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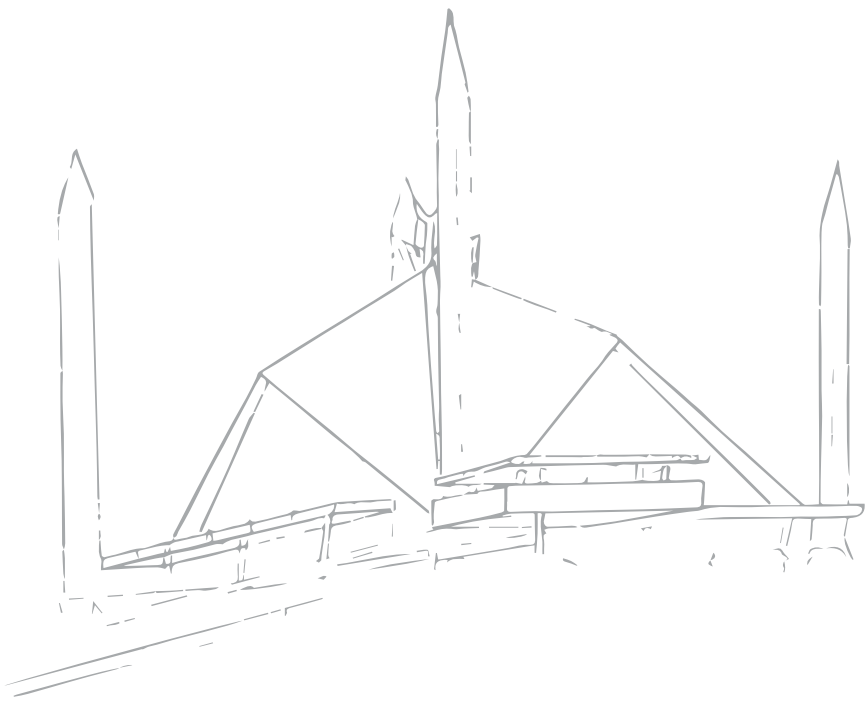

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International Islamic University

ISLAMABAD LAW REVIEW

VOLUME 4

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

Preface

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

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

Besides, being the only institution in the country which offers a largest range of under and post grade programs in legal studies, the faculty puts ample emphasis on the Legal Research. It launched Islamabad Law Review (earlier in 2ooo) with a focus on the comparative research on Shariah and Common Law. The *Law Review* is a high quality open access peer reviewed Quarterly Research Journal of the Faculty of Shariah & Law, International Islamic University Islamabad. A worldly renowned author and publicist on Islamic Law, Prof. Imran Ahsan Khan Nyazee was pioneering editor of the journal. For few years ILR was unable to catch it regular frequency and had gathered a lot of backlog.

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

Assistant Editor, ILR

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Abusive Constitutionalism and Military Courts in Pakistan

Mirza Hasib Hussain Baig*

Abstract

The article analyses the constitutionality of military courts in Pakistan to determine to what extent it is compatible constitutional scheme of Pakistan. The 21st amendment accepted the military courts conditionally. The establishment of military courts has raised concerns on enforcement of fundamental rights, more specifically safeguards as to detention and arrest, right to fair trial and due process, dignity of man and protection against double jeopardy. These inalienable rights of the people need to be treated in accordance with law and enjoy the protection of law. The judiciary's role is to provide justice according to the constitution and laws of the state same cannot be assigned to any other institution. The role of the Armed Forces to exercise judicial powers necessitated through an unprecedented 21st constitutional amendment is not in aid of civil power and the judiciary but supplanting it. The 21st amendment submerges fundamental rights under national security policies. Military courts work as a detached parallel departmental justice system to the national justice system. This article is an effort to summarily put across the challenging and contradictory viewpoints of military courts and discuss their merits in an object way in the light of constitutionalism by focusing whether from perspective of constitutionalism , the military courts qualifies the test of constitutionality and protection of fundamental human rights or it is abusive constitutionalism.

Keywords: *Constitutionalism, Abusive Constitutionalism, 21st Constitutional amendments, NAP, Military Court, Fair trail*

1. Introduction

"For extraordinary circumstances, extraordinary steps are required."

Former Prime Minister Mian Nawaz Sharif

"I have been in the Senate for more than 12 years, but have never been as ashamed as I am today and I cast my vote against my conscience,"[1]

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Former Chairman Senate Mian Raza Rabbani

In January 2015, Pakistan's Parliament passed the 21st amendment to the Constitution and enacted National Action Plan, empowering military courts to try civilians for terrorism-related offences[2]. In August 2015, in the District Bar Association Rawalpindi v Federation of Pakistan (known as the military courts case), a lengthy and far-reaching judgment upholding Parliament's privilege to amend the Constitution, the Supreme Court ruled that the 21st amendment could stand[3]. The civil society, intellectuals, lawyers and Human Rights observers, notably Human Rights Commission of Pakistan[4], have voiced their extreme displeasure on the 21st Amendment and the military courts[5]. Legal community of Pakistan has uttered extreme opposition to the amendment and started observing every Thursday as black day to protest the military courts. This amendment has raised concerns over the importance of rights protections in Pakistan's understanding of constitutionalism. Not the first occasion, and certainly not last, the state machinery in Pakistan including Parliament, judiciary and the military, has abused constitutionalism in shape of anti-terror policies that challenge the fundamental rights foundation of the Constitution. The military establishment was strongly following a proposal to prosecute terror suspects in military courts for some years, but the proposal did not fascinate political agreement. All knows that the 21st amendment passed because the military establishment required it and in future things may not stop here. What if military establishment again wants these courts for some specific

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[1] Raza Rabbani in tears: Ashamed to vote against conscience, *Dawn* 07 Jan 2015.

[2] The Constitution (Twenty-first Amendment) Act, 2015. http://senate.gov.pk/uploads/documents/1420804023_562.pdf (accessed 2 September 2020).

[3] *District Bar Association (Rawalpindi) v Federation of Pakistan*, PLD 2015 SC 401.

[4] "HRCP concerned over military courts move", DAWN Islamabad, December 27, 2014, p.3.

[5] Datta, Anil, "Legal experts warn military courts will undermine independence of judiciary"; *News International, Islamabad,* dated 06 January 2015; http://www.thenews.com.pk/PrintEdition.aspx?ID=294261&Cat=4&dt=3/15/2015, (accessed 2 September 2020).

territory of country through a constitutional amendment? Maybe this will be again seen as a tolerable compromise for some stakeholders.

The December 16 attack on Army Public School attack provided the military establishment a strong ground they needed for developing political consensus for establishment of military courts to prosecute civilians. The guardians of the Constitution through 21st amendment whittled down rights protections that might otherwise be protected by the Constitution. The 21st amendment accepts in deed if not in expression that the basic structure of Pakistan's constitution is now essentially not rights based. 21st amendment like some other laws weakens primarily, the capacity of citizens to determine and reinforce their collective and personal security. Instead, the 21st amendment acts as an informal declaration of war against vaguely identified enemy and classifies the state in ways that do not guard the sanctity of citizen or society[6]. The arguments against the military courts are equally conversant in Pakistan's constitutional contests that in trichotomy of power the executive actions must be separated from the judicial responsibilities and same has been decided in 1998 Mirani's case 1998 and Liaqat Hussain's case 1999[7].

The passage of 21st amendment by abuses of constitutionalism, swiftly had the effect of strengthening non constitutional politics by strengthening the policy outside the realm of law and strengthening the institutions and individuals whose interest even though self-described as coincident with the so-called interest of state. Despite earlier promises that 21st amended has sunset clause and the use of military courts to try civilians was only a "temporary" and "exceptional" measure, after

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[6] Paula R. Newberg *(2016) Pakistan's Constitutionalism in an Age of Terror, Asian Affairs: An American Review,* 43:1, 1-15, DOI: 10.1080/00927678.2016.1131083

[7] See Justice Afrasiab Khan in Liaqat Hussain's case: "...the established of Military Courts for trial of civilians amounts to (a) parallel system for all intents and purposes which is wholly contrary to the known existing judicial system having been set up under the Constitution and the law."

Liaquat hussain and others v. federation of pakistan through Ministry of Law and Justice. PLD 1999 SC 504 SH.

the expiration of the 21st amendment Parliament enacted 23rd amendment in the constitution to renew military courts jurisdiction over civilians[8]. The sun set clause in the 23rd amendment itself suggests reluctance of the Parliamentarians to grant unbridled powers to military courts.

This article is divided into five sections. The first section emphases on Pakistan's problem of taking reactive response to havoc rather to formulate proactive polices to avoid national disasters. The second section discusses constitutionality of military courts in Pakistan to determine to what extent it is compatible constitutional scheme of Pakistan. The third section is an attempt for appraisal and critical evaluation of 21st amendment from the lens of Supreme Court. The fourth section applies the tests to the military courts of Pakistan to determine to what extent it complies with the fair trial standards. The fifth section critically evaluate the legal 21st amendment in context of abusive constitutionalism and the last part of the article sums up the discussion with recommendations.

2. Reactive approach of National Action Plan instead of proactive polices

The 21st Amendment to the Constitution of Pakistan has once again highlighted our problem of taking reactive response to havoc rather to formulate proactive polices to avoid national disasters. Pakistan's parliament through 21st constitutional amendment empowered military courts to try civilians for terrorism-related offences as part of reactive approach of its 20-point "National Action Plan"[9], approved by the Government following the terrible attack on the Army Public School in Peshawar. The political leadership of the country woke up, in a unified manner, to eradicate the menace of terrorism. Pakistan parliament has always been slow to enact proactive policies instead deep-rooted problems of religious intolerance and ethnic

[8] See, The Constitution (Twenty-third amendment) Act 2017. On 30 March 2017, Parliament passed the 23rd constitutional amendment and amendments to the Army Act, 1952, with retrospective effect from 7 January 2017.

[9] National Action Plan, 2014, https://nacta.gov.pk/nap-2014/ (accessed 2 September 2020).

behavior are backed by state authorities that sometimes changes into uncontrollable evil. NAP had intended the use military courts as a short-term solution to eradicate the menace of terrorism and to be operational only for a two-year period during which the Government would bring about essential reforms in existing criminal courts system to reinforce the antiterrorism institutions[10].

