PJALR

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Law Review

A combination of theory and practice.

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PUNJAB JUDICIAL ACADEMY LAW REVIEW
INTRODUCTION

The Punjab Judicial Academy (PJA) is an autonomous body established under the Punjab Judicial Academy Act, 2007, serving as a premier training institution to train judges and court staff in Punjab. Under the guidance of the Board of Management, the Director General supported by a team of faculty members and staff, oversees the academic and administrative affairs of the PJA.

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 REVIEW (PJALR)

The Punjab Judicial Academy Law Review (PJALR) is a research-oriented publication spearheaded by the Research & Publications Wing of the Punjab Judicial Academy. It is published in the English Language. The primary goal of this Law Review is to create a platform for judges, writers, academics and experts in the field of administration of justice to share their thoughts and experiences regarding various legal matters and issues.

The articles featured in this research journal go through a rigorous process, starting with initial editorial assessment and plagiarism checks. Subsequently, they are sent for peer review to experts in the field and further reviewed by members of the editorial board. The Punjab judicial Academy has published four editions of its Law Reviews.

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

- Hon'ble Judges of the Superior Judiciary and the District Judiciary
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- Judicial trainers from all Judicial Academies of Pakistan
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The Punjab Judicial Academy Law Review 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.

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- References should be inserted as footnotes and numbered consecutively. The Chicago Manual of Style Sixteenth Edition (footnotes) should be followed.

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- 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

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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.

(Bushra Zaman)
Director (Research & Publications)/Editor
Punjab Judicial Academy

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ARTICLES/ RESEARCH PAPERS

(1)

ENSURING EQUALITY IN CHILD CUSTODY LITIGATION THROUGH EQUALLY BALANCED VISITATION RIGHTS

Fahad Ahmad Siddiqi[1]

In Pakistan, the Constitution safeguards the rights of citizens that they are to be dealt with equal protection of the law with the further explanation that no person shall be subjected to any action that could be detrimental to life, freedom, body, reputation, or property except as provided by law.[2] This means that no individual shall be subjected to actions detrimental to their life, freedom, body, repute, or possessions except as prescribed by law. The Constitution of Islamic Republic of Pakistan emphasizes that all actions taken by authorities must be lawful, and no statutory authority can act contrary to the law, misapply it, or abuse power. Furthermore, Article 10-A ensures that every individual has the right to a Fair and impartial legal proceedings in the determination of their civil rights and obligations or in any criminal proceedings against them. This underscores the importance of upholding the principles of Impartiality, justice, and adherence to established procedures in all legal proceedings, including guardianship and child custody cases.

Article 10-A of the Constitution of Pakistan,[3] prescribes duty of Courts to deal with everyone in accordance with law. Throughout the judicial hierarchy, courts must never forget that while dealing with matters of life, freedom, body, reputation, or property of all citizens shall be treated in accordance with the law, and anyone appearing before a judicial forum is guaranteed a just and equitable proceeding to determine their civil

[1] qaslaw@gmail.com

[2] (Article 4 explained 2024 P Cr. L J 190 [Baluchistan]

[3] Constitution of The Islamic Republic of Pakistan, 1973

entitlements and responsibilities, as well as any criminal allegations against them, ensuring a fair and impartial adjudication of their rights and obligations,[4] thus growing the scope of Article 4. Substantive due procedure guarantees that lawmaking is analyzed to defend the constitutional freedoms of people. Besides, the law couched in Article 10-A extends beyond customary judicial trials, necessitating fairness in all forums that regulate an individual's rights. This means that anybody or mechanism that decides a person's rights must stick to the principles of equality and due process.

Pursuant to Section 24-A of the General Clauses Act 1897, any individual or body conferred with the power to issue orders or directions under a statutory enactment must exercise this authority in a style that is rational, reasonable, and impartial, aligning with the original purpose of the enactment. Moreover, it is imperious for them to provide a justification for their decisions, either in part or in full, as deemed essential or appropriate, when issuing orders or directions.

Whereas in guardianship matters, Courts exercise in loco parentis authority, prioritizing the minor's welfare. To achieve this, Courts have unfettered powers, which must be exercised in deciding applications for interim custody of the minor children. Hon'ble Lahore High Court has established in Umar Farooq vs Khushbakht Mirza[5] that parents engaged in a custody battle, particularly fathers, have the natural right to seek visitation with the child. Fathers should not only contribute in the minor's nurturing but also develop affection, attachment, and understanding with them. However, non-custodial parents submit applications to the Guardian Courts seeking interim physical custody of their minor children pending the final decision in the custody cases, these applications are frequently dismissed on the grounds of being

[4] PLD 2024 Supreme Court 67
[5] PLD 2008 Lah 527

premature, thereby denying the right of non-custodial fathers to interim custody of their children during ongoing litigation process for grant of a schedule of meetings for twice a month, two hours per session and within court premises.

Although, the primary consideration in child custody disputes is the best interests of the minors, but during litigation Family/Guardian Courts frequently curtail the child's fundamental rights of free and frequent interaction with his biological parent without providing justification. This prevailing practice violates the established legal principle under the provisions of General Clauses Act 1897, which mandates that the Courts to provide valid reasons for limiting access of minor children towards their non-custodial parents. In the context of custody cases, this means that Courts should explain why they restrict a minor's access to non-custodial parents to a schedule comprising of a meagre two hours meeting once or twice in a month and that too to be held within court premises. Meanwhile this approach aims to strike a balance between the mother's custody rights and the child's need for a relationship with the non-custodial father, the restrictions often appear excessive and unjustified, potentially depriving the child of meaningful contact with the non-custodial parent.

It was observed that the guardian courts are very harsh when it comes to the temporary visitation rights of a non-custodian parent with his/her children. Surprisingly, in large majority of cases the granted interim visitation to the non-custodian parent is limited to once a month or for 2 hours within the court premises. Over the period of past many decades, such visitation orders have become a precedent all across guardian courts of Pakistan. Weekly in Guardian/Family Courts, every Saturday, more than 100 minor children are produced in the court premises or in the designated visitation area where they have a brief two-hour interaction with their non-custodial parents. This court

visitation takes place usually in a confined space, comprising one or two small rooms.

It is further pointed out that the court premises often lack basic facilities for the minor children who are brought there every week for the purposes of meeting with their non-custodial parents in uncomfortable atmosphere. Further in most cases the flawed court systems were being manipulated to take revenge from the non-custodian parent by not letting him meet his/her children. It is extremely easy for the parties to delay the proceedings simply by filing frivolous applications/appeals and assailing the orders to higher courts. Using similar delaying tactics, thousands of children are kept away from meeting with their non-custodian parent for months. It is to be noted that the nature of a child custody case is entirely different from routine civil cases. Child Custody litigation is a true representative of litigation where "Justice delayed is justice denied". The mind of a child can easily be changed. Within months due to lack of interaction with non-custodian parent and constant brain washing by custodian parent and his/her family, the children start forgetting and in many cases disliking the non-custodian parent who once used to be extremely dear and loved. This phenomenon has been named as parental alienation.

In Pakistan, the right to a fair trial is a cornerstone of the justice system, and the principle of due process is essential for ensuring a fair trial. Since the introduction of Article 10-A in the Constitution, upholding due process has become even more crucial for conducting a fair trial. Any orders passed in violation of due process are considered null and void. In line with this observation by the Supreme Court of Pakistan, Guardian courts have a constitutional and statutory duty to provide valid reasons when restricting the fundamental rights of non-custodial parents. However, it is striking that non-custodial parents are often denied access to their children, with restrictions

imposed on their visitation rights, limited to just two hours, twice a month within court premises, without any reasoning for dismissing their applications under Section 12 of Guardian & Ward Act, 1890.

The law on the subject is contained partly in the Guardian & Wards Act 1890 & partly in the Family Courts Act 1964. As per the provisions contained in schedule attached with Family Courts Act, 1964, a non-custodial parent possesses the right to seek visitation rights. Unfortunately, the current regulations surrounding this matter are vague and do not provide clear-cut instructions regarding the timing, duration, and place/ venue of these visits, leading to confusion and inconsistency. It is imperative for the Guardian & Family Courts to chalk out visitation schedules that balance both parents' involvement in their child's life, including parents' presence in significant events and activities in a child's life following parental separation, involved in child custody litigation. The primary objective is to ensure that child maintains a strong, loving connection with their extended paternal relatives, allowing them to demonstrate love and affection. Overnight stays can be a positive experience, but their appropriateness must be assessed based on the child's age, needs, and individual temperament. For instance, very young children may require alternative arrangements, while older children, like children over 5 years, may be considered eligible for the grant of frequent overnight stays. When drawing out visitation schedules, Family Courts must deliberate each case's facts and circumstances. Overnight stays ought to be the norm, unless reliable and cogent evidence is produced to establish that an exception is necessary. This approach safeguards consistency and fairness, while allowing for elasticity in exceptional cases, emphasizing the minor's wellbeing and individual needs. By doing so, the family justice system prevailing in Pakistan can ensure a fair and sensible approach that weighs the minor's welfare, including but not limited to factors such as the age of the child, the home environment of the non-custodial parent, availability of time

with the non-custodial parent and relationship of the minor with his extended non-custodial family.

A perfunctory inspection of Section 12(2) reveals that special precaution and restraint are needed when female minors appear in court to interact their non-custodial fathers. This caution is further secured by Article 14,[6] which emphasizes the right to privacy. Therefore, necessitating female minors to meet their non-custodial fathers in a swarming court premises, surrounded by 100-150 strangers, constitutes a violation of their privacy rights. While supervised court meetings with non-custodial fathers may offer advantages over home visits, it's essential to acknowledge that individuals including minor children especially female children have a right to privacy beyond their personal residence, which must be respected and safeguarded in all settings. In other words, a person's dignity and privacy are inviolable, regardless of location.

The concept of human dignity remains largely unexplored in prevailing child custody case. Courts often invoke provisions of Article 14 of the Constitution in cases involving torture, privacy and right to life, however, its application is scarce in other critical areas that impact human dignity. It is crucial to recognize the significance of human dignity in our legal dialogue, ensuring that every individual's worth and respect are prioritized especially during pendency of custody litigation. We need to introduce the concept of human dignity in our family justice system as well, valuing non-custodial parent's worth and respect. This will help us address social and legal issues. Our courts need to interpret Article 14 more generously, putting human dignity at the heart of fundamental rights.

It is significant to understand that a right to life not only comprises of one's own life but also the life, freedom and happiness of one's minor kids.

[6] Constitution of The Islamic Republic of Pakistan, 1973

Depriving non-custodial parents'[7], right to the company of his or her minor children merely because of separation with his spouse is a disadvantage and a fate worse than death, robbing them of a meaningful existence. It is further reiterated here that the right of a child to maintain a relationship with their non-custodial parent must be upheld during child custody litigation before a Guardian Court at an interim stage. It is critical to avoid imposing prolonged restrictions on a child's ability to intermingle with their biological non-custodial parent. Giving directions to custodial parents to produce the child in the court premises for the purposes of meeting with his or her non-custodial parent constitutes an unwarranted check on the human rights and dignity of the child in the first instance and of the non-custodial parent in the second instance.

It is indispensable to appreciate that a child has the fundamental right to receive love, affection, and care from both their mother and father. Moreover, it is a vital right of both the child and the non-custodial parent to have their self-esteem and privacy respected, as enshrined in Article 14 of the Constitution. The Hon'ble superior Courts have consistently held that this right to privacy is not restricted to a specific location, such as a home or office, but extends to the individual themselves, wherever they may be[8]. In addition, Honourable Supreme Court has also laid down the law in the following terms, "Therefore, when a child comes to interact with the judicial system, the response must be facilitative, cooperative and backed by child-right driven approach. Technicalities and trappings of normal practice and procedure are not suitable to the cases where very young children are the party.[9]

[7] "Fair Play, Natural Justice and Due Process in Child Custody Proceedings." Courting the Law, July 13, 2017.
[8] PLD 1998 S.C. 388 and 2010 PLD 119 Karachi
[9] 2023 SCMR 413

Failing in marriage, undoubtedly is an excruciating affair but it is not a punishable crime, hence, a parent cannot be treated as an offender. The Guardian Courts are adamant to appreciate that the concept of 'home' extends beyond physical boundaries, encompassing a sense of personal freedom, security, and privacy. The term 'privacy of home' symbolizes the intrinsic human need for a safe and private environment, which is essential to a person's well-being. Although Article 14 safeguards privacy, the meeting space paradoxically compromises this right due to inadequate seating and frequent overcrowding.

The cases pertaining to children require different skill set and expertise than that of the cases pertaining to land and property, therefore in cases where a minor is involved in litigation, the learned presiding officers needs to be equipped with a subject centric training especially about chalking out of a schedule of meeting of the minor comprising of two hours once or twice in a month and that too to be held within the premises, the Court must explain why such an arrangement is deemed appropriate. Furthermore, the Court must also provide justification for limiting the duration of these meetings to a minimum of two hours per month. This ensures that the rights of all parties involved are respected and that the decisions are made in the welfare of the minor.

With humility, it is stated that all public and judicial authorities are mandated to adjudicate citizen's applications in strict compliance with the provisions of the General Clauses Act, 1897, as unequivocally upheld by the Supreme Court of Pakistan [10]. This means that they must make decisions in a fair, transparent, and timely manner, providing clear reasons for their conclusions.

[10] 1998 SCMR 2268

Every child, by the laws of nature, deserves the love and affection of both parents, a blessing from the Almighty Allah. Despite parental discord, the child should not be deprived of benefiting from both parents. Meeting one's parent at his/her home in congenial atmosphere is a fundamental right bestowed upon every child by Allah, and there is no substitute for a natural father or mother. As much as Article 4 explicitly guarantees every civilian an inalienable right to legal protection & treatment in accordance with the law. When considered in conjunction with Section 12 of the Act 1890, it becomes apparent that the law does not specify the venue/ place for meetings between non-custodial parents and their children within court premises. However, the current practice of Guardian /Family Courts, limiting visitation to a mere two hours once or twice a month and that too to be held within court premises, contravenes fundamental rights of minor children. A court of law cannot take any action that infringes right of a person's life and liberty without valid reasons. Furthermore, a person cannot be restricted or prevented from doing something that is not prohibited by law.

The existing laws governing child custody proceedings, the Guardians and Wards Act 1890 and the Family Courts Act 1964, does not specify a particular duration or frequency for visitation schedules for minors. Instead, the paramount consideration before the Court is to ensure the welfare of the minor. In fact, core objective of both the Guardians and Wards Act (Act No. VIII of 1890) and the Family Courts Act (Act XXXV of 1964), is to protect and promote the welfare and well-being of minors. Guardian Courts must highlight this principle and make decisions accordingly. However, the present practice of chalking out stereotyped visitation schedules can be considered merely a convenient solution to avoid administrative hassles, rather than prioritizing the minor's welfare. Restricting a parent's access to their child without reasoning, cannot be considered an act done in the welfare of minor and should not be justified as a solution to administrative problems.

Studies have consistently demonstrated that children raised by single parents are more prone to various psychological complications as they mature. Research[11] has consistently shown that children from single-parent are at a higher risk of developing multiple psychological issues as they grow older. These potential consequences include, but are not limited to:

- Greater likelihood of substance abuse
- Higher incidence of suicidal tendencies
- Increased propensity for involvement in serious criminal activities

However, it's critical to appreciate that these outcomes are not predetermined and can be improved with the grant of an appropriate and an adequate at home access comprising of frequent overnight stays to the minor child with his non-custodial parent. Providing children with a nurturing environment and necessary tools can help mitigate these risks and promote healthier development.

It is necessary in the prevailing situations, that our higher courts take rapid and somber action to address this perilous issue. The family justice system must emphasize and promptly respond to this problem, safeguarding the rights and well-being of parents and particularly of children. By ensuring the self-worth and reverence of every individual, we can hope to eliminate many of the social and legal disorders plaguing our nation. It is vital that our esteemed family justice system embrace a more extensive elucidation of Article 14, placing human worth at the forefront of the basic human rights discussion. This will allow the law to rise above its literal boundaries and fulfill its true spirit, leading to a fairer and impartial culture.

[11] Report of the Director, Applied Psychology, University of the Punjab, submitted in Writ Petition No. 28566/2011

The misuse of legal process in the name of welfare of minor must be stopped. To achieve this, special syllabus and training sessions are essential for sensitizing presiding officers of the Family and Guardian Courts, enhancing their understanding and expertise in handling sensitive child custody cases. This will ensure that they provide clear, reasoned orders when making decisions as judges and when limiting non-custodial parents' (often fathers') civil rights. They are required to furnish legitimate and cogent reasons for requiring minors to be brought to court premises for meetings with non-custodial parents, especially since each case has unique circumstances that require individual consideration.

Additionally, it is suggested that presiding officers of the Family & Guardian Courts are imparted specialized training to ensure the strict adherence to therapeutic principles of natural justice in all guardianship matters. This enhanced training would empower them to render well-informed decisions that prioritize the welfare and best interests of children, while safeguarding their fundamental rights and dignity. Just as an accused person is entitled to certain rights and protections under the law, non-custodial parents in child custody litigation should also be recognized as human beings deserving of basic amenities and rights by the law of the land. This includes ensuring that their rights are protected and that they are treated fairly and justly in all proceedings.

In conclusion, the establishment of a reasonable, at-home "Minimum Standard" visitation schedule from the outset of child custody litigation is critical, mirroring the provision of interim maintenance allowance under the Family Courts Act 1964. This imperative relief must be universally available to all non-custodial parents without discrimination, commencing from the trial's inception, to prevent further injustice and ensure a fair and equitable process for all parties involved.

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References:

- PLD 1958 SC 41
- PLD 1998 S.C. 388
- 2010 PLD 119 Karachi
- 1998 SCMR 2268
- PLD 2024 Supreme Court 67
- 2008 PLD 527 LHC
- 2023 SCMR 413
- Report of the Director, Applied Psychology, University of the Punjab, submitted in Writ Petition 28566/2011

(2)
ADMISSIONS AND CONFESSIONS

Ayesha Khalid,
Additional District & Sessions Judge

Introduction

Admission, in the context of legal proceedings, refers to a statement, oral or documentary, made by a party to the proceedings or by their authorized agent, which suggests any inference as to any fact in issue or a relevant fact. The concept of admissions is crucial in the administration of justice, as it simplifies the issues that the court must adjudicate.

Judicial Admissions

Judicial admissions are formal admissions made by parties during the proceedings of a case. These admissions are recorded and carry significant weight in the adjudication process.

Relevant Provisions

The legal framework governing admissions is primarily found in the following provisions:

a) Articles 30 to 36 of the Qanoon-e-Shahadat Order, 1984,
b) Order X Rule 1 of the Civil Procedure Code (CPC) 1908,
c) Order XII Rules 6 of the Civil Procedure Code (CPC) 1908.

These provisions outline the conditions under which admissions may be made and the legal implications thereof.

Nature of Admissions

Admissions can be express or implied. Express admissions are those that are clearly and unequivocally stated, whereas implied admissions may be inferred from the conduct of the parties or other relevant circumstances.

Legal Standards for Admissions under Order XII Rule 6 CPC

To invoke the provisions of Order XII Rule 6 of the CPC, the admission relied upon must meet the following criteria:

Clarity: The admission ought to be clear and without any doubt.

Unqualified: The admission must be unqualified, with no reservations or conditions attached.

Unequivocal: The admission must be unequivocal, leaving no room for doubt.

The court must consider the admission as a whole and it shall be read in full context.

