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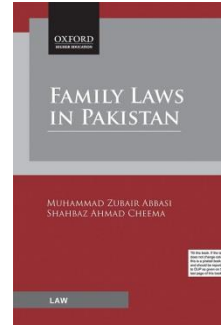
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(1) A REVIEW OF THE BOOK “FAMILY LAWS IN PAKISTAN, BY MUHAMMAD ZUBAIR ABBASI AND SHAHBAZ AHMAD CHEEMA, KARACHI: OXFORD UNIVERSITY PRESS, 2018”

By

Justice ® Dr. Munir Ahmad Mughal¹

The book “provides the latest and updated account of the principles and practices of family laws in Pakistan. It is primarily based on the latest case law and statutes. The authors not only present systemically organized case law but also critically evaluate leading judicial precedents. Various chapters of the book cover general principles of family law, demonstrate their application based on the facts of each case, trace patterns of developments in case law, rationalize conflicting judicial authorities, and propose law reform, wherever required. This is the first book that takes into account personal laws of non-Muslims in Pakistan and covers important issues related to conflict of personal laws.” (back cover)



Apart from four major parts consisting of different chapters, it also consists of a foreword; a preface; a note on translation, transliteration and terminology; a glossary; a bibliography and an index. The book spans over 564 pages. The page size is 15.50 x 23.50 x 2.50 cm and 6.25 x 9.25 x 1.00 inches. The book is printed on 52 gsm Newsprint Paper in Times New Roman font. It has been registered as ISBN # 978-0-19-940868-9. It is printed by Color Plus, Karachi and is published by the Oxford University Press,² No. 38, Sector 15, Korangi Industrial Area, P O Box 8214, Karachi 74900, Pakistan. It is copyrighted by the Oxford University Press, however, the moral rights of the authors have been asserted. This is the first edition of the book published in 2018.

The special feature of the book is that it leaves no scope for doubt about as to what is traditional, i.e., directly transmitted on the authority of a Companion of the Messenger of Allah (peace be upon him) who heard it or saw it as being said by the Holy Prophet (peace be upon him).

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² Oxford University Press is a department of the University of Oxford. It furthers the university's objectives of excellence in research, scholarship and education by publishing worldwide. Oxford is a registered trademark of Oxford University Press in the UK and in certain other countries.

The Foreword of the book is written by Prof. Dr. Shaheen Sardar Ali, professor of law at Warwick School of Law, Coventry, United Kingdom. She introduces the authors as “very promising, competent, and motivated legal scholars...” (p. vii). About the complexity of the family law of Islam, she writes:

Family laws are deceptively simple in that while the general and broad principles are fairly straightforward, this very simplicity is lost in the complexity of interactions with other areas of law....Islamic family law has added layers of complexity including intricacies inherent in the various sects and sub-sects of Islam and how this impacts the outcome of a family law case.” (p. vii)

She prescribes that the family laws are “best understood and applied through a contextual approach...” (p. vii) which “demands that author/s move beyond doctrinal principles and engage with socio-legal, economic, and political factors impacting law-making and its application.” (p. viii) She highlights that “[i]t is also the first book on family laws in Pakistan...covering personal laws of non-Muslim citizens...”. (p. viii) She concludes that this book is an “excellent contribution to family law scholarship for students, lawyers, and judges as well as for the general readers.” (p. viii)

The authors also highlighted that “issues arising under family laws can sometimes pose challenging questions when they interact with other branches of law such as constitutional law, criminal law or private international law.” (p. ix) They distinguish this work from earlier works on the subject as under:

“Our book, however, differs from earlier works in several ways. To mention but a few variances:

firstly, we include material facts of judgments along with legal principles to enable our readers to appreciate the context in which the law is applied;

secondly, we present a systematic account of legal developments by highlighting the principles which are settled or are in the process of being settled, as well as the ones which need to be reformed in light of new social developments;

thirdly, we have added new chapters regarding the personal laws of non-Muslims and the conflict of personal laws.” (p. xi)

The authors also explain the structure of the book and its chapters for readers assistance in the following words:

“To make the family laws accessible to both advanced learners and beginners, each chapter of the book is divided into three main parts. The first part provides a brief but comprehensive

introduction to various aspects of the topic. The introduction is followed by a systematic analysis of relevant case law, which is organized under various headings and sub-headings. The main legal principle along with judicial reasoning. Finally, the conclusion of each chapter highlights the established legal principles with regard to the respective topic; underlines the areas where law is still developing and/or is characterized by conflicting judicial authorities; and identifies the principles that require reform in light of changing social needs. At the end of each chapter, lists of further cases, readings, and review questions are also provided to assist the readers in further research.” (pp. xii-xiii)

In the introductory chapter, the authors have highlighted that there are 30% disputes in courts that relate to family law while disputes relating to land and property also “partially fall within the purview of family law because personal property encompasses gifts, wills, family endowments (awqaf), and inheritance. This chapter is further divided into sub-chapters dealing with formation period of Islamic law and Islamic law in South Asia. About transformation of Islamic law in British India, they have concluded that it “was a gradual process, which was effected primarily through four mechanisms: translation, adjudication, legislation, and education.” (p. 5) Thereafter, a short analysis of various books on Islamic fiqh and Islamic law as authored or translated by different legal scholars was made to highlight that these books have been authoritatively used in courts in South Asia, e.g., “[e]ven today, Mulla’s book is widely used as an authoritative text in South Asian Courts.” (p. 8) About the pre-partition family laws enacted in Indian sub-continent, the authors conclude that the enactment of the Muslim Personal Law (Shariat) Application Act 1937 “protected women’s rights to property” (p. 10) and the Dissolution of Muslim Marriages Act, 1939 “provided Muslim wives the right to judicial divorce. The objective of this Act was to prevent apostasy of Muslim wives who renounced their religion to get out of bad marriages.” (pp. 10-11) When the new State of Pakistan came into being, the family law remained a matter of debate and thus a Commission on Marriage and Family Law was established to recommend “several measures to protect women’s rights by increasing the age of marriage for girls to sixteen years, putting restrictions on polygamy, and requiring the registration of marriage and divorce.” (p. 11) The Report of the Commission was “branded” as an “attempt to westernize society in the garb of legal reform”. As the authors present, this Report was shelved but the Muslim Family Laws Ordinance 1961 was promulgated by the military ruler Ayub Khan’s regime which was “primarily” based on this report. It is still a matter of debate if it violates Islamic provisions.

Giving reference to a number of decisions of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court of Pakistan, the authors have concluded that “[t]hese judgments have implications for Islamic family law, which continues to be influenced by the process of judicial Islamisation of laws.” (p. 13)

The authors have dilated upon the definition of the term “Muslim Personal Law” and after critically evaluating different cases decided by the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court, with reference to defining this term, they have offered their own definition in the following words:

“Muslim Personal Law is the branch of private law of Muslims that applies to family life (marriage, dower, dowry, maintenance, and divorce), and the associated matters such as custody and guardianship of children, and disposal of property *inter vivos* (gift and waqf) or testamentary (will) or through inheritance laws.” (p. 16)

An attempt has also been made to define the term “Muslim” in context of its different sects and in distinction to Ahmadis and Qadianis to see the applicability of the Muslim personal laws to different sects of Muslims. It has been highlighted that the Family Courts Act 1964 is made applicable to Ahmadis, but the Dissolution of Muslim Marriages Act 1939 does not apply to them. (p. 18) It has also been observed by the authors that the courts have taken certain exceptions in applying the personal law if the parties belong to different sects, as under:

“for instance, inheritance cases are decided in accordance with the school of the propositus, not the school of the parties. Similarly, in custody cases the courts take into account the personal law of the child but decide the case in accordance with the welfare of the child.” (p. 18)

With respect to role of Ulema in sub-continent and their influence on development of Muslim personal law, the authors suggest that “even during the colonial period, not only did ulema perform their traditional functions, but they also participated in judicial and legislative processes, albeit with much weaker bargaining power.” (p. 20) They have overruled the negative impressions about ulema in Pakistan in the following words:

“...it is incorrect to portray ulama as essentially conservatives, traditionalists, and orthodox. Not only are the ulama diverse as a religious class but also their relationship with the state and society, in the context of Pakistan, has been considerably dynamic and historically contingent.” (p. 21)

With respect to the co-existence of shariah and modern human rights conventions, the authors refer to various approaches including “Islamic interpretation” (p. 21) of these documents “based in the traditional sources of Islamic jurisprudence.” (p. 22) The role of judges in modern Pakistan is contextualized to term them as performing “judicial *ijtihad*”. (p. 22)

While dealing with the question of free consent of a lady for her marriage, the authors quote an erudite decision of the Supreme Court of Pakistan as under:

“To bind a girl with such an agreement in the nature of betrothal in such a manner that she should be compelled to give her consent at the time of marriage or for that matter a decree for conjugal rights or for a direction for marriage be passed against a female in the above circumstances is unimaginable. The whole fabric of Islamic law and jurisprudence on the subject is against such a notion. The lady remains free to give or to withhold consent for marriage till the moment when marriage contract takes place.” (p. 44)

Likewise, in another case about free consent of a female about her marriage, in a criminal case where the lady victim has alleged zina (rape) committed by the accused, the court has observed that any alleged free consent of the lady based on fear will not be considered as “free consent” (p. 45); and still in another case, it has been held that if a minor female contracts marriage after she reaches her age of puberty, the marriage contract will be deemed as lawful. (p. 45)

The consent of wali is explained in the light of Saima Waheed case where it has been held that a sui juris Muslim female can enter lawfully into marital contract without consent of her wali. (pp. 46-47) About the proof of nikah, the authors have relied on 1992 SCMR 1520 where it has been held that testimony of all witnesses to a nikahnama is not required to prove its validity.³ The Court observed:

“This is now well-settled that for establishing the Nikah, the Registrar or for that matter all the witnesses need not appear. One or more of them and/or other witnesses can prove the Nikah. (pp. 59-60)

The authors have analysed a case decided by the Supreme Court of Pakistan where the presumption of valid marriage as a result of prolonged cohabitation was accepted even for prostitutes. The authors of the book observed:

“He [Justice Afzal Zullah] observed that all prostitutes do not adopt or continue to practice this profession on their own volition; rather, a large number of them are compelled to do so on account of social conditions, mishaps in their childhood due to broken families, and cruelty of criminals. Therefore, the court held that it would be unjustified to assume that a prostitute could not abandon her profession and live a respectable married life. The court endorsed this view by referring to Articles 35, 25, and 14 of the Constitution of Pakistan 1973....Article 14 guarantees the dignity of man.” (p. 62)

³ See also Munir, Muhammad Amir, Family Courts in Pakistan in Search of ‘Better Remedies’ for Women and Children (September 1, 2006). Lawasia Journal, pp. 191-226, 2006. Available at SSRN: <https://ssrn.com/abstract=1922837>. Last accessed 2 June, 2019.

In the next chapter about dower and dowry, the authors have pointed out the customary practice in some parts of Pakistan that daughters are denied their due share in inheritance in the family property and dowry is treated as their share in lieu of their right to inheritance. They conclude that “this practice is not based on Islamic law and the courts in Pakistan have condemned it unambiguously.” (pp. 72-73) The authors have critically evaluated the concept of deferred dower and the question of its payability on demand by the wife and referred to the Supreme Court’s decision in *Sadia Usman’s case*⁴ that deferred dower without time limit of its payment is payable at the time of death of husband or divorce by him. (p. 78) However, a reference has been made to a judgment of AJK Shariat Court, 2016 YLR 440, to highlight that the legislature has now used different terminology to hold that deferred dower is payable on demand. (p. 83) The authors have concluded that the “trend in the case law on dower and dowry shows a dynamic approach of the Pakistani judiciary towards securing women’s financial rights.” (p. 101)

On the question of maintenance for the wife and children, the authors have concluded that a wife is entitled to maintenance if she can show a ‘lawful excuse’ to live away from her husband. However, for iddat period, she is entitled to maintenance even if marriage is dissolved through khula or mubaraat. (p. 110) With respect to the fixation of the quantum of maintenance, reference is made to a case 2009 CLC 364 to show that the needs of the claimants and the income of the defendant have to be given due consideration. (p. 113) Another principle is discussed with reference to maintenance of unmarried and divorced daughters by their father. The principles have been discussed in the light of cases of Ch. Muhammad Bashir v Ansarun Nisa, 2012 MLD 1394, where it has been held that mere “age of majority itself is not sufficient to declare unmarried daughters disentitled to maintenance allowance if otherwise it is not proved with cogent and sufficient evidence that daughters were living apart from the father against his wishes and were not ready to obey his lawful and reasonable demands.” (p. 123) Dealing with another question of maintenance for a daughter who has refused to marry as per wishes of her father, reference has been made to a case titled Muhammad Ali v Judge Family Court, 2010 YLR 520, where the Court has held that a father cannot compel his daughter to marry a particular person without her free will. She was held entitled to receive maintenance from her father accordingly. (pp. 123-4) Likewise, as per PLD 2012 Lah 154, it has been shown that a divorced daughter is also entitled to maintenance even if she is living with her divorced mother. (pp. 124-5) Authors have also pointed that even an adult son can seek maintenance from his father in exceptional circumstances as per PLD 2013 SC 557. Here a son was studying abroad and attained majority age. The Supreme Court held that this son can seek maintenance. (pp. 126-8) The authors have observed that “the way the jurisprudence is unfolding, ..., suggests that the courts are likely to adopt a more progressive and

⁴ 2009 SCMR 1458.

dynamic approach in future by granting wives and children extensive maintenance rights, but at the same time, balancing them against the earning capacities of their husbands and fathers.” (p. 141)

Authors have dilated upon the critical questions involved in suits for dissolution of marriage. Different forms of dissolving marriage either at the instance of husband or wife have been discussed in the light of case law. The issue of notice of talaq has been discussed in the light of leading case law particularly the cases of Ali Nawaz Gardezi⁵ and Kaneez Fatima⁶. Reference is also made to Farah Naz case⁷ where the Supreme Court has held that if the husband has not initiated proceedings under the MFLO to give notice of talaq as per its section 7, oral assertion of talaq will not be accepted to deprive a wife from claiming maintenance and other rights.

With respect to question of triple talaq, the authors observe that the “law is not yet settled on the issue of the validity of triple talaq...” (p. 180) and to show that the courts tilt towards protection of women rights and for that matter contradictory judgments have been pronounced. They remarked:

“It appears that in various contradictory judgments the judges try to protect the rights of women by interpreting the law in one way or the other. They accept the validity of triple talaq when it serves to protect women’s right. They, however, question its validity when the triple talaq is misused to deprive a wife of her right to maintenance and inheritance.” (p. 180)

With respect to the children rights and the question of legitimacy, reference is made to Manzoor Hussain’s case⁸ where the Supreme Court has held that the “courts should have inclination towards legitimization rather than stigmatization...”. (p. 201) Further reference is made to Ghazala Tehsin Zohra case⁹ to highlight that to disprove paternity, the courts cannot order DNA testing in routine. The courts have now cautioned that DNA test may have element of human error which may result in “dangerous consequences for an innocent child”. (p. 206)

About the guardianship matters, the principle of ‘welfare of minor’ is found to supersede¹⁰ any private settlement between the parties pertaining to the custody of minors. (p. 228) Further, the right of a non-Muslim mother to enjoy the custody of a minor child is discussed in the light of Roshni Desai case cited as PLD 2011 Lahore 423. In this judgment, it has been held:

⁵ PLD 1963 SC 51

⁶ PLD 1993 SC 901

⁷ PLD 2006 SC 457

⁸ 1992 SCMR 1191

⁹ PLD 2015 SC 327

¹⁰ 2004 SCMR 1839

A non-Muslim mother suffers no disability as Islamic law allows a non-Muslim mother to exercise the same rights of custody as are enjoyed by a Muslim mother.” (p.238)

About surrogacy, reference is made to Farooq Siddiqui case where the Federal Shariat Court has held that a baby produced through medical intervention by the sperm and egg of duly wedded couples, without involving a third party, is permissible under Islamic law. (p. 241) Other forms of surrogacy are declared by the Shariat Court as against injunctions of Islam as laid down in Qur’an and Sunnah.

The chapter of hiba has discussion about pardanashin ladies. The authors observe that “the case law shows that the courts have developed principles to protect the interests of both the donee and the donor....the courts require that pardanashin ladies receive independent and friendly advice before executing a deed of gift. Such ladies must also be capable of understanding the transaction and the said transaction should be free from any doubt of genuineness of intention.” (p. 289)

About inheritance, the authors have concluded about question of determination faith of deceased person in the following words:

“First, considering the great majority of Sunni population among Muslims in Pakistan, a deceased would be treated as a Sunni, unless proven otherwise. Second, as there are many sub-sects among sunnis, but the majority among them follows the Hanafi school, a deceased would be considered to be a Hanafi unless the contrary is proved. Third, since the overwhelming majority of the Shia population in Pakistan follows the Ithna Ashari school, a Shia deceased would be presumed to be a follower of the Ithna Ashari school unless proven otherwise.” (p. 338)

The authors have discussed case law about the women rights in inheritance and have concluded:

“[t]he courts in Pakistan have developed various principles to protect the property rights of women in inheritance. The law of limitation is not applied to protect the proprietary rights of women when they initiate suits for recovery of their property held by their male relatives. In case the male relatives aver that females relinquished their share in the estate they are required to prove it by adducing convincing evidence. In the absence of such evidence, women are put in possession of their inherited property even decades after the death of a propositus.” (pp. 404-5)

Authors have further concluded:

“Many instances of disinheritance go unnoticed by the legal system as a large number of women do not bring their cases before the courts due to fear of being deprived of the support of their ancestral family for the rest of their lives, especially during hard times.” (p. 405)

About the minority rights, the authors have discussed the recent judgment of Lahore High Court cited as Ameer Masih case, PLD 2017 Lahore 610, whereby section 7 of the Christian Divorce Act has been restored and the amendments in the law are declared ultra vires the Constitution.

Finally, the authors have concluded the book in the following words:

“The preceding analysis suggests that, in the project of Islamic family law reform, judges and parliamentarians have been equal partners. However, given the religious nature of family law in Pakistan, politicians often fail to develop consensus on pressing legal issues in order to protect the rights and interests of vulnerable parties (ie., women and children) within the institution of the family. Considering competing political interests in the society, it seems that the future developments in family laws will be led by the judiciary, rather than legislature. In order to keep abreast of these developments, our readers will do well if they keep themselves updated with the latest judicial trends in case law.” (p. 521)

Conclusion:

The book under review is a fresh analysis of family laws in Pakistan with reference to case law developed by the Pakistani courts over the years. The study shows that the Courts are conscious about the vulnerability of women and children in this country and thus have protected their fundamental and legal rights as and when a question came before them.

As the style of the book is academic and helpful to the law students, therefore, it will also become a good source of guidance for the law teachers not only to grasp the topics under discussion but also to explain them to their students. Judges and lawyers will equally be benefitted from this book based on case studies. Law schools, judicial academies and law libraries will find the book a valuable addition to their shelves for researchers and academics. I congratulate the authors for producing a quality text book on a difficult subject but with doing justice to its contents. Oxford University Press, Karachi deserves special commendations for publishing the book in presentable good quality.

**Articles/
Research Papers**

(2) CLASSIFICATION OF PRISONERS INTO ORDINARY, BETTER, AND POLITICAL CLASS IN THE PRISONS ON ACCOUNT OF SOCIAL STATUS: A DENIAL OF LAW OF EQUALITY

By

Dr. Qadeer Alam

AIG Prison

ABSTRACT:

Pakistan Prisons Rules classifies prisoners into better class, ordinary and political class on the basis of education, profession and status in the society. Under this classification, affluent under-trial and convicted prisoners are not treated in the same manner in a prison as an arguably poor, uneducated or less influential persons who commit the same offence. Convicted prisoners hailing from the upper strata of the society sentenced rigorous imprisonment by the courts are entitled to get own food, clothes and services of poor convicts. The paper examines whether the classification of prisoners on the basis of social ranks is in conformity with definition and purpose of classification of prisoners under criminal science, treatment of prisoners under the United Nations Nelsons Mandala Rules and the best prisons practices of the classification of prisoners. Moreover, the paper identifies that entitlement of extra-benefits and special treatment of rich criminals is discordant to right of equality before law, guaranteed by the Constitution of Pakistan and administration of justice in Islam.

Context of classification of prisoners and its rationale

In 1764, in his treatise on 'Crime and Punishment', Cesare Beccaria, one of the distinguished criminologist of classical school of criminology, condemned punishments greater than the crimes committed and reinforced the principle of equality before law.¹ He argued that legislature should standardized punishments for particular crimes to minimize arbitrary use of judicial power.² The classical criminologist laid emphasis upon classification of offender for their treatment in accordance with nature of offence of the offender. Both Beccaria and Jeremy Bentham, as proponents of classical school of criminology adhered to rationalism and humanitarianism.

In the last decade of nineteenth century, the positive school of

¹ Cesare Beccaria, On Crime and Punishment (1764) (London: Pearson Education,1963), pp.2-3

² Cesare Beccaria, On Crime and Punishment (1764) (London: Pearson Education,1963), pp.2-3

criminology studied crime scientifically under the influence of scientific revolution and tried to trace the causes of crime bases of biological, psychological, and social factors. In this context, Cesare Lombroso, Enrico Ferri and Raffaele Garofalo played vital role in classification of criminals. Cesare Lombroso laid the foundation of modern criminal anthropology and divided the criminals into five groups.³ Subsequently Enrico Ferri also classified criminals into five types: (1) criminal insane; (2) criminal born; (3) habitual criminals; (4) chance criminals; (5) criminal by passion. To his credit, Enrico Ferri added new class of prisoners namely 'chance criminals' by defining crime as a complex phenomenon result of biological, physical and social conditions.⁴ Garofalo, relying upon theory of natural crimes, classified criminals into two groups: Firstly, those who commit crime against persons; secondly those who commit crime against property. In fact, the natural crimes are worthy of punishment in all times and places and by all peoples since the dawn of humanity.⁵ With the passage of time, the criminologists evolved the theory that classification of criminals is a complex phenomenon that constitutes sociological, psychological and biological characteristics.

At the same time, classification of prisoners attracted the attention of penologist to improve prisons management. In the beginning, the emphasis was laid upon the segregation of women from men and habitual offenders from casual offenders. Consequently, the basic segregation system evolved that was based upon static variables like age, race, criminal history, severity of offence, length of sentence and history of drug use.⁶ Under the traditional system of classification, the main focus of prisons' administrations was on the safety and security of prisoners and prisons guards.⁷ The system entailed over-classification of prisoners and usually did not match the needs of inmates for rehabilitation programs. Moreover, the said system of classification did not include behavior of inmates in the institution as one of the variables. Owing to its discretionary in nature, it gave birth to many complexities. In some instances, once a prisoner was suspected to be a member of a prison gang on the basis of information received through spying system of prisons' guards, he could be segregated into 'a special housing unit' or

³ Cesare Lombroso, *Crime, Its Causes and Remedies*, translated by Henry P. Horton, M. A (London: William Heinemann, 1911), pp. 475-476. See Marvin Wolfgang, 'Pioneers in Criminology: Cesare Lombroso (1835-1909),' (1961) 52(4) *The Journal of Criminal Law*, p. 369.

⁴ Enrico Ferri, *Criminal Sociology*, 1917, p.139

⁵ De Quiros, *Modern Theories of Criminality* 1912, p.30

⁶ Hutchinson 2009

⁷ Sarah Lawrence, Daniel P. Mears, Glenn Dublin, and Jeremy Travis, 'The Practice and Promise of Prison Programming. Research Report' (Washington, DC: Urban Institute, 2002), p.10

shifted to a high security prison'.⁸

The second half of the twentieth century saw paradigm shift from basic technique of segregation to objective classification in the United States and other western developed countries. Irwin identifies the very era in the United States of America as transformation of penitentiaries from 'a big house' to correctional institutions with the main objectives of reformation and rehabilitation.⁹ To minimize the discretion in the method of classification of prisoners, the contemporary criminal science embraced the system of classification that takes into account age, sex, previous history of offender, mental condition and behavior in the jail. The objective system of classification does not rely upon the non-legal variables such as race, employment, education.¹⁰ But this system of classification does not include social standing or the financial position of offender as one of the variables for internal as well as external classification.

Currently term objective system of classification of prisoners constitutes 'identification of the level of risks and needs of inmates'.¹¹ The risk means how a prisoner is dangerous to himself and others inmates and his tendency to attempt to escape.¹² Need is a 'measurement of inmate's physiological and psychological requirements for a well-being'.¹³ To make the system of classification effective, the jail administration must chalk out criteria for classification that is well defined, equally applicable to all inmates, able to predict the behavior of a prisoner and be dynamic in nature.¹⁴ To ensure validity, 'classification systems should be re-evaluated and tested at least every five years'.¹⁵ The effective classification of prisoners is helpful to effective prisons management, to obtain desired results of rehabilitation programs, reduce the negative effects of overcrowding, and minimize the rate of recidivism.¹⁶

⁸ Geoffrey Hunt, Stephanie Riegel, Tomas Morales, and Dan Waldorf, 'Changes in prison culture: Prison gangs and the case of the "Pepsi Generation' (1993) 40(3) Social problems 398, p.401.

⁹ John Irwin, *Prisons in turmoil* (Boston, MA: Little, Brown, 1980), p.115

¹⁰ James Austin, 'Assessing the new generation of prison classification models' (1983) 29(4) *Crime & Delinquency* 561, p. 563.

¹¹ Raymund E. Narag, Jordan Galehan, and Clarke Jones, 'Challenges to inmate classification in a developing country setting: implications for context-based inmate classification schemes' (2018) 42(4) *International Journal of Comparative and Applied Criminal Justice* 341, p.342.

¹² Virginia A. Hutchinson, Kristin D. Keller, and Thomas Reid, *Inmate behavior management: The key to a safe and secure jail* (US Department of Justice, National Institute of Corrections, 2009), p.3

¹³ *Ibid*, p.3

¹⁴ Ira Rubin, Anthony H. Jones, *Project guide: Objective classification analysis* (Demarest, NJ: National Institute of Corrections, 2005). p.7

¹⁵ James Austin, Patricia L. Hardyman, and Sammie D. Brown, *Critical issues and developments in prison classification* (Washington, DC: US Department of Justice: National Institute of Corrections 2001), p.1.

¹⁶ Ira Rubin, Anthony H. Jones, *Project guide: Objective classification analysis* (Demarest, NJ: National

International human rights treaties and its soft laws corroborate objective classification of prisoners. In this regard, article 10 of the International Covenant on Civil and Political Rights ordains to classify under-trial from convict and juveniles from adult prisoners. Besides, the prisoners are classified on the basis of legal status. The factors that determine the classification have its cogent reasons and justification. Under trial are segregated from convicts on the basis of the recognized principle of presumption of innocence until proved guilty.¹⁷ Besides, the convicts are segregated from pretrial for their vocational and training needs. The juveniles are segregated from adult for safe and humane prisons. Rule 93 of Nelson Mandela Rules stipulates two purposes of classification: firstly, to restrict the bad impact of habitual criminals and secondly, to facilitate the treatment for their social rehabilitation.¹⁸

International human rights law on the treatment of prisoners does not approve special treatment to the prisoners on the basis of social status or birth. In this regard, Rule 2 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) says that ‘there shall be no discrimination on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status’.¹⁹ Principle 2 of Basic Principles of Treatment of Prisoners discourages the discrimination on the basis of social status of prisoner.²⁰ Principle 5(1) of *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* also denounces treatment or classification of prisoners on the basis ‘birth or other status’.²¹ American Bar Association’s *Standards on Treatment of Prisoners* exclude the social status as credentials for the classification of prisoners. Rule 13 of European Prisons Rules prohibits any discrimination in application of prisons rules on the ground of birth or social status.²²

Classification of Prisoners during Colonial India

Till the last decade of nineteenth century, no uniform standard was observed to classify prisoners in Indian Prisons. The Report of the Prison Discipline Committee of 1836-38 observed: ‘In the Bombay House of Correction, women, thieves, young offenders and old offenders are kept

Institute of Corrections, 2005). p.10

¹⁷ Nelson Mandala Rules, Rule 111(2)

¹⁸ Nelson Mandala Rules, Rule 93

¹⁹ Nelson Mandala Rules, Rule 2

²⁰ Basic Principles for the Treatment of Prisoners’ UNGA (45/111 of 14 December 1990)

²¹ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment’ UNGA 43/173 (9 December 1988).

²² European Prisons Rules, Rule 13

in separate place by night, but not by day' and in others jails 'no classification or separation whatever, either of males or females, by day or by night'.²³ In 1856, an investigative report compiled by Frederick. J. Mouat, a British surgeon and prisons administrator, revealed that male and female prisoners in Sandoway Jail were segregated by mere a mate partition and under this arrangement the male and female could easily see each other.²⁴ In 1864, an Inquiry Committee was set up by John Lawrence, the Governor General of India, the report of the Committee published in 1867, records: 'Criminals of all classes, old or young, male and female, are in our ordinary Indian prisons mixed and mingled together rather like brute beasts than human beings'.²⁵

The Inquiry Committee report also suggested reforms to improve prisons conditions of colonial India. The Committee underlined the importance of segregation of juveniles from adults.²⁶ In 1877, the Government of India Convened Conference of Experts which recommended one of the measures to adopt classification of prisoners to streamline prisons management in India.²⁷ In 1888, Lord Dufferin appointed Fourth Jail Commission in colonial India to probe into the affairs of the prisons administration. The Report of the Commission recommended to classify prisoners into under-trial, casual and habitual to improve discipline and management of prisons. In line with recommendations of Conference of Experts held in 1877 and the Fourth Jail Commission 1888, Indian Prisons Act 1894 was enforced to bring uniformity in prisons system in India. Section 26 and 27 of the Act stipulate as statutory requirement to classify prisoners.

In 1920, the Indian Jail Committee, headed by Sir Alexander G. Cardew, visited the United States, Japan, Philippine, Hong Kong, England and Wales, Scotland, India and Burma to study the prisons systems of the countries in the world to compile a comprehensive report on prisons reforms in India. The report vehemently opposed the preferential treatment given to the prisoners hailing from the opulent class of the society in Indian Jails. The Committee noted that the high social rank and education as aggravating the seriousness of crime, rather

²³ Report of the India Committee on Prison Discipline (Baptist Mission Press, Bengal, 1838), para.40

²⁴ F. J. Mouat, Report on Jails Visited and Inspected in Bengal, Behar, and Arracan (Calcutta: Military Orphan Press, 1856). p.189

²⁵ Measures taken to give effect to the recommendations of a committee appointed to report on the state of jail discipline and to suggest improvements (Calcutta: Office of Superintendent Government Printing, 1867).

²⁶ Measures taken to give effect to the recommendations of a committee appointed to report on the state of jail discipline and to suggest improvements (Calcutta: Office of Superintendent Government Printing, 1867). pp.145,172

²⁷ Report of the Indian Jail Committee 1919-20, para.73

an excuse for extra facilities in the jail.²⁸ The Committee recommended that 'as long as the discomfort of imprisonment does not affect the health of prisoners, it must be regarded as the penalty which is due to those who in spite of their advantages of station fall into crime'.²⁹ Unfortunately, the recommendations of the committee could not be implemented during the colonial India. If the recommendation of the Committee had implemented, Bhagat Singh and his fellow prisoners, in 1929, would have not to protest and observe 114 days hunger strike to get the same treatment which European prisoners were entitled in the Indian prisons including facilities for studies, newspaper, better diet and association with other prisoners.

Prisons Administration as a Colonial Legacy in Pakistan

Since partition of Indian sub-continent, Pakistan, under Pakistan Law Order 1947, adapted Prisons Act 1894 which is still a primary law which deals with prisons administration in Pakistan. Section 27 of the Prisons Act, 1894, requires to classify prisoners on three variables: gender, age and legal status.³⁰ According to the Act, female prisoners should be separated from male prisoners. If female and male prisoners are confined in the same prison, the building of female must be separated from other male population of the prison. The prisoners under the age of eighteen be confined separately from the adult population of the prisons. Moreover, the juveniles be classed into those who 'reach the age of puberty from those who have not'.³¹ The un-convicted criminal prisoners shall be separated from convicted criminal prisoners. The civil prisoners must be classified separately from criminal prisoners. This act does not ordain to classify prisoners on the basis of social status or rank in the society.

Section 59 of the Prisons Act 1894, empowers the provincial Government to frame rules for the management of prisons. On the contrary to the parameters of classification enunciated by the Prisons Act, 1894, Pakistan Prisons Rules 1978, further, classified convicted prisoners into superior class, ordinary class and political class.³² The superior class prisoners were further classified into A, B and political class.³³ The Superior Class prisoners were not only entitled to get separate accommodation but also different diet menu Ironically, the

²⁸ East India (Jails Committee): Report of the Indian Jails Committee, 1919-20, Government Central Press, Simla, para.131.

²⁹ East India (Jails Committee): Report of the Indian Jails Committee, 1919-20, Government Central Press, Simla, para.131.

³⁰ The Prisons Act, 1894, Section 27

³¹ The Prisons Act, 1894, Section 27(2)

³² Pakistan Prisons Rules 1978, Rule 225

³³ Pakistan Prisons Rules 1978, Rule 247

prisons administration was bound to provide different scale of food to better class prisoners at state's expense.³⁴ The Government could grant better class facility to even habitual offender if he had accustomed to superior mode of living.³⁵

On 19-04- 2018, Government of Punjab by exercising its power under section 59 of the Prisons Act,1894, through an amendment, deleted A class and re-classified convicted and under-trial prisoners into three classes: (a) better class; (b) ordinary class; or (c) political class.³⁶ Rule 242(2) enumerates the prerequisites for the grant of better class facility that includes qualification, economic status and the profession. The Additional Chief Secretary Home is empowered to grant the facility of better class on the recommendation of Inspector General of Prisons or Deputy Commissioner concerned within 48 hours of the receipt of the such recommendations.³⁷ The person who is not Member of Parliament, Provincial Assembly and gazetted officer of armed forces or civil services is not entitle to get better class facilities unless he/she paid income tax of worth, at least, 600000 (six hundred thousand) in the preceding financial year.³⁸ It reflects that the afore mentioned set of rules are framed to facilitate a group of prisoners hailing from a segment of society characterized on the basis of their economic and social status.

Better Class Prisoners as a Privileged Class

The better class and political class prisoners are privileged class in the prisons population due to extra facilities and preferential treatment which the ordinary class prisoners are not entitled under the prisons rules. The better class prisoners are allowed to wear 'own clothing, arrange their own bedding, mattress, shoes, table, chair, television, radio, toiletries, newspapers and such like other accessories at their own expense'.³⁹ Ironically better class prisoners are entitled to get the services of ordinary class prisoners as their service men to cook food.⁴⁰ Since 22nd of March 2013, the Government of the Punjab removed disparity and implemented a uniform diet menu for both ordinary and better class prisoners. The current diet, 3,000 calories per prisoner per day, was prepared with the consultation of the Institute of Food and Science Technology, University of Agriculture, Faisalabad. But

³⁴ Pakistan Prisons Rules,1978, Rule260(i)

³⁵ Pakistan Prisons Rules 1978, Rule 242(c)(iii)

³⁶ SO(R&P)4-24/10(P-I), dated 19th April, 2018

³⁷ Pakistan Prisons Rules 1978, Rule 242

³⁸ Pakistan Prisons Rules 1978, Rule 242(b)

³⁹ Pakistan Prisons Rules,1978, Rule 261

⁴⁰ Pakistan Prisons Rules, 1978, Rule 258

still the discrimination prevails in the sense that better class prisoners are entitled to cook their own food and home diet as a class.

Better class prisoners are provided separate accommodation from ordinary class prisoners.⁴¹ This preferential treatment becomes conspicuous due to overcrowding in jails in Punjab especially at Lahore, Rawalpindi and Multan where prisoners' population is almost twofold from the authorized accommodation. In fact, ordinary class prisoners compete for space to sleep on the floor of overcrowded barracks and cells without mattress. The effects of the afore mentioned discrimination trickle down the families and friends of ordinary class prisoners because the relatives and friends of better class prisoners have interview in different shed or place. Those convict prisoners who are sentenced rigorous imprisonment by the trial courts are bound to perform allotted labor in the prison and wear special uniform in the jail. On the contrary, better class convicted prisoners practically, less likely to undergo hard labor or any work due to their special status in the prison. To minimize the apparent discrimination among the prisoners, Justice and Law Commission Report on Jail Reform recommended that all convicts of class C may be allowed to wear own uniform.⁴²

The system of classification, in vogue in the Punjab Prisons, involves multiple threat to a good control of prisons because better class prisoners enjoy extra facilities at the comfort of ordinary class prisoners. It may create unrest among ordinary class prisoners by aggravating their sense of deprivation. Statistics of Punjab Prisons show that most of better class prisoners are confined in the overcrowded prisons in the Punjab where the competition for getting place to sleep is very high. Seven prisoners have been granted the facility of better class at Central Jail Rawalpindi wherein five thousand prisoners are confined against authorized accommodation of 2100. 34 accused charged with corruption and malpractices under National Accountability Bureau Ordinance has been provided better class facilities at District Jail Lahore which houses 3004 prisoners against the authorized capacity of 2000.⁴³

Political Class Prisoners

Under Pakistan Prisons Rules, 1978, the classification of under-trial and convict into political class on the basis of 'political motive' of commission of crime, is vague and complex. In this context, Rule 225 does not differentiate between the crime committed under 'criminal

⁴¹ Pakistan Prisons Rules, 1978, Rule 252

⁴² Law and Justice Commission of Pakistan, Jail Reform, 1997, p.22

⁴³ Inspectorate of Prisons, Daily Population Statement dated 09 August, 2019.

motive' and 'political motive'. In this context, the Pakistan Penal Code does not recognize any offence committed against property and human body on the basis of political motive. Without incorporating hard and fast definition of crime committed on the political basis would tantamount to furnish 'a criminal with the ready-made excuse that he committed his offence from a political motive'.⁴⁴ To interpret motif is difficult task surrounded with complexities. A myriad of political crime definitions which are based on the motivations of offenders.⁴⁵ In this context, in the absence of any tacit explanation of political crime or offence, the prisons authorities has not any cogent reason to classify an offender as political prisoner.