In Past Civilian governments in Pakistan has enacted laws to create special courts for anti-terrorism, speedy trial courts were established to work without any delay but one can argue that they didn't work, or didn't have time to work, or were never actually meant to work. Few alternatives were also discussed before drafting the 21st amendment but APS attack placed in sharp relief the failures of anti-terror policy and avoided the possibility of taking decisions that could reach the same goals fighting terrorism and seeking peace without abusing state power and amending the Constitution.[11] The state authorities has not prevented the worst from happening, but by compromising rights protections it has mistaken to protect the state on the expense of state's vital agenda to protect its citizens[12]. Amending the Constitution by limiting rights protection does not fix state's multiply determined terrors. The real change would mean understanding and eradicating the foundations and sources of terror and the reasons it thrives. A wave of the terrorism in Pakistan is backed and based on sectarian violence. This is based on deep rooted problems of religious intolerance, ethnic behavior and class relations, these are not military problems even though military may be involved in solution but cannot take lead in the solving them.

3. Governing the State by Abusive Constitutionalism

Administration of justice through military courts has placed Pakistan in clear violation of its legal obligations and political commitments to respect the right to a fair trial, the right to life, and the independence and impartiality of the judiciary. This 21st amendment has simply found another way to expand the role of the military in state policy. Shifting responsibility of the

[10] Ibid.
[11] *Newberg*, p. 4.
[12] Ibid.

justice to an institution whose relationship to law is based on exceptions to both Constitution and law is one thing under a military government but shifting this responsibility to institution is something entirely different in an elected and democratic government. The 21st amendment and Supreme Court judgment has weakened constitutionalism in Pakistan and untie the ways that constitutional change can be justified.

Abusive constitutionalism is the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before[13], the patchwork structure 21st amendment and August 2015 judgment transforms Pakistan into 'significantly less democratic'. But if it can be argued that Pakistan's security problems are political in origin and nature, it can also be argued that solving these problems cannot happen without a purposely rights-based agreement about the relationship between Constitution, law, and politics[14].

4. 21st amendment from the lens of Superior courts

The Supreme Court ruling in favor of the 21st amendment and earlier a concurrent discussion of the 18th amendment on federalism hewed toward a discussion of parliamentary prerogative and judicial limitations rather than rights. The most important impacts of 21st amendment case in Supreme Court may not have been in determining whether the 21st amendment was constitutional according to right based approach of constitutionalism, but based on three grounds: the prerogatives of Parliament, the responsibilities of the judiciary and the interruptions of conflict in considering civilian law. Supreme Court of Pakistan accepted the government's description of terrorism and based its decision on it to accept the necessity of expanding military court jurisdiction, how can a court determine the truth and relevance of evidence in light of government authority's discretion. Supreme Court held that the military justice system meets the requirements of free and fair trial standards and

[13] David Landau, Abusive Constitutionalism, *University of California, Davis Vol. 47:189, (2013)*

[14] *Newberg,* p 11.

if the system is considered free and fair for services personnel, it should be considered free and fair for terror suspects as well.[15]

During the hearings Justice Azmat Saeed raised an issue extensively: does war set the direction for law, and is terrorism the same as war? His conclusion was yes backing the government case. "It is the activities of such terrorists that have created the war like situation against the State necessitating its defense by the Armed Forces," he stated, noting that citizens are protected because the higher judiciary can review the decisions of such tribunals, and that the fundamental rights "of the overwhelming majority" of Pakistanis are not affected by such tribunals.[16] However reality suggests otherwise 21st amendment affects the entire polity through the national policies by reducing the rights of masses[17].

Had the Supreme Court declared the 21st amendment unconstitutional, the state agencies in Pakistan could nevertheless have continued many of its existing practices by reworking the amendment, or authorizing military courts through other means or drastically in intentional regime change in each instance making a mockery of constitutional rights protections without explicitly violating the Constitution[18].

5. The Right to a Fair Trial, Opacity of judgments and the Military Justice in Pakistan

In the aftermath of the barbaric Army Public School attack and the newly emerged national political consensus to establish military courts for trail of civilians was cautious but some muted voices termed the 21st amendment against the right to a fair trial.

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[15] *District Bar Association (Rawalpindi) v Federation of Pakistan*, PLD 2015 SC 401.

[16] *District Bar Association (Rawalpindi) v Federation of Pakistan*, PLD 2015 SC 401. See *paras:* 145, 159, and 174 of Justice Azmat Saeed's opinion.

[17] International Crisis Group, *Revisiting Counter-Terrorism Strategies in Pakistan: Opportunities and Pitfalls, Asia Report* No. 271, July 22, 2015, http://www.crisisgroup.org/~/media/Files/asia/ south-asia/pakistan/271-revisiting-counter-terrorism-strategies-in-pakistan-opportunities-and-pitfall s.pdf

[18] *Newberg,* p. 9.

Some saw it as a 'soft coup'[19] as the military justice system blatantly violates fair trial standards it is part of the executive and is neither impartial nor independent. The trials of terror suspects were very private. Even families of the under-trial suspects did not know the date and location of trails[20].

The substantive and procedural law of Pakistan recognizes the right to a free and fair trial and its elements are reflected in the constitution and other subordinate legislation. Article 10-A of constitution states that 'for the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process'[21]. The main elements of the right to a fair trial such as presumption of innocence, adequate time and facilities for preparation[22], counsel of one's choice[23],to be tried without undue delay[24], to have the assistance of an interpreter[25], to be informed of the charge and cause of the charge[26], not to be compelled to testify against oneself[27], to examine witnesses[28], prohibition of double jeopardy[29] ,taking the age of juveniles into consideration[30],and to have one's conviction and sentence reviewed by a higher tribunal according to law[31] are guaranteed by general and special laws and all these essentials elements of free and fair trial was compromised by military courts in shape of parallel departmental justice system. The independence of judiciary is one of the salient features of Constitution of Pakistan; the preamble to the Constitution

[19] The Express Tribune, 'Roundtable talk: 'Establishment of military courts led to a soft coup' - *The Express Tribune*' (Karachi, 15 March 2015).

[20] International commission of Jurists, 'Pakistan: trials of civilians before military tribunals a subversion of justice | ICJ' (Geneva, 15 April 2015) <http://www.icj.org/pakistan-trials-of-civilians-before-military-tribunalsa-subversion-of-justice> accessed (2 September 2020).

[21] Article 10 of the Constitution of the Islamic Republic of Pakistan.

[22] Article 10 of the constitution, ss 80 and 340 of the Code of Criminal Procedure (CrPC) 1898.

[23] Ibid.

[24] Sec. 344 of the Code of Criminal Procedure 1898.

[25] Ibid., Sec. 361.

[26] Article 10 of the constitution; and Se. 80 and 340 of CrPC.

[27] Article 13 of the constitution of the Islamic Republic of Pakistan.

[28] Sec. 241 of CrPC.

[29] Article 13 of the constitution, s 403 of CrPC.

[30] Juvenile Justice System Ordinance 2000 (XXII of 2000).

[31] Chapter XXXI of CrPC.

provides that the independence of the judiciary shall be fully secured[32]. The constitution provides for the 'separation of judiciary from the executive'[33] and the constitution and law has ensured the independence and impartiality of judiciary but the military courts do not meet the basic elements of the right to a fair trial such as trial by an independent and impartial tribunal.

Pakistan had acquired new international human rights obligations in 2010 by acceding to the International Covenant on Civil and Political Rights (ICCPR). Article 14 of the ICCPR states "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[34]" The UN Human Rights Committee has made clear that the right to a fair trial before an independent and impartial court under Article 14 of the ICCPR applies to all courts, whether ordinary or specialized, civilian or military[35].

The bigger question would be that of due process and ensuring principle of *audi alteram partem* and a written judgment backed by reason, including the essential and critical findings, evidence and legal reasoning, is an essential component of a fair trial. All those involved in the proceedings of the military courts are part of and reliant on the executive branch from appointment till retirement. The military courts are managed by the military management itself; it is hard to be seen as an impartial system by a sensible observer. Civilians tried by military courts particularly seem disadvantaged.

6. Unconstitutional Constitutional Amendment in Context of Abusive Constitutionalism; Constitution (21st Amendment) Act 2015

The 21st Amendment has specifically, made two changes i n the Constitution: first in addition of proviso to article 175 and second is inclusion of legislation at entries 6,7,8 and 9 in the first

[32] Preamble of The Constitution of the Islamic Republic of Pakistan.

[33] Article 175 (3) The Constitution of the Islamic Republic of Pakistan.

[34] Article 14 of International Covenant on Civil and Political Rights.

[35] Human Rights Committee General Comment 32 "Article 14 of the ICCPR. UN document CCPR/C/GC 32 Para 22.

seclude of the constitution so certain other secondary legislations[36] have been protected from the applicability of the prohibitory clause of the article 8 of the constitution.

Constitutional Amendment as a tool to enforce some policy measures is one kind of problem but on the other hand reassuring military and political strategies via constitutional amendment is another problem. The 21st Amendment also erodes away from Pakistan's already shaky obedience to its own legal standards and to international humanitarian law standard. The military establishment was keenly pursuing a proposal to prosecute terror suspects in military courts for some years, but the proposal did not attract political consensus.

The 21st amendment creates contradictions in policy, law and in the Constitution itself. There is a fascinating difference in language between the Protection of Pakistan Act and the 21st amendment, the PPA focuses on acts that include offenses relating to "crimes against ethnic, religious and political groups or minorities[37]," while the 21st amendment refers to offenses "by terrorist groups using the name of religion[38]. In the time of a few months, the emphasis of the problem shifted from acts to intentions, and the object of the amendment became more confusing and puzzling than the PPA[39]. Needless it to say that it is easier to prosecute observed actions than the ostensible reasons for undertaking them. Quick and unclear legislative drafting frequently, leads to confusing policies and laws, and additional divergence and inconsistencies in the 21st amendment has raised more constitutional questions. The 21st amendment expands Pakistan's upsetting cultures of impunity. This amendment takes a step forward on the road impunity. For example, Article 9 of the Constitution "No person shall be deprived of life or liberty save in accordance with law"[40] is already limited by the subsequent

[36] "The Protection of Pakistan Act 2014 (X of 2014)", "the Pakistan Army Act 1952 (XXXIX of 1952)",
"the Pakistan Air Force Act 1953 (VI of 1953)" and "the Pakistan Navy Ordinance 1961(XXXV of 1961).