Judicial Interpretation

The judiciary has provided guidance on the treatment of admissions. In the esteemed judgments of August Supreme Court of Pakistan in a case titled G.R Syed Vs. Muhammad Afzal[1], it was held that under Order XII Rule 6 CPC, the court is empowered to pass a judgment based on admissions made by the parties to their pleadings, at any stage of the proceedings. However, if a defendant admits part of the plaintiff's claim and denies the rest, the court should, if it passes judgment under this rule, do so only for the admitted portion of the claim. For the purposes of judgment on admission, proceedings should not be dissected but must be read as a whole. An Admission of a wrong fact or by a person unaware of his legal rights has no biding effect upon its maker. When an admission is acted upon by a person to whom it is made, then it operates as an estoppel.[2] Admission is admissible against the person making it or against a person bound by such admission. In a case titled Messrs Kuwait National Real Estate Company (Pvt.) & others Vs. Messrs Educational Excellence LTD & others, August Supreme Court of Pakistan held that in order to invoke the provisions of Order XII Rule 6 CPC, it is absolutely necessary that the admission relied upon be clear, unambiguous,

[1] 2007 SCMR 433

[2] Amirt Lal Vs. Sadashiv (1944)46BOMLR432

unqualified and unequivocal, and further that the purported admission has to be read as a whole. One cannot be allowed to rely on a part ignoring the rest.[3]

Party to the Proceeding in article 31 QSO 1984, includes not only plaintiff and defendant in a civil suit but also an accused in a criminal case and complainant in a non-cognizable case. Likewise, an admission by agent shall bind the principal. An Admission by one member of a partnership firm within scope of partnership business shall be binding on all partners.

Summary and Speedy Remedy

The provisions of Order XII Rule 6 CPC provide a summary and speedy remedy in cases where admissions are made by defendants in pleadings or outside the same. The object of order XII Rule-6 CPC is that a party may obtain judgment quickly upon the admission made by defendant. However, if the questions involved cannot be decided, by such admission the court may proceed further and require evidence.

Legal Implications of Admissions

Nevertheless, since every admission is capable of being explained or withdrawn, it cannot be used against the party making it unless they are given an opportunity to explain or withdraw the admission. Admissions made by a party in earlier proceedings may be worth consideration, in other proceedings, related to the same subject matter. This highlights the principle that admissions, while powerful, must be treated with caution and subject to judicial scrutiny to ensure fairness in the legal process. Admission is a substantive piece of evidence but not a conclusive proof. An Admission made by a person may be proved in any of the manner in which a statement is proved. If admission is included in some document, the document must be proved in the manner required. From admission of signature upon a document, it cannot be, so inferred, that it is admission of its execution.

[3] 2020 SCMR171

Exceptions to the Hearsay Rule

Admissions are generally admissible against the person making them or against a person bound by such admissions. However, they constitute one of the three exceptions to the hearsay rule. The other two exceptions are:

a. **Statements Made by a Deceased Person:** These are admissible under certain conditions, particularly when the statement pertains to the cause of death or was made in the course of duty. (Article 46 Qanon-e-Shahdat Order 1984)
b. **Statements Contained in Public Documents:** Such statements are also admissible, given that public documents are presumed to be accurate and are made by public officers in the performance of their official functions.

Admissions in Evidence

The most generally accepted ground for the reception of admissions in evidence is that a party's declaration, whether for or against their interest when made, may always be taken as true against themselves.[4] A previous statement in writing by a witness, if contradicted by him, cannot be used as evidence unless he has been confronted with such writing, inviting his explanation.

Key Principle Regarding Inconsistent Statements

When a party has testified in the witness box and made a statement inconsistent with or denying a previous admission, the previous admission cannot be used as legal evidence against that party unless:

a) The attention of the witness was specifically drawn to that previous statement during cross-examination.
b) The witness was confronted with the specific portions of the statement intended to be used as admissions.

[4] (as per Phipson Evidence, 14th Ed. Page 223).

If the statements relied upon as admissions are ambiguous or vague, the party relying on them is obligated to draw the opponent's attention to these statements during cross-examination. This ensures that the opponent can be cross-examined properly, and the statements can be used to contradict their evidence on oath.

Categories of Admissions

1) Admissions of Fact:
2) Of Document: (Order XII Rule 2 CPC)
3) Admissions in Pleading:
4) Expressly: (Order VII Rule 5 CPC)
5) Constructively: (Order VII Rule 5 CPC)
6) Admissions through Examination by Court:
7) Examination by Court: (Order X Rule 1 CPC)
8) On Notice: (Order XII Rule 4 CPC)
9) On Agreement of Parties: (Order XXIII Rule 3 CPC)
10) Admissions through Answer to Interrogatories:
11) On Oath: (Order XI Rule 8 CPC)
12) Admission under (Order XIV Rule 3 CPC)

Interest of the Minor:

Although, provisions of Order XII Rule 6 CPC is discretionary with the court to grant decree on admissions but where the interest of a minor is involved, the court must be cautious in granting a decree based on a conceding written statement if filed by a guardian ad litem.[5]

Confession Defined

A confession is a free and voluntary statement made by the accused, through which the accused admits his guilt. It is not specifically defined in the Qanoon-e-Shahadat Order, 1984, in the General Clauses Act, 1897, or the

[5] 2007 SCMR 1684 (Bashir Ahmed v. Shamsuddin and others).

Criminal Procedure Code, 1898, or any other statutory law in Pakistan. Therefore, the meaning of confession is typically understood through the interpretations provided by jurists and various judgments. In simple terms, a confession is a direct acknowledgment of guilt by the accused.

Explanation by Sir James Stephen

Sir James Stephen, who drafted The Evidence Act of 1872, explained confession as, "a confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime." This definition was used by judges in sub-continent till 1939. However privy gave a different definition, stating that a statement merely suggesting inference that the maker of the statement has committed a crime cannot be considered a confession. A valid confession must admit the offense or, at any rate, substantially all the facts constituting the offense.

Although the QSO 1984 does not clearly define "confession," the essence of related Articles in the QSO (Articles 37 to 43) suggests the following:

- A confession should be made:
- Voluntarily
- Without coercion
- Without undue influence
- Without any promise
- Without any greed
- Without any benefit given in exchange
- In front of a person who has the authority to take it

Classification of Confession:

Confessions are classified into two kinds:

a) **Extra-Judicial Confession:** A confession of accused recorded not before a magistrate or in court but somewhere else.

b) **Judicial Confession:** A confession made before a court.

Requirements for Relying Upon Extra-Judicial Confession:

To rely on an extra-judicial confession, the following essential elements must be considered.

a) The confession was made voluntarily.
b) The confession was true.
c) The actual words of the maker are reproduced by the court.
d) The person deposing about the extra-judicial confession is impartial.
e) The witness of the extra-judicial confession is trustworthy.[6]

Corroboration of Extra-Judicial Confession

Where other reliable evidence, such as medical evidence and circumstantial evidence, corroborates an extra-judicial confession, then conviction may be based upon such extra-judicial confession.

Judicial Confession (as per Black's Law Dictionary)

A Judicial Confession is defined as a confession made before a Magistrate or in court, during the due course of legal proceedings. This also includes confessions made during preliminary examinations before a Magistrate.

Relevant Provisions

- **The Code of Criminal Procedure 1898 (Cr.PC):**
  - Section 164 and 364 Cr.P.C
- **Qanoon-e-Shahadat Order, 1984:**
  - Article 37 to 43 of QSO
  - Article 91of QSO
  - High Court Rules and Orders:- Volume III, Chapter 13
  - Police Rules, 1934:
  - Rules 25.27, 25.28, 25.29 of Chapter 25

Types of Confessions

a) Self-Inculpatory Confession:

This type of confession includes statements where the accused directly admits his guilt. It serves as a substantive piece of evidence.

[6] (2005 YLR 3346)

b) Self -Exculpatory Confession:

This kind of confession is a part of the statement where the accused denies guilt or provides information that could exonerate him. This type requires corroboration for its admissibility.

Retracted Confession

A retracted confession is one where the accused initially confesses but later on denies the truth of that confession. Essentially, it means the confession has been withdrawn or taken back by the accused after being made.[7]

Admissibility of Retracted Confession

Merely retracting a confession does not automatically render it inadmissible. A retracted confession if made truly, voluntarily and also corroborated by independent evidence can be considered for conviction.

Confession Where Not Relevant

Under Article 37 of Qanoon-e-Shahadat Order 1984, if a confession appears to the court to have been made under inducement, threat, or promise, it becomes irrelevant in criminal proceedings.

Under Article 38 of Qanoon-e-Shahadat Order 1984, a confession made to a police officer cannot be proved against the accused in any offence.

Statement of Accomplice or Approver

Confessional statement of an approver is admissible under section 339 (2) Cr.P.C against him in his own trial, when the pardon gets forfeited. Statement of confession as made by approver before tender of a pardon, as recorded under section 164 Cr.P.C is thus admissible in evidence.

[7] (1989 PCr.LJ 574)

Probative Value of Confession

A confession must be considered along with other evidence on record. The court, acting prudently, should avoid convicting a person solely based on a confession. The confession must be evaluated in light of the facts and circumstances of the case.

Comparison Between Admission and Confession

Comparison and Difference		
Sr. #	**ADMISSION**	**CONFESSION**
1.	Admission is acknowledgement of truth of existence of a particular fact.	A statement made by accused admitting his guilt.
2.	Admission may not go against the person making it. It may be proved by or on behalf of the person making it.	Confession always goes against the person making it.
3.	Admission by a co-defendant is not evidence against other defendants.	Confession made by one co-accused can be duly considered against other co-accused.
4.	An admission may be made by the person or his duly authorized agent.	An agent can never make the confession of an offence.
5.	Retracted admission is of no value.	A retracted confession coupled with other factors may form the basis of conviction.
6.	An admission is generally subject of civil transactions and those matters of fact in criminal cases not involving criminal intent.	A confession is generally in criminal trials and pertains to acknowledgement of guilt.
7.	Admission once made operates as estoppel. It is rebuttable and needs additional evidence.	Voluntary confession is conclusive proof. Confession alone may be sufficient to pass an order for conviction.

8.	There is no difference between admissions made before court or other.	Confession whether being judicial or extra judicial do make a difference while being considered by the court during evidence.
9.	Admission may be express or implied or made by a referred person.	Confession is express only (Article 43 QSO 1984)
10.	Admission operates as estoppel.	Confession when retracted requires corroboration.
11.	Admission is genesis.	Confession is species.
12.	Admission is mostly a fact in issue.	Confession is direct acknowledgement of guilt.
13.	Admission can be at times beneficial to the maker of it.	Confession is not beneficial to the maker of it.
14.	Admission is to be recorded on oath.	Confession is to be recorded without oath.
15.	No warning is required.	Warning has to be given by the Magistrate to the person making it.
16.	Right of cross-examination is available to other side.	No right of cross-examination is given to the other side.
17.	Admissions are wider in term than confession.	All confessions are admissions.
18.	Admission cannot be admitted in evidence if admission is labelled as without prejudice.	Confession cannot be admitted in evidence if given under duress, undue influence, pressure and promise.

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(3)

THE EVOLUTION OF MALICIOUS PROSECUTION WITHIN PAKISTAN'S LEGAL FRAMEWORK: A COMPREHENSIVE STUDY OF LEGAL SAFEGUARDS AND REMEDIES

Danyal Amin[1]

Abstract

A claim for malicious prosecution arises when a lawsuit is filed in the court of law without reasonable cause with malicious intent. This study explores the concept of malicious prosecution and its applicability in both civil and criminal contexts. It highlights the essential elements needed to establish a claim, the absence of probable cause, a favourable outcome for the defendant, and resulting damages. The paper delves into key legal principles and landmark court decisions governing malicious prosecution, drawing on case law from various jurisdictions, including Pakistan. It also examines potential damages and the statute of limitations for bringing such claims. By analyzing these aspects, the paper provides a comprehensive understanding of malicious prosecution as a tort, offering practical guidance on how to apply it and what recourse is available for those wronged by baseless litigation.

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Introduction

The term "malicious prosecution" refers to the wrongful and vindictive initiation of legal proceedings without legitimate grounds. It serves to protect individuals from lawsuits that are not only baseless but also intended to harm or harass the accused. At its core, malicious prosecution represents an abuse of the legal process, where a person or entity deliberately files a criminal or civil suit with the aim of causing distress or damage to the other party, rather than seeking a fair legal outcome. Although malicious prosecution applies to both criminal and civil cases, its relevance and scope depend upon the specifics of the case, highlighting its flexible role within the legal system. A crucial element in such claims is the lack of probable cause, meaning there were no reasonable basis for the initial prosecution.

In the case of Mehrban vs. Ghulam Hassan, the Peshawar High Court delivered an insightful definition of malicious prosecution, elucidating its scope and application in both civil and criminal contexts. The court defined malicious prosecution as a legal remedy available to individuals who have been subjected to unsuccessful civil or criminal proceedings initiated without probable cause and for reasons other than the pursuit of justice.[2] This definition emphasizes that malicious prosecution is designed to address baseless and vindictive litigation, providing a means to redress the wrong done to the accused.

Importantly, the court highlighted that the concept is not confined solely to criminal prosecutions; it equally applies to any unfounded and malicious legal actions, whether these are civil or criminal in nature. This broad interpretation also allows for claims to be filed in civil court by individuals who were unjustly targeted in either type of proceedings. In this context, the

[2] (2016 CLC 1585)

original defendant, having faced malicious litigation, may transition to the role of the plaintiff in a subsequent malicious prosecution suit, while the original plaintiff or prosecutor is reclassified as the defendant or respondent in the new claim.

This comprehensive perspective on malicious prosecution emphasizes its role as a crucial legal safeguard, enabling those who have been wrongfully implicated to seek accountability and damages from those who instigated the unjust legal actions against them. By recognizing the potential for malicious prosecution claims in various legal scenarios, the court provides a pathway for individuals to reclaim their dignity and seek justice against malicious conduct in the legal system.

Legal Grounds

In the case of Muhammad Yousaf vs. Abdul Qayyum[3], the august Supreme Court of Pakistan extensively discussed the tort of malicious prosecution, acknowledging that it is not governed by any specific statutory law in Pakistan. Hon'ble Mr. Justice Jawwad S. Khawaja former Chief Justice of Pakistan, in his remarks, highlighted that malicious prosecution provides a legal remedy for individuals who have been unjustly prosecuted without reasonable cause and with malice. Since Pakistan does not have a specific statute addressing malicious prosecution, the courts have traditionally relied on the principles of English common law to adjudicate such cases. This practice is not new, as it was affirmed in earlier judgments like Muhammad Yousaf v. Ghayyur Hussain Shah[4], wherein it is recognized that no statutory law in Pakistan governs malicious prosecution, and courts in Pakistan are not only the courts of law but the courts of equity, justice and good conscience as well, therefore, aggrieved person can have recourse to the courts in

[3] PLD 2016 SC 478
[4] 1993 SCMR 1185

Pakistan to redress his grievance qua malicious prosecution. Consequently, the courts apply the standards set by English courts, allowing plaintiffs to claim damages for wrongful prosecution based on these established principles. The court's reliance on common law underscores the absence of formal legislative guidance in Pakistan, making judicial interpretations critical for addressing malicious prosecution claims.

In Muhammad Yousaf vs. Abdul Qayyum referred above, Hon'ble Mr. Justice Jawwad S. Khawaja former Chief Justice of Pakistan, explored how the courts in Pakistan have addressed malicious prosecution, adhering to principles of English common law. He noted that under common law, a plaintiff must demonstrate that the prosecution was initiated without reasonable and probable cause, was driven by malice, and ended in the plaintiff's favour, with resultant damage. Citing various cases, he reiterated the meaning of " reasonable and probable cause", such as in Walayat Khan v. Abdul Usman (1990 CLC 37), where it was explained that initiating criminal proceedings for an issue better suited for civil courts is malicious in nature. Further, in Ghulam Nabi Khan v. Azad Government of State of Jammu and Kashmir [5], it was clarified that "probable cause" refers to a bona fide prosecution based on circumstances that would convince a prudent person that the accused was guilty of the offence with which he was charged.

Moreover, in Niaz v. Abdul Sattar[6], the august Supreme Court of Pakistan defined "reasonable and probable cause" as an honest belief in the accused's guilt, based on sufficient evidence to convince a prudent person and if reasonable and probable cause is established, then question of malice becomes irrelevant. Hon'ble Mr. Justice Jawwad S. Khawaja also cited Muhammad Aslam v. Muhammad Ibrahim (2000 CLC 154), emphasizing

[5] 1984 CLC 325
[6] PLD 2006 SC 432

that the circumstances of a case determine the prosecutor's state of mind. He concluded that proving malice requires more than just the absence of reasonable and probable cause, though the latter can serve as evidence of malice. Malice, a mental state, can be inferred from circumstantial evidence. In Pakistani societal norms, even the lodging of an FIR (First Information Report) creates negative public perception, and if the FIR is proven false or baseless, this can indicate malice in the lodging of the criminal case.

Ingredients

In Subedar (Retd.) Fazale Rahim vs. Rab Nawaz[7], the Supreme Court of Pakistan outlined the essential elements for establishing malicious prosecution. The Court referred to the earlier case of Muhammad Akram v. Mst. Farman Bibi[8], reaffirming that the following factors must be proven by the plaintiff for malicious prosecution:

- The plaintiff was prosecuted by the defendant.
- The prosecution ended in the plaintiff's favour.
- The defendant acted without reasonable and probable cause.
- The defendant was actuated by malice.
- The proceedings interfered with the plaintiff's liberty and affected his reputation.
- The plaintiff suffered damage as a result.

These factors form the basis for awarding a decree in suits for malicious prosecution in the courts of Pakistan.

Application

In Abdul Rauf v. Abdul Razzak (PLD 1994 SC 476), the Supreme Court established a key principle regarding malicious prosecution. The Court

[7] 1999 SCMR 700
[8] PLD 1990 SC 28

observed that malicious prosecution arises when there is no reasonable or probable cause for the prosecutor's malice. The term "malice" in such cases does not merely refer to personal spite or hatred but reflects an improper or indirect motive—malus animus. The proper motive behind prosecution is to serve justice, and it must be shown that the prosecutor was driven by personal motives rather than this legitimate aim. Citing cases such as Mitchell v. Jenkins, Pike v. Waldrum, and Stevens v. Midland Countries, the Court emphasized that malice must be affirmatively proven by the plaintiff. While malice may sometimes be inferred from the absence of reasonable and probable cause, this is not a general rule and may not apply in all cases. If reasonable and probable cause is established, the question of malice becomes irrelevant. Additionally, the lack of reasonable and probable cause cannot be substituted by evidence of malice, as highlighted in cases like Turner vs. Amber, Mitchell v. Jenkins, Brown vs. Hawks, and Herniman vs. Smith.

It would be proper here to quote the following observation of Denning, LJ (as he then was) in Tempest v. Snowden, (1952) 1 KB 130:

> *"Even though a prosecutor is actuated by the most express malice, nevertheless he is not liable so long as there was reasonable and probable cause for the prosecution."*

It is well-established in legal precedent that in suits for malicious prosecution, merely proving the existence of malice is insufficient; it must also be accompanied by evidence demonstrating the absence of reasonable and probable cause. This principle is affirmed in various cases, including United Bank vs. Raja Ghulam Hussain (1999 SCMR 343), Abdul Rauf v. Abdul Razaq and another (PLD 1994 SC 476), Muhammad Akram v. Mst. Farman Bibi (PLD 1990 SC 28), Raja Braja Sunder Deb v. Bandeb Das (AIR 1944 P.C. 1), Balbabaddar Singh v. Badari Sah (AIR 1926 P.C. 46), Abdul Shakoor v. Lipton

(AIR 1924 Lah. 1), Noor Khan v. Fiwandas (AIR 1927 Lah. 120), and V.T. Strinivasa Fhathachariar v. Thirunvenkat Achariar (AIR 1932 Mad 601).

