Punjab Judicial Academy Law Journal

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Editorial Team
Punjab Judicial Academy
Law Journal

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Punjab Judicial Academy Law Journal (PJALJ)

Introduction:

The Punjab Judicial Academy (PJA) has been established under the Punjab Judicial Academy Act, 2007 as an autonomous body. PJA is a premier training institution to train judges and court staff in the Punjab. Under the guidance of the Board of Management, academic and administrative affairs are run by the Director General, PJA with the support of faculty and staff.

There are multiple means of training and dissemination of knowledge. Publication of law journal is also one factor to promote research based knowledge. To publish law journal and promote research are the statutory functions of the PJA.

Scope & Aim of Law Journal (PJALJ):

The Punjab Judicial Academy Law Journal (PJALJ) is a research based journal which is published by the Research & Publications Wing of the Punjab Judicial Academy in English Language. The 1st Punjab Judicial Academy Law Journal (PJALJ) has already been published and 2nd Law Journal is on its way to publication.

The aim of the Law Journal is to provide a forum to judges, writers, academicians and thinkers from the fields allied to the administration of justice so as to share their ideas and experience on different legal aspects and issues. The articles published in this Research Journal undergo

initial editorial scrutiny, plagiarism test and then sent for peer-review to the experts and further reviewed by the members of the editorial board.

Guidelines for Contributors

Contributors:

Keeping in view the objectives of Law Journal, contributions/manuscripts/articles are received from following categories of individuals:

- Hon'ble Judges of the Superior Judiciary and the District Judiciary.
- Persons holding the judicial office or discharging the judicial functions.
- Judicial trainers from all Judicial Academies of Pakistan.
- Writers, thinkers, academicians from the fields allied to administration of justice and
- Court staff

Contents of PJALJ:

The Punjab Judicial Academy Law Journal receives following form of writing for publication:

- Research papers, articles and essays,
- Case notes,
- Legislation reviews,
- Book reviews

Format of PJALJ:

- The articles should be composed in M.S. Word format in Times New Roman font size 12, in double space. Manuscripts in PDF form are not acceptable.

- Authors are required to submit an abstract not more than 200 words along with the manuscript.
- Manuscript may be sent through email as attachment and complete detail of author including name, designation, mailing address, email address, contact number and institutional affiliation should also be mentioned.
- Writer's brief CV may be provided while submitting an article for the publication first time.
- All articles undergo through an initial editorial scrutiny and plagiarism test. Thereafter, these articles will be sent to two experts in the field for their critical assessment. The Editorial Board of PJALJ takes the final decision to publish an article and is not bound to explain the reasons for its decision.
- The Editor reserves the right to change, modify or edit the paper before publishing it or send the article to the writer to do so where it deems necessary.
- References should be inserted as footnotes and numbered consecutively. The Chicago Manual of Style Sixteenth edition (footnotes) should be followed.

Originality and Co-authorship:

- Writing submitted to PJALJ must be original and must not be under consideration for publication or published elsewhere.
- PJALJ permits Co-authorship/Multiple authorship.

Nature of Contributions:

- The length of research articles, papers or essay should be between 4000 to 6000 words which should be thoroughly researched and referenced.
- Case notes should be between 2000 to 3000 words;
- Legislative review should be between 2000-4000 words;
- Book reviews should be between 3000-5000 words

How to Submit:

Manuscripts may be submitted at submit@pja.gov.pk. Other editorial correspondence may be addressed to the Director, (Research and Publication)/Editor, Punjab Judicial Academy 15-Fane Road Lahore.

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(Bushra Zaman)
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(1) Book Review -
Book Name: "The Law of Criminal Procedure"
Author: Justice (R) Fazal Karim

By

Akhtar Abbas Khan[1]

"The Law of Criminal Procedure," by Mr. Justice (R) Fazal Karim nearly surpasses all legal literature resources present for our use with panoply of legal propositions and brilliant literary pieces. It is a masterstroke by the author which is a treasure for members of legal fraternity and a valuable addition to their library. The eloquent words and the detailed analysis captivates the interest of the reader and though, I read it thrice, the beautifully penned down intriguing details about criminal procedure fascinated me more in each round.

The book pre-eminently contains an intricate discussion on the Constitution of Pakistan with detailed analysis of the constitutions of other Common Law jurisdictions, especially, with reference to the US Constitution which is a codified set of norms similar to the Constitution of Pakistan and mostly developed through decisions of the Judges of the US Supreme Court. The author primarily analyses the constitutional provisions containing the criminal procedural norms in the two Common Law countries and then unravels the crucial rules of interpretation of the Constitution

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and the Criminal Procedural Law. He also observes that the superior courts while rendering the critical decisions referred in this book had a dearth of proper assistance. His valuable input may be used as a tool to overcome similar jurisprudential and interpretational queries in like cases. This book on Criminal Procedure also contains numerous dissenting notes by the Honorable Judges of the superior judiciary of Pakistan, United States of America and Great Britain, in order to bring forth the constitutional scenario as well as the relevant law on the subject.

The **Part-I** of the book begins with a Latin legal phrase *Fīat jūstitia ruat cælum* i.e. "Let justice be done, though the heavens should fall" and its importance. It lets the reader voyage through the history of criminal procedure which dates back to the famous trial of *Socrates* to the Star Chamber (essentially a torture Chamber) of England to the present day with laws embedded with principles of procedural fairness and natural justice. It also highlights some rudimentary concepts of procedural and constitutional law, such as, due process, natural justice and procedural fairness along with the conceptual analysis of substantive and procedural criminal law, effect of amending statutes on current statute and principles of retrospectivity and prospective effect of law, with regard to the constitutions of Pakistan, US and Great Britain. The journey through the history and significance of fair trial and its procedure prepares the reader to dive further into the ocean of knowledge on the subject which covers the brim of this book. This part of the book unleashes new meanings and concepts of law and constitution.

Constitutional Criminal Procedure and regular Criminal Procedural Law have been explained and distinguished from each other in **Part II** of this book. The author has meticulously discussed the subject in context of a written constitution and decisions of the superior judiciary of the Common Law jurisdictions.

Likewise, **Part II-A** of the book deals with the intricacies of Criminal Procedural Law incorporated in the US Constitution. It discusses the law regarding search and seizure, right to privacy, privilege against self-incrimination, right to counsel, Miranda Warnings (the famous Miranda case of US) and the Exclusionary Rule illustrated with rulings of the US Supreme Court. Herein, I find it pertinent to mention Miranda's case which is a milepost in the history of criminal dispensation justice system of America as besides other privileges assigned to an accused, the US Supreme court made it incumbent on the State to provide him representation through counsel from the stage of investigation. The guiding norms laid down in Miranda case are referred to as "Miranda Warnings." Today in America, police officers are duty bound to adhere to Miranda Warnings prior to investigation, moreover, self-incriminating statements of the accused or recoveries shall not only bear nullity in the eye of law but would also amount to an illegal act that shall be triable by the State. It also empowers the courts to exclude evidence taken without administering Miranda's Warning during the trials as "The Rule of Exclusion" is considered as a safeguard against the misuse of constitutional provisions regarding search, seizure and the confession.

The **Part II-B** of the book specifically focuses on the joint impact of Criminal Procedure and The Constitution of Pakistan, 1973. The author discusses the array of fundamental rights guaranteed by the Constitution of Pakistan and their correlation with the criminal procedure. His analysis makes this segment of the book imperative for members of our legal fraternity, the Bar and the Bench. The author highlights harmony between the provisions of the Constitution of Pakistan and the Code of Criminal procedure 1898, and has endeavored to coordinate the provisions of the Constitution of Pakistan with those provisions of US Constitution that deal with the fundamental rights which rely on criminal procedure. The principles albeit being same have not achieved similar outcome in the two Common Law jurisdictions for which the author has suggested that in certain situations superior courts of Pakistan may rely on the jurisprudence developed by the US Supreme Court to prevent the violation of the rights of accused during the course of investigation and trial. His suggestions to adapt the rules practiced in US by making definition of prosecution inclusive of investigation and the right of an accused to avail counsel at the primitive stage of investigation are distinctive. The book offers a plethora of decisions of Superior Courts in Common Law jurisdictions which makes this segment of the book a comprehensive and essential study aid for a student of Constitutional Law. It will not be an exaggeration to say that Part II-B is the heart of this book.

The leaf turned leads the reader to **Part III** of the book, which intrigues one by its unusual title “Participants in the

Criminal Justice Process." It profoundly identifies the role players as 'Police, Defenders of justice & the peace, Prosecutors, the Defense Counsel, Judges and Magistrates'. Each of them have their own important role in the criminal justice process. The police investigate crimes and collects the evidence for or against the accused. Defenders of justice of peace play their respective roles in post crime events, especially in facilitating the process of investigation. Prosecutors represent the state and the society and place evidence against the accused on behalf of them. Defence counsel performs their responsibility qua the defence of an accused within the parameter of law. Courts and Magistrates also have a pivotal role in the criminal justice system. The author in this Part stresses upon the role of the Defence Counsel and Prosecutor, especially with reference to the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006 and the relevant provisions of the Code of Criminal Procedure 1898. Besides headlining some anomalies amidst the provisions of the Code of Criminal Procedure 1898 and the Act of 2006, the author also indicates the need for the removal of such derivations. Thus, while concluding this part, the author remarks on the nobility attributed to the profession of prosecutors in England and in furtherance of their duty, they command respect from the other role players i.e. Court and Defence Counsel.

"Stages of Criminal Process" is dealt by the author in **Part IV** of the book. Henceforth, he has discussed entire Code of Criminal Procedure1889, under different captions in the following parts of the book with regard to the Constitution of

Pakistan and the jurisprudence developed by the superior courts of Pakistan. However, Part IV emphatically focuses on the stage of investigation in the criminal process. It walks the reader through all stages of an investigation, starting from filing of FIR till the submission of report under section 173 of the Code of Criminal Procedure 1898. The author describes it as the administrative stage, which intrigues the reader as to the administrative role played by the magistrate, as different stages of an investigation lead an open involvement of the magistrate, who is a neutral & disinterested entity between the state and the accused and his orders are subject to the power of 'Revision' by the superior courts. If judicial orders like remanding the accused to police custody are subject to review, then it might be unfair to label the stage of investigation as an administrative stage. It deals with all stages of investigation in cognizable and non-cognizable offences such as arrest, discharge, and remand to police of male and female accused and change of investigation. As proportionate to other parts of the book Part IV also contains material and numerous decisions of the superior courts in Pakistan.

The Code of Criminal Procedure 1898 empowers the magistrates to conduct different kinds of inquiries, most importantly, the ones conducted in the proceedings of removal of public nuisance under Sections 145 Cr.P.C, 174 and 176 Cr.P.C 1898. These have been assiduously offered in **Part V** of the book under the caption of inquiries.

Thereafter, comes the most important stage which is the judicial stage and it has been examined in detailed in **Part VI** under the title of "The Judicial Phase." In fact, it deals with the trial before a Magistrate, Court of Sessions and the High Court. This section of the book examines the essence of the Code of Criminal Procedure, 1898 and provisions of Qanoon-e-Shahadat Order, 1984 pertaining to a criminal trial, and provides a detailed discussion on law of evidence in criminal cases and on theory of sentencing, which makes this book an exceedingly important resource for the students of law. The book has equitably dealt with all aspects of a criminal trial starting from framing of charge to passing of sentence. Every proposition is illustrated with the help of relevant decisions of superior courts. The most enthralling aspect of Law of Evidence is the kinds of suspect evidence, which include evidence regarding identity, child evidence, evidence of approver and evidence of interesting witness. However, as a reader, my views and understanding diverge with the observations of the author to the extent of child evidence as it is settled law that child evidence is only admissible if the child is mature enough to understand the questions put to him and he/she has capacity to give reasonable answers to such questions, in that case the evidence of a child might fall in a less preferable category of evidence.

The book also elaborates the "**theory of sentencing**" which fascinates the students of law as well as other regular readers and literary critics. The propositions have been explained thoroughly through Pakistani judge-made law as

well as the decisions of other Common Law and successors of Anglo Saxon jurisdictions.

The **Part VII** of the book embodies the principles of criminal procedure as well as the case law with reference to appeal, revision, review and inherent powers of High Court under section 561 of the Code of criminal Procedure 1898. The author opines that section 561 of Code of Criminal Procedure 1898 is redundant in presence of scores of remedies provided by procedural and constitutional law such as appeal, revision, review and writ jurisdiction of High courts and therefore, should be struck down.

The descriptor "**Miscellaneous"** in **Part VIII** of the book expounds in-depth the special procedure enacted for trial of lunatics and law regarding Hudood Cases. Again this part has been strategically compiled by the author and is also elucidated with relevant cases. **Part IX** of the book contains the principles and procedure regarding power to pardon, remit and suspend sentences with reference to the Constitutional Law, provisions of Code of Criminal Procedure 1898 and the judgments of superior courts. It has been analyzed that the constitutional norms and the procedural rules are divergent as the former invests unqualified powers to the President of Pakistan in all cases including murder to pardon the sentence while the latter, in cases of hurt and murder invests qualified powers in the President of Pakistan as he cannot pardon the sentence of a convict without the consent of victim or legal heirs of deceased or victim as the case may be. It follows that provisions of the Constitution would prevail unless it is

amended and aligned with the Code of Criminal Procedure 1898. It is pertinent to mention that the law regarding pardon under the Code of Criminal Procedure 1898, was discussed by the Federal Shariat Court in Habib-ul-Wahab Al- Khairi case, PLD 1991 FSC 236.

