is important because the entrenchment makes the constitution rigid which cannot be easily amended. However, over time the circumstances or the 'conditions' of a society changes. Hence, it is mandatory for the compatibility and adjustability, that the constitution be responsive to the new circumstances. This is possible, as already mentioned elsewhere through two modes. First, either the constitution be amended, which is not an easy task, as the majority of the world constitutions exhibits lengthy and technical procedure for its amendment. Second, the constitution is to be kept alive by the decisions of the courts in a manner to invent or discover new meanings of the constitution which are more responsive to prevailing circumstances instead of lingering on to the meanings either conceived by the fathers of the old generation or the public meaning perceived by the society of the old days. The significance of the living constitutionalism approach has finely been presented by Strauss in his metaphor of a tree. The tree depicted in his work grows with all its branches and roots in a coherent and coordinated and organic way. He suggest that tree of the constitution shall grow in all directions and with full might. If the growth stops the tree would die and constitution would destroy.[36]

The courts in Pakistan also subscribe to the view of living constitutionalism. Justice Syed Mansoor Ali Shah in his dissenting note in *Khurshid Soap and Chemical Industries (PVT.) LTD.*, while explaining the 'living tree doctrine' in the context of Pakistan says:

> "The 'living tree' doctrine allows the Constitution to change and evolve over time while acknowledging its original intentions…… Our courts have repeatedly underlined that our Constitution is a living document and encouraged its progressive interpretation." [37]

To him progressive interpretation[38] is preserving the *vitality of the constitution.* He is of the belief that if the constitution has not been

[36] Balkin, Jack M., "The Roots of Living Constitutionalism", *Boston University Law Review,* Vol. 92, (2012), p. 1130-1160.

[37] PLD 2020 Supreme Court 641, Dissenting Note of Justice Syed Mansoor Ali Shah, 81.

[38] 'Progressive interpretation' is another name of 'dynamic interpretation' developed in the metaphor of the 'living tree' which may

interpreted progressively, *it would be frozen in time and become more obsolete than useful.*[39]

Justice Syed Mansoor Ali Shah in the *Jurists Foundation through Chairman*, while discussing the interpretation of fundamental rights, maintains that the *fundamental rights in a living constitution are to be liberally interpreted so that they continue to embolden freedom, equality, tolerance and social justice.*[40] He is of belief that *'…vibrancy and vitality is the hallmark of a living constitution in a democracy.'*[41] For Justice Sayyed Mazhar Ali Akbar Naqvi of Lahore High Court *constitution is a living document because it cannot be restrained to the past rather it has life to unfold the future for its implementation.*[42] To the courts in Pakistan, constitution being a living and organic document, shall not be interpreted narrowly or restrictively[43] rather shall be interpreted dynamically[44] and *with an eye to the future.*[45]

4. Conclusion

It may be concluded that a faction of the Political Constitutionalists including Griffit provide an abstractive solution for constitutionalism. However, the abstract phenomenon is impossible to either be interpreted or implemented correctly in the society, whereas, Legal Constitutionalism provides a normative approach towards constitutionalism. For the obvious reasons, normative system is more feasible and ready to be interpreted and applied coupled with the fact it may not easily culminate in corruption or mal-practices. Hence, the concretized system may not only provide a safeguard against the abuses of the power by the executive and legislative organs of the state but also against

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be advocates the idea that the *'the language of the Constitution is applied to contemporary conditions and ideas without regard for the question whether the framers would have contemplated such an application.' See* Goldsworthy, Jeffrey, (edn.), *Interpreting Constitutions: A Comparative Study,* (New York: Oxford University Press, 2006), p. 87.

[39] Ibid.

[40] PLD 2020 Supreme Court 1, 7

[41] PLD 2020 Supreme Court 59913.

[42] PLD 2020 Supreme Court Lahore 285.

[43] 2017 SCMR 1344 (Supreme Court of Pakistan), 37.

[44] 2019 PLC (C.S.) 238, Karachi High Court, 9.

[45] 2015 SCMR 1739, 41.

judicial biases and prejudices. Moreover, it also protects the constitution and advances the cause of justice and overcomes the corrupt practices, owing to the reason that the tradition of Legal Constitutionalism protects the system of justice from absurdity by requiring all the concerned including judges to act in accordance with *pre-fixed* rules. Further, for the purpose of growth and to be responsive to the changed circumstances the only feasible method of interpretation is the living constitutionalism model of interpreting constitution which requires that the court should adopt dynamic interpretation approach while interpreting Constitution, particularly the fundamental rights. This model is gaining much support both in judiciary and academia. They are of the belief that law must correspond to the changed circumstances so as for adaptability of the law, it is necessary that court shall interpret the law by assigning the meanings to the words and phrases in accordance with the prevailing circumstances instead of adhering to the legislative intent of the past.

Both the living constitutionalism and dynamic interpretation approach suggests that constitution and laws be interpreted in accordance with the prevailing circumstances which shall ultimately result in supplementing the gaps in the constitution and law.

Product Liability Law in United Kingdom: An Analysis

Muhammad Akbar Khan*

Abstract

This article argues that the traditional principles of contract law and negligence have limitations which prevent some persons injured by defective products from relying on them as a means of redress. This research paper analyses the application of strict product liability in England through enactment of the Consumer Protection Act, 1987. The background and need for the application of strict product liability in England is highlighted in this regard. Moreover, in order to analyze the effectiveness of English product liability regime the key notions of the regime embodied in Consumer Protection Act, 1987, have been analyzed. The paper poses important questions such as: what is meant by the notion of strict product liability under English law? Which particular act was enacted through which the EU Directive on product liability, 1985 (85/374/EEC) was adopted in England? What is meant by 'product' in CPA? What does defect mean and what are its various kinds under CPA? Who are the potential defendants under the CPA, 1987? What defenses are provided to the defendants under CPA? How to establish the link between the harm caused and defective product? What is the time limitation under CPA, 1987 for product liability cases? These and many other important questions have been tackled in the article.

Key Words: Contract, *Privity*, Torts, Negligence, Strict Liability, Product Liability, Consumer Protection etc.

1. Introduction

In United Kingdom before the introduction of Consumer Protection Act, 1987 product liability can be seen to be deficient, mainly due to the *privity* requirement in contract law and fault requirement in the law of tort.[1] The victims

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[1] Royce-Lewis, Christine A., *Product liability and consumer safety: A practical guide to the Consumer Protection Act* (ICSA Publishing Limited, London 1988), p. 3. Cf. Simon Deakin, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort Law* (5th edn, Clarendon Press, Oxford 2003), p. 603. Geraint

of defective products can never rely on contractual rights unless they bought them, because there is lack of '*horizontal privity*' as they were not a party to the contract under which the goods were supplied. This would exclude the recipients of gifts, possibly members of a group who did not pay for goods consumed and by-standers. The '*vertical privity*' restricts the possible defendants to the final seller.[2] On the other side, in the tort of negligence in cases related to product liability, the major problem is that the liability is fault-based. The burden of proving the negligence is on the claimant and he has to prove that the defendant owed him a duty of care. The defendant breached that duty by failing to meet the required standard of care and causing damage. In such cases the standard of 'care' is that of a reasonably competent person and must be exercised at all stages of production process.[3] If the standard of care is breached it will render the product "defective". J.A. Jolowicz remarks in this context:

> "I think that in this matter of the civil remedies of the consumer public opinion, or perhaps better, public belief as to the law and the law itself, have got rather far apart. I think also that the main reason for this is the law's insistence on privity of contract and on non-contractual liability only for fault. There are signs in other areas of the law that privity of contract is beginning to yield to the pressures of modern society, for example in the case

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G. Howells writes in this context: "The United Kingdom's product liability law can be seen to be deficient, mainly due to the privity requirement in contract law and the fault requirement in tort law. The thalidomide disaster provoked widespread discussion of product liability and the matter was referred to the English and Scottish Law Commission in 1971 and the Pearson Royal Commission on Civil Liability and Compensation for Personal Injury. All three recommended that producers should be strictly liable for personal injury or death caused by their defective products" (Geraint Howells, "Product Liability: A Global Problem" *Managerial Law*, 29: 5/6, p. 1-36.

[2] Geraint G. Howells, *The Law of Product Liability*, (2nd Edition, LexisNexis Butterworths, 2007), p. 265.

[3] Overview of UK: Product Liability Law available at: http://www.biicl.org/files/1123_overview_uk.pdf, last accessed on 15.08.2013.

> of Hedley Byrne & Co.Ltd v. Heller & Partners Ltd., and it is time that in the consumer field also we should prepare ourselves to sacrifice that and other some of the other sacred cows of the law. Popular belief about the law is often wrong and I am far from agreeing that the law should always be so simple that everyone can understand it. But in a field which touches every one as loosely as does consumer law, there is something to be said for a re-examination of the law in the light of what it is popularly, if erroneously, supposed to be".[4]

In this scenario, in England public concern at the problem experienced by *thalidomide* claimants in trying to recover damages under the existing laws of contract and tort led to renewed pressure for their reform.[5] The *Thalidomide* disaster provoked widespread discussion of product liability and the matter was referred to the English and Scottish Law Commissions in 1971 and the Pearson Royal Commission on Civil Liability and Compensation for Personal injury. All three recommended that producers should be strictly liable for personal injury or death caused by their defective products.

Simultaneously the common market was seeking to harmonize the product liability laws of member states. It was deemed an important area for harmony, since differing legal liability in member states affects the price to be charged for a product and distorts competition. The commission to the Council of Ministers of the European Communities embarked upon the task in 1972. It

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[4] J.A. Jolowicz, "The Protection of the Consumer and Purchaser of Goods under English Law", *The Modern Law Review*, 32: 1, January 1969, p. 1-18.

[5] In early 1960s, the drug *thalidomide* affected about 10,000 birth defects and caused thousands of fatal deaths worldwide. The affected babies typically suffered from failure of the limbs to develop. These unfortunate children were cruelly referred to as '*flipper babies*.' Thalidomide had been prescribed to pregnant women to help reduce morning sickness, but tragically, it turned out to be toxic to developing foetuses (The Tragedy of Thalidomide and the Failure of Animal Testing available at: http://www.prijatelji-zivotinja.hr/index.en.php?id=582, last accessed on 14.08.2013).

submitted a draft Directive in 1976 and a revised draft in 1979.[6]

Hence, in Europe, one of the most significant milestone achieved in the history of consumer protection law on 25 July 1985 with the promulgation of the Council Directive on the Approximation of the Laws, Regulations, and Administrative Provisions of the Member States concerning Liability for Defective Products' (hereafter the Directive).[7] The Green Paper on liability for defective products makes clear that the goal of the Directive was to provide a balanced approach giving, on the one hand, a protection to victims but avoiding, on the other hand, a crushing liability, e.g. by requiring the victim to prove the defective nature of the product and by providing limitations in time.[8] The Directive intended to address dangerous products after they are sold and used, in addition to providing redress to an injured consumer.[9]

The purpose of the Directive was to: introduce the notion of strict product liability i.e. liability without fault on the part of the manufacturer in favour of the consumer; establish joint and several liability of all operators in the production chain in favour of the injured party, so as to provide a financial guarantee for compensation of the

[6] Rodney Nelson, Jones & Peter Stewart, *Product Liability: The New Law under The Consumer Protection Act, 1987*, (Fourmat Publishing, 1987), p. 33-34.

[7] Helen Delaney and Rene van de Zande, A Guide to the EU Directive Concerning Liability for Defective Products (Product Liability Directive), U.S. Department of Commerce, National Institute of Standards and Technology, available at: http://gsi.nist.gov/global/docs/EUGuide_ProductLiability.pdf , last accessed on 13.08.2013.

[8] Michael G. Faure. "Product Liability and Product Safety in Europe: Harmonization or Differentiation?", Kyklos, (Online, International Review for Social Sciences). 53:4, (2000), p. 467-508.

[9] See for a detailed discourse on EU Directive on Product Liability, 1985: Muhammad Akbar Khan, *Consumer Protection in Shariah and Law: A Comparative study of Product Liability in Islamic and English Laws*, Chapter 4, PhD thesis submitted to the Department of Shariah, Faculty of Shariah & Law, Interantional Islamic law, Islamabad, 2015. chapter 4 of the thesis

damage; place the burden of proof on the injured party insofar as the damage, the defect and the causal relationship between the two are concerned; provide for exoneration of the producer when the producer proves the existence of certain facts explicitly set out in the Directive; set liability limitations in terms of time, by virtue of uniform deadlines; set the illegality of clauses limiting or excluding liability towards the injured party; set a limit for financial liability; and provide for a regular review of its content in the light of the effects on injured parties and producers.[10]

The Consumer Protection Act, 1987 was promulgated in UK to incorporate the EU Directive on Product Liability, 1985 (85/374/EEC). It was applied to damages caused by products which were put into circulation by the producer after 1 March 1988. Section 1(1) states: "Part I of the Act shall have effect for the purpose of making such provision as is necessary in order to comply with the product liability Directive and shall be construed accordingly".[11]

2. Consumer Protection Act, 1987: An Overview

The principal statutory provisions are contained within Part I of the Consumer Protection Act 1987(CPA). Part I of the Consumer Protection Act, 1987 implements the Directive. The Act has five parts in all: Part I sets out the circumstances in which, under its operation, a consumer can make a claim for damages caused by a defective product; Part II contains the consumer safety legislation; Part III deals with misleading price indications; Part IV details the methods of enforcing the legislation in Part II and III; and Part V consists of miscellaneous provisions concerning, for example, the definition of certain terms. In

[10] Helen Delaney and Rene van de Zande; also Muhammad Fayyad, "The Transposition of the European Union Directive 85/374 /EEC on Product Liability into Palestine and Jordan: Is it Adaptable to Islamic Law?" *Global Journal of Comparative Law*, 1: 2 (2012), p. 194-224.

[11] Sec.1 (1), Consumer Protection Act, 1987.

addition there are five schedules of which the first, the most important, sets out the time limits for starting court action under the Act. Part I of the Act, 1987 implements the Directive and it is a domestic adaptation of the EU Directive on product liability, 1985. Liability in the Act is strict but not absolute as there are a number of defences available under the legislation. The Act covers the establishment of liability in respect of damages caused by a defect in a product.[12] There are two heads of loss mentioned in the law that are personal injury, death and damage to private property over 275 pounds.[13]

Section 5 (2) has expressly ruled out the recovery for damage to product itself (so Murphy-type economic loss not covered) and 'complex structure' type economic loss, so long as part X , causing damage to the product Y (into which X is incorporated) so long as Y was already incorporated when Y was supplied. According to the Act, there are four classes of persons who can be held liable under the Act: Producers[14] that comprises manufacturers, abstractors, and persons who are in neither class (i) nor (ii) but who give an agricultural product an essential characterization by means of an industrial process; brand-namers[15] who hold themselves out as the producer; EC Importers [16] in case where they import from non-EC producer, the former would be liable for damage caused to UK Citizen; 'Silent' Suppliers[17] which covers the situation where the supplier (S) supplies to a buyer (B) and then (B) asks for the identity of the person against whom the action would normally be brought. Section 3 of the Act governs the definition of defect. Defect is defined in terms of the safety of the product being below the standard of safety which one is generally entitled to expect.[18] There are various defences for the defendant to show that he falls

[12] Sec. 2 (1), Consumer Protection Act, 1987.
[13] Sec. 5(1) & S.5(4), Consumer Protection Act, 1987.
[14] Sec.1(2) & 2(2)(a), Consumer Protection Act, 1987.
[15] Sec. 2(2)(b), Consumer Protection Act, 1987.
[16] Sec. 2(2)(c), Consumer Protection Act, 1987.
[17] Sec. 2(3), Consumer Protection Act, 1987.
[18] Sec. 3(1), Consumer Protection Act, 1987.

within one of the statutory defences. These are compliance with rule of law[19], product never supplied to another[20], non-business supply,[21] defect occurring after the time of supply[22], development risks[23], installation defect in a subsequent product[24] and contributory negligence[25].

3. Appraisal of the Key Notions of Strict Product Liability Regime in United Kingdom

3.1. Strict Product Liability

The CPA 1987 places strict liability for defective products on a range of possible defendants. The discussion so far indicates that the modern law of product liability in United Kingdom is based on the rule of strict liability. As it is discussed earlier that the existing English product liability regime is based on EU Directive on Product Liability (85/374 EEC) that is based on the notion of strict product liability. The Directive envisages imposing liability on importers and suppliers even when they have used all reasonable care, the liability to which those parties are exposed is clearly strict. Similarly, the Directive also imposes on producers when the defect was due to the activities of a party further up stream in the process such as an out of house designer or a component part producer. Similarly, it is expected that U.K. judges will continue to impose covert strict liability for manufacturing errors.[26]

3.2. The Notion of Product

The term 'Product' indicates an item which has been manufactured and then sold, perhaps through an

[19] Sec. 4(1)(a), Consumer Protection Act, 1987.
[20] Sec. 4(1)(b), Consumer Protection Act, 1987.
[21] Sec. 4(1)(c), Consumer Protection Act, 1987.
[22] Sec. 4(1)(d), Consumer Protection Act, 1987.
[23] Sec. 4(1)(e), Consumer Protection Act, 1987.
[24] Sect. 4(1)(f), Consumer Protection Act, 1987.
[25] Sec. 6(4), Consumer Protection Act, 1987.
[26] Jane Stapleton, "Product Liability in United Kingdom: Myths of Reforms", *Texas International Law Journal*, Vol. 34: 4, p. 45-71.

intermediary, to the consumer. In market transactions, a product is anything that might satisfy a want and offered to the market. It is also called merchandise. According to manufacturing, products are bought as raw materials and sold as finished products. In project management, products are the formal definition of the project deliverables that make up or contribute to delivering the objectives of the project.[27] Under the general English law of negligence no definition of product exists. Under the new rules, however, 'product' is a central concept-if no 'product' is involved then the new regime of strict liability will not be attracted. What should be the boundary between products and other things? The *Winterbottom v. Wright*, though it was not a case of product liability, may be considered as the starting point to examine the evolution of product liability in United Kingdom. In this case the plaintiff, a coachman, was injured due to the failure of the defendant to maintain the coach. The defendant was a contractor in charge of maintaining coaches for the stagecoach company. The court held that the liability would not attach to the defendant as there was no *privity* of contract between the parties. [28] Mr. Winterbottom's case was an impediment from which English law did not recover until *Donoghue v. Stevenson* in 1932, having spent more than a century with an apparent dichotomy between 'dangerous chattels' and other goods. General negligence principles have been applied to what could be called product liability cases.[29]

As the English regime of product liability is based on EU Directive on Product Liability, it is, therefore, important to know the meaning of the word "product" in the Directive. According to the EU Directive; a "product" means physical property and goods, as opposed to land or rights in or to

[27] Michael G. Faure, p. 470; also quoted by M. Fayyad in his *Transposition of the European Directive 85/374/EEC on Product Liability into Palestine and Jordan: Is it Adaptable to Islamic law?*

[28] *Winterbottom v. Wright* (1842) 10 M. & W. 109.

[29] Alister Clark, *Product Liability*, (Sweet & Maxwell Publishers, 1989), p. 47.

real property.[30] According to this definition, the following are to be products: any goods which can include substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle; electricity-defects do not include a power cut; products comprised in other products as component raw material or likewise. This means that buildings themselves will not be included whereas the materials used to make up those buildings will be. In the original Directive, primary agricultural products and game were excluded (article 2). This modification was only made when consumers had been alarmed by outbreak of mad cow disease.[31]

The Consumer Protection Act, 1987 has defined "Product" in as: "any goods or electricity and (subject to subsection (3) below) includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise".[32] "Goods" is further defined as including: "substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle".[33]

The criteria must be met for an article to constitute a product. It must be movable. Cars and ovens are product.[34] "Product" obviously includes standard consumer goods such as lawnmowers and televisions. It also includes components, such as brakes in a car. It includes raw materials incorporated into goods. It includes ships, hovercrafts, aero-planes, gliders, trains and other vehicles. It includes gas, water and electricity. It includes waste when supplied as a product in its own right, but not where it is merely an unwanted incident of the production process, e.g. effluent from a factory. Land and buildings are not products, because they are immovable. However,

[30] Art. 2, EU Directive on Product Liability 85/374 (EEC).

[31] Hans-W. Micklitz, N. Reich and P. Rott, *Understanding EU Consumer Law* (Oxford: Intersentia Publications, 2009) 246.

[32] s. 1 (2), CPA, 1987.

[33] s. 45, CPA, 1987.

[34] Rodney Nelson, Jones & Peter Stewart, p.36.

s.45 of the Consumer Protection Act, 1987 clearly covers such items as bricks, wood and cement, even though they become part of a house. Hence, building materials are products but not the building itself; the effect is that the Act applies to building material producers but not normally to the work of building and civil engineering contracts. If your house falls down due to defective bricks, you may sue under Part I of the Act. If it falls down due to defective design or assembly, you must rely on the existing laws of contract and tort (including the Defective Premises Act 1972). [35]

Now the question may arise that liability should also be imposed for nuclear accidents? Nuclear accidents are excluded from the Act. In this regard A.14 of Directive states: This Directive shall not apply to injury or damage arising from nuclear accidents and covered by international conventions ratified by the Member states.[36] In the UK the relevant conventions are mainly implemented by the Nuclear Installations Act 1965. In this context, s.6 (8) provides states: 'Nothing in this Part shall prejudice the operation of section 12 of the Nuclear Installations Act 1965 (rights to compensation for certain breaches of duties confined to rights under that Act)'.[37] The most contentious exception concerns agricultural produce which has amended as mentioned earlier. Agricultural produce is outside Part I, but industrially processed agricultural produce is within it. A fisherman is not liable for selling sickly fish, but a food manufacturer would be liable for producing defective fish fingers. If contaminated wheat eventually forms part of defective biscuits, it is the biscuit manufacturer rather than the wheat grower who will be liable under Part I. The industrial manufacturers then have to exercise their rights of contribution and indemnity against the producers of the primary foodstuff. If a consumer is directly injured by primary agricultural produce, such as rotten tomatoes, Part I does not apply at

[35] Sec. 45, Consumer Protection Act, 1987.
[36] Art. 14, EU Directive on Product Liability, 1985.
[37] Sec. 6 (8), Consumer Protection Act, 1987.

all and he must rely on the existing law. The major consequences of the breadth of meaning ascribed to the term "product" is that, despite the statute's short title of the Consumer Protection Act, 1987, Part I`s scheme of strict liability will have a wider application than to consumer goods. As noticed earlier, major disasters stemming from for examples chemicals or aircraft could well be litigated under the Act. The extension of the term "goods" to include movables which have been incorporated into immoveable is of some interest. This clearly covers moveable items such as windows, frames, pipes, and central heating systems which have been so incorporated. In this way the Act implements A.2 of the Directive.

Many difficult propositions are likely to arise in relation to the scope of product. In this regard, the first one is to determine the boundaries the term product covered by the Act.

Another important point which has caused some anxiety is the position of those who produce printed textbooks, manuscripts and the like. In their Explanatory and Consultative Note the "Special problems arise with those industries dealing with products concerned with information, such as books, records, tapes and computer software. It has been suggested, for example, that it would be absurd for printers and bookbinders to be held strictly liable for faithfully reproducing errors in the material provided to them, which-by giving bad instructions or defective warnings-indirectly causes injury. It does not appear that the Directive is intended to extend liability in such situations. On the other hand, it is important that liability is extended to the manufacturer of a machine which contains defective software and is thereby becoming unsafe, and to the producer of an article accompanied by inadequate instructions or warnings, the article thereby become a hazard to the consumer. The line between those cases may however not be easy to draw, particularly in the field of new technology where distinction between

software and hardware is becoming increasingly blurred."[38]

In modern context the most debated question that arises is whether or not computer technology can be categorized as a product. There is no doubt that hardware is covered by the Directive and no doubt providing a modicum of comfort to those working in close proximity to 'killer robots'. The difficulty arises in relation to the question of software. The arguments against software being classified as a product are essentially threefold. Firstly, software is not moveable, therefore is not a product. Secondly, software is information as opposed to a product, although some other obiter comments on the question of the status of software suggests that information forms an integral part of a product. Thirdly, software development is a service, and consequently the legislation does not apply.[39] On the contrary, it can be argued that software should be treated like electricity, which itself is specifically covered by the Directive in article 2 and the Act in section 1 (2), and that software is essentially compiled from energy that is material in the scientific sense. Ultimately it could be argued that placing an over legalistic definition on the word "product" ignores the reality that we now live in an information society where for social and economic purposes information is treated as a product and that the law should also recognize this.

Furthermore, following the St Albans[40] case it could be argued that the trend is now firmly towards categorizing software as a product and indeed the European Commission has expressed the view that

[38] Alister M. Clark, p.53.

[39] *Maurice Jamieson, Liability for Defective Software*, available at: http://www.journalonline.co.uk/magazine/46-5/1000702.aspx, last accessed on 13.08.2013.

[40] *St Albans City and DC v. International Computers Ltd.* [1995] FSR 686; [1996] 4 All ER 481.

software should in fact be categorized as a product.[41] The new bill on consumer rights protection introduced in the British Parliament in 2013 has covered, inter alia, the digital-content.

3.3 The Notion of Defect

In order to establish liability under Consumer Protection Act proof of defect is essential. The plaintiff has to prove that the product is defective.[42] According to S.3 (1) of CPA, 1987, a defect exists where the safety of the product is not such as persons generally are entitled to expect. The test is based on consumer expectations i.e. what they expect generally. It is subject to a reasonable test.[43] In S. 3(2) of CPA, 1987 states certain factors to be taken into account in assessing consumer expectations of a product`s safety. These are: the manner in which, and purposes for which, the product has been marketed, it's get up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product; reasonably expected use; and the time that the product was supplied by its producer to another.

However, there is no defect if:

(a) The product is perfectly safe;

(b) The product is as safe as persons generally are entitled to expect, in view of its nature and presentation;

(c) The damage only arose through the disregard of instructions or warnings;

(d) The damage only arose because the product was put to an unexpected use;

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[41] http://www.journalonline.co.uk/Magazine/46-5/1000702.aspx#.UgEfsPL97Co last visited on 06-08-2013.

[42] *Foster v. Biosil* (2000) 59 BMLR 178.

[43] *Richardson v. LRC Products* Ltd. [2000] Lloyd's Rep Med 280.

(e) The damage was solely caused by fair wear and tear;

(f) Knowledge that the product could be made safer only became available after its producer supplied it.[44]

In addition to factors to guide the analysis of whether there is a defect, there is also the question of what standard of defect is required for the product to be unsafe and for liability to attach.

This differs from case to case. There is not much case law developed so far that's why the notion of defect and standards to determine the defectiveness of something need to be refined. The three kinds of defect pointed out from the case law on negligence i.e. manufacturing, design and marketing are appropriate and expected to be adopted in future litigation.[45]

The 'manufacturing defect' is covered by the CPA, 1987. This is the defect in a product because it fails to conform to design specification as was in the case of 'A v National Blood authority'. The case has made a clear distinction between standards and non-standard products. Burton J held that the infected products were non-standard, unsafe and, in the absence of warnings to the public about the risk of infection, were not what the public was legitimately entitled to expect and were therefore defective. The fact that infection was unavoidable (due to the lack of screening tests available at the relevant time) was irrelevant to the analysis of defect. In 'Bogle and Others v McDonald's Restaurants Ltd'[46] the court held that 'consumers expectations of coffee were that it should be served hot and therefore the product (coffee in a

[44] Rodney Nelson, Jones and Peter Stewart, p.61.

[45] Overview of UK: Product Liability Law, available at: http://www.biicl.org/files/1123_overview_uk.pdf, last accessed on 15.08.2013.

[46] *Bogle and Others v. McDonald's Restaurants Ltd*. [2002] All ER (D) 436 (Mar).

Styrofoam cup with lid) was not defective merely because it could scald when spilled'.

When the design itself is defective that is called design defects. These kinds of defects are more complex as there is no 'standard' product against which to compare the allegedly 'non-standard' product. All products involve inherent risk and the benefits of the product must be weighed against its potential benefits. A product will be considered to have design defect when its risks are much more as compare to its benefits and if such risks could have been avoided by an alternative design. To meet the regulatory standards may indicate that there is no design defect, although this cannot be guaranteed. Where the design permits the risk to arise and there is no warning to the user, the product's safety will fail the consumer expectations test as was the case in 'Iman Abouzaid v Mothercare (UK) Ltd'.[47]

S.3 (2) (a) of the Consumer Protection Act contains the failure to warn/manufacturing defect. Failure to issue adequate and proper warnings of associated risks or instructions to avoid their materialization, the product will be considered a defective one. In Worsley v Tambrands Ltd, the plaintiff filed a suit against the defendant, a tampon manufacturer, claiming compensation for personal injuries suffered as result of toxic shock syndrome after inserting a regular tampon, a type she had used since she age 15. The plaintiff contended that the warnings on the packet were defective. The court held that the box gave unambiguous instructions to read the detailed leaflet inside, and the leaflet was true and accurate. The claim failed.[48]

[47] *Iman Abouzaid v. Mothercare (UK) Ltd.* [2000] All ER (D) 2436.

[48] *Worsley v. Tambrands Ltd.* [2000] PIQR P95.

3.4. The Notion of Producer

The nucleus of Part I of the Consumer Protection Act is s.2 (1), it states:

> "Where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies shall be liable for the damage."[49]

Those primarily liable under the Consumer Protection Act, 1987 are: (1) the producer of the product; (2) any person putting his name on the product or using a distinguishing mark, or who has held himself out to be the producer of the product ('own brander'); (3) or any person who has imported the product into the EU/European Economic Area in the course of any business to supply it to another ('first importer') (section 2(1) and (2) CPA). 'Producer' is in turn defined as: (1) the person who manufactured it; (2) if not manufactured, the person who won or abstracted it; and (3) if essential characteristics of the product are attributable to an industrial or other process having been carried out, the person carrying out that process (section 1(2)). Suppliers of the product (to the person who suffered damage or to the producer in which the product is comprised) may also be liable (in the form of subsidiary liability) if: (1) the person who suffered the damage requests the supplier to identify the producer; (2) within a reasonable period after the damage occurs; and (3) the supplier fails within a reasonable time to comply or identify the person who supplied the product to him (section 2(3) CPA). The rationale behind this provision is to protect the claimant from producers who conceal themselves behind a chain of suppliers. The supplier can avoid liability by informing the consumer of the identity of the producer/importer. Where two or more persons are liable for the same damage then they are jointly and severally liable (section 2(5) CPA).

[49] S. 2 (1), Consumer Protection Act, 1987.

3.5. Proof of Defect and Causation

The liability for compensation is imposed in all those particular situations is nothing more than the resulting harm or injury. The test is whether or not there is injury being in fact caused to or actually suffered by the victim. The matter is being looked at objectively from the side of the victim not from the side of the injury-causing party if a person`s conduct actually results in injury to another. This corresponds to Article 6.1(b) of the EU Directive and S. 3 (1) of CPA, 1987 of United Kingdom.

The claimant has to prove the causation link between the defect in the product and the damage he suffered. In Foster v Biosil,[50] a claimant sought compensation for injury caused by a ruptured breast implant. Her lawyers argued that the fact that the device had ruptured proved that the product was defective. The courts disagreed, holding that a claimant had to indicate a specific defect and identify how it had occurred, e.g. what is a design or a manufacturing fault.

3.6. The Notion of 'Damage'

Meaning of the "*damage*" is wide and covers death, personal injury that includes any disease and any other impairment of a person's physical or mental condition, nervous shock[51] and the loss of or any damage to property including land.[52] The following types of property damage are excluded:

a) Pure economic loss: it means the damage to the product itself or another product of which the defective component was a part;[53]

b) Non-consumer products: it is the damage to property not ordinarily intended for private use;[54]

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[50] *Foster v. Biosil* (2000) 59 BMLR178.
[51] Sec. 45(1), Consumer Protection Act, 1987.
[52] Sec.5(1), Consumer Protection Act, 1987.
[53] Sec.5(2), Consumer Protection Act, 1987.

c) Damage to property of £275 or less.[55]

Any loss or damage to property is to be regarded as having occurred at the earliest time at which a person with an interest in the property had knowledge about the loss or damage to the same.[56] According to S.5 (7)(b) "knowledge" includes which a person might reasonably have been expected to acquire from facts observable or ascertainable by him; or from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek. However, section 5(7) is clear in that a person is not taken to have knowledge of a fact ascertainable by him only with the help of expert advice unless he has failed to take all reasonable steps to obtain, and where appropriate to act on, that advice.[57]

3.7. Financial Limit to Liability

The producer's potential liability is unrestricted; the UK Government chose not to provide for the financial limit to a producer's total liability. However, a limit of sorts is provided by the requirement in section 5(3) that the damaged property used by the victim was intended for private use, occupation or 'consumption'. Section 5(4) provides a lower financial limit of £275, below which the courts will not award damages. This figure does not include the liability for any interest which may have accrued.[58] Section 5(5) provides that the loss and damage shall be assessed 'at the earliest time at which a person with an interest in the property had knowledge of the material facts about the loss and damage' if necessary with

[54] Sec.5(3), Consumer Protection Act, 1987.

[55] Sec.5 (4), Consumer Protection Act, 1987.

[56] Sec.5 (5), Consumer Protection Act, 1987.

[57] S. 5(7), Consumer Protection Act, 1987.

[58] Duncan G. Smith, *The European Community Directive on Product Liability: A Comparative Study of its Implementation in the UK, France and West Germany,* Kluwer Law International, 2007.

the help of expert advice, if it was reasonable to expect the acquisition of such knowledge.[59]

3.8. The Notion of 'Defences'

Under the CPA, 1987 several defences have been given to the defendants in cases of product liability. These are as follows:

a) Where the product is defective because of a standard imposed by statute/EC law;

b) Where the defendant did not at any time supply the product e.g. where the defective product was stolen;

c) Where the supplier was not acting as a business supplier is the gist of this defence;

d) The defect occurred after the time of supply;

e) Development Risks: this defence centres on defects that scientific knowledge at the time of production would not have enabled one to detect.[60] The state of scientific and technical knowledge at the time of supply was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control.[61]

f) Installation defects in a 'Subsequent' Product: this kind of defence can be invoked when the product in question amounts to a fault in a complex/subsequent product, and it does so either because of the design of the subsequent product or because the producer of the second product had dictated certain features in the first product.[62]

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[59] S. 5(7), CPA, 1987. D. Owles, 'Damage to Property', (1988) NLJ 771.

[60] *Richardson v. LRC Products Ltd.* [2000] Lloyd's rep Med 280.

[61] Sec. 4 (1), Consumer Protection Act, 1987.

[62] Ibid.

The defect constituted a defect in a product ('subsequent product') in which the product in question had been comprised and was wholly attributable to the design of the subsequent product or to compliance by the producer of the product in question with instructions given by the producer of the subsequent product (the 'component supplier's defence').

g) Contributory negligence is only a partial defence that reduces the defendant's liability in accordance with the principles in the Law Reform (Contributory Negligence) Act 1945.[63]

Development risks defence is one that was not discoverable when the product was supplied. There was a tension between the development risks defence as articulated in section 4(1)(e) CPA and that in Article 7(e) Directive and the Commission has alleged (unsuccessfully) that the UK had failed properly to implement the development risks defence and brought infringement proceedings under Article 169. The CPA was meant to implement the terms of the EC Directive. The European Commission was concerned that the terminology of section 4(1)(e) of the CPA (the development risks defence) deviated from the wording of the defence under Article 7 of the Directive, creating what could be called a subjective test, as it focused on the conduct and abilities of the reasonable manufacturer. Article 7 (1)(e) was worded differently and required an objective assessment of the state of scientific and technical knowledge at the time the product was put into circulation. It said that the defence would apply when:

> *[t]he state of scientific and technical at the time when the producer put the product into circulation was not such as to enable the existence of the defect to be discovered.*[64]

In EC v UK, the European Court of Justice said that the relevant test was to ask whether the information (that

[63] Ibid.

[64] Art.7 (1) (e), EU Directive on Product Liability, 1985.

would make the product defective) was accessible to the producer of the product concerned at the relevant time.

The Commission argued that section 4(1)(e) CPA called for a subjective assessment in that the phrase "…might be expected to have discovered the defect" placed an emphasis on the conduct of a reasonable producer, having regard to the standard precautions in use in the industry in question.[65]

According to S.1(1) of the Consumer Protection Act, 1987 the provisions are to be construed in conformity with the EU Directive on product liability. About the development risk defence in A v National Blood Authority, the court held that such defence can only be invoked when the producer can show that there was no objectively accessible scientific or technical knowledge existing anywhere in the world which would have helped in discovering the existence defect.

3.9. Limitation Period

The right to bring an action under the CPA 1987 is lost 10 years from the date that the defendant supplied the product. [66] The claimant must begin proceedings within three years of becoming aware of the defect, the damage or the identity of the defendant, or if the damage is latent, the date of knowledge of the plaintiff, provided that it is within the 10-year limit (s11A(4) Limitation Act 1980). In the case of personal injuries there is a discretion vested in the court to override the three-year limitation period (s33 Limitation Act 1980). The liability will expire after a certain period. An injured person has three years to seek compensation from the date on which they first become aware of the damage, the defect and the identity of the producer. [67] In addition, the producer`s liability expires after "long-stop" period of ten years from the date on

[65] Kirsty Horsey and Erika Rackley, *Tort Law*, (Oxford University Press: 20112nd Edition), p.366.

[66] Schedule 1 CPA 1987 and s11 A(3) Limitation Act 1980.

[67] Sec. 11A(4) and S. 14(3), Limitation Act, 1980.

which the product was put into circulation.[68] The basic limitation period may be extended by the courts.[69] In Horne-Roberts v SmithKline Beecham[70], a claimant, seeking compensation for injury alleged to have been caused by the MMR (measles, mumps, rubella) vaccination, brought an action against Merck, based on an error in identifying the batch number for the relevant product. After proceedings had commenced, the claimant realized the error and attempted to sue the correct manufacturer, SmithKline Beecham. However, this was after the ten year long-stop period. The English courts were obliged to consider whether or not to allow substitution of the defendant. The court held that the claimant should be given a 'reasonable length of time' to commence proceedings and exercised its discretion to allow the defendant to be substituted after the ten year period had expired.[71]

4. Leading Cases on Product Liability in United Kingdom

The Consumer Protection Act, 1987 was first mentioned in AB v South West water services Ltd[72] albeit in a secondary manner. There then followed a series of unsuccessful attempts to invoke strict liability in Worsley v Tambrands Ltd[73] (tampons), Richardson v LRC Products Ltd[74] and Foster v Biosii[75] (breast implants) where the judgments showed little appetite for making out strict liability as

[68] Sec. 11A(3), Limitation Act, 1980.

[69] Sec. 33, Limitation Act, 1980.

[70] *Horne-Roberts v. SmithKline* Beecham [2002]1 WLR 1662.

[71] Anne Ware and Grant Castle, *Product Liability for Medical Devices,* available on http://www.cov.com/files/Publication/7a4b6264-9174-4c14-9a25-b0e75e099c03/Presentation/PublicationAttachment/94aacf8f-dec8-46a2-a879-bc89ae81fb82/oid61432.pdf, last visited on 28-08-2013.

[72] *AB v. South West water services Ltd*. [1993] 1 All ER 609.

[73] *Worsley v. Tambrands Ltd.* [2000] PIQR P95.

[74] *Richardson v. LRC Products Ltd*. [2000] Lloyd's Rep Med 280.

[75] *Foster v. Biosii* (2001) 59 BMLR 178.

being distinct from negligence. There followed a pro-claimant Court of Appeal decision in Abouzaid v Mothercare (UK) Ltd[76] (pushchair liner) and of the High Court in A v National Blood Authority[77] (infected blood). Post that landmark case the claimants were in Bogle v McDonalds Restaurants Ltd[78] (hot coffee) and in the Court of appeal in Pollard v Tesco Stores Ltd[79] (child resistant closure on dishwasher powder) and Piper v JRI (Manufacturing) Ltd[80] (replacement hip), but successful in Palmer v Palmer[81] ('Klunk Klip' seat belt device).[82]

5. Conclusion

The term "*Product liability*" is used to identify the body of law that seeks to hold manufacturers and sellers financially responsible for their products not meeting safety standards. Developments in science and technology constantly exert new pressures on existing legal concepts. The speed and accuracy with which those concepts are able to adapt to such challenges have important social and economic consequences.[83] It has become indispensible for all the nations to promulgate concrete and solid legislations on product liability in the era of the rise of industrial capitalism, with the consequent proliferation of dangerous machinery, railways, road traffic, production of mass products, and polluting activities and multiplicity of

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[76] *Abouzaid v. Mothercare* (UK) Ltd [2000] All ER (D) 2436; Williamson, S.. "Strict Liability for Medical Products: Prospects for Success", *Medical Law International*, 5: 4 (September 2002), p. 281-304.

[77] *A v. National Blood Authority* [2001] 3 All ER 289.

[78] *Bogle v. McDonalds Restaurants Ltd. [*2002] EWHC 490.

[79] *Pollard v. Tesco Stores Ltd.* [2006] EWCA 393, [2006] All ER (D) 186 (Apr).

[80] *Piper v. JRI (Manufacturing) Ltd*. [2006] EWCA Civ 1344, (2006) 92 BMLR 141.

[81] *Palmer v. Palmer* [2006] EWHC 1284 (QB), [2006] All ER (D) 86 (Jun).

[82] Geraint G. Howells, *The Law of Product Liability*, p. 277.