In Niaz & others vs. Abdul Sattar & others (PLD 2006 SC 432), the Supreme Court stated that this maxim term "reasonable and probable cause" refers to an honest belief in the accused's guilt, based on a firm conviction supported by reasonable grounds. It rests on the assumption that the circumstances, if true, would lead an ordinary prudent person to conclude that the accused was likely guilty of the crime alleged, citing Hicks v. Faulkner (1881) 8 QBD 167, the Court reaffirmed this principle. Additionally, the Court highlighted that once reasonable and probable cause is established, the issue of malice becomes irrelevant, referencing Tempest v. Snowden (1952) 1 K.B. 130, as observed by Denning L.J.

Limitation of Time

There is certain limitation for filing of a suit for malicious prosecution. Article 23 of Schedule I of the Limitation Act, 1908 (IX of 1908), prescribes one-year limitation period for compensation of malicious prosecution and the time begins to run, "*when the plaintiff is acquitted, or the prosecution is otherwise terminated*". Article 23 of the Act ibid is reproduced hereunder for ready reference:

Description of suit	Period of limitation	Time from which period begins to run
23. For compensation for a malicious prosecution	[One year]	When the plaintiff is acquitted, or the prosecution is otherwise terminated.

The wording of the article, prima facie, concerns criminal proceedings. This is manifest from the usage of the term "*acquitted*", the concept of which is alien to civil proceedings. This raises a question that, would this article apply to civil proceedings or not? This question arose in the judgement of Syed

Mumtaz Ali and three others Versus Mst. Khatoon Begum, before the Sindh High Court,[9] wherein the court observed that if a cause of action arises once a civil proceeding concludes and reaches finality, the limitation period begins from the date of dismissal. However, if the dismissal is challenged through an appeal or revision, the original order merges into the higher forum's decision under the doctrine of merger, and the limitation period is then calculated from the higher forum's ruling. These observations, the court emphasized, apply specifically to the context of Article 23 of the Limitation Act, 1908 (IX of 1908).

Damages

In Rana Shaukat Ali Khan, etc. vs. Fayyaz Ahmed,etc.[10], the Lahore High Court, Lahore clarified that damages for malicious prosecution may be awarded if the essential elements are satisfied. In this case, Hon'ble Lahore High Court reaffirmed the established legal principles, stating that a court can grant such damages when the following conditions are fulfilled:

a) The plaintiff was prosecuted by the defendant;
b) There was no reasonable and probable cause for the prosecution;
c) The defendant acted with malice, driven by improper motives rather than the pursuit of justice;
d) The prosecution concluded in favour of the accused party; and
e) The prosecution caused harm to the party that was proceeded against.

In AIR 1947 PC 108, the Privy Council addressed the topic of damages arising from malicious prosecution, affirming its status as part of England's common law, as administered by the High Court in Calcutta under its letter patent. The foundation of this action lies in the misuse of the court's

[9] 2017 CLC Note 147
[10] 2017 MLD 120

processes, specifically the wrongful initiation of legal proceedings, aimed at discouraging the distortion of justice for improper motives. To succeed in such a claim, the plaintiff must demonstrate that the proceedings against him were conducted maliciously, lacked reasonable and probable cause, concluded in his favour (if applicable), and resulted in actual damages. Historically, as early as 1698, Holt C.J. established a principle (that has been consistently upheld in subsequent cases) that damages could be sought under three categories:

1) damage to the person,
2) damage to property, and
3) damage to reputation.

In Azizullah vs. Jawaid A. Bajwa and three others[11], the august Supreme Court of Pakistan made a crucial observation regarding the implications of wrongful prosecution. The Court asserted that when an individual is subjected to illegal prosecution without clear evidence of good faith, such actions undoubtedly fall within the scope of malicious prosecution. The resultant mental distress and emotional suffering are natural consequences of such wrongful actions. Consequently, the petitioner is entitled to reasonable compensation not only for the mental anguish endured but also for any loss of profits incurred as a result of the wrongful prosecution.

In the case of Niaz and others vs. Abdul Sattar and others (PLD 2006 SC 432), the august Supreme Court of Pakistan articulated a significant perspective on the foundations of malicious prosecution claims. The Court emphasized that the genesis of such claims is more aligned with the principles outlined in the Constitution, particularly Articles 4 and 14, and should be rooted in the abuse of legal processes rather than merely the misuse of court procedures. It pointed

[11] 2005 SCMR 1950

out the unfortunate reality that individuals often face greater violations of human dignity at the hands of police than within the courtrooms. The Court suggested that one effective means for aggrieved individuals to seek justice is by filing lawsuits for damages against offenders, highlighting the vital role of Bar Associations and the Bar Council in educating the public about this recourse. After carefully reviewing the evidence to uphold justice and fairness, the Court affirmed that both lower courts were justified in awarding nominal damages to the petitioners. The Supreme Court of Pakistan called for a concerted effort to promote law of tort. It underscored the importance of citizens and the judiciary being vigilant against the distress caused by falsehoods and wrongful accusations, advocating that filing of damage suits upon the acquittal of innocent individuals serves as a necessary remedy to deter frivolous litigation driven by vengeance.

In Abdul Majeed Khan vs. Tawseen Abdul Haleem[12], the august Supreme Court of Pakistan observed that when a claimant is subjected to criminal prosecution, endangering their liberty or reputation, a remedy through the tort of malicious prosecution becomes available. However, in civil proceedings, liability in tort should only emerge in rare circumstances, as the usual outcome of winning a suit restores the defendant's reputation and recoups defence costs. Nonetheless, in malicious bankruptcy and winding-up proceedings, where such actions could destroy the claimant's business, erode trust in their competence and integrity, and harm their company's goodwill, the remedy of tort in the form of malicious prosecution is deemed appropriate.

Conclusion

Malicious proceedings, a tort providing remedy for prosecutions initiated "without reasonable cause" and driven by "malice," extend to both criminal

[12] 2012 CLD 6

and civil cases. Rooted in the principles of English law rather than statutory provisions, the courts require several key elements to establish a claim i.e. the defendant must have initiated the prosecution, it must lack reasonable cause, the defendant's motive must have been improper, aimed at malice rather than justice, the proceedings must have concluded in the plaintiff's favour, and the prosecution must have caused harm. A one-year limitation period applies for seeking compensation, and if these elements are proven, the court may award damages. Rulings of august Supreme Court of Pakistan reinforced that the foundation for granting such damages as the abuse of the legal process. Need of the hour is to advocate the law of tort amongst the litigant public and to make a nationwide campaign on electronic and print media for this purpose so that false and frivolous litigation may be nipped in the bud.

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(4)
KHULA: GROUNDS, PROCEDURES, AND IMPLICATIONS IN ISLAMIC LAW

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Abstract

Khula, an Islamic mode of separation whereby a wife desires a divorce, is the focus of the research about its legal and social frameworks. This research focuses on Khula, a form of divorce where the wife is the first to initiate the process according to the Shariah. Consequently, this paper explores the history of Khula and legal basis and its relation to existing laws, such as the Dissolution of Muslim Marriage Act 1939 and the Family Court Act 1964. The paper looks at the differences between Khula among the Islamic fraternities, particularly Hanafites and Jafriya, to have a basis for comparing and identifying the effects. In the current study, the analysis of Khula addresses the issue of the Social Impact of Khula, explaining the impact of Khula on women, children, and society at large in modern society. Hence, in the present research, the author intends to enhance understanding of this significant aspect of Islamic family law by presenting general information about khula.

Introduction

Khula is an Arabic word meaning 'setting free' and refers to a divorce sought by the wife under Sharia law. Unlike Talaq, which mostly solely lies in the hands of the man, Khula gives women a certain amount of power to dissolve an untenable marriage. It is a lawful process by which the marital relationship between partners is determined to be destructive to the wife's welfare, mainly due to ineradicable differences, cruelty, or other valid reasons. In recent years, the law of Khula has been subject to many misconceptions. Preceding this decision, a 1976 judgment had declared the extra-judicial methods of divorce that the Act granted to women in the form of Khula and Mubarat as unlawful[13]. However, this view has since been overturned.

This research aims to analyze the history of the Khula practice, the legal guidelines governing the practice, as well as the modern practices related to the concept under Islamic family law. The method used in this research includes using CPL libraries and other legal sources to identify legal provisions that govern Khula and comprehend the legal environment in which khula functions. The laws used include the Dissolution of Muslim Marriage Act, 1939 and the Family Court Act 1964. Furthermore, a comparative examination of the practices concerning khula in the different Islamic schools of thought, particularly Hanafite and Jafriya, will give insights into its different shades or ramifications[14]. This research also studies khula's effects on society in terms of its advantages to women, its impact on children, and its social consequences. These aspects will be examined to unravel the

[13] Sabah Faraj Madi, Ruzman Md Noor, and Ali Saged, "Women's Right to Divorce: A Comparative Study of Al-Khula` on Libyan and Malaysian Women," *Jurnal Akidah & Pemikiran Islam* 18, no. 1 (June 1, 2016): 131–62, https://doi.org/10.22452/afkar.vol18no1.4.

[14] "How Is Property Division Handled in an Islamic Divorce? | Oakbrook Terrace Asset Division Lawyer," How Is Property Division Handled in an Islamic Divorce? | Oakbrook Terrace Asset Division Lawyer, 2021, https://www.farooqihusain.com/blog/how-is-property-division-handled-in-an-islamic-divorce#:~:text=Married%20spouses%20are%20not%20required.

comprehensive understanding of khula as it is practiced in today's Islamic family law.

Origin of Khula in Islam

Quranic verses that support the idea of Khula include verses that provide basic structural composition and interpretative value of concept of Khula. Though there is no specific scriptural reference to Khula, certain verses in the Quran give guidance regarding marital relations, divorce, and the rights of women. Following verses outline the conditions for divorce and possibility of a mutual agreement between the spouses, which has been interpreted as a basis for Khula.[15] These also emphasize the importance of reconciliation in marital disputes and implies that mediation can be sought if reconciliation is impossible and are a precursor to the concept of Khula.

> *"Divorce is twice. Then, keep [her] in good fellowship or release [her] with kindness. And it is not lawful for you to take back anything of what you gave them unless both fear that they cannot keep within the limits of Allah. But if you fear that they cannot keep within the limits of Allah, there is no blame upon either of them concerning that by which she ransoms herself. Those are the limits of Allah, so do not transgress them. And whoever transgresses the limits of Allah - those are the wrongdoers."*
>
> [Quran 2:229]

> *"And if you fear disharmony between the spouses, appoint an arbiter from his family and an arbiter from her family. If they wish for reconciliation, Allah will bring them together. Indeed, Allah is Knowing and Acquainted."*
>
> [Quran 4:35]

Hadiths

Prophet Muhammad (PBUH) gave the framework for dealing with marital issues such as divorce and gender inequality. Some of the hadiths which have

[15] None صارة ، شويخ بن ,"الجزائري الأسرة قانون في الخلع حول للتراضي العملية الجوانب" = Practical Aspects of Consensus on Khula' in the Algerian Family Code," *والاقتصادية القانونية للدراسات الاجتهاد مجلة* 8, no. 4 (June 1, 2019): 261–80, https://doi.org/10.12816/0053711.

been used to justify Khula include the most famous Hadith regarding the incident of Khula by Jamilah bin Thabit, wife of Thabit bin Qais. A woman went to the Prophet and asked for a divorce from her husband, whom she did not like. The Prophet asked her whether she would like him to take back the garden given her as a dowry.[16] Thereupon, she agreed; the Prophet instructed Thabit to repudiate her. This precedent in Hadith lays the rule Khula, in which the wife has the right to divorce with the help of returning part of the dowry to the husband.

Quran and Hadiths have not specifically used the word "Khula," albeit Muslim jurists explain that the primary sources contain the fundamental tenets regarding the practice of Khula. Thus, Khula, as a legal institution, has its basis in pre-Islamic customs of Arab, Quran and its interpretation. Lahore High Court has opined that the State and the Judicial mechanism are the intended recipients in enforcement of injunctions of Quran. Maliki jurists opine that the conciliators/mediators appointed as per Surah Nisa:35 have the right to examine the reason behind the conflict and attempt to make compromise. Incase a compromise cannot be reached, they may decree separation.

According to the basic rules of Shariah, all schools of thought except Maliki and Shia jurists believe that Khula cannot be affected without the husband's consent. Hence, Khula is considered as a contract for which consent of both parties is integral. However, Maliki jurists maintain that the court or appointed arbitrators/concilators can annul a marriage by divorce or Khula without consent.

Schools of Fiqh differ on language and nature of the compensation and separation in Khula. Despite these differences regarding technicalities and

[16] Sayed Mohammad Shahab Mirshahzadeh and Mohammad Hossein Karimi, "Analysis of Consequences and Ordinances of Revocation in Khula and Mubarat Divorce," *Journal of Politics and Law* 9, no. 5 (June 29, 2016): 242, https://doi.org/10.5539/jpl.v9n5p242.

procedure, all schools consider Khula as a right of a wife to free herself from marriage in exchange for a dowry payable to the husband.

Khula and Judicial Attitude

Khula is a form of divorce that extend to women of faith, who have rights in Islamic law, as seen in Quran and Sunnah. Though the concept is as old yet, its legal structure and practice continue to develop afresh, especially in a contemporary legal environment. Khula in Pakistan has been developed by the efforts of judicial interpretation with respect to defining and implementing it procedure.[17] While the traditional Hanafi jurists are more conservative in their views, the Pakistani judiciary, by and large, is hierarchal in the liberal world.

Lahore High Court before and after Impendence has also opined that a wife cannot seek Khula without the consent of her husband. This line of thought however faced an early set back and its complete reversal in later landmark cases. The year 1959 was significant as in Balqis Fatima's case Khula was recognized as the right of women without the consent of her husband. In 1975 in the case of Khurshid Bibi the court followed this principle by holding Quran and Sunnah as the sources of law which entitle both the spouses to equal rights in divorce. These cases showcased Lahore High Court's progressive attitude in matters regarding Khula as it was accepted and allowed to be used by woman for annulment of marriage without the consent of the husband.[18]

These decisions have glorified women's rights to obtain dissolution of marriage without compulsion of express grounds, thereby, the progressive

[17] Mumtaz Associates, "Divorce Laws in Pakistan Best Divorce Law Firms, Divorce Attorneys Divorce Lawyers in Lahore, Karachi, Pakistan," Ma-law.org.pk, 2024, https://www.ma-law.org.pk/Divorce_Laws_Divorce_Lawyer_in_Karachi_divorce_Lawyer_in_Lahore_divorce_law_firms_in_Pakistan#:~:text=Khula%20(Divorce%20by%20Wife%20through.

[18] Gerard Wiegers, "Moriscos and Arabic Studies in Europe," *Al-Qanṭara* 31, no. 2 (December 21, 2010): 587–610, https://doi.org/10.3989/alqantara.2010.v31.i2.243.

interpretation of Islamic family law. The Dissolution of Muslim Marriages Act, 1939 mainly deals with the grounds on which a wife initiates a divorce with due recognition to Khula, however, in practice the utilization of Khula in Pakistan face some limitations for instance the difference in practice on jurisdictional level and also regarding determination of an equitable payment and settlement. This is particularly evident in cases with termination of marriage as the primary goal of Khula or also in the matters of custody of children.

Moreover, the superior courts of Pakistan do not strictly follow the principle of *taqlid* or stick to a particular school of Islamic jurisprudence, instead prefer to apply ijtihad. The courts integrally exercise the power to interpret the sources of Islamic law i.e. Quran and Sunnah without any interference, the power to situationally and equitably deviate from the rulings of the classical schools of Islamic law and the power to dissent with a few decisions of Privy Council on the matters regarding Muslim Family Law.

In short, Pakistani courts have not resorted to the fatwa based upon juristic reasoning instead have relied on Quran and Sunnah, which has led to a lot of criticism from Muslim jurists. However, what the courts role in their judicial capacity is not precisely ijtihad but is of giving preference to scriptural over jurisprudential readings[19]. Although the above rulings of Balqis Fatima and Khurshid Bibi were contrary to the Hanafi, Shafi'i, Hanbali and Shi'a schools of thought, yet they relied on the views of the said schools to support their conclusion that consent is not required in the process of obtaining khula.[20] In

[19] Attia Madni and Rabia Zulfiqar, "Khula under Islamic Law & Judicial Practice in Pakistan: A No Fault Divorce Regime," 2022, https://journals.irapa.org/index.php/jemss/article/download/274/132/1051#:~:text=The%20research%20also%20explores%20the.

[20] Free Law, Free Law: Get Free Headnotes & Judgments (Free Law, April 3, 2024), https://www.freelaw.in/supremecourtupdates/SC-issues-notice-in-SLP-challenging-Kerala-HC-verdicts-recognizing-Muslim-women-s-right-to-unilateral-and-extra-judicial-divorce-through-Khula#:~:text=In%20the%202021%20verdict%20of.

support of this position, the courts pointed to the literature of the Maliki school. Hence, the claims of practicing beyond the tenets of Islam may be considered exaggerated. However, it is noteworthy that since the amendment of the Family Courts Act, 1964 in 2002 superior courts in most cases have allowed the khulʿ for women.

Since the Council of Islamic Ideology cannot veto legislation, it can only inform the government if the nature of a law is Islamic and needs authority to enforce its decision. However, its recommendations have been shifting depending on the position of the Chairperson. It proposed in 2009 for the automatic dissolution of marriage 90 days after a wife writes a letter of divorce to her husband even if the husband does not agree to it.[21] This contradicts verse 2:229 and Prophetic practice that demands compensation. In 2015, the new Chairman was in line with the Hanafi school in opposing court-ordered khulʿ where the husband was unwilling. Although the role of the Council is advisory in nature, it has not always relied on scripture over scholarly opinion.

Khula in Different Islamic Schools of Thought

Sunni Perspectives on Khula

The four main Sunni schools of Islamic jurist interpretation of legal norms, such as KHULA, differ in the Hanafi, Maliki, Shafi'i, and Hanbali systems.

Hanafi School

According to the Hanafi school of law, Khula is allowed if it is based on mutual agreement between the husband and wife[22]. This perspective pays much

[21] "How to Get Khulla in Pakistan & the Procedure of Khula?," Pk-Legal & Assscіates, March 31, 2017, https://pklegal.org/how-to-get-khulla-in-pakistan-and-its-procedure/#:~:text=Muslim%20Family%20Law%20in%20Pakistan.

[22] Gerard Wiegers, "Moriscos and Arabic Studies in Europe," *Al-Qanṭara* 31, no. 2 (December 21, 2010): 587–610, https://doi.org/10.3989/alqantara.2010.v31.i2.243.

attention to the aspect of unanimity in couple affairs. In most cases, the wife provides some form of consideration, such as a part of the Mahr, in exchange for the dissolution of the marriage. In the Khula agreement, the husband's consent is also significant in making the deal completely effective.[23]

Maliki School

The Maliki school of Fiqh provides the most liberal interpretation of Khula. Indeed, it ascribes to the concept of 'consent' but does not categorically deny the possibility of Khula without the husband's consent in some instances. It is also interesting to note that the Maliki jurists reserve the authority of the court or the arbitrators to address the issues that lead to Khula. This school of thought gives more room for the court to intervene in Khula's cases[24].

Shafi'i School

The Shafi'i school of thought is generally synchronized with the Hanafi school in this respect of Khula, with the precaution that it is permissible only with the consent of the husband and the wife. However, the Shafi' jurists are more flexible about the kind and degree of compensation the wife has to provide. This school also recognizes the court's contribution to dispute resolution and Khula proceedings.