The **Part X** of this book encloses intricate details regarding the concept of bail including protective bail in conjunction with the jurisprudential development in this sphere, bail in bail-able offences, post-arrest bail, bail by trial court after passing sentence and bail after conviction. The last chapter also entails details as to forfeiture of bond and the rights of surety after forfeiture. This detailed analysis of the law of bail is essential not only for those seeking clarity on the subject of bail as it lays a trail for the lower courts to follow in granting bail to the accused. The amount of surety should be within bounds as an exaggerated amount for surety or security will result in refusal of bail to an accused.

Conclusion:

To sum it all up, reading the book deepens the impression and further stresses on the importance of how the book has introduced new concepts of law and constitution in Pakistan jurisdiction which have already held ground in the foreign jurisdiction, particularly in US jurisdiction. In the book, it would appear that the author aims to diminish the gap between the Constitution of Pakistan and the Constitution of US, since these constitutions have several common traits; both are the written constitutions, both guarantee the fundamental rights of nature and both have the

provisions of criminal procedure. However, a phenomenon that has not only surprised the audience but the author himself is that criminal law has developed somewhat differently in both countries, therefore, the author urges the audience in this respect throughout the book and it is quite understandable because in Pakistan the level of protection of provisions of the constitution relating to fundamental rights (essentially embodied in the criminal procedure part of the constitution) are not as high as they are in US.

The author also attempts to draw the attention of all concerns toward inter-se contradictions in different laws and inter-se contradictions between constitution and different laws. The Constitution has decided once and for all that the federal statute will prevail over the provincial statute in case of any contradiction and that the Constitution will prevail over the ordinary law that is if the law or any provision of it goes beyond the provisions of the Constitution. It is, therefore, the submission of the author to this concept, that such laws should be amended appropriately or removed from the statute book.

Above all, the chief purpose of the book is the clarity of thought of all legal fraternity, be those judges or lawyers, and the book has successfully achieved this object. The book also has a number of topics which have been dealt with in detail; in every topic there is not only reference to case laws from the Pakistan jurisdiction, but also from the US, England and Indian jurisdictions. Now, it lays upon the ability of the reader what they achieve from the book.

At the end of the book, the index has been given to guide the readers. The book contains 707 pages which have been published by Pakistan Law House.

This book is definitely worth reading and is guaranteed to be a source of enlightenment.

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(2) The Court, the Judge and the Stenographer

By

Justice (R) Dr. Munir Ahmad Mughal[2]

Summary:

In this article, I intend to share my timeless experience with stenographers with respect to their skills of receiving dictation and putting drafts for review and signatures. The interaction between a judge and a stenographer is crucial for the smooth and timely disposal of cases. Judges interact with their stenographers not only to communicate day to day orders on files but also for dictating concluding orders and judgments. It is argued that a good stenographer helps in the swift and timely disposal of cases and vice versa. Job description of Stenographer is an important standing operating procedure for their performance. Ethical questions of maintaining confidentiality of communication are also discussed with reference to judicial conduct. Education and training issues of judicial communication skills between

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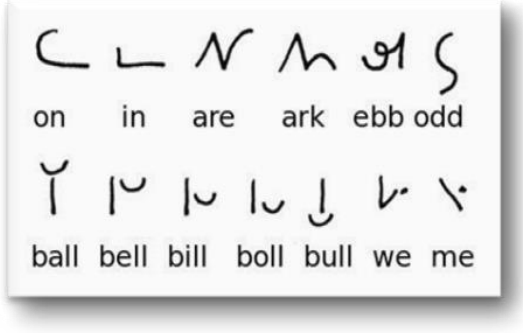
judges and Stenographers, use of social media by court staff, etc. are also deliberated as of key importance.

I. Communication between Judge and Stenographer

I start with few examples where dictated words were typed differently.

Judge Dictated	Steno Typed
Sick	Seek
Done	Down
Received	Receipt
Trial	Trail
Pre-Arrest	Per-Arrest
Proceed	Received
Their	There
Intelligent	Inelegant
Suckling	Slaking
Letter and spirit	Letter and separate
Disputed	Deposited
Disputed	Deputed
Blow	Below
Inflicted	Inflected
Quoted	Coated
From	By

The purpose of these examples is just to highlight that proper and synchronized communication between judges and their stenographers helps to avoid misspending of time. Mistakes in drafts of judgments and orders contribute to a stressful environment for a judge. It means that a good draft submitted for review if carrying less mistakes helps judges not only to use their time for other cases



but also improve their cognitive skills that can be further availed to improve their drafts on writing quality judgments.

There may be many mistakes, which are not errors in the language of short hand teaching. I dictated what was in my mind and the steno, no doubt with bona fide, wrote what he learnt whilst learning the skill of shorthand writing. I want to say that the judge as well as the stenographer both should re-read their dictation and short hand writing in the light of the prescribed skill by the respective teachers.

Where the judge finds that the stenographer goes on committing the same mistake in shorthand writing, it must be discussed with the steno. Doing this will result in the effortless understanding each other's expressions.

This relationship carries two important skills of communication: verbal communication from the judge and written communication from the steno. Both have to learn the skill of their respective modes of communication for harmonious and mistake free results.

Another difficulty experienced by me in my career over half a century is that stenos and judges come from all over the province with different accents in the languages of Urdu and English. When a judge or a steno is transferred in a different province with different language, the minor difficulty then becomes a major complexity and its resolution is the requirement of time. This needs reformation in spirit which means an environment with a spirit of order and discipline creating comfort and ease for both the steno and the judge.

Where error is repeated from either side, they should sit together and practice multiple times, i.e., when the written "done" is "done" in the oral speech and when the word "done" is "down" in the oral speech. This would certainly improve both sides' skills and behavior.

Another easy way is that for the mistaken words, the judge should speak each alphabet separately. So if a steno confuses 'done' with 'down', then a judge can spell for his/her steno: "d"- "o"- "w"- "n" in the case of 'down', and "d"- "o"- "n""e" in the case of 'done'. This is not a difficult task but is relevant for removing the confusion about similar sound words amongst both sides.

The judges may use another technique, i.e. they should give guidance by way of discussion with their stenographers on a word which is often misinterpreted. And the stenographers are advised to write it down using any resource to retain the information about such word so as to be not repeated in the future.

Another method is to arrange a meeting that includes all the stenographers and only the specific word should be spoken by the judge and written in short hand by all the stenographers and then it should be observed, "how many of them have correctly understood and how many amongst them are still confused?", then they should very politely be communicated the use of a particular mechanism for resolution of the issue of conveyance of important information.

Admittedly, every individual, whether a judge or a stenographer, has their individual understanding. Hence, it would be useful that upon occasion when a stenographer or a new judge is appointed, both of them must have a synchronizing meeting to understand and improve the minor shortcomings in the method of communication. This meeting will prove more fruitful if conducted at some regular interval that is convenient for both.

Another important thing, according to my experience, is that a competition must be held occasionally between all the stenographers of the district and those who top must be given not only a letter of appreciation but also a reward. This will certainly add to the efficiency and discipline in the conduct of stenographers. Out of turn promotions, on-the-job-trainings, foreign training opportunities, teaching assignments in judicial academies, appointment as mentors for new comers and alike may be few options in this regard. When it comes to this, suggestions may be obtained from the stenographers as well.

Both sides should remain conscious of the fact that dictation and short hand writing are related much too closely, and that there is no end to learning. What I have said is with the sincerest respect for my judge's fraternity and court staff.

II. Ethics, Confidentiality and Judicial Integrity

Judicial work also carries a lot of information received by a judge while passing judgments. Hearing the parties in open court is the key characteristic of the office of judgeship. Public has a great interest in attending court proceedings to

know how the disputes are settled in courtrooms within the laws. Fairness in proceedings, conduct of the judge, procedural justice, decorum of the court, behavior of the court staff, conduction of judicial business to maintain everyone's dignity, legal assistance through advocates, the calm environment of the courtroom, dignified infrastructure for litigants, advocates, judges and the staff, proper IT infrastructure and open courtrooms are some key features of a modern courtroom. For our topic, stenographers are part of the public hearing in the courtrooms and thereafter, through their skill of taking dictation in shorthand from the judge including typing of judgments and orders. All these include some questions of ethics, confidentiality and judicial integrity.

a) Ethics and Integrity:

Judicial Ethics are important to make oneself compliant with the requirements of the job of a stenographer by following and applying a certain set of laws, rules, instructions, procedures and practices to meet the ultimate objectives of maintaining judicial integrity. Judicial integrity is a value and more importantly, a virtue. It helps to develop the integrity and level of the institution of judiciary in the mind of public for which the courts are functioning; A little indifferent approach towards judicial ethics may reverse this process to decrease the level of integrity of the judiciary in public minds. Thus, it should be given high importance by the judge and the court staff collectively and at all times. The word 'judicial' should not let everyone to consider that it is only for the judges; here, this word means the institution of judiciary and

not the individual judge. Every legal actor in the justice system has their own set of rules and practices and is entitled to protocols of course according to level, stage, rank, station, grade, degree, etc. This observation is for everyone. It should not be forgotten that we all are to work, and that work is to provide for the entire universe and its ease, comfort, benefit, advantage, utility, goodness, fairness, justness, equal treatment, and at no stage to be felt that there is inequality amongst any party. In mutual work, all are to work in a cooperative, coordinative and consultative mood.

Our efforts, exertions, struggles, or by whatever name we call them must be developing and arriving at the stage of being fully developed so that we may play our role as leaders or followers in the best possible atmosphere. We are never to prove to be the least dishonest. We must remain honest, trustworthy and truthful, our appropriate and lawful behavior are our assets, here as well as hereinafter. We are answerable to our own-selves, our co-fellows, our society of which we are also a member and above all the Creator.

b) Confidentiality:

Proceeding to judicial ethics, the specific stenographer has to be a person of confidence and high integrity. Judges have to be aware that as per Lahore High Court Rules and Orders, Vol.-I, Chapter 11-A, Rule 7, "courts should note that judgments are to be dictated only to persons employed for that express purpose or employed as copyists or candidates."[3]

[3] See *Instructions to Civil Court,* Lahore High Court Rules and Orders, vol. I, Chapter 11-A, Rule 7, p. 167.

For a judge or a court, there are many situations, where cases of women, juveniles, children, differently abled and vulnerable groups (like trans-persons, extremely poor, self-represented litigants, litigants of a different language than the mainstream languages etc.) are heard and the law or particular situation may require an in-camera hearing or the revelation of sensitive information with respect to a case in a confidential manner. Cases of Terrorism, high financial crimes, rape, state enemies, war criminals, high treason and intellectually challenged are also a few examples. Here, said information is in the hands of so many of the people who are in the courtroom during such hearing of the trials and most of the times a stenographer is part of the recipients of this information. In one word, the trust reposed in us is not to be betrayed at any stage, in any circumstance or at any cost. If confidence is sensed as lacking in the slightest manner, the best way is to bring it to the notice of the other side in a polite manner. To cause damage to the other side without notifying and providing the opportunity to be careful and cautious is against the principles of a fair trial and the reputation of a person is most definitely an important affair.

The confidentiality issue is thus very vulnerable in terms that any such classified information, fact, document, argument or evidence may be released beyond the walls of the courtroom by someone who is the carrier of that information by virtue of his or her office, may be intentionally or unintentionally. The intention can vary, even with a good intention, confidential information has to be kept confidential until the law allows it to be made public. It is not only a

question of law but also of ethics that the carriers of such information, including the stenographers, have to maintain such secrecy or confidentiality by not revealing any such information to their colleagues, friends, parties, family members, or other social groups with whom they may interact. This restriction has to be observed at all times whether it is on the bench or off the bench, whether in the office or at home. The official atmosphere in the courtroom is that of a domestic nature and requires remaining polite, kind, and full of love, affection, respect and dignity.

c) Social Media, Ethics and Issue of Confidentiality:

Here, I would also like to focus on the advent of "electronic and social media" (ESM) and its uses through mobile phones, smart watches, laptops and other electronic devices. Here, the user of these social media apps may unintentionally or intentionally share some confidential information. This distribution of classified or confidential information in social media groups (virtual world) is in violation of the code of conduct as well as the laws barring any such dissemination of information in the real world. A very cautious approach has to be adopted by the judges and the court staff in this regard.

It would be pertinent to mention that many of the provisions of the Code of Conduct for Members of District Judiciary are equally applicable on the staff of the Court. It is so because a Court is in fact, a sum of the judge and the entire staff in present. Thus, maintaining confidentiality of any information received by them during their official duties is

one of the particular responsibilities. Bangalore Principles of Judicial Conduct, which I have been teaching at the Punjab Judicial Academy, also guide us in this aspect of the matter. I have compiled a manual on Judicial Conduct which will be published soon, it carries information and guidance both for the judges and the court staff.