[83] Jane Stapleton, "Software, Information and the Concept of Product", *Tel Aviv University Studies in Law*, Vol.9, 1989, p. 147-165.

deaths and sever harms due to use of defective products and services. In this context, one of the most significant milestones achieved in the history of consumer protection law on 25 July 1985 with the promulgation of the Council Directive on the Approximation of the Laws, Regulations, and Administrative Provisions of the Member States concerning Liability for Defective Products.[84] The EU Directive, 1985 (85/374/EEC) is intended to address dangerous products after they are sold and used, in addition to providing redress to an injured consumer. No doubt that the *Thalidomide* disaster in Europe was clearly the catalyst for the reforms processes that culminated in the 1985 Council Directive "on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. It provides a telling benchmark by which to evaluate the impact of the latter."[85] The Directive has attempted to reduce distortions in competitive trade between Member States whilst providing a common level of protection to consumers throughout the Community against defective products.[86] Before the European Directive on products liability was implemented in the United Kingdom the principal pillars of products liability were the common law principles of the statutory warranties in the Sale of Goods Act 1979 and the common law action in the tort of negligence. Today, there are three regimes that deal with the issues of consumer protection in the context of product liability i.e. contract regime, tort regime and strict product liability regime (CPA, 1987). In UK the EU Directive on Product Liability, 1985 (85/374/EEC) was adopted through enactment of the Consumer Protection Act, 1987. This has become a very significant law in UK and number of cases has been filed under the strict product liability regime which has proved to be more effective as compare to the traditional regimes of contract and torts.

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[84] Helen Delaney and Rene van de Zande.

[85] Jane Stapleton, *Product Liability in United Kingdom: Myths of Reforms*.

[86] Duncan G. Smith, *The European Community Directive on Product Liability*.

Rights of the accused in the legal system of Pakistan: a legal analysis

Mariam Sherwani*

Abstract

This paper focuses on the rights of accused that are available to him[1] under Pakistani legal system. Accused is often presumed to be an offender before trial which eventually results into snatching away his rights that he ought to have under the law. Pakistani law grants many rights, protections, liberties and remedies to an accused. In this paper rights of the accused have been divided into four prominent categories i.e. pre- trial rights, during trial rights, post-trial rights and exceptional rights. Pakistan being an Islamic state should work for the actual enforcement of the rights that can be availed by an accused under the law because he needs help to get rid of the probable false accusations made against him. This should also be done by the state in order to improve the life of the general public and to meet the ends of justice because denial of the basic rights to an accused may expose him to punishment for a crime that he might not have committed as he is actually innocent in the eyes of law and innocent people cannot be punished.

Keywords: *Accused, Human Rights, Criminal law, Rights of Accused in Pakistani Law*

1. Introduction

In sophisticated societies individuals enjoy different rights, liberties and protections that are ensured to them under law of the land they belong to. These rights and protections are inherent interest of every individual. So is an accused who enjoys number of rights under Pakistani legal system who remains to be innocent until proven guilty after adopting the due process of law. This paper focuses on the rights of the

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[1] Though male gender is used in this article with reference to accused but it also includes the female gender.

accused due to the fact that an offender is often confused with an accused and both are treated equally or even worse. This attitude becomes a reason that those accused of a crime, even if they have not committed any, are deprived of their basic rights that they ought to have under the law.

2. Accused in the Pakistani Legal System

Accused is someone against whom legal proceedings have been initiated[2] and is under trial for a crime punishable by law.

2.1. Difference between Accused and Offender

Accused is the suspect of the crime which is being investigated by the authorities while offender is the one on whom the commission of the offence has been proved by due process of law. Accused is someone who is charged with a crime or is on trial for a crime. On this basis, accused is not an offender because the former is someone who is a suspect of a crime which is being investigated by the authorities while offender is someone against whom commission of an offence has been proved through due process of law.

2.2. Rights of Accused under Pakistani Law

Accused persons enjoy number of rights under Pakistani law and it gives them adequate protections which are divided into categories such as pre-trial rights, during trial rights, post-trial rights and exceptional rights;

2. 2. 1. Pre-trial Rights

1: ***right to be protected against arbitrary or unlawful arrest, detention and searches—.***Article 10 of the Constitution of Pakistan[3] and Section 60 and 61 of the Criminal Procedure Code[4] provide right to the accused to be protected against the

[2] Garner Brayan Ed., "Black's Law Dictionary", (United States of America: Thomson West, 2004), 23.

[3] Article 10, The Constitution of the Islamic Republic of Pakistan, 1973.

[4] Section 60 and 61 of the Code of Criminal Procedure (V of 1898).

arbitrary and unlawful arrest. No one can be arrested and detained without due process of the law. Article 10(1) of the Constitution of Pakistan provides security to the accused that he cannot be detained in custody without being informed about the grounds of arrest.[5]

Writ of *Habeas Corpus* can be filed against illegal detention in High Court. Prisoners seek release by filing a petition for the writ of *Habeas Corpus*. *Habeas Corpus* is a judicial mandate to the prison official to bring the detainee to the Court and it can be determined whether the detainee was lawfully imprisoned or not or he should be released from the custody.[6] Under Section 491 of the Code of Criminal Procedure High Court has the extra ordinary power. Any High Court can direct the liberty of a person in public or private custody. The Court can also order for the appearance of the prisoner before the court so that he can be examined.[7] This is pure discretion of the court and not the right of an accused.

Under Section 51 of the Criminal Procedure Code an accused cannot be arrested and searched by a police officer without warrant.[8] Under Section 100 of the Criminal Procedure Code search cannot be made without search warrant and under Section 103 of the Criminal Procedure Code search shall be made in the presence of witnesses who can be respectable inhabitants of the locality.

2: Production of Accused before Magistrate—.Article 10(2) of the Constitution[9] and Section 61 of the Criminal Procedure Code[10] has fixed the detention of the accused at the Police Station for 24 hours. Beyond 24 hours detention is illegal under the Constitution and the Criminal Procedure Code. The duration of

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[5] Article 10(1), The Constitution of the Islamic Republic of Pakistan, 1973.

[6] Habeas Corpus. Available online at: <http://www.lectlaw.com/def/h001.htm> (Last Accessed: 03.05.2017)

[7] Section 491 of the Code of Criminal Procedure (V of 1898)

[8] Section 51, *Ibid.*

[9] Article 10(2), The Constitution of the Islamic Republic of Pakistan, 1973.

[10] Section 61 of the Code of Criminal Procedure (V of 1898)

24 hours has been stipulated in law because during this time period police can interrogate the accused in their custody. Under Section 344 and 167[11] of Code of Criminal Procedure, Magistrate can send an accused person on remand for not more than a duration of 15 days at a time which prohibits the law enforcing agencies to have the custody of the accused for long or unlimited durations for the purpose of investigation

3: Protection against Ex-Post Facto law—.Ex-post facto law is used in reference to criminal law which applies retroactively by criminalizing the conduct that was legal when originally performed. US law also prohibits ex-post facto law.[12] It also includes increasing the punishment for an existing crime, depriving the defendant of the defense available at the time the act was committed or rendering an act punishable in more disadvantageous manner as compared to the punishment of the crime when it was committed.[13] It is based on the legal maxim, *nulla poena sine lege* i.e. there can be no punishment without law.[14] So it is prohibited because it is unjustified and against fundamental human rights to punish someone for a crime that was not punishable by law when it was committed or giving increased punishment for the same crime

Article 12 of the Constitution of Pakistan gives the right to the accused that s/he cannot be granted punishment for an act or omission which was not punishable by law at the time when it was committed by the accused.[15] Moreover it states that the accused cannot be awarded with a greater or a different

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[11] Section 344 and 167 of the Code of Criminal Procedure (V of 1898)

[12]Legal Information Institute, Ex post Facto. Available online at: <https://www.law.cornell.edu/wex/ex_post_facto > (Last Accessed: 27.05.2017)

[13] Judie Zollar, "*Prohibition against Ex Post Facto Laws*", House Research. Available online at: <www.house.leg.state.mn.us> (Last Accessed: 28.05.2017)

[14]Ex Post Facto, The Heritage Guide to the Constitution. Available online at: <http://www.heritage.org/constitution/articles/1/essays/63/ex-post-facto> (Last Accessed: 27.05.2017)

[15] Article 12, The Constitution of the Islamic Republic of Pakistan, 1973.

punishment for a crime at the time when that offence was committed. It is against the human rights of an accused that he be punished for commission or omission of an act when it was not declared crime or offence under the law.

4: Right to be informed immediately of the grounds of arrest— .Article 10(1) of the Constitution[16] and Section 50, 55 and 75 of the Criminal Procedure Code[17] grants the right to an accused to be informed about the reasons for his arrest immediately after he is being arrested. This provision of law has empowered the accused in a way that he cannot be arrested arbitrarily without any reason. He would know the reasons for his arrest and can prepare his case to contest in court of law according to the accusation made against him.

5: Right to fair trial—.Article 10A of the Constitution envisages that an accused has the right to fair trial and to be tried by independent judiciary in compliance with due process of law.[18] He has right to open trial in an open court.[19]

6: Right to restrain Police from intrusion on his privacy— .Article 14(1) of the Constitution of Pakistan declares the dignity of a man and privacy of his home to be inviolable.[20] Privacy of home cannot be violated except when it is necessary and in compliance of the due procedure for doing so but not arbitrarily.

2. 2. 2. During Trail Rights

i. Freedom from Torture—.Torture is banned and prohibited at all times. Torture includes cruel, inhumane and degrading treatment or punishment.[21] It is prohibited under United Nations Convention against Torture because it is against human rights to expose an individual to unbearable circumstances which may affect him adversely. Article 14(2) of the

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[16] *Ibid.*

[17] Section 50, 55 and 75 of the Code of Criminal Procedure (V of 1898)

[18] Article 10A, The Constitution of the Islamic Republic of Pakistan, 1973

[19] Dr. Ashutosh "Rights of Accused" (Delhi: *Universal Law Publishing Co. Pvt. Ltd.*, 2010), 243.

[20]Article 14(1), *Ibid.*

[21] Torture, "*Human Rights Watch*" Available online at: <https://www.hrw.org> (Last Accessed: 28.05.2017)

Constitution prohibits the use of torture for the purpose of extracting evidence. An accused under the light of this provision cannot be tortured.[22] He cannot be beaten merely for the reason of pulling out the statement from him with regard to the charges he is accused of.

ii. Protection against Double Jeopardy—.It is based on the legal maxim *nemo debet bis vexari pro una et eadem causa* i.e. no person should be twice disturbed for the same cause. This means that no one shall be punished or put in peril twice for the same matter.[23] Article 13(a) of the Constitution[24] and Section 403 of Criminal Procedure Code[25] provides for the protection against double jeopardy i.e. he cannot be tried twice for the same offence. An accused cannot be prosecuted and punished twice for the same crime. The rule laid down in Section 403 of the Criminal Procedure Code is similar to the principle of res judicata laid down in Section 11 of Civil Procedure Code.

iii. Right of the arrested person not to be subjected to unnecessary restraint—.Unnecessary restraint is aimed to restrict or prevent the movement unjustifiably. Section 50 of the Criminal Procedure Code speaks of the right of an accused when arrested. The law allows him only to be restrained only to the extent it is necessary to prevent his escape from police custody.[26] It is violation of his right if he is excessively chained or is kept in inhumane conditions than it is required to restrain him.

iv. Right to be treated under due process of Law—.Due process of law is a constitutional guarantee which prevents the governments from abusing the rights of the citizens.[27] Due process includes substantive due process and procedural due

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[22] Article 14(2), The Constitution of the Islamic Republic of Pakistan, 1973

[23] P L D 1979 Lah. 349; P L J 1979 Cr. C. 76.

[24] Article 13(a), *Ibid.*

[25] Section 403 of the Code of Criminal Procedure (V of 1898)

[26] Section 50, *Ibid.*

[27]Magna Carta: Muse and Mentor, "*Due Process of Law*", Library of Congress. Available online at: <https://www.loc.gov> (Last Accessed: 28.05.2017)

process.

Article 10-A of the Constitution states that a person is to be dealt under due process of law in any condition. An accused cannot be tried extra ordinarily for any charge against him. He should be prosecuted under the substantive and the procedural law as according to the charges he is accused of.[28]

v. Right of Access to Justice and Equality before Law—.Article 25 of the Constitution of Pakistan preaches that all Pakistani citizens enjoy equal protection of law and no one is above law. They cannot be distinguished and discriminated on the basis of their gender. This right is also available to all Pakistani citizens in general but this is also available to an accused under Pakistani law and it cannot be snatched from him in any condition because this is fundamental right of every Pakistani citizen.[29] All of the citizens enjoy equal access to law and in response law protects them equally as no one is above the law.

vi. ***Right to Counsel of choice—.***The accused has the right to consult a lawyer of his own choice to represent his stance in the court of law and Article 22(1) of the Constitution[30] and Section 353 of the Criminal Procedure Code advocates the same[31]. It gives him a right to be defended by a pleader so that he can defend himself in a reasonable way and present his stance. He has the right to enjoy free legal aid if he is economically incapable.[32]

vii. ***Right not to be a witness against himself—.***Article 13(b) of the Constitution gives the right to the accused that he cannot be compelled to be witness against himself if he is accused of any charge.[33] It is his fundamental right under the Constitution that he cannot be forced or compelled to give evidence against himself in any case.

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[28] Article 10A, The Constitution of the Islamic Republic of Pakistan, 1973.

[29] Article 25, *Ibid.*

[30] Article 22(1), *Ibid.*

[31] Section 353 of the Code of Criminal Procedure (V of 1898)

[32] Dr. Ashutosh "Rights of Accused" (Delhi: *Universal Law Publishing Co. Pvt. Ltd.*, 2010), 253.

[33] Article 13(b), The Constitution of the Islamic Republic of Pakistan, 1973.

viii. ***Right to get copies of the report, documents and statements of witnesses on which the prosecution relies—*** **.**Section 265-C of the Criminal Procedure Code gives the right to the accused to be supplied with the first information report (FIR), police report, statements of all witnesses recorded under Section 161 and 164 of the Criminal Procedure Code, note of investigation officer on his first visit to the place of occurrence and on the recoveries made from that place with in a duration of seven days and free of cost.[34] Accused has the right to ask for the copy of statements for the purpose of contradiction of witnesses for the prosecution.[35] The copies of the statements of the witnesses recorded in Court must be supplied to the accused before hearing.[36]

ix. ***Right to insist that evidence be recorded in his presence except in some special circumstances—.***Under Section 353 of the Code of the Criminal Procedure it is the right of the accused that the witnesses should be carried out in the presence of the accused or his pleader or attorney.[37] It is the basic principle of criminal justice.[38] If the accused requests for the exemption from personal attendance and the Court grants it, the accused cannot complain that the exemption was wrongly granted to him and the trial should be held null and void.[39]

x. ***Right to be examined in the language Accused understands—.***Section 364, 360, 361 and 357 of the Criminal Procedure Code gives the right to the accused to be examined by Magistrate or the Court in the language which the accused understands. If the proceedings of the court are in the language the accused does not understand then they shall be interpreted to him in the language he understands as to make him know about the proceedings being conducted and the charges he has been accused of. He shall also be made to read the statement that he has given so that he can explain the previously given

[34] Section 265-C of the Code of Criminal Procedure (V of 1898)
[35] P L D 1955 Lah.59.
[36] P L D 1960 Azad J&K 14.
[37] Section 353 of the Code of Criminal Procedure (V of 1898)
[38] 1981P.Cr.L.J. 194
[39] 14 D L R 355 (DB.)

answers in detail or add something to them.

xi. ***Right to have due notice of the charges—.***Section 364 of the Code of Criminal Procedure states that the accused examined by the Magistrate or by the Court, every question put to him and every reply given by him for those questions shall be recorded.[40] Under Section 364(2) the accused shall declare that the statements made are true and the record shall be signed by the accused and the Judge of the Court shall certify that the examination was taken in his presence and the record contains the full and true account of the statement made by the accused. [41]

Under Section 360 of the Criminal Procedure Code the statement made by the witness shall be read over to him in the presence of the accused or his pleader. During this process if the witness denies the correctness of any part of the statement read over to him the Magistrate shall make a memorandum of the objection made to the statement made by the witness and shall add his remarks as he thinks fit.[42]

xii. ***Right to test the evidence by cross-examination—.***Section 133 and 134 of Qanun e Shahadat Order[43] gives the accused right to test the evidence given against him by cross examination of the witnesses through his counsel or lawyer so he can defend the allegations made against him in a reasonable manner. Under Section 505 of the Code of Criminal Procedure the witnesses produced in trial can be examined, cross examined and re-examined.[44]

xiii. ***Right to have an opportunity for explaining the circumstances appearing in evidence against the accused at the trial—.***Basic principles of natural justice should be ensured and an accused cannot be punished unheard. He should be provided ample opportunity to justify himself in the course of allegations made against him. Section 364 of Criminal Procedure Code states that "whenever the accused be examined by the Court, the

[40] Section 364 of the Code of Criminal Procedure (V of 1898)

[41] Section 364(2), *Ibid.*

[42] Section 360, *Ibid.*

[43] Section 133 and 134 of The Qanun –E- Shahadat (Order 10 of 1984)

[44] Section 505 of the Code of Criminal Procedure (V of 1898)

questions put to him and the answers given by him shall be recorded. The record shall be shown or read to him and he shall be at liberty to explain or add to his answers."[45]

xiv. ***Right to be tried by an independent and impartial Judge—.***Article 175 of the Constitution[46] is the corner stone for the separation and independence of judiciary which is an important element to ensure the fundamental right to access to justice.[47] An accused has right to be tried by an independent judiciary and an impartial judge so that he can compete the charges against him in a fair trial.

2. 2. 3. Post- trial Rights

i. Right to Bail—.Bail is release of a person from the custody of police and delivery into the hand of sureties who undertake to produce him in Court whenever required to do so.[48] An accused has the right to be released on bail, if he has been arrested for commission of a bailable offence and Section 496 of the Criminal Procedure Code endorses the same.[49] In case of a non-bailable offence the granting of bail is not a right but a grace given to the accused.

ii. Right to Appeal—.Section 408, 410, 411-A of the Code of Criminal Procedure[50] and Article 185, 203-F, 212 of the Constitution of Pakistan[51] gives the right to the accused in case of conviction, to file the appeal in appropriate forum in lieu of the judgement pronounced against him.

iii. Right to get copy of the judgment when sentenced to imprisonment—.Section 371 of the Criminal Procedure Code

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[45] Section 364, *Ibid.*

[46] Article 175, The Constitution of the Islamic Republic of Pakistan, 1973

[47] P L D 1993 SC 341. Available online at : <https://pakistanconstitutionlaw.com/pld-1993-sc-341-2/> (Last Accessed: 05.05.2017)

[48] 5 D L R (F.C.) 154.

[49] Section 496 of the Code of Criminal Procedure (V of 1898).

[50] Section 408, 410, 411-A of the Code of Criminal Procedure (V of 1898)

[51] Article 185, 203-F, 212, The Constitution of the Islamic Republic of Pakistan, 1973

provides the right to an accused convicted of an offence to receive the copy of the judgement at the time of pronouncement of the judgement. If the accused does not understand the language of the court or language of the judgement in which it is pronounced he can also be given translation of the judgement in the language he understands free of cost without any delay.[52] If the accused is sentenced with death punishment by a Sessions judge he will be informed about the duration within which he can file an appeal.[53]

2. 2. 4. Exceptional Rights

Law also protects the rights of vulnerable groups who need extra care and protection. These include;

i. ***Lunatics*** – .Under Section 464 of the Code of Criminal Procedure if an accused is lunatic and is unable to make his defence at the time of trial, the court shall ascertain whether he is lunatic or not. If he is found to be a person of unsound mind, the Court may release him on assurance that he will be cared for, even if the case against him is non bailable.[54] Under Section 497 of the Code of Criminal Procedure the Court may direct that any sick or infirm person accused of an offence be released on bail even if the offence is non- bailable.[55]

ii. ***Women*** **—.**Section 52 of the Criminal Procedure Code provides special protection to women if she is accused of any offence and it is necessary to search her it shall be done by another woman in compliance with decency.[56]

iii. ***Minor*** – .Under Section 497 of the Code of Criminal Procedure, the Court may direct the order of release on bail of a person under the age of sixteen years.[57]

[52]Section 371 of the Code of Criminal Procedure (V of 1898)
[53]Section 371(2), *Ibid.*
[54] Section 464, *Ibid.*
[55] Section 497, *Ibid.*
[56] Section 52, *Ibid.*
[57] Section 497, *Ibid.*

3. Conclusions and Recommendations

It can be observed that Pakistani law provides enough rights and protections to the accused but it is because of the faulty enforcement mechanism which sometimes make an innocent suffer which raises questions on the whole system because the system is formed to facilitate the people. It is concluded that enforcement mechanism of laws should be made more effective as to meet the basic needs of justice so that no innocent gets trapped in and no offender evades the law. Following steps can be taken to make situation better for those who are accused of an offence and are seeking justice. Accused should be given their due rights and for this judges, police and other institutions attached with the trial process should come together and play their part to make the system better so that speedy relief could be provided specially to those who are innocent. Awareness amongst general public need to be created so they can differentiate between an accuse and an offender and give him his due rights so that he does not have to carry the stigma for being once accused of an offence which he never committed. A system should be developed to assure that while registering FIR the Police does not exercise its discretion and report the true facts in the FIR. To ensure this there should be another officer to check that the incident and offences are correctly reported in FIR. This would reduce the exercise of abuse of power by the Police Officer too.

Methodologies of Teaching Islamic Law (*Sharī'ah*) in Law Colleges of Pakistan

Sami Ur Rahman*

Abstract

The Islamic law's application is mostly on matters concerning personal law of Muslim. Due to the very nature of legal system in Pakistan it follows, that Shari'ah legal studies is vital to be taught and included in the prospectus arrangement especially for Law students, Lawyers, Islamic Legal fraternities and all those who will or might be indulging in judiciary of Pakistan. The purpose of this paper is basically to examine the procedures of schooling, teaching and coaching Islamic law (the Shari'ah) in Law Colleges of Pakistan. The Exam system focusses on the training procedures with reference to topics that are meant for legal theories and ideas as well as subjects that are meant for both legal theories and applied everyday aspects as practiced in the courts of Pakistan. The objective and purpose of this paper is to examine and analyze whether such practices and procedures of teaching is in line and attuned with the existing development of Shari'ah legal practice in the country. This research will basically adopt a qualitative research methodology where the research will be library based and available resources and literatures in the Universities. Finally, the paper will recommend certain upgrading advices in syllabus of Law Colleges related to the teachings of Shari'ah subjects.

Keywords: *Methodologies of Teaching, Islamic Law, the Shari'ah, Legal theories, Practical Aspects.*

1. Importance of Islamic law in Pakistani legal system

Islamisation of Pakistan's legal system has been persistent until the present. It is no longer confined to few distinctive areas of law but has become an essential part of the legal discourse being relied on in the context of a wide range of issues, from the permissibility to erect high rise buildings in Karachi to the dismissal of prime minister under Article 58(2) (b) of the 1973 constitution. [1]

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[1] Martin Lau, *The Role of Islam in Legal System of Pakistan* (Leiden-Boston: Martinus Nijhoff Publishers, 2006), p. 24.

The Islamic provisions of pre-1973 constitutions shared a basic structure in respect if their provisions for Islamisation: there was the objective resolution, which served as preamble, containing a common obligation to create an Islamic society and various constitutional provisions asking the state to promote Islam and to bring the legal system in conformity with Islam, Pakistan's first constitution, the 1956 constitution, envisaged to mechanisms to introduce Islamic law.[2] The first took the form of a 'Directive Principle of State Policy' which obliged the state to take steps 'to enable the Muslims of Pakistan individually and collectively to order their lives in accordance with Islam. However, Article 24 of 1956 constitution provided that 'Directive Principle of State Policy' were not enforceable in any court though the state was to be guided by them in the formulation of its policies. The non- justiciability of Directive Principle of State Policy in effect prevented any attempt to enforce the state to bring the legal system closer to Islam.[3]

The second instrument focused on the formation of advisory body which would make commendations to the parliament as to the content, application and enactment of Islamic laws.[4] However, there was no compulsion enforced on the parliament to act upon those recommendations. None of Islamic provisions had any effect on legal system of Pakistan.[5] After the abolition of 1956 constitution, recommendation on the structure of new constitution for Pakistan adapted a caution approach: legal system should only be subject to Islamisation if different school of Islamic laws could evolve unanimity with regards to the fundamentals of Islam as far as traditions are concerned.[6] Even objective resolution retained as preamble to 1962 constitution and no legal mechanism was provided for any form of Islamisation of

[2] Abdul Ghafur Muslim, Islamization of Laws in Pakistan: Problems And Prospects 76 (1987).

[3] *Ibid.*

[4] Martin Lau, The Role of Islam in Legal System of Pakistan 25 (2006).

[5] *Ibid.*

[6] Muhammad Khalid Masud, Teaching of Islamic Law and Sharī'ah: A Critical Evaluation of the Present and Prospects for the Future 78 (2005).

legal system. Public pressure led to the amendment in 1962 constitution that centered around the reintroduction of 'repugnancy formula' with the only power of recommendations not implementation, it has been confirmed by the Supreme Court of Pakistan in the case of Tanbeer Ahmed Siddique v Province of East Pakistan that we cannot use Islamic law to strike down a ruling as unconstitutional and unlawful. The constitution of 1973 consisted a distinct chapter headed 'Islamic Provisions' with extension of the same method as in earlier constitution. Real outline of Islamic law in legal system was noticeable during the era of Zia ul Haq.[7]

2. Importance of objective resolution

Importance of Islamic law in Pakistani legal system can be pragmatic from the fact that Objective Resolution was so important that was made a part of it through article 2A. Its importance was emphasized by Justice Rahman as:

> *"In an event, if a grundnorm is essential for us I do not have to look upon the western legal academicians to determine one. Our own grundnorm is cherished in our own doctrine that the legal sovereignty over the entire universe belong to Allah Almighty alone and the power exercisable by the people within the limit prescribed by Him a holy belief. This is an unchallengeable and constant norm which is clearly accepted in the Objective Resolution passed by the constituent assembly of Pakistan this has not been repealed by any one so far, nor has been it deviated by any regime, civil or military. Indeed, it cannot be, for it is the ultimate values preserved in the Quran."*[8]

Same idea was supported by Justice Sajjad Ahmad as:

> *"Pakistan was created as a permanent state founded on Islamic ideology and ruled on all the basic norms of that ideology, if god forbids the whole body politics of Pakistan, is re-constituted on an un-Islamic outline which will of course, mean the devastation of its innovative notion. The constitutional concept of Pakistan and the spirits and*

[7] Martin Lau, The Role of Islam in Legal System of Pakistan 31 (2006).

[8] See the Legal Framework Order 1970 and the Interim Constitution of the Islamic Republic of Pakistan 1972.

fundamental norms are embodied through the practice of Objective resolution."[9]

Article 2-A recited with Objective Resolution of the constitution according to some jurists, as well as some decided cases, was enacted on account of an observation in the case of "The State v Zia ur Rehman and others PLD 1973 SC 49.[10] According to that it always formed part of constitutional arrangement and setup of Pakistan. Article 2A read with Objective Resolution; chapter 3A, part VII (the Principle of Policy) of the constitution vis-à-vis the functioning of Federal Shariyat Court and Shariyat Appellate Bench; Article 227 and other provisions of constitution related to Islamisation, are being inferred and applied in various situation.[11]

3. Role of legislators

The lawmakers have a tremendous and remarkable task before them. The new legislature will not only require meeting the new necessities of the altering situations but also the whole of present law is also to be revised so that it should imitate with the injunctions of Quran and Sunnah.[12] The effectiveness in this respect of the legislators is uncertain. To cater with the insufficiency, a board of legal experts has to be established in order to assist the legislators.[13]

There shall be two houses in the Islamic legislature, the house of jurists and the house of professionals.[14] This dualism is done in order to combine the religious and secular positions in one exclusive character, that is, Islam. Kurdi by putting this idea states that *'A human being has both a body and soul and needs certain*

[9] Supra, note 22, at p, 258.

[10] Muhammad Khalid Masud, Teaching of Islamic Law and Sharī'ah: A Critical Evaluation of the Present and Prospects for the Future 79 (2005).

[11] PLD 1989 SC 613, p. 625.

[12] Martin Lau, The Role of Islam in Legal System of Pakistan 33 (2006).

[13] Abdul Ghafur Muslim, Islamic Studies 270 (1987).

[14] *Ibid.*

direction lest one faction gains control over another. An equilibrium between these two aspects is indispensable.[15] In fact, legislature is the chief structure of the Islamic states which chains the secular and the religious position in one unique character: in preservation of belief and managing the matters of the world as *al-Mawardi* states,

> *"Islamic state's most effective branch, the legislature, shall not only consists of an instantly religious structure nor an exclusively secular one. The jurists shall present the religious side and professionals who are specialized in different fields of social sciences, shall present secular side of the government"*[16]

Islamic modifications shall be familiarized with both modern educational institutions and the religious old-fashioned institutes, in order to prevent the risk to Islamic institutions by the modern social sciences, spreading of the awareness of Islamic law in our academies and schools would undoubtedly aid to face this risk.[17]

Joseph Sachet said,

> *"Islamic law is the essence of Islamic believes, we can say that the typical demonstration of the Islamic way of life, the core and kernel of Islam itself... apart from this, a Muslim's way of living his whole life, the learnings of Arabic literature and the Islamic discipline are deeply infused with the ideals of Islamic law; Islamic law cannot be understood without understanding Islam."*[18]

So essential footsteps must be used for a thought-out programme to give appropriate abode to the education of Islamic law, in the syllabus prescribed for legal training in our colleges and universities.. It requires immediate attention as most of the politicians and legislatures have always been drawn from the legal profession. Iqbal says

> *"the actual therapy for the potentials of inaccurate interpretation of the straightforward foundations of Islamic law is to modify the present system of legal training in Mohammadan countries, to spread its range,*

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[15] 'Abd al-Rahman 'Abd al-Qadir al-Kurdi, The Islamic State: A Study Based on the Islamic Holy Constitution (1973).

[16] Abu'I Hasan al-Mawardi, Al-Ahkam al-Sultaniyyah (1973).

[17] *Ibid.*

[18] Joseph Schacht, Introduction to Islamic Law (1964).

and to chain it with intellectual study of contemporary jurisprudence"[19]

4. Federal Shariat Court

Organizational modifications are both complex and confusing in Pakistan's legal system. In 1978, "Shariyat Appellate Benches" were imbedded to Pakistan's four high courts. Their authority involved hearing appeals relating to hudood law verdicts and they were permitted original jurisdiction to hear "Shariyat petitions".[20] Later in 1980, such benches were dispersed and the "Federal Shariyat Court" was established though a long, painful and disjointed labor. The provisions related to the operation of FSC were modified 28 times between 1980 and 1985, by the appliance of 12 distinct ordinances and were assimilated into constitution in 14 subsections covering 11 pages of text. After settling of the dust , FSC came out as a body containing not more than eight judges, choosed by president from the judges of high courts.[21] The FSC jurisdiction comprise of

- In Zina and Qadhf cases it has appellate jurisdiction against conviction or acquittal from district courts
- In property and prohibition cases it has limited appellate jurisdiction against conviction or acquittal from district courts
- Limited Suo moto jurisdiction to declare laws and practices un-Islamic and hence void
- Original jurisdiction to hear "Shariyat petitions"
- On hudood laws it has revisional jurisdiction decided by any courts included itself

[19] Muhammad Iqbal, The Reconstruction of Religious Thought in Islam (1954).

[20] Martin Lau, The Role of Islam in Legal System of Pakistan 56 (2006).

[21] Muhammad Khalid Masud, Teaching of Islamic Law and Sharī'ah: A Critical Evaluation of the Present and Prospects for the Future 79 (2005).

The pronouncement of FSC is subject to appeal before the "Shariyat Appellate Bench" of the Supreme Court consisted of three regular Supreme Court justices and two ad hoc judges drawn either from FSC or from among ulema.[22] But regarding criminal law process following points should be looked upon:

Firstly, original jurisdiction lies with district courts for most major crimes in Pakistan. Specifically, district courts are exercising jurisdiction relating to the enforcement of property, Qadhf and Zina ordinances. Appellate jurisdiction is also exercised by district courts for the purpose of hearing appeals against the remaining hudood ordinance, secondly, judges of district courts have unrestricted and discretionary authority for exercising individual cases either under shariyah or civil law, thirdly, the verdicts of district judges can be appealed to shariyah side to FSL and to high court in the civil side, fourth, all criminal cases are dealt by Supreme Court in its final appeals.[23]

It is significant information that most of overpowering superior courts judges in Pakistan is attorneys that are trained professionally in British civil law tradition. It is undeniable that legal qualifications and credentials are mandated constitutionally for selection of Supreme Court and high court judges and the law of constitution lays down that most of FSC bench must be include those who are qualified or practice in high court. 78% of individual served on FSC since its establishment has been former high court judges and 87% of them possessed western style law degree.[24]

5. Methodologies and syllabus for Islamic law

Critiques have been targeted at methodology related to teaching and learning of Islamic Law during the last century, in particular they have been targeted towards the failure to efficiently reply to the encounters and challenges brought by modern requirements

[22] Abdul Ghafur Muslim, Islamic Studies 274 (1987).

[23] Murteza Bedir, Fikih to Law: Secularization through Curriculum 4 (2004).

[24] Charles H. Kennedy, Islamization and Legal Reforms in Pakistan, 1979-1989 63 (1990).

in this contemporary world.[25] Islam being a religion of the population of one fifth of the world, Islamic Law needs to re-vamp its procedure and methodology in order to safeguard its uninterrupted significance and as a reply to the demands exercised by the globalization and presented by the modernity.[26]

Preferably, Islamic Law shall answer to the tests at the level of theory and application, brought by the modernism.[27] Thus, teaching Islamic Law should be innovative as the related subject in order to cope the modern needs of the contemporary world in light of the principles as stated in Quran and Sunnah.[28] Islam should be brought into line with the age and it shall become part of global modernity. Past Islamic civilizations are proud glory for us but stagnancy with revolutionizing innovative concepts at the practical level are somehow against the relevant subject of Islam in this present world. All principles of Islam has to be recalled by the Islamic Law in order to motivate all humans on how to live this contemporary world in co-occurrence and peacetime.[29]

The purposes and visualization of Islamic learning were preserved in the history through the communication between past (tradition) and innovation (modernity). The modernity helps to develop flexibility while the tradition helps to advance a stable identity.[30] Niyozov and Memon (2011) demonstrated the continuousness and the changes in Islamic teaching; its purposes, methods and operations, have gone through five historical periods, namely; the revelation and the promise period, medieval period in which the building of Islamic education was built, colonial period in which Islamic education struggled to survive,

[25] *Ibid.*

[26] *Ibid*.

[27] Abdul Ghafur Muslim, Islamic Studies 285 (1987).

[28] Joseph Schacht, Introduction to Islamic Law (1964).

[29] Muhamad Faisal Ashaaria, Zainab Ismaila, Anuar Puteha, Mohd Adib Samsudina, Munawar Ismaila, Razaleigh Kawangita, Hakim Zainala, Badlihisham Mohd Nasira & Mohd Ismath Ramzib, "An Assessment of Teaching and Learning Methodology", *Islamic Studies*, 618 (2012).

[30] *Ibid.*

post-colonial period where radical Islamisation emerged, the period of Islamisation in which various views on Islamisation concepts came to exist and Islamic education after 2000.[31]

The Muslim societies are far away from the Islamic ideals of rule of law, justice, sense of responsibility and civility and prosperity, even when the vitality of Islamic law is evident and heartwarming. The question that arises is this vacuum between the knowledgeable gap of Islamic law and the absence of its influence in some way related to the quality of Islamic legal education.[32] For the effective implementation of ideals of Islamic law quality of legal education and its social relevancy should be ensured.[33] If we shift our focus to the methodologies of teaching Islamic law in law colleges of Pakistan, following questions should be considered.[34]

- Whether our curriculum covers all subjects of Islamic law or not?
- Whether Islamic legal education given in colleges is society and development oriented or not?
- Whether faculty members of law colleges in Pakistan are having expertise of Islamic law or not?

5.1. Curriculum of LLB by Higher Education Commotion (HEC)

Curriculum of LLB given by Higher Education Commission includes following compulsory subjects related to Islamic law:

- Islamic Jurisprudence-I
- Islamic Jurisprudence-II
- Islamic Personal Law-I
- Islamic Personal Law-II

Curriculum of LLB given by Higher Education Commission includes following elective subjects related to Islamic law:

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[31] Ibid, p. 620

[32] A discussion paper was presented at international seminar on "Education in the Muslim Ummah; Present Realities and Future Aspiration," International Islamic University, Islamabad March 13-18, 2005.

[33] *Ibid*.

[34] Joseph Schacht, Introduction to Islamic Law (1964).

- Islamic Commercial Laws
- Islamic Legal Maxims[35]

Islamic Laws – the disciplines and values that deals with the behavior of a Muslim towards his or herself, neighbors, community, family, city, nation and the Muslim institution as a whole, the *Ummah*.[36] Similarly, the interaction between societies, communities and public and financial administrations is dealt by the Islamic Law.[37] The standards by which all societal activities are categorized, classified and controlled within the overall authority of the state are established by Islamic law. Objectives of Islamic law are;, Safeguarding morality in public and private, formation of justice averting suffering on persons and society, educating the individual and avoiding oppression.[38] Can these limited subjects on Islamic law help student to understand Islamic law completely? How can a student be able to implement Islamic law when he is not completely aware of it?

5.2. Faculty members teaching Islamic law subjects at law schools

The author has collected some data, related to the subject experts in a few colleges across Pakistan, which shows that only 5% of the teaching faculty, teaching Islamic Jurisprudence are qualified and having the expertise in Islamic Law. The rest are having simple LL.B qualification, which, off course is insufficient to teach this important subject of Islamic Law. The data gathered is as below in the table:

Sr. No	Law College/School/Department	Teacher Name	Specialization in Islamic Law

[35] http://www.hec.gov.pk/english/pages/home.aspx

[36] Muhammad Khalid Masud, Teaching of Islamic Law and Sharīʿah: A Critical Evaluation of the Present and Prospects for the Future 79 (2005).

[37] Abdul Ghafur Muslim, *Islamization of Laws in Pakistan: Problems and Prospects* 76 (1987).

[38] Muhammad Khalid Masud, "Teaching of Islamic Law and Sharīʿah: A Critical Evaluation of the Present and Prospects for the Future" 79 (2005).

1	Islamia College University Peshawar	Ms. Muniba	Nil/ Simple LLB
2	Malakand University	Ms. Parveen Gul	Nil/ Simple LLB
3	Swat University	Dr. Lutfullah and Qazi Obaid Ullah	Yes, background of Sharia & Law
4	Women University, Swabi	Ms. Maryam Khansher	Nil/ Simple LLB
5	Abdul Wali Khan University, Mardan	Name was not revealed	Nil/ Simple LLB
6	Shaheed Benazir Bhutto Women University Peshawar	Ms. Aarzo Farhad Ms. Neelum	Nil/ Simple LLB
7	Pakistan College of Law, Lahore	Ms. Saiqa	Nil/ Simple LLB
8	GC University Faisalabad	Different Teachers	Nil/ Simple LLB
9	Institute of Law, University of Jamshoro, Hyderabad	Mr. Arshad Hussain to LLM Ms. Shabana Kausar to LLB	Nil/ LLB and LLM
10	University of Swabi	Dr. Zabeh Ullah	Nil/ PhD in Islamic Studies

6. Conclusion

Apart from incomplete curriculum, main difficulty lies with the commencement of Islamic law. Islamic Law is and should be considered different from Islamic Studies. In the university legal education which is having many problems in its teaching, services, procedure and aims of the education of law overall and Islamic law in particular. If the faculty is unaware of the technicalities of teaching Islamic Law, how could they produce judges, lawyers, bureaucrat, law makers and parliamentarians who could be considered well-versed in Islamic Law? Usually, legal learning in Muslim states is not public and advancement oriented. Circumstances like these calls for a new visualization of Islamic legal teaching, in order to get a clear description of its objective.[39]

7. Recommendations:

1. A board of experts at law shall be established to assist law and policymakers.
2. Knowledge of the Maqasid al-Shariah is a must for each and every member of the parliament.
3. The primary task of the legislators should be only law making.
4. Essential steps shall be taken for a well-organized programme to up bring the study of Islamic law, in the syllabi recommended for the legal training in our institution education.
5. A comprehensive syllabus of Islamic Law is to be prepared which shall answer the questions of the day.
6. The books on Muhammadan Law shall be replaced with proper books from the classical texts.
7. We need to improve the capacity of the faculty who are involved in teaching subjects of Islamic Law. They should be properly trained.

[39] Muhammad Khalid Masud, Teaching of Islamic Law and Sharī'ah: A Critical Evaluation of the Present and Prospects for the Future 166 (2005)

8. Constitutional institutions, such as the FSC, IIUI and others, shall play its vital role in capacity building of the lawyers, judges, law teachers, parliamentarians etc.

General Principles of Islamic Law about Combatant Status: From *Sharḥ Kitāb al-Siyar Al-Kabīr*

Muhammad Rafeeq Shinwari*

Abstract

This paper discusses more than fifty principles and rules concerning the combatant that are employed by Imām Shaybānī and Imām Sarakhsī in Sharḥ kitā al-Siyar al-Kabīr. Initially, certain rules in respect of theoretical aspect of the discussion, that is, qawā'id uṣūliyyah, are embarked upon then the legal maxims of Islamic law, expounded by Ḥanafī jurists, are mentioned. The paper strives to reproduce the maxims in exact wordings and phrases of the great authors; however, slight changes, that are very rarely, took place according to the needs.

Keywords: *combatant, Hanafi law, Shaybani, Sarakhsi, war.*

1. Introduction

The "law of war in Islām" has footings in the earlier period of Islām itself. The Qur'ān has talked about it in hundreds of its verses, the Prophet peace and blessings of Almighty Allah be upon him had lived a considerable part of his life involved in wars, many traditions and number of the *Sunna*, therefore, inevitably had come into existence. The era of rightly caliphate and the lives of all the companions by their interpretations and practices supplemented the foundations for this branch of Islāmic law. Later on, it has been pursued by the jurists through the history of Islām and it was constructed as a skeleton under the title of "*Siyer*". Imām Muḥammad bin Al-ḥasan Al-Shaybānī, is doubtless to say, a major part of the galaxy that worked on "*Siyer*" and he produced two valuable books, "*Al-Siyer Al-Ṣaghīr*" and "*Al-Siyer Al-Kabīr*". Both these two books have, since very

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beginning, been referred to in the debates by the jurists regarding the law of war in Islām. The jurists throughout the history owed a great tribute to Imām Shybānī for his tremendous work which is acknowledged as a richest source among them.