Although there is no universally recognized legal definition of political crimes, but this term is, generally, employed for those who struggled against monarchy, colonial regime and right for self-determination. Ingraham and Tokoro divided criminal crimes into two groups on the basis of combination of motivation and act. Firstly, pure political crimes that directly harm the interest of state including treason, subversion and insurrection. Secondly, relative political crimes that harm the state as well as society including killings of political figures, robbery, theft or vandalism.⁴⁶ Moreover, Turk identified 'non-conformist' who challenge the legitimacy of existing government and strive for better social order for a nation.⁴⁷ On the subject, in 1961, Peter Benenson, founder of Amnesty International, injected new blood by coining the term 'prisoner of conscience'.⁴⁸ In general, it is recognized that crimes committed for noble and altruistic ends termed as political crimes.

On the other hand, crimes committed by public official or political leaders for personal gains are called politician' crimes. William Minor explains that the crimes committed by office holders for 'personal aggrandizement are viewed as a form of occupational crime available to politician'.⁴⁹ In fact, the offences committed by political leaders cause harm to the society as a whole by destroying life or property. It cannot be ruled out that political leader intended to use the seized money and property to propagate the agenda of political party. Besides, it provides legitimacy to political leader or worker to eliminate his political opponent

⁴⁴ East India (Jails Committee): Report of the Indian Jails Committee, 1919-20, Government Central Press, Simla, para.132.

⁴⁵ George B. Vold, 'Some Basic Problems in Criminological Research' (1953) 17 Fed. Probation 37, p.41.

⁴⁶ Ingraham, B.L. and K. Tokoro, 'Political Crime in the United States and Japan: a comparative study' (1969) 4 Issues in Criminology 145, p.146.

⁴⁷ Austin T. Turk, *Criminality and Legal Order* (Chicago: Rand McNally, 1969), p.84

⁴⁸ Encyclopaedia Britannica < <https://www.britannica.com/topic/political-prisoner> >

⁴⁹ W. William Minor, 'Political Crimes, Political Justice and Political Prisoners' (1975) 12(4) *Criminology* 385, p.391.

by committing the murder.⁵⁰ On the subject, Raffaele Garofalo, also reiterated that 'killing of people and destruction of property by act of violence of political workers constitute the *mens rea* of crime.'⁵¹

Currently in Pakistan members of parliaments, former members of parliament and bureaucrats are facing the charges of corruption and money laundering under National Accountability Act. The rich under trial and convict prisoners are enjoying extra facilities and care in the jails under the prisons rules that permit better class. Total 63 inmates have been provided better class facilities which include three members of National Assembly and three members of provincial Assembly. On 20-08-2019, the National Accountability Court, Islamabad not only ordered to grant better class facilities to a politician but to equip the room with AC, refrigerator against the prevailing rules of B-Class. Moreover, the court ordered to depute three private persons as service men in the jail. In this regard, it is not understandable how a person without a valid commitment warrant can be admitted in a prison facility to serve a under-trial prisoner. The politician facing the charges of corruption and criminal offences do not meet the standard of political crimes rather they may be categorized as politician's crimes and do not deserve preferential treatment

Equality before Law

The special treatment to the affluent and the rich criminals is contradictory to fundamental rights of 'equality before law' and equal 'protection of law' as guaranteed to all citizen of Pakistan by the Constitution of Pakistan,1973.⁵² Historical and comparative study of jurisprudence reflects that aforementioned rights have been universally recognized by the constitutions of different countries in the world and were enshrined in the Last Sermon of the Holy Prophet (PBUH), Magna Carta, the 14th Amendment in the American Constitution, the Universal Declaration of Human Rights⁵³ and International Covenant and Civil and Political Rights.⁵⁴

The Supreme Court of Pakistan interpreted equality before law in numerous cases. In *Baluchistan v. Azizullh Memon*, the court interpreted

⁵⁰ East India (Jails Committee): Report of the Indian Jails Committee,1919-20, Government Central Press, Simla, para.132.

⁵¹ Raffaele Garofalo, 'Criminology' Translated by Robert Wyness Miller (Boston: Little Brown and Company,1914), p.122

⁵² The Constitution of Pakistan,1973, Article 25.

⁵³ Universal Declaration of Human Rights (adopted 10 December 1948) U NGA Res 217 A (III) (UDHR)

⁵⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

that equal protection of law means that all persons, equally placed, be treated alike both in privileges conferred and liabilities imposed.⁵⁵ The Court further maintained:

Persons or things similarly situated cannot be distinguished or discriminated while making or applying the law. It has to be applied equally to persons situated similarly and in the same situation. Any law made or action taken in violation of these principles is liable to be struck down.⁵⁶

On the basis of the interpretation of equality before law, the full bench of the Sindh High Court, in *Saleem Raza v. the Sate*, declared 10(D) of the National Accountability Bureau Ordinance ultra vires because it did not extend remission to those who were convicted under any section of the ordinance. The Court held that:

The law whereby certain persons or group of persons are discriminated without any rational and reasonable classification and leaving the other groups of the same class, the denial of benefit, privilege or right to one group of persons and allowing the other group of persons would certainly be a discrimination between the persons or things similarly situated'.⁵⁷

In Indian Jurisprudence, the Supreme Court of India in *Rakesh Kaushik V.B.L. Vig*, a lifer prisoner complained against torture and extortion of the Superintendent Central Jail Tihar in collusion with better class prisoners. The court disapproved the classification of prisoners on the basis of social status because 'the human rights of common prisoners are at a discount' and 'moneyed 'B' Class convicts operate to oppress the humbler inmates'.⁵⁸ The Court reinstated that 'equality before the law cannot co-exist' with special treatment extending to influential and rich prisoners whereas destitute of the society hanker after the basic facilities inside the prisons.⁵⁹ Justice Mulla Committee Report 1980-83 also noted that the classification of prisoners on the basis of social status and accustomed to high mode of living is without any reason.⁶⁰ The learned Single Judge of the High Court of Punjab & Haryana declared that paragraph 576-A of the Punjab Jail Manual unconstitutional and contradictory to the equality before law (Article 14

⁵⁵ Baluchistan v. Azizullah Memon (PLD 1993 SC 341).

⁵⁶ Baluchistan v. Azizullah Memon (PLD 1993 SC 341)

⁵⁷ Saleem Raza v. The Sate (PLD 2007 Karachi 139)

⁵⁸ Rakesh Kaushik V.B.L. Vig (AIR 1981 SC 176, para.9

⁵⁹ Rakesh Kaushik V.B.L. Vig (AIR 1981 SC 176, para.17

⁶⁰ All India Committee on Jail Reforms, 1980-83, para.9

of the Indian Constitution) and prohibition of discrimination (Article 15(1) of the Indian Constitution) and the court observed that ‘a person who is born in rich family cannot be provided with more protection or more facilities and comfort under law’⁶¹

In Pakistan, the courts did not entertain the petitions for the provision of better class facility to rich and educated prisoner as fundamental right despite the fact that a prisoner meets the criteria under the prisons rules. In this regard, the trial court in Karachi granted B class to under-trial prisoner on being law graduate and accustomed to a high mode of living subject to approval of the Provincial Government. The Government of Sindh did not grant B-Class facilities to the accused. Aggrieved upon the rejection of Better Class facilities by the Home Department, the prisoner filed writ petition in Sind High Court which was dismissed. Subsequently, the Supreme Court in *Abdul Rashid vs. the State* upheld the judgment of Sindh High Court and declared that grant of better class facilities to a rich and qualified prisoner is not his vested and enforceable right.⁶²

The Provisions relating to the Holy Quran and Sunnah in the Constitution of Pakistan 1973 requires ‘no law shall be enacted which is repugnant to such injunctions’.⁶³ The special treatment to rich convicts and under-trial is not in line with spirit of Islamic criminal justice system that envisages equity and equality before law. The Holy Quran attributes a paramount importance to justice and equity and God adores those who act justly.⁶⁴ The Holy Quran ordains to shun all kinds of prejudices and discrimination based upon race, color and language. The Holy Quran recognizes moral excellence only standard of superiority among mankind.⁶⁵

In this regard, the last sermon of the Holy Prophet (*Khutba Hujjat-al Wida*) categorically denounces discrimination among human beings and commanded to maintain equality among all human beings:

All mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also a white has no superiority over black nor a black has any superiority over white except by piety (*taqwa*) and good action.

⁶¹ Nihal Singh Etc. Vs State of Punjab and others, 2000 Cri LJ 3298, para.8

⁶² Abdul Rashid vs. the Sate,1980 SCMR 632, p.633

⁶³ The Constitution of Pakistan, Article 227

⁶⁴ Al-Quran, Surah Al Hujurat,49:9

⁶⁵ Al-Quran, Surah Al Hujurat,49:13

A frequently quoted traditions of the Holy Prophet Muhammad (PBUH) denounces discrimination in the administration of justice on the basis of social status. In this context, a noble woman hailing from Makhzoom tribe committed the offence of theft and one of the companion of the Holy Prophet namely *Usaamah ibn Zayd* tried to influence the Holy Prophet. The Holy Prophet underlined the fact that, in the past, the crimes of the weak were prosecuted and penalized only and the powerful and the affluent used to get escape from the punishment of the crime. Owing to this inequality, the nations met with disastrous end. Furthermore, the Holy Prophet categorically mentioned that even the daughter of the Muhammad (Prophet himself) had committed same crime and she would be penalized with the same punishment without any discrimination.⁶⁶ To keep the traditions of the Holy Prophet alive, the second caliphs of Islam adhered to the principles of equity and justice. Hazrat Umar (R.A), the second caliph, addressed a letter to one of his governor, Abu Musa al-Ash'ari, to ensure equality between rich and poor litigants in dispensation of justice.⁶⁷

The question of preferential treatment to the rich prisoners in the context of Islamic jurisprudence was deliberated by the Federal Shariat Court in *Dr. M. Aslam Khaki vs. Federation of Pakistan*.⁶⁸ The Shariat Court recognized the fact that Islamic jurisprudence envisages equity and fair play in administration of justice. The Court showed its concern that the prevailing prisons system 'does not envision rectification, reform, reformation, or rehabilitation of the convict'.⁶⁹ The judgment analyzed the classification of prisoners on the basis of crime, age and gender but real issue of preferential treatment in terms of food, clothing and exemption from labor had not been contemplated. The judgment concluded with very weak argument that there is no verse in the Holy Quran that categorically prohibits the classification of prisoners on the basis of social status. The judgment did not touch upon question of obligation under international law and best prisons practices in the world.

Way forward

The Supreme Court of Pakistan consistently expressed its opinion that 'classification is permissible provided the same is backed by law,

⁶⁶ Sahih Al-Bukhari, 'Ahaadeeth al-Anbiyaa', 3216

⁶⁷ Imam Al-Hafiz Ali Ibn' Umer ad-Daraqutni, Sunan al-Daraqutni, third part (Lebanon: Dar El-Marefah, 2001), p.449; also see Dr. Khurshheed Ahmad Farooq, The Official Letters of Hazrat Umer Farooq (Lahore: Idara Islamyat,1978), p.243.

⁶⁸ Dr. M. Aslam Khaki Vs. Federation of Pakistan etc. Sharait Petition No.62/I of 1992, Fedral Shariat Court

⁶⁹ Dr. M. Aslam Khaki Vs Federation of Pakistan etc. Sharait Petition No.62/I of 1992, Fedral Shariat Court, para 70.

rules or is based on reasonable differentia'.⁷⁰ In this regard, the best prisons practices resort to objective system of classification based upon individualized correctional treatment. This system of classification aims at improving custody, discipline and correctional goals, from admission till release. It is based on collecting and evaluating information about each offender to determine risk and need for appropriate confinement, the Federal Bureau of corrections in the United States of America has attributed paramount importance to system of classification. The process may be replicated into Pakistan Prisons System by introducing necessary changes according to our situation and resources.

The prisons authorities should adopt diagnostic techniques to classify prisoners by establishing Diagnostic Board. The Punjab Prisons has recently recruited 19 junior psychologists and 18 psychologists. A social welfare officers is deputed at all central jails and Class-A District Jails of the Punjab. The Medical Officer is deployed at each jail in the Punjab. A committee comprises psychologist, sociologist, Medical Officer and Deputy Superintendent Jail under the chair of Superintendent Jail may perform the task of classification of a prisoner in jail. This committee should allot housing and rehabilitation activities for a prisoner on the basis of point system on the factors including age, gender, severity of current conviction, offender's criminal history, previous conviction and conduct in the jail.

CONCLUSION:

The Punjab Prisons System incarcerates all prisoners in same facilities whereas privileges and facilities depend upon classification into ordinary, better and political class based upon social status in the society. The classification of prisoners on the basis of social class and mode of living in the society involves insidious discrimination on the account of the following factors: entitlement to engage the services of ordinary class prisoners to cook their food, separate accommodation from other prisoners, preferential treatment in the interview with their families and friends, liberty to move around the prisons compound and exemption from rigorous imprisonment. Voices were raised against this gradation of prisoner during the colonial legacy India. In 1920, Indian Jail Committee recommended to abolish classification of prisoners on the basis of social ranks and provision of extra-facilities to them. In 1929, Bhagatt Singh and his fellow prisoners did hunger strike in the jail situated at Lahore for 114 days to get same facilities and status which European prisoners were entitled in the Indian Prisons.

⁷⁰ Nazar Hussain v. State, PLD 2010 SC 1021.

The prisons in Pakistan are still managed under Prisons Act 1894 which does not stipulate the classification of prisoners on the basis of social ranks. The special treatment and extra-facilities to rich prisoners as a class is not supported by International Treaties and soft laws on the treatment of prisoners. Even it is derogatory to the provisions of the Constitution of Pakistan that guarantee equality before law, equal protection of law and prohibition of discrimination. Moreover, the Constitution of Pakistan forbids state to enforce the laws contradictory to the Holy Quran and Sunnah. Though the Holy Quran does not stipulate operation of prisons system but preferential treatment extended to better class prisoners in the Punjab prisons is contradictory to the principle of equity and prohibition of discrimination as enunciated by the Holy Quran and Sunnah.

The social status and financial position are not considered as variables for the classification of prisoners in any prisons system in the world except India, Pakistan, Bangladesh and Nepal. Moreover, the traditional mechanism for classification of prisoners in vogue in Punjab prisons is not in conformity with the contemporary definition of classification which embraced by prisons management system in the world. To introduce objective and scientific classification of prisoners, this paper suggests that a committee comprising of psychologist, sociologist, Medical Officer and Deputy Superintendent Jail under the chair of Superintendent Jail may perform the task of classification on the basis of point system corresponding with age, gender, severity of current conviction, offender's criminal history, previous conviction and conduct in the jail. The proposed system of classification must be dynamic and subject to evaluation after every five years.

(3) THE DYNAMICS OF PUBLIC INTEREST LITIGATION (PIL) IN THE PERSPECTIVE OF ADVERSARIAL LEGAL SYSTEM OF PAKISTAN

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Introduction:

At present there is a pervasive concern in the legal circles of Pakistan as to how the public interest litigation can help them have an easy access to justice in the face of massive backlog of cases, rampant corruption in public sector, serious threats to the independence of the judiciary and bureaucratic red-tape culture. The speedy dispensation of justice has become a stupendous task in view of the considerable delays in the disposal of cases and scarcity of judges, with the consequence that the prevalent adversarial legal system benefit the rich due to these loopholes and the poor become victims of the time consuming and expensive conventional litigating process.⁷¹ The grim scenario significantly prevents enforcement of the basic human rights guaranteed by the Constitution on account of a cumbersome and complex legal procedures militating against socio-economic justice in the society. Such a scourge of the marginalised vulnerable segments falling prey to the financial might, is manifestly a common phenomenon in the sub-continent since independence from the British rule.⁷² The provisions of the Constitution of Pakistan unequivocally shield them against inequality and social injustice;⁷³ nonetheless the procedural constraints like *locus standi* inhibited these groups of aggrieved people to combat this challenge⁷⁴ unless the concept of public interest litigation was introduced to provide laxity in the rigid legal procedures.

Soon after some political stability gained ground in the late 1980s, the judiciary while realising the impact of social imbalance, started to demonstrate its sensitivity as to a dire need of a mechanism to remedy such enormous issues of the impoverished people of Pakistan. Hence the judges progressively became prone to relax the conventional concept of *locus standi* in a purposeful manner so as to enable a person, acting as *bona fide* representative, to seek a relief pertaining to the fundamental rights on the matters of the public importance. The superior courts⁷⁵ began to transform the longstanding formal procedures with a view to set these grave concerns at rest. The method so evolved was characterised as public interest litigation yet the term “social action litigation”⁷⁶ was also used in India to describe this novel concept of litigation. It gave somewhat a sigh of relief to the deprived sections of the society for enforcement of their constitutionally guaranteed human rights in Pakistan. The present research dilates upon the underlying rationale of relaxing procedural rules in public interest litigation. A pro bono publico i.e. a member of public, having special interest, can move the

⁷¹ Mohammad Afzal Zullah, ‘Human Rights in Pakistan’ (October 1992) Commonwealth Law Bulletin London Vol 18, 1343.

⁷² S. P. Gupta v President of India, (All India Reporter 1982 Supreme Court 149).

⁷³ The Constitution of the Islamic Republic of Pakistan (1973), Art. 2-A.

⁷⁴ Bhagwati P.N, ‘Judicial Activism and Public Interest Litigation’ (1985) Columbia Journal of Transitional Law, Vol. 23 No. 3: 575.

⁷⁵ The [Supreme Court of Pakistan](#), the [Federal Shariat Court](#) and five [High Courts](#).

⁷⁶ Upendra Baxi, ‘Courage, Craft and Contention: The Indian Supreme Court in the Eighties’ (1985) Bombay: N.M. Tripathi.

court for the enforcement of constitutionally guaranteed fundamental rights, in a *bona fide* manner.⁷⁷ It will go on to explore the limitations on exercise of such jurisdiction, in that; the proceedings are not adversary in nature to involve rival parties for contest. The proposed research will refer to the proactive role of judiciary in Pakistan for encouraging the legislature to transform guiding principles into legal shape and the executive to implement those solemn principles of policy and fundamental rights in a legitimate manner through due performance of their functions. This research is also an effort to delineating the future role of public interest litigation for stability of democracy and rule of law in Pakistan.

PIL: An Inspiration for Enforcement of Fundamental Rights:

The public interest litigation is an endeavour of the judiciary to enforce the fundamental rights as envisaged by the 1973's Constitution. This trend to address societal problems is a well-documented intertwined phenomenon in many other countries.⁷⁸ The chequered political history of Pakistan, with imposition of martial laws, culminating in abrogation and holding in abeyance of various constitutions⁷⁹ undermined rule of law and shifted focus of the judiciary to safeguard the fundamental rights of the people. In the year 1958, it was held by Munir, J in the case of Sargodha-Bhera Bus Service,⁸⁰ that the court must consider the question in the first instance as to “whether the petitioner has a *locus standi* to invoke the extraordinary jurisdiction of the court.” However, the judiciary of Pakistan soon became mindful to relax the procedure under the notion that it should not frustrate dispensation of substantial justice to the oppressed litigant public. For instance Kaikaus, J had observed that:-

“I think that proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their right. All technicalities have to be avoided unless it is essential to comply with them on the ground of public policy...Any system which by giving effect to the form and not to the substance defeats substantive rights ...is defective to that extent.”⁸¹

⁷⁷ Instances are Begum Nusrat Bhutto v Chief of Army Staff (All Pakistan Legal Decisions 1977 Supreme Court 657) & Muhammad Nawaz Shareef v President of Pakistan (All Pakistan Legal Decisions 1993 Supreme Court 473).

⁷⁸ Gordon Silverstein, *Law's Allure* (Cambridge University Press, 2009)

⁷⁹ Mansoor Hassan Khan, 'Public Interest Litigation: Growth of the Concept and its meaning in Pakistan' All Pakistan Legal Decision 1992 Journal Section, p. 85-95.

⁸⁰ Tariq Transport Company, Lahore v. Sargodha-Bhera Bus Service, (All Pakistan Legal Decision 1958 Supreme Court 437) p. 452.

⁸¹ Imtiaz Ahmad v. Ghulam Ali, (All Pakistan Legal Decision 1963 Supreme Court 382) p. 400.

When the former prime minister Zulifqar Ali Bhutto and other ten members of Pakistan People's Party were arrested in the martial law regime, the then acting Chairperson of the party, Begum Nusrat Bhutto sought remedy from the Supreme Court under Article 184 (3) of the Constitution on the premise that the fundamental rights of those arrested as such, were infringed upon. The plea was contested on two-fold argument by the Federation to the effect that Begum Bhutto neither had any *locus standi* nor did she raise or establish a pre-requisite question of Public importance to invoke jurisdiction of the court under the afore-referred provision but the then Chief Justice Anwar-ul-Haq in his landmark judgement,⁸² had held that:-

“Clause (1)(c) of the Article 199 does indeed contemplate that an application for the enforcement of Fundamental Rights has to be made by an aggrieved person. Now, it is true that in the case before us the petitioner is not alleging any contravention of her own Fundamental Rights, but she has moved the present petition in two capacities, namely, as wife of the one of the detenus and as Acting Chairperson of the Pakistan People's Party, to which all detenus belong. In the circumstances, it is difficult to agree with Mr. Brohi that Begum Bhutto is not an aggrieved person within the meaning of Article 199.”⁸³

Hence, the liberal interpretation of the words aggrieved person had facilitated to enlarge the scope of term “*locus standi*” for those who turned out to be a *bona fide* next of kin or a relation of the aggrieved.

The widespread poverty and illiteracy operated as stumbling block for the people to enforce their fundamental rights. The above mentioned laxity in the concept of *locus standi* enabled them to claim such rights through their representative essentially having a *bona fide* personal interest as an individual, in the relevant matter before the court. Nevertheless, restrictions on exercise of *suo moto* jurisdiction and grant of a relief beyond the prayer of the writ petition confronted the underprivileged litigants. In the case of Akhtar Abbas,⁸⁴ a principal was enunciated by Nasim Hassan Shah, J that the court was confined to the relief sought in the writ petition and the High Court was not competent to issue a writ *suo motu*. According to Asif Saeed Khan Khosa,⁸⁵ such a principal would have created only exception for *suo motu* powers in connection with a limited review jurisdiction under Section 115 of the C.P.C. ⁸⁶ and for satisfying itself as to the correctness, legality or propriety

⁸² Begum Nusret Bhutto v. Chief of Army Staff and Federation of Pakistan, (All Pakistan Legal Decisions 1977 Supreme Court 657).

⁸³ Ibid, (All Pakistan Legal Decisions 1977 Supreme Court 657) p. 675.

⁸⁴ Akhtar Abbas v. Nayyar Hussain, (1982 Supreme Court Monthly Review 549) p. 550.

⁸⁵ Asif Saeed Khan Khosa, 'Suo moto exercise of writ jurisdiction' All Pakistan Legal Decision 1993 Journal Section, P. 79-102

⁸⁶ The Code of Civil Procedure, 1908, Section 115.

of any finding, sentence or order under Section 435 of the Cr.P.C.⁸⁷ Such a view was derived by referring to the observation of Hamoodur Rehman J in the case of Abu A'la Maudoodi⁸⁸ to the following effect:-

“I also find no difficulty in granting relief because of any defect in the form of the prayer in the petition. The prayer as framed in the petition is sufficiently wide and, in any event, the court is not powerless to grant the relief that the justice of the cause requires to the same extent as it has been asked for.”⁸⁹

Such a situation would narrow down the scope of litigation to enable only those litigants who had an interest having a direct bearing on the matter in issue before court while those illiterate and the poor with no adequate financial or material resources were prevented from enforcing their fundamental rights as a group through their *bona fide* representative. Thus, the restrictive views of the jurisdiction as regards *suo motu* powers, *locus standi*, and relief to the extent of prayer, as mentioned in the afore-referred judgements, would not benefit the neglected rural community suffering from “socio-economic injustice, state repression and governmental lawlessness”.⁹⁰ Hence, the introduction of public interest litigation in Pakistan became imperative to rescue the fundamental rights of the oppressed segments of the society.

The Genesis of Public Interest Litigation:

The case of Benazir Bhutto⁹¹ in the year 1988 became a catalyst for the dawn of public interest litigation in Pakistan when she challenged the Political Parties Act, 1962 before the Supreme Court. She moved the court through a constitutional petition under article 184 (3) on the grounds *inter alia* that certain provisions relating to the registration of the political parties therein impinged upon the fundamental right of forming a political party as contemplated by Article 17 (2) and therefore, were violative of the Constitution. The afore-referred constitutional provision envisages that “every citizen shall have right, subject to reasonable restriction imposed by law, to form and be a member of a political party”.⁹² She had also called in question the Freedom of Association Order 1978 as repugnant to the constitutional provisions. Ms. Bhutto had invoked jurisdiction under Article 184 (3) to seek a relief for registering her party and contesting elections scheduled to be held in the later part of the that year, by seeking a declaration that the restrictions so imposed by the Act *ibid* were void *ab initio*. The petition was accepted and it was held by the Supreme Court in its authoritative judgement that

⁸⁷ The Code of Criminal Procedure, 1898, Section 435.

⁸⁸ Abu A'la Maudoodi v. Governemnt of West Pakistan, (All Pakistan Legal Decisions 1964 Supreme Court 673).

⁸⁹ *Ibid*, (All Pakistan Legal Decisions 1964 Supreme Court 673) p. 791.

⁹⁰ Upendra Baxi, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, (1985) 4 Third World Legal Stud, p 109-10

⁹¹ Benazir Bhutto v Federation of Pakistan, (All Pakistan Legal Decisions 1988 Supreme Court 416).

⁹² The Constitution of the Islamic Republic of Pakistan, Art. 17.

the Political Parties Act, 1962 contravened her constitutional right to form and register a political party. The Supreme Court granted her a *locus standi* on the ground that matter involved public interest for all the citizens' viz-a-viz enforcement of their fundamental rights. There was an explicit deviation from the previous restrictive views as to *locus standi* and the rules of procedure in this case.

The preliminary objection was raised by the Federation that her petition was not maintainable as she had no *locus standi* on behalf of a political party and there was no violation of her fundamental rights. The earlier restrictive view of the judiciary would not allow alike *bona fide* representation. The case of Benazir Bhutto culminated into a venerate judgement changing the entire complexion of earlier restrictive construction in regard to the enforcement of fundamental rights and sowed the seed of public interest litigation in Pakistan. Through an illustrious judgement, Haleem CJ, along with his eleven members Bench sustained Miss Bhutto's plea of *bona fide* representation. The said judgement had perforce to exterminate the limiting mechanism of "*locus standi*" by identifying shortcomings in the judicial system of Pakistan. The status of the petitioner as an aggrieved party was held as under:-

*"...Section 3 of the Act was enacted for a limited purpose, that is, for the forthcoming election and those not having been held, it outlived its purpose and is no longer of any effect, and by no stretch of imagination it negates the provision of non-registration under that section. This being so, it cannot be doubted that the political party is an aggrieved party."*⁹³

The Chief Justice followed the principle laid down in S. P. Gupta's case⁹⁴ from India which may be characterised as pioneering judgement of Public litigation in the sub-continent. While quoting the said judgement, he found it to be very beneficial for the dominated people of lower economic strata as it achieved the object of providing them an easy access to justice and made their reach possible to the constitutional courts. The Chief Justice urged that such an interpretation of the constitutional provision helped a group or class of people to institute a case of public importance through a *bona fide* representative for the enforcement of their fundamental rights. Haleem CJ, also relied upon another case of Bandhua Mukti Morcha⁹⁵ which referred to the adversarial system as "a mimic battle" involving the rigid rules of evidence and procedure. He became convinced that the stringent Anglo-Saxon legal system authorised only the person wronged to initiate the judicial proceedings. Such a loophole in the system, no doubt, occasioned enormous hardships to the poor litigants to seek redress of their

⁹³ Supra note 20, (All Pakistan Legal Decisions 1988 Supreme Court 416) p. 485-486.

⁹⁴ S. P. Gupta v. President of India, (All India Reporter 1982 Supreme Court 149).

⁹⁵ Bandhua Mukti Morcha v. Union of India, (All India Reporter 1984 Supreme Court 802) p. 815

grievance for violation of their fundamental rights. No access to justice for them essentially amounted to the denial of Justice. The open-ended Article 184 (3) was interpreted to its essence by the Supreme Court as there is no embargo or restrictive nature to determine in any manner as to who can or cannot invoke jurisdiction of the Supreme Court as such. The Chief Justice had, therefore, held as under:-

“While construing Article 184 (3), the interpretive approach should not be ceremonious observance of the rules and usages of interpretation, but regard should be had for the object and purpose for which this Article is enacted, that is, the interpretive approach must receive inspiration from the triad of provision which saturate and invigorate the entire Constitution, namely the Objective Resolution (Article 2-A), the Fundamental Rights and the directive principles of the State policy so as to achieve democracy, tolerance, equality, and social justice according to Islam.”

The contention of the Attorney General turning upon non-maintainability of the petition for want of the *locus standi* was turned down by the Supreme Court while elaborating the point in the following terms:-

“The plain language of Article 184 (3) shows that it is open ended. The Article does not say as to who shall have the right to move the Supreme Court nor does it say by what proceedings the Supreme Court may be so moved or whether it is confined to the enforcement of the Fundamental Rights of an individual which are infringed or extends to the enforcement of the rights of a group or class of persons whose rights are violated.”⁹⁶

Such a comprehensive interpretation gave genuine impetus to public interest litigation in Pakistan. The said judgements outlined a new format of litigation to potentially allay the miseries of the poor that sprang from sheer socio-economic imbalance in society and violation of their fundamental rights. After this well-considered judgement, the Supreme Court became sole arbiter to determine as to whether a particular matter was that of public importance or otherwise. The Supreme Court had provided adequate scope of leniency from the rigours of the procedural constraints whenever any situation would necessitate the safeguarding and enforcement of fundamental rights. The Chief Justice, however, had also not overlooked the significance and the equal prospect of such matter of public importance arising from the cases of individual rights.⁹⁷ While referring to the concurrent jurisdiction of both forums of the

⁹⁶ Benazir Bhutto v Federation of Pakistan, (All Pakistan Legal Decisions 1988 Supreme Court 416) p.488.

⁹⁷ Ibid, (All Pakistan Legal Decisions 1988 Supreme Court 416) P.491

Supreme Court and the High Courts, it was held that the *dictum* laid down in the case of Ch. Manoor Elahi⁹⁸ was not inviolable when genuine exceptions so required. The principle for invocation of lower hierarchy in the first instance was made imperative in the said case.⁹⁹ In the case of Benazir Bhutto, applying such principle would have delayed the hearing and decision of the appeal of Benazir Bhutto in view of the earlier matters pending decisions before the High Courts' so as to frustrate the very relief the petitioner had sought for. Chief Justice Haleem, therefore, demonstrated a high scholarly sagacity to hold that Article 184 (3) has not defined the procedure to be followed and the very nature of such proceedings ought to be adjudged in terms of the purpose for enforcement of the fundamental rights involved in accord with the peculiar circumstance of every case. The earlier view of the Supreme Court in the case of Asma Jilani¹⁰⁰ had also augmented the principle so derived by the Chief Justice when he quoted the words of Hamoodur Rehman, CJ in the said case, as under:-

*"The law cannot still nor can the judges become mere slaves of the precedents. The rule of stare decisis does not apply with the same strictness in criminal, fiscal and constitutional matters where the liberty of the subject is involved or some other grave injustice is likely to occur by strict adherence to the rule."*¹⁰¹

The case of Ms. Bhutto was, therefore, treated with a changed outlook by the Supreme Court as the application of the principle contemplated in Ch. Manzoor Elahi's case¹⁰² would have amounted to the denial of justice to the petitioner, in that, the earlier rule would have occasioned massive delay in the proceedings so as to frustrate the relief sought by her. This case had actually helped do away with restrictive interpretation of the notion of *locus standi*, and the complexity as well as the strict enforcement of the rules of procedure. The approach of the Supreme Court in the above observations to regard the constitutional provision of Article 184(3) as open-ended for relaxing the principles of *locus standi*, *stare decisis* and tedious procedures; sustained its social legitimacy as was explained by S. P. Sathe.¹⁰³ The principles laid down in the said judgement thus gave rise to the public interest litigation *in a limbo* so as to enable the Supreme Court assume a dynamic future role in Pakistan for the enforcement of fundamental rights.

Evolution of Public Interest Litigation in Pakistan

⁹⁸ Ch. Manzoor Elahi v. Federation of Pakistan, (All Pakistan Legal Decisions 1975 Supreme Court 66).

⁹⁹ Ibid, (All Pakistan Legal Decisions 1975 Supreme Court 66) p.79.

¹⁰⁰ Asma Jilani v. Government of the Punjab, (All Pakistan Legal Decisions 1972 Supreme Court 139).

¹⁰¹ Ibid, (All Pakistan Legal Decisions 1972 Supreme Court 139) p.149.

¹⁰² Supra note 27.

¹⁰³ S. P. Sathe, Judicial Activism in India (Oxford University Press, 2006) p. 307.

The case of Benazir Bhutto¹⁰⁴ had given a new orientation to the concept of public interest litigation inasmuch as the Supreme Court assumed a pro-active role for the enforcement of fundamental rights. Thus, its purpose to dispel the impression that laws benefitted only the few instead of a class, group or a vast majority in the identical matter of public importance; stood ascertained. The role of courts while exercising their powers by departing from the conventional litigating procedure¹⁰⁵ became pivotal for the rule of law particularly when the legislature or executive abdicated its authority and failed to discharge its legal obligation culminating in exploitation and injustice to a group or class of people. Such a stance became more explicit when the Supreme Court applied these principles to the case of Darshan Masih¹⁰⁶ relating to brick kiln labourers.

Miss Bhutto belonged to an affluent family whose ancestors had been the ruling elite of the sub-continent. She was a well-educated and had invoked jurisdiction of the Supreme Court which eventually helped the down-trodden like Darshan Masih to approach the court through a telegram to seek protection of his family. He claimed that they (Darshan alongwith 20 others), being labourers were engaged in the forced labour on a brick kiln and managed their release through a court order but three of them were again abducted by the owners of the brick kiln. They were apprehensive while anticipating loss of their lives and were allegedly starving in a miserable plight. They had earlier filed applications before various forums but to no effect. They solicited indulgence of the court for their help to live at least with a status like human beings. They urged that there was no help available to them under the law.

The case of Darshan Masih¹⁰⁷ emanating from a telegram was entrusted to a Bench headed by Muhammad Afzal Zullah J. and was treated as a matter of public importance under Article 184 of the Constitution. After extensive hearing and taking into account versions of all the stakeholders, the court devised measure to put the bonded labour to an end in the country and formulated viable mechanism to uphold the basic human rights of the aggrieved community. For instance, the court embarked on the reform process by implementing an agreement reached between the parties the salient features whereof underlines the non-adversarial approach of the Court. A telegram received from a labourer of the brick kiln had put the Supreme Court on its mettle to give collective well-being to the poor labourers a precedence over an individual interest of Darshan Masih only; and thereby the human rights of all the community, suffering from bonded labour in the country, were pledged in the light of constitutional provisions, through a well-calculated interim mechanism¹⁰⁸ put in place to regulate the system of Peshgi (advance

¹⁰⁴ Supre note 18.

¹⁰⁵ S.P. Gupta v President of India (All India Reporter 1982 Supreme Court 149) p. 191.

¹⁰⁶ Darshan Masih v. The State, (All Pakistan Legal Decisions 1990 Supreme Court 513).

¹⁰⁷ Ibid. (All Pakistan Legal Decisions 1990 Supreme Court 513).