III. Harassment at workplace:

Judiciary in Pakistan has not had a long experience with women appointed as judges and court staff. After a positive and affirmative action of all the three branches of government, in recent years, many women are now a part of the judicial service as judges, magistrates and court staff. On the other hand, a reasonable number of women are already working as lawyers, advocates, prosecutors, solicitors, and attorneys. It has been established that judges and stenographers have to interact with each other not only in a courtroom with open public access, but that they have also to work within the confines of the retiring room of a judge for dictation, correction of drafts and other official work. Therefore, to maintain the dignity of each gender, the judicial human resources have to be sensitized, educated and well-trained on the issue of harassment at a workplace. Female judges are working with male stenographers and male judges are working with female stenographers. It has added the perspective of gender in the third organ of state, i.e., Judiciary. Female emancipation and empowerment is in accordance with the Constitution of Pakistan 1973. Given our particular circumstances in Pakistan, which is a

patriarchal society, the male gender is required to give space, respect and an enabling environment to their female counterparts, colleagues, seniors, juniors and staff.

Here, the role of the Federal and Provincial High Courts under Article 203 of the Constitution of Pakistan, 1973; District Judges as heads of District Judiciary and the Federal and Provincial Judicial Academies become of prime importance in providing guidance, training and education to all concerned. Dignity (takrīm / تَكْرِيْم) is one of the Higher Objectives of Sharī`ah (maqāṣid-e-Sharī`ah / مَقَاصِد شَرِيْعَہْ). Islam is State Religion of Pakistan. Articles 2 and 2A of the Constitution read as under:

> ***2. Islam to be State religion.*** *Islam shall be the State religion of Pakistan.*
>
> ***2A. The Objectives Resolution*** *to form part of substantive provisions. The principles and provisions set out in the Objectives Resolution reproduced in the Annex are hereby made substantive part of the Constitution and shall have effect accordingly.*

Article 227 of the Constitution reads as under:[4]

227 Provisions relating to the Holy Qur'an and Sunnah.

(1) All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.

[4] http://www.pakistani.org/pakistan/constitution/part9.html. Last accessed 30 October 2020.

[Explanation: - In the application of this clause to the personal law of any Muslim sect, the expression "Quran and Sunnah" shall mean the Quran and Sunnah as interpreted by that sect.]

(2) Effect shall be given to the provisions of clause (1) only in the manner provided in this Part.

(3) Nothing in this Part shall affect the personal laws of non-Muslim citizens or their status as citizens.

Sub-Article (1) of Article 14 of the Constitution of Pakistan deals with the Fundamental Right of Dignity. It reads:[5]

14 Inviolability of dignity of man, etc.

(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable.

Here, the word 'man' has to be seen in the light of Article 263 of the Constitution of Pakistan, 1973 which reads:[6]

263. Gender and number.

(1) In the Constitution,

(a) words importing the masculine gender shall be taken to include females; and

(b) words in the singular shall include the plural, and words in the plural shall include the singular.

[5] http://www.pakistani.org/pakistan/constitution/part2.ch1.html. Last accessed 30 October 2020.

[6] http://www.pakistani.org/pakistan/constitution/part12.ch5.html. Last accessed 30 October 2020.

IV. Judicial Training and Skills

For stenographers, the first important element is to know one's job description of the post, this description provides their working domain. The High Court or the District Judges, as the case may be, have to ensure that every stenographer has a copy of all the relevant laws, rules, instructions and standing operating procedures of their job. For this, a manual or bench book may be prepared either by the High Court or by the Punjab Judicial Academy. It will be the first step to enable them to remain aware of their job requirements. Coupled with this, the Punjab Judicial Academy has to develop training and education courses for them with respect to various dimensions of the job of a steno which may include a skill-set as a major component apart from providing them the knowledge and enabling them to change their behavior.

To design and implement judicial education and training package for the stenographers, the High Court, the District Judges and the Punjab Judicial Academy have to conduct training needs assessments based on information which may be obtained from the stenographers, judges, bar members, typing schools, etc. Likewise, the training manuals prepared have to be both in English and Urdu languages so that language is not to come as a barrier for any of them who are not well-versed in either language.

The training programs have to be both exclusive and inclusive. Exclusive trainings are amongst stenographers. They are to provide them training and education into their

hard core skills of stenographer ship. Inclusive trainings are to comprise judges and stenographers as one group sitting together. It will help them to discuss and pin point issues of communication skill, speed, conduct, ethics, etc.

In modern world, the traditional court is now taking a turn towards e-courts. Therefore, like judges, the court staff, including the stenographers, need to be educated and informed about information technology and its optimal use beyond the facility of cut and paste.

A whole set of judicial philosophy is to be inculcated in court staff to understand that the computers and software's are to be used very carefully to the benefit of the justice system for the timely delivery of judgments and orders. Both judges and the court staff have to realize that the computer is not merely a modern typewriter, instead, it is a lot more. It is a tool to effectively use information technology and artificial intelligence. Quality of justice administered in courts is to be ensured even while adapting to modern technology.

There are many software now-a-days which allow a robotic voice transcribed into a processed file. Transcription of records, creating PDF and hyper-text terminal protocol (http) files, using Microsoft Office programs, Google Apps, effective and efficient use of social media apps, managing online meetings and conference sessions though Zoom, MS Team and Google Meet, sharing of official documents, digitalization of judicial records are some of the IT related areas for learning and training, both for the judges and the court staff.

V. Developing Literature on Court Staff:

My experience also suggests that there is an uncommon understanding of every article, research paper, book, radio, TV program, or social media talks by the court staff. This creates a vacuum causing lack of information for judicial policy makers to make informed decisions about court staff and their working. Efficiency of the court staff can be raised as subject to their involvement in telling their own difficulties to design and implement programs of their education and training as suggested by them. They should be encouraged, within the limits prescribed by law, to write, speak, present and teach on issues concerning them.

Punjab Judicial Academy plays a great role as a prime institution for the training of Court Staff in Punjab. Likewise, Federal Judicial Academy has also a duty to train and educate not only judges but also the staff of courts. These institutions have to come forward with an integrated judicial education regime to include court staff as part of their training programs. The websites of judicial academies have shown some training programs organized for court staff in the past, however, specialized inclusive and exclusive trainings for stenographers and judges on the subject topic are the need of today.

Conclusion:

I have been in the public profession of law since 1962 after receiving my law degree from the University of the Punjab Lahore, I joined West Pakistan Judicial Service in

1966 as a Civil Judge after practicing law for four years. Thereafter, I have worked in all tiers of district judiciary. I have had the honor to be elevated and served as judge of the Hon'ble Lahore High Court, one of South Asia's oldest High Courts. Apart from judicial service, I have had the honor to serve on different administrative posts in Federal Law Ministry, Solicitor of Punjab Government, Member Inspection Team, Lahore High Court and Deputy Registrar Rules. My extensive judicial service has led me to write on this commonly neglected topic. Judicial Policy Makers need to consider formulating a policy for an appropriate and integrated training and education regime for court staff generally and the Stenographers particularly. My experience of working in judicial and executive branches of the government has also encouraged me to write about these important human resources required to run a court successfully ensuring the constitutional theme of inexpensive and timely justice.

I am hopeful that the Hon'ble Chief Justice of Pakistan as head of the court system, head of the Law and Justice Commission of Pakistan, head of the National Judicial Policy Making Committee, head of the Board of Governors of the Federal Judicial Academy and being at the top of the whole Judicature will consider the contents of this paper for further discussion at policy level so that the quality of justice administered in courts is looked upon and further improved.

(3) Challan/Report under Section 173 Cr.P.C 1898

By

Ch. Quasar Shahab[7]

The steps to be taken by the Magistrate after receipt of report u/s 173 of The Code Criminal Procedure 1898 to send up the case to the court of Sessions.

No doubt to get decision of the case in a shortest possible time is the right of the complainant as well as accused. Therefore, in order to overcome causes of delay, one of important stakeholder is Magistrate who first of all, conducts initial proceedings and takes cognizance of the offences on submission of report under section 173 Cr.P.C 1898, before sending up the same to the Court of Sessions.

Before promulgation of Law Reforms Ordinance 1972, inquiry under chapter XVIII (commonly known as committal proceedings) was held after receipt of challan and taking cognizance of the offence exclusively triable by the court of Sessions. In the said inquiry, which was conducted under the warrant cases, the Magistrate used to frame charge, record evidence of prosecution witnesses, exhibit all the relevant documents, property and other articles, record statements of the accused and examine defense witnesses. Under various provisions of the court, all proceedings such as declaring

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accused absconder, granting bail etc. were conducted. After the conclusion of such proceedings the Magistrate used to evaluate evidence to ascertain as to whether or not prima facie case was made out against the accused, if so, then they committed the accused to the court of Sessions for trial, if not then accused was discharged.

In the year 1972, it was found that said inquiry took considerably long period of time for its completion, resulting into the promulgation of Law Reforms Ordinance 1972 by making simple procedure for sending the cases to Court of Sessions without recording evidence through item No.82 of the said Ordinance. Though various amendments were made to give effect of the procedure as simple while maintaining all general powers of Magistrate under the court, but a bar was created, only in recording the evidence in shape of section 190(3) of the court, which used to be recorded in committal proceedings, before sending the case to the court of Session, which was also removed in the shape of absconder accused by making amendments in section 512 Cr.P.C 1898 that allowed the Magistrate to record the evidence in absence of accused after fulfilling the requirements mentioned therein.

But the ordinance was misconstrued and misinterpreted which meant that without completing the miscellaneous proceedings, so as to complete the case in all respect to start with the trial in the sessions court, the magistrate sent up all the cases incomplete to the court of sessions and as a result thereof, Court of Sessions had to commence such proceedings which were to be completed by

the Magistrate. When large number of cases were received at one and same time, the Sessions Court, felt difficulties to cope up with the work load resulting in delay in the disposal of cases.

What is the role of Magistrate and what proceedings have to be conducted by him prior to send up the challan to court of Sessions?

Hon'ble Apex court in the case of "Mehr Khan. Vs. Yaqoob Khan (1981 SCMR 267)" examined the question and held that Magistrate is not post office but they have to apply their mind to ascertain as to whether case is fit for trial before the court of Session.

A reading of subsection (3) of section 190, Cr.P.C, in the light of above noted facts would, however, show that-

(i) Before he can send a case for trial to the Court of Session, a Magistrate must, firstly, have taken cognizance of a case, under any one of the three clauses to sub-section (1) of section 190, Cr.P.C. In other words, he must either have received a private complaint under clause (a), or a police report under section 173 Cr.P.C, as envisaged in clause (b) or he should be acting on any information received by him, as mentioned in clause (c). It is, therefore, evident that he cannot act under subsection (3) without having received a private complaint or a police report (i.e. a challan either complete or incomplete) or some information from any other source and

(ii) That although now a Magistrate is not required to hold an inquiry under Chapter XVIII, but that does not mean

> that he is to act merely as a post office and automatically send the case for trial to a Court of Session simply because a section relating to an offence exclusively triable by a Court of Session has been mentioned by the police or the complainant (as the case may be) in the challan or the private complaint. He is in fact required on having taken cognizance of such a matter to enquire into the case and to apply his mind to whatever material is placed before him by the police or the complainant, in order to determine whether private allegations made in the Police report, private complaint or information received by him, make out a prima facie case triable exclusively by a court of Session.

Thus, this court clarified the position of law that though inquiry as contemplated under repealed Chapter XVIII of the Code was dispensed with but application of mind by the Magistrate would be essential without recording of evidence. No other amendment was made under the Ordinance curtailing the powers of Magistrate which he exercised in those proceedings as such all the general powers of the Magistrate are intact. So, in the changed circumstances, after the commitment proceedings have been dispensed with by Law Reforms Ordinance, but inquiring the relevant material and application of mind thereto by a Magistrate is allowed: -

Firstly, to determine *nature of offence* i.e. to determine as to whether or not the case is triable, exclusively by the court of Sessions, would now constitute an inquiry within meaning of the word defined in clause (k) of section 4 of Cr.P.C 1898 and used in S.344(1) Cr.P.C 1898.

Secondly Challan/report U/S173 Cr.P.C is *fit* for sending the same to the court of Sessions.

The scheme of the Cr.P.C 1898 "hereinafter called code" is that the police after completing the investigation have to form opinion as to whether or not there is sufficient evidence and reasonable ground or suspicion to justify the forwarding of the accused to a Magistrate. If the opinion is in *negative*, the police officer is required to release the accused if in custody on executing bond, with or without surety and such officer may direct him, to appear if and when so required, before the Magistrate in order to take cognizance of the offence, on a police report and to try the accused or send him for trial as provided under section 169 of the Code, which reads as under: -

> 169. "Released of accused when evidence deficient. If, upon an investigation under this chapter, it appears to the officer in charge of the police station, or to the Police Officer making the investigation that there is not sufficient evidence or reasonable ground or suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct him to appear, if and when so required before a Magistrate empowered to take cognizance of the offence on a police report and to try the accused or send him for trial."

If the opinion is *positive*, the police officer is required to forward the accused in custody to the Magistrate empowered to take cognizance of the offence upon a police report for trial

of the accused or to send him for trial to the Court of Sessions, if the offence is bailable and the accused is able to give surety, the police officer is required to take surety from him for his appearance from day to day before such Magistrate. At the same time, the police officer is also required to send to the Magistrate any weapon or other articles which may be necessary to be produced before him along with the bonds of the complainant and witnesses for their appearance before the Magistrate as required under section 170 of the Code, that reads as under: -

> "170. Case to be sent to Magistrate when evidence is sufficient. (i) If upon an investigation under this Chapter, it appears to the Officer in charge of the police station that there is sufficient evidence or reasonable grounds as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or send him for trial or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.
>
> (2). When the officer in charge of police station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as

he may think necessary to execute a bond to appear before the Magistrate as thereby directed and prosecute or given evidence (as the case may be) in the matter of the charges against the accused.