Nevertheless, the need for the further search and inquiries, however, persisted. Because today the political order of the glob and especially that of the Muslim world witnesses an immense violence in its nature and thus it faces multiple challenges. The terrorism and armed confrontations are, unfortunately, the day to day incidents. All these unfortunate incidents themselves, the perpetrators and conditions before, during and after of the strategies made and steps taken to cope with them are to be measured on legal criteria. Meanwhile, most of the cases in this regard necessitate the rules of Islāmic law of war to be cautiously applied thereon. Whereas many other issues need the extension of the already established rules of Islāmic law of war via a fresh analogy; as they in their nature are 'hard cases'. Since the discussion on new and contemporary issues must be founded on texts of the Qur'ān and the Sunna and the determined rules of interpretation are ought to be followed, the easy and safe way for doing so is to pursue the methodologies of the earlier jurists. Moreover, since the classical works for the contemporary scholars in midst of their raging debates on the issues of before, during and post-war situations are indispensable, a scholar would gain strength for his view from the earlier jurists' works. A need, therefore, would always be felt for establishing and strengthening the relationship between a today's scholar and classical works on Islāmic law including law of war.

Since our focus, through this work, would be on the general principles of Islamic law and their application to regulating the combatant status issue, a need is felt for identifying such rules. In the following, the texts of such rules are reproduced from *Kitāb al-Siyar al-Kabīr* and Sarakhs┘'s *Shar┣* thereon with English translation. In footnote a precise explanation of the rules and contexts in which they are mentioned by the authors, are also provided. The following rules are only those that are applicable to

various aspects of the 'combatant'. In order to provide a useful and conceivable proposition, rules are classified into different categories. All the rules are mentioned in words of the authors, however, on feeling a need alternative phrases are also, but very rarely, given. Similarly, other Ḥanafī jurists are also quoted for further explanation. First of all qwā'id Uṣūlihhah are mentioned that will be followed by the …

2. Principles of Interpretation (*Qawā'id 'Uṣūliyyah*)

١. "الثابت بالعرف كالثابت بالنص"[1]

Proved by custom is as to be proved by the text.

٢. "الحكم (حكم الحاكم) في المجتهدات نافذ بالإجماع"[2]

The ruler's rule shall be enforceable by consensus in cases where there no text is found.

Sarakhsī mentioned the disagreement in a case when *Zimmzī*s participate in war with Muslims soldiers; whether they would be entitled a specified share in spoils as all other Muslim soldiers or not? He mentioned several opinions and concluded that the issue, at least, is disputed and no text, determining a way or another, is found. In such a case if the ruler issues an order that such *Zimmzīs* would be given the share as all Muslim soldiers. The consensus of jurists is held that this rule shall be enforceable and if a successor would implement another rule he would rebut the *Ijmā'* (consensus).[3]

٣. "أكبر الرأي كاليقين فيما لا يمكن معرفة حقيقته"[4]

[1] See: Shams al-'Aimmah Muḥammad b. Aḥmad b. Abī Sahl al-Sarakhsī, *Uṣūl al-Sarakhsī* (Hyderabad: rep. Dār al-Kutub al-'Ilmiyyah, 1993, Abū al-Wafā' al-Afghānī Edtr.), 1:120

[2] Ibid., Sharḥ kitāb al-Siyar al-Kabīr (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), 3:43.

[3] Ibid.,

[4] Ibid., 4:247.

Most probable view is like certainty wherever to know the actual position did not remain possible.

Sarakhasī has applied this rule in a case where if non-Muslim besieged a fortress for Muslims and they already have captured a Muslim. They coerce him to let them know how they could enter into the fortress, and consequently kill the Muslims, or inform them about source of water for Muslim so that they could stop the water and compel the Muslims this way to come out, otherwise they will kill him. The captured Muslim is sure or his most probable view is that they would kill all those who are in the fortress if he may let them know. The rule is that he shall not give information in this concern. This rule is based on the maxim that most probable view is like certainty wherever to know actual position did not remain possible.[5]

٤. "اليقين لا يزول إلا بيقين مثله"[6]

Certainty will not be removed except by similar certainty.

This rule is extensively been applied in Islamic law not only in the law if war, rather, many other issue of other branches of Islamic law are based on it. The context, where this rule has been discussed by Sarakhsī herein, is that if a non-Muslim teenager falls into the hands of Muslim army and they are not sure whether he is adult or not? Here the maxim of "Most probable view is like certainty" shall not be applied therefore it is not permissible for them to kill merely on the basis that in their probable view he is adult. Rather, another maxim is to be applied which says that infancy and childhood of this teenager is certainly known while the adulthood is indefinite. So, the definite and certainly known shall be preferred over indefinite and the Muslims are, therefore, not allowed to kill him.[7]

[5] This rule has been applied to other cases as well. For instance see: Ibid., 4:253, 200, 114, 201 and 204.

[6] Ibid.

[7] See also for the application of same principle Ibid., 4:200 and 253.

٥. "إنما يبنى الحكم على الظاهر حتى يتبين خلافه"[٨]

Rule shall be constructed on what is apparent until an adverse appears.

Sarakhsī has applied this principle in a context that if Muslims enter into the abode of non-Muslims (*Dār al-ḥarb*) forcibly everyone shall be presumed as combatant and, *inter alia,* they are allowed to kill them except than if a sign is seen over any among them that signifies him as Muslim or a *Zimmī*. Those sign holder shall not be killed. It has been explicitly stated in *Fatāwā 'Ālam Gīrī* that the *Dār* is evidence which signifies that whoever is found therein he is among its inhabitants. The sign, however, is stronger evidence than *Dār*. Therefore, one is to be presumed as the sign may signify.[9]

٦. "الحكم للغالب والنادر لا يظهر في مقابلة الغالب"[١٠]

Rule of the usual shall be taken into account while the rare does not appear in the face of the dominant.

The phrases of this principle seem to be approximate to the previous principle. It says that if there are two options and one is dominant and adopted frequently whereas the other is adopted rarely. The ruling shall be based on which is adopted frequently. For instance, generally it is not permissible for Muslims to conduct business transaction of weapons by which non-Muslims may strengthen themselves. As far as raw materials or all non-weapon materials are concerned, if those materials are frequently used in manufacturing weapons and non-Muslims may increase their power through business of such materials, business thereof shall not be permissible. On the other hand, if those materials are

[8] Ibid., 4:206.

[9] See: Committee of the 'Ulamā' under the Supervision of Niẓām al-Dīn al-Balkhī, *al-Fatāwā al-Hindiyyah*, (Beirut: Dār al-Fikr 2nd edn. 1430 A.H) 2:236. See *Sharḥ kitā al-Siyar al-Kabīr* for another case where the same principle has been applied 1:142.

[10] Ibid., 4:285.

frequently used for other purposes and may rarely be used for weaponry purposes, those materials can be sold to them. [11]

٧. "ليس من الصواب أن يترك فرضاً عيناً ليتوصل إلى ما هو فرض كفاية"[١٢]

One shall not escape individual obligatory for fulfilling communal obligation.

٨. "مطلق فعل المسلم محمول على ما يحل شرعاً"[١٣]

An absolute act of a Muslim shall be construed on what is lawful.

According to this principle, acts of a Muslim are, principally, to be construed on what is permissible. If something contrary is latent therein, the rule may change then. The case where Sarakhsī has applied this principle to is that if during war there is a Muslim on the non-Muslims' side and he is supporting them. A Muslim shoots him an arrow and he lies killed. The guardian of such Muslim claims that shooter Muslim knew that killed person was coerced by non-Muslims to come and despite of it he killed him. While, the shooter Muslim denies it saying I did not know that, his opinion is to be preferred. Because he act of shooting arrow towards non-Muslims was principally lawful. Hence, if a Muslim, even though coerced by non-Muslims to come there, is killed and he is claiming to be not aware of this fact, his claim is to be preferred and the law of *Qiṣāṣ* or *Diyat* shall not be applied.

٩. "التكليف بحسب الوسع"[١٤]

Obligation is to be imposed as per capacity.

١٠. "عند اجتماع الحقوق يبدأ بالأهم"[١٥]

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[11] Ibid.,

[12] Ibid., 1:35

[13] Ibid., 4:277.

[14] Ibid., 1: 133.

[15] Ibid., 4:209. This principle is applied by Sarakhsī to various cases. One of them, for example, is if a Muslim intends to go out for *Jihād* but there are certain other rights due to him i-e he is indebted or his parents

> *The most important right, among all others, shall be fulfilled firstly.*

In his book on *'uṣūl*, Sarakhs┘ provides a proper classification of rights and laws relate to them. "Rights are", as Nyazee have summarized the whole discussion, "classified into four categories;

1. Rights of Allah (حق الله تعالى)

2. Rights of individual (حق العبد)

3. Mixed right of Allah and individual; this is further divided into two kinds;

    a. Mixed right of Allah and individual in which the right of Allah is predominant

    b. Mixed right of Allah and individual in which the rights of individual is predominant

4. Rights of individuals collectively or of the communal, this is also referred to as the *ḥaqq al-salṭanah* or *ḥaqq al-Sulṭān*.

Rules relating to the right of Allah are of eight kinds, namely; Pure Worship like *'Īmān* (faith in God); Pure Punishment like *ḥdūd* penalties; Imperfect Punishments like prevention from inheritance in case of murder; Those vacillating between a worship and a penalty like *kaffārāt*; Worship in which there is an element of a financial liability like *ṣadaqat al-fiṭr*; Financial liability in which there is an element of worship like *'ushr;* Financial liability in which there is an element of punishment like *kharāj* tax; Those that exist independently. These are three: those which are laid down initially as rule; those that are imposed as an addition to a rule;

need him; he is not allowed to go out for *Jihād* if the call for it is not general. Because the rights of others, due to him, are *farḍ 'ayini* (individual obligation) and the right of Almighty to go out for *Jihād,* if the call for it is not general, is *farḍ kifā'ī* (collective obligation). And *fard 'ayni* (individual obligation) prevails over *farḍ kifā'ī* (collective obligation).

and those that are associated with the initial rule. The examples are *khums* levied on cattle, minerals, and treasures troves."[16]

Here again a question arises concerning the priority to one over the other in the time of clash. For Islamic law, all interests, inter alia rules and rights protecting those interests and objectives are divided into purposes of the Hereafter and worldly purposes; and primary and secondary. Further each primary purpose is supposed to have been supported by needs and complementing norms. This way a coherent and consistent structure of purposes is attempted by Islamic law, then rules are provided for removing clash and giving priority to one over the other. Such rules are, for example; "stronger interest shall prevail; public interest is prior to private interest; and definitive interest prevails over the probable."[17]

١١. "أن مواضع الضرورة مستثناة من الحرمة"[١٨]

> *The instances of necessity are excluded as exceptions from sanctity.*

This is a very general principle and its influences have expanded to almost all branches of Islamic law. The origins of it are, even, found it the Qur'ān itself. The case where Sarakhsī has applied to: is that usually Muslims are not allowed to have a gold ring, wear brocade or use anything on which a picture of a living is made. Similarly, Muslims are not allowed to have those kinds of weapons on which picture of a living is made, but, under this

[16] See for further details: Sarakhsī, *'Uṣūl al-Sarakhsī*, 2:232. And See for English summery of this entire discussion: Nyazee, *Islamic Jurisprudence*, (Islamabad: 6th Reprinted edition, 2016, Islamic Research Institute) p.93-97

[17] The discussion of rights and relevant rules has been well elaborated by Sarakhsī and the discussion of purpose of law or objectives of Sharī'ah has been provided by Shāṭibī in his *Al-Muwāfaqāt* second volume. Nyazee has succinctly summarized it, along with his comments from the current developed legal systems, in his *Islamic Jurisprudence* (p. 195-212) also his *Theories of Islamic law* (Rawalpindi: 2007, Advanced legal Studies Institute) p.239-337

[18] Ibid., 4:218.

principle, if need is immense for having such weapon during warfare, he may use it.[19]

١٢. "مطلق الأمر يقتضي اللزوم"[٢٠]

Absolute order requires obligation

١٣. "لا طاعة للمخلوق في معصية الخالق"[٢١]

No obedience to creature in disobedience to the Creator.

This principle has been extensively applied to different cases by Sarakhsī through the entire law of war. For example if non-Muslims demand a Muslim prisoner to kill other Muslim prisoner, he is not allowed to commit it because one must not obey in a manner that leads to disobedience to the Almighty.[٢٢]

١٤. "الوفاء بالشرط واجب"[٢٣]

Fulfilling of the condition is mandatory.

١٥. "التمسك بالعزيمة خير من الترخص بالرخصة"[٢٤]

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[19] Ibid.,

[20] Ibid., 1:131-132. This principle has been mentioned in the context where Sarakhsī gives his interpretation of Qur'ānic verses of combat. For him, all such verses, describing different rulings, were revealed in different times. Therefore, all those verses are divided in different stages. In very beginning, the prophet was ordered to preach without confronting (Qur'ān, 15:94); he was enjoined to confront with argumentation (Qur'ān, 16:125); in third stage the permission for fighting was revealed (Qur'ān, 29:46); in fourth stage Muslims were enjoined to wage war against those who initiated aggression against them (Qur'ān, 2:193); in the final stage the prophet Peace be upon him was enjoined to wage war against all unbelievers unconditionally (Qur'ān, 2:244). See for further details: Sarakhsī, Ibid., 1:131 and *al-Mabsūṭ* (Beirut: Dār al-Ma'rifah, 1993), 10: 5.

[21]Ibid., 4: 245.

[22] Ibid.

[23]Ibit., 4: 254. This principle has been referred to at several places. See for example: Ibid., 4: 255, 256 and 281.

[24]Ibid., 4: 282.

Acting according to 'Azīmah is better than acting according to Rukhṣa.

In his work on *'uṣūl*, after defining the terms *'Azīmah* and *Rukhṣah*, Sarakhsī provided with extensive discussion on *rukhṣah* or exemption and its kinds. In addition, he provides too illustrations from Ḥanafī positive law while arguing on each kind. In bellow an attempt of a summery is made. Sarakhsī defines the term *'Azīmah* as 'a *ḥukm* which was imposed initially as a general rule without any cause of defective legal capacity' and the term *rukhṣah* as 'based on the excuse of subjects, as an exemption from general rule that makes a prohibited thing lawful in spite of the reason of prohibition being there. The rulings will be varying according to the subjects' excuses.' Elaborating various kinds of *rukhṣah*, he says it is of two kinds; *ḥaqīqa* (actual or perfect exemption) and *majāz* (imperfect or figurative exemption). The former is of two kinds; full-perfect and less perfect, the latter is also of two kinds; full figurative and less figurative. *Rukhṣah* is, therefore, of four kinds.

1. The one that is full perfect exemption. This one where the cause and rule of prohibition both persist but due to the excuse (or very emergent condition of the subject) that prohibited thing becomes lawful. For instance to take the other's thing to eat without the owner's permission is prohibited but one may take it if he scares of his death in case of not taking it. To avail this kind of *rukhṣah* is although lawful. Yet, to act on *'Azīma* or general rule is preferable.[25]

2. The one which is lesser in being perfect exemption. This is one where the cause persists but the consequence has yet to take place. As the cause of prohibition is still standing and the prohibited became lawful nevertheless, it would be a *rukhṣah*. On the other hand but the prohibition has not yet taken place it would be lesser in being *rukhsah* or exemption. The

[25] See: Sarakhsī, *'Uṣūl*, 1:119.

example is the holy month of *Ramaḍān* as cause of fasting. In the case of traveler or sick this rule of fasting would be belated because of journey or sickness. Nevertheless, if, acting upon *'zīmah*, the traveler or sick may fast; it would counted as of the holy month of *Ram ╔ān*. The question arises what is preferable; fasting as acting upon *'zīmah* or intermit it and make up in other days as acting on *rukhṣah*? For Ḥanfīs the former would be preferred as it contains submission to Almighty Allah instead of enjoyment by him-or-herself.[26]

3. Those burdens and shackles which were imposed on past nations and we are relieved of them. In fact, these are not exemptions in true sense that initially they were imposed on us and then, based on our excuses, we were relieved of them. Rather, such things were never imposed. Therefore, such burdens are called 'figurative exemptions'. Because real figurative is one where the cause of a rule/prohibition exists but, on the basis of the subject's excuse, the rule of the prohibition turns belated.[27]

4. In this kind those exemptions are falling where that cause is supposed to persist but its role has been changed from 'leading towards prohibition' to 'leading towards permissibility'. If we look that there is no cause that may lead to prohibition it is to be called '*rukhṣa*' or an exemption, but if we look that the cause is there it is supposed to be *rukhṣa majāzī* or a figurative exemption. For example the *Salam* transition. As general principle, for all transition the determination of good, that is being sold, is indispensable. But in case of *Salam* not only this condition is dropped for permissibility of transition but this condition, i-e determination of good that is being sold, would cause deficit. Now, the role of the cause – that is, determination of good, has been changed from 'leading

[26] Ibid., 1:119-120.
[27] Ibid., 1:120.

> towards prohibition' to 'leading towards permissibility' and thus there is cause of prohibition of this kind of transition; it should be *rukhṣa* or exemption from a general principle. Similarly, if we look that the same cause still exists it is supposed to be *rukhṣa majāzī* or a figurative exemption.[28]

This detail is to be kept in mind while determination the role of this general principle of 'preference of acting upon '*Azīmah* over acting upon *Rukhṣa*'.

١٦. "الواجب علي المسلم أن يشتغل بدفع أعظم الضررين"[٢٩]

> *It is mandatory on Muslim to involve in removing general harm at first.*

This general principle has been applied to different cases of various chapters of the law of Islam. The context in which this has been mentioned is that it is a general principle that if the call for jihad is not general it is not permissible for one who has to fulfill the individuals' rights, to go out for jihad. The reason, as has been mentioned earlier, is that fulfilling the individuals' rights are *fard 'ayinī* (individual obligation) while going out for jihad is *farḍ kifā'ī* (collective obligation). And *farḍ 'aynī* is to be preferred over *farḍ kifā'ī* (collective obligation). On the other hand if the call for Jihad is general, he must leave the rights unfulfilled and go out for Jihad. Because in such case abandoning Jihad would cause a general harm and not fulfilling the rights will give rise to an individual harm. According to the principle at hand, repelling the general harm, by going out for Jihad, is to be preferred over repelling individual harm. Moreover, Imām Ghazālī says: "وأهون الشرين خير بالإضافة، ويجب علي العاقل اختياره" this means that *a relatively lesser harm is better than a greater harm; it is indispensable on a wise man to adopt it.*[30]

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[28] Ibid., 1:121.

[29] See: Sarakhsī, *Sharḥ*, 4:212.

[30] See: Abū Ḥāmid Muhammad b. Muhammad al-Ghazālī, *al-Iqtiṣād fī al-I'tiqād* (Saudi Arabia: Dār al-Minhāj, 1st edn. 2016), p.400.

١٧. "ما يرجع إلى مكايدة الحرب فلا بأس به للمسلم"[٣١]

There is no harm in to resort [or learn] whatever is related to the strategy of warfare.

2. Legal Maxims (Qawā'id Fiqhiyyah)

2. 1. On the combatant's duty towards the ruler

A. On the appointment of a commander

١٨. "ينبغي للإمام إذا بعث سرية قلت أو كثرت أن لا يبعثهم حتى يؤمر عليهم بعضهم وإنما يجب هذا اقتداء برسول الله عليه السلام"[٣٢]

Whenever a ruler sends a group of troops, whether small or a big, he should not send them out until he appoints a commander amongst them. This is indispensable as following the Prophet peace be upon him.

Geneva Convention-III stipulated certain criteria or conditions for considering one as combatant. One of them is that of being commanded by a person responsible for his subordinates.[33]

B. On the obedience to the commander

١٩. "الجهاد مع كل أمير ، أي عادلاً كان أو جائراً فلا ينبغي للغازي أن يمتنع من الجهاد معه"[٣٤]

Jihād is to be fought under the command of every one [appointed so by the ruler], whether he is just or unjust. So, a Ghāzī [Muslim soldier] should not deny fighting under his command.

Sarakhsī stated at another place:

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[31] Ibid., 4:227

[32] Ibid., 1:45. At another place Sarakhsī says: "أن المسافرين يستحب لهم أن يؤمروا عليهم أميراً فما ظنك في المحاربين" it is preferable for travelers to appoint a chief for themselves, then what do you think of warriors! (Ibid., 1:124)

[33] Geneva Convention-III, Article 4(A)(2).

[34] Ibid., 1:111.

"وعن جماعة من الصحابة رضوان الله عليهم قالوا: إذا عدل السلطان فعلى الرعية الشكر وللسلطان الأجر وإذا جار فعلى الرعية الصبر وعلى السلطان الوزر فهذا كله لبيان أنه لا ينبغي أن يترك الجهاد بما يصنعه الأمراء من الجور والغلول"

> On the authority of the Companions, may God be pleased with them, they said: If the Sulṭān is doing justice with the people they have to thank and the Sulṭān shall be awarded *'Ajr* [by Almighty], if the Sulṭān is unjust with them, they must sustain and the Sulṭān shall bear burden thereof. All this is to explain that *Jihād* should not be abandoned just because of what the injustice and corruption are committed by rulers [or commanders].[35]

٢٠. "طاعة الإمام فرض عليهم بدليل مقطوع به"[٣٦]

> *The obedience to ruler is mandatory over the masses through definitive evidence.*

It is a well-known principle of Islamic law that the ruler must be obeyed. However, Imām Sarakhsī in phrasing the words of this principle, mentioned the terms "*Dalīl Maqtū'*" whereby he intends to highlight a significant role of this principle that might have been hidden had it would not been explicitly focused on. He says that if Imām ordered all the groups to not leave their places and even not for helping each other. If a group, then, apprehends the other group to be killed if not be assisted, it must not leave its place to help and save that group; because the obedience of the ruler is obligatory by a definitive evidence that must be preferred over their apprehension which may or may not become true. Sarakhsī, at another occasion, said that if the ruler [or commander] orders soldiers and they differ. Some of them are of the opinion that the obedience of the ruler would lead to death and others view that there is salvation in it, they must obey the ruler; as

[35] Ibid., 1:112.
[36] Ibid., 1:121.

Ijtihād does not appear in the face of *naṣṣ* [text] and the text rendered his obedience obligatory on them.[37]

٢١. "ومن يراع أمره في شيء يراع صفة أمره"[٣٨]

> *Whose order is to be taken care of, the condition of his order should also be considered.*

On the basis of this rule if the ruler orders to be there under the flag and not leave the group. One can only go, to fight, as much far from the group as he could be assisted if he needs the help of the group and he is not allowed to leave the group at all. Because the intention of the ruler, when he said 'don't go out except under a specific flag', be under that flag so that you could come back safely. So, in going out under the flag or being far from that flag or group the condition or intention of the ruler must be considered.[39]

C. On the limitation of the obedience to the commander

٢٢. "إنما الطاعة في المعروف لا في المنكر"[٤٠]

> *The [ruler's] obedience is related to lawful matters not unlawful ones.*

The prophet (peace be upon him) is reported to have said: "to listen to and obey the ruler is obligatory until unless his orders involve disobedience to (Almighty); if an act of disobedience (to almighty) is imposed, he will not be listened nor will he be obeyed."[41] With reference to International Humanitarian Law, the rule that persons are responsible for war crimes committed pursuant to their orders is contained in the Geneva Conventions and the Hague Convention for the Protection of Cultural Property and its Second Protocol, which require States to prosecute not

[37] See: Ibid., 1:117

[38] Ibid., 1:١٢٥.

[39] See: ibid.,

[40] Ibid., 1:117. See also: Ibid., 1:126 and 118 and 4:215.

[41] Muḥmmad b. Ismā'īl al-Bukhārī, *al-Ṣaḥīḥ*, Kitāb al-Jihād: Bāb al-Sa' wa al-Ṭā'ah li al-Imām.

only persons who commit grave breaches or breaches respectively but also persons who order their commission.[42]

٢٣. "أن العصيان فيما لا يتيقن فيه الخطأ من الأمير لا يحل بحال"[43]

If the mistake of the ruler is not ascertained, disobedience is not permissible

2.2. On who is combatant

A. On the cause of engaging into combat

٢٤. "العلة الموجبة للقتل هي المحاربة" [44]

The reason of killing [enemy] is aggression.

According to this principle only those are combatants who participate in war. The words of Ḥanafī jurists are different in phrasing this rule to an extent that may ostensibly give rise to distinct consequences. Here the term "*al-'Illah al-Mūjibah*" (affirmative cause) has been used. The same term has been used too by another Ḥanafī Jurist al-Mauṣilī. He says " لِأَنَّ الْمُوجِبَ لِلْقَتْلِ هُوَ الْحِرَابُ" (because the affirmative cause of killing is aggression).[45] On the other hand some other Ḥanafī jurists adapt the term "*al-Mubīḥ*" (permissive cause). For instance Kāsānī says " بَلْ الْمُبِيحُ هُوَ الْكُفْرُ الْبَاعِثُ عَلَى الْحِرَابِ، " (*the cause that renders his blood permissible is his unbelief that may compel him on aggression*).[46] Similarly, imam Marghinānī says "لأن المبيح للقتل عندنا هو الحراب(*because, for us, the reason that permitted killing of those persons is the aggression*). A question that may be asked based on such distinct in the phrases of this rule, is that whether the killing of unbelievers, who are aggressors

[42] See for further detail: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, (ICRC, Cambridge University Press: 2009), 1:556

[43] Ibid., 1:118. Kāsānī says: "لأن اتباع الإمام في محل الاجتهاد واجب كاتباع القضاة في مواضع الاجتهاد". This means that "*following of Imam is obligatory in cases where Ijtihad is do resorted to, like obey to the judgment of a judge in cases where Ijtihad is to be conducted.*" See: al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 9:390

[44] Ibid., 4: 187.

[45] See: Abdullah b. Mahmūd *al-'Ikhtiyār li ta'līl al-Mukhtār* (Cairo: Egypt, Maṭba'ah al-Ḥalabī 1937, and reprinted in Beirut) 4:120.

[46] *Badā'i' al-Ṣnā'i'*, 7:237.

too, is only *Mubāḥ* (permissible) or *Wājib* (affirmative or obligatory)? The answer for why this distinction in terms of *ibāḥ*a and *'Ījāb* is there in propositions of the jurists, is found in the context of these terms. The term *ibāḥ*a is used where the rule of Islamic law is discussed regarding the civilians, children, women, religious personages and all those who are in fact prohibited to kill, but on meeting their case a certain position, for instance active participation in hostile activities, the rule may change and thus their killing become *mubāḥ* or lawful; although it would not be *wājib* or obligatory to kill them. As far as the term *'Ījāb* is concerned, it is used in the context of combatants, meaning thereby that in the case of aggression their killing for Muslim soldiers is not only lawful but, rather, indispensable. Once the context of both terms has been clarified the question may be answered that killing of combatants when they aggress against Muslims is *wājib* or obligatory.

The UN Charter prohibits the use of force except for two situations: firstly, collective action in order to maintain international peace and security; the power of which is provided for under the Articles 24, 25 and Chapter VII; secondly, for Self-defense —individual or collective, under Article 51.

٢٥. "ليس للمرأة بنية صالحة للقتال"[47]

Women have no capability to fight.

٢٦. "أن ظهور القتال من بعضهم كظهوره من جماعتهم في حكم إباحة قتالهم"[48]

Waging war by some of them is as the waging war by all of them in rendering the war legitimate against them.

The context wherein this maxim has been mentioned by Imām Sarakhsī is that if there are some Muslims with non-Muslims and Muslim soldiers do not know are they coerced to fight against Muslims or have they come by their own choice. In this case

[47] Ibid., 1: 129. As the prophet peace be upon him said when he saw a slain woman, "she was not one who engage in combat, so why was she killed?"

[48] Ibid. 4:207.

Muslim Soldiers must not kill them until they ask them if possible or know by other means or they begin fighting against Muslim soldiers then killing them is permissible for Muslims. If Muslim soldiers are lesser in numbers and they think if those Muslims are let begin fighting a huge, destruction would be caused or Muslim soldiers would be killed, then Muslim soldiers may target those Muslims who stand there with non-Muslims; because as soon as non-Muslims begin fighting it would be considered fighting from the side of those Muslims too even though they did not begin actually. Since they are standing with non-Muslims and ascertaining about them, whether they have come being coerced or by their own choice to fight, did not remain possible Muslim soldiers and non-Muslims began fighting and Muslim soldiers are lesser in number, in such case beginning to fight from non-Muslim shall be deemed as fighting from those Muslims too and thus Muslim soldiers are allowed to kill them.[49]

B. On the official registration of combatants

٢٧. "من كان مكتوب الاسم في الديوان فعليه طاعة الإمام في الخروج على الوجه الذي يكون على المملوك لسيده"[٥٠]

Whose name is officially registered, he has to obey the ruler, to go out, in the same manner as a slave has to obey his master

٢٨. "وفي الجهاد إنما يجمعهم الديوان لا البلدة"[٥١]

For the purpose of Jihad, the unification (affiliation) is based on registration and not on town (of residence).

According to this rule, if someone belongs to town *A* but he has been registered in the Unite of town *B*, the ruler orders town *A* to go out for Jihad, he would not has to go out.[52]

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[49] Ibid.

[50] Ibid., 4:213. This rule implies that in order to consider one as combatant must has been registered officially as a soldier. After having been registered he has to obey the ruler to go out for Jihad. In case if the ruler does not allow going out, he must not go.

[51] Ibid., 1: 120.

[52] Ibid.,

٢٩. "إن كان النفير عاماً فالخروج فرض عين على كل أحد ممن يقدر عليه"[٥٣]

If the call for Jihād is general then going out for it is mandatory on all of those who are capable.

2.3. Rules on Non-combatants; and if they participate in war

٣٠. [لا بأس بقتل من لم يقع الأمن عن قتاله] "لا بأس بقتلهما لأنه لم يقع الأمن عن قتالهم"[٥٤]

[There is no harm in killing of those from whom the apprehension of engaging in combat still exists]. There is no harm in killing them because an apprehension of their involvement in combat still exists.

٣١. "كل من لا يقتل إذا باشر القتال أو حرض على ذلك أو كان ممن يطاع فيهم فلا بأس بقتله"[٥٥]

Whoever may not be killed, if fights or incites to fight or is among those who may be obeyed by non-Muslims there is no harm in killing such person[s].

These two rules signify that non-combatants are protected on the basis of assumption that may not take arm and not participate in hostile activities. But if they leave their status of civilians by participating in war they will lose their protection and hence will become legal target for the enemy. The same rule has been determined in IHL too. Such persons are deemed as the second category of combatants.[56]

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[53] Ibid. 4:212. To go out for Jihad is *Farḍ kifā'ī* (collective obligation) If the call for Jihad is not general, and it would be *Farḍ 'aynī* (individual obligation) if the call is general. According to this principle, if the call for Jihad is general and going therefore turned into *Farḍ 'aynī* (individual obligation) one must leave all other individual rights (of creditors or parents for example) even unfulfilled and shall go out for Jihad and thus he would acquire the combatant status.

[54] Ibid. 4:200

[55] Ibid. 4:198.

[56] See for further detail the Fourth Chapter of this work.

A. On non-combatants if killed by Muslims

٣٢. ''وجوب الكفارة أو الدية باعتبار العصمة والتقوم في المحل وذلك بالدين أو بالدار''[٥٧]

> *The obligation of expiation is based on the legal protection or the value of locus which may be gained only by [embracing] Islam or [entering into] the territory of Islamic.*

If a Muslim kills any of children, insane, women or elders, who are principally not to be killed, nothing is imposed on such Muslim killer; because the obligation of *Kaffārah* (expiation) or *Diyyah* (blood money) is based on infallibility of blood, that may be gained by embracing Islam, and value thereof which may be acquired by moving to *Dār al-Islām* and none of these two is found here. So, no *Kaffārah* (expiation) or *Diyyah* (blood money) is imposed on the killer.[58] Sarakhsī at another place says: "ومن أسلم منهم حرم قتله" (*it is forbidden to kill who embraces Islam; from non-Muslims*).[59]

And another place he further stated: "إن الإسلام يؤمن من القتل" (*Indeed, Islam protects from killing*).[60]

B. On non-combatants if kill any Muslim

٣٣. ''الصبي أو المجنون ما كان مخاطباً (لا يكون مخاطبا) فلا يكون فعله جناية يستوجب به العقوبة جزاء عليه''[٦١]

Since the child and insane are not the subjects of law, their acts are not crimes whereby they may be sentenced as reward for that act.

The context in which this maxim has been mentioned is that principally speaking children, insane, women and elders are not allowed to be killed. In case, they fight and kill a Muslim then they are captured by Muslims, if the killer of Muslim is a child or insane they shall not be killed because they are not subjects of law, so no law is directed towards them. If the killer is a woman or an

[57] Ibid. 4:187.
[58] See also: Ibid. 1:90-91 and 4:197
[59] See, 3:126
[60] See, 3:126
[61] Ibid. 4:187.

elder person they may be killed because they are subjects of certain laws therefore, they may be killed as *qiṣāṣ*.[62]

C. On medical personals

٣٤. "ولا يعجبني أن يباشرن القتال"[٦٣]

I don't encourage (young) women to participate in war

— "أما العجائز فلا بأس بأن يخرجن مع الصوائف لمداواة الجرحى"[٦٤]

As far as elder women are concerned, there is no harm if they go out (for Jihad) with huge corps for the treatment of wounded.

These two excerpts show that women are not participating directly in war.

— "لا يسهم للنساء ولكن يخدين من الغنائم أي: يعطي لهن رضخاً"[٦٥]

No share is to be given to women; rather, they would be given a small gift from the spoils.

Jurists consider her treatment of wounded as participation in war though not direct and actual. Imām Marghīnānī clearly stated:

"والمرأة يرضخ لها إذا كانت تداوي الجرحي ، وتقوم علي المرضي لأنها عاجزة عن حقيقة القتال فيقام هذا النوع من الإعانة مقام القتال"[٦٦]

The woman is to be given a gift if she gives treatment to the wounded, and looks after ill, because she is unable to actually participate in battle. This form of help is made to stand in the place of actual fighting.

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62 Ibid.

63 Ibid., 1: 140.

64 Ibid.

65 Ibid., 3:42.

66 See: Marghīnānī: *Al-Hidāyah* (with Nyazee English translation. Rawalpindi — Lahore: Federal law house, , 2015), p.1397-1398. See also: Sarakhsī, *Sharḥ Siyar kabīr* 3:98.

The crux of these rules is that women do participate in war —as medical personnel—; this is why they are given gifts from the spoils and they can give *Amān* to enemy, but their participation is not considered direct and/or actual participation.

D. On wounded

٣٥. ''المرض يعجز المقاتل عن القتال ولا يخرجه من أن يكون من المقاتلة ؛ فلا يقع به اليأس عن قتاله مع المسلمين ، إلا أن يحيط العلم بأنه لا يعيش مع هذا المرض أو يكون عليه أكبر الرأي فحينئذ لا ينبغي أن يقتلوه''[٦٧]

Illness causes failure of the combatant of fighting anymore and does not exclude him from the ambit of the combatants; so, Muslims cannot despair of his fighting against them unless until it is categorically or probably known that he may not survive with this disease then he should not be killed.

E. On religious personages

٣٦. ''إنما لا يقتل من لا يخالط الناس''[٦٨]

> *(Among religious personages) those are not to be killed who do not merge with the people.*

F. On the children of enemy

٣٧. ''إنما عليهم الامتناع من الإساءة''[٦٩]

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[67] Ibid. 4:203.

[68] Ibid. 4:201. Sarakhsī at another place clearly stated that:

> '' أئمة الكفر إذا كانوا يخالطون الناس إما خروجاً إليهم أو إذناً لهم في الدخول عليهم وكانوا يحثونهم على قتال المسلمين والصبر على دينهم فأما إذا كانوا في دار أو كنيسة قد طينوا عليهم الباب وترهبوا فيه فإنهم لا يقتلون''
>
> *Religious personages are to be killed if they merge with the masses by hanging out to them; or permitting them to come in and hence incite them to fight against Muslims and endure calmly on their religion. If they are within their houses or churches, closed the doors behind themselves and adopted monastic lives then they shall not be killed.*

See: Ibid., 4:196.

[69] Ibid. 4:283.

What is mandatory on Muslims that they must refrain from abuse?

The context in which this principle has been mentioned is that if Muslim soldiers took children of non-Muslims in battleground and then they felt unable to take them (to *Dār al-Islām*). Then they came across a fort of non-Muslims and they asked them for those children to foster and take care of them. This is not obligatory on Muslims. Rather, they may keep them somewhere if those non-Muslims may come and take them or not. Because what is mandatory on Muslims concerning the children of non-Muslims is to refrain from committing abuse and leaving them on earth is not abuse. However, giving them to the non-Muslims of fort is a sort of kindness that is not obligatory on Muslims regarding the children of non-Muslims.[70]

٣٨. "الامتناع من الإحسان لا يكون إساءة"[٧١]

Refraining from kindness is not an abuse.

The case where to this principle has been applied is that if Muslims capture a woman along with her child and they are unable to take them both (to *Dār al-Islām*). They are not allowed to kill the woman nor her child; because it is forbidden by the text. Instead, they may leave them at a dangerous or a place of loss. Because leaving them at such a place is refraining from being kind with them by taking them to peaceful place. And refraining from kindness is not abuse.[72]

2.4. On the combatants' behavior towards hostages by non-Muslims

٣٩. [الدفع المأمور به شرعا لا يوجب دية ولا كفارة]"وذلك دفع مأمور به شرعاً فلا يكون موجباً دية ولا كفارة"[٧٣]

[70] Ibid.
[71] Ibid. 4:277.
[72] Ibid.
[73] Ibid., 1:74.

> *[The defense, ordered by Sharī'ah, shall not be reason for diyyah or kaffārah]. That is a kind of defense which Sharī'ah has ordered for. So, it shall, therefore, not be reason for diyyah or kaffārah.*

The context, to which this maxim has been applied, contains two parallel cases helps in better understanding of this maxim. One, if two groups of Muslim soldiers are to fight against non-Muslims in night and each one conceives the other group of non-Muslims and thus begun fighting. If any Muslim is killed nothing shall be imposed on the killer. The reason is that the Muslim who has been killed was intending to kill him. That intention of killing has rendered the defense obligatory and therefore to kill him became a permissible act that is to impose nothing if the defender would have killed him.[74] Another case, if during fury war some Muslim soldiers attacked a Muslim, conceiving him non-Muslim, and thus killed him it is *Qatl e Khaṭā* that imposes *diyyah* and *kaffārah* through the text. The reason is that the Muslim, who has been killed, had no intention to kill. His blood is still infallible.[75]

٤٠. "الفعل متى كان مباحاً مطلقاً لا يصير ذلك سبباً موجباً للدية ولا الكفارة"[٧٦]

> *The act, when it is absolutely permissible, does not become cause for Diyyah (blood money) or Kaffārah (expiation).*

This maxim has been applied by Imām Sarakhsī to various cases: for instance, if there are some Muslims along with non-Muslims in battlefield even though coerced by non-Muslims to join them and fight against Muslims. In such case all non-Muslim combatants along with Muslims are legal target for Muslim soldiers. Thus meanwhile, if a Muslim is killed no *diyyah* (blood money) or *kaffārah* (expiation) shall be imposed on the one who killed. Because they were legal target for Muslim and subsequently killing them was permissible and a permissible act does not cause any responsibility in form of *diyyah* (blood money) or *kaffārah* (expiation). Second, if there were children of Muslim. This

[74] Ibid., 1:74.
[75] Ibid., 1:75.
[76] Ibid., 4:227.

principle has been repeated by Imām Sarakhsī and defined it well by different phraseologies.[77]

2.2.1 **2.5. Rules on Conduct of war**

A. On the stage just before to engage into combat

٤١. [يجب البداية بعرض الإسلام علي الكفار] .”وفي تقدم عرض الإسلام عليهم دعاء إلى سبيل الله تعالى: بالحكمة والموعظة الحسنة فيجب البداية به“[٧٨]

[First of all, Islam must be offered to infidels] offering Islam in very inception contains to call to the path of Allah with wisdom and good exhortation; therefore, it is necessary to begin with it.

٤٢. ”المرتدون وعبدة الأوثان من العرب فإنه لا يقبل منهم إلا الإسلام أو السيف“[٧٩]

Nothing shall be accepted from apostates and worshipers of idols among Arab except than Islam or they must face the sword [of Muslims].

B. On who may be killed during war

٤٣. ”إنما يقتل منهم من يقاتل دون من لا يقاتل“[٨٠]

Only those are to be killed who may fight not those who do not fight.

٤٤. ”يباح قتل من له بنية صالحة للمحاربة يتوهم القتال منه“[٨١]

It is permissible to kill whoever is capable to fight and from whom an apprehension of fighting still persists.

C. On who may not be killed

٤٥. ”لا ينبغي للمسلمين أن يقدموا على قتل حرام باعتبار الموهوم“[٨٢]

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[77] See for example, 4:277, 208, 221 and 224
[78] Ibid. 1:56.
[79] Ibid. 1:57.
[80]Ibid. 4:196.
[81]Ibid. 4:186.

Muslims should not dare a Ḥarām (forbidden) killing on an imaginary basis.