¹⁰⁸ Ibid. (Pakistan Legal Decisions 1990 Supreme Court 513) p. 531-33.

money) with its limit confined equivalent to wages of one week duly acknowledged under a proper receipt; the payments of wages to workers or their head of family under duplicate receipt; the elimination of the role of *Jamadar*¹⁰⁹, the registration of criminal case of bonded labour in a brick-kiln along with copy of FIR to the Advocate General for onward imperative submission within 24 hours to the Supreme Court; invalidation of past *pashgis* and non-employment of any coercive measure for recovery thereof; the prohibition of pressurising a labourer for employing females and children in his/her family; non-deduction from wages for loss of bricks due to rain; and the payments strictly in terms of counting of the bricks so prepared by the labourers etc.

The court, while relying upon the principles enunciated in the case of Benazir Bhutto,¹¹⁰ reiterated its view that the procedural impediments should not be allowed to prevent the enforcement of fundamental rights. The court also preferred to suggest some further measures through enactment of comprehensive nature compatible with human dignity to address the issue of forced labour in the following terms:-

*“...comprehensive law should deal with the compulsory education of the classes concerned for making them aware of their rights; the detection of the infringement thereof is the duty of the State; and providing remedial mechanism also at the instance of the State whenever the will to assert or exercise them is lacking on the part of a citizen.”*¹¹¹

The judgement of Supreme Court in the case of Darshan Masih contributed a great deal to the development of the public interest litigation. It enlarged purview for exercise of its jurisdiction on the basis of representative applications, without strictly following the procedural rules. It served as an alternative remedy for those sections and groups of society, who could not raise their voice against blatant violations of the basic human rights under any other law. Such illuminating guiding principles as contemplated by the Supreme Court in the supra judgement entailed the enactment of the Bonded Labour System (Abolition) Act of 1992. It was, in effect, a mark of solidarity of the Courts in the sub-continent with the poor in a bid to ensure even-handed accessible justice. The role of court for “transforming societies by spreading the values set out in the constitution...” as conceived by David Robertson, was fully observed in this case.¹¹²

¹⁰⁹ An Employer provides cash to the contractors called jamadars or thekedars in exchange for guaranteed products in future. The contractor ensures that the labourers must produce designated amount of the goods within a certain period of time.

¹¹⁰ Supra note 20.

¹¹¹ Darshan Masih v. The State, (All Pakistan Legal Decisions 1990 Supreme Court 513) p. 546.

¹¹² David Robertson, the Judge as A Political Theorist (Princeton University Press, 2010) p. 1.

The remarks of Zullah J. in the judgement had unequivocally underlined that the very nature of the proceeding was non-adversarial in nature. He observed that:-

“...it has to be further clarified that no party as such would be deemed to have been recognised as a “complainant” or “contesting party” nor the interim decision shall be treated as the success or failure in any form, of any person, party, or institution.”¹¹³

This judgement inculcated a true spirit in the courts for the genuine enforcement of the fundamental rights consonant with the social fabric of Pakistan. After the case of Darshen Masih, the process for striking a balance between the two classes i.e. elites and starving vulnerable, took its course through a judicial activism. The said judgement assigned a pivotal role to the judiciary for devising appropriate ways and means to ensure enforcement of fundamental rights in the matters of public importance in the absence of any appropriate alternative mechanism.

Suo Motu Jurisdiction:

According to Asif Saeed Khan Khosa,¹¹⁴ the term suo moto means “taking notice or cognizance of a matter by a court or authority upon its own initiative”. He was critical of the exercise of such jurisdiction on the assumption that the judges making inquiry into a particular matter become a party while assuming the role of a social reformer. Initially, the courts were also reluctant to use this power available to them under the law and exercised unnecessary restraint, as it appears from many judgements.¹¹⁵ The public interest litigation was alien to the legal system of Pakistan as far back as late 1980’s and it originated from the famous case of Benazir Bhutto.¹¹⁶ Muhammad Muneer J took *suo motu* action on a news item that women were becoming victims on the pretext of oil stove bursting during cooking by them and there was an alarming increase in death toll of newly-wed brides. He summoned the victim’s family, the police department, the stove manufacturers, the health departments, and other relevant governmental and non-governmental officials, for investigation into the matter for taking necessary measures for the protection of women.¹¹⁷ Another *suo motu* action was initiated on the pathetic conditions of Juvenile Jail of Landhi, Karachi.¹¹⁸ The concept

¹¹³ Darshan Masih v. The State, (All Pakistan Legal Decisions 1990 Supreme Court 513) p. 534.

¹¹⁴ Asif Saeed Khan Khosa, ‘Suo Motu Exercise of Writ Jurisdiction’ [1993] All Pakistan Legal Decisions 1993 Journal Section, p. 87-96. (the author was later on elevated as Judge of Lahore High Court and retired as Chief Justice of Pakistan in 2019)

¹¹⁵ Fazl-e-Haq v. The State, (All Pakistan Legal Decisions 1960 Supreme Court 295) & Islamic Republic of Pakistan v. Muhammad Saeed, (All Pakistan Legal Decisions 1961 Supreme Court 192).

¹¹⁶ Supra note 20.

¹¹⁷ State v. Senior Superintendent of Police, Lahore, (All Pakistan Legal Decisions 1991 Lahore 224).

¹¹⁸ Suo Motu Notice Case, 1990 Pakistan Criminal Law Journal 1231.

was earlier characterised as judicial activism when the courts attempted to protect the fundamental rights of the citizens by instituting legal actions against the state functionaries. Since this kind of litigation was not adversarial, the presence of the aggrieved party was not deemed mandatory before starting the proceedings and the Supreme Court applied the criterion of the infringement of fundamental rights involving the matters of Public importance. The public interest litigation, thus, became a notion of departure from the procedural norms as a remedial measure against the public functionaries whenever the fundamental rights were flouted by them. It has served the purpose of good governance by making the executive and legislature operate within the constitutional parameters and discharge their duties diligently by eliminating socio-economic exploitation in keeping with the fundamental rights and principles of policy.

The Supreme Court took *suo motu* notice of the public hangings which was filed, following the undertaking by the Attorney General that the government had taken a decision to refrain from public hangings in future.¹¹⁹ In another *suo motu* case, the Supreme Court held the government to the account for cutting the trees of a park in order to raise a parking plaza which was subsequently abandoned by the said government and the petition was disposed off with a direction to the government for restoration of the park as such.¹²⁰ The Supreme Court also took *suo motu* action¹²¹ when it learnt from a newspaper about inefficiency of a police in a case of kidnapping of two minor children and directed the police for their recovery. The court appreciated the police on recovery of both the minor children from Afghanistan. The Supreme Court took another *suo motu* notice of the negligence and mala fide of the police when through an anonymous application it was informed that the police was not taking up the investigation of a murder of a woman who became victim of the highhandedness of her influential uncle, and the court directed the concerned District and Sessions Judge for holding an inquiry into the matter. As a result of the finding of inquiry report, the FIR was registered and the culprit arrested. The Inspector General of the Police gave assurance to the court for taking stern action against the delinquent police officials.¹²²

In view of the afore-going analysis, it becomes evident that despite all the concerns and critical voices by the eminent jurists like Mr. Khosa, the development of public interest litigation through *suo motu* actions goes a long way to address many violations of human rights and contribute to the positive image of the courts for the reformation of the society through judicial activism. The exercise of *suo motu* jurisdiction not only became the way to get justice when the aggrieved persons had no means to avail themselves of the remedy due to no access to justice for want of financial resources rather it was even doled out to those who had

¹¹⁹ *Suo Motu Constitutional Petition No. 9, 1994 Supreme Court Monthly Review 1028.*

¹²⁰ *Suo Motu Case No. 3 of 2006, (All Pakistan Legal Decisions 2006 Supreme Court 514).*

¹²¹ *Human Rights Case: (2006 Supreme Court Monthly Review 1769).*

¹²² *Human Rights Case No. 3062, 2006 Supreme Court Monthly Review 1780.*

lost their lives and nobody was there to seek justice on their behalf, in the matters of public importance. The use of *suo motu* power has become such a most important tool to uphold the fundamental rights and rule of law that it held the influential people accountable to the law for the most unconscionable breaches of human rights, in a very befitting manner. Therefore, the *suo motu* actions by the Supreme Court have become bedrock of the concept of public interest litigation to give effect to the fundamental rights in harmony with the Islamic Jurisprudence. The people of Pakistan have always applauded it for the simple reason that the courts itself stood for justice when there was no other forthcoming remedy for them for the violations of their fundamental rights of public importance.

Public Interest Litigation: An Effective Remedy.

It is only the public opinion which helps the judiciary occupy a position of pre-eminence.¹²³ A relaxation in the maintainability criterion, modified concept of *locus standi*, and implied reconstruction of judicial power in both the cases of Benazir Bhutto and Darshan Masih , according to the concept of Mark S. Kende,¹²⁴ initiated the “appropriate role” of the constitutional court for “social change”. The judgement entailed abolition of the bonded labour.¹²⁵ The role of a judge as “political theorist” for “transforming societies by ‘spreading the values set out in the Constitution throughout state and society” as described by David Robertson¹²⁶ was manifest in the judgement of Darshan Masih’s case. It facilitated a social change when the Bonded Labour System (Abolition) Act, 1992 was passed by the Parliament. A trend of public interest litigation operated as an alternative remedy to adversarial legal system to help the poor like Amjad Mahmood,¹²⁷ who was a convict and had undergone the punishment of imprisonment but was not released for non-payment of *diyat/daman*¹²⁸ due to want of financial capacity. He moved the Supreme Court through a petition and the court directed his release subject to furnishing bail bonds equivalent to the *diyat/daman* amount so as to enable him to arrange the said payment in 36 instalments, failing which he was liable to be taken into the custody until discharge of his liability.¹²⁹ The principle so evolved under the constitutional provision esteemed as public interest litigation benefitted many prisoner unable to even pay *diyat*,¹³⁰ who could have been released even in murder cases but for their weak financial status, in the manner

¹²³ ‘Forward’ by Former Chief Justice of India, A.S. Anand in S.k. Verma and Kasum, Fifty Years of Supreme Court of India (Oxford University Press Eds. 2010), vii.

¹²⁴ Mark S. Kende, Constitutional Rights in Two Worlds, South Africa and the United States (Cambridge University Press, 2010) p. 14.

¹²⁵ The Bonded Labour System (Abolition) Act, 1992

¹²⁶ Supra not 42.

¹²⁷ Amjad Mahmood v. State, (2003 Supreme Court Monthly Review 1850).

¹²⁸ The compensation determined by the court to be paid by the offender to the victim for causing hurt

¹²⁹ Amjad Mahmood v. State, (2003 Supreme Court Monthly Review 1850) p. 1851-52

¹³⁰ The meaning of word diyat in Islamic law is the financial compensation paid to the victim or heirs of a victim in the cases of murder, bodily harm or property damage. It is an alternative punishment to qisas (equal retaliation).

the case of convict Amjad was treated. The mobilised awareness of public interest litigation, thus, went onto sensitise the non-literate and poor prisoners to seek a collective relief for their community. Rather the Supreme Court, in a *suo moto* case,¹³¹ called upon the concerned High Courts to take all possible measures into consideration for clearing the backlog of cases so as to ameliorate the situation in the cases of prisoners languishing for years together in the jails and promptly hear the cases of those convicts awaiting outcome of their appeals, in the death cells. The court also mobilised the police for diligently concluding the investigations in the criminal cases and the prosecution and the Bar for their cooperation in the speedy trials as such.¹³² Such a cognizance by the Supreme Court in public interest litigation gave impetus to the disposal of cases within shortest possible time. This analysis brings home the significance of the public interest litigation on such a format which protected the fundamental rights of those who did not have even any remedy available to them under the law.

There is no denying the fact that the public interest litigation is the recognition of mal-functioning of state institutions. The astonishing 65.72 per cent of prison population of under trial prisoners¹³³ indicates failure of our criminal justice system calling for an extraordinary remedy of public interest litigation. There are many examples of corruption cases,¹³⁴ law and order cases,¹³⁵ election issues,¹³⁶ and illegal appointments¹³⁷ etc which necessitated the role of public interest litigation. The former Chief Justice of India, A. S. Anand had pertinently underlined that “when two organs of the state fail to perform their duties, the judiciary cannot remain a mute spectator”.¹³⁸ At times, it is not a mere failure rather an implied recognition of those institutions. The Federal and the Sindh governments have had recourse to the Supreme Court for launching Rangers operation in Karachi.¹³⁹ Fali S. Nariman, a leading Indian Lawyer rightly noted that, Judicial over-arch is the direct consequence of legislative and executive under-arch”¹⁴⁰ as it comes into play for an effective remedy when the State fails to enforce fundamental rights as such.

¹³¹ Suo moto Case, (All Pakistan Legal Decisions 2001 Supreme Court 1041).

¹³² Ibid, (All Pakistan Legal Decisions 2001 Supreme Court 1041) p. 1046-47.

¹³³ State of Human Rights in 2012, Human Rights Commission of Pakistan, p. 82-86.

¹³⁴ Suo motu Case of 15 of 2009, (Corruption in Pakistan Steel Mills Corporation) (All Pakistan Legal Decisions 2012 Supreme Court 610).

¹³⁵ President, Balouchistan High Court Bar Association v Federation of Pakistan (2012 Supreme Court monthly Review 1958)

¹³⁶ Imran Khan v Election Commission of Pakistan and others (All Pakistan Legal Decisions 2013 Supreme Court 120).

¹³⁷ Khawaja Muhammad Asif v Federation of Pakistan (2013 Supreme Court monthly Review 1205)

¹³⁸ ‘Forward’ by Former Chief Justice of India, A.S. Anand in S.k. Verma and Kasum, Fifty Years of Supreme Court of India (Oxford University Press Eds. 2010), vii.

¹³⁹ Implementation proceedings in the judgement of Watan Party v. Federation of Pakistan, (All Pakistan Legal Decisions 2011 Supreme Court 997).

¹⁴⁰ Fali S. Nariman, Before the Memory Fades..., (Hay House India, 2010) p. 375.

Public Interest Litigation and Social Justice:

The public interest litigation helped address societal problems and arguably opened up avenues for social change. The measures so adopted found favour through public legitimacy in Pakistan. Whenever the Supreme Court observed the executive authorities turning a blind eye to the critical social issues resulting in breach of fundamental rights, it took appropriate measures for social righteousness. A suo motu¹⁴¹ action by the Supreme Court entailed ban on the kite flying when an article in the newspaper divulged the life threatening hazards involved in the activity. It was brought to the notice of the court that such sports had occasioned deaths of many people and the law on the subject did not cater to the requirement of effectively curbing the precarious situation. The court had given extensive hearing to the stake holders, and also to a boy who became victim of throat cutting by string of the kite and lost his capacity to speak for good. The court emphatically directed the government to explore the possibility of managing his medical treatment within the country or, for that matter, outside the country for the revival of his voice. The court also ensured strict implementation of ban with observation for initiating contempt proceedings in addition to criminal CTUIB in case of future violations in this regard.

The court had earlier overruled interpretations resting on the restrictive meanings of social justice and had held in the case of I. A. Sherwani¹⁴² that “[in] order to advance the cause of justice and public good, the power...of Article 184 of the Constitution is to be exercised liberally, unfettered and without technicalities”.¹⁴³ Zullah CJ. was of the view, in the human rights cases,¹⁴⁴ that all the technical difficulties for the enforcement of the fundamental rights, stand removed by virtue of the Objective Resolution.¹⁴⁵

A crucial area where public interest was applied was the provision of clean environment and various directions were issued for the protection and health safety of the people. The elaborate judgement in the case of Shehla Zia¹⁴⁶ was the first of its kind to mark mobilised awareness calling for liberal interpretation of right to life. A welcome development of this sort of litigation in India stemming from the famous case of M. C. Mehta¹⁴⁷ has significantly impacted on ways of tackling environmental issues confronting people of the sub-continent. The petitioner Shehla Zia felt aggrieved against the installation of a grid

¹⁴¹ Suo Moto Case No. 11 of 2005, (All Pakistan Legal Decisions 2006 Supreme Court 1) p.14.

¹⁴² I. A. Sherwani v. Government of Pakistan, (1991 Supreme Court Monthly Review 1041).

¹⁴³ Ibid, (1991 Supreme Court Monthly Review 1041) p. 1065.

¹⁴⁴ 1993 Supreme Court Monthly Review 2001, p. 2006

¹⁴⁵ Supra note 3.

¹⁴⁶ Shehla Zia v. WAPDA, (All Pakistan Legal Decisions 1994 Supreme Court 693).

¹⁴⁷ M.C. Mehta v. Union of India, (All India Reporter 1987 Supreme Court 1086).

station for construction of high power transmission lines near the residential area which could endanger human life and her request to the Water and Power Authority did not bring any relief. The Supreme court, while taking cognizance of the matter on a letter by the petitioner, gave a sophisticated meaning to the word 'life' in a broad sense while holding that:-

*“The word “life” in terms of Article 9 of the constitution is so wide that the danger and the encroachment complained of would impinge upon fundamental right of a citizen. In this view of the matter, the petition under Article 184 (3) is maintainable.”*¹⁴⁸

Similarly, another case filed by the mine workers and local residents of Khewra¹⁴⁹ came under consideration before the Supreme Court as a matter of public importance. It involved an issue of high health risk for the local residents caused by the poisonous water supply and reduction of catchment area on account of illegal grant of lease of mines. The Supreme Court observed that:-

*“...in....public interest litigation under Article 184 (3) the procedural trappings and restrictions, pre-conditions of being an aggrieved person and other similar technical objections cannot bar the jurisdiction of the court.”*¹⁵⁰

The court granted relief to the petitioner in the case of Shehla Zia¹⁵¹ and enjoined upon the respondent to take active protective measures without putting the life of those inhabitants in danger. Also while relying upon the said case of Shehla Zia, the court allowed relief to the residents of Khewra mines, in that, the polluted water involved a serious threat to their lives.

In the famous judgement of Wattan Party,¹⁵² the process of privatisation of Pakistan Steel Mills was quashed by the Supreme Court when a petition was filed on the premise that a colossal loss worth billions of rupees will be incurred by the exchequer. The court found that cost of land was not even calculated for inclusion of its value and there were flagrant violations in connection with codal formalities, to the prejudice of national interest. While vitiating the proceedings of privatisation initiated on the basis of a decision of the Council of Common Interest, the objection as to the maintainability raised by the counsel for Privatisation Commission was turned down on the ground that the Attorney General had already concurred with the view that matter was one of public importance. The court went on to hold that the process of privatisation of Steel Mills was breach of Articles 4 and 9

¹⁴⁸ Shehla Zia v. WAPDA, (All Pakistan Legal Decisions 1994 Supreme Court 693) p.713.

¹⁴⁹ General Secretary v. Director Industries, (1994 Supreme Court Monthly Review 2061).

¹⁵⁰ Ibid, (1994 Supreme Court Monthly Review 2061) p. 2071.

¹⁵¹ Supra note 74.

¹⁵² Watan Party v. Federation of Pakistan, (All Pakistan Legal Decisions 2006 Supreme Court 697).

pertaining to the fundamental rights. The court further expounded its power of judicial review of administrative action in the following terms:-

*“...if the decision of the authority betrays total disregard of the rules and the relevant material, then the said decision fails the test of reasonableness laid down by the constitutional courts for the exercise of the power of the judicial review. Faced with such a situation a Constitutional Court would be failing in its constitutional duty if it does not interfere to rectify the wrong...”*¹⁵³

The public interest litigation has, therefore, vindicated the public outlook to applaud the role of Supreme Court for their collective wellbeing while operating within its constitutional mandate of judicial review. In his speech at International Judicial Conference, Iftikhar Muhammad Chaudhry CJ¹⁵⁴ acknowledged that “judicial activism...not only strengthens the judicial system as a whole, but has also enhanced public trust and confidence in the formal justice system”. Thus, the concept of social justice and public interest litigation currently go hands in glove with each other in Pakistan.

Public Interest Litigation and Islamic Ideology

Islam is the state religion of Pakistan¹⁵⁵ and therefore, all laws are essentially to be governed by the Islamic ideology. The Objective Resolution¹⁵⁶ has articulated that “[T]he principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam, shall be fully observed”. The Federal Shariat Court and Islamic Ideology Council have been constituted under the constitutional provisions¹⁵⁷ for transformation of the laws according to the fundamental principles of Islam. In the case of Benazir Bhutto,¹⁵⁸ the Supreme Court had observed that:-

“...the interpretative approach must receive inspiration from the triad of the provisions which saturate and invigorate the entire constitution, namely, the Objective Resolution, (Article 2-A), the Fundamental Rights, and the Directive Principles of

¹⁵³ Ibid, (All Pakistan Legal Decisions 2006 Supreme Court 697), p 755-56.

¹⁵⁴ A report of the proceedings of International Judicial Conference 2013, (19-21 April), Islamic Research Institute Press, p. 111.

¹⁵⁵ The Constitution of Islamic Republic of Pakistan 1973, Article 2.

¹⁵⁶ Ibid, Article 2-A.

¹⁵⁷ Ibid, Articles 203, 227-231.

¹⁵⁸ Supra note 20.

*State Policy so as to achieve democracy, tolerance, equality and social justice according to Islam.*¹⁵⁹

The scope for enforcement of human rights having international recognition were also interpreted with the Islamic perception, as was observed in the case of Zaheeruddin that "...even the fundamental rights given in the Constitution must not violate the norms of Islam".¹⁶⁰ The Supreme Court has always regarded the injunctions of Islam as the true and valid laws of the state and effectively enforced them.¹⁶¹ Islamic law is primarily based on the principles of equity, fairness and social justice. The judiciary of Pakistan had always given clear guidance under the Islamic principles even if secular laws failed to expand the scope of public interest litigation. The observation of Mr. Khan that "[a] general tendency is growing in the judiciary of Pakistan to fill the vacuum which exists in the...law with Islamic principles and Islamic common law"¹⁶² is indicative of the trend of constitutional interpretations of fundamental rights in the country. While granting relief to Miss Bhutto,¹⁶³ the finding of the Supreme Court that the constitutional provision of Article 270-A was repugnant to the Article 2-A relating to the sovereignty of Pakistan and independence of the judiciary, speaks volumes of the outlook of Judiciary for growth of public interest litigation under the shadow of Islamic ideology. The reliance of the Supreme Court on Islamic jurisprudence for empowerment of women can be further illustrated through the following observation in the in Ghulam Ali's case:-

*"...the scope of rights of inheritance of females...is so wide and their thrust so strong that it is the duty of the Courts to protect and enforce them, even if the legislative action for this purpose of protection in accordance with Islamic Jurisprudence is yet to take its own time."*¹⁶⁴

In the case of Mahmood Khan Achakzai,¹⁶⁵ the Supreme Court dwelled upon constitutional history of Pakistan and found that the Objective Resolution¹⁶⁶ has been integral part of all the constitutions and the authority of the Parliament under the Constitution would not allow to amend the Constitution so as to alter its salient feature, namely, federalism and parliamentary form of government blended with Islamic provisions. The judgement of Benazir Bhutto's case¹⁶⁷ not only gave liberal interpretation to the concept of *locus standi* rather elaborated the

¹⁵⁹ Benazir Bhutto v Federation of Pakistan, (All Pakistan Legal Decisions 1988 Supreme Court 416). P.489

¹⁶⁰ Zaheeruddin v. The State, 1993 Supreme Court Monthly Review 1718.

¹⁶¹ Ann Elizabeth Mayer, Islam and human rights: Traditions and politics (Boulder, Colorado and San Francisco: Western Press 1991) p.28.

¹⁶² Mansoor Ahmad Khan, Public Interest Litigation: Growth of the concept and its meaning in Pakistan (Karachi: Pakistan Law Book House, 1993) p.48

¹⁶³ Supra note 20.

¹⁶⁴ Ghulam Ali v. Mst. Ghulam Sarwar Naqvi, (All Pakistan Legal Decisions 1990 Supreme Court 1) p. 26.

¹⁶⁵ Mahmood Khan Achakzai v. Federation of Pakistan, (All Pakistan Legal Decisions 1997 Supreme Court 426).

¹⁶⁶ The Constitution of the Islamic Republic of Pakistan, Art. 2-A.

¹⁶⁷ Supra note 20.

notion of Public interest litigation to ensure socio-economic justice by lending unstinting support to the interpretation of the fundamental rights and principles of policy, as contained in articles 2-A and 4 of the Chapter (II) of the Constitution, in the like manner. Islam being the state religion, it was also emphasized by A.R. Cornelius J. that their construction must be consonant with the Islamic Jurisprudence, in the following words:-

“In the Objectives Resolution, it is clearly laid down for the guidance of secular affairs of Pakistan, that they should be conducted in the way of democracy to ensure equality, tolerance and social justice in the democratic mode...[t]he judge who expounds a fundamental right of the constitution is expected to draw inspiration from the high sources which are permanently inscribed in the words of holy Quran.”¹⁶⁸

The above-referred observations of the stalwart Judges like A.R. Cornelius suggest that since inception of the public interest litigation, liberal interpretations of the fundamental rights thwarted any conflict with Islamic ideology so as not to let the fundamentalist criticism creep into the process of its evolution.

Women’s Rights and Public Interest Litigation.

An Advantage of the public interest litigation is to provide access to justice for vulnerable segments of the society. For instance, in the case of Ghulam Ali,¹⁶⁹ although not originating in PIL, Muhammad Afzal Zullah J, handed down a judgement as if it was a representative petition of public interest from all the women of Pakistan becoming victim the nefarious custom whereby they were deprived of their inheritance. The court did not allow the petitioner’s plea of the defence being time-barred, reflecting sensitivity of the Supreme Court to prevailing societal situation relating to inability of women to seek their inheritance. Similarly, in the case of Fazal Jan,¹⁷⁰ Muhammad Afzal Zullah CJ ordered for free legal aid to an old non-literate female to effectively pursue her claim of property in the court. These cases of public interest litigation reveal that courts have adopted all possible measures to guard the women against arbitrary and whimsical deprivation of their property rights.

In Pakistan, as in a number of other countries, women are victimised on account of brutal tribal customs including honour killings

¹⁶⁸ Mr. Justice A.R. Cornelius, ‘Objective Resolution and Duty of Men of Law: Need to Expound Law According to True Philosophy of Pakistan’ a lecture delivered at 2nd Law Conference at the S.M. Law College, Karachi on March 11, 1965, All Pakistan Legal Decisions 1965 journal 44, p. 48.

¹⁶⁹ Ghulam Ali v. Mst. Ghulam Sarwar Naqvi, (All Pakistan Legal Decisions 1990 Supreme Court 1).

¹⁷⁰ Fazal Jan v. Roshan Din, (All Pakistan Legal Decisions 1990 Supreme Court 661).

and sometimes even on the basis of suspicion.¹⁷¹ At times, they cannot even contract marriages of their choice as their male family members have eyes on their inheritance claims. Likewise, women are also prevented from seeking divorce even on humanitarian grounds under the fear of brutal inhuman torture or death. Any deviation on their part in this regard, would easily make them victim of murder without fear of punishment. That is why, the Supreme Court exercised its *suo motu* jurisdiction¹⁷² when on a news item published in daily Dawn Nazim Siddiqui CJ sought an inquiry report about the incident of the alleged murder of a couple who had purportedly contracted love marriage and were executed following the decision of the “*Jirga*”.¹⁷³ There was allegation that the couple was captured and their custody handed over to the girl’s family who perpetrated the murders. After the report of District and Sessions Judge, the court referred the matter for further investigation, to the concerned Inspector General of the Police. ¹⁷⁴ The principal accused of the incident of murder was the father of deceased girl. In such like cases I, as judicial officer, had experienced while conducting trials punishable with death and life imprisonment that the local police at times connived with the family of the culprit. They prefer to register the case through a complainant who often would be part of the conspiracy of such honour killings. Such complainant invariably makes fallacious choice of witnesses in collusion with the police to substitute the genuine incriminating evidence. Consequently, those witnesses retract from the actual story of incident as to the identity and role of the actual culprits. The court anticipated alike situation in the said case and directed the principal officer of the police (IGP) in the province “... to personally look into the matter in order to ascertain the individual liability of the concerned police officers about their involvement in the matter.....”¹⁷⁵ Hence, the role of public interest litigation for peace and harmony in the society and provision of impartial justice to those vulnerable like women, who became victim of brutal tribal customs, has become highly praiseworthy. These actions came to rescue the property rights of women when there was no efficacious remedy in vogue to protect them from exploitation of male dominance. It was the gaining momentum of public interest litigation which solemnly attributed a virtuous role to the court in this respect.

Public Interest Litigation and Rule of Law.

There are two requirements to set the law in motion under Article 184 (3) of the Constitution. Such a provision enables the Supreme Court

¹⁷¹ Rachel A. Ruane, Comment, ‘Murder in the Name of Honor: Violence against Women in Jordan and Pakistan’ (2000) 14 Emory International Law Review. at 1531-32.

¹⁷² Suo Moto Case No. 4, (All Pakistan Legal Decisions 2004 Supreme Court 556).

¹⁷³ A sort of council/body, often informal, consisting of tribal heads responsible for settling disputes etc, in Pakistan.

¹⁷⁴ *Suo Moto Case No. 4, (All Pakistan Legal Decisions 2004 Supreme Court 556) p. 562.*

¹⁷⁵ *Ibid.*

to entertain public interest litigation whenever (i) a matter of public importance viz-a-viz (ii) enforcement of fundamental rights, as envisaged by the Constitution, is involved. Over a period of three decades since the judgement of Haleem CJ in the case of Benazir Bhutto,¹⁷⁶ the parameters to regulate the public interest litigation have further been evolved. A wide range of cases involving interpretation of such litigation came under scrutiny before the Supreme Court, and this constitutional provision went a long way to initiate a process of securing a socio-economic balance and the rule of law. The Supreme Court held in an important judgement in the case of Fauji Foundation¹⁷⁷ that under the constitutional scheme of trichotomy of power, all the three branches of legislature, executive and judiciary have to operate within the confines of their inherent mandate and ought not to encroach upon the domain of each other. The courts are creature of the Constitution and cannot assume jurisdiction not vested in them by the Constitution itself. The exercise of authority by the courts to examine the legislative competence of the Parliament is explicitly confined in terms of limitations enjoined upon them by the Constitution and declaration of any law as null and void does not signify that the courts are superior than the legislature rather they only enforce the Constitution as a supreme law and intervene when a law passed by the Parliament is found conflicting with the provisions of the Constitution. The same principle was reiterated in the case of Tariq Transport Company.¹⁷⁸ Therefore, the judiciary gives effect to the Constitution when legislative or executive authorities breach their constitutional order and act in a manner derogating from the mandate of enacting a law or executing it in a manner not conforming to the fundamental rights recognised by the Constitution.

The famous case of Shiekh Liaqat Hussain¹⁷⁹ to challenge the establishment of military courts is an example, whereby the law to establish the military courts was declared ultra vires the constitutional provisions in regard to the fundamental rights. It was held by the Supreme Court in this case of public interest litigation that:-

*“...the establishment of military courts for trial of civilian population ... against the concept of independence of judiciary are not only questions of public importance but they also relate to the enforcement of fundamental rights of the entire civil population, guaranteed under the constitution.”*¹⁸⁰

Such an exercise of authority in public interest litigation also surfaced in the case of Khan Asfand Yar Wali¹⁸¹ whereby he assailed the

¹⁷⁶ Supre note 20.

¹⁷⁷ Fouji Foundation v. Shamimur Rehman, (All Pakistan Legal Decisions 1983 Supreme Court 457) p.592.

¹⁷⁸ Tariq Transport Co. and State v. Ziaur Rehman, (All Pakistan Legal Decisions 1983 Supreme Court 457) p.592.

¹⁷⁹ Shiekh Liaqat Hussain v. Federation of Pakistan, (All Pakistan Legal Decisions 1999 Supreme Court 504).

¹⁸⁰ *Ibid*, All Pakistan Legal Decisions 1999 Supreme Court 504, p.549.

¹⁸¹ Khan Asfand Yar Wali v. Federation of Pakistan, (All Pakistan Legal Decisions 2001 Supreme Court 607).

constitutionality of several provisions of the National Accountability Bureau (NAB) Ordinance, 1999. The petition was held maintainable on the plea that the Ordinance ibid was not consistent with the philosophy of the constitutional scheme of separation of power and involved serious questions pertaining to the breach of fundamental rights guaranteeing the liberty, security, freedom of movement, equality before law, inviolability of human dignity, trade and profession, and retrospective punishment etc. which could affect public-at-large, and therefore, it was a matter of public importance. As a result of the superb judgement passed in the said case, several provisions of the NAB Ordinance were declared violative of the Constitution, with a consequential direction to the government to move the legislature for necessary amendments accordingly.

In the case of Al-Jehad Trust,¹⁸² the constitutional provisions for appointments of judges in the superior courts¹⁸³ were interpreted under article 184 (3) wherein an objection, by the Federation of Pakistan, relating to direct petition before the Supreme Court was raised and it was agitated before the Supreme Court that the petitioner had already invoked the jurisdiction of High Court on identical grounds. However, the Supreme Court did not allow the plea and held that the petitioner was justified to invoke its jurisdiction as the question for interpretation of the constitutional provisions for appointments in the judiciary was one of the public importance. The word “consultation” in the relevant provisions was moot point to be addressed and was interpreted as under:-

“Consultation in the scheme as envisaged in the constitution is supposed to be effective, meaningful, purposive, consensus oriented, and leaving no room for complaint, arbitrariness, or unfair play.”¹⁸⁴

The afore-referred decisions based on logical justifications to find the legislative instruments as unconstitutional through able judicial interpretations in the matters of public importance has always ensured the rule of law and been instrumental to the growth of public interest litigation. Should a law conflict with the provisions of the Constitution so as to invade the unfettered exercise of fundamental rights, the courts now can entertain the matter as that of public importance with a view to strike down the provisions of such law by declaring them as unconstitutional. The courts always view the Constitution as supreme law having overriding effect over any ordinary law contrary in any manner to the essence of fundamental rights. Such an exercise of judicial power in public interest litigation assured the ordinary people of Pakistan that there will be fairness and transparency in exercise of the authority, be it that of the legislature or the executive both having control over the sword and purse as such. That is why, a justifiable judicial review in the matters of public interest litigation has and will always safeguard their

¹⁸² Al-Jehad Trust v. Federation of Pakistan, (All Pakistan Legal Decisions 1996 Supreme Court 324).

¹⁸³ The [Supreme Court of Pakistan](#), the [Federal Shariat Court](#) and five [High Courts](#).

¹⁸⁴ Supra note 110, All Pakistan Legal Decisions 1996 Supreme Court 324, p. 405.

fundamental rights in order to rally round the thematic scheme of the Constitution to put in place an effective system of checks and balances on exercise of arbitrary authority on all the three organs of the State, for the advancement of the rule of law.

Limitations on Public Interest Litigation:

The evolving system of public interest litigation in the recent past, conferring a protective jurisdiction upon the judges, task them with a paramount duty to preserve fundamental rights of their citizens.¹⁸⁵ Their jurisdiction to keep the state functionaries within the ambit of their authority and to put a check on the accesses committed by them, has become the hallmark of this doctrinal jurisdiction of fundamental rights.¹⁸⁶ In other words it is a refined form of “*ehetesab*” (accountability). The jurisdiction does not provide a scope for the grievance of an individual right not involving a matter of public importance. The Supreme Court had dismissed several petitions when the petitioners like Dr. Noor Muhammad¹⁸⁷ sought relief in the matters not relevant to the public at large. The Supreme Court allows only the matters of public importance for enforcement of fundamental rights through a bona fide representation on behalf of the others. In the case of Muntizma Committe,¹⁸⁸ it was held by the court that its jurisdiction can only be invoked when its conscious is shocked on account of some omission or commission i.e. action or inaction, on the part of either the Federation or the Provinces. The person acting with bona fide may institute public interest litigation for relief in regard to a public injury¹⁸⁹ yet the principle cannot be attracted when the right to be enforced turns out to be a private one. However, there is a subtle distinction between the private right of an individual confined to him/herself , and individual right having nexus with matter of public importance involving gender or social equality of females and minorities etc. The case of Inayat Bibi,¹⁹⁰ was treated by Zullah CJ as matter of public importance, for the petitioners were females from a minority community and complete justice could only be handed down by following the criterion of gender and social parity in the said case.

The Supreme Court declined a petition of holding elections on basis of proportional representation with the observation that “...we cannot allow this relief as this is a legislative fiat...” The court had thereby pledged to abide by the principles of separation of power. It is pertinent to note that the constitutional jurisdiction in the public interest litigation is discretionary and to be exercised only for the public interest. The courts refused to exercise such jurisdiction and upheld administrative orders passed in a bona fide manner for the public

¹⁸⁵ Inamur Rehman v. Federation of Pakistan, (1992 Supreme Court Monthly Review 563) p. 574-75.

¹⁸⁶ Sookhi v. The Punjab Province, (All Pakistan Legal Decisions 1993 Lahore 129).

¹⁸⁷ Dr . Noor Muhammad v. Federation Of Pakistan and others, (1988 Supreme Court Monthly Review 1987).

¹⁸⁸ Muntizma Committee v. Director Kachi Abadies Sindh, (All Pakistan Legal Decisions 1992 Karachi 54).