(3). If the court of District Magistrate or Sub Divisional Magistrate is mentioned in the bond, such Court shall be held to include any court which such Magistrate may refer the case for inquiry or trial, provide reasonable notice of such reference is given to such complainant or persons.

(5). The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it and shall then send to the Magistrate the original with his report."

In both cases, when the accused is released under section 169 or is forwarded to the Magistrate, the police officer is required to submit the report, which is commonly known as challan, in the form provided under section 173 of the Code, Reference is invited to Habib. Vs. State (1983 SCMR 370).

Thus under the provisions of section 170 of the code, the police officer is required to produce the property and other articles as are necessary before the Magistrate along with original bond with report with respect to appearance of complainant and other witnesses in the matter of charge against them.

Now, it is imperative upon Magistrate to see as to whether bonds of accused if released U/S169 are enclosed with report and he should issue instructions to SHO(s) for

implementation of law on subject matter. After taking cognizance, if Magistrate has arrived that case is made out against the accused let off Under Section 169 Code, Magistrate may summon him and proceed for procuring his attendance under the Code, otherwise, his bond may be discharged. Likewise, if all accused named in the F.I.R have not been mentioned in either column of report u/s173 Cr.P.C, Magistrate should inquire into matter and ask the SHO to submit detail of all accused, if some accused could not be arrested, then, SHO/I.O should get their warrants of arrest and proclamation in case sufficient material would be available against them or to place them in Column No. 2 due to insufficient material against them for their arrest. In this way status of all accused should be above board.

So, Magistrate should be vigilant with respect to get clear status of all accused in report U/S173 Cr.P.C 1898, to issue direction for production of case property (articles, weapon or thing) at the time of submission of report along with bonds of released accused u/s 169 of code and bond of complainant/witnesses u/s 170(2) of the Code.

The question of absconders, accused released and placed in column No.2 of the challan will be examined next. The accused who is released with direction to appear before the Magistrate, if and when required by him as provided under section 169 of the Code, it may be stated that in such a case the Magistrate is empowered to discharge the bond executed before the police or pass any order, as he thinks fit

as provided under section173 (3) of the Code which is as under: -

> "(3) Wherever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit."

It is important to note that the above provision is mandatory, therefore, the Magistrate is required to pass appropriate order. For exercising the above powers, the Magistrate should not act mechanically, as he has to form an opinion as to whether it is a fit case where bond should be discharged or pass any other order including joining him as an accused. For that, he is required to examine the file so as to form his opinion. Such order of the Magistrate is not a judicial order but is an administrative one. If the Magistrate discharges the bond executed before the police of the released accused, then it will not preclude the Sessions Court to join such accused in the case as that will be a judicial act which is taken after taking cognizance by Sessions Judge as required under section 193 of the Code. However, the police cannot re-investigate the case against such accused without getting the order of discharge of bond passed by the Magistrate recalled.

As regards the accused who are shown absconders in the challan, it is to be noted that the Magistrate is competent to issue process including warrant of arrest to procure his attendance as provided under Section 204 of the Code because he has powers to take cognizance in the matter. Further, the evidence against accused who is absconder can

be recorded after declaring him absconder as provided under section 512 of the Code, that reads as under: -

> "**512. Record of evidence in absence of accused.** (1) If it is proved that an accused has absconded, and that there is no immediate prospect of arresting him the Court competent to try or send for trial, to the Court of Session or High Court, such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their deposition. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, of trial for the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without any amount of delay, expense or inconvenience which under the circumstances of the case, would be unreasonable.
>
> (2) Record of evidence when offender unknown. If it appears that an offence punishable with death or imprisonment for life has been committed by some person unknown, the High Court may direct that any Magistrate of the first class shall hold an inquiry and examine any witness who can give evidence concerning the offence. Any deposition so taken may be given in evidence against any person who is subsequently accuse of the offence, if the deponent is dead or incapable for giving evidence or beyond the limits of Pakistan."

The phrase "or send for trial to the court of Sessions or High Court" appearing in section 512 of the code clearly demonstrates that the Magistrate who is empowered to send

the case to the court of sessions has also power to record the evidence in the absence of accused after declaring him absconder which can be done as required under sections 87 & 88 of the Code after issuance of warrants of arrest as provided under section 204 of the code. Thus such magistrate has power to initiate proceedings under sections 87 & 88 of the Code in a case triable by the Court of Sessions.

Honorable Apex court held in "PLD 2010 SC-585" by virtue of section 190 (2) of the Code, the Magistrate is required to send the case to the Court of Sessions without recording evidence, which was enacted after repealing Chapter XVIII of the Code to make the inquiry process simple, but this provision is general in nature applicable to all the accused persons. However, section 512 of the Code is a special provision applicable to particular class of accused i.e. absconders. Therefore, as per settled law the special provision will prevail upon general provision of the same enactment. Thus, section 512 of the code is an exception to the general provision of section 190(2) and Section 353 of the Code.

It is not out of place to mention here that originally, such power was not given to the Magistrate, when committal proceedings were being conducted. However, this power was given to the Magistrates after the abolishment of committal proceedings by the Ordinance. The above phrase was added by the Ordinance with a view that the Sessions Court should not be burdened with these type of proceedings because the main function of the Sessions Court is session trial. If the

Sessions Court is involved in these type of proceedings, its major portion of time would be consumed in conducting these proceedings. If the proceedings under Section 87 & 88 of the Code are completed at the level of the Magistrate before the case is sent up to the court of Sessions, then the Session court will be in a position to start the trial expeditiously and the time consumed in such proceedings by it can be saved.

In order to comply with the above provisions of law, if all the accused are shown absconders in the challan then the case be sent up to the court of session after completing the proceedings as provided under section 512 of the Code. So that on receipt of case, the Sessions Court may pass order for keeping the case on dormant file or pass any appropriate order as it deems fit. If some of the accused are absconders and some are present, then before sending the case to the Court of sessions the Magistrate should simply complete the proceedings under sections 87 & 88 of the Code within the shortest possible time but not later than two months after taking cognizance.

Conclusion:

The magistrate should ensure that when a case is sent up to the Court of Sessions it should be complete in all respects, enabling the court of Sessions to start the trial immediately.

In this connection on receipt of the case triable by the Court of Sessions, a thorough scrutiny must be made in order to see whether anything is missing which may affect the commencement of the trial, including details of all accused,

proceedings with respect to discharge of bond of released accused u/s 169 of the Code or its summoning to join as accused in case, proceeding against absconders under sections 87/88 as well section 512 of the Code of Criminal Procedure 1898 for recording evidence in absence of proclaimed offender, procuring of case property with complainant/witness' bond u/s 170 of the Code ibid, provide all the copies of required documents to the accused, statement of PWs under section 161 of the Code, confessions, memo of identification test etc. and to obtain information from the accused as to whether he would engage an advocate himself or an advocate could be provided to him on state expenses. Thereafter, the case should be sent up along with a detailed order showing the application of mind as to whether the case is exclusively triable by the Court of Sessions keeping in view the facts, circumstances of the case and material made available by the police, mentioning all the proceedings including the above mentioned points so as to facilitate the Court of Sessions to fix the case for trial. It is quotable that in case of a murder case of sub-division, recording of option of accused qua place of trial at Sub-division or District Head Quarter is also necessary.

Directions and instructions issued by Honorable Lahore High Court Lahore for the maintaining of registers with details of date of registration of case F.I.R, name of accused with date of their arrest, record of miscellaneous applications, their decisions, remand papers etc. and annexing the same with report u/s 173 of The Code ibid at the time of sending to the Court of Sessions should also be observed in letter and spirit.

Likewise, to preside over meeting by Magistrate with SHO and concerned Prosecutor on the first day of each month has also been directed by the Honorable Lahore High Court, Lahore, in which relevant points may be discussed for removing ambiguities and getting clearance in concepts under the law.

Guidance has been sought from the following landmark judgements of Hon'ble Apex Court:

1. "PLD 2010 SC 585" (Muhammad Ramzan Vs. Rahib and others.)
2. "PCrLJ1984 Lahore 2588" (Ghulalm Sarwar.Vs.The State)
3. "1983 SCMR 370" (Habib. Vs. State)
4. "1981 SCMR 267" (Mehr Khan. Vs. Yaqoob Khan)

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(4) Temporary Injunction: An Equitable Remedy or a Cause of Irreparable Loss to the System?

By

Muhammad Tayyab Khan[8]

Introduction:

"*A court order commanding or preventing an action*", is how injunction is defined in Black's Law Dictionary. To elaborate further it has been explained in a general sense, 'every order of a court which commands or forbids is an injunction'; but in its accepted legal sense, an injunction is a judicial process or mandate which operates in *personam*, upon certain established principles of equity, by which a party is required to perform or refrain from performing a particular action. An injunction has also been defined as a writ framed according to the circumstances of the case, commanding an act which the court regards as essential to administer justice, or restraining an act which it deems as contrary to equity and good conscience; as a remedial writ which court issues for the purpose of enforcing its equity jurisdiction and a writ issuing by the order and under the seal of a court of equity [9](Joyce 1909, 2-3). From this explanation, it is gathered that the law of injunction finds its roots in the principles of equity. From

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[9] Joyce, H.C. A treatise on the law Relating to Injunction 1, at 2-3 (1909)

this exercise of equitable relief by the courts of Chancery the preventive relief emerged. During the reign of Henry VI, Lord Chancellor developed the remedy of injunction which emanated from Chancery Courts[10] (Mahajan 1987, 79-80). In this backdrop, I would like to discuss the law of injunction in general while focusing mainly on temporary injunction and its implementation in the legal system of Pakistan.

Historical Background of Temporary Injunction

Injunction forms the staple of specific relief branching out of equity, the terminology used to distinguish injunction from other specific relief is "preventive relief"[11]. This preventive relief is further bifurcated into different branches such as, temporary and perpetual injunctions; mandatory injunction. This essay mainly focuses on temporary injunction, its applicability, effectiveness and overall impact of exercise of this equitable relief. Taking a look at the historical development, we understand that the initial outlook of a temporary injunction was quite different from its composition that is in practice today. These equitable principles mainly developed in the 19th century. The division of law and equity also led the Lord Chancellor to connect a requirement of irreparable injury/loss with preliminary injunctions. When the right enforced by injunction was a right at Common Law, enforceable by an action for damages, equity had no ground for intervention unless the remedy of damage was inadequate. Irreparable injury/loss, thus, became a source of equity's

[10] Mahajan, V.D. Jurisprudence and Legal Theory, at 79-80 (1987)
[11] S.52 of The Specific Relief Act,1877

jurisdiction in preliminary as well as final adjudications.[12] So, it can be safely said that the concept of preliminary injunction arose out of seeing whether the party seeking the injunction would suffer an irreparable loss, if injunction is not granted and, whether there could be a sufficient remedy given to the plaintiff by awarding damages. From these core principles the law related to temporary or preliminary injunction emerged and developed.

Law of Temporary Injunction in Pakistan

The relief of temporary injunction is an equitable relief and is discretionary in nature. Order XXXIX rules 1 and 2 of The Code of Civil Procedure 1908, elucidate the same intention by using the expression 'may' (1979 SCMR 402) [13]. As the caution is to be exercised by the court, it is a judicial discretion, the hallmark of such a discretion being that a discretionary judicial order, unlike a discretionary administrative order, must be exercised in consonance with reason and sound judicial principles, it must not be arbitrary and fanciful but legal and regular.

As an equitable relief, albeit relying primarily on principles of 'Natural Justice' and good conscience, but in its exercise the court must be guided by specific principles; which are as under: -

i) that the plaintiff has a prima facie good case;

[12] Leubsdorf, John. "The Standard for Preliminary Injunctions" *Harvard Law Review* 91, No. 3 (1978): 525-66. Accessed October 28, 2020. doi:10.2307/1340497.

[13] Salahuddin Vs The Province of Punjab, "1979 Supreme Court Monthly Review pg-402"

ii) that the balance of convenience lies in favour of grant of injunction

iii) that the plaintiff would suffer an irreparable loss if injunction is refused

These above referred principles are extracts of the law laid down in Rules 1 & 2 of Order XXXIX of The Civil Procedure Code, 1908. It may be safely remarked that after their incorporation in Common Law Statues, these principles are not merely guidelines for the courts but in certain circumstances, these are discretionary powers which need to be exercised in favour of the plaintiff.