The context to which this rule has been applied is that if Muslim soldiers capture a *Sabī* or a slave (a woman or child) who was fighting against, and killed some of, Muslims, they should not kill him because he remained no longer as a combatant. If they are unable to carry him out to *Dār al-Islam* and they think he would participate again in war against Muslims if left alive here. Then, he may be killed on the basis of such comprehension of fighting. On the other hand, if they are satisfied that he will not come out fighting against them but he may fight against another group of Muslim soldiers after them, they cannot kill him on this imaginary basis. Because entry of another group of Muslims on this way specifically and coming across this *sabī* is an imaginary that may or may not take place. It, therefore, does not render the *ḥarām qatl* (forbidden killing) permissible.[83]

٤٦. [يكره للابن أن يكتسب سبب إعدام من يكون سببا لإيجاده] "الأب سبب لإيجاد الابن ؛ فيكره للابن أن يكتسب سبب إعدام أبيه بالقصد إلى قتله"[٨٤]

[It is disprovable to be the reason of execution of whom that has been the reason of his coming into existence]. Father is the cause of son's coming into existence; therefore, it is disprovable for the son to be the cause of his father execution by intending his murder.

The son is not forbidden from killing his father at all as it seems from this rule. Rather, wherever, father attacks his son and he would not find any way to avoid his attack except than killing him. In such case it is obligatory on son to defend himself by killing his father. And in this case the father would himself cause the reason of his execution as in the case of suicide according to the other rule which says that the coerced is means at the hands of coercer.[85]

[82] Ibid. 4:200.
[83] Ibid.,
[84]Ibid., 4:199.
[85]Ibid., 1:76

٤٧. ''أن تحكيم السيماء أصل فيما لا يوقف على حقيقته''[٨٦]

The arbitration by mark or sign is a principle (that is to be sorted to) wherever the actual position could not be apprehended.

Imām Shaybānī has applied this principle to the case that if Muslims enter into a city of non-Muslim and conquered it forcefully they may kill all men –capable of fighting–, unless if they see a man having a mark or sign of being Muslim or *Zimmī*, they must not hasten in killing him. Rather, his position is to be examined and ascertained. Sarakhsī infers the principle latent herein i-e a mark or sign plays the role of a principle if the actual position could not be understood. Sarakhsī articulates the reason that if he is killed hastily and later he is known Muslim, nothing would have remained to rectify or straighten out. In contrast, there is no difficulty in adjourning his killing and ascertaining the actual position. In addition to this, the case of mark or sign is of the lesser category than the information of *Fāsiq* and we are bound to not act accordingly until we examine. So, the case of mark or sign is to be preferably examined. Categorizing what may help us in arriving at the actual position, it is stated in *al-Fatāwā al-Hindiyyah* that:

''الأصل أن الدار دليل ظاهر لكون من فيها ، من أهلها والسيماء أقوى من المكان والبينة أقوى من الكل''.[٨٧]

The dār (or abode) is a clearer indication that all those who are therein, are its inhabitants (if the Dār is of Islam all those who are there would be considered as Muslims and vis-à-vis), and the mark is stronger than the place while evidence is stronger than all.

2.5. Rules on treatment with weapons in the territory of war

٤٨. ''فإن الاحتياط في هذا الباب واجب''[٨٨]

[86] Ibid. 4:206.

[87] See, *al-Fatāwā al-Hindiyyah*: 2:236

[88] See: Sarakhs┘ , *Shar* ┌. 4:292 and also 4:287

Indeed, precaution in this regard is indispensable.

٤٩. "أنه لا يستحب للمسلمين أن يدخلوا دار الحرب شيئاً مما فيه منفعة أهل الحرب"[٨٩]

It is not preferable for Muslims to inter the territory of non-Muslims with what may benefit them (against Muslims).

٥٠. "وما يقدرون على إخراجه من الكراع والسلاح فإنه يكره لهم تركه في دار الحرب بعد التمكن من إخراجه لأن هذا مما يتقوى به المشركون على قتال المسلمين"[٩٠]

Those arms which Muslims can take out of the territory of non-Muslims are not to be left over there because this may strengthen non-Muslims against Muslims.

٥١. "وما كان له من الحق في العين الأول فقد سقط حين أخرجه من ملكه بيعاً بالدراهم"[٩١]

The right of non-Muslim [of returning his property to the territory of war] ceases the moment he droves it out of his ownership by sale it against Dirhams.

٥٢. "المعتبر عادة كل قوم فيما يبتني عليه مما يكره أو لايكره"[٩٢]

In constructing of what is preferable or otherwise the costume of each nation is to be considered.

2.6. Suicides and assisting non-Muslims killing himself or other Muslim[s]

A. On self-defense

٥٣. "مأمور بدفع سبب الهلاك عن نفسه بحسب الوسع"[٩٣]

Muslim is ordered to defend himself, as much as he can, against every cause of his death

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89 Ibid. 4:284.

90 Ibid. 4:198.

91 Ibid. 4:292. At another place he says: لأنه قد سقط حقه بالتصرف الأول (because his right has ceased by his first act). See. Ibid. 4:291.

92 Ibid. 4:286.

93Ibid. 4: 248.

٥٤. "الواجب على كل أحد الدفع عن نفسه بجهده أولا ثم النيل من عدوه"[٩٤]

Everyone is bound to defend himself first as much as he can, then by imposing harm his enemy.

The defense —individual as well as collective— is allowed by the UN Charter. Article 51 of the Charter reads:

> "Nothing in the present Charter shall impair the inherent right to individual or collective self-defense if an armed attack occurs against a state."

B. On suicide

٥٥. "وليس للمسلم أن يقتل نفسه ولا أن يعين على قتل نفسه فتعين عليه جهة الامتناع حتى يصير مقتولاً بفعلهم إن قتلوه"[٩٥]

It is not permissible for a Muslim neither to kill himself nor to help other killing him. So, he is bound to restrain from doing so until he is killed by their act if they do so.

٥٦. "لأن يهلك بفعل غيره أولى من أن يهلك بفعل نفسه"[٩٦]

To be killed by other is better than being killed by his own act.

The IHL seems to have allowed the commission of suicide attacks. Because it stipulates certain conditions for taking arms and participating in hostile activities: such as being commanded by a responsible person; having a distinctive sign; carrying arms openly; and conducting war operations in accordance with the law of war. If all these conditions are fulfilled and suicide attack is committed it would be lawful.

C. On assisting non-Muslims killing himself or other Muslim[s]

٥٧. "لا رخصة في التصريح بالأمر بالمعصية في حق نفسه ولا في حق غيره"[٩٧]

[94]Ibid., 4: 249.
[95]Ibid. 4: 248; and 242.
[96]Ibid. 4: 248.
[97]Ibid., 4: 243.

There is no permission for explicit order to commit sin concerning himself or others.

Sarakhsī has mentioned several, and parallel, cases and applied this rule. Briefly speaking, if a Muslim captive became unable to sustain any more the torture of prison, he cannot demand of his murder. Or if enemies have determined to kill him but offered him different ways giving option to choose any of them, he should not explicitly state '*kill me this way*', rather, he ought to utter words that do not contain an order or permission to kill him; for instance, he may say '*killing by that way might be easier*'. The same rule is to be applied if the case concerns another Muslim.[98]

٥٨. "وليس للمسلم أن يجعل روح جماعة المسلمين وقاية لروحه"[٩٩]

It is not permissible for a Muslim to make the soul of the Muslim community protective of his own soul.

For instance, if non-Muslims have besieged the fortress of Muslims and they capture a Muslim. They ask him to help entering into the fortress and he knows such a side whereby they could enter and, *inter alia*, kill the Muslims. He is not allowed to let them know. Nevertheless, even if he imagines that they would kill him if not let them know it; he is still not allowed to do so. The reason is that in the meanwhile he would be making the soul of the Muslim community protective for his own soul which is not permissible. At another occasion Sarakhsī has applied the same rule when he stated that if two Muslims are prisoned by non-Muslims and one of them is demanded by non-Muslim to kill the Muslim prisoner otherwise they would kill him. He is not allowed to make the soul of the other Muslim protective of his own soul. Because both souls are equal in dignity; none could be preferred over the other.[100]

٥٩. "لا رخصة في الإعانة على قتل المسلم"[١٠١]

98 Ibid.
99 Ibid. 4: 230.
100 See, Ibid. 4: 245 and 280.
101 Ibid. 4:246.

No one is allowed to assist killing a Muslim

٦٠. "لا رخصة لهم في قتال المسلمين بحال ولا في إلقاء الرعب في قلوبهم ما لم تحقق الضرورة"[١٠٢]

Muslims are not allowed to fight Muslims nor to terrorize unless necessary.

[102] Ibid. 4: 248; and 253.

اردو مقالات

فہرست

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عبدالرشید**

Abstract

This paper discusses the issues related to transplantation. In the beginning it gives the meaning and various kinds of transplantation, then, presents the views of several religious scholaers. Thereafter, the paper sheds light on the Fatwā issued by Islamic Fiqh *Academy, Jeddah and evaluated it critically. Somilarly, it discusses the views forwarded by the* Fiqh *Acadmey, Idnia. After having been discussed the issue in the light of certain international institutions, the paper talks about it in the light of recomndations given by the Counicl of Islamic Idealog, Pakistan inalitically as well as critically. The last portion of this paper has been devoted to discuss the current law of Pakistan in this regard.*

تعارف

''انسانی اعضا کی پیوند کاری'' سے مراد کسی زندہ یا مردہ انسان کا عضو کسی دوسرے شخص کے جسم میں لگانا۔ یہ موضوع اسلامی نظریاتی کونسل میں بارہا زیر غور آیا ہے۔ کونسل نے اس پر ۸۴- ۱۹۸۳ء اور ۰۱- ۲۰۰۰ء میں تفصیلی بحث کی ہے۔ کونسل نے مختلف انسانی اعضا جیسا کہ گردے اور آنکھ کے قرنیہ کی پیوند کاری سے متعلق سفارشات تیار کی ہیں۔ علاوہ ازیں اسلامی نظریاتی کونسل اس سلسلے میں باقاعدہ مسودہ قانون تیار کر کے حکومت کو ارسال بھی کر چکی ہے۔ اسلامی نظریاتی کونسل کے علاوہ اسلامی فقہ اکیڈمی (انڈیا)، مجمع الفقہ الاسلامی (جدہ) اور هيئة كبار العلماء (سعودی عرب) بھی اس حوالے سے

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قراردیں پاس کر چکی ہے۔ حکومت پاکستان بھی اس سلسلے میں ۱۸ر مارچ ۲۰۱۰ء میں "Transplantation of Human Organs and Tissues Act, 2010" کے نام سے پارلیمنٹ میں قانون سازی کر چکی ہے، جبکہ ۱۰ر اکتوبر ۲۰۱۷ء کو اس ایکٹ میں سینٹ میں ترمیم بھی پیش کی گئی۔

اس مقالے میں کونسل میں "انسانی اعضا کی پیوندکاری" کے حوالے سے ہونے والی کارروائی و سفارشات، اسلامی فقہ اکیڈمی (انڈیا)، مجمع الفقہ الاسلامی (جدہ) اور ھیئۃ کبار العماء (سعودی عرب) کی جانب سے پیش کی جانے والی قراردادوں کا تقابلی و تنقیدی جائزہ لیا جائے گا، نیز پاکستان میں رائج الوقت قوانین کا کونسل کی سفارشات کے ساتھ موازنہ بھی کیا جائے گا۔

انسانی اعضا کی پیوندکاری کا مختصر تعارف

اللہ رب العزت نے انسانی جسم کو عین فطرت کے مطابق بنایا ہے یہ بات قابل ذکر ہے کہ اللہ نے انسانی اعضا تمام انسانوں کو مساوات کی بنیاد پر عطا فرمائے ہیں۔ انسانوں میں حسب و نسب، رنگ اور امیر غریب کی تفریق ضرور ہے لیکن اعضا سب کے تقریباً ایک جیسے ہیں۔ اللہ رب العزت نے جہاں قرآن مجید میں اپنی واحدنیت سمجھانے کے لئے زمین و آسمان کی مثالیں بیان کی ہیں، وہیں انسان کو اپنے جسم اور اعضا کی طرف متوجہ کرتے ہوئے انسانی تخلیق کو "احسن" قرار دیا ہے، قرآن مجید میں ارشاد باری تعالیٰ ہے:

لَقَدْ خَلَقْنَا الْإِنْسَانَ فِي أَحْسَنِ تَقْوِيمٍ [1]

"انسانی اعضا کی پیوندکاری" سے مراد کسی زندہ یا مردہ انسان کا عضو کسی دوسرے شخص کے جسم میں لگانا۔ انسانی جسم کا کوئی عضو اگر کسی بیماری، حادثے یا کسی وجہ سے ناکارہ ہو جائے تو کیا اسے تبدیل کر کے اپنا یا کسی اور انسان کا عضو لگایا جا سکتا ہے؟ یہ اس مقالے کا موضوع ہے۔ اعضا کی تبدیلی کو "اعضا کی پیوندکاری" کہا جاتا ہے۔ اگر کوئی انسان حالتِ حیات میں یا بعد از موت اپنے اعضا کو عطیہ کرنے کی وصیت کر جائے تو اس کی شرعی حیثیت کیا

۱- القرآن، ۹۵: ۴۔

ہو گی؟ طبّی دنیا میں ''اعضا'' کی پیوند کاری کے بڑھتے ہوئے رجحان کے پیش نظر اس موضوع کو شرعی زاویے میں دیکھنا ضروری ہو گیا ہے۔

انسانی اعضا کی پیوند کاری طبّی ماہرین کے نزدیک

طبّی ماہرین کے نزدیک ٹرانسپلانٹ کی درج ذیل قسمیں ہیں:

1. **ایلوٹرانسپلانٹ:** ایک طرح کے جانور مثلاً، بندر سے بندر میں، یا ایک انسان سے دوسرے انسان میں، اعضا کا انتقال؛
2. **ہیٹرو ٹرانسپلانٹ:** ایک نسل سے دوسری نسل میں اعضا کی منتقلی، مثلاً کتے کا دل بندر میں منتقل کرنا؛
3. **آٹوٹرانسپلانٹ:** ایک شخص کا عضو اسی شخص کے جسم میں کسی اور جگہ لگانا؛
4. **زینو ٹرانسپلانٹ:** کسی جانور کا عضو انسان میں لگانا۔

ٹرانسپلانٹ کی قسمیں

1. زندہ شخص کا عطیہ
   أ. خونی رشتہ دار کا عطیہ، مثلاً بہن، بھائی، ماں، باپ، اولاد وغیرہ کی طرف سے عطیہ؛
   ب. غیر خونی رشتہ دار یا غیر رشتہ دار کی طرف سے عطیہ، مثلاً بیوی، دوست، پڑوسی، جو کہ کسی قیمت کے بغیر عطیہ دے۔
2. کسی زندہ شخص کا اپنا گردہ بیچنا؛
3. مردہ شخص کا عطیہ
   أ. ایسے شخص کی طرف سے عطیہ جس کا دماغ مردہ ہو چکا ہو مگر دل دھڑک رہا ہو (brain dead with beating heart- doner)۔ ایسے لوگ ۱۲ تا ۲۴ گھنٹے میں دل کی حرکت بند ہونے کے بعد عام طور پر مکمل وفات پا جاتے ہیں۔

اس دوران میں جب کہ دماغی موت کی مکمل تشخیص ہو چکی ہوتی ہے تو دل کی دھڑکن بند ہونے سے پہلے (یعنی دوران خون رکنے سے پہلے) ان کے اعضا کو استعمال کیا جا سکتا ہے۔ مثلاً دماغی چوٹ لگنے کے بعد، حادثہ (ایکسیڈنٹ) کے بعد وغیرہ؛

ب. ایسے شخص کی طرف سے عطیہ جس کا دل دھڑکنا بند ہو چکا ہو (Non- heart- beating- doner)۔ عام طور پر ایسی حالت میں اعضا قابل استعمال نہیں رہتے مگر کوشش کے بعد ۵۰ فیصد کے قریب قابل استعمال ہو سکتے ہیں۔

اعضا کی پیوند کاری- ایک عام اصول:

- جن اعضا کی منتقلی سے عطیّہ دینے والے پر کوئی اثر نہ پڑتا ہو وہ زندہ آدمی دے سکتا ہے، جیسے گردہ۔
- جن اعضا کے دینے سے انسان کی اپنی جان خطرے میں پڑ جائے وہ Cadaveric ٹرانسپلانٹ کے ذریعے لگائے جاتے ہیں۔

ایک مسلمان سرجن کا نقطہ نظر

1. زندگی اور موت اللہ تعالیٰ کے ہاتھ میں ہے۔اسی ذات نے ہمیں عقل اور علم عطا کیا ہے جس کو استعمال کر کے انسانی جان کو بچانا انتہائی ضروری ہے، خصوصاً ڈاکٹر کے لیے۔
2. کوئی چیز جو قرآن اور سنت اور اجماع کے دائرے سے نکل جائے جائز نہیں۔
3. موجودہ طبّی مسائل میں علمائے دین و طب کو مل کر رائے قائم کرنی پڑے گی کیونکہ معاملات بہت پیچیدہ ہیں۔
4. ٹرانسپلانٹ سرجری کسی بھی دوسری سرجری کی طرح ہے۔اس میں بذاتہ بربریت، بہیمیت، اذیت، درندگی اور تکریم انسانی کے خلاف ہونے کا کوئی شائبہ (نیت اور عمل دونوں میں)

نہیں۔ یہ واحد طریقہ علاج ہے جو کہ عملی طور پر کسی بھی انسان کو ایک دوسری زندگی عطا کرتا ہے جس میں وہ کسی کا محتاج نہیں ہوتا اور اس کی عزت نفس مجروح نہیں ہوتی۔

5. گردہ دینے والے کو کوئی نقصان نہیں پہنچتا۔
6. ایک Cadaveric ڈونیشن سے ۶ انسانوں کی زندگی بچ سکتی ہے (قلب، جگر، لبلبہ، گردوں اور آنکھوں کے عطیہ سے)۔

لہٰذا:

أ. Cadavericٹرانسپلانٹ کو مکمل قانون کے طور پر رائج کیا جائے، جیسا کہ دیگر اسلامی ممالک میں یہ رائج ہے۔
ب. اعضاء کی خرید و فروخت کو جرم قرار دیا جائے۔
ج. Cadaveric ٹرانسپلانٹ سے ملک میں ان لوگوں کو گردوں کی فراہمی کی جا سکے گی جن کا کوئی رشتہ دار واقعی اپنے گردے کا عطیہ نہیں دے سکتا۔ اس سے گردوں کی خرید و فروخت کے کاروبار کا سد باب ہو سکے گا۔[2]

انسانی اعضا کی پیوندکاری قرآن وسنت کی روشنی میں

اس مسئلے کے حوالے سے فقہائے کرام کے دو نقطہائے نظر ہیں۔ پہلا نقطہ نظر مطلقاً عدم جواز کا ہے، ہندوستان وپاکستان کے قدیم فقہا اس موقف کے قائل تھے جبکہ دور جدید کے فقہائے کرام چند شرائط کے ساتھ اعضا کی پیوندکاری کے جواز کے قائل ہیں، جو حضرات عدم جواز کے قائل تھے، ان کے دلائل کا خلاصہ حسب ذیل ہے:۔

۲- اسلامی نظریاتی کونسل، **سالانہ رپورٹ ۲۰۰۰۔۲۰۰۱ء**، (اسلام آباد، ادارہ تحقیقات اسلامی، طبع اول، ۲۰۰۲ء)، ص ۲۳۳۔۲۴۰۔

عدم جواز کے قائلین کے دلائل:

کسی انسانی عضو کا (خواہ زندہ کا ہو یا مردہ کا) دوسرے انسان کے جسم میں استعمال (معاوضہ کے ساتھ ہو یا بغیر معاوضہ کے) مندرجہ ذیل وجوہات کی بنیاد پر جائز نہیں ہے:

(۱) اس مقصد کے لیے انسانی جسم کی چیر پھاڑ کی جاتی ہے جو کہ مثلہ ہے، اور مثلہ شریعت میں جائز نہیں ہے۔ حدیث شریف میں ہے :

عَنِ ابْنِ عَبَّاسٍ، قَالَ: كَانَ رَسُولُ اللهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ إِذَا بَعَثَ جُيُوشَهُ قَالَ: «اخْرُجُوا بِسْمِ اللهِ تُقَاتِلُونَ فِي سَبِيلِ اللهِ مَنْ كَفَرَ بِاللهِ، لَا تَغْدِرُوا، وَلا تَغُلُّوا، وَلا تُمَثِّلُوا، وَلا تَقْتُلُوا الْوِلْدَانَ، وَلا أَصْحَابَ الصَّوَامِعِ»۔[3]

(۲) کسی زندہ حیوان (جس میں انسان بھی شامل ہے) کے جسم سے اگر کوئی جز الگ کر دیا جائے وہ مردار اور ناپاک کے حکم میں ہو جاتا ہے، جیسا کہ حدیث مبارکہ میں ہے :

عَنْ أَبِي وَاقِدٍ، قَالَ: قَالَ النَّبِيُّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ» :مَا قُطِعَ مِنَ الْبَهِيمَةِ وَهِيَ حَيَّةٌ فَهِيَ مَيْتَةٌ»"۔[4]

عضو کی پیوند کاری کی وجہ سے پوری عمر ایک ناپاک چیز سے جسمِ انسانی ملوث رہے گا۔

(۳) کسی چیز کو ہبہ کرنے یا عطیہ کے طور پر کسی کو دینے کے لیے یہ شرط ہے وہ شے مال ہو، اور دینے والے کی ملک ہو، اور یہی شرط وصیت کے لیے بھی ہے۔ جیسا کہ **فتاوی عالمگیری** میں ہے:

أَمَّا مَا يَرْجِعُ إِلَى الْوَاهِبِ، فَهُوَ أَنْ يَكُونَ الْوَاهِبُ مِنْ أَهْلِ الْهِبَةِ، وَكَوْنُهُ مِنْ أَهْلِهَا أَنْ يَكُونَ حُرًّا عَاقِلًا بَالِغًا مَالِكًا لِلْمَوْهُوبِ حَتَّى لَوْ كَانَ عَبْدًا أَوْ مُكَاتَبًا أَوْ مُدَبَّرًا أَوْ أُمَّ وَلَدٍ أَوْ مَنْ فِي رَقَبَتِهِ شَيْءٌ مِنْ الرِّقِّ أَوْ كَانَ صَغِيرًا أَوْ مَجْنُونًا أَوْ لَا يَكُونُ مَالِكًا لِلْمَوْهُوبِ لَا يَصِحُّ، هَكَذَا فِي

3- أحمد بن حنبل، **مسند الإمام أحمد بن حنبل** (بیروت: مؤسسۃ الرسالۃ، المحقق: شعیب الأرنؤوط وآخرون، الطبعۃ: الثانیۃ ۱۹۹۹م)، ۲۱۸/۳۔

4- أبوداود سلیمان بن الأشعث السجستانی، **سنن أبی داود**، (بیروت، دار الکتاب العربی، سن اشاعت ندارد)، ۴۸/۲۔

النِّهَايَةِ .وَأَمَّا مَا يَرْجِعُ إلَى الْمَوْهُوبِ فَأَنْوَاعٌ، مِنْهَا: أَنْ يَكُونَ مَوْجُودًا وَقْتَ الْهِبَةِ فَلَا يَجُوزُ هِبَةُ مَا لَيْسَ بِمَوْجُودٍ وَقْتَ الْعَقْدِ ... ومِنْهَا: أَنْ يَكُونَ مَالًا مُتَقَوِّمًا فَلَا تَجُوزُ هِبَةُ مَا لَيْسَ بِمَالٍ أَصْلًا كَالْحُرِّ وَالْمَيْتَةِ وَالدَّمِ وَصَيْدِ الْحَرَمِ وَالْخِنْزِيرِ وَغَيْرِ ذَلِكَ، وَلَا هِبَةُ مَا لَيْسَ بِمَالٍ مُطْلَقٍ كَأُمِّ الْوَلَدِ وَالْمُدَبَّرِ الْمُطْلَقِ وَالْمُكَاتَبِ، وَلَا هِبَةُ مَا لَيْسَ بِمَالٍ مُتَقَوِّمٍ كَالْخَمْرِ، كَذَا فِي الْبَدَائِع"۔[5]

فتاوی شامی میں ہے:

(وَشَرَائِطُهَا :كَوْنُ الْمُوصِي أَهْلًا لِلتَّمْلِيكِ) فَلَمْ تَجُزْ مِنْ صَغِيرٍ وَمَجْنُونٍ وَمُكَاتَبٍ إلَّا إذَا أَضَافَ لِعِتْقِهِ كَمَا سَيَجِيءُ (وَعَدَمُ اسْتِغْرَاقِهِ بِالدَّيْنِ) لِتَقَدُّمِهِ عَلَى الْوَصِيَّةِ كَمَا سَيَجِيءُ (وَ) كَوْنُ (الْمُوصَى لَهُ حَيًّا وَقْتَهَا) تَحْقِيقًا أَوْ تَقْدِيرًا لِيَشْمَلَ الْحَمْلَ الْمُوصَى لَهُ فَافْهَمْهُ فَإِنَّ بِهِ يَسْقُطُ إيرَادُ الشُّرُنْبُلَالِيِّ (وَ) كَوْنُهُ (غَيْرَ وَارِثٍ) وَقْتَ الْمَوْتِ (وَلَا قَاتِلٍ) وَهَلْ يُشْتَرَطُ كَوْنُهُ مَعْلُومًا. قُلْت: نَعَمْ كَمَا ذَكَرَهُ ابْنُ سُلْطَانٍ وَغَيْرُهُ فِي الْبَابِ الْآتِي (وَ) كَوْنُ (الْمُوصَى بِهِ قَابِلًا لِلتَّمَلُّكِ بَعْدَ مَوْتِ الْمُوصِي)"۔[6]

انسان کو اپنے اعضا میں حقِ منفعت تو حاصل ہے، مگر حقِ ملکیت حاصل نہیں ہے، جن اموال و منافع پر انسان کو حقِ مالکانہ حاصل نہ ہو انسان ان اموال یا منافع کی مالیت کسی دوسرے انسان کو منتقل نہیں کر سکتا۔

(۴) انسانی اعضا و جوارح انسان کے پاس امانت ہیں اور انسان ان کا نگران اور محافظ ہے، اور امین کو ایسے تصرفات کا اختیار نہیں ہوتا جس کی اجازت امانت رکھنے والے نے نہ دی ہو، جیسا کہ **فتاوی عالمگیری** میں ہے:

"وَأَمَّا حُكْمُهَا فَوُجُوبُ الْحِفْظِ عَلَى الْمُودَعِ وَصَيْرُورَةُ الْمَالِ أَمَانَةً فِي يَدِهِ وَوُجُوبُ أَدَائِهِ عِنْدَ طَلَبِ مَالِكِهِ، كَذَا فِي الشُّمُنِّيِّ.[7]

5- لجنة علماء برئاسة الملك المسلم للهند، **الفتاوى الهندية أو الفتاوى المكيرية**، (کوئٹہ، مکتبہ رشیدیہ، سن اشاعت ندارد)، ۳۷۴/۴۔

6- محمد أمين بن عمر ابن عابدين شامي، (المتوفى: ۱۲۵۲ھ)، **رد المحتار على الدر المختار** (فتاویٰ شامی)، (بيروت، دار الفكر، الطبعة: الثانية، ۱۴۱۲ھ - ۱۹۹۲م)، ۶۴۹/۶۔

7- **الفتاوى الهندية**، ۳۳۸/۴۔

(۵) انسان قابل احترام اور مکرم ہے، اس کے اعضا میں سے کسی عضو کو اس کے بدن سے الگ کرکے دوسرے انسان کو دینے میں انسانی تکریم کی خلاف ورزی لازم آتی ہے، یہی وجہ ہے کہ فقہا نے علاج ومعالجہ اور شدید مجبوری کے موقع پر بھی انسانی اعضا کے استعمال کو ممنوع قرار دیا ہے، چناچہ **شرح سیر الکبیر** میں ہے:

وَالْآدَمِيُّ مُحْتَرَمٌ بَعْدَ مَوْتِهِ عَلَى مَا كَانَ عَلَيْهِ فِي حَيَاتِهِ .فَكَمَا يَحْرُمُ التَّدَاوِي بِشَيْءٍ مِنْ الْآدَمِيِّ الْحَيِّ إكْرَامًا لَهُ فَكَذَلِكَ لَا يَجُوزُ التَّدَاوِي بِعَظْمِ الْمَيِّتِ .قَالَ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ : «كَسْرُ عَظْمِ الْمَيِّتِ كَكَسْرِ عَظْمِ الْحَيِّ»[8]

نیز جس طرح کسی زندہ آدمی کے کسی عضو کو لے کر علاج کرنا درست نہیں ہے، اسی طرح کسی مردہ انسان کے عضو سے بھی علاج کرنا جائز نہیں ہے۔ جیسا کہ **فتاوی ہندیہ** میں ہے:

الِانْتِفَاعُ بِاجزا الْآدَمِيِّ لَمْ يَجُزْ، قِيلَ: لِلنَّجَاسَةِ، وَقِيلَ :لِلْكَرَامَةِ، هُوَ الصَّحِيحُ، كَذَا فِي جَوَاهِرِ الْأَخْلَاطِيِّ[9]

یعنی آدمی کے تمام اعضا سے فائدہ اٹھانے کی حرمت اس کی تکریم واحترام کے پیشِ نظر ہے، تاکہ جس ہستی کو اللہ تعالی نے مکرم ومحترم بنایا ہے لوگ اس کے اعضا وجوارح کو استعمال کرنے کی جسارت نہ کریں۔

(۶) اگر انسانی اعضا کی پیوندکاری کو جائز قرار دیا جائے تو یہ پوری انسانیت کے لیے ایک بڑا خطرہ اور تباہی کا ذریعہ بنے گا، کیوں کہ موجودہ زمانہ کے حالات و ماحول اور معاشرہ میں پھیلی ہوئی بددیانتی کو دیکھتے ہوئے کوئی بعید نہیں کہ لوگ اعضا کی منتقلی کے جواز کے فتووں کا بے جا استعمال کرتے ہوئے اسے باقاعدہ ایک کاروبار کی شکل دے دیں اور انہی اعضا کو اپنا ذریعۂ معاش بنالیں۔ اس کا نتیجہ یہ ہوگا کہ:

1) بازار میں دیگر اشیاء کی طرح انسانی اعضا کی بھی علانیہ ورنہ خفیہ خرید وفروخت شروع ہو جائے گی، جو بلاشبہ انسانی شرافت کے خلاف اور ناجائز ہے؛

8- محمد بن أحمد السرخسي، **شرح السير الكبير**، (بيروت: الشركة الشرقية للإعلانات، ۱۹۷۱م)، ۱/ ۸۹۔

9- **الفتاوى الهندية**، ۳۵۴/۵۔

2) غربت زدہ لوگ اپنا اور بچوں کا پیٹ پالنے کے لیے اور اپنی ضروریات پوری کرنے کے لیے اپنے اعضا فروخت کرنا شروع کر دیں گے۔

3) مردوں کی بے حرمتی اور اُن کے ساتھ ظالمانہ رویّہ شروع ہو جائے گا، بالخصوص لاوارث مردے اپنے بہت سے اعضا سے محروم ہو کر دنیا سے جایا کریں گے، اور یہ بھی بعید نہیں کہ مال و دلت کے لالچی اور پُجاری مدفون لاشوں کو اکھاڑ کر اپنی ہوس پوری کرنے لگیں، جیسا کہ مختلف ذرائع سے سننے میں آتا رہتا ہے۔

4) خدانخواستہ یہ معاملہ بڑھتا رہا تو صرف اپنی موت مرنے والوں تک ہی یہ سلسلہ محدود نہیں رہے گا، بلکہ اس کام کے لیے بہت سے معصوم انسانوں کے قتل کا بازار گرم ہو جانا اور اس مقصد کے لیے اغوا کا شروع ہونا ممکن ہے جو پورے انسانی معاشرے کی تباہی کا اعلان ہے۔ چنانچہ مفتیٔ اعظم پاکستان حضرت مولانا مفتی محمد شفیع صاحب قدس اللہ سرہ تحریر فرماتے ہیں:

''انسان کے اعضا و اجزا انسان کی اپنی ملکیت نہیں ہیں جن میں وہ مالکانہ تصرفات کر سکے، اسی لیے ایک انسان اپنی جان یا اپنے اعضا و جوارح کو نہ بیچ سکتا ہے نہ کسی کو ہدیہ اور ہبہ کے طور پر دے سکتا ہے، اور نہ ان چیزوں کو اپنے اختیار سے ہلاک و ضائع کر سکتا ہے۔ شریعتِ اسلامیہ کے اصول میں تو خودکشی کرنا اور اپنی جان یا اعضا رضاکارانہ طور پر یا بقیمت کسی کو دے دینا قطعی طور حرام ہی ہے جس پر قرآن و سنت کی نصوصِ صریحہ موجود ہیں، تقریباً دنیا کے ہر مذہب و ملت اور عام حکومتوں کے قوانین میں اس کی گنجائش نہیں، اس لیے کسی زندہ انسان کا کوئی عضو کاٹ کر دوسرے انسان میں لگا دینا اس کی رضامندی سے بھی جائز نہیں ۔۔۔ شریعتِ اسلام نے صرف زندہ انسان کے کارآمد اعضا ہی کا نہیں بلکہ قطع شدہ بے کار اعضا و اجزا کا استعمال بھی حرام قرار دیا ہے، اور مردہ انسان کے کسی عضو کی قطع و برید کو بھی ناجائز کہا ہے، اور اس معاملہ میں کسی کی اجازت اور رضامندی سے بھی اس کے اعضا و اجزا کے استعمال کی اجازت نہیں دی، اور اس میں مسلم و کافر سب کا حکم یکساں ہے؛ کیوں کہ یہ انسانیت کا حق ہے جو سب میں برابر ہے۔ تکریمِ انسانی کو شریعتِ اسلام نے وہ مقام عطا کیا ہے کہ کسی وقت کسی حال کسی کو انسان کے اعضا و اجزا حاصل کرنے کی طمع دامن گیر نہ ہو، اور اس طرح یہ مخدومِ کائنات اور اس کے اعضا عام استعمال کی چیزوں سے بالاتر ہیں جن کو کاٹ چھانٹ کر یا کوٹ پیس کر غذاؤں اور دواؤں اور دوسرے مفادات میں استعمال کیا جاتا ہے، اس

پر ائمہ اربعہ اور پوری امت کے فقہا متفق ہیں، اور نہ صرف شریعتِ اسلام بلکہ شرائعِ سابقہ اور تقریباً ہر مذہب و ملت میں یہی قانون ہے۔"[10]

انسانی اعضا کی پیوندکاری کے جواز کے دلائل:

انسانی اعضا کی پیوندکاری کے حوالے سے دوسرا نقطہ نگاہ جواز کا ہے،اس کی تائید میں حسبِ ذیل دلائل پیش کئے جاتے ہیں:۔

اولا: بے شک کتاب و سنت کے دلائل، موت و حیات ہر دو صورتوں میں، وجوب تکریم انسانیت پر دلالت کرتے ہیں مگر بعض حالات مستثنیٰ ہیں اور ان میں بوقت ضرورت مسلمان کا خون بہانا جائز ہے اور موت و حیات ہر دو صورتوں میں انسانی جسم کی قطع و برید بھی،اور یہ جواز اس صورت میں ہوتا ہے جب حاجت و ضرورت کا تقاضا ہو یا کوئی مصلحت پیش نظر ہو۔مصلحت سے مراد وہ چیز ہے جو مقاصد شریعت کی حفاظت کرے۔یاد رہے کہ مقاصد شریعت پانچ ہیں:۔

(۱) دین (۲) جان

(۳) عقل (۴) نسل اور

(۵) مال کی حفاظت

جو چیز ان اصول خمسہ میں سے کسی کی حفاظت کا ذریعہ بنے وہ مصلحت ہے اور ہر وہ چیز جس سے ان اصول خمسہ میں سے کسی پر زد پڑے وہ مفسدت ہے۔اس روح شریعت کو سامنے رکھتے ہوئے علما و فقہا نے جن اصولوں کا استنباط کیا ہے، ان میں سے ایک مسلمہ اصول یہ ہے کہ:

"الضرورات تبیح المحظورات"[11]

10- مفتی محمد شفیع،**انسانی اعضاء کی پیوند کاری**، (کراچی: دار الاشاعت)،ص:۳۶۔

(ضرورت محظور و ممنوع اشیاء کو بھی مباح کر دیتی ہے۔)

ثانیا: جسم اللہ تعالیٰ کی ملکیت ہے تو کیا انسان کو عطاء کردہ دیگر اشیاء اللہ تعالیٰ کی ملکیت نہیں ہیں ؟ جس طرح دیگر اشیاء میں انسان کو تصرف کا اختیار ہے۔اسی طرح اپنے جسم کے بارے میں بھی اسے تصرف اور وصیت کا اختیار حاصل ہے۔

اب ہم اسلامی فقہ اکیڈمی (انڈیا)، مجمع الفقہ الاسلامی (جدہ)، هيئة كبار العماء (سعودی عرب) کی جانب سے پیش کی جانے والی قراردادوں اور کونسل میں ''انسانی اعضا کی پیوند کاری'' کے حوالے سے ہونے والی کارروائی و سفارشات کا بالترتیب تقابلی و تنقیدی جائزہ لیں گے، بعد ازاں پاکستان میں رائج الوقت قوانین کا کونسل کی سفارشات کے ساتھ موازنہ بھی کیا جائے گا۔

اعضا کی پیوند کاری سے متعلق اسلامی فقہ اکیڈمی (انڈیا) کا موقف

اسلامی فقہ اکیڈمی (انڈیا) نے فقہی سیمینار مورخہ ۱۔۳ اپریل ۱۹۸۹ بمقام دہلی میں اعضا کی پیوند کاری سے متعلق درج ذیل قرارداد منظور کی:

1. کسی انسان کا کوئی عضو ناکارہ ہو چکا ہو اور اس عضو کے عمل کو آئندہ جاری رکھنے کے لئے کسی متبادل کی ضرورت ہو تو اس ضرورت کو پورا کرنے کے لئے:

أ. الف۔ غیر حیوانی اجزا کا استعمال؛

ب. ایسے جانوروں کے اعضا کا استعمال جن کا کھانا شرعا جائز ہے اور جو بطریقہ شرعی ذبح کئے گئے ہوں؛

ج. ج۔ جان کی ہلاکت یا عضو کے ضائع ہونے کا قوی خطرہ ہو اور اس مطلوبہ عضو کا بدل صرف ایسے جانوروں میں ہی مل سکتا ہے جن کا کھانا حرام ہے، یا حلال تو ہے لیکن بطریق شرعی ذبح نہیں کئے گئے ہیں، تو ایسی صورت میں ان غیر ماكول اللحم یا ماكول

11- زَيْنُ الْعَابِدِيْنَ بْنُ إِبْرَاهِيْمَ ابن نجيم، (۹۲۶-۹۷۰ھ)، **الْأَشْبَاهُ وَالنَّظَائِرُ عَلَى مَذْهَبِ أَبِي حَنِيْفَةَ النُّعْمَانِ**، (بیروت، دار الكتب العلمية، الطبعة : ۱۹۸۰م)، ص:۸۵۔

اللحم مگر غیر مذبوح جانوروں کے اعضا کا استعمال جائز ہے۔ اور اگر جان یا عضو کی ہلاکت کا شدید خطرہ نہ ہو تو خنزیر کے اجزا کا استعمال جائز نہیں۔

2. اسی طرح ایک انسان کے جسم کا ایک حصہ اسی انسان کے جسم میں بوقت حاجت استعمال کیا جانا جائز ہے۔

3. اعضا انسانی کا فروخت کرنا حرام ہے۔

4. اگر کوئی مریض ایسی حالت میں پہنچ جائے کہ اس کا کوئی عضو اس طرح بے کار ہو کر رہ گیا ہے کہ اگر اس عضو کی جگہ کسی دوسرے انسان کا عضو اس کے جسم میں پیوند نہ کیا جائے تو قوی خطرہ ہے کہ اس کی جان چلی جائے گی اور سوائے انسانی عضو کے کوئی دوسرا متبادل اس کمی کو پورا نہیں کر سکتا، اور ماہر قابل اعتماد اطباء کو یقین ہے کہ سوائے عضو انسانی کی پیوند کاری کے کوئی راستہ اس کی جان بچانے کا نہیں ہے، اور عضو انسانی کی پیوند کاری کی صورت میں ماہر اطباء کو ظن غالب ہے کہ اس کی جان بچ جائے گی اور متبادل عضو انسانی اس مریض کے لئے فراہم ہے تو ایسی ضرورت، مجبوری اور بے کسی کے عالم میں عضو انسانی کی پیوند کاری کرا کر جان بچانے کی تدبیر کرنا مریض کے لئے مباح ہو گا۔

5. اگر کوئی تندرست شخص ماہر اطباء کی رائے کی روشنی میں اس نتیجہ پر پہنچتا ہے کہ اگر اس کے دو گردوں میں سے ایک گردہ نکال لیا جائے تو بظاہر اس کی صحت پر کوئی اثر نہیں پڑے گا، اور وہ اپنے رشتہ دار مریض کو اس حال میں دیکھتا ہے کہ اس کا خرب گردہ اگر نہیں بدلا گیا تو بظاہر حال اس کی موت یقینی ہے اور اس کا کوئی متبادل موجود نہیں ہے تو ایسی حالت میں اس کے لئے جائز ہو گا کہ وہ بلا قیمت اپنا ایک گردہ اس مریض کو دے کر اس کی جان بچا لے۔

6. اگر کسی شخص نے ہدایت کی کہ اس کے مرنے کے بعد اس کے اعضا پیوند کاری کے لئے استعمال کئے جائیں، جسے عرف عام میں وصیت کہا جاتا ہے، از روئے شرع اسے اصطلاحی طور پر وصیت نہیں کہا جاسکتا اور ایسی وصیت اور خواہش شرعا قابل اعتبار نہیں۔[12]

اسلامی فقہ اکیڈمی (انڈیا) کے مطابق زندہ انسان اپنا عضو بوقتِ ضرورت اپنے جسم کے دوسرے حصے میں لگا سکتا ہے، اس طرح بوقتِ حاجت بلاقیمت مخصوص صورتوں میں دوسرے انسان کو بھی اپنا عضو فراہم کر سکتا ہے، لیکن اگر کوئی اپنا عضو مرنے کے بعد پیوند کاری کی غرض سے عطیہ کرنا چاہے، تو ایسی وصیت شرعا ناقابل اعتبار ہے، اور بعد از موت پیوند کاری ناجائز ہے۔ بہتر ہوتا اگر اسلامی فقہ اکیڈمی (انڈیا) توسع اختیار کرتے ہوئے عند الضرورۃ بعد از موت بھی پیوند کاری کی اجازت دیتی۔

اعضا کی پیوند کاری سے متعلق هيئة كبار العماء (سعودی عرب) کا موقف

هيئة كبار العماء (سعودی عرب) نے اپنے اجلاس منعقدہ مئی ۱۹۸۹ء میں اعضا کی پیوند کاری سے متعلق جو قرارداد[13] منظور کی اس کا خلاصہ چند نکات کی صورت میں یہ ہے:

1. اگر عضو عطیہ کرنے والا اپنی زندگی میں اپنے اعضا کی پیوند کاری کی کسی خاص شخص کے لیے یا عمومی طور پر وصیت کرے، اس صورت میں وصیت صحیح ہوگی اور یہ مثلہ کے زمرے میں نہیں آئے گی کیونکہ اس صورت میں وہ اپنی رضامندی سے مسلمان بھائی کو اپنے اعضا عطیہ کر رہا ہے؛
2. اگر میت نے اعضا کی پیوند کاری کی وصیت نہیں کی ہے لیکن ورثا میت اس کی موت کے بعد اس کے اعضا کا عطیہ کرنا چاہیں تو اس کی بھی اجازت ہے؛

12- بحوالہ ''اسلامی فقہ اکیڈمی، انڈیا'' کی آفیشل ویب سائٹ (www.ifa-india.org)۔

13- الرئاسة العامة لإدارات البحوث العلمية والإفتاء والدعوة والإرشاد، **مجلة البحوث الإسلامية**، ٢٢/ ٤٩-٥٠.