¹⁸⁹ Ibid, (All Pakistan Legal Decisions 1992 Karachi 54) p. 65.

¹⁹⁰ Inayat Bibi v. Isaac Nazir Ullah, (All Pakistan Legal Decisions 1992 Supreme Court 385).

interest, when so challenged before them on the plea of infringement of fundamental rights; and those orders were found to be lawful and in the public interest, despite the apparent violation of these rights.¹⁹¹ The court has always to be cautious while entertaining matters under article 184 (3), as was held in the case of Wukala Mahaz Barai Tahafaz Dastoor.¹⁹² The Supreme Court has not been inclined to entertain the petitions moved without exhausting the forums available under the ordinary laws.¹⁹³ The court also refused to exercise such jurisdiction against its Benches at Quetta and Peshawar on the basis of established norm that no writ can be issued by one Bench against another Bench of the same court. The court declined to entertain a petition challenging creation of the Council of the National Security on the ground that the matters of national defence and security should not be debated before a court of law.¹⁹⁴

The Supreme Court has been certainly conscious that public interest litigation may inundate the court with such cases. This may have far reaching implications, and “choke the courts” as was observed in the case of Tariq Saeed.¹⁹⁵ The court has also advised in the said case as under:-

*“...people should avoid the filing of frivolous / vexatious petitions...as filing of vexatious and frivolous petitions may entail...abuse of the process of the court”.*¹⁹⁶

The more public interest litigation flourishes, the more prospects of its abuse transpire. The system of litigation has primarily been evolved to ameliorate the conditions of the impoverished and vulnerable segments of the society for evolving socio-economic justice through enforcement of their fundamental rights in Pakistan. Hence, it becomes all the more essential to provide clear guidelines the way Supreme Court of India did in the case of Gurpal Singh.¹⁹⁷ A guidelines specific alike comprehensive judgement on the parameters of the such jurisdiction through authoritative findings, is still awaited. The people applaud the optimum contribution of the Supreme Court of Pakistan to encourage Public Interest Litigation by removing the procedural constraints like *locus standi*, which prevented these groups of aggrieved people to combat socio-economic injustice¹⁹⁸ irrespective of distinction about ethnic, religious or cultural background.

¹⁹¹ State Life Insurance Employees v. Federation of Pakistan, (1994 Supreme Court Monthly Review 1341).
¹⁹² Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan, (All Pakistan Legal Decisions 1998 Supreme Court 1263) p. 1300-01.
¹⁹³ Mian Muhammad Shahbaz Shareef v. The State (1997 Supreme Court Monthly Review 1361) p. 1362.
¹⁹⁴ Muhammad Ikram Chaudhry v. Federation of Pakistan, (All Pakistan Legal Decisions 1998 Supreme Court 103) p. 113.
¹⁹⁵ Tariq Saeed v. Director Anti-Corruption Establishment, (1996 Monthly Law Digest 1864).
¹⁹⁶ Ibid, (1996 Monthly Law Digest 1864) p. 1880.
¹⁹⁷ Gurpal Singh v. State of Punjab, (2005) 5 Supreme Court Cases 28.
¹⁹⁸ Bhagwati P.N, ‘Judicial Activism and Public Interest Litigation’ (1985) Columbia Journal of Transitional Law, Vol. 23 No. 3: 575

Conclusion

The purpose oriented Public interest litigation jurisprudence, a most distinctive contribution of the judicial institution,¹⁹⁹ is not adversarial in its character. It has significantly played a key role for enforcement of fundamental rights, socio-economic justice and rule of law in Pakistan. Those circumscribed by poverty, disability, and cultural barriers in the adversarial litigating format, have had a sigh of relief through a substitution. The public interest litigation provides an opportunity to all the three organs of the state to make co-ordinated efforts for realising the mandate as manifested in the objectives resolution²⁰⁰ providing a political scheme unequivocally compatible with the commands of the supreme divine authority. It calls upon the state to develop an impeccable system to achieve a welfare state in terms of Islamic ideals of social justice. The courts are the last resort in this developing country to provide remedy in this behalf, through the evolving phenomenon of this form of litigation i.e. public interest litigation. Justice Bhawati, in his observations,²⁰¹ expounded that earlier the weaker sections had no access to the courts due to their ignorance, poverty and illiteracy, nor were they conversant with the rights the Constitution has conferred upon them. A systematic violation of fundamental rights circumvents the achievement of these noble objectives of the policy principles. The growth of such a novel system of litigation dismissed the impression harboured by the poor that without being in possession of adequate financial resources, they cannot approach the courts against mighty resourceful persons for enforcement of human rights nor can they win the battle of protecting their rights so infringed by the upper magnates of the society, through a court of law.

The adversarial legal system involves prolonged judicial process and failed to advance the cause of unrepresented poor groups as such. The denial of justice to a bona fide representation on behalf of a disadvantaged group or class of people on account of defective concept of *locus standi* under article 184 (3) of the Constitution, had left these segments of society in devastating state of utter despair and despondency. Therefore, the expanding public interest litigation not only gives the poor an optimistic attitude of hope for social justice and equality in the society rather the administration of justice for the enforcement of their fundamental rights also stands fortified.

In the developing countries like Pakistan, both the organs of executive and legislature created a vacuum of distrust among the vulnerable sections on account of their failure to evolve socio-economic justice through effective enforcement of fundamental rights and principles of policy as enunciated by the Constitution. The supreme court

¹⁹⁹ Burt Neuborne, 'The Supreme Court of India' (2003) International Journal Of Constitutional Law, p. 476.

²⁰⁰ Supra note 3.

²⁰¹ Bihar Legal Support Society v Chief Justice of India, (Supreme Court of India (1986 4 Supreme Court Cases 768).

of Pakistan, as the only alternative, firmly exercised its jurisdiction under Article 184 (3) for enforcement of these rights in the matters of public importance in order to perform its constitutional role and, in turn, has restored the lost faith of the down-trodden people. The public interest litigation is not violative of the doctrine of separation of power rather it creates a system of checks and balances, therefore, the judiciary is more vigilant to achieve the social justice by encouraging the legislature to transform its policies strictly for achieving the objectives as set out by the Constitution and motivating the executive to implement them with genuine zeal and zest. Such a promising future role of judiciary will ensure due performance of duties by all the branches of the state and enhance their credibility manifold.

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(4) JUDICIAL EDUCATION AND TRAINING AT DIGITAL PLATFORM: DIGITAL SIMULATION, VIDEO GAMES AND VIRTUAL REALITY¹

By

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Keywords:

Judicial education (JE), JE digital platform, digital simulation, video game, online learning tools, offline learning tools, digital feedbacks, virtual reality mock trials, engaging the learner, quality of justice administered, judges, magistrates, law officers, court personnel, judicial academy, iJE, Information Technology (IT), Judicial Education Method, eMethod, iMethod, judicial academy

Abstract:

Judicial education is an emerging field in Pakistan. It aims at training and education of judges, magistrates, law officers and court personnel. Over the last 25 years, five judicial academies have been established through one through federal³ and four through provincial

¹ This is a revised and updated version of the paper presented at the International Conference on Engaging the Learner: Rethinking Education, organized by the Fatima Jinnah Women University, Rawalpindi (February 10-12, 2014).

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³ Federal Judicial Academy Act, 1997.

statutes.⁴ Judges, law officers and court personnel have different dimensions and requirements of pre- and in-service training and education. They have to be provided judicial education through adult learning methods. The existing curricula of judicial education at federal level encourages teaching method of lecture supported by discussion, participation, mock trial, Q&A, brain storming and experience sharing or heuristics, among others. Though there is significant information technology explosion (or revolution), the justice sector usually lags behind. Engaging its learners through use of innovative teaching tools, i.e., digital simulation, video games and virtual reality is still a dream.

This paper will explore the digital simulation, video games and virtual reality's power to transfer information and knowledge through engaging the learner at greater level throughout the simulation exercises (on- and off-line video games or virtual reality). But as no such judicial education tool has been conceived or developed here in Pakistan to test or experiment the same for future development, the study will use effectiveness of these tools from other fields of knowledge or levels of studies to highlight the importance of digital simulation on learner's level of engagement. Use of information technology will also help in performance evaluation and getting feedbacks instantly.

The paper will further propose development of digital platform for judicial education simulation exercises and video games to bring revolution in judicial learning. Judges and other professionals may be educated and trained through use of these proposed tools and platforms at much lesser cost but with greater interest and engagement. Thus, the quality of justice administered will improve.

Judicial System and 'justice' as its Core Value:

Judges dispense justice. Court staff provides ancillary support to the judges and courts to function. Lawyers, advocates, attorneys, prosecutors, public defenders and legal experts assist the courts to decide the cases in accordance with the law and precedents (judicial decisions settling law). Litigants, both plaintiffs and defendants are the ones who confront each other in court to get justice proportional to their individual rights. Witnesses, both expert and private, being key factors in justice system help the court to capture the facts as they occurred or happened or recorded.

To have a functional judiciary, we need smart, intelligent and diverse judges. Judges whose integrity is above board; judges who are independent; judges who are competent; judges who are efficient and judges who are effective. Thus, judicial selection process and appointment of competent judges is great challenge for the State generally and for the judiciary particularly. A judiciary that is not

⁴ Sindh Judicial Academy Act, 1993; Punjab Judicial Academy Act, 2007; Balochistan Judicial Academy Act, 2010; Khyber Pakhtunkhwa Judicial Academy Act, 2012.

competent, not efficient, not effective and whose integrity is in doubt cannot acquire the public confidence. Confidence of public is the key element in any civilized society to test its institutions. Without public confidence, the legitimacy of the decisions of judiciary comes under challenge and weakens the institution. This loosens the effectiveness and ultimately society goes into anarchy.

These are the reasons that justice has always been found as an important value in all the religions, all the political systems and all the domains where interaction between human beings is to take place. Of course, the law of the jungle has its own value system quite different from a legal system for the human beings; but still we learn from it as well.

To make the judiciary competent, effective, efficient with integrity as basic value, the induction of quality judges is a *sine qua non*. For this we need to have a strong legal education system. The weakness in the legal education system has been highlighted by the Hon'ble Supreme Court of Pakistan in its judgment *Pakistan Bar Council v Federation of Pakistan*, PLD 2007 Supreme Court 394,⁵ has held (*per* Tassaduq Hussain Jilani, J):

13. The poor quality of legal education in the country is taking its toll on the Bench, the Bar and ultimately the quality of justice. The Provincial Public Service Commissions, while engaged in recruitment to the posts of Civil Judges have frequently regretted the deteriorating academic standards of law graduates competing for the posts. Every year thousands of law graduates are getting added to the Bar. Some are products of colleges, having a certain credibility of imparting quality education whereas many come from colleges where the standard is below average. The products of the latter kind neither have the requisite knowledge of law nor any commitment to professional ethics.

Once the judges are selected and appointed, we need a process of transformation in their way of thinking and doing things. We need to introduce them with codes of conduct, judicial ethics and art of judging. We need to tell them how to conduct court, how to behave with litigants and parties to a dispute and how to settle the matters through use of conventional and modern tools of judging. They are also to be sensitized over the fields of economics, social science, forensics and behavioral sciences, among few. Court management and court technology have to be learned over period of time. Dealing with litigants with special rights and understanding the issues of disability, diversity, gender, poverty, inability, access to justice, barriers to justice and a lot needs continuing judicial education. To introduce transformation in judicial selectees to become good judges, a strong judicial education system is required.

⁵ The Supreme Court of Pakistan has passed further orders in this public interest case which have been reported in 2013 SCMR 1651 wherein the Committee to devise improvements in legal education system in Pakistan was reconstituted and directions were made to do the needful within reasonable time.

Judicial Education in Pakistan: A Brief Introduction⁶

Judiciary in Pakistan is a federal as well as provincial subject in the scheme of the Constitution of Pakistan 1973.⁷ Therefore, we have constitutional judges for Supreme Court, High Courts and Federal Shariat Court; federal judges for special courts and tribunals established under the federal legislation;⁸ provincial judges for special courts and tribunals established under the provincial laws⁹ and ordinary law courts (district judiciary consisting of District & Sessions Judges, Additional District and Sessions Judges, Senior Civil Judges and Civil Judges/Magistrates).¹⁰ Likewise, there are Services Tribunals, both at Federal and Provincial levels to deal matters of civil servants in their respective jurisdiction.¹¹ All the above judicial offices / courts are to be filled through appointment of competent judges having good character and strong profiles to meet the eligibility criteria for selection as judges or presiding officers, as the case may be.

The concept of training and education of judicial officers and staff was first time highlighted in the *Report of the Law Reform Commission 1967-70*¹² wherein it was proposed to set up a Judicial Services Academy. This, however, could not materialize until 1981, when the Shariah Academy¹³, Islamabad started a program for educating judges on Islamic justice system. Since 1988, formal judicial education regime has been developing step by step. The first judicial college, i.e., the Federal Judicial Academy¹⁴ was established in Islamabad for training and education of judges, magistrates, law officers and court personnel from all over the country. The province of Sindh followed the suit and established its own Sindh Judicial Academy in 1993.¹⁵ Punjab Judicial Academy was also established through an Ordinance promulgated by the Governor and thereafter, Punjab Judicial Academy Act was passed by the

⁶ See "Judicial Education in Pakistan" in *CJEI Report*, Summer 2009, pp. 6-9, published online at <http://cjei.org/publications/CJEI%20Report%20Summer%202009.pdf>. Last visited on 4.2.2014.

⁷ See Part VII of the Constitution of Pakistan 1973 dealing with the Judicature.

⁸ E.g., Anti-Terrorism Courts; Special Judge Customs; Accountability Courts, Drugs Courts etc.

⁹ E.g., Labor Courts, Juvenile Courts, Family Courts, Consumer Courts, Anti-Corruption Judges etc.

¹⁰ See generally the Civil Courts Ordinance, 1962; Code of Civil Procedure, 1908; Code of Criminal Procedure, 1898; Family Courts Act, 1964; Juvenile Justice System Ordinance, 2000.

¹¹ Administrative Courts and Tribunals established under Article 212 of the Constitution of Pakistan, 1973.

¹² Government of Pakistan, *The Report of the Law Reform Commission 1967-70*, Karachi: Printing Corporation of Pakistan Press, 1970, at pp. 195 & 484-487. See also www.ljcp.gov.pk.

¹³ See, www.iiu.edu.pk. Shariah Academy is now a constituent body of the International Islamic University, Islamabad. It still continues its training programs for judges, lawyers and prosecutors on annual basis which also include a foreign component where judges are sent either to Saudi Arabia, Egypt or Malaysia for knowing the judicial systems of those countries. For details, please visit http://www.iiu.edu.pk/index.php?page_id=107. Sites last visited on 2.2.2014.

¹⁴ Initially, it was established through a Resolution of Ministry of Law, Government of Pakistan on 14th September 1988. However, in 1997, the Federal Judicial Academy Act was passed by the Parliament to give legal cover to this important and premier institution of judicial education and training. www.fja.gov.pk. Last visited on 2.2.2014.

¹⁵ The Sindh Judicial Academy was also established initially through an Ordinance issued by the Provincial Governor. However, in 1993, the Sindh Judicial Academy Act was promulgated by the provincial legislature. www.sja.gos.pk. Last visited on 2.2.2014.

provincial Assembly in 2007.¹⁶ Balochistan took lead to establish its formal judicial academy in 2010 when the provincial legislature passed the Balochistan Judicial Academy Act, 2010¹⁷ and finally the Khyber-Pakhtunkhwa Judicial Academy was established by the KP law in 2012 titled Khyber Pakhtunkhwa Judicial Academy Act, 2012.¹⁸

In between this, there are other organizations where judges have been sent to get training on different issues, e.g., erstwhile National Institute of Public Administration; National Police Academy; Police College Sihala; Rural Academy Peshawar; Administrative Staff College, Lahore; Forensic Science Laboratory, Lahore; Central Jail Staff Training Institute, Lahore.

It would be pertinent to mention that even before and after establishment of the formal judicial academies, there has been a practice adopted by the High Courts that new judicial officers are posted at respective stations of postings with a direction to the District and Sessions Judge that the newly recruited / appointed judicial officers will get practical training with senior judges in district for 15 days. They have also to know and understand the working of the offices attached with the district judiciary, especially the process serving agency and judicial record rooms. This practice is, fortunate enough to say that, still in vogue and is very much helping to the new judges to understand the practical aspects of their job. After completing this mandatory training, the judicial officers assume their office to work independently.

Judicial Education Method:

For the present study, I would focus on the method of delivery of judicial education in the judicial academies mentioned above.¹⁹ For this, the first guidance has to be taken from the statutes constituting the judicial education bodies. The comparative **Table I** below will provide us a snapshot of the functionality of the federal and provincial judicial academies viz a viz the method of judicial education:

¹⁶ www.pja.gov.pk. Last visited on 2.2.2014.

¹⁷ See <http://www.pabalochistan.gov.pk/uploads/acts/2010ii.htm>. Last visited on 2.2.2014.

¹⁸ See www.kpia.edu.pk. It would be pertinent to mention that before the 2012 Act, there was established a Provincial Judicial Training Center on 11th March 2008, through a notification No. H (a) 43/Trg-I-II-III-IV-V/2008, by an administrative order issued by the Registrar of the Peshawar High Court. See http://www.peshawarhighcourt.gov.pk/nwfp_JTC.php. Dr. Khurshid Iqbal, the then Additional District and Sessions Judge was posted as its first Director. Dr. Khurshid Iqbal (District & Sessions Judge) is presently, Dean Faculty of the KP Judicial Academy established under the 2012 Act. See <http://www.kpia.edu.pk/content/academy-staff>. All sites last visited on 2.2.2014.

¹⁹ I have myself served in the Federal Judicial Academy, Islamabad (www.fja.gov.pk) for almost three years (2006-09) and thus have first-hand knowledge of many a practices followed for the purposes of delivery of judicial education. I have also attended the Intensive Study Program for Judicial Educators at the Commonwealth Judicial Education Institute, Halifax, Canada in 2008 (www.cjei.org).

TABLE I
FINDING THE JUDICIAL EDUCATION METHOD

Name of the Academy	Statute	Relevant provision on Judicial Education Method	Tools of Judicial Education
Federal Judicial Academy	Federal Judicial Academy Act, 1997 ²⁰	No Judicial Education Method in the 1997 Act	No provision
Sindh Judicial Academy	Sindh Judicial Academy Act, 1993 ²¹	No Judicial Education Method in the 1993 Act	No provision
Punjab Judicial Academy	Punjab Judicial Academy Act, 2007 ²²	5. Manner of training. – (1) The Academy shall use all modern techniques for imparting judicial training. Teaching methods and evaluation system shall be at par with international standards. (2) The Academy shall institute a quality examination and evaluation system with regard to the training imparted	Section 5(1) provides use of “Modern Techniques”
Balochistan Judicial Academy	Balochistan Judicial Academy Act, 2010 ²³	No Judicial Education Method in the 2010 Act	No information
Khyber Pakhtunkhwa Judicial Academy	Khyber-Pakhtunkhwa Judicial Academy Act, 2012 ²⁴	No Judicial Education Method in the 2012 Act	No provision

²⁰ <http://www.fja.gov.pk/act.htm>. Visited on 2.2.2014. It was originally established in 1988 through a Government of Pakistan, Ministry of Law, Justice and Parliamentary Affairs Resolution and was working under the administrative control of the Ministry of Law. The 1997 Act provided it independence and gave it the status of body corporate which can sue and be sued in its own name.

²¹ http://www.sia.gos.pk/Assets/SJA_Act.html. Visited on 2.2.2014.

²² <http://punjablaws.gov.pk/laws/494.html>. Visited on 2.2.2014.

²³ <http://www.pabalochistan.gov.pk/uploads/acts/2010ii.htm>. Visited on 2.2.2014.

²⁴ <http://kpja.edu.pk/sites/default/files/kpk%20judicial%20Academy%20Act%202012.pdf>. Visited on 2.2.2014.

From the above Table, a strange phenomenon surfaced: the laws are silent about a critical function of the judicial education bodies, i.e., judicial education method. However, this is not an absolute rule deducted from the analysis of the above table. There is one exception, i.e., the Punjab Judicial Academy Act 2007. Interestingly, the PJA was established almost 19 years after the establishment of the first judicial academy—Federal Judicial Academy—but the provincial legislature considered it important to reflect an important part of the *soft* structure of working of a judicial academy in modern times.²⁵ At the same time, the other three academies have no such provision. Sindh Academy was established in 1993, i.e., after almost five years of establishment of the FJA. Except that it has modified version of the FJA Act, no focus could be provided to the educational methodology. I could not lay my hands on any rules or regulations in this regard as my present source to locate legal materials is the internet.²⁶

Likewise, the remaining two academies, viz., Balochistan and Khyber-Pakhtunkhwa were established, as mentioned above, through provincial laws. They were established after the passing of the Punjab Judicial Academy Act of 2007. However, for the reasons not known, an important functional process (judicial education method) which has been recognized by the PJA Act 2007 could not get favour with the statutes of these two academies.

This shows that in Pakistani judicial education jurisprudence, it is yet not settled as to what features have to be reflected in a constituting statute of a judicial academy. Though it can be argued that the non-mentioning of these values in the statute give more independence to the administrators to follow any line of action which is more suitable; but at the same time there is a contra argument, i.e., laws are not clear and hence unable to bring a baseline feature to the fore for providing minimum guidelines in this regard.

The critical audit of these statutes on the point of education methodology shows us that the statutes require review by the respective legislatures for their improvement to include some minimum threshold features so that the Academies can deliver / impart judicial education to judges, law officers, court personnel and magistrates in more transparent manner. It will also help the judicial educators to learn those minimum teaching methods to avoid disadvantages of passive learning and lecture methods. By inclusion of provision like section 5 of the Punjab Judicial Academy Act, 2007 in statutes of other judicial academies, the judicial education regime will enter into a self-learning exercise where it will be tried first to understand the judicial education methods prevailing in advanced countries, second to localize them by experimenting in training of trainers programs and then by imparting prototype teaching modules to test run the 'methods'. This is not to be done in one day exercise, but will require comprehensive research and publications on the topic.

²⁵ Functional processes.

²⁶ Unfortunately, there is dearth of literature on the topic of judicial education in Pakistan.

Perhaps, the academies have to have compete with each other at one side and to collaborate on the other. Even foreign linkages and exchange programs may be required to come at par with international institutes of judicial education and learning.

My personal experience of the Federal Judicial Academy and the Punjab Judicial Academy is that the resource persons use only 'lecture method' and rarely the IT is used. Likewise, the Socratic method or 'case study' method is a rare phenomenon. Mock trials are almost extinct. IT based programs are sometimes organized only with the assistance of some foreign funded project. The inhouse training of the trainers (TOT) programs are rarely organized in these institutions. The capacity of the resource persons and the institutions itself is not enough to effectively utilize the structures of the academies for optimum use. Even learning on this aspect may be done through mutual exchange programs with neighboring countries and other regional²⁷ and international bodies having programs designed for justice sector personnel using digital media.

What then can be done? One solution is to use digital platform for judicial education. What are its pros and cons and how it will function is discussed below.

Teaching Tools:

Before moving to the theme of digital platform, let us discuss the teaching tools that are being used in the judicial education bodies. The literature on judicial education generally and adult education particularly establish that there are many teaching tools in vogue the effectiveness of which been established if used in combination of five or so for any session of training or education program. These may include:

1. Lecture
2. Power point
3. Literature
4. Case study
5. Quiz
6. Brain storming
7. White board
8. Flappers
9. Cards
10. Q&A
11. Role play
12. Situation analysis
13. Mock trial
14. Jokes

²⁷ Munir, Muhammad Amir, South Asian Chapter of CJEI - A Blueprint for Establishing a Regional Judicial Education Body in South Asia (April 13, 2012). *Proceedings of the International Judicial Conference, 2012*, Law and Justice Commission of Pakistan/National Judicial Policy Making Committee, Supreme Court of Pakistan, Islamabad. Also available at SSRN: <http://ssrn.com/abstract=2052394>.

15. Story telling
16. Learning by teaching
17. Heuristics
18. Hypotheticals
19. Playing video game
20. Listening to audio cassette / cd / dvd
21. Watching movies
22. Digital simulation

But the above list is not exhaustive. It depends upon the training and capacity of the trainer to bring a combination of reasonable number of teaching tools selected from amongst the above listed. Our concern here today is to explore the power and impact of digital platform wherein video games, virtual reality and online games may be considered important tools for judicial education for judges, magistrates, law officers and court personnel using “iMethod” or “eMethod”²⁸ of doing these things. There is dire need to explore these methods for judicial education, side by side the traditional educational methods.

The websites of the five academies establish as under:

1. Lecture method is mostly the first option and used in majority of the programs;
2. Case study is mentioned as one of the teaching methods but there is no literature to establish that it is focused in FJA²⁹ and PJA³⁰. Balochistan Judicial Academy has no website for getting any information nor any published material is available about its working. Sindh Judicial Academy has developed some important teaching tools, viz., questionnaires, power points, modules and worksheets for planning and organizing judicial education

²⁸ These terms are coined just to reflect the doing of old things with internet or electronic media. The small letters ‘i’ or ‘e’ reflect internet or electronic, respectively.

²⁹ The training methodology is explained at the official website of the FJA, <http://www.fja.gov.pk/intro.htm>, as under:

The Academy employs all the standard techniques for imparting training, which include class room lectures by Judges, jurists and scholars, supplemented by panel discussion, and Case studies of important judgments of the superior courts involving issues both pertaining to substantive and procedural law.

Syndicate discussions also form part of the training methodology. It aims at providing an opportunity to the participants to interact and exchange their knowledge and experience with one another; which helps in analyzing and articulation of current juridical issues. Participants are divided into a number of groups. One of the participants is designated as Chairman who prepares a syndicate report with the help of others and the report is presented in a plenary session held at the end of the course.

[However, there is not research paper or literature that can suggest how and what materials for case study have been used or are in use at present in the FJA. The traditional judicial education method needs to be studied in comparison with the use of modern teaching tools. Feedbacks and critical evaluation of the programs run at the Academy is need of the day for bringing scientifically proven results to see the impact of different teaching tools used by the FJA. (author)]

³⁰ <http://www.pja.gov.pk/?q=Teaching-Methodology>. Last visited on 3.2.2014. [Note: My personal experience of attending a two week training program in December 2013 was that the resource persons only used lecture method. Group discussions, case study and mock trials were not used as teaching tools. Most of the faculty did not use the power-point and multi-media. (author)]

programs. Case books have been prepared for trainees. Training of the trainers program is also featured in its working, especially the organization of the First Pakistan Judicial Education Summit.³¹ Khyber Pakhtunkhwa Judicial Academy is latest addition in the field of judicial education. However, its workings as reflected on its website are very comprehensive and it has taken lead to enter into new regimes of judicial education, i.e., issuing reports of every program; designing modules; specialized radio programs; using online evaluation methods for testing the quality of judicial training and education programs etc. However, the training reports do not reflect that more focus is given on case study or skill development concept.³²

3. Information Technology or digital platform is not being explored and used effectively. The FJA has conducted a couple of online courses between Canadian judiciary and Pakistan judiciary.³³ Further, it has organized lectures of foreign judges using the online facility (digital video conference). Data about Balochistan Judicial Academy is not available. Punjab Judicial Academy has also not explored the potential of IT or digital media to disseminate judicial education or training through simulations, games, video clips etc. Same is the case with other judicial academies.
4. It is found that except Balochistan Judicial Academy, other four academies have their own web portals and comprehensive materials have been placed on these websites. At one side, they are effective materials for those trainees who intend to do self-study; but on the other hand, none of the above mentioned academies have developed any online training or education programs.³⁴ Likewise, distance education through online resources are rarely used.
5. The faculty profiles of the judicial educators and academy staff also shows a trend that mostly the faculty is derived from the district judiciary or district bars. Retired judges are on the rosters of the Academy. Most of them are technology deficient. This in fact is not relevant to calculate the slow pace of use of technology in the judicial academies. But, even the IT staff is found as not having capacity to design IT based training programs or modules. Lack of initiative in IT staff is a big reason for the redundancy in this respect. Issue of capacity building and training of the trainers is also one important factor.

³¹ <http://www.sja.gos.pk/JAS/summit/summit.html>. Last visited on 3.2.2014.

³² <http://www.kpia.edu.pk/>. Last visited on 3.2.2014.

³³ <http://www.fja.gov.pk/CurrEvents.htm>. Last visited on 3.2.2014.

³⁴ During my posting in the Federal Judicial Academy, I was aware of the fact that some progress was made in distance learning through use of information technology. However, its present status is not reflected in the current literature.

6. Financial resources are also not being directed towards any effort to develop a comprehensive technology product for judicial education regime.

What is Digital Platform?

Digital Platform is defined as under:³⁵

(Digital platforms) provide audio, video or data transmission in the real time or delayed mode in many networks, such as cable, satellite, terrestrial digital broadcasting and broadband networks.

To extend the above definition for specific purposes, I would add video games, digital simulation, and mobile applications for using these media by judicial educators or the judicial academies to provide on hand judicial education materials to be used on TVs, computers, cell phones, digital pads, mobile devices and even audio CDs or DVDs. We have to see how this media can be used for the benefit to justice sector personnel.

To be more specific, I will also provide definitions of key terms used in the theme of this paper to make these terms more clear to the readers from the judiciary and judicial education institutions. Thus, the terms virtual reality, digital simulation, video games and online games are explained here under:

a. What is virtual reality?

Its definition is available online as under:³⁶

the computer-generated simulation of a three-dimensional image or environment that can be interacted with in a seemingly real or physical way by a person using special electronic equipment, such as a helmet with a screen inside or gloves fitted with sensors.

b. What is Digital Simulation:³⁷

Simulation is the imitation of the operation of a real-world process or system over time.^[1] The act of simulating something first requires that a model be developed; this model represents the key characteristics or behaviors/functions of the selected physical or abstract system or process. The model represents the system itself, whereas the simulation represents the operation of the system over time.

³⁵ <http://montesat.me/index/page/glossary>. Last visited on 2.2.2014.

³⁶ https://www.google.com.pk/?gws_rd=cr&ei=mvPsUp_WBOX8yQGpz4DoDA#q=what-is-virtual+reality. Last visited on 2.2.2014.

³⁷ Books are available on the topic of digital simulation for education purposes. See *Digital Simulation for Improving Education: Learning Through Artificial Teaching Environments*, available at amazon at <http://www.amazon.com/Digital-Simulations-Improving-Education-Environments/dp/1605663220>. Last visited on 2.2.2014.

Simulation is used in many contexts, such as simulation of [technology](#) for performance optimization, [safety engineering](#), [testing](#), [training](#), [education](#), and [video games](#). Often, [computer experiments](#) are used to study simulation models. Simulation is also used with [scientific modelling](#) of natural systems or human systems to gain insight into their functioning.^[2] Simulation can be used to show the eventual real effects of alternative conditions and courses of action. Simulation is also used when the real system cannot be engaged, because it may not be accessible, or it may be dangerous or unacceptable to engage, or it is being designed but not yet built, or it may simply not exist.³⁸

c. Video Games:³⁹

a game played by electronically manipulating images produced by a computer program on a monitor or other display.

d. gaming:⁴⁰

the playing of games developed to teach something or to help solve a problem, as in a military or business situation.
the playing of computer or video games

e. Online games:⁴¹

Internet games are those that require a connection to the Internet to play, and is a type of [PC game](#). Computer games with [multiplayer](#) capabilities can be referred to as Internet games, as are online only games which you play in your [browser](#).

Wikipedia defines online games asunder:⁴²

An **online game** is a video game played over some form of [computer network](#). This network is usually the [internet](#) or equivalent technology, but games have always used whatever technology was current: [modems](#) before the Internet, and hard wired [terminals](#) before modems. The expansion of online gaming has reflected the overall expansion of computer networks from small local networks to the internet and the growth of internet access itself. Online games can range from

³⁸ <http://en.wikipedia.org/wiki/Simulation>. Last visited on 2.2.2014.

³⁹ https://www.google.com.pk/?gws_rd=cr&ei=mvPsUp_WBOX8yQGpz4DoDA#q=define+video+game. Last visited on 02.02.2014.

⁴⁰ <http://dictionary.reference.com/browse/gaming>. Last visited on 2.2.2014.

⁴¹ http://www.webopedia.com/TERM/I/Internet_game.html.

⁴² http://en.wikipedia.org/wiki/Online_game. Last visited on 2.2.2014.

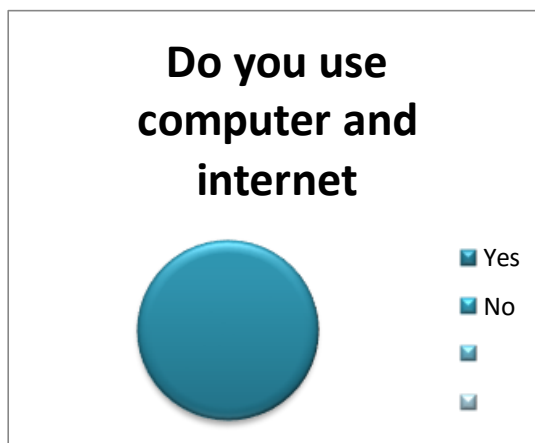
simple [text based environments](#) to games incorporating complex graphics and [virtual worlds](#) populated by many players simultaneously. Many online games have associated [online communities](#), making online games a form of social activity beyond [single player games](#).

Judicial Education on Digital Platform:

Judicial education on digital platform means the use of 'digital platform' for imparting judicial education to justice sector personnel, i.e., judges, magistrates, law officers and court personnel. We have to keep in mind that the judicial education and training is a concept of adult learning and for that matter the educational technology relevant for the adult education have to be utilized. However, in this case, the adult education techniques have to be mixed with even the concepts of toddlers or kindergarten student's learning methods. This is so because the use of video games and virtual reality are more famous among the school education now a day. There are number of websites for every age students from pre-nursery to college and university levels that provide online solutions to their educational needs. Most famous among them is the online educational games, quizzes and virtual reality player driven movies. See for example, Learning Games for Kids provide the following introduction of its website:⁴³

Educational games are a great tool for building foundation math and language skills that today's elementary school curriculum requires. These online learning games and songs for kids are fun, teach important skills for preschool and elementary school kids and they're free. Want educational games that help build skills in math, language, science, social studies, and more? You've come to the right place!

At the same time, the concept of digital media is not to be taken to mean that the human interaction is over once and for all. The role of human beings will remain at the helm of affairs except that by using the digital media, the face to face real time interaction, in many a case, will come to an end but at the same time will convert itself into a digital form where such media will help thousands of learners to interact with one person at one time. This



⁴³ <http://www.learninggamesforkids.com/>. Last visited on 3.2.2014.

will enhance the accessibility of the learners to those trainers with whom otherwise, they could not have come to an interaction.

To make the judicial education fully conversant with the concepts of the digital platform, there is a need to initiate a training needs assessment (TNA) on this front. Without such an exercise, any steps taken may result in under-training, over-training or no-training at all.⁴⁴ Thus, to fully utilize the resources before a comprehensive digital platform strategy is adopted by the judicial policy makers, it would be beneficial to get a TNA done on scientific lines.

To test the relevance of the information technology (IT) in the life of a judge, I have conducted a brief survey over a selected group of judicial officers. The sample has reproduced the following results on the questions put to them:

Question No. 1: Do you use computer and internet?

The answer to this question reveals that 100% of the judicial officers in sample survey⁴⁵ were using computers and internet. This trend shows that the present day lot of young judicial officers is tech-savvy and enjoys the IT for different purposes.

Question No. 2: Are You Aware about Judicial Education Games on Internet?

This question was answered in the following ratio:

Yes 20%

No. 80%

Here comes the question of sensitization of judicial officers and other court personnel through judicial education programs where they can be informed about the availability of judicial education materials and training related literature, movies, audios and other



⁴⁴ Munir, Muhammad Amir, Issues and Challenges in Training Needs Assessment (TNA): Judicial Education in a Rule of Law Perspective (April 15, 2013). *Proceedings of International Judicial Conference 2013*, Islamabad: Law and Justice Commission of Pakistan, 2014, at pp.317-336. See <http://www.ijcp.gov.pk/Menu%20Items/Publications/2013/IJC%202013.pdf>. Also available at SSRN: <http://ssrn.com/abstract=2315698>. Last visited on 4.2.2014.

⁴⁵ Survey is available with the author. The survey was conducted over a group of young judicial officers of age upto 45 years. Of course, the ratio may be different if the survey is also put to senior judges.

interesting online documents which can be used for self-learning. Likewise, the judicial educators can use this material for class room teaching and online training and education programs. Without such sensitization, the judiciary as an institution is missing an important stuff which is relevant and effective.