In the prevalent situation of litigation involving temporary injunction, while adjudicating upon the matters related to permanent and temporary injunctions, it is observed that the ratio of such litigation is quite high especially when it comes to civil class actions. I am at the moment presiding over a court exclusively dealing with civil litigation and in my court alone the percentage of permanent injunction cases is 47.5% and suits in which an application for temporary injunction is also filed is 52.4%, which is quite a high percentage out of the total civil litigation. A similar ratio may be seen in other civil courts across the country. It would not surprise anyone that this is not a contemporary situation rather, this ratio has been on an incline for the past many decades. Presently, influx of suits accompanying an application for temporary injunction is not decreasing. This rise in civil litigation would not essentially imply adverse results but it speculates the excessive reliance of general public on litigation for the redressal of their grievances which

has increased the docket of courts reducing the chances of speedily ending of cases. A great number of civil suits filed to obtain injunctive orders, fail at their final disposal. In the past one year the ratio of successful injunction suits in my court was less than 10%. This ratio of successful as compared to unsuccessful cases is alarming. One may attribute multiple factors for unsuccessful injunctive suits, such as bad legal advice, non-availability of best evidence etc. but the most striking reasons that have been noticed so far are defects in the law of injunction and scores of frivolous litigations. The defects in the law of injunction and frivolous litigation go hand in hand. The defects in our law of injunction coupled with a legal system which does not have an effective means to compensate the aggrieved party eventually leads to multiplicity of frivolous litigation. The litigants themselves also contribute in delays caused in the disposal of cases. The greed, lust and the desire to become rich overnight have also caused excessive frivolous litigation.[14]

Although, application for the grant of temporary injunction is made by the aggrieved party under Rules 1 & 2 of Order XXXIX of the Code of Civil Procedure, 1908 but the law granting the right to obtain temporary injunction is also provided in Specific Relief Act 1877. This dependence on two different statutes has also not allowed the law to be as effective as it was crafted to be. The procedural law has the backing of substantive law but it cannot go beyond the parameters set by substantive law. As the mechanism is

[14] Justice Mian Ajmal, Hardships to Litigants and Miscarriage Of Justice Caused by Delays in Courts, (1991) Pakistan Law Digest, Journal.

always designed with the intention of the drafters to achieve the results intended by the legislation.

Behaviour of General Litigant in Injunctive Suits

Pursuant to the observations made above, I have made further observations as to the litigant's behaviour. These considerations are general in nature to give an overview of the behaviour rather than entangling into technicalities. The reason for making these general observations is that human behaviour is a quite complex phenomenon and there could be multiple factors serving as driving force behind simple and unexplainable behaviour. Now, considering the social aspect of the legal system, these generalities in behaviour directly bear an effect on the legal system. Some of these general behavioural trends observed in litigants are jotted down as under: -

(i) The interest of the plaintiff is in obtaining temporary injunction and prolonging it for as long as possible.

(ii) Although, temporary injunction is granted to plaintiff in the first instance keeping in view the emergent nature of the situation but even after disappearance of such emergent circumstances the plaintiff tries to use the temporary injunction for his advantage.

(iii) The plaintiff loses interest in civil suit after decision of the application of temporary injunction.

(iv) The plaintiff files a fresh suit for perpetual/ temporary injunction on dismissal of application of temporary injunction in first suit.

(v) The plaintiff tries to get temporary injunction by concealing material facts from the court and thereafter,

files disobedience petition against defendant despite that infraction was already in existence at the time of filing of suit which he concealed from the court.

(vi) The plaintiff instead of seeking the correct remedy, goes for a temporary injunction because criteria set for the application under Order XXXIX rules 1 & 2 CPC is completely different and relatively less cumbersome to go through. A very common example is filing a suit for perpetual injunction accompanied by an application of temporary injunction against co-sharers about an undivided piece of land.

Causes of Such Behaviour of Litigant and its Impact on Judicial System

The behavior of general litigants is due to multifaceted reasons and the most importantly, it is the lack of accountability in the process of civil litigation as there is no effective remedy provided to the victim of frivolous litigation. Even after the dismissal of the suit on the grounds of being frivolous, the defendant is not awarded damages or compensation. If the defendant after succeeding in the dismissal of the suit, attempts to sue the plaintiff for malicious civil prosecution, the criteria of success of such suit is a tightrope walk that one seldom succeeds.

Due to lack of responsibility on the plaintiff, he gets inclined to take latitude of the procedural intricacies after obtaining a temporary injunction. Such applications for temporary injunction cannot be decided without affording an opportunity of hearing to each party. If we closely analyze the mechanism through which a temporary injunction is granted, we will observe that the plaintiff in most of the cases feels

relieved in the absence of the other party (defendant) as it provides him an opportunity to take advantage of the emergent circumstances involved in the case which are in his favour and conveniently, conceals the factors which favour the other party (defendants). Once the other party appears before the court to present its defence, the plaintiff becomes adamant to obtain another opportunity to plead his case further, thus making a lengthy process lengthier.

The system is further burdened by the delaying tactics used by the legal fraternity representing the parties. Another reason for prolonged litigation is load of cases on the courts. Even after putting all their efforts, it is beyond the capabilities of civil courts to pursue each and every case with the same fervor and vigilance when the pendency figures of cases are in thousands. Another aspect is that each minute served in such frivolous litigation is one more minute which is taken away from the actual litigation which also creates a compounding effect on the overall system.

Temporary Restraining Order

In order to ease the burden of the judicial system as well as to provide relief to the public, in my opinion, we have to scrutinize the application filed under rules 1 & 2 of Order XXXIX of CPC 1908. The operation of Order XXXIX CPC 1908 creates more problems than it aims to solve. It defeats the spirit of equity by giving an unfair advantage to the person who approaches the courts to seek temporary injunction while concealing the real facts. Although, to counter such a situation the mechanism is provided in the shape of Rules 3 &

4 of Order XXXIX of CPC 1908 but those have proven futile and ineffective in practice, which is evident from the number of frivolous litigation pending in our courts today. I would like to introduce a new term to the legal nomenclature used in the country, that is, **Temporary Restraining Order**. It may sound similar to the term already used in our legal system as 'temporary injunction', but in its operation, it is a completely different concept, a novel idea perhaps. This term (temporary restraining order) is quite frequently used in European and American legal systems.

In German law, two means are provided for temporary judicial protection of rights in jeopardy: the attachment and the temporary restraining order (einstweilige Verfiigung (in German)). The attachment is used for the temporary protection of monetary claims; the temporary restraining order for protecting claims arising from individual performance or non-performance. For instance, if a creditor is afraid that his debtor might transfer his assets abroad, the correct measure to protect his claim for payment is the attachment. This will give him a temporary guarantee either through partial or total attachment of the debtor's assets. On the other hand, if an individual is building a house and crosses the dividing line between his and someone else's property, the latter may protect his rights by asking for a temporary restraining order. Neither the attachment nor temporary restraining order requires the petitioner to produce complete evidence of the existence of his rights in the court. Displaying evidence indicating his right as well as the probability of its impending infringement (*semi plena probatio*)

would suffice. Consequently, the court will order only such measures which provide a temporary protection of the owner's rights. It is said that the attachment and the temporary restraining order lead to the security but not to the satisfaction of the creditor [15](Fritz Baur 1965, 247-65). In other European countries as well, temporary restraining orders are effective means to provide preventive relief. It differs a lot in terms of its exercise and operation than the application of temporary injunction in our legal system.

Proposed Amendments:

I propose complete omission of Order XXXIX from The Code of Civil Procedure, 1908 and instead of it, a new chapter in the Specific Relief Act, 1877 titled as "Temporary Restraining Order" (hereinafter referred as TRO) should be added. This chapter would provide a separate mechanism for obtaining temporary restraining order not as a supporting application in a suit rather as an independent proceeding. In order to further elaborate on the concept of Temporary Restraining Order, some of its key features are described as under:

(i) The application shall be in the manner of a prescribed form mentioning the exact infraction intended to be restrained by the applicant.

(ii) The period for which the Temporary Restraining Order (TRO) is required.

(iii) The persons (whether legal or physical) against whom the TRO is filed.

[15] Baur, Fritz. "Present German Practices in the Application for Temporary Relief: Attachment and Temporary Restraining Orders." *The American Journal of Comparative Law* 14, no. 2 (1965): 247-65. Accessed October 28, 2020. doi:10.2307/838636.

(iv) It must disclose whether the TRO is required for the purpose of approaching any other forum other than civil courts (e.g. time required for approaching revenue courts for partition of immovable property).

(v) If TRO is required during the pendency of a civil suit or till its final disposal, the details of such an emergent situation must be incorporated in the body of the application and the time likely to be consumed in such litigation.

(vi) The apprehension of loss which may occur to the applicant and the exact extent of monetary compensation, if any, which can be claimed in exchange of the loss. In case of actual loss such as loss of building material, destruction of physical property or land than the value of such material or property; in case of infractions against legal rights such as right to vote or hold an office then perceived value in the eyes of the applicant.

(vii) The applicant shall provide a surety equal to the amount of monetary compensation claimed or to the satisfaction of the court.

A. Procedure to be Adopted

The court upon receiving such application for grant of Temporary Restraining Order (TRO) shall fix a date for appearance of the respondents and provide an opportunity to submit relevant documents, if any, to the respondents. During such period not exceeding three days, an interim TRO may be granted to the applicant subject to deposit of surety as assessed in the application. The court shall fix another date of hearing of the parties within a period not exceeding 07 days and on such a day, the court may confirm the interim TRO for

period as mentioned in the application or for any other time as it finds appropriate. In case the court is of the opinion that the interim TRO was obtained through concealment of facts, fraudulent behavior or any other illegal suppression by the applicant then it may dismiss the application and award compensation to the respondent out of the surety submitted by petitioner.

B. Operation of the Temporary Restraining Order

If the Temporary Restraining Order (TRO) is granted for a specific period, then it shall cease to operate on the date mentioned in the TRO. In case the TRO is granted for approaching any other forum or during the pendency of the suit, it shall be the responsibility of the applicant to conclude such proceeding or civil suit within the prescribed time. The TRO may further be extended on submission of an application for extension, if the applicant provides without reasonable doubt that the intended purpose of the TRO has been prolonged due to no fault on his part, in such circumstances, it may further be extended requiring him to submit further surety, if the court thinks fit and after providing an opportunity of hearing to the respondents. If the court finds that such other proceedings or suit could not be concluded within the prescribed period due to the acts or omissions on the part of the applicant then in such eventuality, it shall not extend the Temporary Restraining Order (TRO). If the grievance of the applicant has been met with by the respondent, then he may withdraw his surety with the permission of the court at any time, even before the

termination of period of the TRO. The withdrawal of surety by the applicant shall amount to ceasing of operation of the TRO.

Conclusion:

The idea of TRO appears to be similar to the temporary injunction but it differs in its operation and procedures. One may argue that these objectives can be achieved by a simple amendment in Order XXXIX of CPC 1908 but as explained earlier, it being a procedural law cannot go beyond the substantive law. There will always remain some limiting factors in its implementation. Another aspect that requires consideration and attention is "why do we have come to the injunction in the first place?". Any equitable relief is based on the principles of fairness and good conscience of the society. The birth of equity was to bring the aspect of fairness and good conscience to a somewhat rigid set of common laws, in other words, to bring moral values within the confines of law. To practice equity in our courts of law, we require the incarnation of principles of fairness and high moral values in the society. But it has been observed that the moral values in this country have been in decline for many decades. Let us see if we can identify some of them; commitment to truth, justice, rule of law, equality of opportunity, respect for human life and dignity, loyalty to friends, patriotism, hard work and compensation only from the labour of one's mind and body, among others. There are indications that moral values are in a state of decline in Pakistan [16](Syed 2011 Decline of Moral Values, Daily Times). Lack of moral scruples

[16] "Decline of Moral Values," Daily Times, June 25, 2012, https://dailytimes.com.pk/109500/decline-of-moral-values/

at committing evil can be observed in markets, offices, factories and public places where people interact in a most discourteous manner [17](Valliani 2011 Tackling Moral Decline). In such a state of affairs, when the balance is tilting towards the degenerates, then to counter balance, the law requires to gain its force and provide deterrence to those who intend to misuse it.

The hallmark of the proposed amendments narrated above is the aspect of accountability and an effort to curtail frivolous litigation. Another aspect that requires shedding some light is that the party approaching the court is required to assess its perceived damage, this would enable the court to put a value on the relief claimed by the party. Later on, if it is found that the plaintiff had deceived the court through immoral acts of concealment and fraud then it would be quite easy to assess the damage suffered by the other party as well as the penalty which may be imposed on the plaintiff. It is commonly observed that in certain cases especially when the major portion of relief claimed consists of some declaration of legal right or against a public document, in suit related to partition of immovable property etc., there is such haste due to the emergent situation, and need to receive temporary injunction that the plaintiff has no option but to file a suit filled with legal lacunae and errors which later on become impossible to rectify. This haste in certain circumstances even results in the dismissal of the suit. A Temporary Restraining Order (TRO) would allow a party to take its time

[17] Amin Valliani, "Tackling Moral Decline," DAWN.COM, November 17, 2011, https://www.dawn.com/news/674038/tackling-moral-decline.

in seeking proper legal advice and file a comprehensive & competent suit before the court. Although, on the surface it may seem that this approach will result in the multiplication of litigation but in the broader and long term view, it will eliminate false, frivolous and lengthy litigation. The plaintiff would be pressured by time to pursue his matter and avoid frivolous litigation due to the accountability aspect of the TRO, and the courts would have a streamlined and genuine litigation to adjudicate upon. In order to further facilitate the public, each district may establish a few courts especially empowered to deal with applications of Temporary Restraining Order (TRO). This will eliminate an unnecessary burden on the civil courts and enable them to take up more work. This may be deemed a drastic step to some extent especially, when in practice we are dealing with a bleak situation which is worsening with the passage of time. To curb frivolous litigation and create awareness regarding the decline of moral values in society, such steps and legislations are crucial need of the people.