3. تیسری صورت یہ ہے کہ نہ میت نے کوئی وصیت کی ہے اور نہ ہی ورثا میت نے پیوند کاری کی اجازت دی ہے بلکہ ورثا میت نے اعضا عطیہ کرنے سے انکار کیا ہے، اس صورت میں اگر ''ولی المسلمین''، یعنی حکمران چاہے تو مصلحتِ عامہ کے پیشِ نظر میت کے اعضا پیوند کاری کے لیے استعمال کر سکتا ہے؛

4. زندہ انسان کا خون یا کوئی عضو اس صورت میں پیوند کاری کے لیے استعمال کیا جا سکتا ہے اگر وہ خود عطیہ کرنے پر راضی ہو۔

هیئة کبار العلما کا مؤقف درج ذیل وجوہات کی بناء پر محلِ نظر ہے:

أ. هیئة کبار العلما کے مؤقف میں حد سے زیادہ توسع ہے، اس میں انتہائی تفریط سے کام لیا گیا ہے، اس کی وجہ یہ ہے کہ هیئة کبار العلما کے نزدیک اگر میت نے اعضا کی پیوند کاری کے لیے وصیت نہ کی ہو اور نہ ہی ورثا میت نے اس کی اجازت دی ہو بلکہ صراحتاً انکار کیا ہو، اس صورت میں ''ولی المسلمین'' یعنی حکمران اگر مناسب سمجھے تو اعضا میت کو مصلحتِ عامہ کے نام پر پیوند کاری کے لیے استعمال کر سکتا ہے۔ هیئة کبار العلما کے مؤقف میں شاہی جھلک نظر آ رہی ہے، اس کی وجہ بھی شاید وہاں کا شاہانہ طرزِ حکومت ہے، حکمران کو اتنی چھوٹ دینا ہر گز صحیح نہیں کیونکہ ''اعضا کی پیوند کاری'' کا عمل اصلاً حرام ہے، علما کرام اور فقہا نے اس کی اجازت بوقتِ ضرورت اور بوقتِ حاجت دی ہے، اور تمام فقہا اور دیگر فقہی اداروں نے میت کی وصیت اور ورثاے میت میں سے ایک کی اجازت کو بہر صورت لازمی قرار دیا ہے۔ نیز میت کی وصیت کی عدم موجودگی اور ورثا میت کے انکار کے باوجود حکمران کو میت کے اعضا کی پیوند کاری کی اجازت دینے کے بہت سارے مفاسد اور نقصانات ہیں اور اس کے غلط استعمال کا قوی خدشہ ہے؛

ب. هیئة کبار العلما کے نزدیک اگر میت نے اپنے اعضا کی پیوند کاری کی اجازت نہ دی ہو بلکہ منع کیا ہو تو اس صورت میں ورثا میت اگر مناسب سمجھیں تو میت کے منع کرنے

کے باوجود اس کے اعضا پیوند کاری کے لیے استعمال کر سکتے ہیں، اس میں بھی تمام فقہا اور فقہی اداروں کی مخالفت کی گئی ہے، کسی فقیہہ نے ایسی صورت میں پیوند کاری کی اجازت نہیں دی ہے، نیز اس میں میت کی ایک طرح سے توہین ہے کہ اس کے منع کرنے کے باوجود اس کے اعضا پیوند کاری کے لیے استعمال کئے جائیں۔

ج. هيئة كبار العلما کا مؤقف ایک اور وجہ سے بھی قابل اعتراض ہے، کیونکہ دیگر تمام فقہا اور فقہی اداروں نے اعضا کی پیوند کاری کی اجازت انفرادی طور پر بوقتِ ضرورت دی ہے، عمومی اور اجتماعی طور پر کسی نے اجازت نہیں دی ہے، تمام فقہا اور فقہی اداروں کے برعکس هيئة كبار العلما نے ایک اجتماعی نظم کے تحت عمومی طور پر اعضا کے عطیہ کی اجازت دی ہے اور اس کے نقصانات اور مفاسد فوائد سے زیادہ ہونے کے قوی امکانات ہیں اور اس صورت میں اس کا غلط استعمال خارج از امکان نہیں؛

د. هيئة كبار العلما کے قرارداد کی عبارت سے معلوم ہوتا ہے کہ ایک مسلمان اپنے اعضا صرف مسلمان کو عطیہ کر سکتا ہے، اس میں غیر مسلم شہریوں کی بھی رعایت رکھنی چاہیے۔ اگر اس پابندی کو برقرار رکھنا ہے تو پھر یہاں ایک سوال یہ پیدا ہوتا ہے کہ کیا غیر مسلم کے اعضا مسلمان کو لگائے جا سکتے ہیں؟

اعضا کی پیوند کاری سے متعلق مجمع الفقہ الاسلامی (جدہ) کا موقف

مجلس مجمع الفقه الإسلامی (جدہ) نے اپنے اجلاس مورخہ ۶ فروری ۱۹۸۸ء میں منظور ہونے والی قرارداد [14] کا حاصل یہ ہے:

1) ایک انسان کے جسم کا ایک عضو اسی انسان کے جسم میں لگانا جائز ہے، لیکن اس بات کو یقینی بنانا ہوگا کہ پیوند کاری کے اس عمل کا فائدہ نقصان سے زیادہ ہو؛

2) اجزا/ اعضا جو دوبارہ نشوونما پا سکتے ہیں، جیسے خون اور جلد وغیرہ، ان اعضا/ اجزا کو

14- منظمة المؤتمر الإسلامی بجدة ، مجلة مجمع الفقه الإسلامی التابع لمنظمة المؤتمر الإسلامی بجدة، **مجلة مجمع الفقه الإسلامی**: العدد الأول، ۱ /۸۹.

دوسرے انسان کے جسم میں شرعی قواعد و ضوابط کی رعایت کرتے ہوئے لگایا جا سکتا ہے؛

3) انسان کے جسم کا وہ حصہ جو کسی بیماری کی وجہ سے الگ کر دیا گیا ہو، اس سے استفادہ کیا جا سکتا ہے، جیسے آنکھ کا قرنیہ؛

4) جن اعضا پر انسان کی زندگی کا دار و مدار ہو ان کا دوسرے انسان کو منتقل کرنا حرام ہے جیسے دل؛

5) زندہ انسان کے جسم سے ایسے اعضا کا منتقل کرنا حرام ہے، جن پر زندگی موقوف تو نہیں ہے، البتہ اس عضو کا اصل مقصد فوت ہو سکتا ہے، جیسے دونوں آنکھوں کے قرنیہ نکالنا؛

6) اگر کوئی موت کے بعد اپنے کسی عضو کی دوسرے انسان کے لیے وصیت کرے تو اس عضو کا منتقل کرنا جائز ہے، لیکن اگر کوئی لاوارث لاش ملے تو حکومت وقت یا متعلقہ اداروں کی اجازت سے اس کی پیوند کاری جائز ہے؛

7) جن صورتوں میں اعضا کی منتقلی کی اجازت دی گئی ہے، یہ اجازت ''بلا قیمت اور بلا معاوضہ'' منتقلی کے ساتھ مشروط ہے۔

مجمع الفقہ الاسلامی (جدہ) کی رائے معتدل اور حالات کے موافق ہے۔

اسلامی نظریاتی کونسل کی سفارش (۱۹۸۳۔۱۹۸۴ء)

کونسل نے اپنے چودھویں اجلاس منعقدہ بتاریخ ۱۴؍فروری ۱۹۸۳ء میں زیر صدارت چیئرمین کونسل جسٹس ڈاکٹر تنزیل الرحمٰن اس موضوع پر غور و فکر کرتے ہوئے حسبِ ذیل فیصلہ کیا:

اس مسئلہ کے تین پہلو ہیں:

1) کسی شخص کا اپنے عضو جسمانی کا عطیہ کرنا؛

2) اس عضو کا نکالنا؛ اور

3) اس عضو کا دوسرے زندہ انسان کے جسم میں پیوند کاری کرنا۔

نمبر (ا) بالا میں مذکورہ مسئلہ کی دو صورتیں ہو سکتی ہیں۔

أ. کسی زندہ شخص کا اپنی زندگی میں کسی عضو کا عطیہ؛

ب. کسی زندہ شخص کا اپنی زندگی میں یہ وصیت کرنا کہ اس کے مرنے کے بعد وہ عضو اس کے جسم سے نکال کر کسی دوسرے ضرورت مند شخص کو لگا دیا جائے۔

جہاں تک (الف) میں مذکور صورت کا تعلق ہے، کونسل کے نزدیک کسی زندہ شخص کے جسم سے کوئی عضو اس کی اجازت کے باوجود مندرجہ ذیل وجوہ کی بناء پر نکالنا ناجائز ہے۔

1) نظام قدرت میں یہ دخل اندازی کے مترادف ہے۔ چونکہ اللہ تعالیٰ نے انسان کو تمام اعضا اور صلاحیتوں کے ساتھ ایک اکائی کے طور پر پیدا کیا ہے۔ اس اکائی میں سے کوئی جزء الگ کر لیا جائے تو یہ اکائی مکمل حالت میں باقی نہیں رہتی، بلکہ ناقص رہ جاتی ہے؛

2) شریعت کی رو سے انسانی جسم انسان کی ملکیت نہیں بلکہ اللہ تعالیٰ کی ودیعت ہے اور انسان کو اس ودیعت میں قطع و برید کا حق حاصل نہیں اور اس بناء پر فقہا اسلام میں کوئی فقیہ بھی اس عطیہ کو جائز نہیں سمجھتا؛

3) زندہ انسانی جسم میں کسی عضو کے قطع کر دینے سے اس جسم کی بحیثیت اکائی صلاحیت کا ردائماً متاثر ہو رہی ہے؛

4) اللہ تعالیٰ کے دیئے ہوئے دو دو اعضا میں سے ایک کا عطیہ دے دینے سے مستقبل میں دوسرے عضو کی ضرورت پڑ سکتی ہے؛

5) موجودہ مادی دور میں انسانی اعضا کی خرید و فروخت کا مذموم کاروبار شروع ہو جائے گا جس سے اشرف المخلوقات کا جسم بھی بھیڑ بکریوں کی طرح بکاؤ مال بن کر رہ جائے گا جیسا کہ انسانی خون کا کھلے بندوں کاروبار ہو رہا ہے اسی طرح پاکستان میں متمول حضرات کی طرف سے یہ اشتہارات آ رہے ہیں کہ جو اپنا گردہ دے گا۔ اس کو ایک لاکھ روپیہ معاوضہ دیا جائے گا۔ لہذا سدِ ذریعہ کے طور پر بھی زندہ انسان کے جسم اور اعضا کو کاروباری تعامل کا موضوع بننے سے روکنا ضروری ہے۔

جہاں تک (ب) میں مذکورہ صورت کا تعلق ہے کسی میت کی وصیت کے مطابق اس کی

موت واقع ہو جانے کے بعد اس کا عضو قطع کیا جا سکتا ہے۔

اس وصیت کی حیثیت اصطلاحی وصیت کی نہیں ہے بلکہ اس سے مراد موصی (وصیت کرنے والا) شخص کی یہ خواہش ہے کہ اس کے مرنے کے بعد اس کے اعضا اس کے کام نہیں آئیں گے اور ان سے کسی دوسرے ضرورت مند مضطر شخص کے فائدہ ہونے کی توقع ہے اگر اس کی اس خواہش کی تکمیل سے دوسرے شخص کو فائدہ حاصل ہو سکے تو اس کی یہ خواہش اس کے مرنے کے بعد پوری کی جا سکتی ہے۔

البتہ اس وصیت کی تعمیل مندرجہ ذیل شرائط کے ساتھ ہو گی۔

أ. یہ کہ وہ عضو موصی کی طرف سے خالصتاً للہ ہدیۃً ہونا چاہیے؛

ب. انتقال کے بعد ورثا میت اس کے جسم سے عضو قطع کرنے کی اجازت متفقہ طور پر دیں۔ اگر کوئی ایک بھی وارث اس پر رضامند نہ ہو تو وہ عضو قطع نہیں کیا جائے گا۔ البتہ کسی لاوارث شخص کی وصیت پر اس کی موت کے بعد اس کی نعش سے کوئی عضو علیحدہ کرنے کے لئے ایسی رضامندی کی ضرورت نہ ہو گی؛

ج. موصی کی وصیت کے مطابق اس کا عضو وثقہ متقی ڈاکٹروں کی اس تصدیق پر قطع کیا جائے گا کہ اس شخص کی موت واقع ہو چکی ہے؛

د. ایک ثقہ متقی مسلمان ڈاکٹر اس نیت سے وہ عضو الگ کرے کہ اس سے کسی ضرورت مند مضطر شخص کو فائدہ پہنچایا جائے؛

ہ. کسی مسلمان کا کوئی عضو کسی غیر مسلم کو نہیں لگایا جائے گا۔

مندرجہ بالا وجوہ کی بناء پر مذکورہ عطیہ صرف مرنے کے بعد ہو گا۔

مرنے کے بعد کسی دوسرے کو فائدہ پہنچانے کے لئے نیک ارادے اور نیک خواہش کی بناء پر کسی عضو کو کاٹ کر جدا کرنا مثلہ نہیں کیونکہ وہ احادیث جو مثلہ (شکل بگاڑنے) اور میت کی ہڈی توڑنے (کسر عظم میت) کی ممانعت کی بارے میں آئی ہیں۔ ان میں ممانعت کی علت، بے حرمتی، تحقیر اور ہتک احترام آمیت ہے اور یہاں مرنے کے بعد عضو نکالنے اور پیوند کاری کے سلسلے میں کئے جانے والے عمل جراحی سے میت کی بے حرمتی اور ہتک مقصود نہیں ہوتی بلکہ اس سے ایک دوسرے انسان کو

حدود شرع میں رہتے ہوئے فائدہ پہنچانا مقصود ہے۔اس کے سبب جبکہ معطی کو کوئی ضرر لاحق نہیں ہوتا۔اس لئے یہاں علت جواز مصلحت انسانی مفاد عامہ، دفعِ ضرر اور ازالہ مشقت ہے۔

چنانچہ کونسل نے بکثرت رائے فیصلہ کیا کہ مندرجہ بالا شرائط کو ملحوظ رکھتے ہوئے انسانی اعضا کی پیوند کاری جائز ہے۔(15)

اسلامی نظریاتی کونسل کی سفارش (۸۴- ۱۹۸۳ء) درج ذیل وجوہ کی بناپر محل نظر ہے:

اولا: اسلامی نظریاتی کونسل کی سفارش میں بھی اعتدال نظر نہیں آرہا، کیونکہ کونسل کی اس سفارش کے مطابق اگر کوئی اپنی

زندگی میں اپنا عضو کسی کو عطیہ کرنا چاہے تو اس کی اجازت کے باوجود اس کا عضو نکالنا جائز نہیں ہے۔

ثانیا: اسلامی نظریاتی کونسل کی مذکورہ بالا سفارش کی درج ذیل عبارت محل نظر ہے:

''کسی مسلمان کا کوئی عضو کسی غیر مسلم کو نہیں لگایا جائے گا۔''

کونسل کی وہ سفارشات جو ملک کے شہریوں بشمول غیر مسلم شہریوں سے متعلق ہوں، ان میں غیر مسلم شہریوں کی بھی رعایت رکھنی چاہیے، بہت سے غیر مسلم شہری اپنے اعضا بعد از موت عطیہ کرنے کی وصیت کر جاتے ہیں، نیز بیشتر غیر مسلم شہریوں کو اعضا کی ضرورت پڑ سکتی ہے، کونسل کا یہ کہنا کہ ''کسی مسلمان کا عضو کسی غیر مسلم کو نہیں لگایا جائے گا،'' سمجھ سے بالاتر ہے۔ آخر غیر مسلم بھی پاکستان کے برابر درجے کے شہری ہیں، اعضا کی پیوند کاری میں مسلم و غیر مسلم کی تمیز و تفریق نہیں ہونی چاہیے۔ یہاں تعجب کی بات یہ ہے کہ کونسل نے مسلمان کا عضو کسی غیر مسلم کو لگانے سے تو منع کر دیا ہے، لیکن کیا کسی غیر مسلم کا عضو کسی مسلمان کو لگایا جائے گا؟، اس سلسلے میں کونسل خاموش ہے۔

ثالثا: اسلامی نظریاتی کونسل کو چاہئے کہ وہ لاوارث شخص کی لاش کے حوالے سے بھی قانون سازی کرے،

15- اسلامی نظریاتی کونسل، **سالانہ رپورٹ ۱۹۸۳-۱۹۸۴ء**، (پاکستان، پرنٹنگ کارپوریشن آف پاکستان پریس، طبع اول، ۱۹۸۴ء)، ص ۳۰۳-۳۰۵۔

آیا اس کے اعضا پیوند کاری کے لیے استعمال کیے جا سکتے ہیں یا نہیں؟ مجمع الفقہ الاسلامی (جدہ) کے مطابق لاوارث لاش کے لیے حکومت وقت / متعلقہ ادارے اجازت دینے کے مجاز ہیں، بہتر ہو گا کہ اسلامی نظریاتی کونسل اپنی سفارش میں اس نکتے کو شامل کرے۔

رابعا: کونسل کی سفارش کی درج ذیل عبارت محل نظر ہے:

> ''انتقال کے بعد ورثا میت اس کے جسم سے عضو قطع کرنے کی اجازت متفقہ طور پر دیں۔ اگر کوئی ایک بھی وارث اس پر رضامند نہ ہو تو وہ عضو قطع نہیں کیا جائے گا۔ البتہ کسی لاوارث شخص کی وصیت پر اس کی موت کے بعد اس کی نعش سے کوئی عضو علیحدہ کرنے کے لئے ایسی رضامندی کی ضرورت نہ ہو گی۔''

گویا کہ کونسل کے نزدیک اگر کوئی اپنی زندگی میں اپنے کسی عضو کے عطیہ کرنے کی وصیت کر جائے تو بعد از موت وصیت قابل عمل تب ہو گی جب میت کے تمام ورثا عضو قطع کرنے کی اجازت دیں، اگر کوئی ایک بھی وارث اس پر رضامند نہ ہو تو عضو قطع نہیں کیا جائے گا۔ میت کے وصیت کرنے کے باوجود عضو قطع کرنے کو ورثا میت کی اجازت سے مشروط کرنے کی ضرورت نہیں، بلکہ اگر شرعا کوئی قابل اعتراض امر نہ ہو تو میت کی وصیت کا پاس رکھتے ہوئے اس پر عمل کرنا چاہیے۔

اسلامی نظریاتی کونسل کی سفارش (۲۰۰۰۔۲۰۰۱ء)

کونسل نے اپنے ۱۴۲ویں اجلاس منعقدہ بتاریخ ۱۴۔۱۶ فروری ۲۰۰۱ء میں اس موضوع پر غور و فکر کرتے ہوئے حسبِ ذیل فیصلہ کیا:

1. کسی عطیہ دینے والے کی زندگی کو خطرہ سے دوچار کیے بغیر کسی دوسرے انسان کی شفایابی کے لیے انسانی عضو کی پیوندکاری، جبکہ یہی طریق علاج مؤثر ہو، شرعاً ناجائز نہیں؛
2. کسی انسان کی شفایابی کے لیے اپنے کسی عضو کے عطیہ کے لیے وصیت کرنا شریعت کی رو سے ناجائز نہیں؛

3. اس پر تمام علما کا اتفاق ہے کہ پیوندکاری کی غرض سے انسانی اعضا کی خریدو فروخت نا جائز ہے؛
4. میت کی وصیت کی عدم موجودگی میں اس کے ورثا کو یہ حق حاصل نہیں کہ وہ اس کے جسم کا کوئی عضو بطور عطیہ کسی مریض کو دے دیں؛
5. طبّی تحقیق کے لیے انسانی لاشوں کی بے حرمتی کی اجازت نہیں دی جاسکتی؛
6. لاوارث لاشوں کے دفن کو یقینی بنایا جائے۔ بالخصوص وہ لاوارث لاشیں جن سے پیوند کاری کی غرض سے اعضا حاصل کر لیے گئے ہوں انہیں پورے اہتمام سے دفن کیا جائے۔ ہسپتالوں اور میڈیکل کالجوں سے ملحق قبرستانوں میں ایسی لاشوں کے لیے جگہ مختص ہونی چاہیے، اور وہاں یہ لکھا جائے ''یہ وہ لوگ ہیں جن کے اعضا انسانیت کی خدمت کے کام آئے۔'' وزارتِ قانون کو لاوارث میتوں کی عزت و احترام سے تدوفین کو یقینی بنانے کے لیے قانون سازی کرنی چاہیے۔[16]

اسلامی نظریاتی کونسل کی سفارش (۰۱- ۲۰۰۰ء) مندرجہ ذیل وجوہات کی بناپر محل نظر ہے:

الف: کونسل کی سفارش ہذا گذشتہ سفارش ۸۴- ۱۹۸۳ء سے متعارض ہے، کیونکہ ۸۴- ۱۹۸۳ء کے مطابق کوئی انسان حالت حیات میں اپنا عضو کسی اور انسان کو عطیہ نہیں کر سکتا، جب کہ ۰۱-۲۰۰۰ء کی سفارش کے مطابق اس کی اجازت ہے۔

ب: کونسل نے لاوارث لاشوں میں پیوندکاری کے لئے مجاز اتھارٹی کی اجازت کا ذکر نہیں کیا ہے، درج ذیل عبارت ملاحظہ ہو:

> ''لاشوں کے دفن کو یقینی بنایا جائے۔ بالخصوص وہ لاوارث لاشیں جن سے پیوندکاری کی غرض سے اعضا حاصل کر لیے گئے ہوں انہیں پورے اہتمام سے دفن کیا جائے۔''

16- اسلامی نظریاتی کونسل، **سالانہ رپورٹ ۲۰۰۰-۲۰۰۱ء**، (اسلام آباد: ادارہ تحقیقات اسلامی، طبع اول، ۲۰۰۲ء)، ص ۱۰۱-۱۰۲۔

مذکورہ بالا عبارت سے معلوم ہوتا ہے کہ کونسل لاوارث لاشوں کی پیوند کاری کا قائل ہے۔ سوال یہ اٹھتا ہے کہ لاوارث لاشوں کی پیوند کاری کی اجازت کس سے لی جائے گی۔ کیونکہ کونسل نے اپنی سفارش ۸۴- ۱۹۸۳ء میں میت کی وصیت کے باوجود اعضا کی منتقلی کے لیے ورثا کی رضامندی واجازت کو ضروری قرار دیا تھا۔ کونسل کی اس سفارش میں لاوارث لاش میں پیوند کاری کی اجازت کے حوالے سے مجاز اتھارٹی کی صراحت تو نہیں کی گئی ہے لیکن کونسل کی جانب سے اسی سال (۲۰۰۰۔۲۰۰۱ء) حکومت کو ارسال کردہ مسودے کی شق نمبر ۵ کی درج ذیل عبارت سے معلوم ہوتا ہے کہ لاوارث لاش میں بغیر کسی کی اجازت کے پیوند کاری کی جاسکتی ہے:

> 4. Removal of organs of certain dead bodies.- (1) Where a dead body is found as a result of an accident, trauma or in similar circumstances and is not identified nor claimed for burial by any relative, an autopsy of the dead body shall be carried out for examination and determination if the organs of such dead body were qualified, healthy and suitable for transplantation to another person.

لاوارث لاشوں میں پیوند کاری کی اس طرح کھلی اجازت بہت سے مفاسد کا راستہ کھول لے گی، بہتر ہوگا کہ اسلامی نظریاتی کونسل، مجمع الفقہ الاسلامی (جدہ) کی طرز پر لاوارث لاشوں میں پیوند کاری کو ''حکومت وقت'' کی اجازت سے مشروط کردے۔

ج: مذکورہ بالا نقل کردہ عبارت کا تقاضا یہ ہے کہ کونسل لاوارث لاشوں میں پیوند کاری کا قائل ہے، اب اجازت کون دے گا؟ اس کا کونسل کی سفارش ۱۰- ۲۰۰۰ء یا کونسل کے مرتب کردہ مسودے میں کہیں ذکر نہیں ہے، جبکہ کونسل کی اسی سفارش کی شق نمبر ۴ میں ہے کہ میت کی وصیت کی عدم موجودگی میں ورثا کو یہ حق حاصل نہیں کہ وہ اس کے جسم کا کوئی عضو بطور عطیہ کسی مریض کو دے دیں۔ اس سفارش کی ''شق نمبر ۴'' اور ''شق نمبر ۶'' میں تناقض ہے، بایں معنی کہ ''شق نمبر ۴'' میں میت کی وصیت کی عدم موجودگی میں ورثا کی اجازت کو ناکافی قرار دیتے ہوئے اعضا کی منتقلی کی اجازت نہیں دی گئی ہے جبکہ شق نمبر ۶ میں میت کی وصیت اور ورثا دونوں کی عدم موجودگی کے باوجود لاوارث لاش کی پیوند کاری کی اجازت دی گئی ہے۔ کونسل کے انسانی اعضا کی پیوند کاری سے متعلق مرتب کردہ مسودہ سے بھی یہی معلوم ہوتا ہے کہ لاوارث لاشوں میں بنا کسی کی اجازت

کے پیوند کاری کی جاسکتی ہے۔

د: اسلامی نظریاتی کونسل نے اپنی گذشتہ سفارش ۸۴- ۱۹۸۳ء میں قرار دیا تھا کہ میت کی وصیت کی صورت میں بھی تمام ورثا کا عضو کے قطع/منتقل کرنے پر متفق ہونا ضروری ہے، جبکہ کونسل کی اس سفارش ۱۰- ۲۰۰۰ء کے مطابق میت کی وصیت کی عدم موجودگی میں ورثا کو یہ حق حاصل نہیں کہ وہ اس کے جسم کا کوئی عضو بطور عطیہ کسی مریض کو دے دیں۔ گذشتہ سفارش میں ورثا کی اجازت کو زیادہ اہم قرار دیتے ہوئے میت کی وصیت کے باوجود اعضا کی منتقلی کو ان کی اجازت سے مشروط کر دیا گیا تھا، جبکہ اس سفارش میں میت کی وصیت کو اہم قرار دیا گیا ہے، بایں معنی کہ اگر میت نے وصیت نہیں کی ہے تو ورثا کو حق نہیں کہ اس کے جسم کا کوئی عضو بطور عطیہ کسی کو دے دیں۔ میرے خیال سے میت کی وصیت اور ورثا کی اجازت دونوں کی اپنی جگہ اہمیت ہے، بہتر ہوگا کہ میت کی وصیت اور ورثا کی اجازت دونوں میں سے ایک کی موجودگی کو کافی قرار دیا جائے اور اختلاف کی صورت میں میت کی وصیت کو ترجیح دی جائے۔

انسانی اعضا کی پیوند کاری سے متعلق اسلامی نظریاتی کونسل کے مرتب کردہ مسودہ قانون پر ایک نظر

انسانی اعضا کی پیوند کاری سے متعلق کونسل نے جو مسودہ قانون[17] پیش کیا ہے اس سے متعلق ہماری رائے یہ ہے:

1. اسلامی نظریاتی کونسل کے مسودے کی دفعہ نمبر ۳ میں پیوند کاری کی وصیت کے لیے ۱۸ سال کی حد مقرر کی گئی ہے، اس کی کوئی وجہ سمجھ میں نہیں آتی، اس کے لیے کوئی ٹھوس بنیاد اور مضبوط وجہ ہونی چاہیے، کیونکہ ۱۸ سال سے کم عمر والا بھی اس قسم کی وصیت کرنے کا اہل ہے؛
2. کونسل کے مرتب کردہ مسودے کے دفعہ نمبر ۴ میں لاوارث لاش میں پیوند کاری کو کسی مجاز اتھارٹی کی اجازت سے مشروط نہیں کیا گیا ہے، جس سے بظاہر معلوم ہوتا ہے کہ لاوارث لاش میں پیوند کاری کے لیے کسی کی اجازت کی ضرورت نہیں، کونسل کو چاہیے

17- اسلامی نظریاتی کونسل، **سالانہ رپورٹ ۲۰۰۰-۲۰۰۱ء**، (اسلام آباد، ادارہ تحقیقات اسلامی، طبع اول، ۲۰۰۲ء)، ص ۱۰۳-۱۱۴۔

کہ وہ اس حوالے سے حکومت کو ایک کمیٹی بنانے کی تجویز دے، جو لاوارث لاش میں پیوند کاری کی منظوری دے گی، جیسا کہ مجمع الفقہ الاسلامی (جدہ) نے اسے ''حکومت وقت'' کی اجازت سے مشروط کر دیا ہے؛

3. مسودہ ہذا کے دفعہ نمبر ۵ میں ہے کہ لاوارث لاشوں کو پیوند کاری کے بعد اسلامی تعلیمات کے مطابق قابل احترام طریقے سے دفن کیا جائے۔ اس دفعہ میں مسلم و غیر مسلم دونوں کو شامل کرنا چاہیے، کیونکہ غیر مسلم بھی مسلمانوں کی طرح اس ملک کے شہری ہیں، وہ بھی اپنے اعضا کی پیوند کاری کی وصیت کر سکتے ہیں، نیز ان کی تدفین ان کے مذہبی رسوم کے مطابق ہونی چاہیے؛

4. دفعہ نمبر ۶ میں ''ایویلویشن کمیٹی'' کا ذکر ہے، اس کمیٹی میں ایک معروف عالم دین کو بھی شامل کرنا چاہیے تاکہ وہ اس پورے عمل کی نگرانی میں شریک ہو؛ اور

5. فعہ نمبر ۱۱ میں ''پالیسی اینڈ مانیٹرنگ بورڈ'' تشکیل دینے کا ذکر کیا گیا ہے، اس میں ایک عالم دین کی شمولیت بے حد ضروری ہے تاکہ وہ اس عمل میں خلاف شرع امور کی روک تھام کرے۔

انسانی اعضا کی پیوند کاری سے متعلق موجودہ قانون پر نقد

انسانی اعضا کی پیوند کاری سے متعلق پاکستان کا موجودہ قانون وہی ہے جو ۲۰۱۰ میں بنیا گیا ہے۔ اس قانون کی دفعہ نمبر ۳ میں کونسل کے مسودے کی طرح حکومت کی جانب سے تیار کردہ قانون میں بھی اعضا عطیہ کرنے والے کے لیے ۱۸ سال کی حد مقرر کی گئی ہے، جس کی کوئی معقول وجہ بظاہر نہیں ہے۔ دفعہ نمبر ۵ میں ''ایویلویشن کمیٹی'' بنانے کا ذکر ہے، اس کمیٹی میں ایک عالم دین کی شمولیت ضروری ہے تاکہ وہ پیوند کاری کے سارے عمل کی شرعی طریقے اور شرائط کے مطابق انجام دہی کو یقینی بنائے۔ دفعہ نمبر ۸ میں مانیٹرنگ اتھارٹی تشکیل دینے کا ذکر کیا گیا ہے، اس میں ایک عالم دین کی شمولیت بے حد ضروری ہے تاکہ وہ اس عمل میں خلاف شرع امور کی روک تھام کرے۔ دفعہ نمبر ۱۱ (۴) میں ہے کہ وفاقی حکومت، مانیٹرنگ اتھارٹی کے مشورے سے ایک فنڈ قائم کرے گی، جس میں وفاقی و صوبائی حکومتوں کی جانب سے گرانٹز اور این جی اوز کی جانب سے رقوم بصورت عطیات وصول کیے

جائیں گے۔ این جی اوز کی جانب سے عطیات کی صورت میں رقوم کی وصولی قابل اعتراض امر ہے، اس سے مانیٹرنگ اتھارٹی کی خود مختاری کے حوالے سے شکوک پیدا ہوں گے اور اس طرح کی فنڈنگ کے نتیجے میں مفاسد اور شرعی خلاف ورزیوں کا پیدا ہونا خارج از امکان نہیں۔ دفعہ ۱۶ میں ہے کہ اگر وفاقی حکومت یا کسی بھی شخص کی جانب سے اس ایکٹ کی روشنی میں ''نیک نیتی'' سے اٹھائے گئے اقدامات سے کسی کو کوئی نقصان پہنچے تو وفاقی حکومت یا اس شخص کے خلاف کسی قسم کی کارروائی نہیں کی جائے گی۔ اسلام بھی نیک نیتی سے کیے گئے افعال پر مواخذہ نہیں کرتا تاہم شریعت میں سرکاری امور کی بد دیانتی کے ساتھ انجام دہی کو قابل معافی نہیں سمجھا گیا۔ کیونکہ اسلام میں لوگوں کی جان و مال اور آبرو کی حفاظت کے ذمہ دار سرکاری عمال کو ٹھہرایا گیا ہے اس لیے نیک نیتی سے کیے گئے بعض افعال کو قانونی کارروائی سے مستثنیٰ قرار دینے کے باوجود بے ایمانی سے کیے گئے ایسے افعال کی بابت جن کے نتیجہ میں دوسروں کا نقصان ہو جائے، کوئی تحفظ نہیں دینا چاہیے،[18] حدیث مبارکہ میں ہے:

فان دماءكم واموالكم وأعراضكم عليكم حرام، كحرمة يومكم هذا، فى بلدكم هذا، فى شهركم هذا.[19]

(بے شک تمہارے خون، تمہارے اموال اور تمہاری عزتیں اسی طرح حرام ہیں جس طرح آج کا دن، یہ مہینہ اور یہ شہر محترم ہے۔)

نتائج و تجاویز:

1) انسانی اعضا کی پیوند کاری کے حوالے سے علما کرام کے دو نقطہائے نظر ہیں، ہندوستان و پاکستان کے قدیم فقہا اس کے عدم جواز کے قائل تھے، جبکہ دور جدید کے علما کرام اور معاصر فقہی اداروں نے بوقت ضرورت شرائط کے ساتھ اعضا کی پیوند کاری کی اجازت دی ہے؛

18- اسلامی نظریاتی کونسل، فائنل **رپورٹ بسلسلہ جائزہ قوانین تا ۱۴ اگست ۱۹۷۳ء**، اسلام آباد، ادارہ تحقیقات اسلامی، طبع اول، ۱۹۹۸ء، ص ۲۱۔

19- محمد بن إسماعيل أبو عبد الله البخاري، **صحيح البخارى** (بیروت: دار طوق النجاة، الطبعة : الأولى، المحقق : الناصر، محمد زهير بن ناصر، ۱۴۲۲ھ، ۱/۳۷۔

2) اسلامی فقہ اکیڈمی (انڈیا) نے بوقت ضرورت حالت حیات میں اعضا کی پیوند کاری کی اجازت دی ہے لیکن بعد از موت پیوند کاری سے منع کیا ہے، یہاں تک کہ اگر میت نے اپنے اعضا کے پیوند کاری کے لیے استعمال کرنے کے حوالے سے وصیت کی ہو تو ایسی وصیت کو شرعاً ناقابل اعتبار قرار دیا گیا ہے؛

3) اسلامی فقہ اکیڈمی (انڈیا) نے افراط سے کام لیتے ہوئے بہت شدت اختیار کی ہے، بہتر ہوتا اگر اسلامی فقہ اکیڈمی اس میں قدرے توسیع سے کام لیتے ہوئے بعد از موت عند الضرورۃ وصیت کی موجودگی یا ورثا میت کی اجازت کی صورت میں پیوند کاری کی اجازت دیتی؛

4) هيئة كبار العلما (سعودی عرب) نے اسلامی فقہ اکیڈمی (انڈیا) کے برعکس انتہائی تفریط سے کام لیتے ہوئے اس نازک اور حساس مسئلے میں نہایت توسع اختیار کیا ہے، چنانچہ هيئة كبار العلما کے نزدیک اگر میت نے اعضا کی پیوند کاری کے حوالے سے کوئی وصیت ہی نہ کی ہو یا میت نے اپنے اعضا پیوند کاری کے عمل کے لئے استعمال نہ کرنے کی وصیت کی ہو اور ورثاے میت، میت کے اعضا پیوند کاری کے لئے استعمال کرنا چاہیں تو اس صورت میں هيئة كبار العلما نے میت کی خواہش کا اعتبار نہ کرتے ہوئے پیوند کاری کی اجازت دی ہے۔ هيئة كبار العلما کے نزدیک اگر میت نے اپنی زندگی میں اعضا کی پیوند کاری کی اجازت نہ دی ہو اور نہ ہی ورثا میت نے اس کی اجازت دی ہے، بلکہ ورثا اس عمل کے لئے اجازت نہ دینے پر مصر ہیں، ایسی صورت میں ''ولی المسلمین''، یعنی حکمران اگر مناسب سمجھے تو مصلحت عامہ کے پیش نظر میت کے اعضا کو پیوند کاری کے لئے استعمال کر سکتا ہے۔ حکمران کو اتنی چھوٹ دینا ہرگز صحیح نہیں ہے، اعضا کی پیوند کاری کا عمل اصلاً حرام ہے، علماے کرام اور فقہا نے اس کی اجازت عند الضرورۃ دی ہے، نیز فقہا اور دیگر فقہی اداروں نے جہاں کہیں اس کی اجازت دی ہے تو وہاں میت کی وصیت اور ورثاے میت کی اجازت میں سے ایک کو بہر صورت لازمی قرار دیا ہے، مزید برآں! حکمرانوں کو اس معاملے میں اتنی چھوٹ دینے کے بہت سارے نقصانات و مفاسد ہیں اور اس کے غلط استعمال کا قوی امکان ہے۔

5) اسلامی نظریاتی کونسل کی سفارش (۸۴۔۱۹۸۳ء) کئی وجوہ سے محل نظر ہے۔ کونسل کے نزدیک زندہ انسان کی اجازت کے باوجود اس کا عضو پیوند کاری کے عمل کے لئے نہیں نکالا جا سکتا۔ نیز کونسل نے اعضا کی پیوند کاری کے عمل میں مسلم و غیر مسلم کے درمیان تفریق کرتے ہوئے کہا ہے کہ کسی مسلمان کا عضو کسی غیر مسلم کو نہیں لگایا جائے گا۔ مسلمانوں کی طرح غیر مسلم بھی اس ملک کے شہری ہیں، انہیں بھی اعضا کی ضرورت پڑ سکتی ہے، تعجب کی بات یہ ہے کہ کونسل نے مسلمان کا عضو غیر مسلم کو لگانے سے منع کیا ہے، لیکن کیا غیر مسلم کا عضو مسلم کو لگایا جائے گا؟ اس سلسلے میں کونسل خاموش ہے۔ مزید برآں کونسل کے نزدیک اگر میت نے پیوند کاری کی وصیت کی ہو لیکن ورثا میت اس پر راضی نہ ہوں تو ایسی صورت میں وہ عضو قطع نہیں کیا جائے گا، میت نے وصیت کی ہو تو پھر اس کی ممانعت نہیں ہونی چاہیے، بلکہ میت کی خواہش کا پاس رکھتے ہوئے پیوند کاری کی اجازت دینی چاہیے؛

6) اسلامی نظریاتی کونسل کی سفارش (۰۱۔۲۰۰۰ء)، گذشتہ سفارش (۸۴۔۱۹۸۳ء) سے متعارض ہے، گذشتہ سفارش میں حالت حیات میں اعضا کی منتقلی و عطیہ کو ممنوع قرار دیا گیا تھا، جبکہ اس سفارش کے مطابق حالت حیات میں اعضا عطیہ کرنے کی اجازت ہے۔ اس طرح کونسل نے لاوارث لاشوں میں پیوند کاری کے حوالے سے مجاز اتھارٹی کی اجازت کا ذکر نہیں کیا ہے، تاہم کونسل کی سفارش کی عبارت سے محسوس ہوتا ہے کہ اس کے لیے کسی کی اجازت کی ضرورت نہیں ہے، اس طرح کی کھلی اجازت بہت سے مفاسد کا راستہ کھول لے گی؛