There is however a barrier. It is: non-availability of indigenous judicial education materials which are directly relevant to the problems of Pakistani judiciaries. This can only be done either by the judicial academies or by the judicial educators. High Courts and Supreme Court can equally share the burden by bringing to fore some relevant materials developed specifically for stakeholders of justice sector (trainees) so that the electronic and digital media is effectively used. Some quotable examples are however available even at present. For example, the official website of the Supreme Court of Pakistan has materials of different judicial conferences held in Pakistan; pdf versions of judgments of the Supreme Court and some relevant statutory documents on procedural law of the august Supreme Court.⁴⁶ The Law and Justice Commission of Pakistan, and the five High Courts have also some material for judicial education.⁴⁷ The four out of total five judicial academies have also made available some very interesting

Do you study internet material for judicial...



Are you aware about judicial education virtual...



Do you play games on your cell phone



⁴⁶ www.supremecourt.gov.pk. Last visited on 20.02.2014.

⁴⁷ See for example, www.ljcp.gov.pk; www.lhc.gov.pk; www.sindhhighcourt.gov.pk; www.ihc.gov.pk; www.peshawarhighcourt.gov.pk; www.bhc.gov.pk. Last visited on 20.02.2014.

literature relevant for judicial education.⁴⁸ These materials are definitely indigenous, relevant, and re-usable.

However, these materials are non-interactive and only provide the literature for reading of the trainees. We, in this paper are trying to bring something which is interactive and entertaining as well, like digital simulation and video games for judicial education.

Question No. 3: Do you study internet material for judicial education?

This question was to know the interest of the sample judges into the judicial education materials available online. The result is interesting and encouraging:

Yes 60%

No. 40%

This reflects that the judicial officers of young age are more interested and alert about some relevance of IT materials available online for use into their official work.

Question No. 4: Are you aware about judicial education virtual reality games on internet

This question was again relevant to the theme of this paper. The results were again showing that judges need to be sensitized over the availability of virtual reality judicial education games on world wide web. The results are:

Yes 20%

No. 80%

In fact, again, here comes the role of the judicial education bodies and institutes and even of the judicial educators themselves to research over the internet to know the availability of such like materials. Further, the real need is to develop such like virtual reality games which have local content and discuss local laws. Judicial academies can invest some amount on developing virtual reality judicial education programs with the assistance of IT experts, software developers and international legal software developers.

Question No. 5: Do you play games on your cell phone

⁴⁸ Official websites of the judicial academies have been mentioned somewhere else in this paper.

The results of this question are again encouraging, which are as under:

Yes 60%

No. 40%

I was really happy to see this result because this provides a baseline orientation of judicial officers about the options available on their cell phones, which are now a days called 'smart phones' having all the facilities which a computer or laptop earlier used to have. Thus, with this powerful IT machine in one's hand, the only need is to exploit it to the maximum even for learning the job related issues but in an interesting, engaging and thrilling way. Thus, what I foresee from these results is that if the judicial academies decide to invest in bringing the judicial education video games to be used on cell phones, apart from other modes, definitely, the learners will be happy to have a mobile app downloaded in her cell phone and see the powerful results that the said machine will generate in the form of learning the law by playing video game. Of course, this can be done by the learner at his or her leisure time and thus the learning faculty of the learner will be more receptive. However, further research may be done on this aspect of learning psychology.

We will now look at different digital products available for adoption by the judicial academies according to their needs.

To give any idea about the online gaming, following text has been borrowed from Wikipedia (except footnotes):⁴⁹

Console gaming

Main articles: [Xbox Live](#) and [PlayStation Network](#)

[Xbox Live](#) was launched in 2002. Initially the console only used a feature called system link, where players could connect two consoles using an [Ethernet cable](#), or multiple consoles through a router. With the original Xbox Microsoft launched Xbox Live, allowing shared play over the internet. A similar feature exists on the [PlayStation 3](#) in the form of the [PlayStation Network](#), and the [Wii](#) also supports a limited amount of online gaming. However, Nintendo has come with a new network dubbed "[Nintendo Network](#)", and it now fully supports online gaming with the [Wii U](#) console.

First-person shooter games

Main article: [First-person shooter](#)

⁴⁹ http://en.wikipedia.org/wiki/Online_game. Last visited on 3.2.2014.

During the 1990s, online games started to move from a wide variety of [LAN](#) protocols (such as [IPX](#)) and onto the Internet using the [TCP/IP](#) protocol. *Doom* popularized the concept of [deathmatch](#), where multiple players battle each other head-to-head, as a new form of online game. Since *Doom*, many first-person shooter games contain online components to allow deathmatch or arena style play. And by popularity, first person shooter games are becoming more and more widespread around the world. And FPS (First Person Shooter) games are now becoming more of an art form because it takes lots of skills and strategy with teammates. More first person shooter competitions are formed to give players a chance to showcase their talents individually or on a team. The kind of games that are played at the more popular competitions are [Counter-Strike](#), [Halo](#), [Call of Duty: Modern Warfare 3](#), [Quake Live](#) and [Unreal Tournament](#). Competitions have a range of winnings from money to hardware.

Real-time strategy games

Main article: [Real-time strategy](#)

Early [real-time strategy](#) games often allowed multiplayer play over a modem or local network. As the Internet started to grow during the 1990s, software was developed that would allow players to tunnel the LAN protocols used by the games over the Internet. By the late 1990s, most RTS games had native Internet support, allowing players from all over the globe to play with each other. Services were created to allow players to be automatically matched against another player wishing to play or lobbies were formed where people could meet in so called game rooms. An example was the MSN Gaming Zone where online game communities were formed by active players for games, such as [Age of Empires \(video game\)](#), [Sins of a Solar Empire](#), [StarCraft II: Wings of Liberty](#), [StarCraft II: Heart of the Swarm](#) and [Warhammer 40,000: Dawn of War](#).

Cross-platform online play

As consoles are becoming more like computers, online gameplay is expanding. Once online games started crowding the market, networks, such as the [Dreamcast](#), PlayStation 2, [GameCube](#) and Xbox took advantage of online functionality with its PC game counterpart. Games such as [Phantasy Star Online](#) have private servers that function on multiple consoles. Dreamcast, PC, [Macintosh](#) and GameCube players are able to share one server. Earlier games, like *4x4 Evolution*, [Quake III Arena](#) and *Need for Speed: Underground* also have a similar function with consoles able to interact with PC users using the same server. Usually, a company like Electronic Arts or Sega runs the servers until it becomes inactive, in which private servers with their own [DNS](#) number can function. This form of networking has a small advantage over the new

generation of Sony and Microsoft consoles which customize their servers to the consumer.

Browser games

Main article: [Browser game](#)

As the [World Wide Web](#) developed and browsers became more sophisticated, people started creating [browser games](#) that used a [web browser](#) as a client. Simple single player games were made that could be played using a web browser via [HTML](#) and [HTML scripting](#) technologies (most commonly [JavaScript](#), [ASP](#), [PHP](#) and [MySQL](#)). More complicated games such as *Legend of Empires* or *Travian* would contact a [web server](#) to allow a multiplayer gaming environment.

The development of web-based graphics technologies such as [Flash](#) and [Java](#) allowed browser games to become more complex. These games, also known by their related technology as "[Flash games](#)" or "Java games", became increasingly popular. Many games originally released in the 1980s, such as *Pac-Man* and *Frogger*, were recreated as games played using the Flash plugin on a webpage. Most browser games had limited multiplayer play, often being single player games with a [high score](#) list shared amongst all players. This has changed considerably in recent years as examples like [Castle of Heroes](#) or [Canaan Online](#) show.

Browser-based pet games are popular amongst the younger generation of online gamers. These games range from gigantic games with millions of users, such as [Neopets](#), to smaller and more community-based pet games.

More recent browser-based games use web technologies like [Ajax](#) to make more complicated multiplayer interactions possible and [WebGL](#) to generate hardware-accelerated 3D graphics without the need for plugins.

MUDs

Main article: [MUD](#)

MUDs are a class of multi-user real-time virtual worlds, usually but not exclusively text-based, with a history extending back to the creation of *MUD1* by [Richard Bartle](#) in 1978. MUDs were the direct predecessors of [MMORPGs](#).^[4]

Massively multiplayer online games (MMOG)

[Massively multiplayer online games](#) were made possible with the growth of [broadband Internet access](#) in many developed countries, using

the Internet to allow hundreds of thousands of players to play the same game together. Many different styles of massively multiplayer games are available, such as:

- [MMORPG](#) (Massively multiplayer online [role-playing game](#))
- [MMORTS](#) (Massively multiplayer online [real-time strategy](#))
- [MMOFPS](#) (Massively multiplayer online [first-person shooter](#))
- [MMOSG](#) (Massively multiplayer online social game)

Online game governance

Popular online games are commonly bound by an [End-user license agreement](#) (EULA). The consequences of breaking the agreement vary according to the contract; ranging from warnings to termination, such as in the 3D immersive world [Second Life](#) where a breach of contract will append the player warnings, suspension and termination depending on the offense.^[5] Enforcing the EULA is difficult, due to high economic costs of human intervention and low returns to the firm. Only in large scale games is it profitable for the firm to enforce its EULA.

[Edward Castronova](#) writes that "there are issues of ownership and governance that wrinkle the affairs of state significantly".^[6] He has divided the online governance into "[good governance](#)" and "strange governance". Castronova also mentions that synthetic worlds are good ways to test for government and management.

Player behavior

Where online gaming supports a player chat feature, it is not uncommon to encounter [misogyny](#), [hate speech](#), [sexual harassment](#) and [cyberbullying](#). The subject is controversial, with many players defending their freedom to engage in any form of behavior.^{[7][8]} Players, developers, gaming companies, and professional observers are discussing and developing tools which discourage antisocial behavior.^[9] There are also sometimes [Moderators](#) present, who attempt to prevent Anti-Social behaviour. In some online games, there are [bots](#) which automatically detect some forms of anti-social behavior, such as spam or [rude](#) language, and punish the player if detected.

Online/offline Judicial Education Games:

The idea behind introducing online games for judges and other justice stakeholders is that the judges and others can learn the latest laws, judicial verdicts and solutions to legal problems through hypotheticals developed for these games. The games may be developed by the judicial academies, law colleges or any other relevant justice sector training or education body with mutual collaboration with an IT software firm or those institutions which have expertise in developing video games

and online games. Any of the above platforms or gadgets may be used for playing such judicial games. These games may be placed online at the judicial academies websites or on the official websites of the High Courts from where the judges can either play them online or download them for playing off-line at their convenience.

The strategy for such a game may be that a proposition will be played with request to the player to answer it through hitting a target containing answers. If the player will hit the right answer, he or she will get points. In case of wrong answer, the game will immediately respond through a correct pre-fedded answer along with citation to latest case law of the Supreme Court or High Court. If a game consists of 10 questions, then in 5 or 10 minutes game, the player judge can learn latest laws on the topic of the game. Likewise, games can be developed for magistrates, law officers and court personnel with data with respect to their own independent fields.

This type of access to learning materials will bring the costs of judicial education to a substantial minimum levels and the accessibility of the training institute will raise even upto a remotest area in the country subject to availability of the internet.

A prototype short game has been developed by the author with the help of my friends. It has the above features.

Judicial Education through Virtual Reality:

Virtual reality helps in many ways. While watching a virtual reality movie or playing a VR game, one actively takes part in the exercise. This way the engagement of the learner reaches upto maximum levels. Thus, VR may be used to provide court room settings with certain acts to be done by the player judge to actually participate in the game as a lead person. The real movement and situations with which judge or magistrate comes into interaction in his or her court can be seen on the VR show and the responses generated by the player will give him or her the correct answers with personal efforts to move rightly. This engagement of learner will also raise the level of engagement to a maximum and of course with confidence that any mistake will not result in any embarrassment at the hands of the superior judges but the computer will return the correct answer for learning of the player. As the games will be replay-able, thus, a judge can play them as many times as he or she feels comfortable. The answers provided by the machine will guide him or her to the right law prevalent at the time. By participating directly in the VR hypothetical, the judge will know that how to deal with a particular situation or handle a particular question.

Online simulation:

This proposed new digital platform for judicial education will help the judges, magistrates, law officers and court personnel in man a ways. As the astronauts learn through digital simulation exercises, the feelings

of the space and how to act and move there, likewise, the simulations can be developed for judges and law professionals. These simulations will guide the trainee through certain process with which he or she has to interact. The simulation machine or room will have special programs pre-fed in it. The judge may learn a real court room issue; a magistrate may experience an argument at bail or remand to decide the case; a law officer may respond to a query from the judge; and a court personnel may learn how to deliver a summons to the defendant or a witness.

These exercises will help in lessening the burdens on judicial academies in financial terms once a program is properly developed and run. Its running costs will be much lesser than inviting a number of trainees to the Academy merely for lectures. The concept of learning by doing will be practically experienced by these tools.

Movies:⁵⁰

A very interesting and entertaining mode of education is movies. By developing judicial education movies, the judicial academies may distribute these materials to its audiences either to watch them at the premises of the Academy or these may be purchased by or hired to the trainees. These movies will help the learner in learning at his or her leisure either at office or at home. These can be used even during travelling in a car or bus using the laptops and other gadgets. Judicial education movies on CDs and DVDs may be prepared on the pattern of such like movies developed by the other professional fields, like medicine and engineering.

Audio:⁵¹

Just as has been discussed about the movies that contain visuals, the audio CDs can be prepared for listening judicial and legal materials relating to the work of the judges and magistrates. Court professionals may be provided with audio CDs wherein the information in vernacular is recorded for their direct understanding of the training materials.

Though these are one sided learning materials, but their importance cannot be denied in present day world which is a global village. These audio recordings may equally be uploaded on the judicial academies websites for downloading by the relevant trainees so that they can learn from then at their convenience.

Use of social media:

As judges and lawyers are busy professionals and to leave the court rooms for long trainings cause delays in court procedures and

⁵⁰ The Commonwealth Judicial Education Institute, Halifax, Canada has already developed a number of videos for judicial education. Visit www.cjei.org. Last visited on 3.2.2014.

⁵¹ Ibid.

pending cases, therefore, by use of social media websites and other web portals where movies and audios can be uploaded, the judicial education programs may be uploaded for free availability and quick retrieval. Judges and other judicial staff is already using Facebook, YouTube, LinkedIn, Twitter etc., for other entertainment purposes. But by providing them relevant materials through these means will bring the costs of judicial education down and at the same time the engagement of learners to quickly learn new things or to make their minds clear about some legal questions will be raised.

For example, a daily tweet on some important case decided by the Supreme Court will help judges and magistrates to keep updated about such information thrown by the judicial academy. It is not even necessary that the Academy do this at its own platform. Even any judicial educator does that by using relevant websites. The accessibility of both the trainer and the learner has increased to an unimaginable level in this regard.

Digital platforms are slowly explored by the Pakistani judges through individual steps. I am personally a member on Facebook of an exclusive judges group. The best part of this group is that whenever any judge or magistrate has a question or is in difficulty in understanding a proposition, he or she places the question on the Facebook page. Any member who reads it either at a computer screen or a mobile phone screen can answer it at his or her own convenience. Sometimes, we have seen that in a minute or two the exact and best answer fully documented with important case law and citations of judgments of Hon'ble Supreme Court and High Courts is received from colleagues. So this is the power of the digital media to engage the learners and to provide information to which access was not possible earlier. But this is self-learning aspect of digital media. We need to bring it at official level to make the learning more professional and more authentic.⁵²

Online real time lecture method:

Another innovation of the digital media is online chat programs. They have now developed into online class rooms. For example, we can arrange an online classroom by sitting in our homes but at the same time by interacting with each other in said virtual class. This technology has to be effectively used by the judicial academies and judicial educators so that instead of going to one place from all over the country

⁵² I would, however, recommend that we need to develop indigenous literature on the issue of use of social media by the judges, magistrates and presiding officers of different courts and tribunals as it includes issues of ethics, confidentiality, and propriety. For example, if a judge merely click to 'like' a fb page or comment of a nature which is a matter pending before him or her, then what will be the issues of ethics and code of conduct. A critical question will be to see if this click to 'like' or 'dislike' amounts to bias in the judge. I am sure the social scientists, academic lawyers and judges will deliberate on this point at the earliest.

At the same time, I would also request to the hon'ble judicial policy makers and judicial academies to encourage the research and investment in this media for exploring the power of social media for quick dissemination of judicial education materials, programs and modules. (author)

or a province, and to avoid travelling and boarding lodging costs, the trainer can train or educate the learners. The files can be shared with judges and magistrates prior in time so that the questions may be discussed during virtual class rooms.

Use of Blogs:

The judicial educators may come up with blogs on specific fields so that the learners can join the blog to come into discussion forums for quick understanding and response to their questions placed online for response from other members of the blog. The moderator can always provide a correct answer at the end. This has been done in the past by the Federal Judicial Academy in collaboration with the National Judicial Institute, Canada where judges from both countries participated and shared their views about a specific topic. However, this experience needs to be converted into a regular practice not only with other countries' judges, but even between the judges of same province and between judges and magistrates of all the provinces. The only need is to realize the potential of this medium for dissemination of judicial education.

Mobile Apps:

It will be unimaginable not to properly link the judicial education with the most famous gadget of the times, i.e., cell phone or mobile phone. These devices are now almost with every person. Sometimes, even younger people of tender age have been using it. Many a educational games and applications have been developed by the programmers where the cell phones having operating systems like android, iphone, windows, blackberry etc., provide digital platform for using the mobile apps. Judicial education materials can accordingly be designed, prepared and supported by relevant softwares for users (judges, magistrates, law officers and court personnel). Even judicial education apps may be designed for the litigants and lawyers for their education as to how to interact with the court system and how different court related services can be utilized. The issuance of summons and other court documents can be done through mobile phones and lot more.

Conclusion:

The digital media has its own power and accessibility. The judicial education jurisprudence needs a new twist of using the digital media for dissemination of judicial education to improve the knowledge, skills and attitudes (KSA) of judicial trainees. Though it cannot be everything, but at least it is one of the methods of judicial education wherein any educational tool can be used for effective learning of the trainees. Judicial educators can use the immense power of the media by reaching to every trainee in his or her domain by use of emails and other online accessibility routes. The trainees can equally access the materials and can get engaged in learning by doing themselves by playing judicial education video games and interacting with virtual reality situations.

All the above discussion is to ensure that our justice sector human resources (judges, magistrates, law officers and court personnel) are well trained, well equipped and well-read. The power of the judge and justice system in present day is felt by all the societies. A good and competent judiciary always helps in progress on all the fronts in a society which includes a sure fast economy. It is equally vice versa where judiciaries are not competent or where they are unable to meet the expectations of the people. One of the means to make the judiciary competent and competitive is to provide quick and easy access to judicial training and education through internet and electronic media and to take the judicial education to a new platform for its dispensation, i.e., digital platform. The access to information by digital media will definitely help the judiciary to go a long way in learning judicial education for better performance and resultantly improving the quality of justice administered in the courts. It will also cause the barriers of access to justice to come to minimum.

Judicial Academies, judicial educators, High Courts and other judicial policy making bodies have to take relevant steps to ensure that the digital media is explored timely and effectively. The 'iMethod' and 'eMethod' of educational technology for making the internet and electronic world and cyberspace relevant to the justice sector stakeholders needs human resource and finance investment in this field. It is investment in *judicial* education and it will be like 'investment in the future' and investment for raising the level of competency of the justice sector.

Finally, by having judges, magistrates, law officers and court personnel with qualities like integrity, competency, effectiveness and efficiency,⁵³ ensures *smart* judicial system. The power of digital media in helping them to be so needs to be explored immediately to avoid further loss of time. Of course, the litigants will be the real beneficiary being the end-users of the justice system.

⁵³ To look into the ICEE approach, see www.cjei.org. Last visited on 04.02.2014.

(5) SPEEDY AND INEXPENSIVE JUSTICE: WHAT WE CAN LEARN FROM US LEGAL SYSTEM

By

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Justice, a term still not defined accurately, a slogan misused many times, a dream just a dream, an end searching for the means, is the foundation stone of any modern state. Every modern state promises inexpensive and speedy justice to its citizens but struggles to keep its promise. This paper discusses distinguishing features of American Legal System and makes its comparison with Pakistani Legal System, with an effort to look for the best answers to the challenges faced by the judicial systems.

The most distinguished feature of the American Legal System is trial by Jury. Jury trial came to America with English colonists. First Congress of the American Colonies declared on October 19, 1765, "That trial by jury is the inherent and invaluable right of every British subject in these colonies". The First Continental Congress resolved on October 14, 1774, "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law". Article III of the Constitution of United States of America provides "The trial of all crimes, except in cases of impeachment, shall be by Jury; and such trial shall be held in the state where the said crimes shall have been committed". Trial by Jury is based on the principle of people's participation in every sphere of the governance to make it a real democracy and its purpose is to secure the citizens against oppressive prosecution. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge (Duncan v. Louisiana 1965). American legal system provides two types of juries, grand jury and petit jury.

Grand Jury is introduced at the initial stage of the criminal justice system to determine the question of probable cause and to decide whether the defendant should be indicted. Fifth Amendment requires that no person shall be prosecuted for capital offence or an infamous offence unless he is indicted by a verdict of grand jury. In federal criminal justice system, grand jury is an integral part, however, it is not incorporated in Fourteenth Amendment, and, therefore not all the states but 16 out of them have made it part of their criminal justice system. The question of probable cause in felonies is decided by Grand Jury.

However, in misdemeanor cases, this function is performed by the Judge by conducting preliminary hearing. Grand jury proceedings are ex-parte in nature. The prosecutor is required to produce sufficient evidence before grand jury to convince it that there is probable cause to prosecute a person, who allegedly committed that crime. The proceedings of grand jury are secret proceedings and the defendant is not aware at all of these proceedings. Criticism is made that due to ex-parte nature of the proceedings, the prosecutor is in a position to misguide the grand jury by producing inadmissible evidence or by hiding exculpatory evidence. This issue was taken up before the United States Supreme Court, but the court refused to establish a rule providing supervisory role to the court on Grand Jury and held that it would run counter to the whole story of the grand jury institution (*Costello v. United States* 1956). The honorable Court held that the defendant will not suffer any prejudice as he is entitled at the trial to observance of all the rules designed to bring about fairness. Grand jury is an independent forum, although uses resources of the court to organize its proceedings but is not supervised at all by the court. This is a wonderful and an effective check on the state power to prosecute. It not only provides a sense of participation to the public but also fortifies their conviction that in their system, no one is being prosecuted without a probable cause. Grand jury is an example of highest consciousness in a civil society. The question of probable cause is not an intricate question of law, therefore, a layman especially a group of laymen can very well decide this issue without any difficulty.

In Pakistan, this function is performed by the judge, who at the preliminary hearing can either formally indict the accused or drop the proceedings. But the question is whether the concept of grand jury can be introduced in Pakistan? It is very difficult to say anything with certainty. Pakistani society is strongly divided into tribes and casts and the most of Pakistani people do not even cast their vote on the basis of an informed and intelligent opinion but influenced and prejudiced by their affiliations and interests. Due to this peculiar nature of the society, a judge is not posted in his resident district. Even otherwise, preliminary hearing is an equally effective measure to check unnecessary or oppressive prosecution. In Pakistani Legal System is the accused is considered as favorite child of the law and he is provided opportunity to represent himself pro se or through a counsel from the very moment when he is produced before the Magistrate, as early as possible but not later than 24 hours of his arrest. Thus, the proceedings from that day onward are of adversarial nature and the Magistrate can discharge the accused under section 63 of The Code of Criminal Procedure, 1898 on first appearance if he does not find probable cause to further proceed in the matter.

Sixth amendment of United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and the district wherein the crime shall have been committed. Right to jury trial in criminal cases was incorporated by Supreme Court of the United States in *Duncan v.*

Louisiana, the Court held “the Fourteenth Amendment denies the States the power to deprive any person of life, liberty, or property, without due process of law.....because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which- were they to be tried in a Federal Court- would come within the Sixth Amendment’s guarantee” (Duncan v. Louisiana 1965). Thus, in every criminal case punishable with imprisonment of more than six months, the defendant has a constitutional right to jury trial. However, he may waive his right through informed and intelligent decision and may opt for bench trial provided that the court and the prosecutor agree to this fact. Seventh Amendment provides for trial by jury in civil cases. This right has not been incorporated in the Fourteenth Amendment, therefore, the states are not bound by the United States Constitution to provide trial by jury in civil cases. However, almost all the states provide trial by jury in civil cases. Petit jury is trier of the facts and hear the criminal and civil trials.

It usually consists of 12 jury members, who are selected from cross section of the society after a regulated process of voir dire. 12-member panel is not necessary part of the trial by jury. It is not a constitutional number rather is called historical accident. The federal system uses 12-member jury panel whereas the states use 6 to 12-member panels, depending on the nature of the case. Supreme Court of the United States held that five-member jury does not satisfy the jury trial guarantee of the Sixth Amendment, as applied to the states through Fourteenth Amendment (Ballew v. Georgia 1978). Thus, minimum six-member jury panel is a constitutional requirement. In federal system, the decision by jury must be unanimous decision and mere majority is not the rule of decision. If the jury fails to reach at a unanimous decision, it is called hung jury and may result in mistrial. Unanimity is not a constitutional requirement. Supreme Court of the United States approved a verdict by a 9-3 majority but it did not explicitly determine how small a majority might be consistent with due process but suggested that something more than a bare majority was required (Johnson v. Louisiana 1972). Since then, nine is considered as the minimum number to come to a verdict on 12-members jury. Another requirement is that the jury shall be impartial and shall be selected from cross-section of the society. There is no clear and concrete theory defining what is meant by impartial jury, what are its necessary requirements and what can satisfy the test of cross section. Before 1960, “key man system” was usually used and jury commissioners generally produced venires or panels not by random selection but by some system designed to produce jurors of notably high intelligence and character. The result was the so called “blue ribbon juries” that were selected deliberately to exclude those members of the community who were considered not responsible, intellectual and able enough to serve as jury members. With the passage of time, the Congress and the United States Supreme Court substantially reformed both the theory and the practice of jury composition. Supreme Court of the United States held, “we impose no requirement that petit

juries actually chosen must mirror the community and reflect the various distinctive groups in the population (Taylor v. Louisiana 1975). Defendants are not entitled to a jury of any particular composition, but the jury wheels, pool of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community, and thereby fail to be reasonably representative thereof.”

The court initially draws jury members from the venire through random process. Then starts the process called voir dire. Firstly, the judge will excuse any potential juror for whom there is good cause to believe that the individual may not be able to hear the case impartially. This is called challenge on cause. Then the lawyers use their “peremptory challenges”, which are defined in numbers generally to be between two and twenty, depending on the severity of the issue. A lawyer could traditionally use peremptory challenge without providing any reason. The rationale behind the use of peremptory challenges is that the parties have right to have impartial jury and the use of peremptory challenges provide them the confidence that they have an impartial jury. However, the peremptory challenges could not be used to exclude potential jurors on the basis of racism. If the defendant shows a prima facie case that the prosecutor had used peremptory challenge to exclude any juror on the basis of race, the prosecutor has to provide neutral explanation for use of peremptory challenge. It is criticized that the random selection of venire loses its utility and effectiveness when peremptory challenges are successfully used to exclude any particular section of society. After the conclusion of trial, the judge issues charge or instructions to the jury explaining the important questions. The jury can ask any question relating to law from the judge during their deliberations.

It is criticized that the rules of evidence are the most complicated area of law, therefore, these cannot be understood by the laymen and thus cannot be correctly applied for appreciation of the evidence. The system admits the weaknesses of jury trial and responds to the criticism by trying to eliminate or minimize the negative effects of these weaknesses. Jury men are the laymen selected randomly from the society and usually have no legal background. They are prone to all kind of prejudices, which a Judge being a professionally trained person can deal with effectively. Federal Rules of Evidence have been formulated to save the jury men from getting prejudiced. The Judge has to apply balancing test under rule 403 Federal Rules of Evidence to ensure that the probative value of evidence in question outweighs the apprehended prejudice. Arguments of parties to allow or decline production of disputed evidence are heard by the Judge at sidebar and the Jury is prevented from hearing them, so that they could not get prejudiced. But there are certain limitations and the system despite its all efforts cannot remove the weaknesses inherent in the Jury Trial. Rule 105 Federal Rules of Evidence provides that if the court admits evidence that is admissible against a party or for a purpose but not against another party or for another purpose, the court must restrict the evidence to its proper scope and instruct the jury accordingly. This question was taken up by

Supreme Court of the United States in case (Bruton v. United States 1968), where the conviction of a defendant at a joint trial was challenged on the ground that confession by the co-defendant caused prejudice despite clear instructions by the Judge to the Jury to the effect that such confession be disregarded in determining the guilt or innocence of the defendant in question (Bruton v. United States 1968). The Honorable Court held "It is not unreasonable to conclude that, in many such cases the jury can and will follow the trial Judge's instructions to disregard such information. Nevertheless,....there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored" (Bruton v. United States 1968).

It is further criticized that understanding the essential elements of an offence i.e mens rea and actus reus is a professional and technical job and to expect laymen to understand these legal concepts within a short period of time with the help of the Judge acting as a tutor is beyond comprehension. Last, a hung jury is waste of precious time and resources and to ask the defendant to face a retrial amounts to double vexation and is against the basic principles of criminal justice system. The possibility to get declared mistrial may be misused by the prosecutors and the defendants. If the prosecutor sees that his case is failing on the crucible of adversary system and if he gets another chance, he can make up the deficiency and bring more strong evidence, he can cause mistrial by asking prejudicial questions from the witness or by making prejudicial remarks. Supreme Court of the United States held that if mistrial is caused due to misconduct of the prosecutor with bad faith to cause mistrial, then retrial of the defendant is barred by doctrine of double jeopardy (United States v. Dinitz 1976). Mistrial always give rise to complicated legal questions regarding retrial and bar of double jeopardy. It is easy to say but really difficult to ascertain objectively whether the misconduct was intentional and was actuated by malice. Historically, jury trials provide more grounds to the defendant to challenge his conviction, especially by collateral attack through habeas after exhaustion of regular appeal rights and thus cause drainage of judicial and financial resources.

On the other hand, it can be argued that the standard of proof envisioned by law of evidence is the standard of understanding of a reasonable person, a man of common prudence. So, a fact is considered as proved if a prudent man would think it to be proved in view of the evidence available on the record. Article 2(4) of The Qanun-e-Shahadat Order,1984 provides that a fact is said to be proved when the court considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Thus, jury men are capable of appreciating the evidence and reaching at a fair conclusion. The requirement of unanimous decision further ensures the correctness of decision. Last but not the least, the right of jury trial is an additional right provided to the defendant and he

can make voluntary, informed and intelligent waiver of this right and can seek bench trial.

In Pakistan, the system of bench trial is working perfectly. Pakistani society is not that much diverse and heterogeneous rather it has a different historical background and Pakistan was created to provide a separate country to a substantially homogeneous society. Pakistani society repose complete confidence in the judicial system and the bench trial. The system of administration of justice is highly decentralized and the provinces are autonomous to regulate their judicial systems. The provincial High Courts are custodian of judicial system in the province. The provincial judicial department is a complete autonomous institution having authority to regulate its own finances and to make their own rules of business. The provincial government cannot interfere into the working of judicial department rather the courts have always acted as custodian of rights of citizens against the government. The courts in Pakistan have emerged as an independent organ, which by expanding their power of judicial review of executive acts have gone far than the traditional judicial approach to protect the public interest. The judicial system provides number of checks to ensure that an innocent person is not prosecuted by the state. The Judge acts as a check on the government departments, connected with the administration of justice, like law enforcement agencies and the prosecutors. Magistrate Judge is empowered with certain executive supervisory authority on the police to watch the rights of the accused during the process of investigation. Prosecutor does not enjoy that much discretion in the system. It is the court who decides on the basis of the available evidence that the defendant will be charged with which offences.

Another distinguishing feature of the American Judicial System is discovery. It is a process through which information is exchanged between the parties before the commencement of the trial. It is a lengthy process. A party can ask for the production of the relevant documents, which are in possession or custody of the opposite party. Liberal discovery process may result in production of hundreds or thousands of documents, making the discovery process cumbersome and expensive. Many times, discovery process is used by the affluent to delay the process and to drain the resources of the opposite party and ultimately compelling him to enter into a settlement. In United States Federal Courts, only 2 % of the civil cases go to trial and the rest of the cases are settled out of the court. It is claimed that discovery process ultimately facilitates the parties to enter into a settlement. It is uncertain whether the sharing of information is the driving factor behind such high percentage of settlements or the delay and drainage of the resources. In criminal cases, many states follow open file policy and the prosecutor is required to show all information, he possesses, to the defendant before commencement of the trial. However, in Federal Criminal Justice System, open file policy is not followed and the prosecutor is only required to disclose exculpatory evidence to the defendant before the commencement of the trial.

The defendant is also required to disclose certain evidence before the commencement of the trial. Some states require that if the defendant wants to take defense of alibi, he will have to inform the prosecutor about this fact and will disclose the identity of the witnesses, which he wants to produce to prove this fact. However, the defendant's disclosure obligations are limited by the Fifth Amendment, which provides that no person shall be compelled in any criminal case to be a witness against himself. The defendant's discovery obligations in criminal cases are criticized on the ground that these are against the basic principles of criminal justice system. The defendant is considered as favorite child of law and the burden to prove his guilt beyond reasonable doubt is cast by the law on the prosecution. The defendant is permitted to take as many defenses as he wants though these might be contradictory to each other. Supreme Court of the United States, while discussing the law requiring the defendant to disclose the evidence proposed to be produced by him to prove alibi, held "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for the truth in the criminal trial by insuring both the defendant and the state ample opportunity to investigate certain facts crucial to the determination of guilt or innocence" (Williams v. Florida 1970). Rules, requiring the defendant in criminal cases to disclose evidence before the commencement of trial, are based on the need for efficiency in the system, truth seeking and prevention of the guilty defendant to obscure the truth. These rules show a clear shift in the United States Criminal Justice System towards more effective and efficient punishment mechanism for guilty offenders stripping them of the traditional safeguards misused by them many times to get safe exit.

In Pakistani Legal System, order XI of Code of Civil Procedure, 1908 provides discovery of evidence before the commencement of the civil trial but there is no such parallel provision in the criminal justice system. The discovery process is not effectively used even in the civil justice system. It is unfortunate that the lawyers traditionally do not take serious interest in the proceedings before the commencement of the trial and when once the trial begins, they start filing miscellaneous applications causing delay in the proceedings and complicating and frustrating the whole process. Although, order IX-A of Code of Civil Procedure, 1908 provides that such kind of applications should be filed before commencement of the civil trial and be decided on third date of such hearing but it does not provide sanctions for not filing such applications at the proper stage. The Superior Courts of the country have traditionally interpreted the provisions of civil procedure dealing with discovery and production of evidence liberally to secure the ends of justice, however these interpretations have tilted the balance too far to the side of fairness and making the system less effective and efficient. It is need of time that the discovery process be made more effective and efficient, by providing sanctions for not using it fairly, properly and

timely and closing the doors forever after certain stage of the proceedings. In criminal cases, the accused is not bound to disclose his defense or the proposed evidence before the commencement of the trial rather the prosecutor comes to know about the defence evidence on the very day of its production. However, the prosecutor is bound to disclose all evidence which he proposes to produce during the trial. Such disclosure is made in the report, forwarded by the prosecutor to the court, for taking cognizance and for commencement of the trial. It amounts to open file discovery and the prosecutor cannot produce any evidence, not so disclosed, unless the court grants permission for sufficient cause being shown.

Another important feature of the American Legal System is plea bargain. The system provides wide discretion to the prosecutor to recommend the charges and to propose the sentence. This discretion provides leverage to the prosecutor to bargain with the defendant and to offer certain benefits in return of the defendant's promise to plead guilty. Guilty pleas make the system more efficient and reduce the burden on the courts. In federal system of criminal justice, 96% cases are decided on the basis of guilty pleas, the majority of which are result of plea bargain. In state systems, well upward of 90% of all criminal convictions are obtained by guilty plea, this number goes higher in some states. It is criticized that the innocent defendants succumb to the pressure and coercion employed by the prosecutor and plead guilty. Most of the defendants cannot afford to retain a counsel and the public defendants appointed by the courts are not that much legally competent and do not have sufficient time and resources to defend the accused properly. Having this constraints on one side and the threat by the prosecutor to recommend more serious charges and sentence on the other side, the defendant is left between the devil and the deep sea and cannot make a free decision. The law requires that the judge should satisfy himself that the plea made by the defendant is informed and voluntary. However, the problem is that guilty plea is made mostly in misdemeanor cases, which form majority of all cases, and due to their large numbers and less serious nature, the process of assembly line justice is followed to dispose of these cases. The courts take misdemeanors as not serious crimes and do not use that much care and caution and every plea bargain entered between the defendant and the prosecutor gets approval by the court.

Whatever is said in criticism, it is a reality that plea bargain makes possible the allocation of limited resources to those cases that really require full adjudication and have comparatively serious impact on the society. Had there been no plea bargain, it would not have changed the adjudication of the misdemeanors but would have certainly affected the adjudication of the felonies badly. Resolution by guilty plea spares witnesses and victims the costs and anxiety and trauma of being involved in stressful legal battle. A guilty plea also, of course, ensures conviction of the guilty, whereas in trial there is always possibility of acquittal of the culprit, howsoever strong evidence was collected against him. A single inadvertent or unnecessary sentence said by prosecution

witness can create doubt in favor of the defendant. A professional defender can break a witness emotionally and might get something out of his mouth to create doubt in the minds of jury men. Plea negotiation affords the prosecutor chance to obtain the defendant's cooperation in other cases in exchange of dropping charges or reducing sentence in the case in question.