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(5) Cyber Laws & Intellectual Property Rights: Backbone of E-Commerce

By

Zain Ali Qureshi
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Technology is changing at a fast pace and is always ahead of existing laws. The biggest challenge to the judiciary is to keep the pace of the growth of law with the pace of advancement in technology. With every passing day, advancements in technology are posing new threats to the society collectively and laws that relate to technology become outdated after few years. Technological advancements give birth to new crimes, this implies that amendments in existing laws require somewhat development in order to remain effective and secure people. E-commerce has gained growth after the increase in Internet users.

The World Trade Organization defines E-Commerce as the production, advertisement, sale and distribution of products via electronic communication networks. In simple words, it is basically a business conducted through the Internet for sale and purchase of the products. The concept of e-commerce has broken the long chain of supply/distribution of products from whole-sellers to retailers and then finally to customers. E-commerce provides direct access to customers, and they can buy anything they like easily by placing orders online.

The overall time that is taken in the processes along with the cost has all been reduced quite efficiently. The

current issues relating to e-commerce are divided into two categories; one deals with brand owners and the second relates to customers. The issue that customers are facing right now is basically the fraud committed by several websites; the products they received after online payments were substandard and a replica of original brands. Sometimes even after the payment of online goods they didn't receive anything at the desired address. The credit card frauds and privacy of personal data are major issues faced by customers. The actual issue is faced by the owners of brands and the manufacturers of products. Fake websites effect the loyalty of customers and they are also detrimental to the reputation of brand. Usually, such cases are covered under section 13 and section 14 of The Prevention of Electronic Crimes Act 2016. Electronic fraud and electronic forgery does not protect the trademark and copyrights of a business operated through internet, however, many young entrepreneurs have started successful online businesses.

The online business demands the protection of the brand name, otherwise, the customer finds it difficult to search for the original brand. In the current situation, due to the lockdown, almost all businesses have shifted towards the online resource provided to them for the sale and delivery of their products, therefore, the need of protection of intellectual property rights on the internet has gained more popularity.

Online businesses require less capital in order to keep functioning. Unfortunately, popular brands and new comers

are facing severe issues of violation of intellectual property rights on the internet. Another greatly troubling issue is the violation of the domain name-which is basically the website name. It is the part of an electronic address on the internet. There are also various numbers of domain name disputes and the term used is Cyber Squatting which involves the use of domain name by a person with neither a trademark registration nor any inherent right. In order to protect intellectual property rights, there are two remedies available in the existing laws. One is civil remedy, including interim injunction to stop the infringement and payment of damages to plaintiff. Second is by criminal sanctions which include registration of FIR against the accused for copyright and trademark violation.

The actual issue is whether the present cyber laws cover trademark, copyrights and patent violations on internet, unfortunately, the present cyber laws and existing copyright laws lack provision to deal with the persistent violation of copyrights on the internet. Copyright, domain names and software patent violation on the internet are serious crimes that need to be controlled immediately in order to protect the e-commerce industry. It is pertinent to mention here that online plagiarism shall also be included as an offence in cyber laws. The research and literary work available online are constantly & illegally used by people without consent. The work of many researchers and books written by eminent scholars have been illegally stolen. It is now crucial to legislate laws for the protection of online intellectual property rights. The e-commerce industry can be protected by the legislation of strong and effective cyber laws.

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(6) Shayara Bano Vs. Union of India: Jurisprudential Contrast on the Validity of Triple Talaq between India and Pakistan

By

Mr. Salman Tahir & Ms. Nehan Zehra[18]
Authors are LUMS Law alumnus of 2019

Introduction:

Recent legislations and jurisprudential developments have opened up a debate on triple *talaq* (no-fault based unilateral divorce) instead of putting a closure to it. After the Indian Supreme Court's judgment in *Shayara Bano vs Union of India,*[19] Indian Parliament sought to criminalize triple *talaq* while defining it as a non-bailable offence with imprisonment up to three-years, but they could not succeed in materializing it into the law.[20] Moreover, the government bypassed the parliament and promulgated an Ordinance on September 19, 2018 to criminalize triple *talaq* with fine and imprisonment of up to three years.[21] Since the Bill was initially unable to get parliamentary

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[19] WP No. 118 of 2016(India SC) (Shayara Bano Case)

[20] India seeks to criminalize instant triple talaq divorce', Zeenat Saberin, Date: 27 December 2017 available on: https://www.aljazeera.com/news/2017/12/house-passes-bill-criminalise-triple-talaq-171228113 1 18141.html date accessed:7 July 2018.

[21] 'Why Triple talaq ordinance is better for politics that -a bill' (The Times of India 20 September 2018) accessed 21 September 2018

approval, the Ordinance was re-promulgated in January 2019.[22] The said Bill was finally passed in July 2017 by a slight majority of 99 for and 84 against. This slim majority again sparked debate amongst the legislator, hence, opening up discourse instead of putting a lid on the matter.

A fierce debate about extent of Islamic nature of triple *talaq* formed the background of this case and its criminalization in India. The main question revolves around whether triple *talaq* which is not mentioned in the Quran and whether it is Islamic or constitutional? This case-note begins with an overview of contextual background of the issue, subsequently exploring the emergence of 'triple *talaq'* in the history of Islam. It then sheds light on the facts, procedural history and the ruling by the Supreme Court in the *Shayara Bano* case. This is followed by a detailed discussion on jurisprudence of existing laws in India while contrasting it with the legal developments in Pakistan. The case-note then analyzes the implications of criminalizing 'triple *talaq'* and whether it has the potential to be used as a tool for better or worse for dissolution of marriage. Lastly, a conclusion is drawn by highlighting the potential impact of the judgment on triple *talaq* and its criminalization.

[22] 'Triple talaq ordinance re-promulgated', The Economic Times, 13 January 2019, available on: https:.Veconomictimes.indiatimes.cominews/politics-and-riation/triple-talaq-orclinance-re-promuluatediartieleshowio7509945.cms date accessed: 5 April 2019

Contextual Background: A Brief Overview: There are three types of divorces in Muslim Personal Law, *talaq-e-Ahsan, talaq-e-Hassan* and *talaq-e-Biddat* (triple *talaq).*

The main difference between the first two types of *talaq* and triple *talaq* is that the former two are revocable till a certain period of time which provides the parties a chance of reconciliation, while triple *talaq* becomes effective and irrevocable right after its pronouncement.[23] Therefore, it is also called instant divorce. Triple *talaq* has been predominantly accepted by the Hanafi School. However, in contemporary and modern times, triple *talaq* has been abused by husbands with the emanation of several instances where divorce was pronounced through phone calls, text messages or letters without any prior knowledge or intimation, input or consideration of the wife. This has exacerbated the exceedingly dominating male culture in Muslim countries around the world where married women are in constant and continuous fear of getting divorced by their husbands on issues as menial as not being the perfect cooks.

In order to unravel the historical development of triple *talaq,* the main question which needs to be addressed is that whether triple *talaq* was ever witnessed during the time of Prophet Muhammad (Peace Be Upon Him). Mufti Muhammad Maulana Usmani has narrated an incident from *Musnad Ahmad ibn Hanbal* where *Rukanah*

[23] 'Family Laws in Pakistan', Dr. Muhammad Zubair Abbasi and Dr. Shahbaz Ahmad Cheema, 2018, Oxford University Press.

pronounced triple *talaq* to his wife but later he regretted it. He then went to Prophet (Peace Be Upon Him), to which the Prophet (Peace Be Upon Him) asked whether you pronounced it in one sitting. Upon *Rukanah's* answer the Prophet (Peace Be Upon Him) declared to treat triple *talaq* as one divorce out of the three pronouncements and Rukanah could have his wife back. Hence, this concludes in Sunnah that wherever triple '*talaq'* was pronounced during the time of the Prophet (Peace Be Upon Him), it was considered as one *talaq* after which the husband had a chance to reconcile.[24]

Maulana Usmani points out that it was during Hazrat Umar's (RA) reign when triple *talaq* was validated and became part of the law. However, it is imperative to understand the contextual need for such validation. Then Maulana 'Umar Ahmad further quotes from Haykal's book to show why Hazrat 'Umar was constrained to enforce triple divorce despite the Qur'anic injunction contrary to it. Muhammad Haykal says that when the Arabs conquered Iraq, Syria, Egypt, etc., the women prisoners from these regions were brought to Mecca and Medina. These women were very attractive and charming and the Arabs were captivated by their charm and wanted to marry them. But these women insisted on the men giving irreconcilable divorce to their former wives as a condition precedent in marriage

[24] TRIPLE TALAQ, Ibrahim B. Syed, available on: http://www.irfi.org/articles/articles_151_200/triple_talaq.htm, date accessed: 20 July 2018. Replace with authentic source. i'anzilur Rahman's Code of Muslim Personal Law.

with prisoners. At that time, Caliph Umar (RA) validated triple *talaq'* in order to save Muslims from any sin.[25]

At this point, it is pertinent to repeat that Hanafi law has accepted triple *talaq* as a valid practice of divorce. However, despite this, what is equally important to note is that Hanafi jurists have clearly laid down that cases in which application of Hanafi law causes hardship to Muslim community, it is permissible to apply provisions of Maliki or Hanbali School.[26]

Prior to Independence, organizations working for the welfare of Muslim women condemned uncodified customary laws prevalent in the Indian Sub-continent, which adversely affected their lives. They wanted applicability of Muslim Personal Law as an outcome of enactment i.e. Application of The Muslim Personal Law (Shariat) Act 1937 (hereinafter called as" Act of 1937") was promulgated. Sections 2, 3 and 5 of the Act of 1937 are related to marriage and rights of wives. As far as the matter of triple *talaq* in Muslim dominated countries is concerned, many countries such as Pakistan, Bangladesh, Malaysia, Egypt, Indonesia and others have abolished triple *talaq* or declared it unconstitutional. Countries such as Libya and Yemen, which have not declared it void, have declared that *talaq-e-biddat* will amount to single revocable talaq and have always kept the room open for reconciliation. Pakistan has

[25]TRIPLE TALAQ, Ibrahim B. Syed, available on: http://www.irfi.org/articles/articles_151_200/triple_talaq.htm, date accessed: 20 July 2018. Replace with authentic source. i'anzilur Rahman's Code of Muslim Personal Law.

[26] Ibid

also abolished triple *talaq* under the Muslim Family Law Ordinance 1961 ("MFLO") but it has gone one step further by criminalizing any sort of *talaq* which is given without notifying the chairman of the Union Council under Section 7 (2) of the Muslim Family Law Ordinance 1961 (MFLO).

Facts of *Shayara Bano v Union of India* (WP No. 118 of 2016, India SC, Shayara Bano Case)

The facts of the case are that in 2016, Ms. Bano approached the court demanding that the *talaq-e-biddat* pronounced by her husband be declared void. She was married in April 2001 to the Allahabad based property dealer namely Rizwan Ahmed and she alleged that her husband & in-laws demanded additional dowry from her parents. She was often beaten and kept hungry in a closed room for days. More importantly, without her prior knowledge or consent, on October 2015, her husband sent her a letter by speed post which contained a pronouncement of instant triple *talaq*. Furthermore, as per the letter, their two children would also remain with the father.

Ms. Bano went to the court and prayed that triple *talaq* be declared illegal and unconstitutional on the grounds guaranteed by the Constitution of India under Articles 14, 15, 21 and 25. The petitioner also contended that section 2 of The Muslim Personal Law (Shariat) Application Act 1937 has specifically sanctioned triple talaq and argued that the statute must be declared void and unconstitutional. Her husband, on the other hand, opposed

the plea on the ground that they were governed by Muslim Personal Law and the practice is allowed by Hanafi school *viz a viz,* Muslim Personal Law. Muslim organizations such as the All India Muslim Personal Law Board ("AIMLPB") opposed the court's adjudication in Islamic matters, maintaining that these practices stemmed from the Holy Quran and were not justiciable. The concept of 'bad in theology but good in law was also invoked'. The contention of petitioner was that since it was an accepted position by the respondents that triple talaq is bad in theology, it cannot be good in law and therefore, such a law which is bad in theology must be struck down.

Judgment

The decision of the Supreme Court was delivered by a five-member bench from five different religious communities. These were Chief Justice JS Khehar (Sikh), Justices Kurian Joseph (Christian), RF Nariman (Parsi), UU Lalit (Hindu) and S Abdul Nazeer (Muslim). The verdict of the court banned triple *talaq* with a majority of 3:2. The minority judgments were delivered by Chief Justice J S Khehar and Justice S A. Nazeer. They ruled that *talaq-e-biddat* is a matter of personal law of Hanafi Sunni Muslims which is an integral part of Muslim faith and practice.[27] 'They also held:

> "We have examined whether the practice satisfies the constraints provided for under Article 25 of the Constitution, and have arrived at the conclusion, that

> it does not breach any of them. We have also come to the conclusion that the practice being a component of 'personal law', has the protection of Article 25 of the Constitution."