[37] Preamble of Protection of Pakistan Act 2014 (X of 2014)

[38] Preamble of the Constitution (Twenty First Amendment) Act 2015.

[39] Preamble of Protection of Pakistan Act 2014 (X of 2014)

[40] Article of the constitution of the Islamic Republic of Pakistan.

article 10 (4).[41] It is argued that 21st amendment provides Constitutional cover to military courts that are not already under civil authority as iterated in Article 245. Otherwise, the military would previously be "covered" by Article (8)(3)(a) of constitution[42] , which eliminates the actions of the armed forces from the restraints of fundamental rights shields.

Furthermore, the Constitution of Pakistan is earlier full of attributes that easily alter meanings to suit policy. Public order, Public interest and public morality, reasonable restriction, and the security, integrity and defense of Pakistan all these attributes that can and generally are used to restrict individual liberty and exploit the ambit of state policy.

7. Conclusion

The experience of 4 years tenure of military courts has shown that departure from ordinary legal procedures and safeguards in the name of combating terrorism is counterproductive, as it fuels and feeds the very violence and menace of terrorism it is meant to curtail. There is no justification for trial of civilians by military courts. Solution to menace of terrorism is not to sacrifice and deny essential rule of law principles and deny the rights of accused persons in the name of "speedy trials" through underground proceedings before military courts. Instead, the focus should be on to bolster the fair and effective administration of justice by solidification of police's capacity of investigation; advance the training of prosecutors for terrorism-related cases; and guarantee protection of judges, prosecutors and witnesses, which are among the important reasons why certain culprits of terrorist attacks have been able to dodge answerability in civilian courts in Pakistan and a comprehensive review of counter terrorism laws, policies and practices to ensure they are well-matched with Pakistan's national and international legal obligations is much needed.

[41] Article 10 of the constitution of the Islamic Republic of Pakistan.

[42] Article 8(3)(A) of the constitution of the Islamic Republic of Pakistan.

Administration of Mosques and Appointment of Imams in Nigeria: Between Islamic Law, Customs, and State Law

Ismael Saka Ismael•
Abdulmumini A. Oba••

Abstract

Mosques are pivotal to the practice of Islam. Imams are important to the administration of mosques. In Nigeria, the administration of mosques and the appointment of imams of these mosques are governed generally by a combination of Shari'ah, *local customs (*'urf*) and statutory law. The actual mix of this combination in any particular mosque depends on those that established the mosque. There are central mosques established by the emirates and communities and there are mosques established by individuals or groups of persons or organisations. In the northern emirates, central mosques established by the emirates are under the control of the emirs. In other parts of the country, the congregation or officials of the congregation administrate central mosques. Among the Yoruba peoples in the southwest, traditional rulers also play a nominal role in the recognition of a newly appointed Chief Imam of their town's central mosque. In central mosques established by individuals or groups of persons or organisations, the control lies in the hands of those that established them and in the case of incorporated organisations, the relevant administrative rules are spelt out in the organisations' constitutive documents. There is no central governmental or Islamic authority regulating the establishment and administration of mosques in the country, which means that there is little or no control over the sermons preached in central mosques. In addition, disputes relating to administration of mosques and the appointment of Imams often end in litigation in civil courts. There is the need to create an official or a quasi-official Islamic authority to regulate the affairs of central mosques in the country.*

Key words: *Imams, Mosques, Administration, Islamic Law, Appointment, Nigeria.*

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1. Introduction

Mosques are pivotal to the practice of Islam. Muslims are required to offer the obligatory (*farḍ*) five daily prayers (*salat*, Pl. *ṣalawāt*) and some supererogatory (*sunna*) prayers [1] in congregation. Prayers in congregations are the preferred form for the performance of the obligatory prayers. [2] Mosques are the prescribed place for these congregational prayers. "Mosque" is the English rendition of the Arabic word "*masjid*" (Pl. *Masājid*). [3] Various English dictionaries define mosque as "a building used for public worship by Muslims", "a Muslim place of worship" and "a building in which Muslims worship".[4] Mosques are primarily houses of worship established by Muslims exclusively for worshipping Allah (SWT) through performance of *salat* in congregations.[5] Mosques also serve other functions such as being centres of education and even social activities.[6]

Imams are important in the administration of mosques. In Islamic literature, *Imam* which literally means, 'leader' could refer variously to the *Amīr*/Emir, *Sultan*, Caliph (the Head of the

[1] The *sunna* prayers include the Friday (*jumaʿa*) prayer, the two *id* prayers, prayers during lunar and solar eclipses, and the prayer for rain: Abū al-Ḥasan Al-Māwardī, *The Ordinances of Government: A Translation of al-Aḥkām al-Sulṭāniyya wa al-wilāyah al-Dīniyya*, (tr. Wafaa H. Wahba), (London: Garnet Publishing Ltd., 1996), p. 117.

[2] There are many prophetic traditions that are emphatic on the performance of *salat* in congregation, see Imam Ibn Hajar, *Bulugh al-Maram min Adillat al-Ahkam* (trans. Nancy Eweiss and ed. Selma Cook) (El-Mansoura, Egypt: Dar al-Manarah, 2003), Hadith Nos. 425-429 at pp. 149-150. The prophetic traditions say that *salat* performed in congregation has twenty seven times reward more than *salat* performed individually, *ibid*., Hadith Nos. 422-424 at p. 148.

[3] *Ibid*.

[4] Muzaffar Iqbal, "English as an Islamic Language", *Islam & Science*, vol. 10, no. 1, (2012), p. 3 citing Merriam Webster, *Oxford English Dictionary* and Macmillan respectively. [https://www.academia.edu/16835382/English_as_an_Islamic_Language/, accessed 9 June 2019].

[5] "The mosques of Allah shall be maintained only by those who believe in Allah and the Last Day: perform *As*-salat (the prayers), and give *Zakat* (obligatory charity) and fear none but Allah. It is they who are on true guidance", Quran 9:18.

[6] See Khalid Alavi, *The Mosque within a Muslim Community* (ed. Fiaz Hussain) (Birmingham: UK Islamic Mission Dawah Centre, 3rd edition, 2004), pp. 10-9.

Muslim community). In this paper, we have used the term '*Imam*' exclusively for 'prayer leader' while we have used the terms '*Caliph*' for the leader of the Muslim community in the classical sense, 'Sultan' for the head of the Sokoto caliphate and 'Emirs' for Emirs appointed under the Sokoto Caliphate. Again, *imam* in the context of *salāt* has two meanings. It means the person leading a group of persons in performing *salāt*. It could also mean a person so specifically appointed as the *Imam* of a town or a particular mosque. This paper is concerned with the latter meaning. The paper discusses the law and practice relating to administration of mosques, appointment of Imams of central mosques and control of mosques under Islamic law and Nigerian law. The paper concludes with proposed solutions to the problems identified in the study.

2. Islamic Legal Framework for Administration of Mosques

Mosques can be classified in several ways. First, there are mosques established by the emirates, communities and individuals or groups of persons or organisations. Secondly, in some mosques, the five daily prayers and Friday congregational prayers are held there while some *masjid* only the five daily prayers are held. Nowadays, any mosque where the Friday congregational prayers are held is referred to as a "Central Mosque" and its Imam is described as a "Chief Imam". Mosques where only the five daily prayers are held are call *ratibi* mosques. Each town with the requisite number of residents is required to have a central mosque.[7] Thirdly, there are mosques that are open to the public and there are private 'mosques' accesses to which are restricted to a select few, although such private mosques are not mosques in the technical sense but are rather private place of prayer (*muṣalla*). Mosques opened to the public are considered *habs* and are as such inalienably dedicated to Allah (SWT).[8] There is no need for any special consecration ceremony, as the very opening of a mosque to members of the public suffices.[9] Lastly,

[7] The Maliki School put this at twelve including the Imam: al-Jazīrī, *Islamic Jurisprudence*, (Trans. Nancy Roberts) (Louisville: Fons Vitae, 2009), p. 509.

[8] *Onibudo v. Akibu* (1982) 2 F.N.R. 224, at pp. 226-227.

[9] *Amore v. Adegbami* (2018) LPELR-CA/L/646/2015.

there are mosques established without any form of legal formalities and mosques that are formally incorporated under statutory law based on English common law. Most mosques in the country belong to the former category.

Affairs of mosques as with other Islamic affairs are to be under the general supervision of the Muslim leader. Some scholars have argued that Friday congregational prayer is not compulsory on Muslims where there is no constituted authority to establish the prayer.[10] Generally, the appointment of the *imam* of a town's official Central mosque who is by virtue of office is the Chief Imam of the town, is governed by Islamic law. The methods of appointing imams (prayer leaders) in *masjids* depend on whether the mosque is an official mosque established by the State or whether private persons and organisations establish it.[11] In the official *masjids* established by the state where the Friday congregational prayers takes place, the *caliph* or emir leads prayer personally or may appoint others as prayer leaders. [12] Al-Kashnawī says no one should lead the *hakim* (governor/ruler) in prayers except with the ruler's consent or when the ruler is prevented by a *Shari'āh* reason from leading prayers.[13] This is because the ruler is the leader of Muslims in both temporal and religious affairs and in any case, the imams are only the caliph's delegates.[14] In mosques established by individuals or groups of persons, the congregation or the organization that established the mosque determine the manner of appointing the prayer leader.[15] The state authorities do not interfere unless there is a deadlock in the election, in which cases, the state authorities choose between the competing parties.[16] It is not anybody that can lead prayers. Thus, Islamic scholars have carefully identified the characteristics an Imam should possess and who has priority when it comes to

[10] This is the view of Imam Abu Hanifa and not that of Imam Malik: Nyazee, *The Distinguished Jurist's Primer*, I: 177-8.

[11] Al-Mawardi, p. 112.

[12] *Ibid*., p. 112.

[13] Abu̅ Bakr b. Ḥassan al-Kashnawī, *Ashal al-Madārik Sharh Irshād al-Masālik fī Fiqh Imām al-A'immat Mālik*, vol. I, (Beirut: Dār al-Fikr, n.d.), p. 245.

[14] *Ibid*.