7) اسلامی نظریاتی کونسل کا اعضا کی پیوند کاری سے متعلق مرتب کردہ مسودہ قانون کافی حد تک بہتر ہے، لیکن اس میں مجمع الفقہ الاسلامی (جدہ) کی قرارداد کی روشنی میں مزید بہتری کی ضرورت ہے، اس مسودہ قانون میں بھی کونسل نے لاوارث لاشوں میں پیوند کاری کے حوالے سے مجاز اتھارٹی کی اجازت کا ذکر نہیں کیا ہے، تاہم کونسل کی سفارش کی عبارت سے محسوس ہوتا ہے کہ اس کے لیے کسی کی اجازت کی ضرورت نہیں ہے، اس طرح کھلی اجازت دینے کے بہت سارے نقصانات ہیں، اور اس کا غلط استعمال خارج از امکان نہیں،

نیز اس مسودے کی دفعہ نمبر ۶ میں ''ایویلویشن کمیٹی'' کا ذکر ہے جبکہ دفعہ نمبر ۱۱ میں'' پالیسی اینڈ مانیٹرنگ بورڈ'' کا ذکر ہے، ان دونوں میں ایک عالم دین کی شمولیت بے حد ضروری ہے تاکہ وہ اعضا کی پیوندکاری کی شرعی قواعد کے مطابق انجام دہی کو یقینی بنائے؛

8) اعضا کی پیوندکاری سے متعلق ملک کے موجودہ قانون میں بھی کئی خامیاں ہیں، اس قانون کی دفعہ نمبر ۱۶ میں درج ہے کہ اگر وفاقی حکومت یا کسی بھی شخص کی جانب سے اس ایکٹ کی روشنی میں ''نیک نیتی'' سے اٹھائے گئے اقدامات سے کسی کو کوئی نقصان پہنچے تو وفاقی حکومت یا اس شخص کے خلاف کوئی کارروائی نہیں کی جائے گی۔ اسلام بھی نیک نیتی سے کئے گئے افعال پر مواخذہ نہیں کرتا، تاہم شریعت میں سرکاری امور کی بددیانتی کے ساتھ انجام دہی کو قابل معافی نہیں سمجھا گیا ہے۔ نیز اس قانون کی دفعہ نمبر ۵ میں ''ایویلویشن کمیٹی''، جبکہ دفعہ نمبر ۱۱(۴) میں ''مانیٹرنگ اتھارٹی'' کا ذکر ہے، ان دونوں میں ایک عالم دین کو شامل کرنا چاہیے تاکہ وہ اعضا کی پیوندکاری کے عمل میں خلاف شرع امور پر نظر رکھے؛

9) مجمع الفقہ الاسلامی (جدہ) کے نزدیک اعضا کی پیوندکاری کے عمل کو اپنے جسم اور دوسرے انسان کے جسم کے لیے بوقت ضرورت اختیار کیا جاسکتا ہے۔ اگر کوئی اپنی زندگی میں اپنے اعضا کی پیوندکاری کے حوالے سے وصیت کرے تو اسکی بھی گنجائش ہے، نیز لاوارث لاش ملنے کی صورت میں حکومتِ وقت پیوندکاری کی اجازت دینے کی مجاز ہے۔ مجمع الفقہ الاسلامی (جدہ) کی رائے میں نہ افراط ہے اور نہ تفریط، بلکہ اعتدال پر مبنی اور حالات کے موافق ہے۔

انسدادِ سود کے لیے اسلامی نظریاتی کونسل کی سفارشات کا جائزہ

محمد ساجد*
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Abstract:

The Council of Islamic Ideology (CII) is a constitutional body that advises the legislature whether or not a certain law is repugnant to Islam, namely to the Qur'an, and Sunnah. *In view of the clear and unequivocal commandments of the Holy Qur'an on the elimination of Interest (*riba*) is the bounden duty of an Islamic State. Similarly the Constitution of Pakistan has also declared duty of the government to eliminate* riba *as early as possible. The Council of Islamic Ideology from its inception has given recommendations to eliminate* riba *from economy. The President of Islamic Republic of Pakistan directed the Council on September 29th, 1977 to consider how best to "eradicate the curse" of interest. The Council submitted reports with some practical and viable solutions. This paper has focused on the efforts and recommendations of the CII for the elimination of* riba *from economy. The paper has also highlighted the impact of the recommendations in modern era, the State Bank of Pakistan has adopted the recommended modes of financing for all banks during 2008.*

Key Words: Elimination of Interest from Economy, CII, Interest free economy, Pakistan

۱. تعارف

اسلامی نظریاتی کونسل ایک آئینی ریاستی ادارہ ہے جو مجلس شوریٰ یعنی پارلیمنٹ کو قوانین کے بارے میں بتاتا ہے کہ آیا مروجہ اور نئے قوانین قرآن وسنت سے مطابقت رکھتے ہیں یا نہیں؟ موجودہ کونسل ۱۹۷۳ء کے آئین کے تحت وجود میں آئی[1]۔ اسلامی نظریاتی کونسل پاکستان میں رائج اسلامی قوانین کی تعبیر و تشریح کا اعلیٰ

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1– اسلامی نظریاتی کونسل، پاکستان کا آئینی ادارہ ہے جس کا قیام ۱۴ اگست ۱۹۶۲ء کو عمل میں آیا۔ 1973ء سے قبل اسے **اسلامی مشاورتی کونسل** کے نام سے موسُوم تھی، 1973ء کے آئین میں جب شق نمبر 227 شامل کی گئی جس کے مطابق پاکستان میں کوئی بھی قانون قرآن وسنت کے مخالف نہیں بنایا جائے گا تو عملاً اس کا باقاعدہ نظام وضع کرنے کی غرض سے اسی آئین میں دفعہ نمبر 228، 229 اور 230 میں اسلامی نظریاتی کونسل کے نام سے 20 اراکین پر مشتمل ایک آئینی ادارہ بھی تشکیل دیا گیا جس کا مقصد صدر، گورنر یا اسمبلی کی اکثریت کی طرف سے بھیجے جانے والے معاملے کی اسلامی حیثیت کا جائزہ لے کر 15 دنوں کے اندر اندر انہیں اپنی

ترین ریاستی ادارہ ہے اور پاکستان کی ریاست کی اسلامی بنیادوں پر تعمیرِ نو کا فکری امین ہے۔ اسلامی نظریاتی کونسل کا ایک اہم مقصد رائج قوانین کی اسلامائزیشن کرنا ہے اور تمام مکاتب فکر کی متفقہ آراء کے تناظر میں فیصلہ کرنا ہے۔ جس میں پاکستان کے مسلمانوں کو اپنی انفرادی اور اجتماعی زندگیاں قرآن و سنت کے مطابق ڈھالنے کی ترغیب ملے۔ چنانچہ 1956ء کے دستور کی اسلامی دفعات کے تحت صدرِ پاکستان کے لیے آئین کے نفاذ کے ایک سال کے اندر ایسے ادارے کا قیام لازم و ملزوم قرار دیا گیا تھا جو کہ اسلامی معاشرے کے قیام کے متعلق حکومت کو اپنی سفارشات پیش کرے نیز اس ادارے کے فرائض میں یہ بھی شامل تھا کہ وہ رائج الوقت قوانین کو اسلامی احکامات کے مطابق ڈھالنے اور اسلامی تعلیمات کے نفاذ کے لیے اپنا کردار ادا کرے اور معقول انداز میں مرکزی اور صوبائی اسمبلیوں کے لئے ایسے رہنما اصول مرتب کرے جس سے اس کام کو قانونی حیثیت حاصل ہو سکے۔ مگر افسوس کہ 1956ء کے دستور کے تحت ایسے کمیشن کا قیام ممکن نہ ہو سکا۔ اسلامی نظریاتی کونسل کی سالانہ رپورٹوں، خصوصی رپورٹوں اور جائزوں کے مطالعہ سے واضح ہوتا ہے کہ کونسل ایک اعلیٰ پائے کا تحقیقی ادارہ ہے اور کونسل کی رپورٹوں میں علمی اور تحقیقی پختگی دن بدن مائل بہ ارتقاء ہے۔ رائے دہی اور استفسارات کی جواب دہی کا جو معیار ستر کی دہائی میں نظر آتا ہے اسّی کی دہائی میں اس سے جامع معیار کی جھلک ملتی ہے اور نوّے کی دہائی میں پیش کی جانے والی رپورٹیں زیادہ وقیع، دقیق اور علمی دلائل کا شاہکار نظر آتی ہیں۔ کونسل کے اس نہج میں کئی عوامل رونما ہوتے ہیں۔

07 اکتوبر 1958ء کو ملک میں پہلا مارشل لاء نافذ کیا گیا اور پانچ سال کے بعد 1962ء میں نیا آئین نافذ کیا گیا جس کے تحت اسلامی مشاورتی کونسل قائم کی گئی۔ جیسا کہ نام سے ہی ظاہر ہے کی کونسل کی حیثیت کسی مشاورتی ادارے سے زیادہ نہیں تھی۔ صدر گورنر یا اسمبلیاں اس کی رپورٹ پہ غور و فکر کرنے یا کونسل کے وضع کردہ قوانین کی روشنی میں قانون سازی کرنے یا اس پر کسی طرح کا بھی عمل کرنے کی مکلّف نہیں تھیں۔ کونسل کو جو وظائف دیئے گئے تھے ان میں یہ وضاحت کی گئی تھی کہ کونسل کا کام صدر، گورنر اور اسمبلیوں کے لئے سفارشات تیار کرنا تھا نہ کہ متوازی اور قانون ساز ادارے کے طور پر کوئی قانون سازی کرنا یا ایسی قانون سازی کیلئے کہنا جو قرآن و سنت کے مطابق ہو۔ کونسل کے ابتدائی کاموں میں جو 1962ء کے دستور میں اسے دیے گئے تھے وہ محض سفارشات تیار کرنا تھا۔ سفارشات تیار کرنے کا جو اختیار (Mandate) کونسل کو دیا گیا تھا اس کا

رپورٹ پیش کرنا تھا۔ شق نمبر 228 میں یہ قرار دیا گیا کہ اس کے اراکین میں جہاں تمام فقہی مکاتبِ فکر کی مساوی نمائندگی ضروری ہوگی وہاں اس کے کم از کم چار ارکان ایسے ہوں گے جنہوں نے اسلامی تعلیم و تحقیق میں کم و بیش 15 برس لگائے ہو اور انہیں جمہورِ پاکستان کا اعتماد حاصل ہو۔

لب و لہجہ صاف کہہ رہا تھا کہ کونسل معاشرتی اور اخلاقی اصولوں سے معمور سفارشات تیار کریں جن کا قانون سازی کوئی واسطہ نہ ہو[2]۔

الفاظ ملاحظہ ہوں۔

> 204(1) - The functions of the council shall be: "To make recommendations to the Central Government and provincial as to means of enabling and encouraging the Muslims of Pakistan to order their lives in all respect in accordance with principles and concepts of Islam." [3]

دستور ء1962 میں تو اس کا نام ہی اسلامی نظریے کی مشاورتی کونسل رکھا گیا۔ لیکن 1973ء کے دستور میں بھی اس کی حیثیت اس سے آگے نہ بڑھ سکی۔ بہر حال اسلامی مشاورتی کونسل کی کارکردگی کا اگر جائزہ لیا جائے تو مثبت نتائج سامنے آتے ہیں مثلاً کونسل نے 1972ء تک مجموعہ قوانین پاکستان کے 6 ہزار قوانین میں سے 200 قوانین پر اسلامی شرعی نقطہ نظر سے غور و فکر کیا اور ان کو اسلام کے شرعی قوانین کے مطابق ڈھالنے کی کوششیں کیں۔ مشاورتی کونسل نے آرٹیکل 204 کی ذیلی دفعہ (ب) کے تحت حکومت کی طرف سے کئے جانے والے 19 استفسارات کا جواب دیا اور حکومت کو 24 سفارشات پیش کیں۔[4]

مشاورتی کونسل کی بڑی کامیابی یہ ہے کہ کونسل کی سفارشات سے ملک کی ہر یونیورسٹی میں شعبہ اسلامیات کے اجراء اور طلبہ میں علوم اسلامیہ کی لازمی تعلیم کے لیے سفارشات منظور کر لی گئیں۔ اس کے علاوہ وزارت مذہبی امور کے قیام کی بھی سفارش کی گئی۔[5] اسی طرح انسدادِ سود کے حوالے سے کونسل نے اپنے ہر دور میں کوششیں کیں۔ اس ضمن میں کونسل نے اپنی آراء، اجلاس، سفارشات اور سالانہ و موضوعاتی رپورٹس کا ایک عظیم ذخیرہ مہیا کیا، خصوصاً رپورٹ بلاسود بنکاری 1980ء قابلِ ذکر ہے۔ لہذا ہم یہ کہہ سکتے ہیں کہ محدود وسائل اور ملک کی سیاسی عدم و استحکام کی باوجود کونسل کی کارکردگی قابلِ تحسین رہی اور معاشرے کو اسلامی

2– ڈاکٹر شہزاد اقبال شام، **'دساتیر پاکستان کی اسلامی دفعات ایک تجزیاتی مطالعہ'**، شریعہ اکیڈمی، بین الاقوامی اسلامی یونیورسٹی، اسلام آباد 2011ء، ص 143

3– **The Constitution of Islamic Republic of Pakistan** (First Amendment), Act,1963, pp 103

6– ڈاکٹر اکرام الحق یٰسین، **'اسلامی نظریاتی کونسل، ادارہ جاتی پس منظر اور کارکردگی'**، اسلامی نظریاتی کونسل اسلام آباد، حکومت پاکستان، ۲۰۱۶ء جلد ۱، ص ۱۷۵

۷– اسلامی نظریاتی کونسل، **'سالانہ رپورٹ ۱۹۷۷- ۷۸'**، اسلامی نظریاتی کونسل اسلام آباد، حکومت پاکستان، ۱۹۷۹ء، ص ۵-۶

خطوط پر استوار کرنے کی سر توڑ کوششیں کیں گئیں۔ آنے والی سطور میں ہم انسدادِ سود کے تناظر میں سلسلہ وار کونسل کے کردار کا جائزہ پیش کریں گے۔

۲. اسلامی نظریاتی کونسل کی بلاسود بینکاری رپورٹس (۱۹۶۲ء تا ۲۰۱۷ء) کا تعارفی جائزہ:

اسلامی نظریاتی کونسل نے اپنے دونوں ادوار 1962ء تا 1973ء اور 1973ء سے تاحال اپنی علمی مباحث اور سفارشات کے ذریعے عظیم علمی سرمایہ تخلیق کیا ہے۔ دونوں دساتیر میں درج ہیئتِ ترکیبی کے ساتھ اپنے فرائضِ منصبی کی ادائیگی کے لیے کونسل کو ملک کے عظیم اہلِ علم حضرات کا تعاون حاصل رہا ہے۔ اور پاکستان کے تمام مکاتبِ فکر کی نمائندگی ہمیشہ سے کونسل کی امتیازی خصوصیت رہی ہے۔ کونسل نے اپنے فرائضِ منصبی کے مطابق سفارشات تیار کرنے کے لئے بنیادی حوالہ قرآن وسنت کو مقرر کیا گیا ہے مگر مختلف مکاتبِ فکر کی نمائندگی اس کی تعبیرات اور مباحث میں تنوّع پیدا کرتی ہے۔ عصرِ حاضر کے جدید معاشی مسائل کے بارے میں رائے دینے کے لئے کونسل کو ماہرینِ معاشیات اور مفتیان کرام کا تعاون ہر حال میں شاملِ حال رہا ہے۔

موجودہ سرمایہ دارانہ نظام کو اسلامی نظامِ معیشت سے ہم آہنگ کرنے کے لئے کونسل نے اپنے قیام سے لے کے تاحال بہت سے اقدامات تجویز کیے ہیں۔ اسی طرح کونسل نے موجودہ سودی نظام کو بتدریج اسلامی نظامِ معیشت میں تبدیل کرنے کے حوالے سے وقتاً فوقتاً اپنی آراء اور سفارشات پیش کی ہیں۔ یوں تو کونسل نے اسلامی نظامِ تعلیم، اسلامی نظامِ عدل، اسلامی اقتصادی نظام، اسلامی قوانین کے علاوہ سماجی، عائلی اور معاشرتی مسائل کے بے شمار پہلوؤں پر اپنی آراء، سفارشات اور سالانہ موضوعاتی رپورٹس پیش کی ہیں، لیکن کونسل نے اسلامی بینکاری نظام اور ربا کو خصوصی توجہ کا مرکز بنایا ہے۔ اور اس ضمن میں بے شمار سیمینار اجلاس کے انعقاد کے علاوہ کئی اداروں کی جانب سے موصول ہونے والے استفسارات کے جوابات بھی دیے ہیں۔ اور کئی رپورٹس بھی شائع کی ہیں۔ اس اہم موضوع کی اہمیت کو کونسل نے اپنی کئی رپورٹس میں واضح کیا ہے کہ کسی بھی ملک کی ترقی اس ملک کے نظامِ معیشت پر استوار ہوتی ہے۔ اگر ملک کا معاشی نظام درست سمت گامزن ہو گا تو اس ملک کو ترقی کی راہ پہ گامزن ہونے میں زیادہ وقت نہیں لگتا، اسی وجہ سے کونسل نے اس اہم موضوع کو تفصیلاً بیان کیا ہے۔

۳. بلاسود بینکاری سے متعلق کونسل کی رپورٹس، استفسارات، اجلاس، آراء (۱۹۶۲ء تا ۱۹۷۲ء) کا تعارفی جائزہ:

اسلامی نظریاتی کونسل نے اپنی شائع کردہ پہلی دس سالہ رپورٹ 1962ء تا 1972ء میں ربٰوا کے تمام پہلوؤں اور تمام شکلوں کا تفصیلی جائزہ لیا ہے۔ اور قرآن وحدیث کی روشنی میں دور نبوی صلی اللہ علیہ وسلم

پائے جانے والے سود کا موجودہ نظامِ معیشت کے سود سے تفصیلی موازنہ پیش کیا ہے۔ کونسل نے اپنی تمام تر تفصیل اور مباحث کے بعد یہ نتیجہ اخذ کیا ہے کہ :

أ. قرآن مجید جس سود کی ممانعت کرتا ہے اس کی خود تشریح بھی کرتا ہے اور اس کی تائید تاریخی احادیث سے بھی ہوتی ہے۔ ربٰوا کی تعریف یوں کی جاسکتی ہے کہ ''ادائیگی قرض کی مقررہ مدت کے مقابلے میں راس المال پر غیر متناسب انتہائی گراں قدر اضافہ جس سے راس المال کئی گنا بڑھ جائے''۔

ب. اس تعریف کو مزید وسعت دے کر اس کے تحت لین دین کی دوسری شکلوں کو بھی داخل کرنا جن کا احادیث میں مختلف کلیوں کے طور پر ذکر ہے یہ خود مسلمان فقہاء کی وضع کردہ ہیں۔ جن کو نبی کریم صلی اللہ علیہ وسلم کی طرف منسوب نہیں کیا جاسکتا۔ اس قسم کا ارتقاء ایک منظّم ترتیبی کوششوں کے باوجود خود احادیث کے مواد میں نمایاں طور پر موجود ہے۔

ج. کیونکہ رائج الوقت شرح سود قرآنی ربٰوا کے برعکس قرض کے سرمایہ کی طلب اور رسد کو باقاعدہ بنانے کے لئے ایک منظّم صورت ہے اور چونکہ اس بنا پر اس میں ربا کی طرح مناسب حد سے زیادہ اضافہ نہیں کیا جاسکتا لہذا یہ دونوں یکساں بھی نہیں ہیں۔ لہذا موجودہ وقت کی شرحِ سود قرآن کی ممانعت کے تحت نہیں آسکتا۔

د. اگرچہ ربٰوا کی اسلامی ممانعت کا تعلق اس انداز پر ہمارے آج کے بینکاری سود سے کچھ بھی نہیں۔ تاہم یہ بھی درست ہے کہ اسلام بجائے ایسے نظامِ معیشت کے جو سود پر مبنی ہو ایک ایسا فلاحی نظامِ معیشت قائم کرنا چاہتا ہے جس کی بنیاد زیادہ سے زیادہ باہمی تعاون اور سماجی و معاشی انصاف پر ہو۔ لیکن یہ مقصد آہستہ آہستہ ہی حل کیا جاسکے گا جو ملک کی مجموعی واقعی دولت میں اضافہ کیے بغیر ممکن نہیں ہے۔ لیکن فی الفور بینکاری نظام کو بند کر دینا ہمارے اقتصادی ارتقاء کے لیے مضر بلکہ مہلک ثابت ہوگا۔[6]

اسی دوران ادارہ تحقیقات اسلامی کی طرف سے سود سے متعلق ایک رائے موصول موصول ہوئی جس میں یہ وضاحت موجود تھی کہ قرآن مجید میں بیان کردہ ربا المحرم موجودہ رائج الوقت شرح سود کے برعکس

6– اسلامی نظریاتی کونسل، **'دس سالہ رپورٹس 1962ء۔ 1972ء'**، اسلامی نظریاتی کونسل اسلام آباد، حکومت پاکستان، ص۔ 33

ہے[7]۔اور آجکل بنکوں میں جو سود رائج ہے اس کا تعلق قرآن میں حرام کردہ ربٰوا سے کچھ بھی نہیں۔تاہم انہوں نے کہا اسلام ایسی معیشت جس میں سود رائج ہو اس کے بجائے ایک فلاحی مملکت قائم کرنے کا خواہاں ہے جس کی بنیاد باہمی تعاون اور سماجی مساوات پر ہو[8]۔اس کے بعد کونسل کے ممبران نے سود کے مسئلہ پر الگ الگ رپورٹ مرتب کر کے کونسل میں جمع کرائیں جو کونسل نے حکومت کو بھیج دیں۔ حکومت نے یہ کہہ کر ان رپورٹس کو واپس کیا کہ آئین کے مطابق کونسل ان رپورٹس کا جائزہ لے کر انہیں ایک جگہ مرتب کر کے پیش کرے۔اس مقصد کے لیے کونسل نے 13 جنوری 1964ء کو کراچی میں اجلاس منعقد کیا جس میں کونسل کی طرف سے درج ذیل فیصلہ کیا گیا۔

> ''اسلامی مشاورتی کونسل اس بات پر متفق ہے کہ ربٰوا ممنوع ہے۔ مگر اس امر میں اختلاف ہے کہ کیا قرآن میں ربٰوا سے متعلق جو تصور پیش کیا گیا ہے اس میں وہ سود بھی شامل ہے جو عوام الناس میں مروّج ہے۔ تو کونسل کے نزدیک وہ بھی ربا الحرم میں شامل ہے۔اسی طرح اس امر پر بھی اتفاق ھے کہ اسلامی معاشرتی انصاف اور بھائی چارے کی تکمیل کے لیے غیر سودی معاشی نظام کی تعمیر ضروری ہے گو کہ اس حقیقت سے کونسل اتفاق کرتی ہے کہ اچانک یا فوری تبدیلی بہت سی مشکلات پیدا کر سکتی ہے۔تاہم کونسل سفارش کرتی ہے کہ غیر سودی معاشی نظام کے لیے کوششوں کو طول نہ دیا جائے''[9]۔

جب یہ رپورٹ حکومت کو پیش کی گئی تو اسے واضح اور جامع میں نہیں سمجھا گیا۔چنانچہ 14 جولائی 1964ء کو ربا سے متعلق استفسار دوبارہ کونسل کو بھیجا گیا۔کونسل نے اس بارے میں حکومت سے چند نکات کی تفصیل جاننا چاہی جو حکومت کی طرف سے 22 دسمبر 1964ء کو کونسل کے حوالے کی گئی۔اور دوبارہ یہ معاملہ ممبرانِ کونسل کے سپرد کیا گیا۔اس دوران کونسل کی ہیئت میں تبدیلی آئی اور یہ معاملہ اب نئے ممبران کو منتقل ہوا۔4 فروری 1966ء کو کونسل کے منعقدہ اجلاس بمقام لاہور میں اس معاملے پر غور کیا گیا۔چونکہ یہ معاملہ باریک بینی اور تفصیل کا متقاضی تھا اس لیے اس کو اگلے اجلاس کے ایجنڈے میں شامل کیا گیا۔چنانچہ کونسل کا اگلا اجلاس دسمبر 1966ء کو ڈھاکہ میں منعقد ہوا جس میں اس معاملے کے دو پہلوؤں پر غور کیا گیا۔اوّل یہ کہ موجودہ معاشی نظام کے تحت لین دین اور غیر سودی معاملات کو الگ کرنا۔دوم یہ کہ اگر یہ طے پایا جائے کہ موجودہ پورا نظام ربٰوا کے تحت ہے تو اس کا متبادل نظام کیا ہوگا۔

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7 – Rehman, Habib and Shahzad, Muhammad Asghar, **'A Review of the Publications of Islamic Research Institute on Islamic Economics'**. Fikr-O-Nazar, Islamic Research Institute, International Islamic University, Islamabad. (January- June 2018), Volume 55, Issue 3-4, Available at SSRN: https://ssrn.com/abstract=3117133

8– Council of Islamic Ideology, **'Ten Years Reports 1962-72'**, Advisory Council of Islamic ideology, Government of Pakistan, Vol.1, p.33

9 – Council of Islamic Ideology, **'Ten years Reports 1962 -1972'**, Advisory Council of Islamic ideology, Government of Pakistan, Vol. II, p.183-184

کونسل کی طرف سے 9 دسمبر 1966ء کو دوبارہ اجلاس منعقد کیا گیا جس میں ربٰوا (سود) سے متعلق غور وخوض کیا گیا اور متفقہ طور پر طے پایا کہ موجودہ رائج سود اپنی تمام تر صورتوں میں قرآن وسنت کے مطابق ربا الحرم ہے۔ پھر وزارتِ خزانہ حکومت پاکستان نے پبلک ٹرانزکشن سے متعلق کونسل کی وضاحت کے بعد جس نے حکومتی اور عوامی سطح پر رائج سود کو ربا الحرم قرار دیا گیا تھا مندرجہ ذیل رائج سودی صورتوں سے متعلق حتمی رائے طلب کی جن پر حکومت سود یتی ہے یا لیتی ہے:

1۔ بینک کی طرف سے قرض کی رقم لیا جانے والا اضافہ
2۔ خزانہ کی طرف سے تھوڑی مدت کے قرضے میں دی جانے والی چھوٹ
3۔ سیونگ سرٹیفکیٹ پر دیا جانے والا اضافہ
4۔ انعامی بانڈ پر دیا جانے والا انعام
5۔ پروویڈنٹ فنڈ اور پوسٹل بیمہ زندگی
6۔ ملازمین کو دیے جانے والے قرض پر اضافہ وغیرہ

غور وخوص کے بعد کونسل کی یہی رائے بنی کے موجودہ بینکنگ نظام سود پر مبنی اور یہ مکمل تبدیلی کا متقاضی ہے اور کونسل اس مسئلے پر اپنی حتمی رائے دینے سے پہلے غیر سودی نظام معیشت کے نفاذ کی راہ میں حائل مشکلات سے متعلق تمام سوال نامہ مرتب کرے گی اور حکومت کے ذریعے یہ بیرون ملک پاکستانی سفارت خانوں میں بھیجا جائے گا۔ اس سلسلے میں کونسل نے مجوّزہ افراد کی ایک فہرست بھی تیار کی جن کو سوالنامہ بھیجا جانا تھا[10]۔ اس جواب کے لئے کونسل سے وزارت خزانہ کی طرف سے دوبارہ مزید استفسار کیا گیا جس کے جواب کیلئے دسمبر ۱۹۶۹ء میں ڈھاکہ میں ایک اجلاس بلوایا گیا اور درج ذیل جواب دیا گیا۔ اسلامی نظریاتی کونسل اس امر پر متفق ہے کہ "ربا" ہر صورت میں حرام ہے اور شرح سود کی کمی وبیشی سود کی حرمت پر اثرانداز نہیں ہوتی۔ افراد اور اداروں کے لین دین کی مندرجہ ذیل صورتوں پر کامل غور وفکر کرنے کے بعد کونسل اس نتیجے پر پہنچی ہے کہ:

أ. موجودہ بینکاری نظام کے تحت افراد، اداروں اور حکومتوں کے درمیان کاروباری لین دین اور قرضہ جات میں اصل رقم پر جو بڑھوتری کی جاتی ہے وہ داخلِ ربٰوا ہے۔
ب. خزانہ کی طرف سے تھوڑی مدت کے قرضہ پر چھوٹ دی جاتی ہے وہ بھی داخلِ ربٰوا ہے۔
ج. سیونگ سرٹیفیکیٹ پر جو سود دیا جاتا ہے وہ بھی داخلِ ربٰوا ہے۔
د. پراویڈنٹ اور پوسٹل بیمہ زندگی میں جو سود دیا جاتا ہے وہ بھی ربا میں شامل ہے۔

10– Council of Islamic Ideology, **'Ten years Reports 1962 -1972'**, Vol. II, p.185-187

ہ۔ مقامی اداروں اور سرکاری ملازموں کے لیے دیے گئے قرضوں پر بڑھوتری بھی ربٰوا میں شامل ہے۔(۱۱)

مذکورہ بالا بڑھوتری کی تمام تر صورتوں میں سود بظاہر واضح دکھائی دیتا ہے اس لیے اسلامی مشاورتی کونسل یہ تجویز کرتی ہے کہ اس نظام کی اسلام کی روشنی میں اصلاح کے لئے حکومت پاکستان مشاورتی کونسل کے مشورہ اور مواد کے لئے اکابر فقہاء اور ماہرینِ قانون کی کمیٹی قائم کی جائے جو رائج نظام کی اصلاح کی صورت تجویز کرے کونسل پر امید ہے کہ مناسب کوشش سے اصلاح ممکن ہیں(12)۔

۴۔ انعامی بانڈ سکیم کے سود سے متعلق سفارشات (دسمبر ۱۹۷۱ء)

اسلامی مشاورتی کونسل نے حکومت کے استفسار پر دسمبر 1971 ء میں ربا کے مسئلہ پر غور کے دوران انعامی بانڈ[13] سے ملنے والی انعامی رقم کے بارے میں مندرجہ ذیل رائے دی کہ :انعامی بانڈز پر جو انعام دیا جاتا ہے وہ ربٰوا (سود) میں شامل ہے۔[14]

۵۔ بلاسود بینکاری سے متعلق کونسل کی سفارشات (۱۹۷۸-۷۹ء):

اس رپورٹ میں یہ واضح کیا گیا کہ ماہرینِ معاشیات و بینکاری کے پینل نے بعض معاشی مسائل کے حل کے لیے اسلامی نظریاتی کونسل سے رجوع کیا۔ وہ مسائل درج ذیل نوعیت کے تھے۔

- کھاتہ داروں کی ضمانت
- نقد اور ادھار کی قیمت میں فرق
- ہنڈی میں کٹوتی
- روپے میں کمی و بیشی اور حکومت کا فرض
- قرض اور شرح مبادلہ میں تبدیلی
- قرضوں کی نیلامی شرط پر قرض اور تقدیری نفع

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11 – اسلامی نظریاتی کونسل، **' دس سالہ رپورٹ 83-1982 '**، اسلامی نظریاتی کونسل اسلام آباد، حکومتِ پاکستان، ص،39

12 – Council of Islamic Ideology, **'Ten Years Reports 1962 – 1972'**, Advisory Council of Islamic Ideology, Government of Pakistan, Vol. II, 1967-1969,p.140

13 – Rehman, Habib and Shahzad, Muhammad Asghar, **'Promotion of Islamic Banking & Finance: Role of Professor Dr. Mahmood Ahmed Ghazi (R.A)'**, Pakistan Journal of Islamic Research, Bahauddin Zakariya University Multan, Pakistan, Vol: 20, Issue: 2 (December 2019),: https://ssrn.com/abstract=3036131

14 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 1983-1984ء'**، ص17

اسلامی نظریاتی کونسل نے مناسب خیال کیا کہ ان مسائل کے جوابات دینے سے قبل علمائے کرام سے رائے لی جائے جس پر علمائے کرام کی ایک فہرست تیار کی گئی اور یہ سوالات ارسال کیے گئے مگر علماء کرام کی طرف سے کوئی جواب موصول نہیں ہوا۔ بعد میں اسلامی نظریاتی کونسل کے ہی علماء کرام میں سے ہی مفتی محمد حسین نعیمی صاحب، جناب مفتی سیاح الدین کاکاخیل اور جناب مولانا مفتی محمد تقی عثمانی صاحب نے ان سوالات کے جوابات مرتب کیے(15)۔اس کے علاوہ چند دیگر سفارشات بھی اسلامی نظام معیشت سے متعلق پیش کی گئیں جو درج ذیل ہیں:

۶. سودی نظام کے خاتمہ سے متعلق سفارشات:

مالیاتی اداروں سے سود کا قلع قمع ایک جراءت مندانہ اقدام تھا۔ اسلامی نظریاتی کونسل اور اس کے مقرر کردہ ماہرینِ معاشیات و بینکاری نے طے کیا کہ سود کا خاتمہ مرحلہ وار ختم کرنا زیادہ مناسب ہے[16]۔ چنانچہ ابتدائی مرحلہ پر پینل نے این۔ آئی۔ ٹی، آئی سی، پی اور ہاؤس بلڈنگ فنانس کارپوریشن سے سود کو ختم کرنے کے لیے نومبر 1979ء میں اپنی عبوری رپورٹ پیش کی۔ جس کی بناء پر کونسل نے اپنی سفارشات مرتب کر کے حکومت کو ارسال کیں۔ جس کے نتیجے میں مذکورہ اداروں سے سود کو ختم کرنے کا اعلان کیا گیا۔ اسی دوران ماہرینِ معاشیات بنکاری کے پینل کی سود کے خاتمے کیلئے حتمی رپورٹ کونسل کو پیش کر دی گئی[17]۔

۷. رپورٹ پینل ماہرین معاشیات وبنکاری بابت خاتمہ سود

اسلامی نظریاتی کونسل نومبر 1977ء میں ماہرینِ معاشیات و بنکاری پینل قائم کیا۔ جس کا کام ملک کے معاشی اور مالیاتی نظام کو قرآن اور سنت کے مطابق ڈھالنے کے کام میں کونسل کی مدد کرنا تھا۔ کونسل کی متعین کردہ ترجیحات کے مطابق پینل نے کام کے پہلے مرحلے میں پاکستان میں زکوٰۃ کے نفاذ کے موضوع کا مطالعہ کیا اور مارچ 1978ء میں اپنی رپورٹ پیش کی۔ دوسرے مرحلے میں پینل نے اپنی توجہ ان مسائل کی طرف منعطف کی جو ملکی معیشت سے سود کو ختم کرنے میں درپیش تھے۔ اس سلسلے میں پینل کے پیشِ نظر ایک ایسا

15 – اسلامی نظریاتی کونسل، **'دس سالہ رپورٹ 1978-79ء'**، اسلامی نظریاتی کونسل اسلام آباد، حکومت پاکستان اسلامی نظریاتی کونسل، ص196

16 – Shahzad, Muhammad Asghar and Hameed, Abdul, **'Islamic Banking Branches of Conventional Banks: An Analytical Review'**. Pakistan Journal of Islamic Research (PJIR), Islamic Research Centre, Bahauddin Zakariya University Multan, Pakistan, Volume 19, Issue 2, (December 2018):https://ssrn.com/abstract=2876234; Rehman, Habib and Shahzad, Muhammad Asghar, **'Role of Constitutional Institutions for Elimination of Interest in Pakistan'**, (February 28, 2019). http://dx.doi.org/10.2139/ssrn.3549501.