They also held that it is not up to the court to decide whether, section 2 of The Muslim Personal Law (Shariat) Application Act 1937 which provided for the application of Muslim Personal Law in matters of including, but not limited to, divorce is invalid or not and the matter should be dealt with competent legislature.

However, on the other hand, the majority judgment was of the view that triple *talaq is* not an integral part of either Sharia or Muslim Personal Law and held that:

> "Merely because a practice has continued for long that by itself cannot make it valid if it has been expressly declared to be impermissible. The whole purpose of the Muslim Personal Law (Shariat) Application Act 1937 was to declare Shariat as the rule of decision and to discontinue anti-Shariat practices with respect to subjects enumerated in section 2 which includes *talaq."*

Triple *talaq* was, hence, declared violative of fundamental rights contained under Article 14 of the Constitution of India and the relevant section of The Muslim Personal Law (Shariat) Application Act 1937 legitimizing triple *talaq* was declared to be void. The issue of legality of triple *talaq* with references to the injunctions of Islam has been under consideration since long, the following part

expounds upon the jurisprudential development in triple *talaq* in India.

Judicial History and Development of Triple *Talaq* in India:

This part briefly explicates the key decisions of constitutional courts in India, their role in the development in application of triple *talaq* and pre-conditions that should be met in order to attain the finality of divorce as held by the courts.

Initially, the courts were inclined towards declaring triple *talaq* as a valid form of divorce. The issue was originally in contention in 1932 in *Rashid Ahmad v Anisa Khatun (AIR 1932 PC25)*[28]. In this case, triple *talaq* was pronounced in presence of witnesses but in absence of wife, the court held that the pronouncement of triple *talaq* by the husband constituted an immediate and effective divorce and the validity and effectiveness of such pronouncement is not affected by the mental intention of the husband.[29] Subsequently, courts became more prudent and pragmatic towards the wife's equity especially regarding the causality of the divorce. In the case of *Jiauddin Ahmad vs Anwara Begum (1981, Gau.L.R358)*[30], the Court held that talaq must be given only if there is a good cause of divorce and room for reconciliation must be open.[31] The Court also listed following ingredients which would constitute a valid *talaq:* firstly,

[28] Rashid Ahmad v Anisa Khatun AIR 1932 PC 25
[29] Ibid [15]
[30] Jiauddin Ahmad v Anwara Begum (198 I) Gau.L.R 358
[31] Ibid, [8]

talaq must be based on good cause and not mere desire; secondly, it must not be secret; thirdly, there must be time for reconciliation between pronouncement and finality; and fourthly, there has to be a process of arbitration as a means of reconciliation in a manner provided by Sharia. Constitutional courts became even more inclined towards harmonious interpretation of Muslim Personal Law and the rights of wife, for instance, the Court in *Masroor Ahmad v State* (2008 (103) DRJ 137)[32] stated that pronouncement of triple *talaq,* even for Sunni Muslims was to be regarded as a single revocable pronouncement of talaq, hence, giving ample time to husband to think about what he has done and opens room for reconciliation.[33]

The most eminent case in this regard is the case of *Shamim Ara v State of UP and Another* ((2002) 7 SCC 518) [34], wherein the Indian Supreme Court in its landmark judgment overruled the previously held position in favor of the legal sanctity of triple *talaq.* In this case, the court held that triple *talaq* is devoid of any legal basis and lacks legal sanctity. The Court further held that triple *talaq* is invalid since there are no reasons substantiated in justification of *talaq* and there is no effort at reconciliation after pronouncement of *talaq,* both of which are mandatory requirements for irrevocable *talaq* to be effective.[35]

[32] Masroor Ahmad v State 2008 (103) DRJ 137
[33] Ibid [27]
[34] Shamim Ara v State of UP and Another (2002) 7 SCC 518
[35] Ibid [15]

Lastly, in *Ummer Farooque v Naseema, (*2005 (4) KLT 565)[36], the Court held that the old position was that the only condition necessary for a valid *talaq* was of the husband being a major and of sound mind at the time he pronounces *talaq* and can do so at his own desire.[37] The new position which emerged was that mere pronouncement of *talaq* three times is not sufficient to result in a valid divorce, there may be attempts of reconciliation and the husband is entitled to pronounce *talaq* only on account of failure to reconcile. The Court also relied on *Shamim Ara* case to declare that the practice of triple *talaq* is not an integral part of Muslim faith. It also held that freedom of religion is granted in Article 25 (I) of Indian Constitution subject to certain conditions such as public order, health and morality and other provisions regarding fundamental rights. Article 25(2)(b) Indian Constitution does not prevent State to make laws to promote public welfare. Thus, the majority held that triple *talaq* can be done away with and reiterated the position of *Shamim Ara* by declaring what is bad in theology cannot be good in law.

In conclusion, what can be gathered from the above-mentioned judgments is that the courts initially upheld triple *talaq* as a valid means of divorce. Gradually, the stance changed to making it necessary to show cause for divorce and having a room for reconciliation. The stance further developed to initially declaring it as a single

[36] Farooque v Naseeina 2005 (4) KLT 565
[37] Ibid [5]

pronouncement and later to the current position of declaring it as invalid.

Development of law on Triple Talaq in Pakistan:

In contrast with Indian courts, in Pakistan, we have a very flexible attitude towards triple *talaq.* Pakistan has a very comprehensive legal framework dealing with the matters of divorce and other ancillary matters. The primary law regulating the divorce in Pakistan is Muslim Family Law Ordinance 1961 ("MFLO"). Section 7 makes it a compulsion for the pronouncer of divorce to give written notice of *talaq* to the Chairman of the Union and a copy of it to the wife as wel1.[38] Failure to do the above can amount to punishment up to 1 year and/or fine of up to PKR 5,000/-.[39] More importantly, as per Section 7(3) of Muslim Family Law Ordinance 1961 (herein referred as MFLO), the *talaq* shall not become effective until period of ninety days have passed. This means that in the case where triple *talaq* is pronounced it will not become effective until expiry of period of days.

The requirement of chairman to form a committee for reconciliation after submission of notice under Section 7(1) of MFLO 1961 further curtails husband's power to pronounce triple *talaq.* The above-mentioned deterrents are more than sufficient to maintain sanctity of marriage and not let it tarnish by *talaq-e-biddat.* India while further developing jurisprudence of triple *talaq* should consider

[38] Muslim Family Law Ordinance 1961, Section 7(1)
[39] Ibid. Section 7(2)

provisions of section 7 of Muslim Family Law Ordinance 1961(MFLO).

In order to elucidate the jurisprudential development of triple *talaq* under Pakistani law, it is important to accentuate the cases in which triple *talaq* has been validated and invalidated by the Pakistani courts in the past history. In Pakistan, the courts appear to have a flexible stance over this issue. In some judgments they have held the validity of triple *talaq,* while, in others they have declared it to be invalid after giving due consideration of the welfare of wife. Following cases are pertinent to the issue of validity of triple *talaq* in Pakistan.

Case laws in which *triple talaq* was validated under Section 7 of MFLO in Pakistan:

Discordant to the courts in India, the courts in Pakistan have not rigidly clung to the notion of invalidating triple *talaq* without viewing its social, economic and personal implications for the wife. In *Sardar lqbal vs Tahira Parveen,* [2010] YLR 582 (Lahore High Court, Lahore)[40] the wife sued for the recovery of her *dower, dowry* articles and for the maintenance of herself and her child. In pursuant to this suit, the husband filed a suit for the restitution of conjugal rights, hence, claiming that his marriage has not yet been dissolved and that he did not validly divorce his wife. The facts of this case are that the couple was married on May 11th, 2003. They then had two daughters, one of whom died after ten days of her birth. Four years

[40] *Sardar lqbal v Tuhira Parveen* [2010] YLR 582 (Lahore High Court)

after the marriage, the husband expelled his wife from the house and divorced her through a divorce deed. The husband also sent the notice of *talaq* to the Chairman of the Arbitration Council. The wife had the custody of the surviving daughter, therefore, she filed a suit for the recovery of her *dower* and also claimed maintenance for herself during the period of *iddat* and of her minor child. The husband denied all her averments in his written statement and also filed a suit for restitution of conjugal rights. Both suits were consolidated. The counsel for the husband argued that the husband has given triple *talaq* to her wife mistakenly and for that he referred to a *fatwa* at the back of the affidavit filed by the husband where it was written that he has pronounced triple *talaq* to her wife mistakenly and hence, has the right to revoke it. Such *fatwas* are normally obtained from the *Ullama* belonging to the *Ahl-e-hadith* school and they consider triple *talaq* as one pronouncement.[41] In the appeal at the High Court, the petitioner (husband) stated the same fact that his pronouncement of triple *talaq* to his wife was a mistake and for this he presented the same *fatwa* in the court.[42] The petitioner also claimed that previous judgments of the same case have been misread and that the list of the dowry articles presented by his wife in the trial and appellate court is fake and that since he revoked his *triple talaq* which was pronounced as a mistake, his wife is not

[41] *Sardar Iqbal v Tuhira Parveen* [2010] YLR 582 (Lahore High Court)
[42] Ibid

entitled to the 10 *tolas'* of gold ornaments which she would have been entitled to get on the validation of divorce.[43]

The Court did not agree with the contention that the evidence has been misread. The Court held that the intention of the petitioner (husband) while pronouncing triple *talaq* was that of *talaq-e-Bayan* which is irrevocable.[44] The Court raised the concern that for *talaq* to be irrevocable, there should be co-habitation and since there has been no co-habitation, therefore, *talaq* cannot be revoked. The honorable judge relied on *Tafseer-e-Quran* Volume 1 by Maulana Taqi Usmani which has explained *Ayat* No: 123 of *Surah Baqrah* and opined that the power of husband has been restricted to divorcing twice only. If number of divorces is not more than this then it is open for husband to revoke it during the period of *`iddat'* for which the couple has to continue their marital relations.[45] It is further mentioned in the book by Maulana Taqi Usmani[46] that if *talaq* is pronounced thrice then it cannot be revoked by the husband. It is also pertinent to note that a husband cannot remarry that woman because since irrevocable divorce is deemed to be pronounced, *halala* of intervening marriage is needed, if husband wants to marry his ex-wife.[47] Therefore, the husband cannot revoke triple *talaq* under any

[43] Ibid
[44] *Sardar Iqbal v Tuhira Parveen* [2010] YLR 582 (Lahore High Court)
[45] Ibid
[46] Fqhi Maqalat', Hazrat Maulana Mufti Muhammad Taqi Usmani, volume 3
[47] Ibid

circumstances and the decree was passed in the favor of the wife. Thus in this case, triple *talaq* was validated by the Lahore High Court. Pakistani Courts, hence, favored the wife by declaring triple *talaq* valid and to be effective immediately. By considering the following cases, it will become evident that Pakistani Courts have gradually shifted from declaring triple *talaq* valid to invalid in order to safeguard the rights of women.

In *Allah Banda v Khurshid Bibi,(1990 CLC 1683 (Lahore High Court, Lahore)*[48] triple *talaq* was considered to be valid and effective immediately by Mr. Justice Mian Nazir Akhtar. The brief facts of the case are that Allah Banda (petitioner) married Khurshid Bibi and their *nikkah* was performed in accordance with the provisions of Muslim Family Law Ordinance 1961. After a while, a child was born who died during the time of delivery. Later, the husband divorced wife but soon after he filed the suit for the restitution of the conjugal rights. As a result of this, the ex-wife submitted the husband's notice of *talaq* before the court upon which the husband filed a petition stating that the notice has been forged by her wife and that they are not divorced. The honorable Judge in this case decreed the case in the favor of the respondent (wife) and held that triple *talaq* is valid and was rendered effective immediately. This shows that in the case at hand, the Court declared the *triple talaq* valid adopting a pro-women stance.

[48] Allah Banda v. Khurshid Bibi [1990] CLC I683 (Lahore High

In *Mst. Amira Bokhari v Faqir Syed Jamil-ud-din Bokhari (PLD* 1994 page 236, Lahore High Court, Lahore)[49], the same Judge, Mr. Justice *Mian Nazir Akhtar,* issued a decision validating triple *talaq.* In this case, the petitioner (wife) was married to the respondent in Lahore where they had three children during wedlock and after a while shifted to America. The couple acquired American citizenship there but soon after they started developing some issues in their relationship as a result of which the respondent (husband) came back to Lahore and sent the notice of talaq to the petitioner. The wife then filed a suit in the Lahore High Court claiming for New York Family Laws to be applied, and hence, stating that the issuance of the notice of *talaq* by the Chairman of the Union Council is unlawful.[50] The court relied upon the judgment in *Allah Banda's* case and held that triple *talaq* is valid and effective immediately but its effectiveness cannot be determined by the Chairman of Union Council, hence, the certificate of effectiveness would be unlawful.

Cases in which triple *talaq* was invalidated under Section 7 of MFLO in Pakistan:

In *Sardar v Malik Khan (2003 YLR 2623 Lahore High Court, Lahore)*[51], the main issue, in this case, revolved around the inheritance of the issueless deceased named Sultan Ahmad and his estate. The petitioners were the legal heirs of the deceased, while the respondents were the legal heirs of Mst. Dhami, the widow of Sultan Ahmad.