Hanbali School

The Hanbali school has the same position as the Hanafi and Shafi'i regarding importance of husband's consent in Khula. This aspect of mutual agreement is powerful, and the offer from the wife to recompense is required for a valid

[23] Manjur Hossain Patoari, "The Rights of Women in Islam and Some Misconceptions: An Analysis from Bangladesh Perspective," *Beijing Law Review* 10, no. 05 (2019): 1211–24, https://doi.org/10.4236/blr.2019.105065.

[24] "The Law of Khul' in Islamic Law and the Legal System of Pakistan | SAHSOL," Lums.edu.pk, 2023, https://sahsol.lums.edu.pk/node/12807#:~:text=The%20court%20under%20the%20Maliki.

divorce.[25] However, these are broad outlines pinned by the Sunni schools which might differ in sub-schools. Further, the effectiveness of implementing Khula is also dependent upon an area's culture, society, and laws.

Shia Perspective (Ja'fari)

In the Twelver Shia tradition, followers of the Ja'fari school of Islamic law have a different view of Khula than their Sunni counterparts. One major change is societies' emphasis on women's rights and their ability to make marriage decisions.

Khula as a Right: The Ja'fari school of thought considers Khula the wife's right and not the husband's grace. They further emphasize the autonomy of women's decision-making on issues related to marriage.[26]

Reduced Emphasis on Compensation: Thus, even if the wife brings some things to the Khula process out of compassion or to fasten the process, it is not regarded as an essential requirement of Khula.

Role of the Court: In the Ja'fari legal system, the courts of Khula may still be allowed more discretion than in other cases. The judges may consider many areas, such as the wife's justification for asking for the change, the effects on children, and the couple's financial position[27].

Protection of Women's Rights: Women's rights are important in the Ja'fari school, especially in financial aspects and child custody. Thus, it is regarded as a way of protecting such rights when the marriage proves unbearable.

[25] Ahmed Khan and Ubaid Ahmed Khan, "An Analysis of Husband's Consent in Khula," *Pakistan Journal of Applied Social Sciences* 4, no. 1 (September 8, 2016): 1–22, https://doi.org/10.46568/pjass.v4i1.467.

[26] Chunmei Huang et al., "Leucogranites in Lhozag, Southern Tibet: Implications for the Tectonic Evolution of the Eastern Himalaya," *Lithos* 294-295 (December 1, 2017): 246–62, https://doi.org/10.1016/j.lithos.2017.09.014.

[27] Zubair Abbasi, "From Faskh to Khula: Transformation of Muslim Women's Right to Divorce in Pakistan (1947-2017)," *SSRN Electronic Journal*, 2018, https://doi.org/10.2139/ssrn.3307766.

These principles, such as equal rights for women while seeking Khula, are, however, implemented with differences among different Ja'fari schools of law as well as among the different Shia communities or jurisdictions. Moreover, cultural and societal factors also play a role in the experiences of women seeking divorce.

Grounds for Khula

Khula is a legal process where the wife can ask for divorce. This is based on certain factors, such as the realization that it becomes impossible for the couple to continue as husband and wife.

Dissolution of Muslim Marriages Act, 1939 is a special law which allows Muslim women to dissolve their marriage on certain grounds. It is possible to differentiate between general and particularized grounds for such a decision.

Hence, although specific examples of cruelty, desertion, or impotence are provided while demanding Khula, the general basis is more comprehensive.[28] A woman should not be forced to stick to a marriage even when she knows that the marriage cannot work or when the man is the wrong person to be with. The genuineness of general grounds rests on the fact that the breakdown of a marriage can be caused by numerous causes that cannot be easily defined. There is no definite understanding of what constitutes 'irreconcilable differences,' which is generally a ground for Khula[29]. Marriages are complicated human relationships, and the need to understand why these unions have broken down should, therefore, not be viewed in a very simplistic way. Khula can be granted where the reasons are marital breakdown

[28] Miles Almadrones and Allison DeSantis, "What Is a Final Divorce Decree?," Legalzoom.com, July 28, 2024, https://www.legalzoom.com/articles/what-is-a-final-divorce-decree.
[29] Muhammad Rafi Bunairi and Hujjatullah Agha, "Judicial Khula; Theory and Practice," *Al-Duhaa* 2, no. 02 (September 26, 2021): 29–40, https://doi.org/10.51665/al-duhaa.002.02.0094.

compatibility or unbearable discord that would make living together unbearable and impossible since the couple cannot do so without fighting and hence have no chance of patching up.

In addition, two specific grounds are commonly cited in Khula cases: cruelty and desertion, which are two opposite working models. Torture can be either physical or emotional. Physical cruelty can be defined as the use of force or physical violence, whereas mental cruelty includes physically restraining the spouse, name-calling, rejecting, humiliating or ridiculing the other spouse.[30] To prove claim of cruelty, the wife must demonstrate a course of conduct that creates physical or mental suffering.

Abandonment is where one of the partners moves out of the marriage residence with no plausible cause and without any intention of coming back. The practice of Khula can be applied with different requirements for the duration of desertion that are allowed depending on the legislation and court of a certain country. In some cases, absence from the home for a significant period of time or no contact at all is enough to create desertion. Some of the other specific grounds for Khula are that the husband is impotent, does not maintain the wife, has married another woman, is a prisoner, is mad or is suffering from a related illness. The application of these grounds can be indicative and the implication of the two may warrant some understanding of the conditions of each category.

Financial Implications of Khula

Another factor in the divorce procedure is Khula's financial implications. These include Mahr, other forms of money settlements, maintenance, child support, visitation rights, and property distribution.

[30] N Gabru, "Dilemma of Muslim Women Regarding Divorce in South Africa," *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 7, no. 2 (July 10, 2017): 43, https://doi.org/10.17159/1727-3781/2004/v7i2a2849.

Mahr and Its Return

Mahr, also called dowry/dower, is an essential marital consideration from the groom to the bride in Islam. "According to a tradition in Bukhari, the mahr is an essential condition for the legality of the marriage: 'Every marriage without mahr is null and void.'" In as much as Khula, the issue of Mahr adds a particular layer of complication to the whole process of women seeking a divorce[31]. Earlier, the wife had the option to return the Mahr if the dissolution of the marriage was by her instigation. This hadeeth also demonstrates that the execution of the Khula' is contingent upon the return of the dowry (Mahr). The Prophet (PBUH) asked Jameelah, "Will you be willing to return the garden that he gave you as a dowry?" She replied, "Certainly." Therefore, he (PBUH) instructed Thābit to "reclaim the garden and divorce her with a single declaration." So, according to some Muslim scholars this demonstrates that the Khula' is predicated on the quantity of dowry (Mahr) and that nothing should be added to it.

There is no harm in the husband requesting more than the dowry he gave his wife at the time of their marriage, according to the second opinion (held by other academics). They conclue this from Quran: "If you are concerned that she will be unable to adhere to the restrictions established by Allah, then there is no sin for either of them if she pays compensation for her Khula."[32] Therefore, the verse does not establish a compensation limit as the word (fidyah) is unrestricted. Thus, it is aptly asserted by Muslim scholars that the

[31] "How Is Property Division Handled in an Islamic Divorce? | Oakbrook Terrace Asset Division Lawyer," How Is Property Division Handled in an Islamic Divorce? | Oakbrook Terrace Asset Division Lawyer, 2021, https://www.farooqihusain.com/blog/how-is-property-division-handled-in-an-islamic-divorce#:~:text=Married%20spouses%20are%20not%20required.

[32] (Al-Baqarah 2:229)

compensation may exceed the value of the dowry that the husband initially bestowed upon her.[33]

Consequently, the Prophet (PBUH) instructed Thābit RA to adhere to what was preferable and recommended. Specifically, the husband should not take from his wife more than the dowry he gave her when they were first married. Nevertheless, there is no harm if he wants a reasonable increase on that.

Nevertheless, there are modern interpretations of such provisions and legislation. Some jurisdictions permit the wife to recover the entire Mahr, especially if she can prove grounds that entitle her to Khula, which would blame the husband. Some allow a partial return to be made depending on the circumstances of the particular case.[34] Different codified laws and judicial systems contain the specificities of Mahr and its return and may also be discretionary.

- **Full Mahr:** If Khula has been permitted without the wife's fault, the wife is normally entitled to full Mahr, including the deferred Mahr or the immediate Mahr.
- **Partial Mahr:** If the wife is to be held principally responsible for a marriage failure, the court has the power to lower the Mahr rate[35].
- **Return of Mahr:** If the wife has taken part in the Mahr previously, she has to surrender it in cases where Khula has been granted her own volition. However, this is at the discretion of the judicial system and will depend on the circumstances of the case.

[33] Vanshika Kapoor, "All about Khula in Muslim Law - IPleaders," iPleaders, October 17, 2023, https://blog.ipleaders.in/all-about-khula-in-muslim-law/#:~:text=Lateefutoonissa%20(1861)%2C%20the%20judicial.
[34] "Impotence," LII / Legal Information Institute, 2022, https://www.law.cornell.edu/wex/impotence#:~:text=Impotence%20usually%20refers%20to%20a.
[35] "The Law of Khul' in Islamic Law and the Legal System of Pakistan | SAHSOL," Lums.edu.pk, 2023, https://sahsol.lums.edu.pk/node/12807#:~:text=The%20court%20under%20the%20Maliki.

Other Financial Settlements

Unlike Mahr, there can be other kinds of monetary demands that may come up during Khula proceedings. These can include:

- ***Nafaqa:*** *This* refers to providing financial means for the wife during and maybe after the marriage has dissolved due to a divorce. The amount of *Nafaqa* is calculated based on the wife's requirements and the husband's financial capabilities.
- ***Mut'ah*****:** This is a lump sum payment to compensate the wife upon the marriage's dissolution. It may be fixed typically based on customs or fixed with the consent of the two parties.
- ***Iddat*** **period:** Traditional Islamic law also prohibits the husband from having sexual intercourse with his wife during the period known as 'iddat, the waiting period after divorce; besides a husband is usually bound to supply maintenance to the wife[36].
- **Consolatory gifts:** In some jurisdictions, the court for dissolution of marriage may allow compensation to the wife in the form of a consolatory gift only.

The Waiting Period (Al-'Iddah)

According to Ibn' Abbās RA, the Prophet (PBUH) made his wife's 'iddah one menstrual cycle after she took a Khula' from him.[37]

According to this hadeeth, the waiting time for a woman to get a khula' is one menstrual cycle since one cycle is enough to eliminate pregnancy, and there is no reversal. Three menstrual cycles are the divorce waiting time, allowing the husband to reconcile and reclaim his wife (whether it was the first or second talāq). Allah stated: "Divorced women wait for three periods…"

[36] None الجزائري الأسرة قانون في الخلع حول للتراضي العملية الجوانب", صارة ، شويخ بن = Practical Aspects of Consensus on Khula' in the Algerian Family Code," *مجلة الاجتهاد للدراسات القانونية والاقتصادية* 8, no. 4 (June 1, 2019): 261–80, https://doi.org/10.12816/0053711.

[37] Abu Dawood 2229, At-Tirmidhee 1185

Three menstrual cycles. Quran added: "If people believe in Allah and the Last Day, they cannot hide what Allah made in their wombs. If they desire reconciliation, their spouses have greater right to take them back now."[38] This waiting time is longer than in the Khula' because it allows the husband and wife to reconcile before the three periods expire and the marriage ends[39].

If it is the third divorce declaration, one cannot bring back one's wife, and the waiting time becomes one menstrual cycle to prove she is not pregnant. The waiting period ('iddah) is three menstrual cycles when divorce is the first or second declaration.

The 'iddah always lasts until the baby is born if the woman is pregnant. After the kid is born, she may remarry after the 'iddah. Remarrying her spouse is prohibited if it is a third talāq.

Besides a Khula' or third talāq, a husband might reclaim his wife during pregnancy. He may divorce her, and she may have a Khula throughout her pregnancy.

Scholars also argue that the waiting time ('iddah) for first, second, and third divorces and Khula is three menstrual cycles (save for pregnancy). The hadeeth of Ibn' Abbās demonstrates that a husband cannot take his wife back until one menstrual cycle has passed. And Allah knows best.

'Amr ibn Shu'ayb learned from his father and grandpa that Thābit ibn Qays RA was unsightly. His wife said that she would have spit in his face if not for the fear of Allah. Al-Albāni considered Ibn Mājah weak in 2057. Ahmad said in his Musnad (16095) from Sahl ibn Abee Hathmah: "This was the first

[38] Quran 2:228

[39] Gerard Wiegers, "Moriscos and Arabic Studies in Europe," *Al-Qanṭara* 31, no. 2 (December 21, 2010): 587–610, https://doi.org/10.3989/alqantara.2010.v31.i2.243.

Khula' in Islam." She hated his looks and was not drawn to him. The Prophet (PBUH) awarded her the Khula' since being together was not beneficial.

When considering Thābit RA, it is essential to prioritize piety above external looks in the eyes of Allah. Thābit ibn Qays RA is among the most pious and superior Companions. The Messenger (PBUH) confirmed his arrival in Paradise. Not being gorgeous doesn't affect his standing since what counts is people's hearts and virtuous conduct. Allah said of hypocrites: "You like their bodies and listen to their speech. They are wood blocks propped up. They assume every shout is against them, beware of the enemy. May Allah curse them! How are they straying?"[40] While they had good speaking, their lack of faith hindered their success, while Thābit's RA external unattractiveness did not affect him.

Inheritance in Case of Death during Iddat

If a woman dies during the iddat period, her inheritance rights remain unaffected. She is entitled to her share of the inheritance from her deceased husband, just as any other heir would be. However, the distribution of the inheritance may be subject to certain conditions and limitations based on the case's specific circumstances.

Intervening Marriage during Iddat

Although Islamic law does not categorically ban an intervening marriage in the course of the iddat period, it is discouraged. The iddat is a waiting period that is imposed on a divorced woman to avoid her being pregnant if there are issues with child custody or inheritance[41]. If a woman gets married during

[40] Al-Munāfiqoon: 4)

[41] "KHULA: A WOMAN'S ABSOLUTE RIGHT to DIVORCE and a REMARKABLE DEVELOPMENT within the ISLAMIC LEGAL SYSTEM SAJAL RASOOL," n.d., https://leappakistan.com/wp-content/uploads/2021/05/KHULA-A-WOMANS-ABSOLUTE-RIGHT-TO-DIVORCE-AND-A-REMARKABLE-DEVELOPMENT-WITHIN-THE-ISLAMIC-LEGAL-SYSTEM-1.pdf.

iddat and the earlier marriage is later reunited, the second marriage is null and void. This is because the parentage of a child born in the second marriage may be doubtful.

Effectiveness Certificate

The effectiveness certificate is a critical legal paper that can be acquired from the Union Council (UC) or other concerned local governments to annul the marriage. This certificate is crucial as it provides clear evidence of divorce, thus allowing persons to go on with other lawful formalities, such as remarriage or acquiring a passport. An extraordinary role belongs to the Chairman of the Union Council in providing the enterprise's actions with the effectiveness certificate. The tasks include, for example, verifying the divorce documents such as the divorce decree or khula agreement, completing the iddat period, and ensuring that there are other ancillary documents, for example, the maintenance agreements or child custody agreements. To get the effectiveness certificate, the people must submit a copy of the divorce or khula papers, identification documents of the parties involved, and a declaration from the wife that the iddat has been completed, besides any other document that might be needed. After examining the submitted documents, after these requirements are harmonized, the chairman of the Union Council will award the effectiveness certificate, which will indicate the termination of the marriage relation.

Prerequisites for Issuing the Effectiveness Certificate

Some conditions have to be met for the issuance of an effectiveness certificate, such as a copy of the divorce decree or khula agreement, both spouses' identity proofs, a declaration from the wife that the iddat has been fulfilled, and any other documents that may be required. The above-stated documents prove that the divorce process is complete, including the iddat

period, the validity of the divorce, and the issuance of the effectiveness certificate, which are wanted, and hence, it passes.

Maintenance and Child Custody

One of the essential aspects considered in Khula proceedings is the question of maintenance for the wife and children. Maintenance is defined according to the wife and children's needs and the husband's ability to pay. Child support is also a considerable issue, and custody of the child always goes to the best interest of the child[42].

Property Division

Another financial consideration of the Khula is the division of the couple's property accumulated during marriage. Typically, the law of Sharia incorporates a system of separation. As such, any property owned by the spouse before or during the marriage remains the property of the particular owner. However, there are circumstances that the courts can consider in the sharing of property, such as the efforts of both spouses in the marriage.

Khula as an Empowerment Tool

Khula has been critical in providing women recognition and protecting certain rights in Islamic law. In the same way that Shariah provides a legal opportunity for women to end unhappy marriages, Khula enables women to make decisions over their future and welfare. This was a significant shift from the conventional patriarchal thoughts that subordinate wives to their husbands and provide them with some level of autonomy in marital partnerships. Thus, Khula is a way for women to free themselves from

[42] "Egypt: Divorced from Justice: III. Overview of Mariage and Divorce Laws in Egypt," www.hrw.org, n.d., https://www.hrw.org/reports/2004/egypt1204/3.htm#:~:text=On%20January%2029%2C%202000%2C%20President.

abusive or inapt marriages[43]. It enables women to apply for protection from violence, abuse, negligence, and any other form of ill-treatment. As Khula offers a legal procedure for the dissolution of contentious marriages, it will go a long way in the creation of a secure environment for women. Moreover, it can be used economically to empower women in Khula. Day by day, it is seen that many women mainly depend on their husbands economically. Thus, Khula allows women to restore their financial autonomy, receive an education, find a job, and achieve other goals.

Social Stigma and Challenges

As Khula is an empowering tool, it comes with many social-related challenges, such as stigma. It was criticized that societal nature and culture do not allow women to pursue Khula, as divorce is not embraced in most societies. The perceived risk that women may have is being isolated socially, losing the support of family members, and getting a bad reputation.

Another critical issue that a wife faces when applying for Khula is financial dependence. Most women take financial responsibilities from their husbands, hence, they must work hard to abandon their marriages. This can lead to an imbalance of power between men and women and deter what amounts to women's right to Khula. However, the process of Khula is also a time-consuming and emotionally exhaustive legal process. Some of the challenges include legal assistance which is at times not accessible to ladies, the legal process is too expensive and lengthy.

[43] Sabah Faraj Madi, Ruzman Md Noor, and Ali Saged, "Women's Right to Divorce: A Comparative Study of Al-Khula` on Libyan and Malaysian Women," *Jurnal Akidah & Pemikiran Islam* 18, no. 1 (June 1, 2016): 131–62, https://doi.org/10.22452/afkar.vol18no1.4.

Impact on Children

In the whole process of Khula, a susceptible issue to discuss is the effects that Khula has on children. It may be good for the children to escape the wrong home, it causes emotional turmoil and interruption to the children. If the children are much younger, the inter-parental relationship could be more harmonious, or it may be challenging for the parents to cooperate and coordinate in the children's best interests. The effect of Khula may be felt in this sphere. Spousal access, child care, support, and visitation, as well as service provision for the children, remain instrumental when it comes to diminishing the adverse outcomes of divorce.

Conclusion

Khula as a legal tool for the dissolution of marriage has evolved over time transforming nature of marital relationships in Islamic societies. The interpretation and application of Islamic Sharia law vary in different schools of Fiqh. Khula also marks women empowerment as they are allowed to divorce their husbands under certain circumstances. However, the fight to achieve equal status and justice for women who seek Khula is still in process. Discrimination, financial reliance, and several legal factors still hinder progress. While the world has adopted the concept of Women's Rights through Khula, enforcing existing laws about women's rights is an issue. One may agree with the fact that several measures must be taken to ensure that Khula is empowering women and that the problems of gender inequality emerging in the country, poverty, and ignorance are solved. Thus, through legal changes, campaigns, and services, one can achieve a reasonable degree of fairness in the relations between women requesting Khula. Finally, the objective is to enable women to make sound decisions concerning their marital status, not forgetting their rights and children.