[15] *Ibid*., pp. 114-5.

[16] Al-Mawardi, p. 115.

being an imam.[17] From the Islamic law perspective, the issue of who deputizes for the Emir as imam of a mosque is entirely within the discretion of the Emir subject only to appointing a person who is qualified to perform the functions of the office. It is clear then that the appointment of *imams* of central mosques is a political and administrative (*siyāsa*) matter, which is completely outside the jurisdiction of the *Qāḍī*.[18] However, if the matter is one concerning administration of a mosque which is subject of *waqf*, the *Qāḍī* could assume jurisdiction.[19]

Islamic scholars make a distinction between leading *salaẗ* and formal appointment as an *imam* as they prescribe more strict qualifications for the latter. They have carefully identified the characteristics an *Imam* should possess and who has priority when it comes to being an *imam*.[20] To qualify as an *imam*, a person must be a male adult who is upright and has knowledge of what invalidates *salaẗ* in terms of the recitation of the Qur'an and understanding of the relevant *fiqh*. It is disapproved to appoint a slave and a person born out of wedlock even though they could lead prayers. It is desirable to appoint as *imam* a person who has good looks and good character and it is disapproved to appoint the physically disabled.

Imams are responsible for the conduct of prayers. On Fridays, the *Imam* gives the sermon (*khuṭbah*) and leads the congregational *salaẗ*. The *Imam* conducts other prayers at important functions such as funeral prayers (*janāzah*), marriages

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[17] See 'Abd al-Raḥmān al-Jazīrī, pp. 563-5 (Maliki School, pp. 564-5). See further from the Maliki perspective: Al-Aʿbī al-Azharī, *Jawaʿhir al-'iklīl: sharh mukhtaṣar al-allāmah shaykh khalīl fī madhḥab al-imāṁ malik*, vol. I, (Cairo Dar al-Fikr, n.d), p. 83 and Al-Kashnawī, I:246.

[18] See Al-Mawardi, p. 81.

[19] *Ibid*., p. 79 and Abdullahi Bin Foduye [Fudi], *Guide to Administrator: Ḍiyaʾ al-Ḥukkāṁ* (Tran. S. Yamusa) (Sokoto: The Islamic Academy, 2000), p. 17.

[20] See al-Jazīrī, pp. 563-565 (Maliki School, pp. 564-5). See further from the Maliki perspective: 'Abd al-Bari al-'Ashmawi, *Matn al-'Ashmawiyyah* (trans. Abu Zahrah 'Abd al-Qaʿḍīr Mandla Nkosi ([Pretoria?]: Khethu Press, 2014), pp. 25-6, *Muwatta.Com,* (22 April 2014) http://www.muwatta.com/ebooks/english/matn_al-ashmawiyyah_en.pdf/, accessed 3 June 2018, and Al-Kashnawī, I: 240-246 and Al-Aʿbī al-Azharī, *Jawaʿhir al-'iklīl*, I: 83

(*nikaȟ*), naming ceremonies (*'aqīqah*), housewarming and other occasions of 'special' prayers. While any capable Muslim who has the required Islamic knowledge can lead these prayers, *Imams* perform the prayers when they are present at the occasion.-Other officials of a mosque include the Muezzin, that is, the person who makes the call to prayer and those responsible for the physical maintenance of the mosque.

3. Legal Framework For Administration Of Mosques In Nigeria

Nigeria is a federation consisting of 36 states and a Federal Capital Territory (FCT).[21] The country is a multi-religious state with Islam, Christianity and African Traditional religion as the main religious groups.[22] The attitude of the Nigerian state to religion is premised on the principles of non-adoption of any religion as state religion and freedom of religion.[23] The state does not interfere in internal affairs of religious groups or in sectarian matters. Thus, there is a complete absence of an official central control of Islamic affairs in Nigeria.

The preeminent Muslim authority in the country is the Nigerian Supreme Council for Islamic Affairs (NSCIA).[24] Although, the NCSIA often speak and act formally and informally for Muslims and is meant to be the umbrella body for all Muslims in the country,[25] it is not an official organ of the government as

[21] See: sections 2(1) and 3(1), Constitution of the Federal Republic of Nigeria, 1999 as amended.

[22] There are no census figures for these adherents of religions in the country, however, America's Central Intelligence Agency's 2018 estimates puts it as follows: Muslim, 53.5%, Roman Catholic 10.6%, other Christian 35.3%, other .6%. Central Intelligence Agency (CIA), *The World Factbook: Nigeria The World Factbook*, http://www.cia.gov/cia/publications/factbook/geos/ni.html#people/, accessed 28 September 2020.

[23] See: sections 10 and 38, Constitution of the Federal Republic of Nigeria, 1999 (the 1999 Constitution).

[24] See Abdulazeez B. Shittu, "The Role of the Nigerian Supreme Council for Islamic Affairs in Unifying Muslims in Nigeria: Prospect and Challenges", *International Journal of Muslim Unity*, vol. 9, no. 1/2, (2011), 35 at pp. 35-6.

[25] *Ibid*., p. 36. See article 4, Constitution of the NSCIA, *Nigerian Supreme Council for Islamic Affairs*, https://www.nscia.com.ng/docs/CONSTITUTION_of_the_Nigerian_S

such it does not have coercive powers on Muslims in the country. While its aims and objectives include "build, manage and support Mosques in Nigeria and elsewhere",[26] it does not exercise control over mosques in the country beyond the National Mosque, Abuja.[27] There are other Islamic organizations in the country but these organizations do not come under a single leadership and each control its mosques. The implication of this is that there is no centralized Islamic authority charged with administration of Islam including appointment of *imams* and resolving of disputes connected with such appointments. Thus, the affairs of Islam in the country are left largely to individual, organisational or sectarian choices and preferences.

The laws applicable in Nigeria to administration of mosques derive from Islamic law, customary law (*'urf*) and the practice and convention of each mosque. The applicable Islamic law is that of the Maliki School, the country's official school (*madhhab*). [28] Customs and local traditions (*'urf*) are relevant because the Maliki School accepts as a source of law, customs that are not contrary to the dictates of Islam.[29] Where the parties have not proffered any evidence of the law regulating the affairs of their mosque, the courts will invoke English law as the law applicable. In *Asani v. Adeosun*,[30] which concerned a dispute relating to appointment of *Imam* of a central mosque in the southwest, the parties did not proffer proof of the applicable law and custom, hence the court applied English law. Subsequently,

upreme_Council.pdf/, accessed 19 December 2018) states that "all Muslims Communities, Islamic Organizations and individuals in Nigeria form the constituents of the Council" and that "member" or "an Islamic Organisation of Body" shall be any person or group of persons who embrace Islam and accept the finality of the prophet hood of the Holy Prophet Muhammad (P.B.O.H)".

[26] *Ibid*., article 3(8).

[27] In fact, Shittu's work on the role of the NSCIA did not include supervision of the mosques among its roles; see Shittu, "The Role of the Nigerian Supreme Council for Islamic Affairs".

[28] See discussion of this in Abdulmumini A. Oba, "Judicial Practice in Islamic Family Law and Its Relation to ʿ*Urf* (Custom) in Northern Nigeria", *Islamic Law and Society*, vol. 20, no. 3, (2013), 272, at pp. 275-6.

[29] *Ibid*., pp. 277. See also ʿAbd al-Wahhāb Khallaf, *ʿIlm Usūl al-Fiqh* (Cairo: Dār al-Ḥadīth, 2003), p. 100.

[30] (1966) N.M.L.R. 268 citing *Odebode v. Ashaka* (1944) 17 N.L.R. 84 at p. 90.

the courts have invoked in such cases, principles of English law including the rule in *Foss v Harbottle*, [31] rules relating to unincorporated associations,[32] and arbitration laws.[33] However, in *Opebiyi v. Noibi*[34] the Supreme Court distinguished *Asani's* case. Bello, JSC delivering the lead judgement of the court held that:

> One may, however, unhesitatingly infer from the *ratio decidendi* of the consolidated case [*Asani*] that the rule of Moslem law or native law and custom prevail over the rules of common law in matters pertaining to the selection, appointment and installation of a Chief Imam.
>
> For avoidance of doubt, we may emphasize that Imamship, being the highest office of a mosque; any question relating to the selection and installation of a person to the office is regulated entirely by Moslem law, and the convention and practice of a particular mosque.[35]

Justice Bello held further that "the convention and practice of a mosque" in this respect "is a question of fact to be proved by the evidence of an expert".[36] In *Amokomowo v. Andu*,[37] the Supreme Court added the clarification that such expert should be "any person learned in Islamic law ... and who is also knowledgeable or conversant with the convention and practice of the mosque".[38]

Statutory law applies in the administration of mosques that are incorporated under the law or owned by incorporated associations as they are governed by their registered constitution and other constitutive documents under the general regulation of the Companies and Allied Matters Act, 2020 "CAMA 2020" (which repealed the previous CAMA, 1990[39]) that now regulates the affairs of incorporated associations in the country. A major

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[31] See *Agbaje v Agboluaje* (Unreported) SC/286/1967 decided by the Supreme Court on 20 February, 1970, and *Abubakri v Smith* (1973) LPELR-SC.195/1971 and (1973) 6 S.C. 24.

[32] See *Asani v Adeosun* (1966) N.M.L.R. 268.

[33] See *Opebiyi v Noibi* (1977) N.S.C.C. 464

[34] (1977) N.S.C.C. 464.

[35] Ibid., p. 470.

[36] Ibid, at p. 470.

[37] (1985) 1 N.S.C.C. 633.

[38] Ibid., p. 636, per Uwais, JSC (as he then was) reviewing the judgment of the trial court.