But these negotiations have negative effects as well. It can hide police mistakes and misconduct from the public. People lose access to the information and do not know what was going on behind the doors, when cases are resolved through private negotiations; the Constitution's contemplated system of public and transparent trial is replaced by a private and secret negotiations and the people never know whether justice was done. Traditionally, it was difficult for the legal system to digest that the public trial would be dispensed with the private negotiation. It is celebrated principle of law that justice should not only be done, it be seen to be done. Thus, the Supreme Court did not openly embrace plea bargain until the 1970 case of *Brady v. United States*. Until *Brady*, the Court's case law had actually been marked by strong hints that plea bargain might be unconstitutional. In this case, United States Supreme Court observed "A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats..., misrepresentation..., or perhaps by promises that are, by their nature, improper as having no proper relationship to the prosecutor's business." The Court observed in *Blackledge v. Allison*, "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."

As discussed above, more than 90 % cases are decided on the basis of guilty plea and most of the guilty pleas are result of plea bargain, therefore, the regulation of plea bargain becomes really important to ensure fairness and justice in the system. Plea bargain is regulated internally by the prosecution agencies and each office has its own internal mechanism, sometimes not very transparent. However, the courts have authority to regulate the process when plea agreement is submitted in the court. The court is required to satisfy its conscience that the agreement to plead guilty made by the defendant is voluntary and well informed. The court may demand information from the prosecutor and question the defendant to satisfy itself and may refuse to accept the plea agreement if it thinks that it is not just and fair. However, the courts are heavily burdened, therefore, they do not have time to dig deep and a stereotype process is followed before acceptance of plea agreement.

In Pakistan, the concept of plea bargain does not exist generally in the criminal justice system. The only available example in the system is plea agreements before National Accountability Court, a special court

to try financial and corruption crimes committed by the government servants or the public representatives. The prosecutor does not enjoy that much discretion in the system. He forwards the police report making his recommendations regarding the offences to be charged but it is the court who decides that with what offences the accused is to be charged with and the court's decision in this regard is premised on the prosecution story narrated in the police report and the available evidence on the record. The prosecutor does not have any authority to recommend the sentence for the accused and it is the court who decides this question without any influence by the prosecution. The interesting fact about the system is that although, legally, plea bargain does not exist in the system, however, practically it is followed. The majority of petty cases are decided on the basis of guilty pleas, which are encouraged or persuaded by the prosecutor. But the prosecutor does not have anything to offer and he tries to persuade the accused on the basis of sole hope that the court will take lenient view of the matter and will pass less harsh sentence. However, there is no limitation on the court and it can pass any sentence it thinks appropriate. Practically it happens that the accused offers to the court that if it agrees to pass so and so sentence, he can plead guilty. Thus, it can be said that plea agreement is reached upon between the accused and the court, however, neither it has any legal backing nor the colloquy between the judge and accused finds any place on the record. This process is followed by the courts to make the system more efficient and to apply resources of the court to matters which are heinous in nature and require more attention. The legislature should take notice of the situation and plea bargain should be made part of the legal system. The prosecutors should be given more vibrant role in the criminal justice system. It will reduce burden on the courts and will make the system more effective and efficient.

The last but not the least is the case management. Case management is the mechanism by which the courts supervise flow of cases from the stage of its inception to its ultimate end removing the obstacles coming in the way of its ultimate goal of administering inexpensive and expeditious justice. It includes procedures, approaches and systems employed for management of legal cases. The Judiciary, being one of the three pillars of the state is assigned the primary goal to administer justice in a prompt, independent, impartial and fair manner in all cases. The mechanism devised by the Judiciary to achieve this goal is called case flow management plan. United States judicial system is an adversary system; thus, the judge is a neutral umpire and the parties are bound to present their cases and to adduce evidence to support their claims and defenses. With passage of time, number of cases and cost of litigation increased and thus created the necessity to manage the resources more efficiently and effectively. In 1983, Rule 16 of the Federal Rules of Civil Procedure was amended and the Judge was provided effective control on the case flow process. The management of the case flow starts with the initial case management scheduling conference. The Judge asks both the parties that when they want their case to be tried. Usually the parties have already submitted the proposed joint case

management schedule. Usually, criminal cases are prioritized and the civil cases are put on running or a trailing trial list. The Judge will tell the latest trial date, he is going to accept. If the parties want a fixed trial date, they can agree to go to Magistrate Judge, every United States District Judge is paired with a Magistrate Judge. When once the parties agree to month and year for trial of their case. The Judge will tell them to be ready for trial on the first Monday of that month. The trial may start of that very day or the parties may have to wait in order until the court reach at their case. The criminal cases are fixed at priority with the gaps of running or trailing trial dockets. Within ten days of the first initial case management scheduling conference, the parties will submit the supplemental case management schedule. The parties are required to provide a road map for all the pretrial proceedings and if they do not agree, the court can fix deadlines for discovery process, disclosure of expert witnesses, filing of dispositive motions and for conducting mediation. Honorable Judge William G. Young, United States District Courts, uses as he says “the baseball arbitrator role” (Young 2018). He provides opportunity to the parties to agree and follows the joint proposed plan but if the parties do not agree, he selects the plan which looks more reasonable, meaning he will not take the middle ground but will accept one of the plans, so submitted. This method works as an incentive and the parties remain reasonable (Young 2018).

The parties are required to file their final pretrial memorandum on the first Monday of the month preceding the month for trial. During that month, final pretrial conference is held and the parties get ready for trial. The period between first pretrial conference and the final pretrial conference is used for discovery, dispositive motions and other miscellaneous motions. When once the trial starts, it continues without any break or continuance except in rare circumstances when good cause is shown to the court for continuance. In united states, historically, the fixation of trial dates was very deferential to the attorneys’ availability but in the last fifty years, the balance has shifted to the side of strict managerial supervision by the courts to ensure efficiency of the system and administration of expeditious justice. That does not mean that due consideration is not given to the engagements of the attorney but the deciding and controlling factor is the individual case management by the court. The traditions of bar associations are helping the courts to achieve their goals. It is considered highly unprofessional to seek continuance without real necessity. Professional conduct of the lawyers is under scrutiny by the bar associations and the rules of professional conduct are implemented in its letter and spirit. There are some exceptional cases where effort in made by the attorneys to delay and frustrate the process to provide undue favor and advantage to the clients. This usually happens when any big business entity or entrepreneur is involved in the litigation. But the system has the potential to deal with such threat and it responds proportionately to thwart any such effort. The allocation and distribution of the judicial work in Federal Courts is done by electronic random distribution system. In civil cases, a Judge, who is unable to hear any case, can send that case directly to another judge having time

to hear that. However, this cannot be done in criminal cases and any such case is to be sent back for its inclusion in random allocation process. When once a case is allocated to a Judge, his staff automatically starts working on the case. Every Judge is given services of at least two law clerks, who are the best fresh graduates from the law schools. Usually, the Judges assign cases to the law clerks for research on the basis of odd and even docket numbers. This brings transparency and efficiency to the system. From the very moment of allocation of case, the law clerk is aware of the fact that he is supposed to do legal research for that case and he starts his work without hearing the word go from the Judge. (Young 2018)

In Pakistan, the biggest problem in the judicial system is the delay in administration of justice. It is a common saying that benefits of a claim filed by one generation are reaped by the next generation. It amounts to total failure of the system. If a state fails to provide prompt and inexpensive justice, it fails to fulfill the very objective of its creation. The maniac of delay in judicial system can be dealt with effectively by applying case management procedures. The underlying principle is that the courts should be provided more autonomy and discretion to manage their dockets. The concept of holding conference with the attorneys and parties for fixation of trial dates is very effective method of agreeing upon the managerial and procedural matters involved in the case. It provides sense of participation to the parties in deciding these matters and enables the court to be aware of the compulsions of the parties and their attorneys. The procedural laws need to be amended and certain time frame should be provided for different stages of the proceedings. Pakistani courts, historically, have decided the procedural matters by implying liberal interpretation approach to protect rights of the parties but at the cost of efficiency and expediency. It is need of time to change this traditional approach and find a middle ground, striking a balance between the truth seeking and the efficiency. It is basic principle of law that if law requires anything to be done within specific time and in a specific manner, it must be done so and no one can claim to be wiser than the law. Leniency shown by the courts have made the procedural requirements ineffective and the lawyers manipulate the procedures to provide unfair advantage to their clients. If a party is not vigilant to protect its procedural rights within provided parameters, it must face the brunt. Equity helps the vigilant nor dormant. Practically, more time is consumed in deciding miscellaneous matters than holding and concluding the trial. Statistics show that time spent in deciding application for grant of temporary injunction to preserve subject matter of the suit and to maintain status quo takes as much time as the regular trial does. The courts fail to compel the parties to argue on their pretrial motions/applications for months, causing inordinate delay in start of the trial. Law requires that all applications regarding procedural matters must be filed before the completion of pleadings and fixation of date for settlement of issues but mockery of law is made when the parties keep filing these petitions till conclusion of the trial and sometimes after conclusion but before pronouncement of the judgment. Section 141 Civil

Procedure Code 1908 provides that provisions of that code are applicable to the miscellaneous petitions and the trial alike. The standard for decision making in both matters is the same whereas the objectives and the ends are different. Thus, period of one month is provided to file reply of any miscellaneous petition and hearing both the parties is necessary for its decision and if factual controversy is involved, evidence is required to be recorded. Hence there are several mini trials within the trial.

In United States, the court is neither bound to obtain reply of every pretrial motion nor to hear both parties. Many times, pretrial motions are decided by the Judge immediately after its filing without even hearing the party who moved that motion. Reply is taken, usually, only of the dispositive motions and the parties are heard before their disposal. Procedural requirements for decision of the pretrial motions must be relaxed and the Judges be given wide discretion to deal with these matters on case to case basis. Laws dealing with lawyers' conduct be effectively implemented and the bar councils be sensitized to play their role effectively and if they are unable to perform their role due to their internal constraints, the courts be empowered to take action against lawyers guilty of misconduct. Electronic random allocation system is working in High Courts. It should be introduced in District Judiciary as well. Once trial starts, it should proceed without any break and continuance should not be granted except in extreme necessity. Information technology be effectively used to manage the dockets and for inter system communication. Law clerks should be provided to the courts. Research work done by the law clerks helps the Judge a lot and saves his time and reduces his dependence on the assistance of the attorneys. Due to the helping hand of the law clerks, the Judge is well prepared at the time of hearing arguments of the attorneys, can raise valuable queries and can decide the pretrial motions instantaneously, expediting the process.

The objectives and the ends of all judicial systems in the world are the same but different means and different strategies are employed to achieve them. The biggest challenge faced by the systems is to reduce delay in decision making and expenses of the litigation. Joint and concerted efforts are required to deal with these common enemies. Let's share our experiences and make this world a happy and just world.

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(6) PRESERVATION AND EXECUTION OF DIGITAL EVIDENCE AN EXIGENCE OF CONTEMPORARY TIMES

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ABSTRACT:

This thesis practically refers to the use of Digital evidence in the Pakistan Legal System, especially for the Judges and investigators with their Knowledge and understanding about use of digital evidence in computer related crimes and other cases involving digital evidence. The gap between the Judges and problems associated with the use of Digital evidence would also be addressed. The study would help to understand and compare Digital Forensic Tools/techniques that are being used internationally. The purpose of study is to make research about various Forensic methods, methodologies, and frameworks being used across the Globe for investigating criminal activities driven by digital or electronic devices. It would suggest the precautions which should be observed by the courts while appreciating the evidence and by the investigating agency while extraction and preservation. To preserve the value of digital evidence, it is necessary to sensitize the relevant quarters about the intricacies involved therein. This paper would provide help in this respect.

Keywords: Digital evidence, modern devices, computer, mobile phones, preservation, extraction, courts, investigation

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INTRODUCTION:

Digital evidence is defined as any piece of information which is stored and transmitted in digital form, and is used in the trial before a court¹. The most important question is whether the digital evidence is acceptable or not? And the answer is that the court in each specific case decides to accept the evidence in an original or copied form. Now a days the courts are accepting digital evidence in the form of ATM transactions, emails, internet histories, cell phone records including audio calls and messaging, and much more. According to Mason, S., 2008 Digital evidence is a product of digital forensic process². In this era of modern age it is a proven fact that the current legal system which is dealing digital evidence is not up to the mark and has certain areas of improvements. With the technological advancement criminals have also found new ways to deceive people and system as well. Therefore both courtrooms and investigative agencies should be familiar with the technology use in order to stop the criminals by getting away.

According to the FBI report about ratio of crime types which occurred during the year, Almost 50 percent cases were related to Computer crimes which includes hacking, copyright infringement, pornographic material posting. Investigative agencies should be well aware of the use and analysis of Digital evidence.

According to Kerr, 2009 & Whitcomb, 2002 Digital forensic includes concepts of computer science such as computer architecture, Software and networking system, operating files etc.³The extensive use of digital evidence in cases has provided new challenges and opportunities as well. Any linkage between the defendant and commission of crime through use of digital technology such as photographs, videos, emails may lead towards evidence which is acceptable before the courts.

LITERATURE REVIEW

According to the SWGDE Digital evidence is defined as “Any piece of information which is stored or transmitted in a binary or digital form”. According to National Institute of Justice [NIJ] there are four phases in a digital forensic process which are collection, identification, preservation and reporting of necessary information⁴. As compared to other physical evidences digital evidence require less legal foundations for its acceptance. Digital evidence provided by a party is acceptable if the party

¹ Digital Evidence and Forensics | National Institute of Justice. (n.d.). Retrieved January 15, 2018, from <https://www.nij.gov/topics/forensics/evidence/digital/Pages/welcome.aspx>

² Mason, S. (2008). Judges and technical evidence. Keynote address at CFET 2008: The 2nd International Conference on Cyber forensics Education and Training, Canterbury Christ Church University, Canterbury, UK, September.

³ Kerr, O. S. (2009). Computer crime law (2nd ed.). St. Paul, MN: Thomson/West

⁴ Electronic Crime Scene Investigation: A Guide for First Responders, Second Edition, April 2008

provides foundation in such a way that critical findings could be extracted from the information and the opposing party has equally access to enquire about that information and can also oppose legally and logically.

A general feeling about digital evidence is that it can be easily changed and so untrustworthy is strongly rejected by the courts. Any Digital evidence is accepted when it qualifies to the Best evidence Rule. Digital evidence is converted into a written or any other analog form before presenting as evidence. For example data stored in a compact disk or hard-disk is not used by the trier directly as facts but it is converted into a printable form such as print-outs and it is considered to be in original form if it is genuine and clearly indicating the required unmodified data. In some cases a duplicate of printouts is acceptable if there is no ambiguity about the originality of the facts. The forensic experts should gather data in such a way that the questions regarding accuracy of the data are clearly eliminated.

In early 1984 the law enforcement agencies and FBI started developing systems to evaluate digital evidence. And the resulting Computer Forensic Science was the result of such laboratory work. To Study Digital Evidence Computer Analysis and Response Team was formally established by the FBI. According to (Kerr, 2005a, 2005b) like other physical evidence the digital evidence has different form as it exists in Zeros and Ones⁵. Saferstein, R. (2009) explained that both Judges and Jury take digital evidence quite differently as compared to other physical evidences and therefore a special attention is needed during the collection and handling of such evidences⁶.

In USA the investigation agency FBI has reported that almost all cases are linked with some sort of digital evidence during any stage of their occurrence. This is increasing due to extensive use of laptop, cell phones, and other digital devices for illegal record keeping and handling which results in computer related crimes. All segments of population are using digital devices, therefore, at crime scenes device like PDAs and Cell Phones are presented that contains information related to criminal activity. According to Van Buskirk & Liu, 2006 digital evidence have limited value because it is much harder to validate the original source of information for the evidence so it is less authentic as compared to other evidences⁷. Schatz has explained that digital evidence is quite different in presentation as compared to other evidence and this is because the unfamiliarity of the practitioner to the digital evidence process, its methodologies and framework.

RESEARCH METHODOLOGY:

⁵ Kerr, O. S. (2005a). Digital evidence and the new criminal procedure. *Columbia Law Review*, 105(1), 279-318.

⁶ Saferstein, R. (2009). *Forensics science: From the crime scene to the crime lab*. Upper Saddle River, NJ: Pearson Education.

⁷ Van Buskirk, E., & Liu, V. T. (2006). Digital evidence: Challenging the presumption of reliability. *Journal of Digital Forensic Practice*, 1(1), 19-26

In this thesis an exploratory research method would be used to explore and overview current issues in digital evidence collection, preservation, analysis and execution in the legal systems. Legal issues pertaining to digital forensic process would also be discussed in detail. Digital evidence detection and preservation from all sorts of digital devices such as computer, Mobile phones, and the Modern methods/tools used for data acquisition/presentation would be discussed. Usually an exploratory study is carried out to look different aspects of already defined problem in more detail and suggesting the necessary areas of improvement.

EVOLUTION OF DIGITAL DEVICES AND CYBER CRIMES:

In this section of the thesis various technique /tools available for data extraction, preservation and execution from digital devices such as cell phones, computers would be discussed and compared. It is a well-known fact that the mobile phone manufacturing industries are characterized by their fast pace and therefore developing new devices per year for attracting as many customers as they can. Mobile devices are known as an evolving form of commuting used for transferring information electronically, storing contact details, using social networking sites for sharing information, pictures ,videos etc. In a very short time mobile devices and Internet have become a part of everybody's life. A recent survey has reported that emerging countries are adopting mobile phone at a faster pace⁸, as in Pakistan there are over 130 million mobile phone subscribers, where 53% of the adult population owns cell phone as compared to 5 percent in 2002⁹. An interesting but alarming situation for cellular network providers is that the percentage of Smartphone owners is lowest among the 24 emerging countries as per data collected by Pew Research Center.

DATA PRESERVATION:

From forensic perspective mobile devices present dynamic challenges due to launching of new models globally, according to some experts five new models are developed every week¹⁰. Due to such growing number and variety of mobile devices a single comprehensive tool for addressing issues regarding data collection, preservation, and execution is merely impossible. Today there are various cell phone operating system providers such as Android, Blackberry, Windows, and Apple

⁸ Tryhorn, C. (2009, March 02). Developing countries drive explosion in global mobile phone use. Retrieved February 28, 2018, from <https://www.theguardian.com/business/2009/mar/02/mobile-phone-internet-developing-world>

⁹ Malik, H. (2014, February 27). Research Shows Pakistan Still has one of the Lowest Smartphone and Internet Users Percentage. Retrieved March 02, 2018, from <https://propakistani.pk/2014/02/27/research-shows-pakistan-still-has-one-the-lowest-smartphone-and-internet-users-percentage/>

¹⁰ Digital Evidence on Mobile Devices - Elsevier. (n.d.). Retrieved May 15, 2018, from https://booksite.elsevier.com/9780123742681/Chapter_20_Final.pdf

phone¹¹. The most important aspect regarding data acquisition and preservation from mobile device is to keep in mind that most of the handheld devices are network devices using communication systems for sending and receiving data. As compared to computers, the digital data in mobile devices can be altered, or destroyed by a remote destruction command received over the communication network. Mobile devices are becoming like computers from data handling and functionality point of view, so it has become a challenge to have a look on various data file systems, data sources, and formats on consistent bases. The peculiar feature of Mobile devices for data preserving point of view is that these devices contains deleted data information n on the flash memory chips which are durable against impact, temperature and other harsh environmental conditions. So in a case where the potential suspect has tried to overwrite or delete data, there remains a record in the flash memory which can be retrieved and stored by a careful investigative process.

EXTRACTION & PRSERVATION OF DATA FROM DIGITAL DEVICES:

After the development of first android phone by Google in 2008¹², there is a tremendous advancement in the Mobile technology and currently a most sophisticated and advance operating system is present. In Nielson 2012 Survey it was reported that about 46.3 percent of smart phone users will have android device and in future not only the smart phone but devices like net books , televisions , GPS will also use android operating system. Smart phone are considered to be more sophisticated devices in terms of their processing power and features, at the same time these devices has posed serious threats such as security breach and cyber-crimes. The reason for security violation is the predominant use of mobile devices by the employers. IBM the world known IT firms has warned about malware attack on mobile devices, the company reported that there was about 273 percent rise in malware attack of mobile phones and tablets as compared to last year. Due to rapid growth in cell phone technology the amount of personal data which these devices hold also increased significantly, but only the organizations dealing with cyber-crimes has depicted their concerns for a data security. A well-known software company McAfee has reported that there was about 76 percent rise in Trojans, viruses and malware attack on Google's android system.

MOBILE FORENSIC TOOLS

Various forms of Digital evidence include audio, video, images etc. while Mobile Forensics is a scientific technique used by forensics investigators for extracting and preserving digital evidence from digital devices like cellular phones, tablets, PDAs and Smart phones. According

¹¹ Guru. (2018, August 11). Top 10 Mobile Phones Operating Systems. Retrieved May 21, 2018, from <https://www.shoutmeloud.com/top-mobile-os-overview.html>

¹² Martonik, A., & Martonik, A. (2018, February 05). A look back at Sooner, Google's first Android phone. Retrieved from <https://www.androidcentral.com/look-back-google-sooner-first-android-phone>

to the NIST mobile phone forensic is the process of acquisition, preservation, analysis and reporting of digital evidence¹³.

<u>Tools</u>	<u>Features</u>	<u>Functions</u>
Micro Systemation GSM. XRY	Applicable to GSM, CDMA, UMTS and iDEN phones, Support USB, Bluetooth and Infrared Interfaces, Extract SIM card data,	Acquisition, Examination, Reporting
Oxygen Forensic Suit	Providing three distinct data extraction modes, Supporting almost all type of mobile phone operating systems, recovers both SIM and mobile internal data.	Acquisition, Examination, Reporting
MOBILedit! Forensic	Automatic logical data acquisition along with option for manual data acquisition Supports various mobile phone operating systems and connection interfaces. Data access option from social networking apps such as Facebook, My space, Skype etc.	Acquisition, Examination, Reporting
Logicube CellDEK	Data acquisition from Cell phones, PDAs and GPS receivers, Automatic data capturing facility , small and compact in size.	Acquisition, Examination, Reporting
TULP 2G	Open source software with the facility of adding user developed plug-ins, USB Cable, Bluetooth and IR interface support, requires PC/SC for external SIM cards	Acquisition, Reporting
XAMN horizon	Comparative analysis of collected data to find association between suspect and contacting people, Supporting both logical and physical data extraction, Flexible data filtering and searching ability, Multiple data formats support	Acquisition, Examination, Reporting

¹³ Lai, Y., Yang, C., Lin, C., & Ahn, T. (2011). Design and Implementation of Mobile Forensic Tool for Android Smart Phone through Cloud Computing. *Convergence and Hybrid Information Technology Communications in Computer and Information Science*, 196-203. doi:10.1007/978-3-642-24106-2_26

Secure View	Logical and physical acquisition, Supporting multiple data formats, does not support for exporting complete case file	Acquisition, Examination Correlating different parts of case file to achieve reporting function
Athena	Acquisition and examination of live data, operates under both light and dark modes, supports data encryption and biometrics facility	Acquisition, Examination, Reporting
FINAL Mobile Forensic	Acquisition of data from CDMA cell phones, multiple plug-ins support for latest mobile phone technology	Acquisition, Examination, Reporting

COMPUTER FORENSIC TOOLS

Before 1990s most of digital forensic investigation procedure involves live data analysis without utilizing specific forensic tools but after 1990s firms have created several digital forensic tools to access data without any modification validate the authentication of the collected data¹⁴. At present time there exist several reliable and dedicated tools for computer and mobile device forensics. In situations involving large amount of forensic data the investigators prefers to build their own forensic toolbox by using several available forensic solutions such as SIFT, X-WAY Forensic, Encase, Oxygen Forensic toolkits etc. Advantage of building customized toolbox helps investigator to apply stage specific tools to conduct precise and timely investigative process. For data capturing some of famous tools are FTK Imager, EnCase forensic imager, and for email analysis tools are Mail Viewer, EDB viewer etc. Most of tools support multiple platforms but some are designed especially for dedicated platforms for example to conduct investigative process on Mac Operating system one can use Chain Breaker or Volafax.

Forensic software or toolkit must have support hashing of files for comparative searching and filtering, ability to load iOS backups, exact pathways locators, full disk hashing confirms acquired data is unchanged, and have an acquisition feature as well.

Some of major prolific forensic software solutions are discussed in this part of thesis, it is important to note that some forensic tools are free but some are paid.

¹⁴ List of digital forensics tools.(Retrieved August 15, 2018, from https://en.wikipedia.org/wiki/List_of_digital_forensics_tools)

1. EnCase Forensic Software
2. SANS Investigative forensic Toolkit
3. CERT Forensic
4. Forensic Toolkit
5. X-Way Forensic
6. Blacklight
7. Bulk Extractor

Handling mobile device as a source of digital evidence

When handling mobile devices by the initial responder following points should be considered

- i. Typical forensics methods are used during the initial handling of the mobile device, it is recommended to not use aluminum powder on the device for DNA and finger print collection, because the use of powder can contaminate the digital data found on the device.
- ii. Turn off the device, enable Airplane mode or put device on faraday bag to isolate the devices from the network, but all these practices have some limitations and not applicable to all situations.
- iii. Investigator should consider the feature of volatile memory (RAM) of mobile device¹⁵, RAM stores temporary data, the data stored on RAM includes the record of most recent activity performed on the mobile device. When the mobile device is switched off or battery gets drained all data residing on RAM vanish away, so the investigator should be well aware of how to preserve data from RAM.
- iv. Physical damage of the device does not guarantee the loss of digital evidence from the mobile devices, as data can be extracted and preserved using various available techniques.
- v. For data destruction magnetic field effect is used by offenders.
- vi. In sensitive cases just like military operations it is not possible to isolate device from the network, because any delay can activate time security lock, so the moment device is captured, try to extract information or any relevant data as soon as possible.

15 Ayers, R., Jansen, W., & Brothers, S. (2014). Guidelines on Mobile Device Forensics National Institute of Standards and Technology

- vii. Use of effective stage triage processes and tools can acquire and preserve digital evidence which can be the difference between life and death¹⁶.
- viii. For initial responder and investigator it is recommended to not insert personal SIM card to mobile devices found at the crime scene, because data in the SIM cards is automatically imported into mobile phone memory and which leads into contamination of the data.

Data acquisition/extraction methods

According to International Organization on Computer Evidence conference 2000, methods applied for mobile phones and electronic device data acquisition/preservation should have minimum impact on data change or loss. Due to a large variety of mobile devices there is no single standard method for data extraction and this is the main hurdle of mobile forensics which leads into only one option i.e. manual examination. A data extraction method depends upon the specific case and the type of mobile device. A brief explanation of available methods is described below.

1. Manual Extraction

Mobile user interface is used to access mobile device data, to ensure preservation of chain of custody and details are gathered a log book is maintained having a record of photographs and videos. Data accessible through operating system is retrieved and this extraction method is applicable to all kind of devices but it is time consuming.

2. Logical Extraction

Logical acquisition recovers mobile files such as call records, text messages, contacts, media, and apps data¹⁷. This method uses AT commands and Object Exchange protocols for interacting with the operating system of mobile devices. Forensic tools use these protocols for communicating and requesting data from the operating system. Live data is mostly accessed through this process and extracted data output is in readable format. Deleted files cannot be recovered from this method. Mobile device are protected with security software such as biometric, pattern locks which can be an issue during logical acquisition.

3. Physical Extraction

¹⁶ Mislán, R. P., Casey, E., & Kessler, G. C. (2010). The growing need for on-scene triage of mobile devices. *Digital Investigation*, 6(3-4), 112-124. doi:10.1016/j.diin.2010.03.001

¹⁷ Ogden, D. (n.d.). Retrieved June 07, 2018, from <https://www.crime-scene-investigator.net/mobile-device-forensics-beyond-call-logs-and-text-messages.html>

Physical extraction is usually performed through communication port, via JTAG, via direct memory chip access. Chip access is the most expensive and least used method of data extraction because this method requires full access to the internal memory of mobile device which is further dependent on operating system and security checks set up by the mobile device manufacturer. In Physical extraction method bit- by -bit copy of the entire flash memory contents is performed. Data accessed through this method includes location information, images, emails, videos and deleted version of these files. For any type of physical extraction method usage a complete knowledge of how data in memory structures is stored is required.

4. File System Extraction

In this extraction method forensic tool directly access the internal memory of the mobile device, files extracted through this method includes system files, logs and database files¹⁸. While in logical extraction method API is used to access each type of data. This extraction method is useful for accessing apps usage history, web browser history and file structure. The advantage of recovering data base files is that whenever a user deletes some file such as images, videos a copy is retained in the data base files which are recoverable until a routine maintenance of cleanup is performed by data base itself.

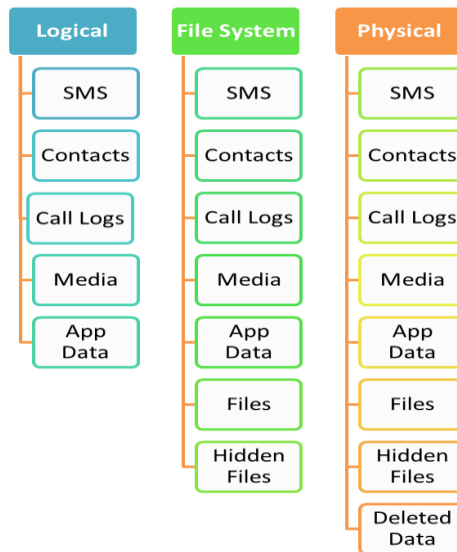


Fig 4.2.4: Mobile Data Extraction Methods

¹⁸ Mobile Forensics - Extraction Types. (2016, March 21). Retrieved June 08, 2018, from <https://4n6explorer.com/forensics/mobile-forensics-extraction-types/>

DIGITAL FORENSIC PROCESS MODELS

There are a lot of research models generated on regular basis for accurate and robust data collection from digital devices. Acquisition, Identification, Evaluation, and Admissibility were only four steps included in the primary model. A few models have been mentioned below through flowcharts.

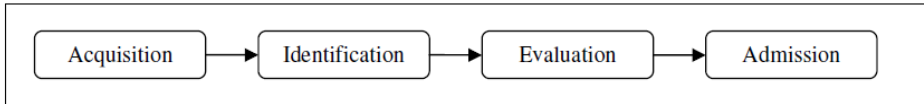


Fig 2.1.1: Computer Forensic Investigative Process

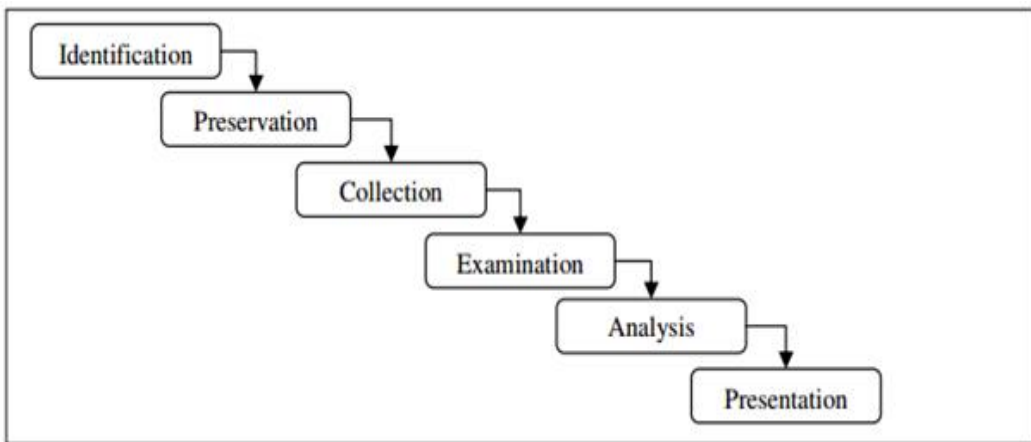


Fig 2.1.2: DFRWS Investigative Model (2001)

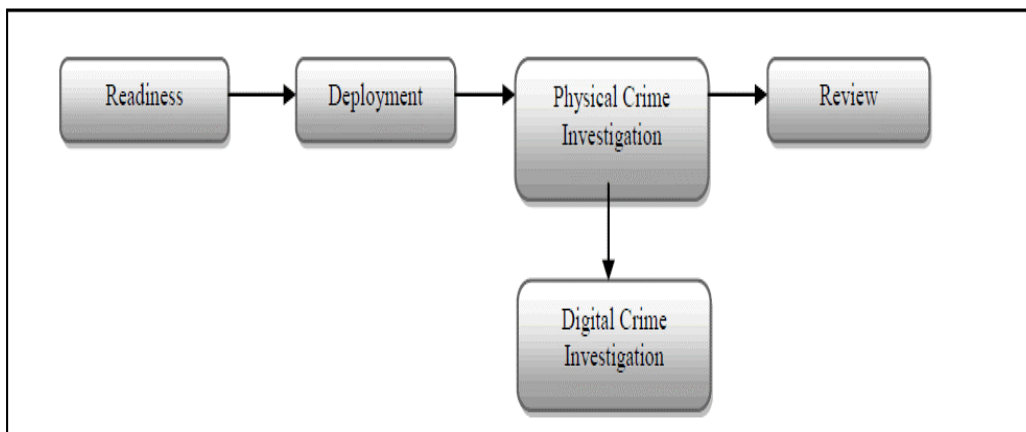


Fig 2.1.4: Integrated Digital Investigation Process Model

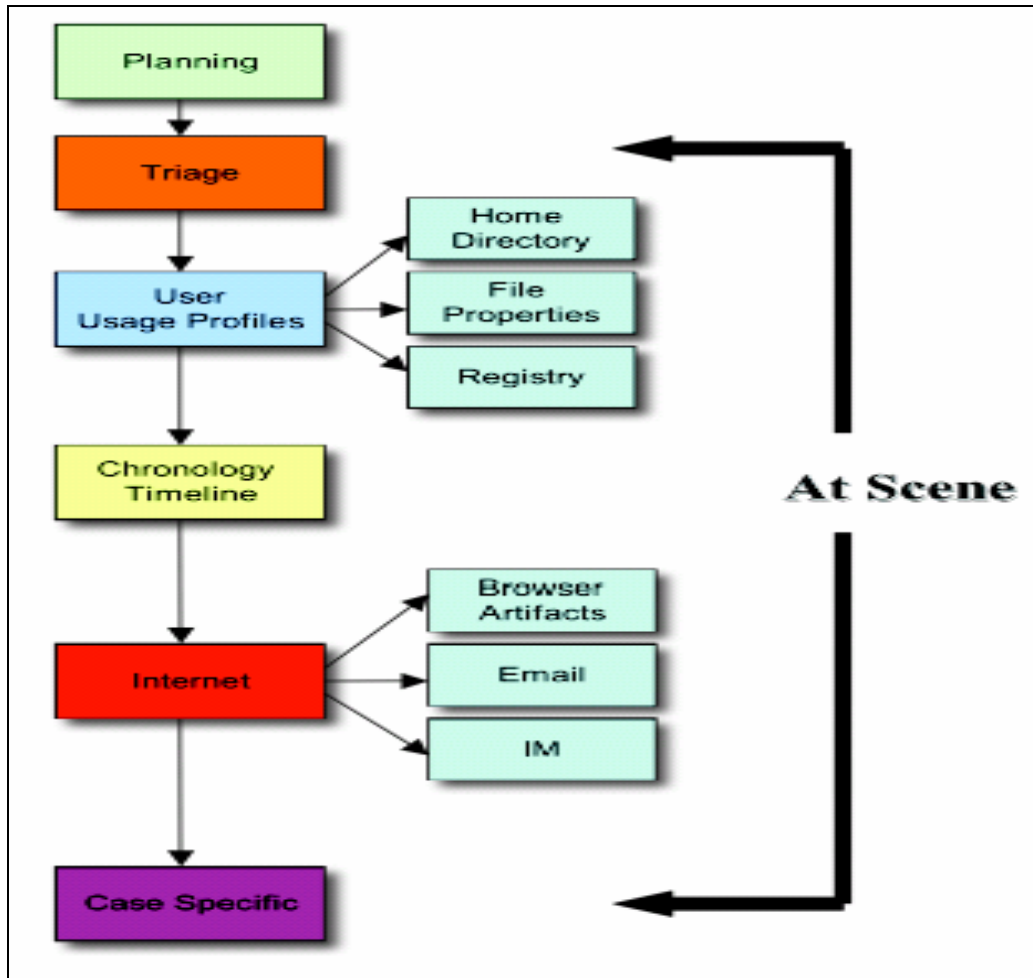


Fig 2.1.5: Computer Forensics Field Triage Process Model

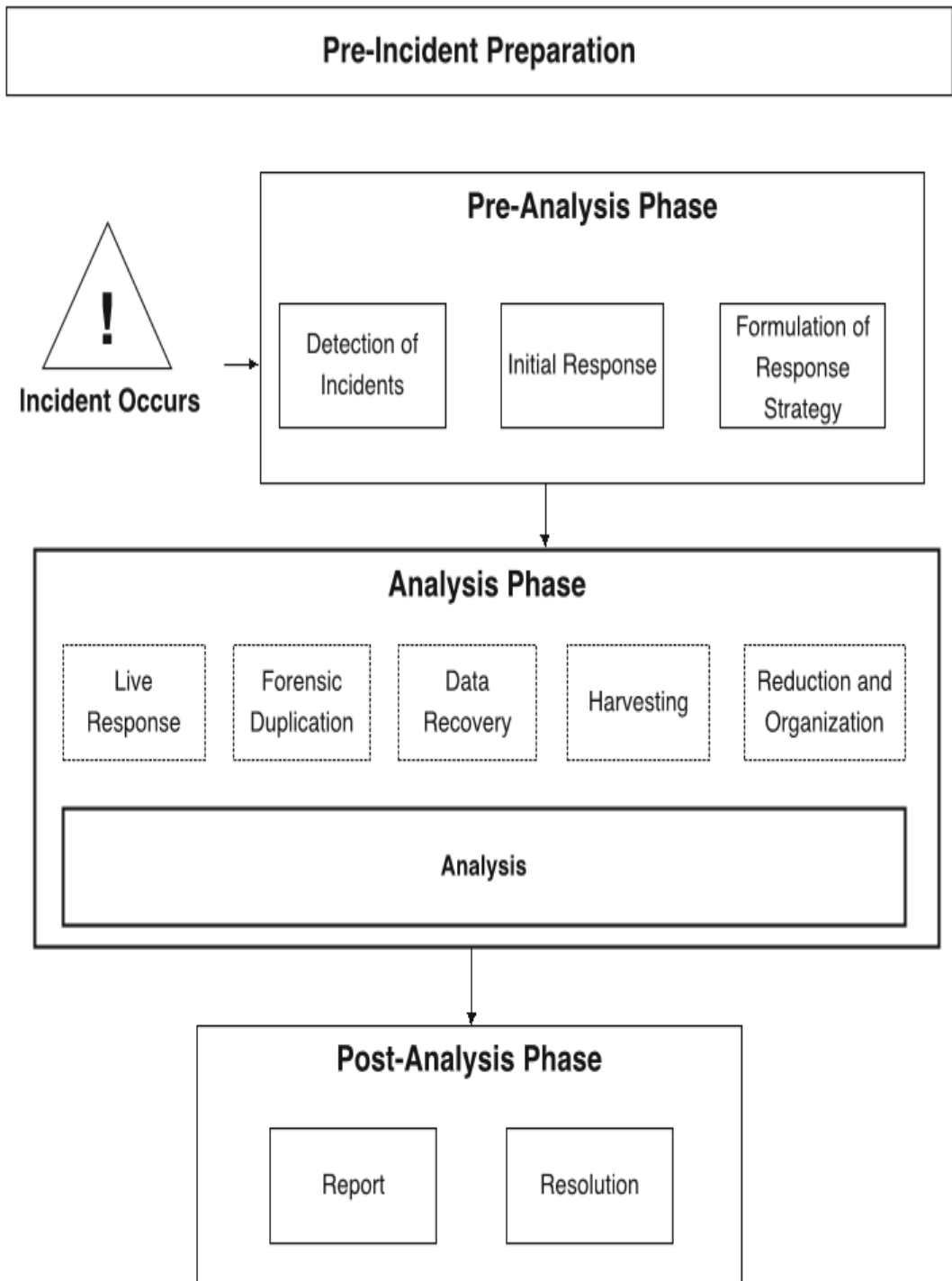


Fig 2.1.6: Common Process Model for Incident Response and Computer Forensics

PRINCIPLES OF DIGITAL EVIDENCE

According to the Association of Chief Police Officers & 7Safe, 2007 there are four generally accepted principles of digital forensic practice¹⁹.