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(5)
VOIR DIRE TEST/PRINCIPLE

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Voir dire is French term which means **"to see to say"**. Voir dire is a process within a trial aimed at addressing relevant ancillary issues that are crucial for a fair decision. It allows the trial court to assess the competence of a child witness by posing various questions. If the child successfully meets the rationality test, he is considered as a competent witness by the Court. A child can testify in court, provided they possess the capacity and understanding necessary to comprehend their testimony. The determination of a child's competence and their ability to pass the "Rationality test" is made by the court in accordance with Article 3 and Article 17 of the Qanoon-e-Shahadat Order 1984, following the voir dire process, which translates from French as "to speak the truth."

Definition

It is defined as, ‘‘a preliminary examination to test competence of a witness.”[44] It is also defined as, “a special form of oath administered to a witness whose competency to give evidence in the particular matter before the court is in question, or who is to be examined as to some other collateral matter”[45]. It also means “an oath administered to a proposed witness or a Juror by which he or she is sworn to speak the truth in an examination to ascertain his or her competence”[46].

Relevant Laws

1. Pakistan Penal Code 1860
2. Majority Act 1875

[44] . BLACK’S LAW DICTIONARY
[45] . ADVANCE LAW LEXICON
[46] .WEBSTER’S DICTIONARY

3. Qanun-e-Shahdat Order 1984
4. Queens Land Evidence Act 1977

Objectives

The aim of the voir dire or rationality test is not to validate the evidence but to safeguard the court time by ensuring that proceedings do not continue if the child witness is found incompetent. The court can evaluate the child's capacity through their testimony and delivery. If the court is satisfied, it may proceed to record the evidence directly without preliminary questioning.[47] The basic purpose is to ensure fair and impartial trial. Hence, in this way integrity of legal proceedings is not compromised, as if compromised it would lead to an unjust decision.

Law is very clear that all persons are competent to testify except those who are prevented from understanding the questions put to them on account of:

a) Tender age
b) Extreme old age
c) Disability of any kind
d) For any other reason

Applicability

The rationality or voir dire test, conducted by the presiding judge at the start of a child witness's examination-in-chief, should be consistently applied throughout the child's testimony. If the presiding judge notices any hesitation or difficulty in the child's narration, the evidence should be paused, and measures should be taken to discard any inconvenience the child may be experiencing. If the child continues to struggle, the presiding judge should document his observations, and may conclude the child's testimony, and excuse him as a witness.

[47].[State of Orissa vs Machindra Majhi and another AIR 1964 ORI 100]

Importance

Man's ability for rationality and reason is one of the defining traits of humanity. It allows him to analyze complex situations and to make decisions and per sue understanding beyond immediate impulse and emotions of men. Humans are rational beings as they make inferences all the time through reasoning process by looking at the facts and seeing what conclusions they support. As Aristotle and Kant have observed that our reasons lead us to a better conclusion and knowledge no other species can infer. Conducting of voir dire is significant as it allows the judge to evaluate the witness's competence before the actual examination begins. While there is no strict requirement for a preliminary examination, judicial experience supports its necessity. The method of conducting this examination is flexible, allowing the court to choose any approach that reveals the witness's capacity, intelligence, comprehension, and understanding of the obligation to speak the truth, as well as the distinction between right and wrong.[48] Hence, in this way the people who could jeopardize the trial can be a identified and removed.

It provides two tests for competence of a witness appearing before court i.e.

1. Capacity to understand and rationally respond to the question put.
2. Witness must be possessed of qualification expressed by quran and sunnat. Qanoon-e-Shahdat does not provide any procedure for such preliminary test. However general practice is that the judge should make such inquiry by putting some question to child and make a record of that. Mere tender age is not a disqualifying factor, but it is the power to understand the question and the rational way to answer, which decide the competence of the child. The section 5, 6 and 13 of the Oath Act are also relevant. There is

[48] . [Miraj ul Islam Shiekh vs The state of Karela (2018 1 KLT 454)]

no hard and fast rule for determination of intelligence of a witness. It varies from case to case. For instance, to determine the competence following questions may be asked;

a) What is your name?
b) What is this place where you are standing?
c) Who has brought you here?
d) Do you go to school?
e) When do you have vacation at school?

This whole process must be used to familiarize the child with the court atmosphere and court process to enable him to refresh his recollection of the event regarding which the child intends to depose. Thus, after recording such questions, the court may give a ruling as to whether in his or her opinion the child has the capacity to testify as a witness. Such note by the judge is sufficient proof of the child being a competent witness.[49] However the judge has to give reasons as to how and on what basis, he concludes that the child is a competent witness.

Age of Witness

Article 3 of the Qanoon-e-Shahadat, 1984, serves as a cautionary guideline. The court must determine whether a child appearing as a witness is intelligent enough to understand their testimony and provide rational answers. The law does not specify a particular age for determining a witness's competency; rather, it depends on the child's ability to comprehend.[50] The judge must record such question in open court and the court room environment needs to be relaxed and informal for the child witness for whom the court environment is much intimidating. Article 3 Qanon-e-Shahdat order 1984 is a rule of caution. The court has to make an assessment whether the child appearing before the court is intelligent to be able to understand as to what evidence he

[49] PLD 2020 Supreme Court 146
[50] . [Amjad Ali vs The State 2020 PCRLJ 964]

or she is giving and he or she should be able to give sane answers[51] to the questions put to him.

Guidelines for Child/Mentally Challenged Witnesses

1- **Independent Inquiry**: The voir dire should be a standalone inquiry, separate from other issues like the admissibility of out-of-court statements.

2- **Brevity**: The voir dire should be concise, considering all relevant evidence before deeming a witness incompetent.

3- **Clear and Simple Questions**: The witness's competence is primarily assessed through their own responses, with special accommodations for individuals with mental disabilities, ensuring questions are clear and straightforward.

4- **Familiar Individuals**: People familiar with the proposed witness and their daily life may be called as fact witnesses, as they provide valuable insights into the witness's development.

5- **Expert Evidence**: Expert testimony may be introduced if it meets admissibility standards, preferably from those with regular contact with the proposed witness.

6- **Oath or Affirmation**: During the voir dire, the trial judge must ascertain whether the proposed witness understands the nature of the oath or affirmation and can effectively communicate their evidence.

7- To Communicate: Second inquiry into the witness's ability to communicate evidence requires the trial judge to explore whether he/she can relate concrete events, understand and respond to questions, differentiate between true and false everyday factual statements.

[51] 2015 YLR page 17 or 2016 PCRLJ page 513

8- **Passing of Test:** If witness passes both parts of test they testify under oath or affirmation, if they pass only second part they promise to tell the truth. [52]

Untrustworthiness

Persons having disabilities and of tender age are most untrustworthy class of witnesses, as our common experience teaches us, that children often mistake dreams for reality, repeat glibly as of their own knowledge that they have heard from others and are greatly influenced by fear of punishment, by hope of reward, and by desire of notoriety.[53] As the child is in a learning stage and he/she does not have the capability to characterize the informers potential reliability and he can make evaluation of events on a limited scale. The testimony of child witness must be accepted with great care and caution. The rationale behind it is that in common experience that a child witness is the most susceptible to tutoring.[54]

Evidentiary value

Evidence of child witness is a delicate matter and generally, it is not safe to rely upon it unless corroborated as a rule of prudence. Great care is to be taken that in the evidence of child, element of tutoring is not involved. In any case, the rule of prudence required that the testimony of child witness should not be relied upon unless it is corroborated by some evidence on the record.[55] Honorable Supreme court discarded uncorroborated testimony of a child witness.[56] However, in the latest judgment it has been held by the August Supreme Court of Pakistan that in a case of child abuse single testimony of

[52] . R VS. DAI (2012) 2 LRC 633 SUPREME COURT OF CANADA
[53] .[Outlines of criminal law by Dr. Kenny Dowing, professor of law of England, Cambridge University]
[54] NLR 2003 Criminal Page 474 M.Feroz Vs. State
[55] . State through Advocate General Sindh, Karachi vs Farman Ali and others (PLD 1995 SC 1):-
[56] . ibid

the minor child is sufficient for conviction if it is reflected as independent, unbiased and straight forward. As the analogy is that a rape victim stands on a higher pedestal than an injured witness, for an injured witness gets injured physically whereas the rape victim suffers psychologically and emotionally.[57]

Conclusion

Voir dire is a process whereby a potential juror or a witness is preliminarily examined by the court to determine his trustfulness/competence as a witness. The benefit of the voir dire in a child's case is two-fold, firstly, to save the court time by excluding incompetent child witness, secondly, to preserve the questionnaire of voir dire for the Appellate Court to evaluate the findings of the court below regarding the child witness. Commonly, it is described as trial within a trial.

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[57] 2022 SCMR Page 50

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PAKISTAN AND CYBER CRIMES: ORGANIZATIONS, SOCIAL CHALLENGES AND PREVENTIONS

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Abstract

As the human population is increasing day by day, at the same rate the use of the internet and modern devices is also on the increase and at large. Every country, every company, and every institution is introducing online service. The users are also interested in knowing and utilizing the online services. Indubitably, the world, which is also called nowadays one village, is connected with the help of the internet. A person can purchase any item of his need, may purchase, sell, see items, can extend help and also can take assistance. In order to achieve and to provide such services, human beings are in dire need of the internet, mobile phones, computer sets, laptop, tab and such like many other devices and gadgets which are easily available to them in the market. Whenever any person goes online to procure such services, in that eventuality, due to lack of knowledge of information technology, he is liable to the access of digital crimes and criminals. Digital criminals obtain his personal financial information, personal data and other sensitive information from a person who is not well conversant with them and even hangs his device as such to accomplish their desired target and ultimately succeed in their ulterior purpose. Such things are happening in other parts of the world. Digital or cyber criminals very easily target Pakistani users of the internet as there is no appropriate education, or training of information technology related to cybercrime. Cybercrime is considered as one of the dangerous crimes in the world, comparatively there is no awareness to the internet users. There is a lack of enacting laws about prevention of cybercrimes. There is no awareness to the people about the cyber laws. The agencies such as FIA in PAKISTAN seems unsuccessful in dealing with digital crimes due to the said reason. There is a fantastic increase in the rate of commission of cybercrimes. This research paper is based on the study as to kinds of cybercrimes, cyber security, cyber laws, websites, many articles, concerned books, newspapers, especially the perusal of cyberattacks conducted on the websites of the Supreme Court of Pakistan, and Provincial High Courts has been made. Besides this, the author has conducted face to face interviews of teachers, students of colleges and universities, and the employees of those institutions, which are providing internet services, especially the employees of the Punjab District Judiciary, lawyers and the

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employees of police department. The author has collected the data through E-mails, simple messages, WhatsApp messages and the telephonic calls. The author has made an attempt to furnish awareness of cyber security to the institutions, which are providing online facilities to the public. This is material for us to know deeply about cyber security so as to combat the cyber criminals through the use of modern computer technology and in this context the innovations or amendments be made in the cyber laws.

Keywords: Cybercrimes, cybercrimes law, cyber security, uses of the internet, pirated software.

Introduction

The population of this world is presently almost 8,161, 972,572 out of which 5.45 billion people, coming to 63.5%, use social media. The population of Pakistan presently is 251,269,164 out of which 71.70 million are inclined to use social media. According to a survey conducted during the period intervening July, 2023 to July, 2024, 95.63% Facebook, 1.76% Instagram, 0.94% YouTube, 0.67% Pinterest, 0.63% Twitter, 0.19% Reddit are users. (Social Media Stats Pakistan July, 2023—July, 2024. Pakistan figures at serial No.10 of the cyber-attacks vulnerable. Active network of mobile phones in Pakistan is 188.9 million, which becomes 77.8% of the total population of Pakistan. (Digital Pakistan February, 2024). In Pakistan, one of the increased trend, or use of internet is that our banking system, educational institutions, job providers and candidates testing services providers, land record management system, and the Courts have developed websites and have also shared data and all other information so that the users by using the latest, or modern computer technology can take online advantage. Viewing the use of internet services by the users, the mobile phone companies have introduced many internet packages on mobile phones. In Pakistan, the count of beneficial uses of the internet is too rare. Mostly, our country's population rehabilitates in rural areas where there is too much literacy rate, however, in the rural areas there is too much use of the internet like the urban areas through mobile phones with the help of the latest information technology devices. The use of the internet in rural areas is just for entertainment. The villagers do not know the correct and secure use of the internet due to which they are susceptible to the evil designs of cyber criminals and they suffer loss in form of loss of money, documents, personal information and many secrets and even sometimes they cause damage. They sometimes suffer their future by furnishing said information to the cyber criminals. Like developed countries, cyber-crime attacks are on increase in Pakistan. In our country, the

people are not aware about cybercrime like the people of other countries. The increase of number of cyber-crimes day by day, in Pakistan like other countries of world, strict cyber laws have been enacted for awarding severe punishments to the cyber criminals. Amongst them include the Pakistan Electronic Transaction Ordinance, 2002, Electronic Crimes Act, 2004, and the Prevention of Electronic Crimes Act, 2016. The employees of online services provide either belonging to government sector, or to the private sector are bereft of information of cyber-crimes and cyber security. Owing to this, hackers easily gain access to their important information, data and their main servers and steal sensitive information, documents and in this way the institutions/organization suffer a lot of loss and damages. We read message that server is down or website has been hacked because of which the customer cannot be provided services. All this is the offshoot of cyber-attacks. Such is occurring in the world. In the entire world, the cyber-attacks are spreading like fatal disease. To know about cyber security is necessary for general public, as well as for the employees of online services providers. This research paper concentrates on the cyber-crimes, policies and cyber laws of the government in which courts and other cyber-crimes survey. The survey of courts and cyber-crimes shows that we have to make further encampments that how much is material for internet users to know cyber security so as to prevent cyber-crimes.

Pakistan is susceptible to cyber-attack due to increased use of the internet. A general user of information technology uses tools for his benefit as well as communication with other people; but the cyber criminals use this powerful technology for illicit and illegal purposes. Due to the high increase of cyber-crimes, pirate software is easily available. The internet user does not know that his devices connected to the internet and software installed therein have been pirated, or registered. The user purchases many costly equipment, however, installed software is not found registered. It has been observed that

our desktop computers, laptop computers, tabs, and mobile phones are found to have a pirated operating system. Besides this, the installed application software of these devices which are too much in number are too pirated. When a user uses the internet through pirated software, the dangers of cyber-attacks become manifold. The files executed on account of pirated software are even provided by the cyber criminals. As soon as we install this pirated software in our devices connected with the internet, our data, our devices are easily accessible to the grip of digital criminals, by means of which digital criminals easily achieve their targets.

Literature Review

In Pakistan, besides other countries of the world, the use of the internet has been increased which is proving an important milestone in the businesses of people. The people while living in any part of the world are purchasing and selling their products, services, ideas and information which manifests the history, culture, literate and business. The users in seconds trade their services through means of information technology. The general world comes to know about any happening, incident etc., occurring in the sphere of the world. As already narrated above, the use of the internet carries many disadvantages along with its advantages. Out of these disadvantages, we are facing dangers of cyberattacks in respect of which we know very little or even nothing. If we are fully able to know the disadvantages of cyberattacks, we perhaps would not go to connect our devices. In each and every society of the countries. During the course of different surveys, which data was collected it revealed that fake messages of amounts to be granted by the Benazir Income Support Program have been received various times to the users of mobiles. Through different modes, fake and threatful messages for providing information about bank accounts numbers, ATM etc., are received from purported various banks to the users. Various fake messages about winning of prizes have been received to the users of mobiles phones through telephone

calls or WhatsApp calls that in order to received prize money of Rs.20,00,000/-, he has to deposit a sum of Rs.3,00,000/- in their bank account, in that eventuality they would deposit the remaining amount of Rs.17,00,000/- in the bank account of the user. An abominable trend has developed on the mobile phones that a man pretending himself as SHO of police station makes a phonic call to any user of mobile phone that his son has been captured in connection with commission of any crime, a threat is conveyed to the user that if he deposits certain amount in his bank account, his son would be released otherwise he would be booked in some FIR. Many parents have been swindled and deprived of their money through this fake mode of phone calls. Sometimes a fake call is received from near and dear one of the user of mobile phones that he has been detailed by the police in the lock-up of police station in connection with commission of crime along with his accomplices or friend; his friends have escaped while he has been arrested and detailed in lock-up, so the user should arrange some money to be sent to him for his release. Sometimes fake phone calls are received to unemployed youth that they had sent their CVs for a certain post, now the interview date has been fixed on such and such date, so they should come at any site over there their vehicle bearing a certain registration number will be available. In that vehicle, the user should sit and the driver will convey the user at the place of interview. Likewise, the winning of a vehicle and houses through draw of lot, message or phone call is received that minimum amount be sent in the given bank account number and they should come to their office along with a certain amount so that they may be able to complete their documentation about the house and delivery of keys to the user. By virtue of such incidents, the people have either lost their lives or lost their hard earned money. Sometimes a fake call is received to us through which the first digits of our bank accounts are sent to us and a reply is sought by them about the remaining digits of our bank accounts. A threat is extended to the user that if he did not

provide the remaining figures of his bank account, or ATM card, his bank account would be either closed and fine would also have to be paid by the user. By this fraud, many users/people have become prey and have provided information about their bank accounts and their family. The investigation conducted revealed that such fake phone calls have been working in any bank; they are well aware about the first digits of accounts of any bank. The user becomes convinced that the call was actually made from the bank staff, but that it is virtually made by cyber criminals. In our country, the use of facebook has increased. The ID of Facebook is hacked; its user comes to know that his Facebook ID is being used by some other. In this way, the users receive Emails about the winning of prizes, or availability of job or about online deposit of school fees of their children which almost all are fake. WhatsApp use is also on high pace. It is being hacked frequently. Various groups have been formed on WhatsApp about services, business, politics and tourism wherein many persons of different countries join. Thus, there is an increased danger of hacking of important information. Different virus attacks are usual on the devices continuously connected with the internet due to which our material data stands deleted, important messages change; sometimes our devices become disused. The strict implementation of cyber laws and policies would prove helpful in the survival of information technology, and it is the responsibility of the government, its relevant institutions or departments to keep the user away from all blacklist websites and illegal data. As the system of the world is shifting from manual mode to computerized mode, the crimes are also becoming digitized. Cyber-crimes are always different from ordinary crimes in society. Whenever any infectious disease spreads, wars take place and any other problem is faced, the people are besieged in their houses, but they through computer technology keep themselves abreast of their services, their businesses, and many other

information. The cause of the increase of digital crime is that it is not only very different to comprehend digital criminals but is also rather impossible.

Emerging Trends and Challenges

It has become difficult to use information technology because the user does not know that he is sharing data, information to correct the user or to digital criminals since the digital criminals have suppressed their identity; he obtains sensitive information from the user by becoming his friend and then causes disadvantages to the user. The user is not aware of what he is sharing on social media; he does not take care of his privacy; thus, suffers a lot of loss of reputation, money and social status. Nowadays, new software is being developed by the companies for computers and mobiles. The world, instead of using traditional paper and by using computer technology, is intending to become digital and also intends to save data, important and sensitive information in main computers and servers. At the cost of repetition, it is recounted that this process also has inner ward threats of cyber-attacks. In the world, the number of users of Windows operating systems and Android operating systems is at a higher level and increasing as well. Such operating systems are very easy while using it, however, such operating systems are sustaining severe cyber-attacks; their security system is comparatively too low than that of the Linux operating system and mac operating system. Cloud computing is considered as a secure system, however, although new technology always carries many facilities and conveniences, simultaneously carrying many disadvantages which are divulged to the user with the passage of time.