17 – اسلامی نظریاتی کونسل، **'دس سالہ رپورٹ 1978-79ء'**، ص223

معیاری نمونہ تجویز کرنا تھا جو شریعت کے مطابق ہونے کے ساتھ ساتھ تمام عصری تقاضے بھی پورے کر سکے۔ پینل نے کل آٹھ اجلاس منعقد کیے۔4 جنوری 1978ء کے اجلاس میں پینل نے اپنے تین ماہرینِ بینکاری کی اس رپورٹ پر پر غور کیا جو بینکوں سے سود کے خاتمے سے متعلق تھیں۔اسی رپورٹ میں کونسل نے اپنی رپورٹ بلاسود بنکاری کا خلاصہ بھی پیش کیا اور متبادل نظام بینکاری کے تمام طریقوں کی نشاندہی بھی پیش کی[18]۔چنانچہ کونسل کی بار بار یاد دہانی اور پھر 1973ء کے آئین میں نو سال کے اندر قانون معاشی اور معاشرتی نظام کو اسلامی ڈھانچے میں ڈھالنے کا وقت مقرر کیا گیا۔لیکن بد قسمتی سے ان سب کے باوجود عملی طور پر انتہائی غفلت برتی گئی۔ نہ تو سودی نظام کو بدلنے کے لیے اکابر فقہاء کا تقرر ہوا اور نہ ہی معیشت دانوں اور ماہرین قانون کی کمیٹی تشکیل دی گئی اور نہ ہی اس سمت کوئی اور قدم اٹھایا گیا۔بعد ازاں 1977ء میں جنرل ضیاء الحق نے حکومت سنبھالی اور 10 فروری 1979ء کو قوم سے خطاب کرتے ہوئے کہا کہ تین سال کے اندر ملکی معیشت کو کلیتاً سود سے پاک کر دیا جائے گا۔دریں اثناء کونسل کی طرف سے ملکی معیشت سے سود کے استحصال کے متعلق ایک رپورٹ بعنوان" رپورٹ بلاسود بنکاری" 15 جون 1980ء کو صدرِ مملکت کو پیش کی گئی۔اس رپورٹ کی غیر معمولی افادیت کا اعتراف اسلام آباد میں منعقد ہونے والی اسلامی مالیاتی سیمینار منعقدہ 11 جنوری، 1981ء میں اعلانیہ طور پر کچھ یوں کیا گیا:

> "سیمینار میں حکومت پاکستان نے اسلامی نظریاتی کونسل کی ان بلیغ کوششوں اور جانفشانیوں پر جو انہوں نے استیصالِ سود کے ذرائع مسائل دریافت کرنے کے سلسلے میں کیں انہیں خراج تحسین پیش کیا جاتا ہے اور خاتمہ سے متعلق کونسل کی رپورٹ کو ایک تاریخی دستاویز اور نظام بینکاری سے میدان میں اولین کوشش قرار دیتے ہوئے امید ظاہر کی ہے کہ یہ دستاویز تمام اسلامی ممالک کی ان کوششوں کے لیے مشعلِ راہ ثابت ہو گی جو اپنے نظامِ بینکاری کو اسلامی اصولوں کے مطابق از سرِ نو استوار کرنے کے سلسلے میں کوششیں کر رہے ہیں۔ سیمینار نے یہ سفارش کی کہ اسلامی نظریاتی کونسل کی اس رپورٹ کا عربی اور اسلامی ممالک کی دیگر زبانوں میں ترجمہ ہونا چاہیے تاکہ زیادہ سے زیادہ اہل علم حضرات اس سے استفادہ کر سکیں۔"[19]

چونکہ حکومت کے اعلان کے مطابق معیشت کو سود سے مکمل طور پر پاک کرنے کے سلسلے میں معینہ مدت ختم ہو چکی تھی اور کونسل کی توقع تھی کہ 1982-83ء کے وفاقی بجٹ کے اعلان کے ساتھ حکومت کی طرف سے سودی نظام کے خاتمے کا اعلان کیا جائے گا۔کونسل کو یہ دیکھ کر سخت مایوسی ہوئی کہ اس سلسلہ میں کوئی قدم نہیں اٹھایا گیا۔چنانچہ کونسل نے اپنے اجلاس منعقدہ اسلام آباد بتاریخ 21 اگست 1982ء میں یہ طے کیا کہ کونسل اب نظامِ زکوٰۃ و عشر، بلاسود بینکاری، مارک اپ سسٹم تمسکات اور بلاسودی کھاتے خصوصاً این۔آئی۔ٹی

18 – 'دس سالہ رپورٹ 1978-79ء' ص 229

19 – اسلامی نظریاتی کونسل، 'دس سالہ رپورٹ 83- 1982'، اسلامی نظریاتی کونسل، حکومت پاکستان، ص، 40

یونٹس کی ضمانت کے بارے میں سفارشات اور ان سے متعلق حکومت کے منظور کردہ قوانین کا جائزہ لے گی۔ اس سے قبل نومبر 1977ء میں اکابر فقہاء اور ماہرینِ معاشیات کی ایک 15 رکنی کمیٹی تشکیل دی گئی تھی جس نے نومبر 1978ء میں عبوری رپورٹ پیش کی۔[20] سود کو مرحلہ وار ختم کرنے کی سفارش کی تھی۔ یہی عبوری رپورٹ بعد ازاں 1980ء میں ہی ایک جامع حتمی رپورٹ[21] بعنوان " Report of the council of Islamic ideology on The elimination of interest from the economy"[۲۲] کے نام سے حکومت کو پیش کی گئی جس میں یہ کہا گیا تھا کہ دسمبر 1981ء تک ملک کو سودی نظام سے پاک کر دیا جائے گا[23]۔

۸. کونسل کی رپورٹ "بلاسود بینکاری" کے ابواب کا خلاصہ:

استیصالِ سود کے موضوع پہ کونسل کی یہ رپورٹ تعارف کے علاوہ پانچ ابواب اور ایک اختتامیہ پر مشتمل ہے۔ جو کہ 127 صفحات پر محیط ہیں۔ رپورٹ کے تعارفی باب میں اس امر پر بحث کی گئی ہے کہ وہ کون سے عقلی و نقلی دلائل اور حکمتیں ہیں کہ جن کی بنیاد پر اسلام نے سود کو حرام قرار دیا ہے۔ اس کا پہلا باب جس کا عنوان "مسائل و مشکلات اور ان کے حل کے طریقے" ہے۔

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20 کونسل نے یہ عبوری رپورٹ اپنے اجلاس منعقدہ ۲۵ تا ۳۰ نومبر ۱۹۸۵ء میں چیئرمین کونسل جناب محمد افضل چیمہ صاحب کی زیرِ صدارت این۔ آئی۔ ٹی یونٹ اور آئی۔ سی۔ پی مکانات کی تعمیر کیلئے دیے جانے قرضوں کو سود سے پاک کیے جانے والے اجلاس کے پینل کے سامنے پیش کی۔ مزید تفصیل کیلئے ملاحظہ ہو: **"مجموعی سفارشات اسلامی نظامِ معیشت"**، اسلامی نظریاتی کونسل، حکومتِ پاکستان، ص ۲۷

21 – اسلامی نظریاتی کونسل کے مقرر کردہ پینل ماہرینِ معاشیات و بینکاری نے دو سال کی محنتِ شاقہ کے بعد 28 جنوری 1980ء کو استیصالِ سود سے متعلق اپنی حتمی رپورٹ بزبان انگریزی کونسل کو پیش کی جو کہ کونسل نے ہی طبع کی تھی۔ یہ رپورٹ 113 صفحات پر مشتمل ہے اور یہ 05 ابواب پر مشتمل ہے۔

22 – اس خصوصی رپورٹ بلاسود بنکاری کی اشاعت کیلئے جناب صدرِ مملکت نے مورخہ ۲۱۔۲۲ اگست ۱۹۸۰ کو علماء کنونشن کے موقع پہ منظوری دی بعد ازاں افادہ عام کیلئے اس رپورٹ کا اردو ترجمہ بھی کونسل نے شائع کرایا۔ استیصالِ سود سے متعلق کونسل کی یہ رپورٹ اس موضوع پہ پہلی جامع کوشش تھی جس کی تیاری میں نہ صرف صاحبِ بصیرت علمائے دین بلکہ جدید اقتصادیات و بنکاری کے پیچیدہ علمی و فنی مسائل کا گہرا ادراک و شعور رکھنے والے اہلِ نظر حضرات کی خصوصی کاوشیں بھی شامل ہیں۔ مزید تفصیل کیلئے ملاحظہ ہو: **"مجموعی سفارشات اسلامی نظامِ معیشت"** اسلامی نظریاتی کونسل، حکومتِ پاکستان، ص۔ ۴۲

23 – اگرچہ ابتداء میں یہ رپورٹ انگریزی زبان میں تھی۔ کونسل نے اس رپورٹ کی افادیت کے پیشِ نظر اس کا اردو ترجمہ کرایا۔ اس رپورٹ کا عربی ترجمہ **"تقرير مجلس الفكر الاسلامى بشان الغاء الفائدة من اقتصاد الباكستان"** کے نام سے ملک عبدالعزیز یونیورسٹی جدّہ کے زیرِ اہتمام 1982ء میں شائع ہو چکا ہے۔ اس رپورٹ کے اب تک کئی ایڈیشن شائع ہو چکے ہیں۔ خاتمہ سود سے متعلق کونسل کی یہ رپورٹ اپنے موضوع پر دنیا کی سب سے پہلی کوشش تھی جس کی تیاری میں نہ صرف صاحبان بصیرت، علمائے دین بلکہ جدید اقتصادیات و بینکاری کے پیچیدہ عملی، علمی اور فنی مسائل کا گہرا ادراک و شعور رکھنے والے ماہرین حضرات کا وسیع تجربہ بھی شامل رہا۔ ملاحظہ ہو: اسلامی نظریاتی کونسل ' **مجموعی سفارشات اسلامی نظامِ معیشت**'، ص، ۴۵

أ. باب اوّل:

یہ باب اس بحث پر مشتمل ہے کہ ملکی اقتصادیات کو نفع و نقصان میں شرکت کی بنیاد پر کس طرح استوار کیا جا سکتا ہے اور وہ کونسی عملی مشکلات ہیں جو اس راہ میں حائل ہو سکتی ہیں۔ نیز یہ کہ اس طریقہ کے علاوہ اور کون سی ایسی صورتیں ہو سکتی ہیں جن کے ذریعے سودی نظام کو تبدیل کیا جا سکتا ہے۔ اس باب میں ان اقدامات پر بھی گفتگو کی گئی کہ جنہیں نئے نظام کی کامیابی کے لئے ہمیں معاشی زندگی میں بروئے کار لانا چاہیے[24]۔

ب. باب دوم:

دوسرے باب میں بڑی تفصیل کے ساتھ ان طریقوں کی وضاحت کی گئی کہ جن کے ذریعے تجارتی بینکوں کے لین دین سے سود کا عنصر ختم کیا جا سکتا ہے۔ اور اس باب میں بینکوں کی راہنمائی کے لئے وہ اصول درج کیے گئے ہیں جن کی روشنی میں ان کے لیے یہ ممکن ہو گا وہ زندگی کے مختلف شعبوں مثلاً صنعت، تجارت، زراعت، تعمیرات اور نقل و حمل وغیرہ میں اپنی سرمایہ کاری اور مالی لین دین کو سود سے پاک بنیادوں پر از سر نو استوار کر سکیں۔

بینکوں میں رکھی جانے والی امانات کے لیے کونسل نے ایک نیا نظام تجویز کیا۔ جس کے تحت بچت کھاتوں اور معیادی امانتوں پر ایک عبوری دور کے بعد کسی مقررہ شرح سے سود کے بجائے بنک کی آمدنی میں سے حصہ ملے گا جس کی مقدار بینک کو حاصل ہونے والی آمدنی کے مطابق کبھی زیادہ اور کبھی کم ہو گی، لیکن کھاتے داروں کو سود کے مقابلے میں زیادہ نفع حاصل ہو گا[25]۔

ج. باب سوم:

تیسرے باب میں خصوصی نوعیت کے مالیاتی اداروں کے لین دین سے خاتمہ سود کے وسائل و ذرائع پر گفتگو کی گئی ہے۔ اس باب میں صنعتی کارپوریشن، زرعی ترقیاتی بینک، چھوٹے کاروبار کی مالکاری کارپوریشن، وفاقی بینک برائے امداد باہمی کے طویل المیعاد قرضوں کو نفع و نقصان میں شرکت کی بنیادوں پر متبادل سرمایہ کاری کے حوالے سے بحث کی گئی ہے۔ اسی طرح بیمہ کاری کے نظام میں سوئے بازی اور سود کے عنصر کی نشان دہی کی گئی اور کونسل نے اپنی رائے دی کہ نظام بیمہ کاری کو امدادِ باہمی کے ان خطوط پر استوار کرنے کی ضرورت ہے جس کی وضاحت

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24 – اسلامی نظریاتی کونسل، **"رپورٹ بلاسود بنکاری"**، ص، 105

25 – اسلامی نظریاتی کونسل، **"رپورٹ بلاسود بنکاری"**، ص، 113

متن میں کی گئی ہے اور اسکے قواعد ان لوگوں تک محدود ہونے چاہیے جو مفادِ عامہ کیلئے قربانی دینے کیلئے تیار ہوں[26]۔

د۔ باب چہارم:

چوتھے باب میں سود سے پاک اقتصادی نظام میں مرکزی بینک کاری، زری بینکاری اور زری پالیسی کے مختلف مسائل کو زیرِ بحث لایا گیا ہے۔اس باب میں سفارش کی ہے کہ سود سے پاک نظام میں وسائل کی پیداوار کی تشخیص و تعیّن کے عمل کو منضبط کرنے کے لیے ضروری ہے کہ اسٹیٹ بینک کی جانب سے تجارتی بینکوں اور مالیاتی اداروں کو امدادی رقم مہیا کی جائیں۔ان کے منافع میں شرکت کی شرح مقرر کرنے کا اختیار اسٹیٹ بینک کو حاصل ہو۔اسی طرح تجارتی بینک اور مالیاتی ادارے دیگر ضرورت مندوں کو جو مالی امداد دیں اس کی شرح منافع کے تعین کا حق بھی اسٹیٹ بینک کو ملنا چاہیے[27]۔

ہ۔ باب پنجم:

رپورٹ کے آخری باب میں سرکاری لین دین سے استیصال سود کے مسائل زیرِ غور لائے گئے ہیں۔اس باب میں کہا گیا ہے کہ ملک سے سودی نظام ختم ہو جانے کے بعد حکومت کے لیے یہ ممکن نہ ہو گا کہ وہ مالیاتی اداروں یا عوام سے سود کی بنیاد پر قرضے حاصل کرے۔ لہٰذا حکومت کو اپنی مالی ضروریات پوری کرنے کے لیے بیشتر صورتوں میں اسٹیٹ بینک سے بغیر سود کے قرضہ لینے پڑیں گے۔ چنانچہ ایسے اقدامات کیے جائیں جن کے ذریعے مرکزی بینک کے سرمائے کی ملکی اقتصادیات میں آمیزش اور گردش کو مناسب حدود کے اندر رکھا جاسکے[28]۔

سود سے پاک نظامِ بینکاری سے متعلق کونسل کی سفارشات، آراء 1980 تا 1990 کا تعارفی جائزہ:

کونسل کیلئے یہ عشرہ بلاسود بینکاری نظام کے نفاذ اور خاتمہ سود سے متعلق انتہائی اہمیت کا حامل ہے کیونکہ اس عشرے میں ملکی مالیاتی اداروں سے سود کے مکمل خاتمہ کا اعلان کیا گیا تھا۔

۹۔ پاکستان بینکنگ کونسل کا پہلا اجلاس (۱۹۸۰ء):

26 – اسلامی نظریاتی کونسل، **"رپورٹ بلاسود بنکاری"**، ص، 117

27 – اسلامی نظریاتی کونسل **"رپورٹ بلاسود بنکاری"**، ص، 121

28 – اسلامی نظریاتی کونسل **"رپورٹ بلاسود بنکاری"**، ص، 125

پاکستان بینکنگ کونسل کا اسلامی نظریاتی کونسل کی پیش کردہ رپورٹ کی بنیاد پر قائم ہونے والی صورت سے پاک نظامِ بینکاری کی ترویج پر غور و فکر کرنے کے لئے ایک اجلاس 6 ستمبر 1980ء کو حبیب بینک پلازہ، کراچی میں زیرِ صدارت چیئرمین اسلامی نظریاتی کونسل پاکستان منعقد ہوا۔[۲۹]

کونسل کے چیئرمین و دیگر ارکان نے سود سے پاک نظامِ بینکاری کے عملی پہلوؤں پر گفتگو کی۔ اس اجلاس میں قومی ملکیت میں لیے گئے پانچ بینکوں کے سربراہوں، اسٹیٹ بینک کے ایگزیکٹیو ڈائریکٹر مسٹر حنفی اور بینکرز ایکیٹویٹی کے مینیجنگ ڈائریکٹر مسٹر ڈی ایم قریشی نے بھی شرکت کی اس اجلاس کی اہم باتیں درج ذیل ہیں۔

1) اجلاس میں چیئرمین اسلامی نظریاتی کونسل نے بینکاروں کے اس خدشے کی جانب اشارہ کیا کہ اگر لوگوں نے بینکوں سے لیے گئے قرضوں کی واپسی میں تاخیر کی تو اس صورت میں غیر سودی نظام کے رواج میں رکاوٹ پیدا ہو گی۔ کیونکہ ایسی صورت میں ایک تو بینکوں کو قانونی کاروائیوں میں الجھنا پڑے گا اور دوسرے ان کی رقمیں پھنس کر رہ جائیں گی جس سے انہیں سخت نقصان ہو گا لہٰذا ایسے سخت اقدامات کرنے ہوں گے جس سے اس صورتحال کا تدارک ہو سکے۔
2) بحث کے دوران یہ خیال بھی ظاہر کیا گیا کہ اگرچہ بیع مؤجل (deferred sale) کی صورت میں نظریاتی طور پر "مارک اپ" کی بنیاد پر زیادہ قیمت مقرر کی جاسکتی ہے۔

(تاکہ اگر قرض دار جلد رقم ادا کردے تو اسے چھوٹ دی جاسکے) لیکن میعاد کی بنیاد پر "مارک اپ" کو بڑھانے سے عوام کی بے چینی حکومت کے لیے مشکلات کا باعث ہو گی خصوصاً اس وقت جب کہ اس کی شرح سود کی بنیاد سے بھی زیادہ ہو جائے۔

3۔ میٹنگ میں اس سوال پر بھی غور کیا گیا کہ آیا اسلامی فقہ کے مطابق "نظریہ ضرورت" کے تحت وقتی طور بھی کوئی ایسا نظامِ بینکاری وضع کیا جاسکتا ہے جو خواہ صحیح معنوں میں مکمل طور پر اسلامی نہ ہو لیکن معیشت اور نظام بینکاری کی بقا اور صحت مند نشوونما کا ضامن ہو۔ اس ضمن میں یہ بات بھی سامنے آئی کہ ہمیں اسلامی ملکوں میں قائم دوسرے بلاسود بینکوں کے نظام اور ان کے طریقہ کار سے بھی واقفیت پیدا کرنی چاہیے[30]۔

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29 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 81-1980ء'**، اسلامی نظریاتی کونسل، حکومتِ پاکستان، ص 112

30 – چیئرمین نے اسلامی بینکوں کے معائنہ کے سلسلے میں اسلامی ملکوں کے دورہ کرنے کی اجازت کے لئے ایک خلاصہ مورخہ 21 دسمبر 1980ء کو ارسال کیا جس میں چیئرمین کونسل، ڈپٹی گورنر اسٹیٹ بینک، ایکویٹی لمیٹڈ کے مینیجنگ ڈائریکٹر اور حبیب بینک لمیٹڈ کے پریذیڈنٹ کو شامل کرنے کی تجویز پیش کی گئی تھی۔ لیکن چیف آف سٹاف برائے صدر نے ہدایت کی کہ اس دورے کے بارے میں چھ ماہ بعد وزارت مالیات صدرِ مملکت کو وضاحت پیش کریں۔

۱۰. پاکستان بینکنگ کونسل کا دوسرا اجلاس (۱۹۸۱ء):

پاکستان بینکنگ کونسل کا دوسرا اجلاس 15 جنوری 1981ء کو منعقد ہوا۔ اسلامی نظریاتی کونسل کے چیئرمین نے خصوصی شرکت کی۔اس اجلاس میں بھی اسلامی نظریاتی کونسل کے چیئرمین بزنس ریکارڈ کے اداریے مورخہ 12 جنوری کا حوالہ دیتے ہوئے اپنے خطاب میں کہا:

> ''اسٹیٹ بینک آف پاکستان کا جو سرکلر گزشتہ سنیچر کے اخبارات میں شائع ہوا اس سے ایک معمولی ذہانت رکھنے والے آدمی پر بھی یہ بات واضح ہو جاتی ہے کہ ایک متعینہ وقت کے عوض متعین آمدنی کا طریقہ جو اب تک سود کے نام سے پہچانا جاتا تھا "آئندہ مارک اپ" کے عنوان سے جانا جائے گا اور اس میں جو بات سب سے زیادہ اہم ہے وہ یہ ہے کہ مرکب سود لینے کے طریقے کو نہ صرف ختم نہیں کیا گیا بلکہ مارک اپ کے طریقوں کی صورت میں اسے بینکوں کیلئے نفع بخش بھی بنا دیا گیا ہے۔''[31]

اس اجلاس میں ڈاکٹر شرافت علی ہاشمی نے یہ خدشہ ظاہر کیا کہ بلا سود معیشت کا نظام جس طرح نافذ کیا جارہا ہے اس کا نتیجہ مکمل یا جزوی ناکامی کی صورت میں ظہور پذیر ہوگا۔ اور نتیجتاً اسلام بدنام ہوگا۔انہوں نے بھی مارک اپ سسٹم کو سود کا دوسرا نام قرار دیا۔ڈاکٹر ضیاءالدین احمد (جو اسی گروپ کے کنوینئر) تھے انہوں نے بھی یہ خیال ظاہر کیا کہ بلا سودی نظام کی رفتار کو تیز تر کرنے سے پیشتر یہ ضروری ہے کہ نافذ شدہ اقدامات کے اثرات کا اچھی طرح جائزہ لیا جائے[32]۔

۱۱. یادداشت بسلسلہ اقدامات خاتمہ سود (۱۹۹۸۱ء)

نو تشکیل شدہ اسلامی نظریاتی کونسل نے اپنے اجلاس منعقدہ، اسلام آباد مورخہ 27 جون، 1981ء کو بصدارت چیئرمین کونسل جسٹس ڈاکٹر تنزیل الرحمٰن ان اقدامات کا جائزہ لیا جو حکومت نے ملک میں سودی نظام کے خاتمے کے لیے 1980-81 میں کیے تھے۔ کونسل نے خاتمہ سود سے متعلق کیے جانے والے حکومتی اقدامات کو ان سفارشات کے برعکس قرار دیا جو کونسل نے تجویز کیے تھے۔ کونسل نے اپنی رپورٹ میں سود کے خاتمے کے ہر مرحلے کو منطقی ترتیب دے کر واضح کر دیا تھا۔اور خطرات سے بھی آگاہ کر دیا تھا جو اس تجربے کی ناکامی پر منتج ہو سکتے ہیں۔ حکومت کی طرف سے اس واضح تنبیہ کو مسترد کر دیا گیا ہے اور وہ طریقہ اختیار کیا گیا ہے جو مقصد کو فوت کرنے کا باعث بن گیا ہے۔ کونسل نے شراکت و مضاربت اور قرضِ حسنہ کو ہی سودی نظام کا اصل اور حقیقی بدل قرار دیا تھا۔البتہ عبوری دور کے کیلئے اور ناگزیر حالات میں بعض دیگر طریقوں کی سفارش بھی

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31 – اسلامی نظریاتی کونسل، **'نظام معیشت'**، اسلامی نظریاتی کونسل، حکومتِ پاکستان، ص46

32 – اسلامی نظریاتی کونسل، **'مجموعی سفارشات اسلامی نظام معیشت'**، ص،49

کی تھی۔ حکومت نے اپنی سکیم میں جو مارک اپ اور مارک ڈاؤن کا طریقہ اختیار کیا ہے وہ سود کے سوا کچھ بھی نہیں[33]۔

۱۲. سودی نظام کے خاتمہ کے لیے عملی تدابیر اور کونسل کی سفارشات (۱۵ اگست ۱۹۸۱ء)

صدر مملکت نے نو تشکیل شدہ کونسل کے افتتاحی اجلاس منعقدہ بعنوان "سودی نظام کے خاتمے کے لیے عملی تدابیر" پر غور و فکر کرنے کے لئے کونسل کو ہدایت فرمائی[34]۔ چنانچہ کونسل نے صدرِ مملکت کی ہدایت کی روشنی میں اپنے اجلاس منعقدہ اسلام آباد 5 اگست 1981ء بصدارت چیئرمین کونسل جسٹس ڈاکٹر تنزیل الرحمٰن اس موضوع پر غور کرنے کے بعد یہ سفارش منظور کی:

> "اسلامی نظریاتی کونسل نے جو یاداشت بسلسلہ اقدامات برائے خاتمہ سود بصورتِ قرارداد مورخہ 27 جون 1981ء کے اجلاس میں منظور کی اسے عملی جامہ پہنایا جائے"[35]۔

۱۳. حصہ داری کے میعادی سرٹیفکیٹ سے متعلق کونسل کی سفارشات (۱۰ نومبر ۱۹۸۱ء):

اس اجلاس میں کونسل کے چیئرمین جسٹس ڈاکٹر تنزیل الرحمن نے این۔ آئی۔ ٹی کے چیئرمین سے تبادلہ خیال کیا اور حصہ داری کے مالی سرٹیفکیٹ کے حوالے سے تشویش کا اظہار کیا اور اس ضمن میں یہ واضح کیا کہ کونسل اس صورتحال کو تشویش کی نگاہ سے دیکھتی ہے کہ بلاسودی بچت اور سرمایہ کاری اسکیموں کے مقابلے میں سودی بچت اور سرمایہ کاری کی اسکیموں کو زیادہ شرح منافع دے کر زیادہ نفع مند بنایا جارہا ہے۔ جیسا کہ خاص ڈیپازٹ سرٹیفکیٹس اور ڈیفنس سیونگ سرٹیفکیٹ سے عیاں ہے۔ لہٰذا کونسل حکومت سے یہ سفارش کرتی ہے کہ:

> سودی بچت اور سرمایہ کاری کی بلاسودی بچت اور سرمایہ کاری کے مقابلے میں ہمت افزائی نہ کی جائے تاکہ بلاسودی بچت اور سرمایہ کاری کو کم از کم یکساں مواقع ملیں[36]۔

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33 – اسلامی نظریاتی کونسل، **'نظام معیشت'**، ص50-51

34 – Rehman, Habib and Shahzad, Muhammad Asghar, **'Role of Constitutional Institutions for Elimination of Interest in Pakistan'**, (February 28, 2019). Available at, http://dx.doi.org/10.2139/ssrn.3549501.

35 – اسلامی نظریاتی کونسل، **'نظام معیشت'**، ص59

36 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ، 1981-82ء'**، اسلامی نظریاتی کونسل، حکومتِ پاکستان، ص86

۱۴. خاتمہ سود کے لئے چند مزید تجویز(۱۱نومبر ۱۹۸۱ء):

اسلامی نظریاتی کونسل نے اپنے اجلاس منعقد اسلام آباد مورخہ 11 نومبر 1981ء کو چیئرمین کونسل جسٹس ڈاکٹر تنزیل الرحمن کی صدارت میں خاتمہ سود سے متعلق چند تجاویز منظور کیں جن کا خلاصہ یہ ہے :

> ''ملک میں عوام و خواص سب کے لئے یہ امر باعثِ مسّرت تھا کہ مرکزی حکومت نے پہلی بار سنجیدگی سے خاتمہ سود کی پالیسی کا اعلان کیا ہے۔ اس کام کے لیے تین سال کی مناسب مدت کا ہدف مقرر کیا ہے۔اور ایک حقیقت پسندانہ اور مرحلہ وار پروگرام اختیار کیا گیا۔اسلامی نظریاتی کونسل کے ارکان کے لئے یہ امر بھی باعثِ اطمینان ہے کہ پہلے مرحلے میں کونسل کی سفارش کے مطابق ہاؤس بلڈنگ، فنانس کارپوریشن، نیشنل انویسٹمنٹ ٹرسٹ اور انوسٹمنٹ کارپوریشن آف پاکستان سے سودی لین دین یکسر ختم کر دیا گیا۔ ہمیں قوی امید ہے کہ اس کے بعد تجارتی بینکوں سے سود ختم کرنے کے سلسلے میں بھی کونسل کی سفارشات کو عملی شکل دی جائے گی۔ کیونکہ خاتمہ سود کی اصل مہم یہاں سے ہی شروع ہوتی ہے۔''[37]

۱۵. ۱۹۸۲-۸۳ء کی وفاقی میزانیہ میں نفاذ اسلام کے معاشی پہلوؤں پر کونسل کی تجاویز(۱۲ اگست ۱۹۸۲ء)

اسلامی نظریاتی کونسل نے اپنے اجلاس منعقدہ اسلام آباد مورخہ 12 اگست 1982ء کو جسٹس ڈاکٹر تنزیل الرحمان کی زیرِ معیشت کو اسلامی بنانے کے لیے اقدامات کا جائزہ لیا جن کا سال رواں کے بجٹ میں تذکرہ کیا گیا تھا۔ کونسل کو اس کی توقع تھی کہ اس بجٹ میں حکومت کی جانب سے غیر سودی معیشت کے سلسلے میں کیے جانے والے اب تک کے اقدامات کی ان خامیوں کی اصلاح کر دی جائے گی جن کی نشاندہی کونسل متعدد بار کر چکی ہے۔ کونسل کو اس کا خاص طور سے یقین تھا کہ مارک اپ کا جو طریقہ کار جنوری 1981ء میں تیار کیا گیا تھا اور جسے کونسل، دینی حلقوں اور دوسرے اعلیٰ نظر نے واضح طور پر سود قرار دیا تھا۔ ختم کر دیا جائے گا۔ لیکن کونسل کو یہ دیکھ کر سخت مایوسی کے اس سلسلے میں حکومت کی طرف سے ختم کوئی قدم نہیں اٹھایا گیا اور غیر سودی کاروبار

کونسل کی مذکورہ بلا سفارش بذریعہ مراسلہ نمبر 6(25)/81آر۔سی آئی ٹی/3682، بتاریخ 19 جنوری 1982ء وزارتِ خزانہ کو ارسال کر دی گئی۔اس کی ایک نقل وزارت، مذہبی امور کو بھی روانہ کی گئی۔مزید تفصیل کیلئے ملاحظہ ہو: ''مجموعی سفارشات اسلامی نظام معیشت'' اسلامی نظریاتی کونسل، ص۔۸۷

37 – اسلامی نظریاتی کونسل، **سالانہ رپورٹ، 81-1980**، ص،60

کے نام پر یہ سودی طریقہ کار برقرار رکھا گیا ہے۔ تاہم کونسل نے اس اجلاس میں بیع المشارکہ، پٹہ داری اور مشارکہ کے اسلامی طریقوں کے حوالے سے اپنی سفارشات پیش کیں[38]۔

۱۶. رائج الوقت معاشی قوانین میں کونسل کی سفارشات (۱۹۶۲ء تا جولائی ۱۹۸۳ء)

اسلامی نظریاتی کونسل نے آئین پاکستان کے تحت میں یوم تاسیس سے لے کر جولائی 1983ء حسب ذیل رائج الوقت معاشی قوانین کا جائزہ لیں اور اپنی سفارشات حکومت کو ارسال کی جن کی تفصیل قوانین رائج الوقت کو اسلامی سانچے میں ڈالنے سے متعلق کونسل کی آٹھ رپورٹوں میں موجود ہیں۔ کونسل کی یہ سفارشات مجموعہ قوانین پاکستان کی جلد 1 تا 8 سے متعلق ہیں[39]۔

۱۷. قرضوں کو سود سے پاک کرنے سے متعلق کونسل کی سفارشات (جولائی ۱۹۸۳ء)

کونسل نے اپنے اجلاس منعقدہ کراچی 27 جولائی تا 27 جولائی 1983ء میں موضوع بالا پہ حسبِ ذیل سفارشات بالاتفاق رائے منظور کیں:

> انکم ٹیکس آرڈیننس کی دفعہ 12 ذیلی دفعہ 7 کے مطابق اگر کوئی ٹیکس گزار کسی شخص کو کچھ رقم بطور قرض دیتا ہے اور اس پر شخصِ مذکور سے کوئی سود نہیں لیتا تو مذکورہ دفعہ کے مطابق انکم ٹیکس آفیسر قرض دی گئی رقم پر سود چارج کرے گا۔ اور اس رقم کو ٹیکس گزار کی آمدنی سمجھا جائے گا۔ اگر ٹیکس گزار نے قرض خواہ سے مذکورہ شرح کے مطابق سود نہیں لیا تو جتنا کم سود لیا گیا ہے وہ ٹیکس گزار کی آمدنی میں شامل کیا جائے گا۔ آج کل بینک کی شرح دس فیصد ہے گویا 12 فیصد کے مطابق محکمہ انکم ٹیکس سود چارج کر کے ٹیکس گزار کی آمدنی میں شمار کرے گا۔ مذکورہ بالا دفعہ سے سودی قرضوں کی ہمت افزائی اور قرضِ حسنہ کی ہمت شکن ہو رہی ہے۔ سودی قرضوں کا ایک اسلامی متبادل قرضِ حسنہ ہے۔ جس کی سفارش کونسل اپنی رپورٹ "بلا سود بنکاری 1980ء" میں کر چکی ہے۔ اس اعتبار سے قرض حسنہ کی حوصلہ شکنی سودی نظام کے اجراء میں حائل ہو کر نفاذ اسلام کی راہ کا سنگِ گراں ثابت ہو گی۔ اس لئے کونسل یہ سفارش کرتی ہے کہ دفعہ 12 (7) کو ختم کیا جائے[40]۔

۱۸. سودی نظام کے خاتمے سے متعلق سفارشات (۱۹۸۳ء)

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38 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 1982-83ء'**، اسلامی نظریاتی کونسل، حکومتِ پاکستان، ص 41

39 – اسلامی نظریاتی کونسل، **'نظام معیشت'**، ص 95

40 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 1983-84ء'**، اسلامی نظریاتی کونسل، حکومتِ پاکستان، ص 169

43 – یہ سفارش بذریعہ مراسلہ نمبر ۷ (۴۴)/۸۳-آر سی آئی مورخہ ۲۲ فروری ۱۹۸۴ء کو وزارتِ مذہبی امور کو ارسال کی گئی۔ مزید تفصیل کیلئے ملاحظہ ہو: **'سالانہ رپورٹ 1983-84ء'**، اسلامی نظریاتی کونسل، ص۔ 175

آئین پاکستان کے آرٹیکل 234الف (1) کے تحت ملکی معیشت سے سود کے خاتمہ کے ضمن میں موضوع بالا پہ ذیل سفارشات کیں:

نیشنل ڈویلپمنٹ فنانس کارپوریشن کے اشتہار جس میں ایک لاکھ روپے بینک میں جمع کرا کر 100 روپے ماہانہ وصول کرنے کا لالچ دیا گیا ہے۔ کونسل کے زیر بحث آیا۔ کونسل نے متفقہ طور پر ایسے اشتہار کو سودی کاروبار کے لیے حوصلہ افزائی قرار دیا اور حسبِ ذیل قرارداد منظور کی:

> ''ایک لاکھ روپے کی امانت پر بیٹھے گیارہ سو روپے کی ماہانہ آمدنی حاصل کیجیے۔ یہ اشتہارات اور ٹی وی کے ذریعے عوام تک پہنچائے جاتے ہیں تاکہ لوگوں کو رُبوا کی طرف راغب کیا جائے۔ یہ ضمانت شدہ ماہانہ ادائیگی جو نیشنل بینک میں فنانس کارپوریشن کی طرف سے پیش کی جاتی ہے، دراصل سود ہے۔ ذرائع ابلاغ کے ذریعے اس قسم کے اشتہارات حکومت کی معاشرے میں اسلامی طرز حیات اور اسلامی اقدار کے احیاء کی پالیسی کے خلاف اور قرآنی احکام کا تمسخر اڑانے کے مترادف ہے۔[41]''

لہذا اسلامی نظریاتی اسلامی کونسل سفارش کرتی ہے کہ اس مسئلہ کے مناسب حل کے لیے اس معاملے کو کونسل کے علم میں لایا جائے۔

۱۹. این۔ڈی۔ایف۔سی NDFC سکیم میں ممانعتِ سود کی سفارش (نومبر ۱۹۸۳ء)

.اسلامی نظریاتی کونسل نے این ڈی ایف سی کی ممانعتِ سود کے حوالے سے اپنے اجلاس منعقدہ 5تا 16 نومبر 1983ء کو موضوع بالا پر درج ذیل سفارشات منظور کیں :

> ''نیشنل ڈیویلپمنٹ فنانس کارپوریشن کا اشتہار جس نے ایک لاکھ روپے بینک میں جمع کرا کر گیارہ سو روپے ماہانہ وصول کرنے کا لالچ دیا گیا ہے کونسل کے زیر بحث آیا کونسل نے متفقہ طور پر ایسے اشتہارات کو سودی کاروبار کے لیے حوصلہ افزائی قرار دیا۔''[42]

۲۰. کونسل کی بلاسود بنکاری رپورٹ کا دوسرا ایڈیشن:

کونسل کی مذکورہ رپورٹ 1980ء میں پہلی بار شائع کی گئی تھی۔ اس کے بارے میں اس وقت کے حالات کے مطابق سود کو فوری طور پر ختم کرنے کے بجائے تدریجاً ختم کرنے کے لیے تین مراحل کے مطابق ختم کرنے کا مشورہ دیا گیا تھا۔ تین مرحلے 21 دسمبر 1981ء کو مکمل ہونے کو تھے۔ مزید دو سال گزر جانے کے باوجود سودی نظام جاری تھا۔ ان حالات کے پیش نظر سیکرٹری کونسل میں بلا سود بنکاری نظام کے فروغ کے سلسلے

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42 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 1983-84ء'**، اسلامی نظریاتی کونسل، حکومتِ پاکستان، ص177

میں کونسل کی بلا سود بنکاری رپورٹ میں بعض ترامیم پیش کیں۔ جس کے مطابق چند صفحات اور پیراگراف اس مقصد کے لئے اضافہ اور ترامیم کی کی گئیں۔ کونسل نے اپنے اجلاس منعقدہ کراچی یکم اور 02 جنوری 1984ء کو ان تجاویز پر غور کرنے کے بعد حسب ذیل سفارشات بزبان انگریزی اتفاقِ رائے سے منظور کیں۔

"Review of Council of Islamic Ideology's Report on the Elimination of Interest from the Economy (June 1980)"[43]

۲۱. خاتمہ سود کے متعلق اسلامی نظریاتی کونسل کی رپورٹ ۱۹۸۰ء پر نظر ثانی:

اسلامی نظریاتی کونسل نے اپنے بیسویں اجلاس منعقدہ کراچی مورخہ 24 دسمبر 1983ء تا 2 جنوری 1984ء چیئرمین کونسل ڈاکٹر جسٹس تنزیل الرحمان کی صدارت میں اس پیش رفت کا جائزہ لیا جو ملکی سود سے پاک بینکاری کے میدان میں 1980ء میں خاتمہ سود کے موضوع پر کونسل کی رپورٹ پیش ہونے کے بعد عمل میں آئی۔ کونسل نے یہ یاددہانی کرائی کے مذکورہ رپورٹ میں شامل اس کی متعدد سفارشات کا مقصد یہ تھا کہ سودی بنیاد پر قائم پاکستانی معیشت کو بتدریج ترک کرکے سود سے پاک نظام کے قیام میں سہولت اور آسانی پیدا کی جائے۔ موجودہ حالات کے پیش نظر کونسل یہ سمجھتی ہے کہ اگرچہ استیصالِ سود کے لیے مقررہ گزرے اب کافی دن ہو چکے ہیں لیکن اب تک اس سلسلے میں جو پیش رفت ہوئی ہے اسے کسی طرح بھی اطمینان بخش نہیں کہا جاسکتا ہے۔ بیع مؤجل کا طریقہ جس کی اجازت بعض اقسام کے لین دین میں عارضی طریقہ کار سے دی گئی تھی تجارتی بینکوں نے اسے اپنے نام نہاد لین دین کا سب سے بڑا ذریعہ بنالیا ہے۔ اب کونسل یہ رائے رکھتی ہے کہ اب تک پاکستان اور دیگر مسلم ممالک سود سے پاک بینکاری کے میدان میں کافی تجربہ حاصل کر چکے لہذا ضروری ہے کہ بینکاری اور مالیات کے موجودہ نظام کو بدل کر پاکستان میں بینکاری اور مالیات کا ایسا نظام رائج کیا جائے جو اسلامی اصول و تصورات سے ہم آہنگ ہو۔ ان گزارشات کو سامنے رکھتے اسلامی نظریاتی کونسل نے اپنی مذکورہ بالا رپورٹ کے صفحات کی نسبت سے حکومت کی خدمت میں کچھ آراء اور سفارشات بالاتفاق رائے پیش کیں[44]۔

۲۲. ملکی معیشت سے سود کو بیک وقت ختم کرنے سے متعلق کونسل کی سفارشات اور مسودہ قانون برائے امتناعِ سود (۱۹۸۳-۸۴ء)

اسلامی نظریاتی کونسل نے اپنے اجلاس منعقدہ کراچی بتاریخ 24 دسمبر 1983ء تا 2 جنوری 1984ء چیئرمین کونسل ڈاکٹر تنزیل الرحمن کی صدارت میں حکومت کی جانب سے یکم جنوری 1981ء سے

43 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 1983-84ء'**، ص182

44 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 1983-84ء'**، ص177

اب تک ملکی معیشت سے خاتمہ سود کے بارے میں کیے گئے اقدامات کا تفصیلی جائزہ لیا اور عدمِ اطمینان کا اظہار کرتے ہوئے ملک میں سودی معیشت کو بیک قلم ختم کرنے کے لئے حسبِ ذیل سفارشات اور مسودہ قانون برائے بزبان انگریزی منظور کیا۔ جو اس عنوان سے منظرِ عام پہ آئے۔

"In Appraisal of interest free banking in Pakistan"(45)

۲۳. مجموعی سفارشات اسلامی نظامِ معیشت:

آئین پاکستان 1973ء کے ارٹیکل 230 کے تحت کونسل کی یہ ذمہ داری تھی کہ وہ ایسے ذرائع و وسائل کی سفارش کرے جن سے پاکستانی مسلمان اپنی زندگیاں اسلامی اصول و ضوابط کے مطابق گزار سکیں۔ کونسل نظامِ معیشت سے متعلق اب تک مختلف ادوار میں لاتعداد رپورٹس شائع کر چکی تھی۔ جو کہ استیصالِ سود، نظامِ زکوٰۃ و عشر، نظام ٹیکس کی اصلاح اور معاشی فلاح و بہبود سے متعلق تھیں۔ تاہم ان تمام رپورٹس کو یکجا کرنے کی غرض سے کونسل نے ایک جامع مجموعہ بعنوان "مجموعی سفارشات اسلامی نظامِ معیشت" مرتب کیں(46)۔

۲۴. اسلام کے معاشی نظام پر رپورٹ (جنوری ۱۹۸۷ء)

پروفیسر ڈاکٹر ضیاءالدین احمد رکن کونسل نے اجلاس منعقدہ کراچی بتاریخ 10 تا 15 جنوری 1987ء میں کونسل کی توجہ اس جانب مبذول کرائی کہ اگرچہ کونسل سود، زکوٰۃ اور عشر جیسے اہم معاشی موضوعات پر اپنی تحقیقی رپورٹ حکومت کے سامنے پیش کر چکی ہے لیکن کونسل نے اسلام کے پورے معاشی نظام کے بارے میں کوئی مفصل رپورٹ ابھی تک تیار نہیں کی حالانکہ مسئلے کی اہمیت کا یہ تقاضا تھا کہ اس پر خصوصی توجہ دی جاتی۔ بہر حال مناسب ہوگا کہ اس طرح کی ایک کمیٹی تشکیل دی جائے جو اسلام کے معاشی نظام کا تفصیل سے مطالعہ کر کے اپنی جامع تحقیقی رپورٹ مرتب کرے۔ اور یہ رپورٹ پہلے کونسل کے سامنے پیش ہو

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45 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 1983-84ء'**، ص ۱۹۴

46 – معاشی نظام سے متعلق پہلے سالانہ رپورٹ شائع ہوتی رہیں لیکن بعد میں کونسل کی ایک قابلِ تعریف کاوش یہ ہوئی کہ کونسل نے معاشی نظام سے متعلق تمام سفارشات کے مجموعے کو یکجا کرنے کی غرض سے پہلی بار 1983ء میں بعنوان **"مجموعی سفارشات اسلامی نظامِ معیشت"** (Consolidated Recommendations on the Islamic Economic System) کے نام سے منظرِ عام پہ آئیں۔ ان سفارشات کا دوسرا ایڈیشن اپریل 2013ء میں دوبارہ شائع کیا گیا۔

اور پھر کونسل کی منظوری سے حکومت کو بھیجی جائے۔ کونسل نے معاشی نظام کے حوالے سے تفصیلی رپورٹ مرتب کرنے کے لیے ایک کمیٹی ترتیب دی[47]۔

25. بلاسود بنکاری کی جائزہ کمیٹی (مارچ 1987ء)

کونسل نے محسوس کیا کہ ان دنوں ملک کے تجارتی بینکوں میں جو لین دین ہو رہا تھا وہ صحیح نہیں لہذا کونسل نے اپنی سفارش کے مطابق بلاسود بینکاری پیش رفت کا جائزہ لینے کے لئے 17 مارچ 1987 کو کونسل کے چیئرمین پروفیسر ڈاکٹر عبدالواحد ہالے پوتا کے زیر صدارت ایک اجلاس منعقد کیا۔ اس میں ایک کمیٹی تشکیل دی[48]۔

26. ربٰوا سے متعلق وزارتِ خزانہ کا کونسل سے استفسار (مارچ 1993ء)

ربٰوا سے متعلق سب سے پہلے مارچ 1993ء میں وزارت خزانہ، حکومت پاکستان نے 'ربا' کے بارے میں سوال کیا کہ کیا عوام میں مروّج سودی نظام اسلامی اصولوں سے مطابقت رکھتا ہے یا نہیں؟ کیا اسلام جس سود کی ممانعت کرتا ہے وہ ہمارے روایتی بینکاری میں موجود ہے؟ تو اس کے جواب میں اس وقت کے اسلامی مشاورتی کونسل کے چیئرمین ابو صلاح محمد اکرم نے تجویز دی جس کا خلاصہ درج ذیل ہے:

> "The advisory council of Islamic Ideology that Riba is forbidden but in disagreement as to whether". Interest in the form in which it appears in public transition" which in the opinion of the council includes ''institutional credit as well as it will also covered by Riba, Specified in the Holy Quran. There is, however unanimity on the point that for the fulfillment of the Islamic requirement of social justice, and concept of human brother hood, a system of interest less economy should be in a guaranteed. The council recognizes that any abrupt or sudden change will create numerous difficulties for the country. The council recommends that effects in the direction of establishing an economy free from interest should not be unduly delayed." [49]

۲۷. اسلامی نظام معیشت کی تدوین نو کیلئے کمیٹی کا قیام (۱۹۹۰-۹۱ء):

47 – اسلامی نظریاتی کونسل، ' **سالانہ رپورٹ 1986-87ء**'، اسلامی نظریاتی کونسل، حکومتِ پاکستان، ص88

48 – اسلامی نظریاتی کونسل، ' **سالانہ رپورٹ 1986-87ء**'، ص95

49 Council of Islamic Ideology, **'Consolidated Recommendations on the Islamic Economic System'**, Council of Islamic Ideology, Government of Pakistan, p.1