Principle 1: Law enforcement agencies, investigators require that applying data acquisition/preservation methods data originality should not be changed. Digital data is fragile in nature therefore special care should be taken in handling and preserving the data.

Principle 2

Cases involving direct collection of data from the scene of incident only professionally trained personnel should collect and examine the digital data in such a way that its relevance and competence should not be questionable at any stage of data execution and collection. Moreover the investigators should be aware of the implications of their actions that may alter, damage the originality of the data.

Principle 3

All activities relating to seizure, data collection, preservation and presentation must be recorded and should be available for audit conducted by the third party. The results of the audit should be same as executed by the investigators involved in Digital evidence process. In general during the absence of original person for data analysis, the collected facts should be in such a form that any other person using the available tools for analysis /interpretation must reach the same results as predicted. The Repeatability of the process demands the presence of chain of custody for seizure and processing of digital data, and its documentation must be maintained and available at any stage of the digital forensic process. Records and notes of cases should be available in hand written forms with permanent ink, instead of pencils which can be used for marking and tracing diagrams. All forms of notes should be authenticated by digital signature, handwritten signatures, or other marking systems.

Principle 4

Responsibility of conducting a digital forensic according to the set rules and procedures is on the shoulder of the person in charge of the investigation process. It is necessary to provide the objective(s) of the whole process and also proving the integrity of the digital evidence before the courts. The investigators should be well aware of the national and state laws relevant to the case being presented in the courts for Trial.

¹⁹ ACPO Good Practice Guide ACPO Good Practice Guide. (n.d.). Retrieved February 28, 2018, from https://www.digital-detective.net/digital-forensics/documents/ACPO_Good_Practice_Guide_for_Digital_Evidence_v5.pdf

DUTY OF INITIAL RESPONDER & FORENSIC INVESTIGATOR AT CRIME SCENE FOR D.E COLLECTION

1. Approaching the scene and Initial Response

The preliminary step in every forensic investigation is to secure the crime scene with minimal contamination to the potential evidence²⁰. Upon reaching the scene investigator should stop unauthorized entrance of persons and equipments which may alter the evidence. The investigator should keep a close look on surroundings which may involve but limited to weather, lighting conditions, location ,condition of the victim, sounds, smells, presence of persons , vehicles etc. For a professional approach the investigator should wear special cloths, shoe covers and gloves to make sure that there are minimum chances of contaminating the digital data being collected from the scene of incident.



Fig 2.4.1: Crime Scene warning Message

Lance James the head of cyber intelligence urges that in cases of cyber-attacks the incident responders rush to rectify and collect necessary data but in doing so they usually loose important data which is helpful in forensic investigation process for tracing the likelihood of cyber-attack and the persons behind such attack. There is always a tension between incident responders and forensics experts on the issue of prioritizing actions likely to be executed after the cyber –attack. The incident responders tries to pull out the attackers and bringing the system back to its normal operation on the other hand forensics experts demand lengthy time for step by step examining of the data under attack and reaching at the point for tracking data breaches reasons in a way helpful for prosecuting the case before the courts.

The question here arises what should be done in order to avoid such situations? According to Robert Spitler a specialist at Deloitte Financial

²⁰ Gehl, Rod & Plecas, Darryl. (2016). *Introduction to Criminal Investigation: Processes, Practices and Thinking*. New Westminster, BC: Justice Institute of British Columbia.

Advisory Services LLP the organizations should have an incident response plan consisting of list of actions taken by the incident responders before the arrival of forensics experts. Incident responders should note the time, location, and actions taken by them at the time of cyber-attack instead of fixing the systems before arrival of forensic examiners. Some experts confirms that preservation of the data should be the first priority of incident responders, this is achieved by copying the data and logs into hard-drives, creating and copying an image of systems in case of cyber-attack. Large organizations have a set of replacement hard drives for quick remediation of the system to its normal operation. In case of malware attack the system is temporarily shut off and hard drives are replaced with new one, and infected hard drives are then handed over to the forensics experts for examination and further necessary actions.

2. Safety precautions and Emergency care

This is the most sensitive and key part of every investigation, the physical well-being, and safety of the all persons in and around the crime scene is the core responsibility of the forensic initial responder(s).

Initial responders should examine the surrounding lights, smell, and sounds as well. Make sure that there is no presence of dangerous equipment's, persons, and hazardous materials such as gasoline, natural gas etc. If the situation involves any kind of biological weapons, or chemical threats report and get approval from the concerned authority before entering the crime scene and also call for backups if necessary. Approach the scene in such a way that minimum chance of danger should occur. At the crime scene the initial responders are assisted by emergency responders for collecting and preserving the digital evidence along with a special medical attention provided to the injured person(s) at the sight. Try to avoid contaminating the crime scene by securing the body fluids and also not walking on them.



Fig 2.4.2: Sketch showing ideal case of seizing crime scene

3. Controlling Persons and establishing boundaries at the Crime Scene

Initial responder(s) should carefully assess and secure the crime scene by identifying, removing, securing and controlling unauthorized or potential victims for evidence collection and preservation²¹. Control and restrict unnecessary movement or intervention of the persons for securing any sort of physical evidence present. Carefully observe the movement and location of potential victims, witnesses, bystanders, emergency and law enforcement personals. One of the core responsibilities of initial responder is to establish boundaries for maintaining integrity of the digital evidence collected from the crime scene. Boundaries are established after an initial assessment at the crime scene and these are not a part of initial scope and merely depend upon the nature and location of the crime. A boundary includes setting up physical barriers such as tapes, ropes or existing boundaries e.g., doors, walls, gates. Preserving, equipment's location and physical appearance of the suspects as found when the scene was approached. Any kind of movement must be recorded and documented after establishing boundaries for the specific incident.

4. Briefing the Investigators, Setting up a command Post

After assessing and securing the scene of incident, initial responders should handover the charge and control of scene to the concerned investigator(s) and should give a detailed briefing about the actions taken so far. Initial responders should also assist the investigator(s) for managing documentation of entry/exit and remain there until relieved of the duty. Setting up a central command post for investigative process, team meetings, resource allocation, and media meeting is an important aspect of Investigators responsibilities. After setting up a command post notify to the concerned departments such as Communication department. In case if any suspect had fled from the scene, ask communication departments to inform surrounding agencies nationally and internationally.

5. Initiatory documentation and Walk-Through of the scene

After getting initial working detail from the initial responders, it is the core responsibility of the investigator in charge to assess the nature and type of the crime scene and develop plan accordingly. Plan for conducting a formal investigation process should in accordance with the departmental/organization policy, procedures as well as federal and local state laws. Authority for search and seizure is also executed in this phase. Conduct an initial walk-through of the entire scene making sure that there is not any sort of hurdle or complication to appear due to initial walk-through of the scene which may contaminate the originality of the physical evidence present. Make sure that the marked path ways

²¹ National Forensic Science Technology Center (U.S.). (2013). Crime scene investigation: a guide for law enforcement. [Washington, D.C.] :Bureau of Justice Assistance, U.S. Department of Justice, National Institute of Justice, NIST, NISTC,

should be followed along with the use of recommended personal protective equipments if mandatory. Note and draw a rough sketch of everything observed, which may include but not limited to climatic conditions, Lights: On or off, Floors Weapons observed, Furniture present, Temperature of the room, description of crime-related people present. Maintaining the log-sheet for tasks completion and detail of persons entering and leaving the crime scene is important for developing permanent record of every move made by the investigation team and probably the suspect also. A formal log sheet usually contains information such as Name, location, time of arrival, time of departure, reason for being present at the scene of witnesses, victims, and investigation team members.

6. Interviewing the Witnesses

Managing, Securing and interviewing the potential witness at the crime scene is the most critical part of an investigative process. Investigator should cautiously identify the type of witness either cooperative, Disinterested, Suspicious or Talkative and a timely interviewing with proper technique/methods should occur. It is generally accepted rule that the success of any investigation merely depends upon correct information collected from the witnesses. So an investigator should keep in mind the dignity and individual needs of a witness and treat him/them accordingly. In case of more than one witnesses, interview them separately, record and document every sort of information provided and also transport them to police station separately if required.

RECOMMENDATIONS

- i. The law relating to crimes involving digital evidence as a key role player needs to be developed and aligned according to international available instruments.
- ii. Countries like Pakistan still face a higher risk of inadequate digital evidence acquisition and preservation in crimes like cyber bullying, child abuse and pornography.
- iii. There is a continuous need of developing and amending statutes to combat against crimes committed through digital devices.
- iv. Public awareness about the negative use of digital devices.
- v. Data privacy, reliability, and efficiency of digital forensic mining system should be enhanced in future according to advancement in ICTs.
- vi. To prevent mobile devices from remote connection for wiping of data, always use faraday bag for disabling the option of mobile connection for the criminal.
- vii. Digital investigator should be trained enough to collect evidence without any alteration because digital devices are very sensitive to any change and can potentially damage the authenticity of the digital data collected.

- viii. Technology development associated with cybercrimes means legislations must also deal with intangible computer data.
- ix. Efforts for development of Criminal law and justice, law enforcement capacity, public awareness regarding digital crimes and reporting is needed across all over the world.
- x. Make people aware of their rights and duty to cooperate with the society in case of Digital crime, and also make laws more stringent to check crime.
- xi. Promote creation of national level forums for understanding, knowledge sharing, research, and necessary training for dealing digital crimes.
- xii. Empower and Train youth for safely use of internet and Digital devices.
- xiii. Only a skilled investigator should investigate crime, lack of skill would result in damage of digital evidence and also failure of justice.
- xiv. Standard of admissible evidence should be followed for digital evidence acquisition, preservation, and execution.
- xv. As a forensic investigator you should have the complete authority of seizing and reading evidence in form of data from Digital devices.

Future Research

In this thesis we have discussed in detail about the Digital evidence, Criminal law Cases specific to Digital Evidence from the past national as well as international level and also various Forensic methods, methodologies and frameworks being used across the Globe for investigating criminal activities driven by digital or electronic devices. Although Modern & Advanced forensic techniques / tools are available for forensic investigations criminals are aware of how to reduce effectiveness of such forensic techniques/tools. They are using Anti forensic techniques to reduce the impact of forensic tools for evidence gathering. As for the future research awareness for dealing with Anti-forensic techniques should be given to the forensic auditors and a comprehensive tool for dealing with the present vulnerabilities in computer forensic tools should be developed. The tool should also fix the existing problems in forensic tools and also apply the mitigation technique to overcome problems resulting from Ant-forensic techniques/tools.

(7) BLACK WARRANT, ITS EXECUTION AND POSTPONEMENT

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This paper examines history and the laws relating to the post proceedings of awarding capital punishment specially mode and manner of its execution and postponement in Pakistan, India and USA. The analyses brings to the deduction that despite strong voices against the outdated and inhumane method of hanging by neck till death of convict, it has still sanction of law and judicial appreciation in Pakistan and India. However, several countries like USA etc. for many decades have opted to use less painful, civilized and more humane method i.e. lethal injection. Although law has some space to postpone, terminate and commute death verdict in special circumstances but still it is need of time to shift to the method of execution of such convicts which is more painless, civilized and dignified. However, it is matter of encouragement that public hanging has already been disapproved by the constitutional courts of Pakistan and India while considering element of gracious execution.

Introduction:

An evaluation of the management of criminal fairness of olden periods divulges that demise verdict was usually inflicted in cases of terrible criminalities. Though, style of finishing the convict was at variance. In ancient time, the communal style of imposing capital chastisement on the lawbreakers were crucifixion, drowning, boiling, decapitation, hurling before wild animals, flaying skinning off alive¹, throwing the criminal from rock pelting, throttling, removing, gunfire and starved to passing. There was usual style to finish life of the convict by droopy before general community. Such draconic and ferocious style of finishing convicts were acceptable due to the fastest and the coolest ways of penalty and simultaneously had section of preventive and reprisal.

The first proven capital punishment rules have traces since 18th Century (Before. Christ) in the Law of *King-Hammurabi* of Babylon, where demise punishment was ordered for twenty-five various criminalities. In 10th Century (Anno Domini)., droopy by rope developed as the usual style

¹ Skinning alive used to be inflicted in ancient Assyria, Saytha and Persia

of finishing death convict in United Kingdom. In Sixteenth Century, under reign of Henry VIII, boiling, droopy, decapitation, sinking and slicing were the usual styles of finishing life of criminals. In cases of major crimes like marriage with Jews, denied to admit accusation and subversion, death punishment was awarded and carried out.² Due to rise of numerous ethics linking to just process confined in Laws of some autonomous states and with the solid development of civil rights drive, such unembellished demise sentences connecting agony started to end since the eighteenth century. There were only few crimes with demise sentence in some important states. Likewise, punishments concerning torment vanished due to awareness that demise sentence must be instant and gentle, even though decapitate, droopy, garrote, or the headman's blade.³

With a understanding to abolish death punishment, the UN. General Assembly in 2007, 2008, 2010, 2012 and 2014 has approved, non-compulsory resolutions calling for a universal suspension on executions. While various countries have eliminated death punishment, more than sixty percent of the world's inhabitants exists in states having capital punishment including Pakistan and India.⁴

2. Literature Review

Intentional murder, **profanity**, Zina, attack on the diffidence of females, trafficking of narcotics and many more are the crimes given in The Pakistan Penal Code,1860 ('PPC') which have capital penalty. The Law is combination of Muslim and **Common law**.⁵ However, minor culprit cannot be given death penalty.⁶ Even despite confirmation of death sentence, qisas (sentence under the command of God) for intentional murder cannot be imposed in some situations.⁷ Similarly in case of pregnant female, the Court may, after discussion with doctor, delay the imposition of *qisas* for a period of 02 years after delivery of baby and throughout such time, pregnant convict may be set at liberty on supplying of security to the approval of concerned judge. In other case, her imprisonment shall be simple if she is not set at liberty through bail.⁸ In first two cases, court shall pass alternative sentence but in case of pregnant death convict, High Court may commute her sentence.⁹

² <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty>

³ <http://lawcommissionofindia.nic.in/187th%20report.pdf>

⁴ "[moratorium on the death penalty](#)", [United Nations](#), 15 November 2007.

⁵ [Pakistan Penal Code 1860](#)

⁶ Section 16 The Juvenile Justice System Act ,2018

⁷ Section 307 The Pakistan Penal Code,1860

⁸ Section 314 The Pakistan Penal Code,1860

⁹ Section 382 The Pakistan Penal Code,1860

The provisions of section 368, 374, 381, 382, Form XXXV, Schedule of Criminal Procedure Code, 1898 ('Cr.PC'), Lahore High Court, Vol.-III (Instructions to Criminal Courts) chapter 20-E, Part-E, chapter 20-F, Part-F and (Prisoners under sentence of death) of Pakistan Prison Rules, 1978 chapter 14 deal with 'Black Warrant', its format, issuance, mode of execution and its postponement.

'Black Warrant' is issued by the Sessions Court as per the provision of section 381 of 'Cr.PC' and Form XXXV, Schedule V of The Code if death sentence of condemned prisoner has been approved by the High Court of the Province. The execution is carried out in presence of the Magistrate, Superintendent of Jail and Medical officer.

Although the term '**Black Warrant**' has not been defined in 'Cr.PC' but the term '**Death Warrant**' has been defined in **Merriam-Webster** as,

“a warrant for the execution of a death sentence”¹⁰

Cambridge dictionary defines it as,

“an [official document](#) that says that someone must be [killed](#) as a punishment”

“something that [leads](#) to someone's [death](#) or the [complete destruction](#) of someone or something”¹¹

'**QANUN-E-LUGHT**'¹² defines the term 'Death Warrant' as “hukamnama phansi or saza-e-muat”.

Security of life has been surefire under article 9 of the Constitution of Pakistan¹³ but it may be finished in accord of law. Courts in Pakistan may award death sentence under penal code¹⁴, anti-terrorism laws¹⁵, narcotics laws¹⁶ and under different statutes. However, it is obligation of the trial court to send reference to the High Court for confirmation.¹⁷

Appeal may be filed by the convict in the High Court.¹⁸ The convict, whose appeal or reference¹⁹ has been turned down may approach to the Supreme Court of Pakistan against his conviction.²⁰ He

¹⁰ <https://www.merriam-webster.com/dictionary/death%20warrant>

¹¹ <https://dictionary.cambridge.org/dictionary/english/death-warrant>

¹² Justice (R) Doctor Tanzil-ur-Rehman (QANUN-E-LUGHT) ENGLISH-URDUE WITH LEGAL AND ISLAMIC MAXIMS (Tenth Edition)

¹³ Article 9 The Constitution of the Islamic Republic of Pakistan, 1973

¹⁴ Section 302 The Pakistan Penal Code, 1860

¹⁵ Section 7 Anti-Terrorism Act, 1997

¹⁶ Section 9(c) The Control of Narcotic Substances Act, 1997

¹⁷ Section 368 The Code of Criminal Procedure, 1898

¹⁸ Section 410 The Code of Criminal Procedure, 1898

¹⁹ Section 374, 376 The Code of Criminal Procedure, 1898

²⁰ Article 185 The Constitution of the Islamic Republic of Pakistan, 1973

even may file review²¹ against such verdict. The condemned prisoner may also file mercy petition²² before the President of Pakistan. Even after rejection of mercy petition, he may file application to compound the capital sentence.²³ However, any matter ancillary to the execution may be challenged in writ petition before High Court.²⁴ Failure in all above eventualities, the only course left is to execute him as per law.

2.1 Mode and Manner of Execution of Death Penalty and Ancillary Matters

The only mode of executing a sentence of death known to The Code of Criminal Procedure, 1898 is that of hanging by the neck till the convict is dead. When the sentence of death is passed, the court must direct at the same time that the convict be hanged by the neck till he is dead and this direction by no means a separate order. Generally speaking after the sentence of death is confirmed by the Honorable High Court of the Province, the Sessions judge has no choice but to issue a 'Black Warrant' in the prescribed form (Form XXXV, Schedule V of The Code of Criminal Procedure, 1898) and the Superintendent of Jail has no choice but to execute the death sentence in a manner laid down in the 'Black Warrant'. Form XXXV, Schedule V of 'Cr.PC' is the relevant format of "Death Warrant"

At the time of execution of sentence of death of condemned prisoner, presence of Magistrate 1st Class is mandatory. Magistrate 1st Class is deputed by Sessions Judge. He must reach at the place of implementation of death sentence before its time. He shall visit the death cell of the condemned prisoner before execution of sentence of death and ask him about his last wishes or will (if any). Magistrate shall note the same in black and white. He shall also record that the medical officer has given medical fitness certificate of condemned prisoner for carrying out of demise verdict. After performance of the same and certification of medical officer that the condemned prisoner has been died, Magistrate shall write down these facts in his report. He shall also inform the legal heirs (if any) of the deceased convict present outside the place of execution of sentence of death or scaffold or gallows enclosure that execution of sentence of death has been carried out. He shall also mention these facts in his report and shall submit his report to worthy Sessions Judge by whom he was deputed.²⁵

In view of High Court Rules and Orders²⁶, the Registrar will return the file, with identical copy or an attested copy of the judgment under the cap of the Court to the Sessions Judge after a death sentence has been approved or other order has been passed by the High Court. Sessions

²¹ Article 188 The Constitution of the Islamic Republic of Pakistan, 1973

²² Article 45 The Constitution of the Islamic Republic of Pakistan, 1973

²³ Section 345, 381 The Code of Criminal Procedure, 1898

²⁴ Article 199 The Constitution of the Islamic Republic of Pakistan, 1973

²⁵ See Pakistan Prison Rules, 1978

²⁶ Rule 1 of Chapter 20-E Part-E of RULES AND ORDERS OF THE LAHORE HIGH COURT, LAHORE VOLUME III (INSTRUCTIONS TO CRIMINAL COURTS)

Judge then will follow the procedure given in section 381 of 'Cr.PC' to cause the sentence or the order to be implemented.

High Court Rules and orders²⁷ covenants and states that after approval of death sentence by the High Court and its official communication to the Sessions Judge, it is obligatory for him to issue the 'Black Warrant' to the Superintendent of the Jail for the implementation of the same, In case of transfer of condemned to another jail, it is duty of the Superintendent to return the warrant for carrying out of death penalty to the Sessions Judge with such information. The Sessions Judge is duty bound to issue the revised warrant to the Superintendent of the jail in which the condemned prisoner is kept.

The detail procedure for performance of death sentence has been mentioned in prison rules²⁸. Rule 329 says that "Sessions Judge" or the "High Court" 'will issue Black Warrant' of execution to the jail Superintendent in which the condemned prisoner is kept.

Rule 358 binds the presence of the Superintendent of jail, Medical Officer and a First-Class Magistrate deputed by the Sessions Judge at the time of execution. Presence of three persons mentioned above is mandatory for proper execution of condemned convict as required by law.

Droopy is the only mode of implementation of death verdict as envisaged in section 368 of 'Cr.PC'. The section is reproduced as under for ready reference:

*"When any person is sentenced to death, the sentence shall direct that he be **hanged by the neck till he is dead**"*

However, in July 2017, a Peshawar High Court bench has deferred execution of death sentence of condemned prisoner 'Jan Bahadur'. He challenged the way of imposition of death penalty on the ground of its being aching and against human ethics.²⁹. Another death row prisoner 'Gul Wali' moved to the Peshawar High Court to seek directions to the government to "introduce a less painful mode of execution instead of hanging to death" The court has also sought response of Islamic Ideology Council and concerned Ministry.³⁰

In the Crown v. Saidu and another³¹, the Lahore High Court ruled that though trial court did not mention the way of imposition of death

²⁷ Rule (ii) of Chapter 20-F Part-F of RULES AND ORDERS OF THE LAHORE HIGH COURT, LAHORE VOLUME III (INSTRUCTIONS TO CRIMINAL COURTS)

²⁸ Chapter 14 (Prisoners under sentence of death) of Pakistan Prison Rules,1978

²⁹ [https://www.dawn.com.\(July 21, 2017\)](https://www.dawn.com.(July 21, 2017)

³⁰ <https://thenews-com-pk.cdn.ampproject.org/v/s> (Jan.3, 2018)

³¹ PLD 1952 Lah 587

verdict but the only way to implement it is “hanging”. The court observed that there is no other way of execution of death row convict except given in Cr.PC. i.e. droopy.

In *Crown v. Habibullah and others*³², the Lahore Court put its weight in support of hanging though there is no specific order about mode of execution. The court ruled that although method of carrying out demise verdict should have been mentioned in the decision but even omission to do so does not affect manner of droopy by neck because mentioning of method of execution in death warrant is considered to be sufficient requirement.

In *Abdul Qayyum v. FOP and 5 others*³³, the Islamabad High Court decided a question of jurisdiction of issuance of ‘black warrant’ in terms that Sessions Court at Islamabad rightly issued ‘black warrant’ despite the fact that trial of the condemned prisoner was conducted by the court at Rawalpindi because by the time of issuance of ‘death warrant’ Anti-Terrorism Courts for the territory of Islamabad were established. The court observed that the convict has no bestowed right to avoid the death warrant on the basis of stated technicality.

In *The State v. Muhammad Ashraf*³⁴, the Karachi High Court met with the question that once ‘black warrant’ has been issued by the Sessions Court, then on transfer of convict from jail to some other prison not in his jurisdiction may issue amended/fresh ‘death warrant’ to the jail Superintendent having such condemned. The court held that there is no legal hurdle to issue altered or amended warrant in case of transfer of condemned convict from one place of confinement to other one.

In *Ghulam Shabir Qasim v. Salah-ud-Din and another*³⁵, the Lahore High Court while interpreting the term “Sessions judge” laid down the principle that even Additional Sessions Judge as duty judge may issue ‘black warrant’ in absence of Sessions judge.

In *Secretary to Government of N.W.F.P. v. Muhammad Ayaz and 3 others*³⁶, the Peshawar High Court was engaged in a question whether if trial of the accused was conducted with procedure given in law of ‘Tazir’ (sentence under the command of the state), ‘black warrant’ issued by way of Qisas (sentence under command of God) was legally permitted? The court declared such practice illegal. The court observed that mistake in issuance of death warrant has no legal impact on the earlier correctly issued warrant.

³² PLD 1952 Lahore 587

³³ 2015 P Cr. L J 1058

³⁴ P L D 1961 (W. P.) Karachi 452

³⁵ 2003 Y L R 2291

³⁶ P L D 1996 Peshawar 7

In *Fazal Din v. Taj Din*³⁷, a question came to the Federal Shariat Court regarding religious position of way of execution of death. The court confirmed the mode of hanging being Islamic.

In *Eid Wali v. The State*³⁸, the Azad J & K Shariat Court while relying on above decision of Federal Shariat Court declared execution through droopy as Islamic. The court observed that hanging of death culprit is not against the command of Islam.

Two modes of imposition of death sentence on death convict have been given in Indian criminal system i.e. one by hanging and second by shooting. After approval of death verdict, condemned prisoner is hanged in view of provision 354(5) of the Code of Criminal Procedure, 1973. However, in case of laws of armed forces i.e. It is given under The Air Force Act, 1950, The Army Act 1950 and The Navy Act 19572 that the execution of death row culprit has to be carried out either through hanging by neck till death (droopy) or by being shot to death (fire arm shot). In *Deena v. Union of India*³⁹, the Supreme Court of India in the year 1983, after taking legal assistance determined some standards for implementation of death verdict i.e.

1. Execution should be swift and humble as possible and free from needlessly anxiety of prisoner.
2. Instant unconsciousness should be the result of execution
3. Execution should be fair.
4. Element of defacement should not be in execution.

In *Smt Shashi Nayar v. Union of India*⁴⁰, while relying on *Deena's* case, apex court of India held that droopy is the slightest hurting way of implementation of death verdict.

Hanging as a way of implementation of death sentence was considered by the Royal Commission of England, appointed in 1949. The Commission preferred the method of hanging by rope to other prevalent methods of execution likes guillotine, shooting etc. It was considered certain painless, simple, expeditious & human and has advantage over all other methods.⁴¹

However, Canadian Committee on capital punishment found the method of hanging to be absolute method and recommended its replacement by electrocution.⁴²

In *Rishi Malhotra vs Union of India* on 6 October, 2017,⁴³ Indian government submitted reply to the Supreme Court of India in public

³⁷ PLD 1983 FSC 133

³⁸ 1983 PCr. L J 1418

³⁹ 1983)4 SCC 645/ AIR 1983 SC 1155

⁴⁰ AIR 1992 SC 393

⁴¹ Royal Commission Report of England

⁴² Report of Canadian Committee on Capital Punishment referred in *Deena's* case (AIR 1983 SC 1155)

⁴³ <https://www.indiatoday.in/india/story/supreme-court-capital-punishment-death-hanging-dignified-crpc-354-rishi-malhotra-1059694-2017-10-07>

interest litigation that hanging is the slightest hurting way of implementation of death verdict. Formation the implementation “overly comfortable” would create no fear in public. The Centre responded that the ways of execution i.e. lethal injection or shooting could be more brutal and crueler. As per government, death verdict is only given in the rarest of rare cases of objectionable and brutal acts. The Supreme Court observed that

“...though we do not intend to advert to the same at present, yet it may be observed, prima facie, that legislature can think of some other mode by which a convict who, in law, has to face the death sentence should die without pain. It has been said for centuries that nothing can be equated with painless death. And that is, possibly, the dignity in death.”

In *Bachan Singh vs. State of Punjab*⁴⁴, Bhagwati, J. observed while noting his dissenting view as:

“The physical pain and suffering which the execution of the sentence of death involves is also not less cruel and inhuman. In India, the method of execution followed is hanging by the rope.... No mercy can be shown to one who did not show any mercy to others. But, as I shall presently point out, this justificatory reason cannot commend itself to any civilized society because it is based on the theory of retribution or retaliation and at the bottom of it lays the desire of the society to avenge itself against the wrong doer. That is not a permissible penological goal.”

Western countries have not still opted Electrocutation or lethal gas as method of implementation of death verdict. The Royal Commission on Capital Punishment 1949-53 considered the droopy method of execution as the most suitable and gentle way⁴⁵.

In *Ichikawa v. Japan*, Vide, David Pannick on "Judicial Review of Death Penalty, page 73, the Japanese Supreme Court ruled that hanging is not 'cruel punishment' as given in Article 36 of the Japanese Constitution. However, the court further held that hanging is certainly go with by severe body suffering and hurt⁴⁶.

Warden Duffy of San Quentin, “a high security prison in the United States of America” tagged the hanging method with ruthless act⁴⁷:

⁴⁴ AIR 1982 SC 1325

⁴⁵ <https://indiankanoon.org/doc/97772801/>

⁴⁶ <https://indiankanoon.org/doc/97772801/>

⁴⁷ <https://indiankanoon.org/doc/97772801/>

“The day before an execution the prisoner goes through a harrowing experience of being weighed, measured for length of drop to assure breaking of the neck, the size of the neck, body measurement et cetera. When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken, and the rope many times takes large portions of skin and flesh from the side of the face and that the noose is on. He urinates, he defecates, and droppings fall to the floor while witnesses look on, and at almost all executions one or more faint or have to be helped out of the witness room. The prisoner remains dangling from the end of the rope for from 8 to 14 minutes before the doctor, who has climbed up a small ladder and listens to his heart beat with a stethoscope, pronounces him dead. A prison guard stands at the feet of the hanged person and holds the body steady, because during the first few minutes there is usually considerable struggling in an effort to breathe. If the drop is too short, there will be a slow and agonizing death by strangulation. On the other hand, if the drop is too long, the head will be torn off.”

In England, repetition of hanging method have fashioned a thorough graph concerning a man's weight and body status to the adequate length of drop though mistakes are still evident. In 1927, a doctor while watching two executions wrote:

“The bodies were cut down after fifteen minutes and placed in an antechamber, when I was horrified to hear one of the supposed corpses give a gasp and find him making respiratory efforts, evidently a prelude to revival. The two bodies were quickly suspended again for a quarter of an hour longer...Dislocation of the neck is the ideal aimed at, but, out of all my post-mortem findings, that has proved rather an exception, which in the majority of instances the cause of death was strangulation and asphyxia.”

In *Gian Kaur vs. State of Punjab*, the Chief Justice Verma, J. in ⁴⁸ has held:

“The “right to life” including the right to live with human dignity would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life

⁴⁸ (1996)2 SCC 648

is ebbing out. But the “right to die” with dignity at the end of life is not to be confused or equated with the “right to die” an unnatural death curtailing the natural span of life.”

In *P. Rathinam vs. Union of India and Another*, understanding of Article 21 of the Constitution was not approved by the court⁴⁹.

In a "Consultation Paper on Mode of Execution of Death Sentence and Incidental Matters", India Law Commission deliberated the different modes of death sentence through history of criminal justice delivery system.

Law Commission's 35th report submitted in 1967 noted considerable form of view for substituting 'execution of death sentence by hanging' with something more humane and "less painful way"⁵⁰. The different ways of execution were explored as;

Burning at the stake:

It was prevalent in many parts of the world, particularly in Europe. But, it was considered very cruel and barbaric. This method was lastly inflicted in Spanish Inquisition in 1834.

The wheel:

Death wheel was also one of the ways to execute a death convict by attaching him with the same and rolled over sharp spikes.

Guillotine:

This way of execution was on the name of French doctor Joseph Guillotine who suggested this method, guillotine was carried out by decapitation of the convict. It was considered less painful and quick.

Hanging and the garotte:

It was a two-step execution depending on whether the sentence intended torture or not for certain crimes. A trap/noose was used to hang for fracturing of the neck. If torture was intended in the sentence, the garotte was used. Motorized tool was used to stiffen around the neck of the criminal which resulted into unhurried choking, extending, and obstacle of blood vessels.

Headman's axe:

It involved decapitation of the convict executed with an axe or sword.

⁴⁹ (1994) 3 SCC 394

⁵⁰ <https://www.indiatoday.in/india/story/supreme-court-capital-punishment-death-hanging-dignified-crpc-354-rishi-malhotra-1059694-2017-10-07>

Firing squad:

It is still an execution method in many countries. The convict, blindfolded, is usually tied to a pole with hands or to a chair. Authorized state personals used to fire bullets on heart.

Gas chamber:

The convict is kept in an airtight gas chamber, which is filled with poisonous gases at a designated time. Death occurs to convicts in six to 18 minutes.

Electrocution:

Electric chair is used for condemned prisoner by a team of executioners pushes the buttons.

Mortal dose:

In most of the states of US, poisonous doses/drugs are injected into the death convict. There is an evolving trend in the world in favour of this method.

After analyzing all the prevalent methods of executing death sentence, the Law Commission in its consultation paper says,

"There is also significant increase in the number of countries those who have adopted the method of execution by lethal injection and today thirty five States (of the US) use this method."

Comparative table as per the Law Commission's view on execution of death sentence.

Hanging By Neck Till Death	Shooting	Intravenous Lethal Injection
1. Simple to execute	1. Simple to execute	1. Simple to execute
2. Execution process takes more than 40 minutes to declare prisoner to be dead	2. Execution process takes not more than few minutes to declare prisoner to be dead	2. Execution process takes 5 to 9 minutes to declare prisoner to be dead
3. Less scientific equipments are required.	3. Less scientific equipments are required.	3. More scientific equipments are required, they are easily available.
4. Uncertainty as to time required for the prisoner to become unconscious	4. Instant death.	4. Unconsciousness takes place immediately after the application of anesthesia and dies in sleep.
5. May cause lingering	5. Instant death	5. Not a lingering death.