Unique Challenges

The world is using new technology and an ordinary criminal while also using technology is inclined towards digital crimes which is a unique challenge for the world. Cyber criminals living in any part of the world can make a

cyberattack. Such digital criminals have no territorial limits. There are different cyber laws in the world. The investigating agencies are hindered by territorial limits. Cyber attackers do not reveal the original and real name of the cyber-criminal. They attack with fast technology and at the same time they delete their identity and disappear the evidence. We should use such technology and tools with the help of which no cyber-attack is launched and cyber-attack is retaliated within a short span of time. Cyber criminals work in teamwork and groups wherein top programmers of technology are included; they for their group use different kinds of malware, viruses, prior registered software, and illegal coding. Computer network engineers working with such groups and teams create technical disturbance in network provider companies and in main servers. Such groups have top level hackers who seek various weaknesses in software and networks and easily achieve their target and then sell at high price such data and sensitive information.

Cyber Crimes Law in Pakistan

In our country there is the slightest awareness of cybercrimes to the general public, advocates, government and private departments; every citizen has fallen victim to the cyber-attacks. We have received information from governmental agencies such as the police and FIA that the rate of cyber-crimes is on a higher level, but the people do not go to law because of the intricate legal system. In our country, if the number of registered cyber cases is up to 1,00,000 and unreported or unregistered cyber-crimes are much more than the reported number. Our investigation agencies have no modern technology other than the advanced technology being in possession of cyber-criminal groups. In Pakistan, enactment was made about Information Technology in the year 2002 titled Electronic Transaction Ordinance, 2002 which deals with the different sorts of cybercrimes. This Ordinance prescribed punishment about banking system, and online banking system fraud. In the year, 2007 Prevention of Electronic Crimes or Cyber Crimes Act

was enacted wherein it was provided that in Pakistan every person committing cyber-crimes, to whichever country he belongs by way of internet terrorism, altering sensitive information, stealing data, online stealing, is liable to punishment extending from six months even up to capital punishment. In the Prevention of Electronic Crimes Act, 2016, detail of digital crimes has been provided for with sentences which is an effective law for the prevention of cybercrimes.

Case Study

Undoubtedly, general litigants have to resort to the courts of Pakistan even up to the August Supreme Court of Pakistan. The courts have established their websites sharing information and data just for the convenience of litigants who while sitting in their houses may seek information and data about their cases on websites.

On 27.09.2011, the website of the Supreme Court was again subjected to cyberattack with a message by the hacker who used the screen name Zombie-Ksa to the Chief Justice to ban all pornographic websites and do more to help the poor.

> *"You must have heard about me on news, headlines, government charged, blogs, blah blah,"*

The message read.

> *"Yes, the Pakistan supreme court got stamped by Zombie_Ksa,"* the hacker wrote.
>
> *"So I am here to request you to go out there and help the poor, needy and hungry"* the hacker said in the message. (BBC 27 September, 2011).

Another cyberattack was made by the Indian hacker on the website of Peshawar High Court, Peshawar on 21.12.2012. According to the message left by the hackers "**DA Killar" & "H4x4rWo**", the hack was in remembrance of November, 2008, Mumbai attacks.

A message posted by the hackers read:

"never forget 26/11 and Rest in peace Victims of 26/11"

The hackers further pointed out the security employed by the website administrators was not strong enough to keep them out.

"Your Security SUCKS!!!!!"

(Umer Farooq/web desk December 21, 2012, The Express Tribune)

Likewise, on 25.09.2015, on the website of the Lahore High Court, Lahore, a second cyberattack was launched wherein the cyber-criminal wrote that *"we are not damaging the data of the website but the index."* The unidentified hacker further said the LHC website was very vulnerable to hacking and the acts of "illegal control" of the website would be continued in future. *"The hacking spree would be continued till freedom of Palestine."* Published in Dawn, September 25th,2015.

Another cyberattack was made by an Indian digital criminal on the website of Sindh High Court on 04 July 2021.

Indian hackers going by the name of **"Indian Cyber Troops**" have hacked the website of Sindh High Court. Several pictures were also shared on the SHC website by hackers. (ARY News, July 4, 2021)

Such cyber-attacks are often made in Pakistan. Owing to this, the different institutions and their employees as well as online services users have to face manifold difficulties. We cannot take advantage of cyber laws of various countries of the world and cannot punish the cyber criminals. It has come to notice and observation that every institution of Pakistan is within the approach and range of the cyber criminals; whenever they wish they can cause damage to the devices, data, and sensitive information.

Recommendation and Suggestions

Establishment of I.T Wing

In our governmental institutions, especially the Supreme Court of Pakistan, all provincial High Courts and all the District Courts of all provinces of Pakistan, including AJK High Court and Gilgit Baltistan High Court, the establishment of I.T Wing would prove highly beneficial where selection and appointment of software engineers, computer hardware engineers, computer network engineers, website developers and database administrators must be necessary. But, unfortunately, from superior and higher courts up to the District Courts, there is a great shortage. In our Courts in Pakistan, a large number of computer operators have been inducted but they have no skill, knowledge or strategy to combat or tackle the hackers and to cope with the latest information technology. Nor have they been provided with the latest technological facilities. They have too not been provided with necessary IT tools and devices. The courts have though selected and appointed soldiers (computer operations) but they have got no commander to properly and suitably command and supervise them. From courts of Pakistan, the online case management system is a great beneficial project which has assumed the status of the NADRA. However, no strategy or planning has been made to deter cyber-attacks. If this project is subjected to cyber-attack, there would be an immeasurable, irreparable and irremediable loss. One simple computer operator is unable to compete with the digital cyber criminals who are always in an organized group nor can he save the system from the cyber attackers. In order to avoid such cyber-attacks, we need a professional competent team which may cope with the future challenge of cyber-attacks and other computer technology challenges. In the present case management system. The data of all courts of Pakistan is available online without any cyber security which may be changed or stolen or crashed. If such an untoward incident occurs, our struggle based on so many years would go spoiled. Pakistan judiciary nowadays works like

other private or government institutions which provide online services. Thus, our equipment is open for round-the-clock from which the data may be changed, deleted, or hacked. After the installation of IP cameras, we have entered an online danger zone. Our cameras are online, the recording of which may be hacked, changed or deleted. Occasionally in our courts scuffle between rival groups takes place even murderous attacks are launched. Even murders are caused in the courtroom. The change of scene of the gruesome incidents in courts, possibility of its deletion or change, or hacked cannot be ruled out, it is common for digital criminals or hackers. In our institutions, there is little awareness about IT security. The maintenance of IT equipment is entrusted to the computer operator who is not equipped with necessary knowledge of security, policy, networking, coding, data-based administration, if any little difficulty erupts, technicians are called from the market to tackle the problem. In courts of Pakistan, for delivery of any lecture on any subject or any meeting to be convened are conducted through Zoom. Through Zoom, there is an increase in the world of cyber-attacks in all the meeting s, lectures conducted through Zoom. Cyber attackers while taking advantage of weak security easily become part of these meetings, lectures from where they hack important information. They may even cause any hindrance in such meetings as there is no satisfactory arrangement of security in the courts. In the courts, it is the responsibility of computer operators for managing the completion of such meetings and lectures. Presently, the data of all the courts of Pakistan is available or existing without any security. If there is any system of security, that too is not in accordance with the international standards, thus, we are in a danger zone; at any time, our data, our equipment may be subject to cyber-attack. As the world is victim of cyber-attacks, so it is making best strategy and planning to evade such cyber-attacks, and making legislation, giving awareness to the people of society and awarding severe punishments to the cyber criminals, taking help of computer professional experts as the cyber-

attack cannot be prevented by cannons, guns, missile, bullets, bombs, rockets and even by atomic bomb. The disadvantages of cyber-attacks are more dangerous and fatal than those aforementioned weapons. We need professional experts to prevent cyber-attacks as in our courts the use of computer technology is increasing day to day, who may ensure the security of cyber-attacks. To accept the challenge of the modern world, and their powerful and illegal opponents and to keep surveillance over the spread of illegal networks and illicit communication and deter them from achieving their illicit designs and purposes. Cyber criminals easily hack whenever they wish, change the information and keeping in view such a situation, the establishment of an IT wing in the Courts is a must. Cyber war is the most dangerous war of all the world wars and its strategy is altogether different from traditional wars. To win such a war and to secure our online frontiers, we need to create a professional computer force. All the institutes along with August Courts of Pakistan who provide online services should have their I.T wings to avoid such cyber-crimes attacks in future.

Ban on Pirated Software

The mobile phones, laptops being used in online service provider institutions carry pirated software due to which any attack on such devices, especially cyber-attack easily can be made. Such software and application software must be banned. Registered software should be installed and updated.

Awareness of Cyber Crimes

Our society members even highly literate and educated persons have no knowledge about the cyber-crimes, but they have such gadgets in their use and through its help they go online. Several times they have received fake calls, messages, WhatsApp messages, E-mails and even from their bank accounts, money has been drawn, but they could not tell or disclose such facts nor could they report such cyber-attacks to the police. Such things like calls,

messages, hanging of their devices, suffering from viruses, and data deletion are ordinary for them and they do not take their notice in routine. Thus, the imparting of awareness to our institutions and employees is essential.

Awareness about Cyber Laws

It is necessary for layman users of mobile phones, internet and laptops. Our institutions ought to get the implantation of these cyber laws. The people should be made aware about cyber laws through newspapers, electronic media and mobile phones. All laws and procedures may be made simple within the awareness of even the general public. Instead of establishing FIA Cyber Crimes Wings at far off and longer distances, FIA Cyber Crimes Wings must be established even at Tehsil levels so that the general public may have resort to them for redress of their lawful and genuine grievances.

Never Open Attachments in Spam Emails

Easy targets are carried out through spam Emails. The hackers through fake IDs send E-mail to the user which contain some attachment files. When the user opens attachment files, all the information of user, data, device go to the access of the hackers, hence the user should not open the Emails sent by unknown persons.

Do Not Click the Links Blacklisted Website

The employees of institutions/users may have limited or narrow excess of internet uses; they ought to have access proportionate to their job and work. They do not know as to which links, they are clicking, that may be dangerous not only to the institution but even for themselves.

Access control and password security: The concept of user name and password has been a fundamental way of protecting our information. This may be one of the first measures regarding cyber security.

Malware scanners: This is software that usually scans all the files and documents present in the system for malicious code or harmful viruses. Viruses, worms, and Trojan horses are examples of malicious software that are often grouped together and referred to as malware.

Use of Firewall

A firewall is a product program or piece of equipment that helps screen out programmers, infections, and worms that attempt to arrive at your PC over the Web. All messages entering or leaving the web go through the firewall present, which analyzes each message and blocks those that don't meet the predetermined security rules. Thus firewalls assume a significant part in distinguishing the malware.

The use of firewalls saves us from hacker attacks. Without the installation of a firewall, our sensitive data, information, and computer networks are easily susceptible to hackers.

Cyber ethics: Cyber ethics are nothing but the code of the internet. When we practice these cyber ethics there are good chances of us using the internet in a proper and safer way. The below are a few of them

Conclusion

Cyber-attacks are spreading quietly in all the societies of the world; its example is like cancer disease. As the virus of cancer quietly enters into the body of human beings and finds the weak part of the body, that weak part of the body is attacked. The patient comes to know or the Doctor diagnoses such cancer disease at the last and irreversible developed stage. Admittedly, some patients recover from such cancerous diseases. Such effects are carried by cyber-attacks. We must enact severe cyber-attacks. The procedure for

reporting cyber-crimes should be simple. There should be awareness to the general public about cyber-attacks. The people must be bound down to report even the slightest matter of cyber-crimes to the police as the hackers launch too minor cyber-attacks, if they are captured in such minor cyber-attacks, the cyber-crimes would be nipped in the bud. If the cyber attackers are successful, they then form organized groups and then go to launch cyber-attacks at great length. The cyber-attack is a crime within and outside the frontiers of any country owing to which cyber criminals escape easily. We must make legislation in collaboration with the world which must benefit the world and to avoid the spread of cyber-attacks. Cyber-attacks are a great problem for the world. To detect cyber-crimes, to conduct investigations and to secure our frontiers, we need computer professionals with modern information tools which are deficient with us.

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AN INSIGHT TO ARTIFICIAL INTELLIGENCE IN COURTROOMS: USES AND THREATS

Maisoon Yousaf

Abstract

Given the interaction using technology has been noticeable in both civil and criminal courts. Technological information has been upgraded through the application of artificial intelligence, bringing an opportunity for speedy justice. The objective of the present study is for courts across the world to use modern technology to collect, practice, and investigate judicial data. In doing so, the paper first grasps the use of modern technology in the courts resulting in improvement in communicating and keeping day-to-day judicial data. After deploying doctrinal research methodology, it further highlights the number of cases that outstrip the holding capacity to resolve them, as the huge tantamount to the shortage of resources at hand. The judicial system is dispossessed of an effective case-flow management system, which is reflected in an international best practice in the legal realm. It further explores the uses of modern technology in the courts. It advances the argument that the courts should use the literature produced in artificial intelligence and law to link it with judicial evidence. Finally, the paper concludes by contributing to the possible benefits and also the threats of modern technology in the courts' proceedings.

Keywords: Artificial intelligence, Courts' performance, Judicial data, Speedy justice, Law, State institutions, Pakistan.

Introduction

The term "technology" means, practically applying scientific knowledge to fulfill various tasks.[59] In judicial settings, technology has often been regarded as identical to extensive computer systems that keep caseload information and create administrative analyses and legal forms. Historically, court record / data has been a foundation of the judicial process, ensuring the protection and availability of momentous legal information. Traditional practices for upholding and generating court records have primarily orbited around paper-based systems. These systems have classically involved particular handwritten or typed documents, which are then manually filed and stored for future purposes.

Traditionally, paper-based systems were widespread, requiring physical storage space and documents.[60] These systems involved the use of paper files, filing cabinets, and document indexes, leading to substantial challenges in positions to organization, retrieval, and conservation of data.[61] Additionally, manual data intricate the time-consuming process of recording and duplicating the legal documents, leading to errors and delays in case proceedings.[62] The limitations of these traditional methods became ostensible as the courts faced increasing caseloads and the need for more effective and consistent data management solutions.[63]

Subsequently, this led to a development in the overall working of the justice administration system. In certain regions, the application of technological

[59] Agar, J. (2020). What is technology? Technology: critical history of a concept, by Eric Schatzberg, Chicago and London, University of Chicago Press, 2018, 352. *Annals of Science*, *77*(3), 377-382.
[60] Smith, S. (2010). The evolution of record-keeping practices. Records Management Journal, 20(1), 14-28.
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[63] Ferguson, J. L. (2016). Technology in the courtroom: A comparison of current and upcoming technologies. Journal of Court Innovation, 9(2), 183-209.

tools lines up with procedural workings that have been facilitated by legal measures. Besides this, technology assists in enhancing the aptitude of legal practitioners to elucidate intricate evidence, thereby enabling the comprehension of evidence by both jurors and judges.[64]

The Pakistani courts are not exceptions with the experience of new technologies and they are using emails, SMS, computers, and video conferences for various purposes. However, research is scarce on the distinct types of instruments based on modern technology that the courts are using. Further to that, the Pakistani courts are unaware of how the research produced in artificial intelligence and law may be used to make it rational with judicial evidence. The present study aims to fill up the gray area in the literature by addressing two research questions; what are the technologies that are being used in the courtrooms? And what are the possible threats of using Artificial intelligence technologies in the court? The present study has four sections other than the introductory section. The second section reviews the literature, the third section describes the methodology, the fourth section illustrates how modern technology may be used to assess judicial evidence and the last section provides recommendations and also concludes the study.

Literature Review

The use of AI in the courts is not a new phenomenon within world judicial systems. It saves time and cost for the documents. With the assistance of AI, many countries i.e., China, Japan, and Brazil are moving up their judicial systems. Maria & Kenyon (2016) acknowledge that globalization and new artificial technologies put out strong influences on remote processes of the court in the present day.[65] Electronic filing permits litigants and court staff to

[64] Lederer, F. I. (1998). The Road to the Virtual Courtroom-a Consideration of Today's--And Tomorrow's--High-Technology Courtrooms. *SCL Rev.*, *50*, 799.
[65] Maria Edström, and Andrew T. Kenyon, *Blurring the Lines: Market-driven and democracy-driven freedom of expression*, (Nordicom, 2016), 20.

get additional work done with their computers, pay filing fees, send and receive documents, send and receive court notices to send summons to other parties, and recover court information. (Qasim M. et al 2023; McMillan, Walker& Webster, 1998)[66]

In the year 2015 Sustainable Development Goals (SDGs), the theme of the United Nations (UN) was established for the UN's vision for the future. AI technology can align with each of the purposes and provide both assistance and consistency. The UN SDGs and AI technology are associated with the fundamental qualities that, if these AI technologies are widely engaged, they might create efficiency and sustainability. (Hughes, Dwivedi, Misra, Rana, Raghavan & Akella, 2019)[67] AI technology is used in various patterns i.e., in e-Services, Procurements, HRM, e-Shariah, Information Systems, etc. Furthermore, almost all international agencies and networks have online plans that intend to enhance effectiveness and sustainability

Digitization and globalization with developing framework, legislative courts transformed our communication system, legal records concerning time, these changes have altered the public sphere, and the background of isolated operations of the court has shifted. (Maria & Kenyon, 2016)[68] Japan was gaining importance due to its technological developments where courts used Artificial Intelligence (AI) for the perseverance of decision support organizations to create the judgment process faster and more effectively with Case-Based Reasoning. (Khan & Ali 2021)[69]. Strong AI is denoted as generic

[66] Qasim M. et al (2023), "Use of Artificial Intelligence for Better and Rapid Criminal Justice System", Journal of Xi'an Shiyou University, Natural Science Edition ISSN: 1673-064X. VOLUME 19 ISSUE 02 FEBRUARY 2023 1330-1344.

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[68] Maria Edström, and Andrew T. Kenyon, *Blurring the Lines: Market-driven and democracy-driven freedom of expression*, (Nordicom, 2016), 20.

[69] Khan, A., & Ali, A. B. (2021). Electronic Court System and Speedy Justice: A Comparative Critical Analysis of Legal Systems in Pakistan, Malaysia, and India. *JL & Soc. Pol'y*, 26.

AI by some computer scientists, as it is a wide intellect that isn't restricted to a single task. A weak AI software doesn't contribute to communication, sense feeling, or learning for wisdom; it simply accomplishes the task assigned to it. (Doug Rose, 2020)[70]

Studies such as Daugherty & Wilson (2018) supported that the spontaneous generation of case statistics in the court management system offers uniform reports in addition to strong results. Organizations that are using artificial intelligence-based systems are continuously rising, changing business and industry, and broadening their reach into what were earlier thought to be solely human areas.[71]

Tenney, 2019, states that the legality of artificial intelligence (AI) is a complex and evolving theme that has cultural, ethical, and legal consequences. The crucial factor is in the manner and implementation of AI systems, sticking to widely recognized ethical principles, predominantly emphasizing justice, transparency, accountability, and the avoidance of bias[72] (Miller, 2019) supported that the Faithfulness to current legislation and regulations on liability, intellectual property, and data protection is crucial for guaranteeing legal validity. The integrity of AI relies on ensuring its safety and security, mainly in domains where it influences human lives. The legality of AI is conditional upon societal acceptance, public confidence, clear dialogue, and the maintenance of human oversight and responsibility for AI decisions. [73]The credibility of AI is furthermore influenced by global

[70] Doug Rose, Artificial Intelligence for Business, 2nd Edition, December 2020, ISBN: 9780136556565.
[71] Daugherty, P. R., & Wilson, H. J. (2018). Human+Machine: Reimagining work in the age of AI. Harvard Business Press, retrieved from https://data.gov.in/catalog/estimated-number-enterprises-different-statesuts.
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[73] Miller, T. (U. Ill. L. Rev. 113 (2019): 1449.). Artificial intelligence and law: An overview." U. Ill. L. Rev. 113 (2019): 1449.

principles and ethical considerations, which seek to preserve an equilibrium between its benefits

Methodology

The researchers of the present study deployed doctrinal research methodology to address the two research questions stated in the above section. After devising the research questions and shaping the scope of the study, the researcher placid the data from secondary sources. The secondary data resulted from the literature review of sources which includes journal articles, books, and desertions to address the research questions.