[49] Mst. Amira Bokhari v. Faqir .Syed Jamil-ud-Din Bokhari [1994] PLD 236 (Lahore High Court)

[50] Ibid [2]

[51] Sardar v Malik Khan [2003] YLR 2623 (Lahore High Court)

The facts of the case are that the deceased gave a notice of divorce to Mst. Dhami three days before he died. Mst. Dhami filed a suit claiming her share in the estate of the deceased with the affirmation that the divorce notice was fabricated and hence, the fictitious document was prepared by the petitioners in order to deprive her from her legal share as the wife of Sultan Ahmad. She stated that her husband was of unsound mind at the time of divorce and that she was never informed of any such thing regarding divorce. The suit was decreed in the favor of Mst. Dhami and she was declared to be entitled to 1/4th of the estate of her husband. The petitioners then filed an appeal against this decision, which was dismissed by the appellate court, as a result thereof, a revision petition was filed before the Hon'ble Lahore High Court.[52] The petitioners made the argument that the written divorce becomes operative immediately and therefore, Mst. Dhami has no legal share in the property of the deceased. The learned counsel for the respondent argued that '*triple talaq*' given in one session amounts to be a single pronouncement and for this, they relied on Verses 226 and 231 of the *Surah Baqarah* and Verse 49 of *Surah Ahzab.* The respondents argued that according to these verses triple *talaq* amounts to single pronouncement which cannot be revoked until the time of *iddat'* and therefore, *Mst. Dhami* continues to be the widow of the deceased and should be given her share from the property of Sultan Ahmad. This argument was upheld by the Court in the aforementioned judgment.

[52] Sardar Vs. Malik Khan (2003 YLR2623)

Few judgments that were cited in the above-mentioned case are the ones that held triple *talaq* invalid since it was considered as a single pronouncement. In the case *Federation of Pakistan v Mst. Tahira Begum (1994 SCMR 1740)* [53], it was mentioned that the parties belonged to *Fiqah Jaffariah* according to which, triple *talaq* in one session is not considered valid.[54] Moreover, it was held in *Farah Khan v. Tahir Hameed Khan* (1998 MLD 85) that even in the absence of the notice of *talaq* to the chairman, *talaq* would become operative under injunctions of Islam.[55] Furthermore, in the case *Zuhaida Khatoon (1996 MLD 1689),* it was established that triple *talaq* is binding and that the husband is not given the option of revocation, once triple *talaq* has been pronounced.[56] All these judgments were cited in Sardar vs. Malik Khan by the petitioners to establish their case that even in the absence of the notice, triple *talaq* was to be considered as valid.[57]

The Court relied on the several verses of different Surah of Quran. Verse No.229 of *Surah Bagarah* contemplates the issue of triple *talaq* and says that it is irrevocable.[58] Verses Nos.228- 229 and 231 also provide for a reunion during the period of *Iddat.* Verse No. 1 of *Surat-al-talaq,* mandates that a divorcee is not to be turned out of

[53] Federation of Pakistan v Mst. Tahira Begum 1994 SCMR 1740
[54] Ibid [6]
[55] Farah Khan v. Tahir Humid Khan and another 1998 MLD 85
[56] Zubaida Khatoon v. Administrator, Union Council Uch Gillani, Tehsil and District Bahawalpur and another 1996 MLD 1689
[57] Sardar v. Malik Khan 2003 YLR 2623
[58] Ibid

the house during the period of *Iddat*. This clearly expands upon the scope for reconciliation.[59]

The judgment also discussed the scope of the validity of triple *talaq* in different schools of *Fiqah*. It was mentioned in the judgment that:

(i) Fiqah Jaffaria does not consider it as valid.
(ii) Malikis also share the same view with Fiqah Jaffariya.
(iii) Shafis also share the same view with Fiqah Jaffaria.
(iv) Hanblis recognize triple divorce as one if marriage is consummated and is pronounced in a particular form.[60]

Therefore, the Lahore High Court invalidated the triple *talaq* in this case and it was decreed that Mst. Dhami would continue to be the widow of the deceased and hence, is entitled to her legal share in his property.[61]

A detailed analysis of all the case laws regarding triple *talaq* establishes that courts in Pakistan conclusively tend to protect the rights of the women either by validating triple *talaq* or by invalidating it in the cases where triple *talaq* is being used to deprive women from their rights arising out of marriage. Therefore, in light of the aforementioned cases, it is pertinent to understand that courts in Pakistan have not set a definite rule as to validating or invalidating triple *talaq* rather the said jurisprudence has been developed in favor of women. Over

[59] Ibid
[60] Sardar v. Malik Khan 2003 YLR 2623
[61] Ibid

the years, courts have set the precedent that triple *talaq* has been employed by husbands to violate women's rights and hence, its validity depends upon whether it goes in favor of the wife or not. This may be a result of an attempt by superior courts in Pakistan to show that the principles of Shariah and Muslim Personal Law are not rigid in their application and interpretation.[62]

Implications of Criminalizing Triple *Talaq:*

This part will highlight both positive and negative implications of criminalizing triple *talaq.*

An argument in favor of criminalizing triple *talaq* could be made by considering the repercussions of this form of *talaq* pronounced on Muslim women. Penal consequences can be considered necessary not only because it is a form of verbal abuse but also if the divorce is declared void, the wife is again sent back home to live with the same husband. Reconciliation, more often than not, is bound to fail. The eventual option for the wife is to seek *Khula* or for the husband to grant divorce properly. But this does not discourage the practice of pronouncing triple *talaq* particularly, since the husband knows that he will not suffer further consequences apart from the payment of meager maintenance and dower. Furthermore, the pronouncement of triple *talaq* can still be used as a pressure tactic against the wife in the same way as the plea of restoration of conjugal rights is used by husbands.

[62] Abbasi, M.Z, 'Women's right to unilateral no-fault based divorce in Pakistan and India', (2016) 7 Jindal Global Law Review. Jindal Global Law Review (2016) 81

Also, there might exist a group of women with a view that even though triple *talaq* would have been declared ineffective if pronounced, the theological argument might play a role. An argument can be made that women might be thinking that they would be committing *Zina* (unlawful sex) regardless of the pronouncement, if the judge is inclined to save marriage.

Another important reason to prohibit triple *talaq* is to prevent it from being used as a coercive tool by husbands, similar to the application of restitution of conjugal rights on wife's demand for *Khula.* For instance, a husband and/or court could simply annul the triple *talaq* in question declaring it invalid. In such a case, the wife would have to return to the same person who pronounced triple *talaq* with the intent to give her divorce. Subsequently, the wife in such a situation would be left with no alternate remedy other than to file suit for *khula* and consequently, surrender her dower. This causes particular confusion in cases where families still continue to elect a remedy under Muslim Personal Law rather than civil law. Triple *talaq* could then be used as a tool to sever ties with the wife leaving her with no option other than filing for *Khula.* Therefore, it can be argued that there is a dire need to legislate on the very matter where husbands pronouncing triple *talaq* should face penal sanctions in order to uproot this menace act while safeguarding the rights of a wife.

On the contrary, Section 3 of the Ordinance which makes the pronouncement of *talaq* void, illegal and

punishable with a maximum of three years of punishment, constitutes a strict liability offence, which does not require a proof of *mens rea.*[63] Furthermore, marriage is a contract which imply that invalid termination of such a contract would incur civil damages and not criminal. A breach of contract is a private wrong i.e. violation of a right in *personam* and therefore, the law provides for liquidated damages which are fixed by parties themselves at the time of entering into contract.[64] These damages are usually in monetary form as a payment to compensate for damages suffered. Violation of rights promised through contract of marriage (right in *rem)* is a civil wrong and therefore, should be remedied through damages rather than imprisonment.[65] In either case, it could be argued that terminating a marriage contract through triple *talaq* should not incur penal sanction due to privity of the contract.

Furthermore, it is important to expound upon the aftermath of the criminalization of triple *talaq* and whether it actually serves the purpose that is to work towards the prosperity of women as a whole. An argument made against criminalizing triple *talaq* is the harshness of imprisonment up to 3 years. Other crimes that incur up to 3 years imprisonment include: rioting, armed with deadly

[63] Chirag Balyan, 'The criminalization of triple talaq is it a doom of Criminal Law'. 24 September 2018, available on: https://www.livelaw.in/the-criminalisation-of-triple-talaq- is- it-a-doom-of-criminal-law/ date accessed: 25 September 2018

[64] Faizan Mustafa, 'Why Criminalizing Triple Talaq is Unnecessary Overkill?', 15 September 2018, available on: https://thewire.in/gender/why-criminalising-triple-talaq-is-unnecessary-overkill Date accessed: 26 September 2018

[65] Ibid

weapon,[66] promoting enmity between classes of people, making or selling instrument for counterfeit coin, import or export of counterfeit coin, deliberate and malicious insulting of the religion or religious beliefs of any class. These crimes are much more serious than the act of an individual who, instead of taking three months to divorce his wife, divorced her instantly.[67] Imprisonment would also be seriously detrimental to the life and sanctity of the family as men usually are breadwinner for the family; and sending them behind the bars as penalty while declaring *talaq* invalid, would perhaps make the dependents face financial crisis. Not only does criminalizing husbands on pronouncing triple *talaq* would counter-intuitively reinforce what the Courts were trying to get away with at first place. It might hence, lead to the unwanted separations which in the end would definitely not be benefitting the women of the society. The process of criminalization would start at the time when a woman reports pronouncement of triple *talaq, it* would surely lead to the divorce if husband is sentenced to imprisonment as a result of pronouncement. Moreover, a woman reporting this would want to save her marriage and doing this would not only lead to dissolution of the marriage but also would deprive her of the financial support as the husband would be serving jail up to 3 years. Hence, the reporting of the triple *talaq*

[66] Indian Penal Code 1860, Section 148

[67] Faizan Mustafa, 'Why the triple talaq Ordinance is neither perfect nor necessary', 21 September 2018, available on:https://indianexoress.com/article/explained/why-the-triple-talao-ordinanee-is-neither-perfect-nor-necessary 5367271/ Date accessed: 26 September 2018.

might also lead to additional violence faced by women which may make their future insecure in terms of their socio-economic sustenance. Lastly, the pronouncement of triple *talaq* would be done mostly in private so very little proof would be available for the state to successfully validate the claim making it nearly impossible to convict.

Therefore, criminalization of triple *talaq,* particularly in the form of detention, would not be as beneficial as it has been posed at the face of it. What the Courts should do is not to criminalize it by imprisoning the husband but rather putting financial sanctions upon its pronouncement. This would silence the counter arguments of unwanted separations and no financial support for the women and children. Hence, financial sanctions such as large tines will serve as a deterrent for the husbands to not pronounce triple *talaq* and would also not make women financially and socio-economically insecure of their well-being.

Conclusion:

In light of aforementioned case law from diverse jurisdictions, it is incumbent upon the State to legislate on the matter of triple *talaq* in a manner where there is effective implementation of both *de facto* and *de jure* ban of triple *talaq.* The superior judiciary in India has attempted to take a more rigid and uniformed approach towards triple *talaq* without taking the social, economic and personal aspect of a Muslim wife and her family into

consideration.[68] A law safeguarding the rights of a wife must not be too harsh on a husband and his family. Therefore, a suggestion is made to penalize the act of pronouncing triple *talaq* only to the extent of financial sanctions and those too for the benefit of the aggrieved wife. Furthermore, it is also suggested that if it is unequivocally proved in the court of law that triple *talaq* was indeed pronounced, it should be treated as cruelty towards the wife who should be given a right to seek dissolution of marriage. The main distinction between jurisprudential development of triple *talaq* in both Pakistan and India denote that the neighboring jurisdiction has stressed upon banning triple *talaq* without giving due consideration to is practical ramifications for husband as well as wife. In Pakistan, courts while applying and interpreting the law, have taken a rather flexible approach which is favorable to women. This could be considered as the underlying purpose behind declaring the *triple talaq* illegal which can only be considered while dealing on case to case basis. However, laying an embargo on triple *talaq* by the Indian Supreme Court is a step in the right direction and the judgment could be implemented effectively by enacting a pragmatic law with appropriate and reasonable financial sanctions. However, it is pertinent to mention that the decision of the Indian Supreme Court is concerned more with the harmonization

[68] Abbasi, M.Z, `Women's right to unilateral no-fault based divorce in Pakistan and India', Jindal Global Law Review, Jindal Global Law Review (2016) 7: 81. https://doi.org/10.1007/s41020-016-0024-9

of Muslim Personal Law rather than safeguarding the interest of wives because, if the welfare of women is of paramount consideration for the superior courts in India then they should have declared no fault-based *khula* a legal means of ending divorce. Multi ethnicity of the bench hearing the *Shayara Bano* case only reinforces this notion of compatibility of Muslim Personal Law with other personal laws prevalent in India.

Pro tempore, both Pakistan and India have placed a *de jure* banned on triple *talaq.* In *de jure* terms, now what awaits to be witnessed is the *de facto* ban on the practice of triple *talaq*

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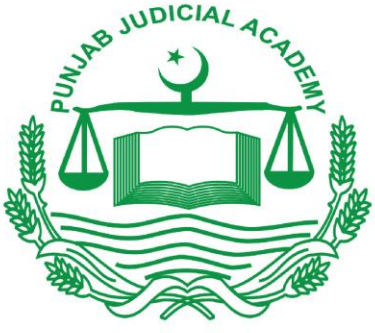

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