In *Baze v. Rees*⁵¹, (plurality opinion), the Supreme Court of US sustained the mode of lethal injection used for capital punishment.

In *Glossip v. Gross*⁵², the highest court of America laid down the principle that using the lethal injection midazolam-killing substance to execute death convict of capital offences is not harsh and uncommon punishment. It is also not against the 8th Amendment to the US Constitution. The Supreme Court held that condemned prisoner can only avoid injection of such poisonous doses/drugs if he provides a known and available alternative method. The SC also gave history of different modes of execution in America that *at the time of the approval of the Constitution, the death sentence had legal backing which was generally carried out by hanging. To find out more humane and dignified method of*

⁵¹ 553 U.S. 35, 61 (2008)

⁵² No.14-7955576 U.S._ (2015) Also see 2015 SCMR 1601

execution, a commission was appointed by Legislature of the State of New York which suggested electrocution. This mode was approved in 1888. Considering less painful and kind style of execution, Nevada Legislature in 1921 approved another new method of execution. i.e. lethal gas.

In Gregg v. Georgia, 428 U. S. 153 (1976), when death penalty was declared constitutional by the Supreme Court of America, some States wanted a gentler style to execute death sentences and method of injecting lethal injection was implemented which now a days is the most dominant method of execution in the United States.

A “painless death” has not been surefire by the U.S. ‘Constitution’. Supreme Court of America held that American Constitution does not pledge altogether painless death to many death culprits.

United States firstly introduced lethal injection for execution. China, Thailand, Guatemala, Taiwan, the Maldives, Nigeria and Vietnam have also adopted this mode of execution. Shortage of drugs stopped Taiwan to execute the death convict by lethal injection. Same position is with Nigeria. Before abolishing death sentence in 2006⁵³, lethal injection was used in the Philippines.

Islam guarantees less painful slaughtering of animals that is why it insists to use a instant, profound cut with a very shrill knife on the gullet, cutting the wind pipe, jugular veins and carotid arteries of both sides but leaving the spinal cord unbroken.⁵⁴ On this touch stone, execution of condemned prisoner who is human being must have been more painless and humane.

Pakistan Constitution article 10-A guarantees ‘fair trial’ and ‘due process’ (fair treatment) but implication of the same is not restricted only to pending trials rather far reaching. Even condemned prisoner is entitled to fair treatment in his execution (in dignified manner). Articles 4, 14 and 25 also pledge such right.

2.2 Public Hanging

Executive may opt public place for execution of condemned prisoner for deterrent effect in view of codified laws⁵⁵ but the Superior courts of Pakistan and India have categorically disapproved public hanging of the death convict while holding that such mode of execution is not only brutal and disrespected but also against the mandate of the constitution. Pakistan and Indian Constitutions have articles 14(1) and 21 respectively to save honor and respect of a man.

⁵³ ["Lethal injection". www.capitalpunishmentuk.org.](http://www.capitalpunishmentuk.org)

⁵⁴ Mufti Muhammad Taqi Usmani, "The Islamic Laws of Animal Slaughter", White Thread Publishers, CA, USA]

⁵⁵ Section 10 The Special Courts for Speedy Trials Act, 1992. (Repealed by Act of XI, 1996), Section 22 The Anti-Terrorism Act, 1997

Article 14(1) says “The dignity of man and, subject to law, the privacy of home, shall be inviolable.”

Article 21 of the Indian Constitution reads as:

“No person shall be deprived of his life or personal liberty except according to a procedure established by law.”

Only place of execution of condemned prisoner provided in rule 354 of Pakistan Prisons Rules 1978 is the District Prison in which the prisoner was sentenced.

Human Rights Universal Declaration in Islam⁵⁶ states:

“The right of protection from torture. (a) It is not permitted to torture the criminal, still less the suspect: God will inflict punishment on those who have inflicted torture in this world”.

Under custody male or female is a human being, and he/she has the self-respect and liberty, as defined by Allah.⁵⁷

Public execution’ for Zainab’s killer was the demand of public at large. Senate failed to reach an agreement for enactment in favour of public hanging. However, the Senate Standing committee on Law and Justice sent a proposed amendment in ‘PPC’ regarding criminals abducting children for murder to the Council of Islamic Ideology for its opinion. In view of The Council, there is no need to amend laws qua ‘public execution’. It referred “The Special Courts for Speedy Trials Act, 1992” section 10 and Pakistan Prison Rules, 1978 rule 364 but this Act has been repealed by Act No. XI, 1996. It further opined that rule 364 allows gathering of twelve reputable major males to see execution either in or outside of a ‘jail or gallows inclusion’⁵⁸.

In *Suo Motu Case* ⁵⁹, the Supreme Court of Pakistan declares that every man has untouchable honor, therefore, even execution of worst criminal in public shall negate the self-esteem of man as article 14 of the Constitution gives assurances to the dignity of man.

In *Muhammad Ameen v. GOP and others*⁶⁰, the Lahore High Court was approached by father of the victim to hang in public the murderer and rapist of minor girl Zainab (*Imran Ali v. State*)⁶¹. The court while referring article 14 of the Constitution declared public hanging as barbaric penalty and against the dignity of the convict.

⁵⁶ Article 7 of Universal Declaration of Human Rights in Islam published in London on April the 12th, 1980

⁵⁷ <https://www.al-islam.org/rights-prisoners-islamic-teachings-sayyid-muhammad-sadiq-al-shirazi/chapter-4-rights-prisoner>

⁵⁸ <https://www.dawn.com/news/1390060>. Also see Article published in Dawn, February 18th, 2018

⁵⁹ 1994 S C M R 1028

⁶⁰ P L D 2019 Lahore 330

⁶¹ 2018 SCMR 1372

The court further observed that this type of hanging will not only endanger the life of the culprit before his execution but also the lives of the public due to chance of public violence.

India law commission in its 35th report has expressed against the introduction of practice of public hanging in India.

In *Devi Attorney General of India v. Lachrna*⁶², the court ruled that ferocious offence requires no barbaric penalty such as public hanging.

The Supreme Court of India⁶³ in its judgment in *Gian Kaur versus State of Punjab* held that Article 21 of the Constitution is also available to a death convict. It had ruled that "the right to die by a dignified procedure of death is a fundamental right."

2.3 Postponement of Execution

The question whether the execution of sentence of death can be postponed or commuted, the answer is yes. Relevant provisions have been mentioned in the Constitution of Pakistan⁶⁴, Criminal Procedure Code⁶⁵, Pakistan Penal Code⁶⁶, High Court Rules and Orders⁶⁷, Prison Rules and judicial verdicts⁶⁸.

The most relevant provision in Pakistan qua issuance of 'Black Warrant' is section 381 'Cr.PC' which says that

*"When a sentence of death passed by a Court of Sessions is submitted to the high court for conformation, such Court of Sessions shall, on receiving the order of confirmation or other order of the high court thereon, causes such order to be carried out into effect by issuing a 'Black Warrant' or **taking such other steps as may be necessary**"*

The words 'taking such other steps as may be necessary' are significant. These empower the Court of Sessions to opt other steps which are necessary in matter of execution. Even execution of death convict may be deferred under this provision by the court of Sessions .

Earlier section 381 including various other provisions concerning crimes against human bodies was declared offensive to the command of Islam⁶⁹ but later on proviso to section 381 'Cr.PC' was added to make

⁶² AIR 1986 SC 467

⁶³ (1996)2 SCC 648

⁶⁴ Article 45 The Constitution of the Islamic Republic of Pakistan, 1973

⁶⁵ Proviso of section 381, 382 of The Code of Criminal Procedure, 1898,

⁶⁶ Section 307,314 The Pakistan Penal Code, 1860

⁶⁷ Note under rule (ii) of chapter 20-F Part-F of RULES AND ORDERS OF THE LAHORE HIGH COURT, LAHORE VOLUME -III (INSTRUCTIONS TO CRIMINAL COURTS)

⁶⁸ Rules 347 to 350 of chapter 14 (Prisoners under sentence of death) Pakistan Prison Rules, 1978

⁶⁹ PLD 1983 Supreme Court 633

this provision in accordance with command of Islam. Even at the eleventh hour before imposition of the penalty, it can be stopped if the heirs of the deceased forgive the condemned prisoner or make a settlement with him.

The offences under provisions of 'PPC', which are compoundable, have been enlisted in the first two columns of the table of section 345 'Cr.PC'. However competent person may also contract on behalf of minor, idiot and lunatic with leave of the court. After conviction, only the court, where appeal is sub-judice, is competent to grant permission for compromise. Permission to compromise offence may be granted by High Court as per provision 439 'Cr.PC' and trial court in view of provision 439-A 'Cr.PC'. Effect of such agreement is acquittal.

In *Abdul Rashid v. The State & others*⁷⁰, the Supreme Court of Pakistan was confronted with a question of competency of legal heirs of the deceased to enter into compromise with the convict. In this landmark judgment for the first time, it was held that even successors of deceased legal heir, who till last breath did not compromise with victim' are very much capable to compound and rule of estoppel shall not apply to prohibit such successors.

All legal heirs of the deceased victim must enter into compromise in case of conviction has been awarded as Ta'zir. Incomplete compromise may not disturb conviction of the convict in a case of Ta'zir but in the circumstances of a given case, it may be one of relevant factors to commute and decrease quantum of punishment.⁷¹

Although Anti-Terrorism Act, 1997 section 7 cannot be compounded but for the 1st time, apex court has held that quantum of said sentence could be examined on odd facts. The court commuted death verdict into imprisonment for life.⁷²

In *Hassan & others v. The State & others*⁷³, the Supreme Court of Pakistan has settled that after fatiguing all remedies by the convict, the Government may postpone execution during pendency of mercy petition. If delay in exhausting judicial remedies is on the part of death convict, benefit of principle of expectancy of life cannot be stretched to him.

In *T. V. Vatheeswaran v. The State of Tamil Nadu*⁷⁴, it was declared by the Supreme Court of India that if the sentence of death passed against a convict on the charge of murder was not executed within a period of two years then the sentence of death ought to be quashed and reduced to imprisonment for life because such delay in execution of the sentence of death militated against the convict's

⁷⁰ 2013 S C M R 1281

⁷¹ 2015 SCMR 1064, 2016 SCMR 116, 2001 SCMR 232, 2002 Y LR 50

⁷² P L D 2014 Supreme Court 383, PLD 2014 Supreme Court 809

⁷³ P L D 2013 Supreme Court 793

⁷⁴ AIR 1983 SC 361(2)

Fundamental Right to life and liberty guaranteed by the Indian Constitution. The said judgment was, however, quickly overruled, and understandably so, by the Supreme Court of India in the case of Sher Singh and others v. State of Punjab⁷⁵

In case of Shashikant Parmar, the court held that the value of delay as mitigating factors depends upon the features of the particular case. It cannot be divorced from the diabolical circumstances of the crime itself⁷⁶.

In Dhananjay Chatterjee⁷⁷, the court did not consider the factor of delay as mitigating factor and sentenced him to death.

In Jumman Khan v. State of UP⁷⁸, the court did not consider delay not being undue. In Madha Mehta⁷⁹, it was held that no fixed period of delay could be held to make the sentence of death in executable

In Muhammad Yaqoob v. Superintendent and 4 others⁸⁰, the Lahore High Court was involved in a question whether execution of condemned prisoner may be deferred due to pendency of summary sent by the Prime Minister to President of Pakistan for commutation of death sentence awarded to all condemned prisoners into that of imprisonment for life which is pending there? The court has laid down that mere pendency of summary in this regard is no ground for stay of execution of the convict.

In Jamshed Nawaz v. Sessions Judge and 2 others⁸¹, the Lahore High Court although admitted authority of the President given under the constitution of Pakistan to grant pardon, amnesty, break, set aside, hang or convert any sentence awarded by any court of law but also laid down that omnibus order granting such relief to whole of the class of condemned prisoners without any specification is not the intention of the Constitution. The act of not executing the death convict due to reason of pending consultation of the President and the Prime Minister without any suspension order of the President was declared ultra-constitutional.

The President in Pakistan has full authority to give amnesty under article 45 of the Constitution. Even he may stay execution of death convict.

In Mst. Bhag Sultan and others v. Superintendent and orthers⁸², the Supreme Court of Pakistan has interpreted how mercy petition must be decided. It says that mercy and justice cannot be completely

⁷⁵ AIR 1983 SC 465

⁷⁶ hanged on Sept.6.1989

⁷⁷ AIR 1994 SC 3454

⁷⁸ AIR 1991 SC 345

⁷⁹ AIR 1989 SC 2299

⁸⁰ 2008 P Cr. L J 1709

⁸¹ P L D 2015 Lahore 391

⁸² 1979 S C M R 292(1)

separated from each other and during exercising mercy power; the question whether justice has been done to the parties is also a relevant factor.

In *Muhammad Ayub Khan v. Superintendent etc.*⁸³, the apex court while dismissing petition has given principle that discretion of the President in mercy Petition cannot be interfered.

In *Nazar Hussain and another v. The State*⁸⁴, the Supreme Court of Pakistan admitted un-fettered supremacy of article 45 of the constitution. The court observed that the President has authority to pardon and other powers as enshrined in said article as an act of grace in special cases. A State seems to be defective and *scarce in its political morality without exercise of power of leniency by the President. This power also ensures rectification of unjustified severity in sentencing (if any). One of the objects of pardoning the convict is to realize his sin and to transform him in straight, law-abiding citizen. This authority of President is in fact for the dignity of the State.*

Execution of sentence of death is liable to be deferred till confirmation by the Honorable High Court in view of section 374 Cr.P.C.

2.4 Mental Illness: Deferment of Execution and Commutation

Due to any mental illness of death row prisoner, his medical situation and in special conditions, the Superintendent has discretion to postpone the execution after intimating the same to the Provincial Government and awaiting further orders to send him in mental hospital in view of Rules 445 to 447 of Prison Rules, 1978. However, rule 444 is the basic provision which provides modus operandi for getting the approval from Government before sending a convict, who is of unsound mind, to the mental hospital.

In *Mst. Safia Bano v. Home Department Punjab & others*⁸⁵, the Supreme Court of Pakistan also discussed the above rules and for the first time has declared that "Schizophrenia" is not a everlasting psychological sickness but somewhat it is an unevenness, increasing or decreasing in nature, contingent on the near of pressure which can be cured with medicines by vigorous mental and community supervision, and therapy. The Supreme Court observed that on the ground of psychological disease, infliction of death penalty cannot be stopped or delayed which had achieved inevitability up to the level of the Supreme Court, and when mercy petition of convict had already been dismissed by the President.

⁸³ 1979 S C M R 302

⁸⁴ P L D 2010 Supreme Court 1021

⁸⁵ P L D 2017 Supreme Court 18

In *Mst. Nusrat Perveen v. Home Department and others*⁸⁶, the court decided the question of physical disability of condemned prisoner while dismissing his writ petition⁸⁷ in terms that it is no ground to postpone his execution.

In the case titled '*Shafqat Hussain v. President of Pakistan and others*' Civil Petition No.1127 of 2015, the Supreme Court of Pakistan dismissed the Appeal on 10-06-2015 and held that when all legal remedies have been exhausted then there will be no legal justification to suspend an execution and matter should be treated as per local law and International law should be kept aside.

In a case titled '*Maqbool Hussain @ Jamala Dogar v. FOP & another*' in Writ. Petition. no.19907 of 2015 vide judgment dated 12.8.2015 the High Court did not stay the execution of an accused who had a similar plea that he could not be executed as he had lost both his legs. The Review Application No.76 of 2015 (2016 CLC 219) was also dismissed by this Court on 20.8.2015.

In *Naveed Hussain through Mother v. The State and 2 others*⁸⁸, Gilgit-Baltistan Chief Court rejected petition of convict of capital punishment due the reason that he has already knocked all the doors of concerned forums including mercy petition which have met with failure.

In January 2019, the apex Court of Pakistan on the source of media news stayed execution of death warrant of allegedly mentally disabled death prisoner 'Khizar Hayat' till further order while observing that the matter involved basic human rights.⁸⁹

Similarly, the Supreme Court of Pakistan, in 'Constitutional Petition' filed by the mother of allegedly mentally ill death row prisoner 'Ghulam Abbas', has granted stay on his execution.⁹⁰

In *X v. The State Of Maharashtra*⁹¹ decided on 12 April, 2019, the apex court of India in its recent decision considered issue concerning post-conviction mental illness as a justifying aspect for converting a demise sentence to life imprisonment and observed that due to psychological sickness, implications of actions cannot be comprehend by the death row prisoner, therefore, the execution would lessen the magnificence of law.

⁸⁶ P L D 2016 Lahore 153

⁸⁷ Article 199 The Constitution of the Islamic Republic of Pakistan, 1973

⁸⁸ 2017 P Cr. LJ 1339

⁸⁹ <https://www.dawn.com/news/1457178> (published in January 13,2019)

⁹⁰ <https://www.geo.tv/latest/240607-sc-stays-execution-order-of-mentally-ill-prisoner> (on aired on June 17,2019)

⁹¹ <https://indiankanoon.org/doc/155869274>

Supreme Court of America in *Atkins v. Virginia*⁹², while dealing with the question whether the execution of mentally retarded persons is "cruel and unusual punishment" banned by the 8th Amendment?' The Court observed that hanging psychologically disabled or retarded neither increases the deterrence effect of death penalty nor does the non-execution of the mentally disabled will measurably impede the goal of deterrence.

In *Hall v. Florida*,⁹³ the apex court of America laid down that a positive-line IQ edge requirement' for determining whether someone has an 'intellectual disability' (formerly mental retardation) is **against the constitution in determining whether they are qualified for the [death penalty](#)**.

International Covenant on Civil and Political Rights (ICCPR) articles 6 and 7 **postulates that** life is essential right of every person. He cannot be underprivileged qua such right as the same is saved by law. He should not be exposed to pain or to harsh, cold-hearted or humiliating handling or punishment. Mentally retarded person cannot be executed due to customary international law. There should be no death sentence for the mentally ill person as it is the opinion of large number of global human rights institutions. Numbers of resolutions have been adopted by The UN Commission on Human Rights advising not to impose death sentence on mentally sick persons. In either case, such principles are applicable i.e. whether the person was psychologically sick or logically incapacitated even at the time of the supposed crime.⁹⁴

2.5 No execution of pregnant woman death convict

In case of pregnant female convict, under section 382 Cr.PC, it is mandatory for the High Court to postpone or defer the execution of the sentence but it is its discretion to convert the ruling into imprisonment for life if it thinks fit.

There is mirror provision i.e. rule 348 of Pakistan Prison Rules, 1978 which states that before execution of death penalty, if pregnancy of woman condemned prisoner is certified by Medical Officer, it is mandatory obligation of Jail Officials to return her Death Warrant after mentioning said fact thereon to Sessions Judge who is authorized to postpone the execution awaiting the orders of the High Court.

Section 314(3) 'PPC' states that for the period of 2 years next to birth of baby, execution of qisas of pregnant female can be deferred after consultation of court with authorized doctor and throughout that time she may be given bail on subject to security to the approval of the Court. However, her detention shall be considered as simple punishment if she is not set at liberty on bail.

⁹² 536 U.S. 304 (2002)

⁹³ <https://supreme.justia.com/cases/federal/us/572/12-10882/> . 572 U.S. ____ (2014).

⁹⁴ <https://reprieve.org.uk/what-does-international-law-say-about-the-death-penalty-and-mental-illness/>

2.6 Government may suspend execution

In view of Note under The Lahore High Court, Rules and Orders Volume III (Instruction to Criminal Court) chapter 20-F Part-F rule (ii), the Government may suspend the execution of Black Warrant for further orders in connection with execution of sentence. Sessions Judge shall have no concern with the same.

3. Suggestions

- (a) Legislature and Government should amend relevant laws pertaining to adopt more decent, quick and easiest way for execution of death row convicts.
- (b) The Supreme Court of Pakistan may constitutionally intervene in such a public importance matter to check validity of laws relating to ways of carrying out of capital punishment through droopy particularly in view of “articles 4, 10A, 14 and 25 of The Constitution of Islamic Republic of Pakistan, 1973.”

4 Conclusion

The crux and conclusion are that the only and the main style of implementation of death convict in India and Pakistan is hanging by neck to death but there is less painful and more humane mode for execution i.e. lethal injection. Moreover, constitutions of Pakistan and India assure dignity of man. There are also many sane voices to shift to some other mode of execution i.e. ‘lethal injection’ which is more painless, quick, easiest and humane than other methods of execution. However, there is no room to execute the death row convict in public as settled by superior courts of Pakistan and India. Moreover, in Islamic criminal jurisprudence, due to compromise of legal heirs of victim with the death prisoner, not only his execution may be deferred but his sentence may be terminated with result of acquittal or commuted as the case may be. Death conviction does not mean that he has lost all his legal rights in way of execution, its postponement and commutation. Minors and pregnant death convict woman cannot be executed. Similarly ‘insanity’ even developed after confirmation of death sentence may be a medical ground for rescheduling of his execution, its termination and commutation. Constitutional courts may also intrude in any illegality in the mode and manner of execution because the right to dignity of a condemned prisoner is not liable to give up with the ‘judges’ ink’, rather, it survives sound beyond the prison gates and functions until his last sniff.

Essays

(8) COURT MANAGEMENT, BAR AND BENCH RELATIONS

By

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Undoubtedly Court Management and Bar & Bench Relation is an intricate, complex and sensitive issue our courts and lawyers are facing at District Level Judiciary in Punjab. Although both these topics need to be discussed independently yet these are so jumbled, interlinked and intertwined that have become concomitant to be discussed jointly. Being District Judge Lahore I had the occasion, opportunity and privilege, to deliver umpteenth lectures regularly for the last couple of years on this topic in Punjab judicial Academy to different batches of judicial officers of Punjab and AJK. The participants were so receptive and feedback was so encouraging that I felt tempted to write down all my experiences through this article.

2. Before proceeding further I want to clarify with certainty that I did not get any help from any book or even from internet; whatever is going to be discussed in this article is exclusively based upon my personal experiences and observations stretching over over 36 years of my judicial career. During this marathon career I served in almost all parts and regions of province.

3. Undeniably there are people of different temperaments and behaviors in different parts of the province. A judicial officer may not face any unsavory treatment from Bar while serving in any remote area of South Punjab as compared to in the central Punjab or in any big city of any part of the province as parameters and dynamics of Bench and Bar relations varies from place to place. The most significant aspect to maintain a congenial and harmonious atmosphere in Court is the conduct of the judge/presiding officer. A judicial officer if competent, having command over law and procedure with slight element of sagacity can manage his court more appropriately and befittingly as compared to a judicial officer who is slow in comprehending or lacks the ability to handle his cause list orderly and swiftly. Instances abound where we find the judicial officers holding the courts properly having command over their job. A judge needs to be more a listener and less an inquisitorial.

4. Professionalism is the key to success. If a presiding officer is punctual in attending and leaving the court, he is available in the court hours in his court room he will face less problems as compared to an officer who joins his court late and then makes him unavailable to the lawyers and litigants. I have personally observed especially in Lahore

and other big cities that lawyers can't wait for the Judge to come and listen to them. Sometimes they lose their patience and then ugly situation emerges. The best option for the judicial officers is to firstly exhaust cause list and then to take a rest if it is actually required. A presiding officer not available in the court and leaving the job to the court officials is bound to invite trouble sooner or later. There are variety of reasons to augment this contention. The lawyers generally having engagements in different courts located in different premises, their urgency and impatience is understandable. Similarly, sometimes they have serious parking problems outside courts which force them to approach the court on foot covering sufficient distance. Just imagine that in such a scenario if the presiding officer is not in the court and they have to deal with the officials there is every likelihood of any untoward incident being happened in that Court.

5. Politeness is the next important tool to keep the things cool and calm during court proceedings. A judicial officer having the ability to keep his temperament cool and calm always gets approbation and appreciation and is able to control even the ugliest situation. Needless to point out that we are living in an intolerant era. On very petty issues murders are being committed all around. The lawyers and judges are also part of this society and so are bound to be affected by this phenomenon of intolerance. Only a balanced judge is capable to maintain equilibrium, a sense of proportion and tranquility in his court.

6. With the benefit of hindsight let me say that the best way to avoid any untoward situation in the court is to speak softly, handle the court wisely, demonstrate patience and endurance, exhibit tolerance and learn to smile even in the toughest situations. I know many of my colleagues suffering from different diseases at very young age. They get from their job especially hypertension, diabetes and even heart attacks. It is really disconcerting to observe that during last two / three years we have lost about eight / nine judicial officers in Punjab majority of them was quite young. A couple of whom suffered heart attack or brain hemorrhage while sitting in the court. It manifestly demonstrates the level of pressure and unfriendly working ambience our judicial officers are facing. It is a matter of common observation that a relief giving judicial officer commands more respect and honour from Bar as compared to an officer generally known as miser in relief giving. A judge more articulate and having clarity of thought and vision is an asset for the institution. A judge prompt in decision with logic and reason with a bit beauty of language with positive frame of mind is always considered a star judge at the station of his posting.

7. Now comes the question how to avoid any untoward situation in the court. It is difficult rather impossible to make any prediction or scientific assessment pre hand of any such situation. It may happen even in the court of the most intelligent and competent judge. The judge is only required to remain mentally alert to deal with any such situation. No need to reply every irrelevant thing in the court, no need to take any lawyer or even litigant lightly and taken for granted and no need to speak

lightly to ridicule and lampoon any body and don't deride the caliber of any lawyer appearing before you as retaliation and counter attack may be beyond proportion. Right from inception of human being nobody ever could measure the level of retaliation which may come under any adverse situation or even reaction to any remarks uttered even in the most friendly and frank manner.

8. One thing must be kept in mind that the most difficult task in this world is to resist the temptation to outwit anybody with any sort of skill or competence and to conquer the hearts of people which is only possible by maintaining high level of morality and ethics based upon tolerance and forgiveness. If we know the art to forget and forgive life will be much easier and comfortable. I think this should be the spirit of each judicial officer and rest assured you will not face any ugly situation in life. The inflexible attitude and stubborn behaviour often bring embarrassments whether he is a judicial officer or a lawyer. Here a significant question arises how to tackle and prevent some ugly situation in the courts. Tackling of such ugly situation is entirely different to that of preventing it. It is generally observed that there are two forms of ugly or untoward incidents in the courts. One is premeditated the possibility of which is rare but cannot be ruled out. In my view any attempt to defame or assault any judicial officer with premeditation should not be acceptable under any circumstances. While the other category is that some ugly situation emerges at the spur of the moment. That is also not desirable or tolerable but here due to any act or omission of the court or the ancillary staff or due to any indecent remarks by lawyer sometimes situation emerges all of a sudden and if not tackled promptly and tactfully the situation becomes grave and beyond control

9. Here role of District judge matters a lot. A District judge is not supposed to sit as a silent spectator. The moment he apprehends any such situation he should play his role and his timely intervention would defuse the situation. District judge has a pivotal role in the District of his posting. Bars at District level normally have faith and trust in leadership of District Judge and he should play a parental role; not lopsided but balanced and wise. It is in my personal experience over the years that if a District Judge commands respect from Bar then even in the big cities like Lahore and Faisalabad things are still manageable. Sometimes we try to pass the buck to High Court but without any fear of contradiction it may be observed that while working in different seven districts as District Judge during the post lawyers movement era when the situation was really difficult and vulnerable the Honourable Lahore High Court gave a free hand to me. Resultantly I never referred any matter to High Court and tackled even the most difficult situations especially at Lahore, Faisalabad and Kasur at my own level, something unprecedented and exceptional in the judicial history.

10. The Honble Lahore High Court is already focusing on the training of the judicial officers not only in the country but abroad as well. We can develop proper aptitude and ethics only through training of our young officers by inculcating the spirit of professionalism. We

need to evolve a sustainable system to ensure grooming and mentoring of our judicial officers to demonstrate their skills and abilities more appropriately and befittingly.

11. As far as Bar is concerned unfortunately role of seniors and professional lawyers has been subdued or partly eclipsed due to variety of reasons. The aftermath of lawyers movement has made the youngsters in every Bar so proactive that practically they are dominating the affairs of Bars and seniors have almost become dormant or ineffective; a very important reason in deterioration of the Bench and Bar relations which were once very ideal and I have seen it in early eighties at the start of my career as civil judge. It is my considered view that things are not ideal at the moment but have not gone beyond control. We just need to admit the reality and be ready to face the situation.

12. It is the duty of Bar Associations especially their apex bodies to suggest ways and means to improve the situation. The unabated and free entry in the profession should be regulated with proper training of young lawyers before starting actual practice. The scope and leeway of disciplinary proceedings against the arrogant and indecent behaviors at Bar level having practically vanished and evaporated needs to be revisited at the earliest. Unless some effective and meaningful mechanism of accountability is evolved in the Bars no positive change in the behavior and attitude of any such element would be in sight. The leadership of Bar Associations will have to rise above their personal interests of their internal politics in Bars to make and implement some stringent rules to deal disciplinary matters more effectively. I may share it with full responsibility that saner and professional members of Bar are also not happy over such like attitude of very few Lawyers giving bad name to a very noble profession once known as profession of Lords. There is no denying the fact that Justice Sector needs a cordial, congenial and peaceful atmosphere which has no unilateral solution but needs some comprehensive, well thought out, professional and planned strategy to be evolved by The Honorable Superior Judiciary and Pakistan Bar Council. The sooner it is pondered over, the better it would be for dispensation of Justice and for the institution as a whole.

(9) PRAGMATIC APPROACH FOR IMPLEMENTATION OF ADR IN PAKISTAN

By

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ABSTRACT

Alternative Dispute Resolution comprises of modes, we may use for resolving issues, which include Arbitration, Mediation, Conciliation and Negotiation. The prevailing judicial system meant for dispensation of justice, long ago has lost its effectiveness, enforcement and pace due to delays being caused for multiple reasons. It is now need of the day that we must adopt certain other modes in addition to conventional justice system, for lessening the miseries of litigants, in particular and public at large, in general. Anyhow, for shifting some of the burden of conventional courts over ADR, there exist various impediments which are required to be removed or addressed for proper implementation of ADR in our country.

INTRODUCTION

In the last few decades, the concept of using ADR methods for resolution of disputes, has gained enormous popularity. Pertaining to question, as to if it is result of disadvantages of formal system of resolution of disputes i.e., the conventional court system or the same is result of advantages of informal system of removal of conflicts i.e., resolution of disputes through various modes of ADR, one may argue in favor of former view and the other may support the latter but according to my humble opinion, both the theories are the basics of adopting ADR for the purpose of obtaining resolution of disputes through speedy & low-cost modes as well as for shifting the burden of formal courts in order to clear huge back-log and to provide the litigants/disputants some other forums where they may achieve the resolution of their disputes through less-expensive, less-time-consuming, less-stressful and non-adversarial mechanism which are more effective, more acceptable, long-lasting, amicable and these resolutions remain successful to end the litigation once for all while preserving prevailing good relations and further developing cordial relationships for future deals. As such, on one hand, the formal justice system characterized by delays where normally grandson gets fruits of the efforts of grandfather and on the other, an effort to promote a less formal dispute resolution mechanism, results in growth and development of ADR system for resolution of disputes, so, it is very safe to declare that this growth, popularity & development is not

merely the outcome of any juristic philosophy, intellectual work or wisdom-based idea, rather it was the necessity which became mother of invention for discovery of ADR modes from the past history of human beings when such like modes were the major forums of resolution of disputes, not only, amongst people, but also, amongst the states.

DISCUSSION

Judicial systems for dispensation of justice, all over the world have common objectives so almost all the judiciaries have been facing same kind of issues for the last so many years/decades and for this common cause, all over the world, the concerned authorities started thinking on same lines i.e., searching some new or already experienced ways or means in order to achieve the targets of dispensation of justice as expected or as per the need of time. This universal type of effort gave rise to need of implementation of ADR modes in addition to formal court system for resolution of disputes. ADR is not new, novel, strange, impracticable, un-reasonable or some sort of idealistic theory rather it has history of long-standing usage and a record of very good results in the past. What we have to do now is just to adopt this system with all the bona-fide, to take necessary measures for its proper implementation, to train the experts for the purpose and with the help of Civil Society and Non-Governmental Organizations, try to change the culture & mind-set of litigants/disputants in particular and that of society as a whole then that day is not so far when we will be having the fruits of this system.

It is very natural phenomenon that whenever we divert to a new path, we may come across various questions as to what are the advantages in choosing the new way and what may be the probable disadvantages, what are the reasons due to which we are going to a new route instead of already available way-course. Most importantly, relating to topic in hand, pragmatic approach for implementation of ADR in Pakistan, it is in the fitness of things to study the draw-backs of this system so as to suggest some devices, improvements and techniques to over-come the deficiencies. In this regard, luckily we have the golden words of top most jurists of recent times which not only point out the deficiencies of the system but also the mindset of society and lastly they have blessed us rays of hopes, so we have to follow their footsteps i.e., the sayings of Mr Justice Tassaduq Hussain Jillani, Honourable 21st Chief Justice, August Supreme Court of Pakistan and Mr. Justice Mustafa Kamal, Honourable 10th Chief Justice of Bangladesh, they addressed at various occasions:-

1. *“We (Pakistani) are a vibrant society in transition. There are strains of societal divide, cultural, economic, political, sectarian and ethnic. This divide feeds the downside of adversarial Legalism. There is a need to promote consolidation, concord and search for alternatives in every arena of social divide. This would require a mind-set, a culture and institutional support. ADR is an attempt in the judicial and quasi domains to promote these values and these institutions. Not understanding the need for more resources for the*

administration of justice, I am of the considered view that the problems of backlog and delayed justice cannot be tackled unless there is an attitudinal change in the main actors of the judicial process i.e. the Bench, the bar and the litigant public. Case management and alternative dispute resolution primarily aim at bringing about this attitudinal change. The process has to commence at the basic level i.e. at the subordinate judiciary level. The subordinate courts are the back-bone of the entire judicial hierarchy. It is here that the concept of rule of law confronts the first trial; it is here that more than 95% of cases are filed and pending; it is here that the impressions and conceptions about the judiciary take shape; it is here that people in litigation suffer for months, years and decades and spend the best part of their lives waiting for that elusive justice which at times is delayed, at times denied, and at times is bitter with expenses it entails”.

2. *“Principally, like ground-breaking exercises, ADR requires a promoter or crowd of motivators all over the country. For applied reasons, it is not promising for an acting Judge to devote extra time, energy and strength to undertake this role. Superannuated Judges who are valued by both the Bar and the Bench should come ahead to give headship. That will be paying back to the Bar and the Bench a minor chunk of the debt they owe to the Bar and the Bench for the honour given to them throughout their functioning life. Same is for senior lawyers. Infrequent determination of few years cannot take root. Generations of lawyers and Judges are essential to give their non-stop labour to mark ADR a vital part of judiciary. Secondly, to make ADR successful, a sound thought-out action plan is required. It is not anticipated that a rush of mediation should incline upon the Courts entirely. The Courts firstly ought to refer comparatively simple cases to mediators. A simple case is one that needs the minimum judicial intervention to adjudge upon facts and law. A comparatively composite case is one that needs a little extra judicial exertion to determine facts and law. Following these standard, simple cases should be referred first. With skill increased, comparatively composite cases can be brought for mediation. It is not possible and should not be the ambition of anybody to accomplish anything rapidly.”*

CONCLUSION

As discussed above, undoubtedly various modes for resolution of conflicts are gaining popularity day by day and litigant public while assessing the benefits of ADR modes are diverting to these ways rapidly in whole of the world. Anyhow for successful implementation of ADR in Pakistan, we have to study the concept of ADR, its pros & cons, advantages & disadvantages. We have to look into that why these modes are not so successful in Pakistan despite so many efforts made in this regard in the past and even at present, efforts are still going on. In this regard, we have to follow the guidelines available in the above quoted paragraphs i.e., we need,

- change of mind set and culture
- institutional support
- promoters and crowd of motivators
- Mediators like superannuated judges and senior lawyers
- Sound thought-out action plan

The above mentioned suggestions for successful, result-oriented implementation of ADR in particular and for development/growth of ADR, in general are undoubtedly a few on the track and for the time being as per the prevailing circumstances, these are not the cent percent solutions of all related issues as with the passage of time, situations change, so we have to evolve new strategies according to changed circumstances. There must be think-tanks to ponder upon day to day changing environments, incoming needs and future requirements pertaining to ADR system of resolution of disputes so that it can be kept going on with the pace of time and not to become another example of formal court system, not delivering up to the expectations and as per needs of the day.

REFERENCES:

An article on, "Delayed justice & role of ADR" by Mr. Tassaduq Hussain Jillani, former Chief Justice of Pakistan.

An article on successful implementation of ADR by Mr Mustafa Kamaal, former Chief Justice of Bangladesh