- **Research Design**: This study employs a mixed-methods research design, consisting of a complete understanding of the legal aspects surrounding Artificial Intelligence (AI), its uses, and threats.
- **Literature Review**: The methodology initiates an extensive review of existing literature, covering research articles, policy documents, legal analyses, and reports associated with AI technologies in legal contexts. The literature review aims to identify key themes, developments, and gaps in the literature, providing a basis for the subsequent stages of the research.

Research objectives

The purpose of this research article is to propose solutions for effectively adapting legal systems to advances in courtroom AI. These solutions will take into account as following:

- To create the necessity for fair litigation in courtrooms by using artificial intelligence.
- To address the major risks and challenges connected with the amalgamation of AI in the courtrooms.
- To make a legal framework that takes into justification the use of AI in the courtroom.

- To incorporate principles such as transparency, and responsibility so that the legal systems can ensure fair and ethical trials in the courtrooms.

Discussion

Artificial intelligence (AI) has gained significant importance on a national and international scale as one of the key constituents of developing and developed countries, as well as the efficient government for the management of justice.[74] This industry is given a very high prominence in Pakistan by both the government and the judiciary, mainly the National Judicial Committee, under the Honorable Chief Justice of Pakistan. Both of them are recognized and have executed automation in their judicial systems as a means to rapidly up the process and provide a higher class of service to the litigant public, the bench, the bar, law enforcement agencies, etc. Along with cutting expenses, it also makes data accessible and increases accountability and transparency. It aims to conserve the directness of human judgment but may lead to a prolonged court case, more expenditures, and limited accessibility, which may prevent some people from accessing justice.[75] Because of this, Pakistan's National Judicial Policy Making Committee (NJPMC) has given computerization a high priority and produced a distinct subcommittee to deal with all IT initiatives and keep track of the development.[76] To achieve swift case resolution, developed justice system, and other judicial goals, a second automation strategy and effective framework of activities are currently under development for the betterment of the procedure in courts.[77]

[74] https://pid.gov.pk/site/press_detail/23936.
[75] Besan S. Abu Nasser, Marwan M. Saleh, Samy S. Abu-Naser, Interplay of Legal Frameworks and Artificial intelligence (AI): a Global perspective. *Law And Policy Review (LPR) Volume 2 Issue 2, Fall 2023 ISSN(P): 2076 5614*.
[76] https://pid.gov.pk/site/press_detail/23936.
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There are substantial hurdles in the way of justice and accountability because AI algorithms lack efficiency and have the possibility for algorithmic bias. It assures that the legal process is operative, transparent, and just, in observance of the standards of justice and the rule of law.[78]

Uses of Artificial Intelligence in Courtrooms

Due diligence reviews

One of the principal tasks that lawyers accomplish on behalf of their clients is the verification of facts and figures, and systematically assessing a legal situation. This due diligence process is required for directing clients on what their options are, and what engagements they should take. The legal professionals want to conduct an inclusive investigation for meaningful results. As such, lawyers are also disposed to errors and incorrectness when examining spot checks. There are now tools that can automate this procedure of using AI, comprising of finding specific legal concepts and producing reports about what originated like Kira Systems, Leverton, eBrevia, JPMorgan, ThoughtRiver, LawGeex, Legal Robot, Ross Intelligence, Casetext, etc [79]

- Kira Systems has produced software that rapidly sets up the process by automating the evaluation of due diligence contracts and recovering relevant data for the study.[80]
- Leverton is an offshoot of the German Institute for Artificial Intelligence, which engages AI to extract data, accomplish documents, and assemble leases in real estate dealings. Their

[78] Besan S. Abu Nasser, Marwan M. Saleh, Samy S. Abu-Naser, Interplay of Legal Frameworks and Artificial intelligence (AI): a Global perspective. *Law And Policy Review (LPR) Volume 2 Issue 2, Fall 2023 ISSN(P): 2076-5614*.

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[80] Kira AI power tools for contract Co retrieved on January 27 2024 from https://kirasystems.com/

cloud-based tool boasts high-speed contract reading abilities in 20 different languages [81]

- Leveraging natural language dealing with machine learning, eBrevia removes pertinent textual data from legal contracts and other documents, supporting lawyers in inquiry with due diligence, and lease abstraction. This software permits customization of the preferred facts and figures to be extracted, which are then précised and presented in various formats[82].
- JPMorgan has established an in-house legal technology instrument called COIN (Contract Intelligence), which speedily extracts 150 attributes from 12,000 commercial credit agreements and contracts. This procedure saves thousands of hours of legal work annually for their lawyers and loan officers.
- Thought River has created the Fathom Contextual Interpretation Engine, a solution that automates the summary of high-volume contract reviews. Users can read content removed and receive an understanding of clauses provided by the AI, which also recognizes and flags contracts with potential dangers[83]
- LawGeex's software empowers contracts by assessing compliance with predefined strategies. If a contract does not fulfill the principles, the AI system endorses essential edits and seeks approval. It syndicates machine learning, text analytics, arithmetical benchmarks, and legal expertise[84]

Fairness and Equity in AI

[81] Leverton AI | Now MRI Contract Intelligence, AI Data Extraction. Retrieved June 6, 2023, https://mricontractintelligence.com/

[82] eBrevia | AI Powered Contract Review Software | DFIN, Donnelley Financial Solutions. Retrieved June 6, 2023, https://www.dfinsolutions.com/products/ebrevia

[83] ThoughtRiver's AI technology aims to disrupt how business contracts are reviewed. (2017, September 18). Cambridge
Network. Retrieved June 6, 2023, from https://www.cambridgenetwork.co.uk/ news/thought rivers-ai technology- aims-disrupt- how-business-contracts-are-reviewed

[84] Lawgeex Conquer Your Contracts. Retrieved June 6, 2023, from https://www.lawgeex.com/

In the era of technology, diverse strategies designed to improve fairness and equality in AI systems working within the courtrooms. It highlights the importance of continuous monitoring and adaptive modifications to minimize biases. The strategies encompass a spectrum of approaches, including adjusting the weights of examples in the training data and implementing adversarial training methods that specifically aim to classify and reduce biased predictions. Continuous monitoring and auditing of AI systems throughout their lifespan are critical for distinguishing and resolving fairness concerns. The Contribution of legal experts and communities, in the process of emerging and evaluating AI systems encourages a more thorough understanding of justice. This engagement guarantees that a wide range of perspectives actively contribute to the constant improvement of AI models [85]

Preparing contracts

There are AI tools that can make contracts by applying whatever arrangement of parameters the lawful office feels is crucial. In addition, the device can be set up as "self-service" for clients, i.e., the clients can indicate onto the framework, select the type of agreement they want, and enter in a couple of aspects. The legal department can pick the amount it needs to be connected with the creation procedure, or just perceive contracts of a specific sort or if the client wants something[86]. With the appearance of individualized computing, legal counselors are underway sparing the formats to distinct work areas or report administration frameworks. In a generally unremarkable advance ahead, applications would now be able to apply deductive guidelines to robotize the procedure of field population[87].

[85] Khan, A. (2018). Autonomous Weapons and Their Compliance with International Humanitarian Law (LLM
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[86] James, Peltz., Anita, C., Street. Artificial Intelligence and Ethical Dilemmas Involving Privacy 2020, https://doi.org/10.1108/978-1- 78973-811-720201006

[87] McKinsey Global Institute. The future of women at work: Transitions in the age of automation (Executive Summary). 2019, https://www. mckinsey.com/~/media/mckinsey/ featured% 20 insights/gender%20 equality/the%20 future% 20of%20women%20at%20work%20

AI enhances the creative analysis by the Lawyer

With the time funds of computerized audit, research, and archive value, AI saves lawyers' time and mental vitality for a more prominent amount of work. These improvements and imagination, enable lawyers to contain special esteem and spotlight totally on the work that PCs can't do. Expanded trust in results additionally gives lawyers the free hand they have to go out on a limb and assess options. With shrewd legal research programming, lawyers can try out varieties of certainty designs or lawful examinations to identify the most invaluable technique.[88]

Decision-making

The utilization of Artificial Intelligence (AI) has enabled individuals to make informed decisions by providing them with precise and comprehensive data. [89]Artificial intelligence algorithms can predict the likelihood of reoffending amongst criminal offenders in the context of pre-trial detention, sentence, and parole. The application of artificial intelligence (AI) holds promise in assisting the advancement of more precise and consistent linguistic norms employing scrutinizing past data, thereby permitting for the detection of the most efficacious predictors of outcomes among varied variables.[90]

Threats of Using AI in Courtrooms

Loss of Public Trust

The incorporation of artificial intelligence in the judicial system holds promise for affecting the public trust in the legal system. The application of

transitions%20in%20the%2 0age%20of%20 automation/mgi-the-future-of-women-at-workexec-summary-july-2019.pdf

[88] Avaneesh Marwaha, July 13, 2017,‖ Seven Benefits of Artificial Intelligence for Law Firms‖, https://www.lawtechnologytoday.org/2017/07/seven-benefitsartificial- intelligence-law-firms

[89] Mikhaylov, S. J., Esteve, M., & Campion, A. (2018). Artificial intelligence for the public sector: opportunities and challenges of cross-sector collaboration. *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences*, *376*(2128), 20170357.

[90] Reiling, A. D. (2020). Courts and artificial intelligence. IJCA,

AI is perceived as unjust or discriminatory which consequently gives rise to lack of confidence in the judicial system by the general population[91]

Bias in Data and Algorithms

AI algorithms are only as unbiased as the data they are qualified on, and this can give rise to biased outcomes. The data used to train AI algorithms can be particular, consisting of historical discrimination and societal prejudices. Partial data can give rise to narrow results, which can have severe penalties in the legal industry. If AI algorithms that predict case outcomes may be biased against specific demographics, leading to unfair results. Similarly, AI algorithms used for document review may only accept relevant information if it fits preconceived notions of what essential algorithms are only as unbiased as the data they are trained on. If the data used to train AI algorithms is biased, the algorithms will also be limited. In the legal industry, this can lead to discriminatory consequences in cases, which can continue systemic biases and injustice. Ensuring that the data used to train AI algorithms is illustrative and unbiased is critical to address this issue.

Lack of Technical Expertise

The effective integration of AI in the court system requires technical proficiency, a source that may not be accessible within the legal profession[92] According to Gough and Statham (2020), lawyers and judges may be involved in enhanced technical proficiency to successfully utilize and evaluate AI systems owing to their restricted technical expertise.

[91] Ulenaers, J. (2020). The impact of artificial intelligence on the right to a fair trial: Towards a robot judge? *Asian Journal of Law and Economics*, *11*(2). *80-92*

[92] Leslie, D., Burr, C., Aitken, M., Cowls, J., Katell, M., & Briggs, M. (2021). Artificial intelligence, human rights, democracy, and the rule of law: a primer *https://doi.org/10.48550/arXiv.2104.04147*, *7(1), 131-160*

Lack of Transparency

Artificial Intelligence can only work with the data they are given, and they may only sometimes be able to understand the context in which that data is obtainable. This can be problematic in legal contexts, where the meaning of a tenure or phrase can vary subject to the specific legal context. With a human understanding of that context, AI algorithms may be able to examine and understand legal documents accurately.

One of the significant drawbacks of AI in law is the need for more transparency in how AI algorithms make decisions. AI algorithms are often reflected as black boxes, meaning it is difficult to understand how they reached a particular conclusion. This lack of transparency can make it perplexing to recognize and correct errors or biases in the system. Moreover, it can make it challenging for legal professionals to explain the rationale behind a particular conclusion to their clients.

Lack of Accountability

At present, there are relatively few laws or guidelines governing AI and automated decision making.[93] Furthermore, when data is first collected or generated, basic human error in gathering or interpretation is common.[94] Human errors could take place in the training phase of the data or even later in the further development of the program. Nevertheless, to create accountability, one needs to establish the person behind the program, who did something wrong. In machine learning systems, where computer scientists are frequently unable to regulate how or why a machine learning system has made a specific decision, this is very difficult to achieve. Furthermore, AI experts and AI companies argued that the AI systems and especially the

[93] Devin Coldewey, *AI Desperately Needs Regulation and Public Accountability, Experts Say*, TECHCRUNCH (Dec. 7, 2018)

[94] WA Logan and AG Ferguson, 'Policing Criminal Justice Data' (2016) 101(2) Minnesota Law Review 549–615, 559.

machine learning one's progress in unforeseen ways, due to their autonomous and self-learning nature. Consequently, no programmer could be held liable for their evolution.

Cost and Accessibility

AI technology can help diminish costs in the legal industry, but it can also be exclusive to implement. Small law firms and individual practitioners may not have the capital to invest in AI technology, making it less accessible to those who want it most. Moreover, AI-powered legal services may not be offered in all areas or for all legal issues, further limiting accessibility.

Ethical Concerns

There are several ethical apprehensions associated with using AI in law. For example, AI technologies may be used to envisage the likelihood of a person committing a crime, which raises questions about privacy and the presumption of innocence. Similarly, using AI in making decisions may lead to discriminatory outcomes. The legal industry must carefully consider these ethical concerns when realizing AI technology.[95]

Failure to Ensure Data Privacy and Data Protection

Another significant drawback of using AI in the legal industry is data breaches and other security concerns. Legal professionals handle complex and intimate information, and any data breaches could have legal and financial consequences. AI tools used in the legal industry must be effectively secured, and suitable security measures must be executed to protect sensitive data.

[95] Atrey, Ishan. 2023. Revolutionising the legal industry: the intersection of artificial intelligence and law. *SSRN Electronic Journal* (1. January). doi:10.2139/ssrn.4632440, https://doi.org/10.2139/ssrn.4632440.

Along with the collection of vast aggregates of data for AI algorithms come the growing risks of privacy violations and data breaches. There is a tension between more precise predictions based on larger, more representative data sets, and encroachment on privacy.

Recommendation

AI technology is being used and industrialized in the legal sector quickly. When the facts are fully recognized and simpler to write, it is anticipated that AI-based technologies will be developed frequently. Even in complex and difficult situations, the technology-based trial mode may be fulfilled. It is mostly based on the developments in machine deep learning and neural networks. Further efforts should be concentrated on growing the application proficiency in legal proceedings. In the case of Pakistan's legal system, we are still very late in getting an advantage from the development of technology. There are thousands of undecided cases in Pakistani courts and these delays can be curtailed by the use of Artificial Intelligence. This paper makes a contribution by trying to explain every step of the judicial application of AI through careful combination with the established judicial model. The purpose of the study is to demonstrate how artificial intelligence can help in the field of justice, as well as its functional expectations, limitations, and hazards. Additionally, it examines the legal consequences of artificial intelligence, the ethical concerns brought on by its advancement, the complete integration blockades of AI and legal reasoning, and problem-solving approaches. Furthermore, proper training of court staff, lawyers, and judges should be mandatory, especially at the start of any new application or software. Pakistan can get its pending cases issues resolved by optimal application of technology-based systems for its legal proceedings, but still here are some recommendations that are required for the use of Artificial Intelligence in the courtrooms.

Standards for Transparency and Explainability:

There must be detailed guidelines for the level of transparency and explainability required in AI systems utilized in the courtrooms.[96] Policymakers ought to require that AI algorithms furnish understandable justifications for their decisions, therefore guaranteeing accountability and facilitating the capability to contest outcomes and this can assist lawyers to make better decisions and to avoid mistakes[97].

Detection and Reduction of Bias:

There must be efficient ways to recognize and minimize biases present in AI models[98]. It is authoritative for lawmakers and technologists to work together to create and incorporate tools that systematically assess and resolve biases in artificial intelligence applications used in court proceedings, to guarantee just and impartial results.

Ethical Guidelines and Principles:

The government should generate and distribute extensive ethical guidelines and ideologies for the implementation of AI in the Pakistani courts. The strategies should prioritize the promotion of human rights, the avoidance of discrimination, and the safeguarding of individual dignity. These principles should form the foundation for the appropriate utilization of AI in the courts.[99]

Human Oversight and Decision Review:

There must be a Requirement for the presence of human supervision and inspection of AI choices in Courtrooms. Although AI has the competence to improve efficiency, human judgment remains to be obligatory. Implementing

[96] From Byte to Bail: Assessing Challenges and Opportunities in AI-Driven Criminal Justice Systems. *Internatnal Onal Journal of Human and Society* Vol. 4. No. 01 (Jan-Mar) 2024.
[97] Atrey, Ishan. 2023. Revolutionising the legal industry: the intersection of artificial intelligence and law. *SSRN Electronic Journal* (1. January). doi:10.2139/ssrn.4632440, https://doi.org/10.2139/ssrn.4632440.
[98] From Byte to Bail: Assessing Challenges and Opportunities in AI-Driven Criminal Justice Systems. *International Onal Journal of Human and Society* Vol. 4. No. 01 (Jan-Mar) 2024.
[99] From Byte to Bail: Assessing Challenges and Opportunities in AI-Driven Criminal Justice Systems. *International Onal Journal of Human and Society* Vol. 4. No. 01 (Jan-Mar) 2024.

a system that gives the authority to human intervention and assessment guarantees an equitable and unbiased approach to decision-making[100].

Promote public awareness and engagement:

There must be the encouragement to the public to be knowledgeable and directly involved in the process of developing and executing AI in courtrooms. To create trust and accountability, policymakers and lawyers should actively communicate with the public in a translucent manner. It is high time to have a management system that clearly defines the roles and responsibilities of these intelligent machines.

Strict data protection laws

There must be the exact data protection laws that are important to protect privacy. Therefore, the way out is to step back and use AI to our benefit, not by circumventing the technological revolution but by accepting it and creating the necessary guidelines to keep the welfare of users. [101]

Conclusion

Hence it is concluded that the global problem of safeguarding fairness and accountability in litigation with the help of AI was considered in the courts. By investigating the international legal framework, classifying specific problems, and proposing solutions, several key conclusions and additions were recognized. The main findings of this study highlight the significance of considering the ethical, legal, and social implications of integrating AI technologies into the legal realm. Furthermore, based on the above discussion it is suggested that court proceedings improvements are the need of the hour otherwise justice delays will hamper the realization of an approachable, speedy, and effective justice within Pakistan.

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[100] Dremlyuga, R., & Prisekina, N. (2020). The Concept of Culpability in Criminal Law and AI Systems. *J. Pol. & L.*, *13*, 256.

[101] Atrey, Ishan. 2023. Revolutionising the legal industry: the intersection of artificial intelligence and law. *SSRN Electronic Journal* (1. January), https://doi.org/10.2139/ssrn.4632440.

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THE USE OF VIRTUAL ATTENDANCE IN CRIMINAL ADMINISTRATION OF JUSTICE.