[39] Cap. 20, Laws of the Federation of Nigeria, 2004.

advantage of incorporation is that an incorporated association acquired thereby a legal personality that enables it to sue and be sued in its own name, to hold land and do other things that a legal person can do.[40] An unincorporated association cannot do all these things. For example, it can only sue or be sued in a representative capacity. In *Shitta v. Ligali*,[41] 12 persons who described themselves variously as the "Executive of the Central Mosque" and "members of the Executive Committee" of Lagos instituted the case in that capacity. The court held that they being nothing more than a collection of individuals had no capacity to sue or be sued.[42]

4. Administration of Mosques In Nigeria

The *ratibi* mosques are generally smaller mosques under the control of the congregation of the particular mosques while the administration of central mosques is more complex. Central mosques in the country can be classified into official central mosques belonging to towns, privately owned central mosques and special central mosques. Official central mosques are located within the northern emirate system, Yoruba towns and in other Muslim-majority towns in the country. In the northern emirates, official central mosques are those established by the emirate. These are usually the main central *masjid* where the Friday prayers take place and which the Emir attends. In the southern states among the Yoruba and the Auchi peoples, each town has an official central mosque owned by the Muslim community of the town. These *masjids* are usually situated near the Oba's place in the various towns. The traditional ruler attends this mosque for Friday prayers if he is a Muslim.

Generally, the central mosques in the north and in Yorubaland were established long ago and were not usually incorporated under Nigerian laws. The status and ownership of the Central Mosque of Offa town vis-a-vis purported incorporation of the same mosque was the subject of litigation in

[40] Sections 823(2) and 830(1), CAMA 2020.

[41] (1941) 16 N.L.R. 23.

[42] See T. Akinola Aguda, *Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria* (London: Sweet and Maxwell, 1980) p. 112.

Oyawoye v Ijaiya.[43] The case decided by the Federal High Court, Ilorin Division centered on the management of Offa Central Mosque. The current mosque was built in 1948 by the Muslim community of the town with the Oloffa, the traditional ruler of the town as their leader. In 1993, the community decided that the mosque needs to be expanded and the defendants being the children of the prominent families that took initiative in the building of the old mosque were constituted into a board of trustees for the project. A plan was drawn up and the fund raising commenced. Over the years, while the fund raising was going on, a crisis engulfed the Muslim community. In 1999, the plaintiffs incorporated the Offa Grand Mosque and Islamic Centre with themselves as members of the board of trustees. The crisis deepened when a new *Imam* for the Offa Central Mosque was to be appointed and this led to litigations in various courts. The present case was filed in 2007 with the plaintiffs claiming inter-alia, a declaration that the Registered Trustees of the Offa Grand Mosque and Islamic Centre are the only competent body to manage the "Offa Grand Mosque and Islamic Centre". In rejecting the Plaintiff's claims, the court noted that the plaintiffs did not produce any authority from the Offa Muslim community that permitted them to change the name of the mosque from "Offa Central Mosque" to "Offa Grand Mosque and Islamic Centre" and to incorporate the latter. The Court held that "what the Plaintiffs registered was a fictional entity called the Offa Grand Mosque and not the physical structure known as the Offa Central Mosque".[44] The court concluded that, "… the only legally known and centrally controlled mosque in Offa is the Offa Central Mosque" which "is owned by the Offa Muslim Community".[45]

The privately owned central mosques include those established by individuals, groups of individuals, unincorporated and incorporated Islamic associations. For a mosque owned by an incorporated association, the applicable rules are those in the association's registered constitution and other constitutive documents. The National Mosque, Abuja and the Sultan Bello

[43] (Unreported) Suit No. FHC/IL/CS/6/2007 decided by the Federal High Court, Ilorin on 23 October 2015, per Faji J.

[44] Ibid, pp. 26-27.

[45] Ibid, pp. 26 and 28.

Mosque, Kaduna deserve a special mention here. Both are incorporated mosques but they are in a class of their own as they commenced in the traditional or quasi-traditional emirate manner. The Sultan Bello Mosque was established by the Sardauna of Sokoto, Sir Ahmadu Bello, the late Premier of Northern Nigeria. Sheikh Abubakar Gumi who was then the Grand Kadi of the defunct Northern Nigeria also played a major role in the establishment of the mosque and the establishment of the Jama'atu Nasril Islam (JNI).[46] The Sultan Bello Mosque was established in the 1960s but was formally incorporated in around 2014.[47] The National Mosque at Abuja is registered as a Non-Governmental Organisation. The idea of establishing a National Mosque at Abuja started in 1981 after Alhaji Shehu Shagari the then President of Nigeria ordered that the seat of government be moved from Lagos to Abuja, the newly designated capital of the country.[48] The Abuja Mosque is now essentially "a faith-based Non-governmental Organization" with a Mosque Management Board.[49]

Normally, a town should have only one central mosque. However, other central mosques can be established if there are valid reasons. As towns grow, there may be need for additional central mosques. Sometimes, conflicts among the people who had hitherto used the same central mosques can result into a faction branching out to establish their own central mosques. This was

[46] The JNI was established in 1962 as an organisation for Muslims in northern Nigeria. See an account of the establishment of the JNI in Sheikh Abubakar Gumi (with Ismaila A. Tsiga), *Where I Stand* (Ibadan: Spectrum Books, 1992 reprint, 2001) pp. 104-108.

[47] Sheikh Gumi insisted that the JNI was founded over forty years ago but was registered only three years ago by the present leadership of the JNI and that Sultan Bello Mosque was incorporated along with the JNI despite his formal objection: Maryam Musa, "How Gov El-Rufai, Sultan, Emir Of Zazzau, JNI Approve The Appointment Of Sheikh Gumi's Anointed Candidate As Chief Imam", *Universal Reporters* (5 January 2017), https://universalreportersng.com/how-gov-el-rufai-sultan-emir-of-zazzau-jni-approves-the-appointment-of-sheikh-gumis-anointed-candidate-as-chief-imam/, accessed 7 June 2019.

[48] Abuja National Mosque, "Management", *Abuja National Mosque*, http://www.abujanationalmosque.org/management/, accessed 23 February 2019.

[49] Ibid.

the case in *Okanle v. Okanle*[50] where a protracted chieftaincy tussle as to who is entitled to be the traditional ruler of the Okanle town divided the Muslim community. The conflict started when two claimed to be the traditional ruler of the town. One claimed to be the Bale of Okanle while the other claimed to be the Olokanle of Okanle. Both nomenclatures conform to the terms used in Yoruba towns to mean the traditional ruler of a town and thus could not exist simultaneously in a town. The chieftaincy dispute became pronounced such that the two factions could no longer observe the Friday congregational prayers in the town's central mosque. In 1972, the Bale filed a case at the Upper Area Court to restrain the Olokanle faction from operating the Ojude Mosque as a central mosque. The court dismissed the suit but upon appeal, the Sharia Court of Appeal ordered that all the Muslims in the town should observe the Friday congregational prayers service at Fayabale mosque only.[51] The Sharia Court of Appeal premised its decision on the ground that the town is too small to have two central mosques.[52] Meanwhile, the central mosque needed repairs and pending the repairs, a mosque called Fayabale mosque was used as the central Mosque. The Olokanle faction established another central mosque at Ojude Mosque while the Bale group established another central mosque at the Ara-Okanmi mosque. In 1986, the parties went to the High Court to resolve the chieftaincy dispute. In 1987, the court ruled in favour of the Olokanle.[53] This decision infuriated the other group who subsequently refused to participate in any settlement to resolve the central mosque dispute. In 1989, the group again applied to the Sharia Court of Appeal for leave to be observing the Friday congregational prayer service at Ojude Oba Mosque. The Sharia Court of Appeal again turned down the application.[54] In 1993, the Supreme Court affirmed the decision of the High Court in favour of the

[50] (1994) Annual Report of the Sharia Court of Appeal, Kwara State 119.

[51] (Unreported) Appeal No KWS/SCA/IL/10/73 decided by the Sharia Court of Appeal, Ilorin on 12 February 1975.

[52] Ibid.

[53] (Unreported) Suit No KWS/GH/1/86 decided by the Kwara State High Court on 7 September 1987.

[54] (Unreported) Motion No KWS/SCA/CV/M/89 decided by the Sharia Court of Appeal, Ilorin on 12 December 1989.

Olokanle.[55] With this decision, it became impossible for the two parties to agree to any settlement. In 1994, the Olokanle group filed a fresh application before the Sharia Court of Appeal to permit them to use the Ojude mosque for the Friday congregational prayers services. This time, the Kwara State Sharia Court of Appeal granted their request.[56] The court held that due to the hostilities between the parties, the ancient mosque cannot be rebuilt and the Fayabale mosque is no longer capable of serving as a central mosque for both parties. The court citing Maliki texts held that given the irreconcilable differences between the two factions, in the interest of peace mandates that each be allowed to establish their own central mosques.[57] The court therefore approved the use of the Ojude and the Ara-Okanmi mosques as central mosques for the town.

There has been a proliferation of central mosques in many towns in the country.[58] This is due mainly to rapid urbanisation, increasing number of wealthy individuals who establish central mosques to seek Allah's good pleasure, and lastly but more

[55] *Attorney-General of Kwara State v. Olawale* (1993) 1 SCNJ 208 and (1993) 1 NWLR (Pt. 272) 645.

[56] (1994) Annual Report of the Sharia Court of Appeal, Kwara State 119.

[57] Ibid., pp. 127-9. The court quoted the Maliki texts to the effect that it is permissible to allow another Friday prayer mosque in such circumstance. The court provided only the title of books and pages referred to without providing the citations of the editions used. The quoted texts are from Uthmān b. Ḥasanayn Barī al-Ja'ali al-Mālikī, *Sirāj al-Sālik Sharḥ As'hal al-Masālik*, (Beirut: Dar al-Fikr, 1995), 1: 184 (1:152), Aḥmad B. Ghunaym B. Muhanna al-Nafarāwī al-Mālikī, *Al-Fawākih al-Dawānī alā Risalā ibn Abi Zayd al-Qayrawānī*, (Beirut: Dar al-Fikr, 1995), 1: 260 (1:266) Abū Abdallah Muḥammad ibn Aḥmad, *Fath al-Alī al-Mālikī fī al-Fatwā alā Madhab al-Imam Mālik*, (Beirut: Dar al-Fikr, n.d.) 1: 143 and Al-Azharī, *Jawāhir al-'Iklīl*, 1: 94. The volumes and pages of the editions cited by the court are herein put in brackets where they are different from the editions cited here.