اسلامی نظریاتی کونسل پاکستان نے اپنے منعقدہ اجلاس [50] اسلام آباد مندرجہ بالا موضوع پر غور کیا۔ گزشتہ کونسل میں اسلامی نظامِ معیشت کا خاکہ تیار کرنے کے لئے ذیلی کمیٹی قائم کی تھی۔ جس کے دو اجلاس منعقد ہوئے لیکن اس کام میں کوئی خاص پیش رفت نہ ہو سکی تھی۔ چنانچہ نو تشکیل شدہ کونسل نے سابقہ مواد پر غور کرنے کے بعد اراکین پہ مشتمل ایک کمیٹی تشکیل دی اور طے پایا گیا کمیٹی جلد از جلد اس موضوع پر جامع رپورٹ مرتب کرے گی [51]۔

۲۸. اسلامی نظام معیشت پر جامع رپورٹ:

ذیلی کمیٹی نے اس کام کی تکمیل کے لیے تین اجلاس [52] منعقد کیے اور ایک جامع رپورٹ مرتب کی۔ جسے کونسل نے اپنے اجلاس منعقدہ اسلام آباد تاریخ 25تا28 نومبر 1990ء میں چند ترامیم اور اضافوں کے ساتھ منظور کر لیا یہ رپورٹ الگ طور پر طبع کی گئی [53]۔

29. مسلم کمرشل بینک کی مال سکیم کو سود قرار دینے سے متعلق کونسل کی سفارشات (نومبر 1998ء):

اسلامی نظریاتی کونسل نے اپنے 134 ویں اجلاس میں جو کہ 24تا26 نومبر 1998 ء میں کونسل کی معیشت کمیٹی کی رپورٹ پر حسبِ ذیل دلائل سے اتفاق کرتے ہوئے اس اسکیم کو ناجائز قرار دیا۔ اور یہ واضح کیا کہ راتوں رات کروڑپتی بنانے والی یہ سوچ نہ صرف غیر اسلامی بلکہ اخلاقیات کے عام دستور معاشیات کے صحت مند اصولوں کے بھی خلاف ہے۔ چنانچہ کونسل نے یہ فیصلہ کیا کہ اس میں رِبٰوا اور قمار دونوں کا عنصر شامل ہے لہذا یہ اسلامی احکام کے مطابق نہیں [54]۔

۳۰. حبیب بینک کروڑپتی سکیم کے حوالے سے کونسل کی سفارشات (نومبر ۱۹۹۸ء)

50 – یہ اجلاس 19 مارچ تا 21 مارچ 1990ء میں اسلام آباد میں چیئرمین اسلامی نظریاتی کونسل جسٹس محمد حلیم کی زیرِ نگرانی میں منعقد ہوا۔

51 – اسلامی نظریاتی کونسل، 'سالانہ رپورٹ 1990-91ء، اسلامی نظریاتی کونسل، حکومتِ پاکستان، ص171

52 اس کمیٹی کا پہلا اجلاس 9تا10 مئی، 1990ء اسلام آباد میں، دوسرا اجلاس 23تا24 مئی 1990ء کراچی میں اور تیسرا اجلاس 25تا28 اگست 1990ء لاہوار میں منعقد ہوا۔

53 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 1990-91ء'**، ص171

54 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 1990-91ء'**، ص، 150

کونسل نے اپنے 134 ویں اجلاس مورخہ 24تا26 نومبر 1998 میں اس مسئلے پر غور کیا کونسل نے وضاحت کی کہ اس سکیم میں سود اور قمار دونوں کا عنصر پایا جاتا ہے لہذا کونسل نے اس سکیم کو شرعاً حرام قرار دیا[55]۔

31. بلاسود بنکاری کی جامع رپورٹ کی تشہیر اور بینکاری نظام کو اس رپورٹ سے راہنمائی لینے سے متعلق کونسل کی سفارشات (جنوری 1999ء)

اسلامی نظریاتی کونسل کے 135 ویں اجلاس مورخہ 30تا31 جنوری 1999ء کے سامنے یہ سوال آیا کہ اب جبکہ حکومت خود بھی اسمبلی میں شریعت بل (پندرھویں ترمیم) پیش کر چکی ہے، لہذا کونسل کی سفارشات پر غور اور عملدرآمد تیز تر ہونا چاہیے۔ اسی طرح کونسل اپنی بلاسود بینکاری رپورٹ بھی پیش کر چکی ہے جس کے اب اردو عربی اور مالیزی زبانوں میں تراجم بھی ہو چکے ہیں۔ تو کیا ہم کسی ایسی تجویز پر متفق ہو سکتے ہیں جس کی رو سے حکومت کو اس جامع رپورٹ کے نفاذ پر مجبور کر سکیں۔ اس کے جواب میں ڈاکٹر محمود احمد غازی نے حسب ذیل تجاویز پیش فرمائیں۔

1) حکومت پاکستان اسٹیٹ بینک میں کسی ایسی شخصیت کو بطور ڈپٹی گورنر مقرر کرے، جس کی اسلامی معاشیات سے نہ صرف گہری وابستگی ہو بلکہ بلاسود بینکاری سے کمٹمنٹ بھی ہو۔ تو بلاسود بنکاری اقدامات پر آسانی سے عملدرآمد کروایا جاسکتا ہے۔

2) بلاسود بینکاری رپورٹ کی اخبار میں تشہیر کی جائے۔ کیونکہ اس میں سود کے کئی متبادل حل پیش کی گئے ہیں اور قانونی طور پر یہ کیا جاسکتا ہے کہ آئین کے آرٹیکل 239 کے حوالے سے حکومت کو مجبور کیا جائے کہ وہ چھے ماہ کے اندر نافذ کرے، اور اس رپورٹ سے تمام مالیاتی ادارے رہنمائی لیں[٥٦]۔

۳۲. یو۔بی۔ایل کی زرآمد سکیم کے متعلق کونسل کا نوٹس (مئی 1999ء)

55 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 1990-91ء'**، ص، 153

56 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 1998-99ء'**، اسلامی نظریاتی کونسل، حکومتِ پاکستان، ص۔147

اسی طرح کونسل نے اپنے 136 ویں اجلاس مورخہ یکم تا 2 مئی 1999 میں مسلم کمرشل بینک مال سکیم کو بھی ناجائز اور حرام قرار دیا۔ اور واضح کیا کہ اس طرح کی تمام سکیم میں ربا اور قمار دونوں کو شامل ہے لہذا یہ اسلامی احکام کے مطابق نہیں ہے [57]۔

33. بین الاقوامی کانفرنس "اسلام اور جدید معاشی مسائل" (2007ء)

کونسل کے زیرِ اہتمام یہ کانفرنس یکم اور 2 جون 2007ء کو منعقد ہوئی۔ جس میں اس وقت کے وزیرِ اعظم جناب شوکت عزیز نے افتتاحی خطبہ دیا۔ کانفرنس کے ذیلی موضوعات درج ذیل تھے۔

- معیشت سے ربا کے خاتمے کے موضوع پہ کونسل کی سفارشات کا تجزیہ
- غربت کا خاتمہ: نظام زکوٰۃ و بیت المال
- اسلامی بینک کاری
- اسلامی حکومت کی خصوصیات و کردار [58]

34. کونسل کی منعقدہ بین الاقوامی کانفرنس "اسلام اور جدید معاشی مسائل" میں پیش کردہ سفارشات (جون 2007ء)

اس کانفرنس میں بلاسود بینکاری کے حوالے سے درج ذیل سفارشات پیش کی گئیں۔

أ. لوگوں کو اسلامی بنکاری کے بارے میں معلومات اور آگاہی فراہم کرنے کی ضرورت ہے

ب. اسلامی بنکاری کے ماہرین معیشت دانوں، ماہرین شریعہ اور عام بینکاروں کے درمیان کھلے ذہن کے ساتھ مسلسل مذاکرات ہونے چاہییں۔

ج. اسلامی بینکاری کے نام کے مستعمل بعض نعم البدل ربٰوا کی نسبت زیادہ استحصالی ہیں اور ان سے اجتناب کیا جانا چاہئے۔

د. نظام تعلیم اسلامی بینکاری اور اکاؤنٹنگ کے مضمون شامل نصاب کیے جانے چاہیں۔

ہ. پاکستان کے بینک LIBOR یا KIBOR شرح منافع کے تعین کے لئے بنچ مارک کے طور پر استعمال کرتے ہیں، انہیں اسلامی انڈکس سے بدلا جانا چاہیے۔

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57 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 1998-99ء'**، ص 152

58 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 2006-2007ء'**، اسلامی نظریاتی کونسل، حکومتِ پاکستان، ص 228

و. شریعہ کے ماہرین کو روایتی سٹہ بازی، دستاویزات کی فروخت اور (اثاثوں کی) حصص یا تمسکات میں تبدیل (Securitization) کا حل تلاش کرنا چاہیے۔

ز. شریعہ اور فقہ میں لازمی طور پر فرق کیا جانا چاہیے۔ شریعت خدائی قانون لیکن فقہ نہیں۔

ح. سود سے پاک نظام پر مکالمہ میں کھلے دل سے مسلمان اور غیر مسلم دونوں کو شامل کیا جانا چاہئے۔

ط. معاشرے کے تمام طبقوں کو شامل کرنے کے لئے "سود سے پاک بینکاری" کی اصطلاح اسلامی بینکاری کی اصطلاح سے بہتر ہے۔

ي. نظامِ تعلیم میں اسلامی بینکاری اور اکاؤنٹنگ کے مضمون شامل نصاب کیے جانے چاہیے[59]۔

۳۵. بلاسود معیشت کا قیام- کونسل کی رپورٹ پر تبصرہ- دیگر امور و مسائل (2008ء)

اقتصادی کمیٹی کے اجلاس اوّل میں یہ طے کیا گیا کہ شعبہ تحقیق کی طرف سے کونسل کے بارے رپورٹ میں دی گئی ہے کہ سفارشات کا خلاصہ تیار کیا جائے، اور اس کمیٹی میں پیش کیا جائے۔ حسبِ فیصلہ خلاصہ تیار کیا گیا اور کمیٹی کے سامنے پیش کیا گیا[60]۔

36. کونسل کا اجلاس بعنوان "پاکستان میں مروجہ اسلامی بینکاری کا جائزہ اور اسلامی بنکاری کے اصول"

اس اجلاس میں اقتصاد کمیٹی کے معزز ارکان کے سامنے اجلاس اوّل کا خلاصہ پیش کیا گیا۔ اس کانفرنس میں پیش کی گئی سفارشات سے آگاہ کیا گیا۔ اور واضح کیا گیا کہ اس موضوع پہ جامع رپورٹ کی تیاری کا کام بھی اقتصاد کمیٹی کے زیرِ غور ہے۔ اور اس رپورٹ کی تیاری میں اتحاد کمیٹی کے ممبران اور بینکنگ کے ماہرین شامل ہوں گے جن سے مفید علمی سوالات کیے جاسکیں گے[61]۔

37. انٹرنیشنل کانفرنس "جدید معاشی مسائل اور اسلام" میں کونسل کی سفارشات و تجاویز پر غور و خوض:

59 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 2006-2007ء'**، ص246-47

60 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 2007-08ء'**، اسلامی نظریاتی کونسل، حکومتِ پاکستان، ص65

61 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 2007-08ء'**

جدید معاشی مسائل اور اسلام سے متعلق یہ کانفرنس 2007ء میں منعقد ہوئی۔اس کانفرنس کے مقاصد کی تفصیلات سے معزز اراکین کو آگاہ کیا گیا۔اور ضروری بحث و تمحیص کے بعد آخر میں کمیٹی نے یہ طے کیا کہ محترمہ فیض بلقیس صاحبہ کی جانب سے متذکرہ کانفرنس کی رپورٹ آنے کے بعد اس کی روشنی میں اقتصاد کمیٹی اس موضوع پر اپنی سفارشات مرتب کرے گی۔ کمیٹی نے طے کیا کہ کمرشل بینکنگ کے لیے باقاعدہ اصول وضوابط کے حوالے سے اگلی میٹنگ عمل میں لائی دی جائے گی اور اس کی روشنی میں ورکشاپ کرائی جائے گی(62)۔

38. ربا کے خاتمہ سے متعلق تجاویز(2009-10ء):

جناب مولانا ابوالفتح محمد یوسف نے ربا کے خاتمے کی کوششوں میں تیزی لانے کے لیے تجویز دی کہ کونسل کا ایک وفد اس سلسلے میں چیف جسٹس سے ملاقات کرے(63)۔

39. رباوراسلامی بینکاری: 02روزہ آل پاکستان علماء ورکشاپ

اسلامی نظریاتی کونسل کے زیر اہتمام متذکرہ بالا موضوع میں دو روزہ ورکشاپ کا انعقاد کیا گیا جس میں ملک بھر سے علماء کرام و مفتیان عظام ،ماہرین معیشت اور اسلامی بینکنگ سے متعلق شخصیات کو مدعو کیا گیا۔اس ورکشاپ کا پسِ منظر یہ تھا کہ کونسل کے قیام سے لے کر تاحال ملکی نظامِ معیشت سے سود کا عنصر ختم کرنے کے لیے کونسل کی طرف سے مسلسل سفارشات پیش کی جاتی رہی ہیں۔اور ایک مستقل رپورٹ بھی شائع کی گئی ہے۔تاہم عملی طور پر حکومتی سطح پر بالخصوص قانون سازی کے حوالے سے سفارشات پر عملدرآمد کی کوئی واضح شکل اب تک سامنے نہیں آئی۔ صرف عدالتوں میں فیصلوں اور ان کے خلاف اپیلوں کی حد تک یہ مسئلہ ضرور زیرِ گردش رہا۔اتنا ضرور ہوا کہ اسلامی بینک کاری کا آغاز ہوا۔لیکن اس پر بھی مختلف جہات سے اعتراضات اٹھائے گئے۔ یہاں تک کہ ماضی قریب میں علماء کے مابین اسلامی بینکاری کا مسئلہ بھی مختلف فیہ رہا۔اس ورکشاپ کے انعقاد کا مقصد یہ ہے کہ اسلامی بینکاری نظام سے متعلق اٹھنے والے سوالات کے جوابات تلاش کیے جائیں مثلاً

أ. ربا کا اطلاق پاکستان کے کن اداروں پر ہوتا ہے؟
ب. کیا ربا کی تعریف پر علماء اور ماہرین متفق ہیں؟
ج. رباوراور مقاصد شریعت کیا ہیں؟
د. اسلامی بینکوں میں شرعی عقود و معاہدات اور اسلامی بینکوں کا روایتی بینکوں سے تقابلی جائزہ

62 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 2007-08ء'**،ص 66
63 – اسلامی نظریاتی کونسل، **'سالانہ رپورٹ 2009-10ء'**،اسلامی نظریاتی کونسل، حکومتِ پاکستان، ص196

ہ. ربا کے خاتمے کیلئے قوانین میں ترامیم

کونسل نے تفصیل سے ورکشاپ کی تجاویز اور سفارشات پر غور وخوض کیا اور ان تجاویز کی روشنی میں سے سفارشات مرتب کیا۔ اور ان سفارشات کی منظوری دی[64]۔

۴۰. اسلامی معیشت کے قیام کی جدوجہد (۲۰۱۷ء)

اسلامی نظریاتی کونسل نے 26۔27 اپریل 2016ء کو اسلام آباد میں اسلامی معیشت کے حوالہ سے دوروزہ سیمینار کا اہتمام کیا جس کی مختلف نشستوں سے ملک کے ممتاز علماء کرام، اصحاب دانش اور ماہرین معیشت نے خطاب کیا۔ اور ''اسلامی معیشت کی بنیادیں اور دور جدید کی مشکلات'' کے موضوع کے مختلف پہلوؤں پر اظہار خیال کیا۔ کونسل کے چیئرمین مولانا محمد خان شیرانی صدر نشین تھے۔ کونسل نے واضح کیا کہ بلاسود بینکاری کی بات تو برطانیہ، فرانس اور روس میں بھی ہو رہی ہے جو اس حوالہ سے خوش آئند ہے کہ بلاسود بینکاری کو اب عالمی سطح پر قابل عمل تسلیم کیا جانے لگا ہے۔ لیکن ہم تشویش کا اظہار کرتے ہیں کہ اگر بلاسود بینکاری کی بنیاد ایمان وعقیدہ اور مذہبی اخلاقیات پر نہیں ہوگی اور اسے محض نفع کمانے کا ایک ذریعہ سمجھ لیا جائے گا تو بلاسود بینکاری اپنے اصل مقاصد کے حصول کی بجائے عالمی سطح پر لوٹ کھسوٹ کا ایک نیا ذریعہ بن جائے گی۔ مزید برآں پاکستان میں سودی نظام سے نجات اور اسلام کے معاشی احکام و قوانین کی عملداری کے لیے ہم نے اگر صرف اپنی رولنگ کلاس پر ہی انحصار کرنا ہے تو اس کا نتیجہ اس کے سوا کچھ نہیں ہوگا کہ سودی نظام کے خاتمہ کے لیے ہمارے ساتھ جو آنکھ مچولی عدلیہ، مقننہ اور انتظامیہ کے تینوں اداروں میں گزشتہ تین عشروں سے کھیلی جا رہی ہے وہ آئندہ بھی جاری رہے گی اگر ہم آگے بڑھنا چاہتے ہیں تو ہمیں سول سوسائٹی کو منظم کرنا ہوگا، رائے عامہ کو بیدار کرنا ہوگا، اسٹریٹ پاور کو متحرک کرنا ہوگا، اور ایک منظم عوامی تحریک کا اہتمام کرنا ہوگا۔ اس کے بغیر ہم اپنی رولنگ کلاس کو قیام پاکستان کے نظریاتی مقاصد کی تکمیل، سودی نظام کے خاتمہ، اور اسلامی احکام و قوانین کی عملداری کے ٹریک پر نہیں لا سکیں گے۔

۴۱. خلاصہ کلام:

عصرِ حاضر میں اسلامی بینکاری کا نظام روایتی (سودی) نظام بینکاری کے متبادل کے طور پر سامنے آیا اور روز بروز اس کی ترقی کر رہا ہے۔ آئے روز اسلامی بینکوں میں تیزی سے اضافہ ہو رہا ہے۔ اس نئے نظام کے تنوع اور شرح نمو میں اضافہ کا اندازہ اس بات سے کیا جا سکتا ہے کہ اسلامی بینکاری کی ترقی کی شرح 23.1% ہے جبکہ سودی بینکاری کی ترقی کی شرح 7.1% سے زیادہ نہیں ہے۔ اس کے علاوہ اب اسلامی بینک اسلامی تمویلی

64 – اسلامی نظریاتی کونسل، **سالانہ رپورٹ، 2009-10ء**، ص218

اداروں(Islamic Financial Institutions) کی مجموعی تعداد تین سو سے زائد ہے۔ جن کے مجموعی اثاثے 450 بلین ڈالر سے بھی تجاوز کر چکا ہے۔ پاکستان میں سود سے پاک نظامِ معیشت کے بارے میں بابائے قوم قائد اعظم محمد علی جناح نے جولائی ۱۹۴۸ء کو اسٹیٹ بنک کے افتتاح کے موقع پر فرمایا: ''میں اشتیاق اور دل چسپی سے معلوم کرتا رہوں گا کہ آپ کی ریسرچ آرگنائزیشن بینکاری کے ایسے طریقے کس خوبی سے وضع کرتی ہے جو معاشرتی اور اقتصادی زندگی کے اسلامی تصورات کے مطابق ہوں۔ مغرب کے معاشی نظام نے انسانیت کے لیے بے شمار مسائل پیدا کر دیے ہیں اکثر لوگوں کی یہ رائے ہے کہ مغرب کو اس تباہی سے کوئی معجزہ ہی بچا سکتا ہے۔ یہ تباہی مغرب کی وجہ سے ہی دنیا کے سر منڈلا رہی ہے۔ مغربی نظام انسانوں کے مابین انصاف اور بین الاقوامی میدان میں آویزش اور چپقلش دور کرنے میں ناکام رہا ہے''۔

بعد ازاں اسلامی نظریاتی کونسل نے اپنے قیام سے ہی سود کی حرمت اور متبادل کے حوالے سے اپنی متعدد رپورٹوں اور سفارشات کے ذریعے شعور بیدار کیا۔ کونسل نے ہر دور میں اپنی سالانہ رپورٹوں کے علاوہ جامع انداز میں مربوط موضوعاتی رپورٹس اور تجاویز پیش کیں۔ اور معاشرے سے سود کی بیخ کنی میں ہمیشہ اپنا مثبت کردار ادا کیا۔ جس کے مثبت اور واضح اثرات آج بھی موجود ہیں۔

شاہ رخ جتوئی کیس: کیا مسئلہ قصاص ودیت کے قانون میں ہے؟

محمد مشتاق احمد *

شاہ رخ جتوئی کیس کی بنیاد پر ایک بار پھر قصاص ودیت کے پاکستانی قانون، اور پھر چھلانگ لگا کر اسلامی قانون، کے خلاف کئی لوگوں نے محاذ کھول دیا ہے۔ کوئی "انصاف کی نجکاری" کی دُہائی دے رہا ہے تو کوئی عدلیہ پر تبرا کر رہا ہے اور سارے شور میں اصل سوالات پر بحث ہی نہیں ہو پا رہی۔ سر دست چند نکات پیشِ خدمت ہیں۔

قصاص ودیت کا قانون کیسے بنا؟

قصاص ودیت کا قانون پاکستان میں طویل مباحثے اور مذاکرے کے بعد وجود میں آیا ہے۔ یہ کسی ''ڈکٹیٹر کا مسلط کیا گیا قانون'' نہیں ہے، جیسا کہ بعض ناقدین مسلسل کہہ رہے ہیں۔ شاید یہ پاکستان کا واحد قانون ہے جسے قانون سازی کے مرحلے سے گزرنے میں اٹھارہ سال لگے اور ان اٹھارہ سالوں میں چھے حکومتوں کے ادوار آئے (نگران حکومتیں ان چھے حکومتوں کے علاوہ ہیں)۔

تفصیل اس اجمال کی یہ ہے کہ قصاص ودیت کے آرڈی نینس کا پہلا مسودہ اسلامی نظریاتی کونسل نے حدود آرڈی نینسز کے مسودات کے ساتھ ۱۹۷۹ء میں ہی بنالیا تھا لیکن اس مسودے کو جنرل ضیاء الحق نے آرڈی نینس کی صورت میں نافذ نہیں کیا بلکہ یہ مختلف وزارتوں کے افسران کے درمیان ہی گھومتا رہا۔ پھر ۱۹۸۰ء میں کونسل نے دوسرا مسودہ بنا کے دے دیا۔ اس پر بھی مختلف وزارتوں کے اعتراضات رہے تو تیسرا مسودہ ۱۹۸۲ء میں کونسل نے تیار کیا۔ وہ مسودہ وفاقی کونسل (جو اس وقت پارلیمان کا کام کر رہی تھی) کو پیش کیا گیا اور دو سال مختلف کمیٹیوں میں زیر بحث رہنے کے بعد بالآخر ۱۹۸۴ء میں منظور کیا گیا لیکن جنرل صاحب نے اس پر دستخط نہیں کیے۔ ۱۹۸۴ء سے ۱۹۸۹ء تک کے دور میں (جب پہلے محمد خان جونیجو صاحب کی حکومت آئی اور پھر محترمہ بے نظیر بھٹو کی) یہ مسودہ سرد خانے میں ہی پڑا رہا لیکن پھر حکومت کو مجبوراً اس پر بحث کرنی پڑی۔

اس کی وجہ یہ تھی کہ ۱۹۷۹ء میں گل حسن خان نامی ایک شخص نے پشاور ہائی کورٹ کی شریعت بنچ کے سامنے مجموعۂ تعزیراتِ پاکستان اور ضابطۂ فوجداری کی دفعات کو اس بنیاد پر چیلنج کیا تھا کہ ان دفعات کی رو سے قتل کے جرم

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میں معافی یا صلح کی گنجائش نہیں ہے، جبکہ شرعاً مقتول کے ورثا کو یہ حق حاصل ہے۔ پشاور ہائی کورٹ نے ۱۹۸۰ء میں فیصلہ سنادیا کہ مذکورہ دفعات شریعت سے متصادم ہیں اور مقتول کے ورثا کو شرعاً معافی یا صلح کا حق حاصل ہے۔ اس طرح کے کئی اور مقدمات دیگر ہائی کورٹس کے سامنے بھی موجود تھیں۔ تو جنرل ضیاء الحق نے ہائی کورٹس کی شریعت بنچوں کو ختم کر کے ان کی جگہ ایک مرکزی عدالت ''وفاقی شرعی عدالت'' کے عنوان سے قائم کی اور یہ سارے مقدمات اس عدالت کو منتقل ہوئے۔ وفاقی شرعی عدالت کے پانچ رکنی بنچ نے ۱۹۸۰ء میں محمد ریاض کیس میں تین—دو کی اکثریت سے وہی فیصلہ سنادیا جو گل حسن کیس میں پشاور ہائی کورٹ نے سنایا تھا۔ وفاقی حکومت ان دونوں فیصلوں کے خلاف اپیل میں سپریم کورٹ میں گئی جہاں دیگر ۹ مقدمات کے ساتھ ان دو مقدمات کی اکٹھے سماعت ہوئی اور ۱۹۸۹ء میں پانچ رکنی بنچ نے متفقہ فیصلے کے ذریعے وفاقی شرعی عدالت اور پشاور ہائی کورٹ کے فیصلے کو برقرار رکھا۔

اس فیصلے کی رو سے حکومت کو اس قانون میں تبدیلی کے لیے ۲۳ مارچ ۱۹۹۰ء تک کا وقت دیا گیا۔ پھر مذکورہ مدت میں حکومت کی مسلسل درخواستوں کے نتیجے میں اضافہ کیا جاتا رہا یہاں تک کہ سپریم کورٹ نے ہاتھ کھڑے کر دیے کہ مزید وقت نہیں دیا جاسکتا۔ اس دوران میں محترمہ کی حکومت ختم ہو چکی تھی۔ چنانچہ غلام مصطفی جتوئی صاحب کی نگران حکومت نے ستمبر ۱۹۹۰ء میں قصاص ودیت آرڈی نینس جاری کروایا۔ یہ اس قانون کے نفاذ کی ابتدا تھی۔

اکتوبر ۱۹۹۰ء میں میاں نواز شریف صاحب کی حکومت آئی تو اس آرڈی نینس کو نو منتخب قومی اسمبلی کے سامنے رکھا گیا جس نے اسے مختلف کمیٹیوں کے سپرد کیا اور ڈھائی سال بعد بالآخر جون ۱۹۹۳ء میں یہ مسودہ واپس قومی اسمبلی میں پیش کیا گیا جس نے جولائی ۱۹۹۳ء میں اس کی منظوری دی لیکن اگلے ہفتے قومی اسمبلی ہی تحلیل کر دی گئی۔ انتخابات کے بعد پھر محترمہ بے نظیر بھٹو کی حکومت آئی اور ان کے دورِ حکومت میں پارلیمان سے یہ مسودہ منظور نہیں کیا جاسکا۔ فروری ۱۹۹۷ء میں انتخابات کے نتیجے میں میاں نواز شریف صاحب کی حکومت آئی تو اپریل ۱۹۹۷ء میں بالآخر پارلیمان کے دونوں ایوانوں نے قصاص و دیت کے ایکٹ کی منظوری دے کر اس قانون کو مجموعۂ تعزیراتِ پاکستان کے سولہویں باب میں شامل کر لیا۔

واضح رہے کہ ایکٹ کی صورت میں نافذ ہونے سے قبل اسے ستائیس دفعہ (جی ہاں ستائیس دفعہ!) آرڈی نینس کی صورت میں جاری کرنا پڑا۔ اتنے طویل مذاکرے، مباحثے اور مکالمے کے دوران میں اس قانون میں مختلف ترامیم

بھی کی گئیں۔ یہ بھی واضح رہے کہ ترامیم کا سلسلہ بعد میں بھی جاری رہا جن میں بالخصوص جنرل مشرف کے دور میں ۲۰۰۵ء میں کی گئی ترامیم اہم ہیں۔ بعد میں بھی ترامیم ہوتی رہیں تاآنکہ یہ قانون اس شکل میں آیا جو اس وقت ہمارے سامنے ہے۔

انصاف کی نجکاری؟

یہ اعتراض کہ اس قانون کے ذریعے مقتول کے ورثا کا حق مان کر انصاف کی نجکاری کی گئی ہے، اس مفروضے پر مبنی ہے کہ جرم ریاست کے حق کی خلاف ورزی کا نام ہے۔ انگریزی قانون کا یہ مفروضہ اپنی مطلق حیثیت میں اسلامی قانون کی رو سے صحیح نہیں ہے۔

انگریزی قانون میں قانون کی خلاف ورزیوں کو دو بڑی قسموں میں تقسیم کیا گیا ہے: فرد کے قانونی حق کی خلاف ورزی (ایسی خلاف ورزی کو ٹارٹ اور ایسے مقدمے کو سِول مقدمہ کہا جاتا ہے) اور ریاست کے حق کی خلاف ورزی (ایسی خلاف ورزی کو کرائم اور ایسے مقدمے کو کریمینل مقدمہ کہا جاتا ہے۔) سول کیس میں دعوی دائر کرنے کا اختیار متاثرہ فرد کے پاس ہوتا ہے، ثابت کرنا بھی اس کی ذمہ داری ہوتی ہے اور خلاف ورزی کرنے والے کے ساتھ سمجھوتا کرنے کا یا اسے معاف کرنے کا اختیار بھی اس کے پاس ہوتا ہے۔ اس کے برعکس کریمینل کیس میں مقدمے کا حق ریاست کے لیے مانا جاتا ہے، جرم کا ثابت کرنا ریاست کی ذمہ داری ہوتی ہے اور جرم ثابت ہونے پر مجرم کو سزا دی جاتی ہے، خواہ جرم سے براہِ راست متاثر ہونے والا فرد اسے معاف کرنا چاہے۔ اس تصور کا ایک نتیجہ یہ ہوتا ہے کہ جرم سے براہِ راست متاثر ہونے والا شخص ثانوی حیثیت اختیار کر لیتا ہے اور انگریزی قانون اپنی اصل شکل میں اسے پہنچنے والے نقصان کی تلافی کے لیے کوئی راستہ نہیں بتاتا۔

اسلامی قانون میں اس کے برعکس یہ ضروری نہیں کہ ہر جرم کو نظمِ اجتماعی کے حق کی خلاف ورزی قرار دیا جائے؛ بلکہ اسلامی قانون کی رو سے کرائم کی تین بنیادی قسمیں ہیں: اللہ کے حق کی خلاف ورزی (ایسے جرائم کی سزا کو حدود کہتے ہیں)؛ فرد کے حق کی خلاف ورزی (ایسے جرائم کی سزا کو تعزیر کہتے ہیں) اور نظمِ اجتماعی کے حق کی خلاف ورزی (ایسے جرائم کی سزا کو سیاسہ کہتے ہیں)۔ کبھی ایک ہی جرم سے دو مختلف حقوق بیک وقت متاثر ہو رہے ہوتے ہیں تو پھر اسے دیکھا جاتا ہے کہ کون سا حق غالب ہے؟ قصاص کے متعلق فقہاے کرام کہتے ہیں کہ اس میں حق اللہ بھی ہے اور حق العبد بھی لیکن حق العبد اس میں غالب ہے۔ آسان الفاظ میں اس کا مفہوم یہ ہے کہ متعلقہ

فرد کے پاس مجرم کی معافی کا اختیار ہے لیکن وہ معاف نہ کرے تو پھر اس سزا کا نفاذ لازم ہے۔ (حدود میں کسی کے پاس معافی کا اختیار نہیں ہوتا، اس لیے انھیں حقوق اللہ کہا جاتا ہے)۔

اسلامی قانون کے ان تصورات کا ایک اہم نتیجہ یہ نکلتا ہے کہ فوجداری مقدمات میں بھی متاثرہ فریق کو پہنچنے والے نقصان کی تلافی مجرم کی جانب سے کی جاتی ہے۔ چنانچہ مجرم (یا اس کے اعوان وانصار کو، جنھیں عاقلہ کہا جاتا ہے) مجبور کیا جاتا ہے کہ وہ متاثرہ فریق کو دیت ادا کردے، یا اگر زخمی کیا ہے تو ارش ادا کردے۔ واضح رہے کہ اسلامی قانون کا یہ تصور (جرم کے متاثرین کو پہنچنے والے نقصان کی تلافی) کو اب مغربی ممالک اپنے قوانین میں، بلکہ بین الاقوامی قانون میں بھی، رائج کرنے کی سعی کر رہے ہیں۔

اسلامی قانون کے ان تصورات کا ایک نتیجہ یہ بھی ہے کہ مجرم اور متاثرہ فریق کے درمیان مزید دشمنیوں کا سد باب ہو جاتا ہے اور جرم در جرم کا سلسلہ رک جاتا ہے۔ یہ بھی یاد دلاؤں کہ مغربی ممالک بھی فوجداری قوانین میں plea bargain اور out of the court settlement کے تصورات اگر ایک جانب عدالت میں مقدمات کا بوجھ کم کرنے کے لیے ہوتے ہیں، ویسے ہی معاملہ کسی طرح ختم کرنے کے لیے بھی ہوتا ہے۔ تاہم اس میں یہ امکان ہوتا ہے کہ طاقتور فریق نظامِ عدل کا مذاق نہ بنالیں۔

فقہاے کرام اس معاملے کو یوں دیکھتے ہیں کہ کیا کبھی ایسا ہو سکتا ہے کہ قتل کے مقدمے میں نظمِ اجتماعی کا حق بھی متاثر ہو جائے اور اس بنا پر مقتول کے ورثا کے معاف کر دینے کے باوجود عدالت مجرم کو سزا دے سکے؟ اس کا جواب فقہاے کرام اثبات میں دیتے ہیں اور وہ کئی صورتیں ذکر کرتے ہیں جن میں وہ قرار دیتے ہیں کہ یہ جرم محض قتل کا جرم نہیں تھا بلکہ عمومی فساد کے زمرے میں آتا ہے اور اس وجہ سے اس جرم پر سیاسۂ سزا دی جا سکتی ہے۔ بلکہ بعض سنگین صورتوں میں وہ تصریح کرتے ہیں کہ ان صورتوں میں سیاسۂ سزاے موت بھی دی جا سکتی ہے۔

پاکستان میں رائج قانون میں بھی یہ اصول مانا گیا ہے۔ چنانچہ مجموعۂ تعزیراتِ پاکستان کی دفعہ ۳۱۱ میں تصریح کی گئی ہے کہ اگر جرم محض قتل نہیں ہے بلکہ اس طرح کیا گیا ہے کہ وہ فساد فی الارض کے زمرے میں آتا ہے تو عدالت مجرم کو تعزیری سزا دے سکتی ہے، خواہ مقتول کے تمام ورثا نے اسے معاف کر دیا ہو۔ ۲۰۰۵ء میں کی گئی ترمیم کے بعد سے عدالت تعزیری سزا کے طور پر سزاے موت بھی سے سکتی ہے۔

اگر اسلامی اور پاکستانی قانون کی رو سے صورتِ معاملہ یہ ہے تو پھر کیسے طاقتور فریق سزا سے بچ جاتے ہیں؟ اس سوال پر غور کریں تو معلوم ہوگا کہ مسئلہ قصاص ودیت کے اسلامی یا پاکستانی قانون میں نہیں بلکہ کہیں اور ہے۔

مسئلہ کہاں ہے؟

مسئلے کی جڑ تک پہنچنے کے لیے چند حقائق پر غور کریں۔ شاہ رخ جتوئی کیس کی ابتدا میں مقدمے میں انسدادِ دہشت گردی کے قانون کی دفعات شامل کی گئی تھیں اور مقدمہ انسدادِ دہشت گردی کی عدالت نے ہی سنا جس نے شاہ رخ جتوئی کو سزاے موت سنادی۔ اس فیصلے کے خلاف اپیل کی سماعت ہائی کورٹ میں ہوئی اور وہاں یہ قرار دیا گیا کہ چونکہ جرم کے وقت شاہ رخ جتوئی 'نوخیز نوجوان' (juvenile) تھا اس لیے اس پر دہشت گردی کا مقدمہ قائم نہیں ہو سکتا تھا۔ اس بنا پر مقدمہ اور ساری کارروائی غلط قرار پائی اور ہائی کورٹ نے مقدمہ واپس نیچے بھجوادیا تاکہ سیشن عدالت عام فوجداری قانون کی رو سے اس مقدمے کی سماعت کرے۔ سیشن عدالت میں اب مقدمہ مجموعۂ تعزیراتِ پاکستان کی دفعات کے تحت چلایا گیا اور استغاثے نے فساد فی الارض کی دفعہ ۳۱۱ مقدمے میں شامل ہی نہیں کی۔ سیشن عدالت میں مقتول کے والد نے مجرم کی معافی کا اعلان کیا تو قصاص کی سزا دینی ممکن نہیں رہی۔ استغاثے کے پاس یہ آپشن تھا کہ وہ تعزیری سزا کے لیے دلائل دیتی لیکن استغاثے کی جانب سے راضی نامے اور مجرم کی ضمانت پر رہائی پر کوئی اعتراض نہیں کیا گیا۔ چنانچہ عدالت کے پاس مجرم کو ضمانت پر رہائی کا حکم دینے کے سوا کوئی راستہ باقی نہیں بچا تھا۔

اب ان حقائق کی روشنی میں دیکھیے تو معلوم ہوگا کہ مسئلے کی جڑ قصاص ودیت کے قانون میں نہیں، بلکہ درج ذیل تین امور میں ہے:

أ. حقوقِ انسانی کے بین الاقوامی قانون کے دباو کی وجہ سے پاکستانی قانون میں 'نوخیز مجرموں' کے لیے تخفیف کا عنصر لیکن ظاہر ہے کہ حقوقِ انسانی کے بین الاقوامی قانون پر تنقید کم از کم ان لوگوں کے بس میں نہیں ہے جو ہر معاملے میں اسلامی قانون کو ہی مسائل کا سبب گردانے کے عادی ہو چکے ہیں؛

ب. استغاثے کی کمزوری جس کی بنا پر مقدمہ پہلے غلط عدالت میں چلایا گیا، پھر جب قانوناً صحیح عدالت میں آیا تو وہاں وہ دفعات شامل ہی نہیں کی گئیں جن کی رو سے مجرم کو قصاص کی معافی کی صورت میں بھی تعزیر کی سزا دی جاسکتی تھی اور جب عدالت میں راضی نامہ پیش کیا گیا تو استغاثے نے ضمانت پر رہائی پر کوئی اعتراض ہی نہیں کیا؛

ج. پاکستان کا عدالتی نظام adversarial ہے جس میں جج اپنی جانب سے الزامات یا دفعات میں اضافہ نہیں کر سکتا، نہ ہی وہ ایسے شواہد طلب کر سکتا ہے جو استغاثے نے پیش نہیں کیے اور اس کا فائدہ ملزم کو ہوا۔ اس وجہ سے جج کو صرف ان الزامات تک محدود رہنا پڑتا ہے جو استغاثہ اس کے سامنے پیش کرتا ہے اور ان الزامات کے ثبوت کے لیے وہ صرف انھی شواہد کی طرف دیکھ سکتا ہے جو استغاثے نے اس کے سامنے پیش کیے ہوتے ہیں۔ اس لیے بعض اوقات جج کو اگر نظر بھی آئے کہ ملزم نے کسی اور جرم کا ارتکاب کیا ہے جس کا الزام استغاثے نے نہیں لگایا تو جج اپنی جانب سے کچھ نہیں کر سکتا۔ اسی طرح اگر جج محسوس کرے کہ استغاثے کے پاس ملزم کے خلاف ثبوت ہے لیکن وہ پیش نہیں کر رہی تو جج کچھ نہیں کر سکتا کیونکہ ملزم کو تو معصوم فرض کیا جاتا ہے جب تک استغاثہ اس کا جرم ثابت نہ کرے۔ اس نظام کی وجہ سے فوجداری مقدمے کا سارا کنٹرول جج کے ہاتھ میں نہیں بلکہ استغاثے کے ہاتھ میں ہوتا ہے۔

اسلامی قانون میں قاضی کے پاس وہ اختیارات ہوتے ہیں جو معاصر دنیا میں ان نظام ہائے قوانین میں جج کے پاس ہوتے ہیں جنہیں inquisitorial system کہا جاتا ہے۔ اس بنا پر استغاثے کی کمزوری کی بنا پر مجرم کے بچ نکلنے کے امکانات کم ہو جاتے ہیں کیونکہ اس نظام میں مقدمے کا کنٹرول استغاثے کے پاس نہیں، بلکہ قاضی/جج کے پاس ہوتا ہے۔ یہ بھی یاد رہے کہ اسلامی قانون کی رو سے قاضی کا کام صرف اتنا ہی نہیں ہوتا کہ دو فریقوں کے درمیان تصفیہ کرے بلکہ اس کا اصل کام عدل کی فراہمی اور کمزور فریق کے حق کا تحفظ ہوتا ہے۔ ہمارے ملک میں انگریزوں کی جانب سے نافذ کردہ adversarial system میں جج بے چارے کے ہاتھ پیر بندھے ہوتے ہیں اور پھر جب نظام کی اندرونی خامی کی بنا پر مجرم چھوٹ جاتا ہے تو ملبہ بھی جج پر ہی گرایا جاتا ہے۔

آخری بات یہ ہے کہ شاہ رخ جتوئی فی الحال ضمانت پر رہا ہوا ہے اور ابھی اصل مقدمے کا فیصلہ باقی ہے۔ اس لیے اس بات کی طرف توجہ کی ضرورت ہے کہ استغاثے کی کمزوری کی وجہ سے اس کے ''باعزت بری'' ہونے کا مرحلہ ابھی باقی ہے۔