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Abstract

Justice is a divine right and is equally important for every citizen in Pakistan who is free as well as for any other person who for the time being, is behind the bars. The courts of Pakistan being custodian of justice are trying at their best to increase the quality and quantity of delivery of justice. But due to multiple reasons, it has become impossible for the courts of Pakistan to decide the criminal cases before them in one session that is why the courts are constrained to direct the public prisons, to keep custody of accused (hereinafter referred to as under-Trial prisoner) and sometime of a witness (who is accused of another criminal case) and to produce them before the courts when and where so required. But it has been noticed that every day hundreds of prisoners are being transported to different courts in Punjab for trial purposes which follows multi-facial risks coupled with its bad effects on state exchequer. In this paper an attempt has been made to find out the legal provisions that make the physical appearance of accused and witness mandatory and to discuss what are the benefits of these legal safeguards for an accused and for a witness? This paper is divided is divided in three parts. The first part of this paper discusses the existing legal exceptions to the above said principle, while the later highlights the recent developments before superior courts have discussed how the courts of Pakistan are permitting virtual attendance of an accused and witness as a substitute for their physical attendance. The third of this paper focuses on as to how the use of audio-video technology is beneficial for all the components of the criminal justice system and how different components of the system benefit from the increased efficacy of each other.

Objectives

Justice delayed is justice denied, is one amongst the fundamental principles of Criminal Administration of Justice. This research has been conducted to discover and highlight different issues that are stumbling the smooth working of criminal courts of this country and to suggest what are the different ways to combat these challenges. In this paper the research theme and main objectives of this research have been highlighted. It has been specially focused as to why law has laid so much emphasis on requirement of physical attendance of witness and the accused before the courts, also what are the major benefits of this practice and on the contrary how much cost of this legal requirement is being paid by the litigants, the courts, the state prisons and the remaining components of criminal justice system. This paper endeavours to extract all the possible legal substitutes for physical attendance of witnesses and the accused before the courts while remaining within the legal framework of this country.

As the use of advanced technology and modern devices by the courts may help address the problems that are faced by the judicial systems of developing nations and might also be able to be cost effective and more effective, hence this paper attempts to consider this aspect in view of latest precedents of Superior Courts of Pakistan.

Significance

Justice is a right so integral to every individual in his personal capacity as well as for the public at large in Pakistan, thus superior courts have repeatedly ruled that all public functionaries and courts of all jurisdictions and hierarchy in Pakistan, are bound to provide free, effective, and prompt justice to all citizens regardless of the question that whether he is a free citizen enjoying his liberties or he is behind the bars in due process of law. Legal experts have defined the word "*Justice*" as*: protecting the rights and punishing wrongs*

using fairness''[102] Whereas the word "*criminal Justice"* has been defined as: "*Criminal justice is the delivery of justice to those who have been accused of committing crimes.''*[103]

As the delivery of justice is a delicate process hence it cannot be left at the whims and fancies of a single individual or group of people, no matter how powerful and prominent they are. To avoid the abuse of any authority either by any citizen or by any state functionary, human civilizations have planned and developed their separate systems and they are contracting the services of experienced judges in order to accomplish the ultimate aim of "The faultless administration of justice". The systems of administration of justice have divided, over the time, into two distinct segments: civil and criminal justice systems.

In Pakistan, a person can be detained only in public prisons by the orders of a competent authority on the basis of sufficient incriminating material and all these orders are subject to judicial review by the courts of this country. The public prisons in Pakistan are required to keep custody of UTP (under-trial prisoners) and CP (condemned-prisoners) in compliance with court orders. In law they are mandated by the courts to present UTPs (under-trial prisoners) when and where so required by the courts. But in reality, the situation is different. Sometimes prison's officials have to confront serious hazards and complex issues while producing utps (under-trial prisoners) before the courts.

For example, in the following cases:

1. The witnesses in one criminal case are accused of another criminal case also.
2. When a high-profiled criminal is brought before a court along with ordinary criminals, it can imperil the lives of UTPs (under-trial prisoners), the Prison officials and the passer-by people.

[102] https://thelawdictionary.org/justice/
[103] https://en.wikipedia.org/wiki/Criminal_justice

3. When the law-and-order situation is upset.
4. When there is any event of national or international importance.
5. When due to any pandemic, transportation of under-trial prisoners becomes impossible.
6. When there is any other situation that is beyond human control.

The above said instances inter-alia with other possible situations are creating obstacles and risks for prison staff themselves, sometimes making it impossible for them to produce UTPs (under-trial prisoners) on each and every date before the courts. These problems are not so simple and these require a wide range of social and legal reforms, for that purpose huge funds, proper planning and management is required but at the same time, on the other hand, the state for the speedy disposal of cases before the courts is required to take some immediate steps. It has been experienced that non-production or less-production of UTPs (under-trial prisoners) and the witness before the courts by prison staff, is one of the main causes of undue delay in trials before those courts. Similarly, this undue delay in trials of UTPs (under-trial prisoners) results in multiple times increase in public prison population that destroys the management system of public prison, consumes its resources, lowers the standards of lives of inmates. Hence for the sake of smooth working of the courts and the public prisons, the rate of production of UTPs (under-trial prisoners) before the courts, and the number of adjudication of cases of under-trial prisoners by the courts must be increased.

Justice and its different kinds

There are four basic types of justice, first economic justice, second social justice, third political justice, and lastly the legal justice. For the purposes of this paper, legal justice is more relevant than the other types of justice. The concept of legal justice has different components. The one amongst them is "criminal justice".

Different components of criminal administration of justice and their working mechanism.

In the modern era, usually the legislature, law enforcement agencies, courts, and correctional services are considered as necessary components of a criminal justice system. They claimed that the primary objective of these criminal justice systems is to protect lives, properties of the citizens and to maintain social order. The hallmark of these criminal justice systems is the concept of "fair trial'' which consists of three basic concepts: impartiality during the inquiry or investigation, fair and prompt adjudication by courts, and successful execution of this judicial conviction and punishment upon the condemned prisoners by public prisons.

In theory, when one component of a criminal justice system performs better, the other components of the system get benefits from this increased efficacy. For example, if the working of investigating agencies is improved, it will result in collection of better evidence, more judicial convictions of actual culprits by the courts and it will result in speedy disposal of cases. Similarly, if working of correctional facilities is improved it will result firstly in increasing the safety and quality of life of UTPs (Under-Trial Prisoners) and the CPs (condemned-Prisoners). Secondly, it will help in more regular production of accused/witnesses before the courts for the purpose of recording their evidence. Thirdly, it will benefit in more convictions of actual culprits by the courts. Fourthly, it will be beneficial in speedy disposal of cases and restoring rule of law in the society and lastly by saving the state exchequer, it will make available more resources, for benefits of all the components of the criminal justice system.

The Legal Requirements as to Physically Produce the Witnesses and the Under-Trial Prisoners Before the Courts and its Cost?

The Case of the Under-Trial Prisoners:

The public prisons in Pakistan are mainly governed under the Prisons Act 1894 and the Pakistan Prisons Rules, 1978 and under aforesaid rules a competent Court has been granted discretion to that order such an accused person to be detained or remanded to custody in prison for a period not exceeding fifteen days at a time.[104] So the public prisons are bound to produce the under-trial prisoner before the courts on dates fixed by the courts.

In Pakistan, the Constitution demands that general criminal trial is to be conducted under the Code of Criminal Procedure (ACT V OF 1898). The different provisions to ensure the rights of fair trial to the Under-Trial persons have been added the Code of Criminal Procedure (ACT V OF 1898).[105] One of these important provisions is the section 353 of the Code of Criminal Procedure (ACT V OF 1898) which reads as follows:

> *"**353. Evidence to be taken in the presence of the accused**. Except as otherwise expressly provided, all evidence taken under (Chapters XX, XXI, XXII and XXIIA) shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader."*

Following case law shows that it is a mandatory provision of law.

Case Study – 1

Title of the Case: Altaf vs State.[106]
Name of judge: Hon'ble Mr. Justice Zulfqar Ali Sangi. SHC

[104] The Prisons Act Rule 366
[105] Ibid.
[106] 2023 MLD 863 KARACHI-HIGH-COURT-SINDH

Discussion

A jail appeal was filed by appellant before the Hon'ble Sindh High court against the judgment dated 10.08.2016 by learned 2nd Additional Sessions Judge, Khairpur, whereby he convicted the accused persons under section 302(b), P.P.C. and he sentenced the accused persons for an imprisonment for life and he also ordered to pay Rs.100,000/-each as compensation to the legal heirs of deceased and in case of default, the accused persons shall suffer S.1 for six months more; however benefit of section 382-B, Cr.P.C was extended to them. The crux of complainant's case was that some days prior to the incident hot words were exchanged between Abdul Waheed and Khando Mari and that due to this grudge on 09.02.2009 complainant along with his son Abdul Waheed and nephew Noor Muhammad when they were present at bus stop Pir Qabil. The accused persons fired KK shots upon Abdul Waheed who succumbed to these injuries at the spot in the presence of witnesses. Ultimately the FIR was lodged against the accused as stated above.

Evidence

During the course of evidence, the prosecution examined as many as 12 witnesses and they also tendered documents EX-P1 to EX-P56 and closed its evidence.

Fate of the Case

Appeal was partly allowed and the case was remanded to the trial court for re-examination of said three prosecution witnesses whose examination-in-chief was not recorded in presence of two accused.

Analysis

The Court holds the opinion that from Circumstances of that case it was established that examination-in-chief of witnesses was not recorded in presence of the accused persons and that a fair opportunity was not provided to the accused persons by ignoring Art. 10-A of the Constitution.

From the above said discussion, it can be concluded that although this proposition has certain exceptions, as a general rule the courts of this country cannot record any incriminating evidence in absence of an accused. That is why, from time to time, they pass production orders and the state prisons are bound to produce the under-trial prisoner on such dates fixed by the courts.

The Case of the Witnesses

Traditionally the courts in Pakistan used to consider mainly two types of evidences:

1. The ocular account.
2. The documentary evidence.

Moreover under the law it is mandatory for a free witness to physically appear before the court for recording his examination-in-chief and for his cross-examination and if he relies on some document, he is duty to produce the original document before the court. But there are instances where he is an accused of another criminal case or he is not a free witness and he is behind the bars, state prisons are bound to produce the witness on such dates fixed by the courts. From above said discussion it is clear that physical attendance of a witness or an accused before the courts is beneficial as it rules out possibility of fake proceedings against him but strict adherence to this rule may cause multiple problems.

The Cost of Legal Requirements as to Physically Produce the Witnesses and the Under-Trial Prisoners before the Courts?

Transportation of hundreds of prisoners to district courts: Every day hundreds of prisoners are being transported to different courts in Punjab for trial purposes which follows multiple risks. The cost of the ongoing prisoner's transportation system is affecting the state exchequer badly.

Whether the legal requirement of physical attendance of a witness and an accused before the courts can be dispensed with?

In Case of Accused

Personal attendance of an accused can be dispensed with: Firstly, under Section 512(1) of the Code where from the record the court is satisfied that accused person facing trial has absconded and that there is no immediate chance of arresting him, the trial Court has been granted discretion to examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions, in absence, of that accused.

Secondly, under section 540-A of the Code, the discretion lies with the trial court, that he may pass a speaking order showing reasonable reasons to dispense with attendance of the accused and may pass further orders that onwards such accused shall be represented by his pleader.

Following case law shows that a court can dispense with attendance of such accused.

Case Study – 2

Title of the case: Muhammad Nawaz v State. [107]

Name of Judge: Hon'ble Mr. Justice Muhammad Tariq Abbasi.

[107] 2015 Pcrlj Lahore 58.

Discussion:

The petitioner/complainant filed this revision petition against the order dated 19-9-2013, passed by the learned Additional Sessions Judge, Dera Ghazi Khan, whereby one application by petitioner/complainant for cancellation of the bail bonds of the said respondent has been dismissed and conversely by accepting the second application, personal appearance of Irshad, the respondent No.2 has been dispensed with, the crux of petitioner/complainant case is that accused Irshad (respondent No. 2) along with his co-accused was facing charges for commission of offence under sections 302/324/148/149/109 of P.P.C. at Police Station Choti, in the court of Additional Sessions Judge at Dera Ghazi Khan. The said respondent preferred an application under sections 205/540-A of Cr.P.C. on the grounds that he is labouring to earn a livelihood in Saudi Arabia and his visa was going to expire. The petitioner also moved an application whereby he sought cancellation of the bail bonds of Irshad (respondent No. 2). The Learned Trial Court accepted the application filed by the respondent No. 2 whereas the application of the petitioner was dismissed.

Defence:

On the behalf of respondent No. 2 the defence was taken that Section 540-A of the Code provides an exemption to an accused from his personal appearance. It was further asserted that the revision petition may kindly be dismissed.

Fate of the case:

This Revision petition was dismissed. But a direction was added that if at any stage of trial, the Court could withdraw the concession, if he felt any hurdle due to non-availability of the accused or his advocate.

Analysis:

The court opined that a court under S. 540-A of the Code is competent to grant exemption to an accused from personal appearance subject to conditions firstly there should be two or more accused before the court; secondly the accused seeking exemption should be before the court; thirdly the accused should be incapable of remaining before the court, fourthly the accused should be represented by a pleader lastly the Court should be satisfied about the incapability of the accused to remain before it.

In Case of Witness

Article 71 of Qanun-e-Shahadat Order, 1984 provides that the oral evidence must be direct and it is mandatory under the law with few exceptions that a witness must appear before the court for his examination-in-chief and for his cross-examination.

Whether virtual attendance is a substitute to physical attendance of a witness or an accused person before the courts.

The alternatives to physical attendance of a witness or an accused person: With the passage of time the data collected through modern and scientific devices has gotten more and more accurate. Even the legislature could not overlook this development in data recording and the following amendment was made in Qanoon-e-shahadat order 1984.

Article164. Production of evidence that has become available because of modern devices, etc.: In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or technique.

So while interpreting this article the superior courts of Pakistan have authenticated different modern devices or techniques including use of audio-video linkage techniques.

Following case law shows that although the physical attendance of the witnesses before the court is a requirement of law but due to recent developments, the virtual attendance of the witnesses is being recognized as a substitute for their physical attendance before the courts.

Case Study – 3

Title of the Case: Meera Shafi Versus Ali Zafar[108]

Name of Judge: Hon'ble Mr. Justice Syed Mansoor Ali Shah.

Discussion:

The petitioner/defendant filed this leave to appeal against impugned judgment dated 18.05.2022 of High court whereby it dismissed the revision petition of the petitioner. The crux of petitioner/defendant petition is that the respondent filed a suit for damages against the petitioner, after the affirmative evidence of the respondent, the petitioner produced her witnesses and also appeared herself in the witness box as DW-4 in her defence evidence. On two dates of hearing, the petitioner (DW-4) was cross-examined but her cross-examination could not be completed and on the next two dates: Later she left for Canada and filed an application in the trial court with request for recording her remaining cross-examination from Canada through a video link. The trial court dismissed the same by its order dated 28.03.2022. The High Court also dismissed the revision petition of the petitioner, vide its judgment dated 18.05.2022 ("impugned

[108] PLD 2023 SC 211.

judgment"). Hence, the petitioner has knocked at the door of the Supreme Court through the present petition for leave to appeal.

Fate of the case:

Appeal was allowed,

Analysis:

The court opined that, the word "attendance" used in Rule 4 can be interpreted as equal to "virtual attendance", and the word "attendance" mentioned in the said Rule does not mean only "physical attendance" but includes "virtual attendance" made possible by the modern technology conferencing. The court further suggested some precautions for the courts who are using audio-video technology in recording this evidence to rule out any fraud and fabrication.

Following case law shows that although the physical attendance of accused before the court is a requirement of law but due to recent developments, the virtual attendance of accused is being recognized as a substitute for their physical attendance before the courts.

Case Study – 4

Title of the Case:	Khawaja Anwar Majid v. National Accountability Bureau[109]
Name of Judge:	Hon'ble Mr. Justice Qazi Muhammad Amin Ahmed.

Discussion:

The accused/petitioner filed his Civil Petition No. 4425 of 2019 in Supreme Court of Pakistan and it was dismissed as withdrawn on

[109] PLD 2023 Sc 635.

11.03.2020. The accused/petitioner again filed a petition in the Islamabad High Court for his release on bail, once again declined on 20.05.2020 and in the above backdrop, the petitioner has again come to Supreme Court of Pakistan for his release on bail with permission to go abroad to undertake cardiac surgery. The gist of the prosecution case against petitioner is that he along with co-accused persons is involved in a massive money laundering scam, executed through 29 fake accounts, detected via a Suspicious Transaction Report.

Evidence:

Report was called from the investigation agencies.

Fate of the Case:

Petition for leave to appeal was converted into appeal and allowed.

Analysis:

The Court while granting bail to the accused/ petitioner on medical grounds permitted him to join investigation through video link or personally and the trial court was given discretion that in the event of physical incapacity of accused, his request for dispensation and representation through a counsel shall be considered most thoughtfully by the trial court.

Therefore, the above said legal provisions and from above said precedent laws of Hon'ble Superior Courts of Pakistan, one thing is very much clear that there is no legal embargo in presentation of accused in a court through video-linkage or recording of evidence of any witness before the court through video linkage.

Conclusion and Recommendations

Like any new technology or techniques, the use of video-linkage in the courts is not free from criticism. Some critics has raised following objections on video-linkage techniques:

> *Although this technology has obvious and exciting implications, it has created certain difficulties for people; with disabilities; having limited English proficiency and for the residents of remote areas where there is no access to high-speed internet.*

The benefits of video- linkage techniques:

1. On the contrary, the supporters of video-linkage technique argue that it is true that while adopting new technologies, there are certain limitations that even amount to threats as to the rights of citizen regarding due process, procedural fairness, transparency, and equal access, but with the passage of time, the video linkage technique can be improved to such extent that it will overcome these technical and legal deficiencies.
2. It was noted that the implementation of video link technology would eliminate the need to transport prisoners to courts that will save the human and financial resources of the state, especially the correctional facilities.
3. Video-link technology will reduce the security concerns of the litigants that will fulfil one of the basic requirements of fair trial.
4. It will increase the safety of inmates of correctional facilities and the vulnerable populations.
5. By reducing travel and transportation expenditures it will reduce the operational costs of correctional facilities.
6. By lowering staff requirements, it will save the budget of correctional facilities and this saved budget shall be available

for improving the quality of facilities for remaining inmates of the Public prisons.

7. The judicial experience has shown that delay in trial before courts occurs either due to non-appearance of witness or due to non-appearance of accused due to some security reason or other reasons beyond human control. But use of video-link technology in recording evidence of the witness or for virtual appearance of accused before the court will result that the number of cases in which evidence have been recorded by the courts will increase and it will help the courts in speedy, safe and effective disposal of cases. Moreover, by reducing total number of pending cases, it will help the correctional facilities both in their budgets and in their operational capabilities.
8. It will expedite case proceedings and contribute to the swift disposal of cases, hence, the rate of disposal of cases will increase.
9. By ensuring a suitable environment, free from any fear as to their own security, at the choice of the accused as well as at the choice of the witnesses, this new technology will contribute in increasing confidence of the litigants in administration of Justice.
10. It will preserve and protect essential information and evidence before the courts.
11. At one end this video-link technology is effective for speedy disposal of cases before the trial courts, on the other end it is equally beneficial for correctional facilities and other components of the criminal Justice system.
12. In so far as experiences of other modern countries that are facing similar problems in prisoner's transportation systems, they have

taken different measures to answer these issues. Some of them have introduced the video link system as part of their ongoing reforms in the judicial systems. In my opinion, keeping in view Pakistan's specific socio-legal scenario, the video- linkage techniques appear the most effective Solution of the problem.

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