[58] For example in Kano City, see Muhammad Wada and Kabiru Haruna Isa, "The Proliferation of *Juma'at* Mosques in Kano Metropolis: A Historical Perspective", *Research Gate* (January 2019), https://www.researchgate.net/publication/330400741_The_Proliferation_of_Juma'at_Mosques_in_Kano_Metropolis_THE_PROLIFERATION_OF_JUMA'AT_MOSQUES_IN_KANO_METROPOLIS_A_HISTORICAL_PERSPECTIVE/, accessed 18 April 2019.

significantly, the interventions by local and international Islamic organisations and sects.[59]

5. Appointment of Imams in Nigeria

The administration of mosques in the Sokoto Caliphate followed the pattern of the classical caliphate. According to him, leading the people in prayers is a branch of rulership.[60] According to Abdullahi Fudi, Emirs are appointed in the towns and provinces to look after the religious and temporal interests of the people which duties include leading them in prayers and preserving the mosques.[61] Thus, in the Sokoto Caliphate, central mosques were established in towns throughout the emirates. Leading prayers is one of the administrative duties placed by the Sharia on the Sultan.[62] However, it is permissible to delegate this duty.[63] The Sultan can appoint other persons to lead the prayers in his stead. He stated further that the Emirs are appointed in the towns and provinces to look after the religious and temporal interests of the people which duties include leading them in prayers and preserving the mosques.[64] Thus, in the Sokoto Caliphate, following the classical ways, central mosques were established in the towns in the emirates. In the past and in the contemporary era, there are instances when Emirs who are capable Islamic scholars on their own rights have effectively performed the functions of Chief Imam such as leading the Friday prayers.[65] However, the

[59] Ibid., pp. 11-5 (Kano) and Jimoh, *Ilorin: The Journey So Far* (Ilorin: L. A. K. Jimoh, printed by Atoto Press, 1994) p. 467.

[60] Foduye, pp. 12 and 22.

[61] Ibid., p. 13.

[62] Abdullahi Bin Foduye, p. 22.

[63] Ibid.

[64] Ibid, p. 13.

[65] This is generally true of the Emirs of Kano who had led prayers at the Kano central mosque: John N. Paden, *Religion and Political Culture in Kano* (Berkeley and Los Angeles: University of. California Press, 1973) pp. 226-227. The deposed Emir of Kano, Muhammad *Sanusi* II performed effectively the role of the Chief Imam. He not only regularly led prayers at the Kano Central Mosque, he also led *janazat* (funereal) prayers, see Oluwatobi Bolashodun, "Emir of Kano leads funeral prayer of Ganduje's mother", NAIJ.COM, 2017 available online at <https://www.naija.ng/753544-muhammadu-sanusi-leads-funeral-prayer-kano-state-governors-mother-photo.html#753544> accessed 4 March 2018. There was also the example of the Otaru of Auchi, Chief A.

general practice is that the emir delegates this duty to a prayer leader appointed by him. Thus, central mosques are under the control of the emirs through a Chief Imam appointed by the Emir after due process. The due process depends on the custom followed in the particular Emirate. Generally, important *imams* (and their deputies) in the emirates are appointed from certain lineages and families within the emirates.[66] In the Ilorin Emirate, this hierarchy consists of the chief imams of the major quarters in the town. These are Imam Fulani, the Imam of the Fulani quarters who is also by office, the Chief Imam of the Emirate, Imam Imale, the Chief Imam of Oke Imale the Yoruba quarters and then Imam Gambari who is the Chief Imam of the 'Hausa' group consisting of Hausa, Nupe and Kanuri settlers.[67] Also in this hierarchy is the *ajanasi*[68] who is appointed from the Yoruba quarters.[69] The emir has the prerogative to appoint any qualified Islamic scholar from the quarters or families that are traditionally entitled to the imamship. With the exception of the Imam Fulani who can be appointed from any Fulani scholar resident in the Fulani quarters of the town, all these imamships are hereditary. [70] The appointment of a new Imam is formalised by his official "turbaning" by the Emir in the case of the Chief Imam and by the Chief Imam in other cases.

In the southern states among the Yoruba peoples, generally, each town has an official central mosque and a number of *ratibi* mosques. The central mosques are usually situated near the Oba's

K. Momoh, see: Abdulrahman Osioke Arunah, *A History of Auchi Kingdom* (Ilorin: Haytee Press, 2nd. Ed., 2010) p. 173.

[66] For example, see Paden, op cit, p. 227 (Chief Imams of Kano) and L. A. K. Jimoh, pp. 467-75 (Chief Imam and other principal Imams in Ilorin).

[67] See generally Jimoh, pp. 467-75, Reichmuth, "A Sacred Community", pp. 36-7 and Musa Ali Agetunmobi [Ajetunmobi], "Islamic scholars", pp. 136-7.

[68] Reichmuth describes the *Ajanasi* as "the official Qur'an reciter": Reichmuth, p. 36. More correctly, an *ajanasi* is an assistant attached to a preacher to ensure that the preacher keeps to the subject matter of the sermon, reminds the preacher or echoes after the preacher of the appropriate verses of the Qur'an or the *hadith* and generally acts as a companion to the preacher while preaching.

[69] *Ibid*.

[70] Jimoh, pp. 467-75.

palace while the *ratibi* mosques are located in various quarters in the towns. The administrative structure of these mosques is more elaborate and more culturally inclined, revolving round a hierarchical order of official *alfas* (Islamic scholars) and another hierarchy of 'chiefs' from the members of the congregation.[71] For the *alfas*, there is the Chief Imam, his deputy (*Noibi*)[72] and the (*Alfa Taosiri*[73]). In many mosques, this is also the succession line to the imamship.[74] There is also the prayer caller (*ladhani*[75]). The *noibi* is followed by such as *Eketa Adinni* (third in rank), *Ekerin Adinni* (fourth in rank) and the *Olori Omokewu* ('head of the Islamic students') who acts as a personal assistant to the Imam in coordinating the affairs of the *alfas* (Islamic scholars). The *Alfa Taosiri* can also have *Arowasi* (who acts as a "megaphone for the *Alfa Taosiri* in public gathering), *Ajanasi* (who recites the Qur'an in a melodious voice after which the *Alfa Taosiri* does *tasfir* of the verse) as his assistants.[76] The mosque chiefs are responsible for the administrative aspects of the mosque. The chieftaincies include the *Balogun Musulumi* (Chief Lieutenant of the Congregation), *Seriki* (assistant *Balogun*), *Otun* (third in rank), *Bada* (fourth in rank), *Sarumi* (fifth in rank), *Olori Giwa* (head of the sub-committees of the Mosque), *Akowe* (secretary) and *Akowe Owo* (treasurer).[77] Some towns and mosques have a similar hierarchy of titles for female members of the congregation.[78] These and other

[71] For an historical perspective, see G. O. Gbadamasi, "The Imamate Question among Yoruba Muslims", *Journal of the Historical Society of Nigeria,* Vol. 6 No. 2, 1972, 229.

[72] *Noibi* (Arabic, *naib*), deputy.

[73] *Taosiri* is the Yoruba version of *Tafsir* (exegesis of the Qur'an). Thus, *alfa Taosiri* means the Islamic scholar who does explains the Qur'an, which in Arabic will mean a *Muffasir* (one who does *tafsir*).

[74] For example, see L. O. Abbas, "Imamate and Peripheral Issues in Oshogbo Central Mosque" in Is-haq Akintola, Badmus O. Yusuf and T. M. Salisu (eds.), *Correlates of Islam* (Zaria: Ahmadu Bello University Press, 2009) 217 at pp. 219-222.

[75] *Ladhini*, the person who makes the *adhan* (call to prayer). The *ladhini* is known in Arabic as the *mua'dhdhin (muezzin)*.

[76] See Doi, *Islam in Nigeria*, pp. 200-201. See also Abbas.

[77] See Doi, *Islam in Nigeria*, pp. 201-202.

[78] For example, *Iya Adini* (literally, 'mother of religion') who is the head of the women in the congregation and *Iya Sunna* ((literally 'mother in charge of Prophetic practices') who is the head of women in *ratibi* mosques. The *Iya Sunna* duties include organising the ritual bath for deceased female members of the congregation.

'titles' more or less, are found generally in traditional mosques and sometimes in modern mosques across Yoruba land.[79] These titles are influenced largely by Yoruba customs and practices.[80] As customary in Yoruba towns, each group must have a leader through whom the state would interact with the group. These titles reflect the hierarchy of Muslim leadership in the town. While the *imam* and other *alfas* provide religious and spiritual leadership, the congregational 'chiefs' provide the social, economic and political leadership for the Muslim community.[81] While the *Imam*, *Noibi*, *ladhani* and probably the *mufassir* are known in the Islamic tradition, the other posts stemmed purely from Yoruba culture. In *Sketch v Ajagbemokeferi*[82] one of these titles was the focal point of litigation. The Chief Imam of Ibadan had conferred the Plaintiff the honorary title "Otun Balogun Oniwasi (Second in rank to the Commander of Muslim Preachers)" on the Plaintiff. The defendants printed and published an almanac called the Voice of Islam wherein under the Plaintiff's picture and name was a caption as follows: "(*Otun Balogun Oniwasi) Oye yi je oye yeye gegebi oye Adadale, ti Islam ko patapata. Egbo bi Anobi ti wi ki ike ati ola Olorun ki* o maba. Ina ni ile gbogbo Aladadale" which in essence means that the title *Otun Balogun Oniwasi* is an innovation (*bidah*) which Islam forbids and that the Prophet (SAW) said that the Hellfire is the abode of all those who introduce *bidah* into Islam.[83]

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[79] These titles have now extended to the communities as a whole within linkage to any mosque, see Saheed Ahmad Rufai, "Rethinking the Proliferation of Muslim Chieftaincy Titles in Contemporary Yorubaland (Southwestern Nigeria) for an Effective Administration of Muslim Affairs", *Jurnal Hadhari* Vol. 3 (1), 2011, pp. 69-77

[80] Gbadamasi, p. 234.

[81] Matthew Hassan Kukah and Toyin Falola, *Religious Militancy and Self-Assertion: Islam and Politics in Nigeria* (Aldershot: Avebury, 1996) 67-68.

[82] (1989) 1 N.W.L.R. (Pt. 100) 678.

[83] This view is perhaps premised on the following *hadith*: "Beware of newly invented matters, for every invented matter is an innovation and every innovation is going astray and every going astray is in Hell-fire", An-Nawawi's Forty Hadith (trans. By Ezzeddin Ibrahim and Denys Johnson-Davies) (place of publication not stated, Dar al-Manar, 1976) pp. 94-96 and "The most truthful speech is the speech of Allah. The best guidance is the guidance of Muhammad. The worst matters are the newly-invented matters. And every newly-invented matter is an innovation and heresy. And every heresy is a going astray. And every going astray is in the Fire" quoted in Jamaal al-Din M. Zarabozo,

The court said that the real issue in the case "was the religious propriety or otherwise of introducing as an innovation, the Yoruba traditional title of *Otun Balogun*, to purely Islamic affairs".[84] The court held that as the parties agree that the title is a traditional Yoruba title not found in Islam, the title is an innovation. However, the court agreed with the submission that not all innovations are forbidden in Islam and that the chieftaincy title is neither forbidden nor goes against Islamic tenets and as such belongs to the category of permitted innovations.[85] The court held that nonetheless, the words complained of are not defamatory as they are nothing more than an expression of opinion as to the permissibility or otherwise of that chieftaincy title in Islam.[86] The court held further that even if the words were defamatory, the defence of fair comment would avail the defendants.[87]

In Yoruba towns, the customs relating to the appointment of Imams vary as the selection/election may be by the "*jamat* [*jamaʾa*]" consisting of all the mosque *alfas* and Muslim chiefs in the town;[88] the congregation of the mosque;[89] a committee of all the *Imam ratibis* and Muslim Chiefs of the town;[90] a committee of the

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Commentary on the Forty Hadith of al-Nawawi (Denver: Al-Basheer for Publications, 2008) Vol. 2, p. 889.

[84] (1989) 1 N.W.L.R. (Pt. 100) 678, at p. 693.

[85] Ibid, p. 696. For a contrary view, see the discussions on Al-Nawawi's Hadith No. 28 in Zarabozo, op cit., pp. 887-891.

[86] (1989) 1 N.W.L.R. (Pt. 100) 678, at p. 696.

[87] Ibid, p. 697.

[88] Normally, *jamat* (*jamaʾa*) means "congregation" which ordinarily refers to the congregation of the mosque or all Muslims in a town. In *Opebiyi v. Noibi* (supra), at p. 466, the Defendants averred that *jamat* elects the Chief Imam of the Igbogila Central and that the *jamat* "comprises of the Chief *Imam*, the *Noibi*, *Olori Omokewu*, the *Mulandam* [*Muqaddam* ?] all the 21 Imam *Ratibis* ..., *Iya Sunna*, all the *Iya Adinis* [of the *ratibi* mosques] and all Muslim Chiefs (male and female)".

[89] "… the election to the post of Chief Imam depends upon the vote either unanimous or of the majority of the whole Community comprised of the local Communities of the Mosques under various Imam *Ratibis* who report to a meeting of themselves and the officers of the Muslim Community.": *Odebode v. Ashaka* (1944) 17 N.L.R. 84 at p. 90 per Brooke. J. It should be noted that this decision was made under the English law applied by the court when parties failed to prove the applicable law and practice.

[90] See *Amokomowo v. Andu*, p. 639.

ratibis;[91] or a committee of the Mosque leaders;[92] depending on the practice in the mosque or town. These bodies have the last say on who becomes the Imam. In *Opebiyi v. Noibi* (*supra*), the candidates vying for the Chief Imamship of Igbogila Central mosque submitted the dispute to the Ansar-ud-deen Society. One of the parties was dissatisfied with the result of the election conducted by the arbitrator. The Supreme Court held that the verdict of the arbitrator is not binding on the *jamat* because it was the candidates and not the *jamat* who are entitled to select or elect the Imam that submitted the issue to the arbitrator. The court held that the decision of the arbitrator was of no effect.

The selection system for Imamship is often based on heredity and the rotation principle. This was common in the past.[93] Here, the Imamship is limited to one or more families who are descendants of the first chief imam who probably introduced Islam into the town and when an Imam dies, a new Imam is selected from a list of candidates from an Imamship family (*Olomo Imam*). Often, the post is rotated among the eligible families. The rotation formula is sometimes invoked to allow different sections of the town or community to produce the Imam. However, the hereditary system is losing popularity in the selection of *imam* with emphasis now on the candidate's personal qualifications especially possession of Islamic knowledge rather than his lineage.[94] There is a tension between hereditary succession and preference for newly emerging Islamic scholars. [95] With the growing number of Muslims who have Arabic and Islamic education and with the emergence of new scholars who are distinguished in Islamic learning, many Muslims have little or no patience for *imams* that have no more than a little rudimentary knowledge of Islam. Additional tension is generated where those holding the hereditary rights are non-indigenes as in where

[91] *Hamzat v. Sanni* (2012) LPELR, 8010 (CA) and (2015) 5 N.W.L.R. (Pt. 1453) 486 (SC).

[92] "33 persons comprising all the Central Mosque Committees and 18 representatives of the *Ratibis* assembled at the Central Mosques": *Ojikutu v. Sarumi* (1981) 4 C.A. 74 at p. 75.

[93] Gbadamasi, p. 233-235.

[94] See Razaq D, Abubakre, *The Interplay of Arabic and Yoruba Cultures in South-Western Nigeria* (Iwo: Darul-'ilm, 2004) 453.

[95] Gbadamasi, p. 236.

descendants of Hausa, Fulani, Nupe and Ilorin families who brought Islam to the town and established the town's first central mosques lay claim to hereditary imamship rights.[96] The ethnic parochialism, which pervades the country, incites rebellion against this class of *imams*. In addition, there are tensions and conflicts of approach between the traditional *imams* and the educated elites who formed part of the congregation. The elites often insist on having control of the mosque while the *imams* believe that traditionally in Islam, they should be in control. The elites claim the right to appoint a "suitable" *imam* for their mosques. Suitability in this context may depend on a number of factors other than the Islamic knowledge possessed by a prospective *imam*. This tendency is creating *imams* who are subservient to the elites. The aversion for the hereditary system is so strong that it has divided some congregations.[97] In some instances, a deserving candidate would be by-passed so as not to give the impression that they are still adhering to the hereditary principle.[98] In such cases, coming from an imamship family is a clear disadvantage. This operates unfairly in many instances given that knowledge often run within families and members of the family may still out pace other rivals when it comes to knowledge.

After the selection or election of the new Chief *Imam* comes the turbanning and presentation of staff of office ceremonies, which are performed, by the *Balogun Musulumi*[99] (where the traditional ruler is not a Muslim) and the traditional ruler respectively. It does not matter if the traditional ruler is not a Muslim. In *Hamzat v. Sanni*,[100] the Court of Appeal accepted that

[96] Kukah and Falola, p. 69.

[97] This is true of most of the cases discussed in this paper. For example, see the review of the facts of the case concerning the Central Mosque of Isara-Remo, Ogun State in *Hamzat v. Sanni* (2015) 5 N.W.L.R. (Pt. 1453) 486 at p. 501, per Peter-Odili, JSC.

[98] For an example in relation to the Oshogbo Central Mosque, see Abbas, p. 220.

[99] See explanations of this post of *Balogun Musulumi* below

[100] *Sanni v. Hamzat* (2012) LPELR, 8010 (CA). In this case, the trial court gave judgment for the plaintiffs but the Court of Appeal set aside the judgement on the ground that the plaintiffs did not call any of the *Imams* of the *Ratibi* mosque as witness to testify as to the position of the *Imams* of the *Ratibi* mosques on the two candidates for the post of Chief Imam. On further appeal to the Supreme Court (*Hamzat v. Sanni* (2015) 5

when the post of the Chief *Imam* of Isara-Remo falls vacant, a new Chief *Imam* is appointed or selected by the *ratibi imams*, who then present their choice to the leaders of the Muslim community who will present the Chief Imam-elect to the *Odemo* of Isara, the traditional ruler. On an appointed day, the Chief Imam elect is "turbaned" by the leader of the Muslim community and presented with a "staff of office" by the *Odemo*. In the instant case, the *Odemo* is a "Christian of the Anglican denomination by birth" but this is of no significance. The Court of Appeal pointed that the only function of the traditional ruler of Remo was to give the staff of office of Chief Imam to the appropriate Chief Imam elect based on information received from the leaders of the Muslim community of Isara. On further appeal to the Supreme Court,[101] the court set aside the proceedings at the two lower courts on the ground that the case was premised on a defective statement of claim leaving the plaintiffs to litigate the matter at the trial court if they so wishes.[102] Nonetheless, we respectfully submit that the opinion of the Court of Appeal regarding role of traditional ruler reflects the correct position of the law.

The process of appointing a new Imam normally runs smoothly although friction mostly occurs when there is a division in the congregation or when the candidate selected by the congregation is different from the candidate preferred by the traditional ruler.[103] Throughout the country, the mode of selection of chief Imams in mosques established by incorporated Islamic associations is based on the procedure and conditions stated in the association's constitutive document or other official documents. Generally, the appointment process is very competitive with associations aiming to seek the services of well-educated persons

N.W.L.R. (Pt. 1453) 486), the court set aside the proceedings at the two lower courts on the ground that the case was premised on a defective statement of claim leaving the plaintiffs to litigate the matter at the trial court if they so wishes.

[101] See *Hamzat v. Sanni* (2015) 5 N.W.L.R. (Pt. 1453) 486 (SC).

[102] See further discussions of this case *infra*.

[103] For examples of such crisis, see Gbadamasi, "The Imamate Question", pp. 236-237, Abbas, "Imamate", pp. 219-22 (Oshogbo Central Mosque) and Kukah and Falola, *Religious Militancy*, 70, 71 and 72 (Lagos Central Mosque).

who are well grounded in both western and Islamic knowledge.[104] Such Imams are employees of the associations and their powers and areas of influence within the association are limited strictly to religious affairs.

Generally, official Chief Imams and other Imams do not receive salaries from the government or the emirates. Their income consists mainly of gifts and charities given to them privately by Muslims or given during ceremonies and in some cases in consideration of 'special' prayers offered for them by the Imam. Many Chief Imams hold regular jobs. However, Chief Imams of the larger towns would be too busy with the official and quasi-official functions to devote their time to any other employment. Imams and other Islamic scholars employed by corporate organisations are on a salary according to their stipulated conditions of service.

Generally, there is little control over what Imams can say in the sermons during the Friday congregational prayers. There is no central Islamic authority, which prepares or supervises sermons delivered by *imams*. Thus, sermons are not subject to any official or quasi-official control. *Imams* in official traditional mosques would generally refrain from saying things that can upset the status quo. *Imams* of mosques established by individuals, groups of individual and organisations have little control provided they stay within the limits of the ideologies of those who established the mosques. Sectarian ideas and ideologies find free expression in such mosques. Many of these mosques, which constitute majority of the central mosques in the country, are specifically established to propagate sectarian perspectives.

6. Regulation of Mosques in Nigeria

As noted earlier, Islamic matters are under the control of the Islamic leadership. The pre-colonial Sokoto Caliphate had such an Islamic leadership but position changed with the advent of colonialism when the Caliphate came under British hegemony. Although the British promised not to interfere with Islam and established a system of indirect rule that used the administrative

[104] Abubakre, op cit, p. 453.

apparatus of the emirates, the emirs had lost substantial control of the people. In the past, within the emirates, congregations that wanted to establish the Friday prayer in their mosques would obtain the permission of the Emir through the Chief Imam of the town. With the rapid growth of central mosques in towns and increasingly acrimonious sectarian differences within the Muslim communities, there is less compliance with this tradition.[105] In the southwest, the official central mosques are established with the permission of the traditional ruler whose council also includes leaders of Muslims in the town. The post-independence era brought a bill of rights, which includes "right to freedom of thought, conscience and religion that made it difficult for the emirs to control the religion of Islam.[106] Islam, become a religion without any central supervision in the country.

Some Muslim majority nations such as Saudi Arabia and Malaysia that have Islam as the official religion have control over the administration of mosques and have maintained a strict control over who can become an Imam of a mosque and what kind of preaching are permissible in the countries.[107] Attempts to control preaching and mosque affairs in Nigeria that does not have a state religion have not been successful.[108] There are many reasons for this. First, there is the paradox of freedom and control that is apparent in the freedom in religious affairs that Islamic scholars traditionally possess (that is, the freedom they enjoyed from state control) from the earliest Islamic era and the authority

[105] See for example, Wada and Isa, "The Proliferation of *Juma'at* Mosques", pp. 15-6 (Kano).

[106] On freedom of religion, see section 38, 1999 Constitution.

[107] In Malaysia, the administration of Mosques is under the Council of Islamic Religion (Majlis Agama Islam): see sections 72-83, the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505). See further Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System* (Kuala Lumpur: DBP, 2nd ed., 1995) pp. 49-51 and Khairil Azmin Mokhtar, "National Bodies Relating to the Religion of Islam in Malaysia", (2006) 4 ShLR 17.

[108] There were attempts to control Islam by some states in northern Nigeria in the aftermath of the Maitatsine crisis in the mid 1980s), see Oba, "The Legal Relevance of Religion in Nigeria", op cit., pp. 38-39. As noted below, recent attempts have not also been successful.

of the state as the leader of the religion.[109] Secondly, there is another kind of freedom that came first with colonialism and later with western individualistic human rights which focuses on individual "agency" where religion is no more than a strictly personal affair.[110] The constitution entrenches this perspective of freedom of religion and other rights such as freedom of association, freedom of assembly and freedom of thought that make an internal control of Islamic and mosques affairs impossible.[111] In 2019, a Kaduna State High Court set aside a law empowering the state to license preachers.[112] Again, as noted above, the Constitution also forbids the country or any state thereof from adopting any religion as state religion. The wall of separation between the state and religion makes many meaningful regulation of religion virtually legally impossible. Thirdly, there is distrust between the elites that run the government and the ordinary Muslims that constitute the majority of the Muslims. These corrupt elites who given the opportunity would manipulate control of religion to secure privileges for their sycophants and deny these for upright scholars. Obviously, they are not in a position to entrench a legitimate state regulation of religion, as they do not enjoy the confidence of the Muslims. Fourthly, there is

[109] On the relationship between scholars and Rulers in the classical era, see Liaquat Ali Khan, "Free Markets of Islamic Jurisprudence," *Michigan State Law Review* (2006): 1487 at pp. 1502-1504.

[110] For this perspective, see Michael Ignatieff, "Human Rights as Idolatry", The Tanner Lectures on Human Values (Delivered at Princeton University, April 4–7, 2000), pp. 322-323.

[111] See sections 38 (Right to freedom of thought, conscience and religion), 39 (Right to freedom of expression and the press), 40 (Right to peaceful assembly and association), and 41 (Right to freedom of movement). See analysis of the implications of these provisions on state control of religion in Ahmed Salisu Garba, "Freedom of Religion and Its Regulation in Nigeria: Analysis of Preaching Board Laws in Some States of Northern Nigeria", *Brill Research Perspectives in Law and Religion* Vol. 1, Iss 4, 2018, 1-82 and Inibehe Effiong, "Kaduna State Religious Preaching Bill: Resolving the Constitutional Controversy", Sahara Reporters retrieved from saharareporters.com/2016/03/30/kaduna-state-religious-preaching-bill-resolving-constitutional-controversy-inibehe accessed 17 November 2019.

[112] See T. Ososanya, "Religious bill: You cannot license preachers - Court tells El-Rufai", Legit.com, 17 November, 2019 retrieved from: https://www.legit.ng/1244361-religious-bill-you-license-preachers---court-tells-el-rufai.html, accessed 14 December 2019.

the rivalry between Muslims and Christians that makes them vary of any state regulation of religion especially in states where any of them constitute a minority. The result of the absence of any control or supervision of Islamic affairs has been proliferation of all sorts of sects and Muslims have had to watch helplessly, the growth of deviant and extremist sects that later metamorphosed into violent groups.[113]

The Corporate Affairs Commission established under CAMA 2020 plays a supervisory role on the activities and affairs of incorporated associations.[114] The CAMA 2020 introduces stringent control on the collection and disbursement of money by incorporated associations, the keeping of accounts and auditing of such accounts.[115] In addition, section 839(1), CAMA 2020 provides that:

> The [Corporate Affairs] Commission may by order suspend the trustees of an association and appoint an interim manager or managers to manage the affairs of an association where it reasonably believes that —
>
> (a) there is or has been any misconduct or mismanagement in the administration of the association;
>
> (b) it is necessary or desirable for the purpose of —
>
> (i) protecting the property of the association,
>
> (ii) securing a proper application for the property of the association towards achieving the objects of the association, the purposes of the association of that property or of the property coming to the association,
>
> (iii) public interest; or

[113] The absence of control of religion has also affected Christianity and this is reflected in the proliferations of churches with doctrines that do not easily come within the ambit of Christianity as traditionally understood.

[114] Section 1, CAMA 2020.

[115] Ibid, section 827 (c).

(c) the affairs of the association are being run fraudulently.

Although the Commission could act in the "public interest", it is submitted that the powers given to the Commission does not extend to doctrinal matters because matters relating strictly to religious tenets and doctrines do not come within the ambit of what government or an agency of government can interfere with or intervene in. The Commission should only be concerned with the ensuring honest and transparent management of the monies and properties of incorporated associations. This is appropriate, as the religious associations once registered and incorporated, are no longer alter egos of individuals no matter how charismatic they may be. It remains to be seen if the Commission can intervene where any religious association is exhibiting extremist ideologies.

7. Conclusion: The Way Forward

According to Islamic law, mosques are to be administered by Muslims exclusively. The non-existence of an official body charged with the legal responsibility for the administration of the religious affairs of Muslims and the inability of Muslims to establish such a body, disputes concerning the administration of Mosques generally and the appointment of Imams of mosques often come before English style courts. The paper concludes that there is the need for reforms that will ensure that official or quasi-official Islamic authorities regulate affairs of mosques including the appointment of *imams*. In Nigeria, a combination of *Shari'ah*, local customs (*'urf*) and statutory law govern the administration of central mosques and the appointment of *imams*. The actual mix of this combination in any particular central mosque depends on those who established the mosque.

The administration of mosques is free from governmental control as the government stirs clear of religious doctrines. However, when there are disputes concerning administration of mosques including the appointment of *Imams* civil courts have jurisdiction. Emirs control traditional mosques in the emirates but no central Islamic authority regulates the establishment and administration of mosques in the country or any part thereof. This situation has allowed free flow of all sorts of ideas, ideologies and

sectarian views that has proved detrimental to the interests of Muslims and the country generally. There is a clear need to create an official or a quasi-official Islamic authority to regulate the affairs of central mosques in the country. Muslims in Nigeria should therefore be alive to this responsibility.

Constitutionalism and Accountability: A Case of over accountability

Muhammad Usman Ali*

Abstract

"Accountability is required to be seen in a holistic view to get a fair idea of efficient and result oriented accountability mechanism. The concept of accountability is very much entrenched in constitutionalism and rule of law and may not be separated from each other. These components functions within their own spare and checked each other. This paper consists of two parts: part one covers the broader picture of constitutionalism, rule of law and accountability. In part two I argue the situation of accountability in Pakistan with reference to part one."

1. Introduction

Accountability means one is responsible to another for performing the given duties or activities, and public accountability entails the liability of a public officer (both elected and unelected) to the public for doing their assigned tasks or duties and for their official conduct[1]. The idea of public accountability was coined in England which emphasized on accountability of King regarding expenditure from accumulated surplus, which was reformed during the surge of liberal democracy as accountability in regard to public funds. Optimal usage of public funds coupled with transparency and accountability is pre-requisite for good governance. Politician, civil servant and the executives are responsible to the public in regard to anticipated expenditures. The remedy against the bad governance lies in accountability, transparency and predictability coupled with the promotion of civil society, involvement of NGO which may establish link between have and have not. Corruption

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[1] M. Shamsul Haque. "Limits of Public Accountability under the Reinvented State In Developing Nations." *Public Administration Quarterly* 31, no. 3/4 (2007): 429-52.

may be controlled through media, transparency and by establishing effective legal environment. Though transparency is essential for accountability but it clashes with the idea of accountability in various ways. In United States, after war on terror, the executive branch need confidentiality to function effectively which make the accountability of executives more difficult[2]. The situation in Pakistan is not different. The authorities who fight war against terrorism enjoy enough constitutional safeguards in this regard and enjoy immunity from the civilian control anti-corruption institutions[3]. Accountability is important and affects considerably social, political and economic outcomes. It cannot be narrowly interpreted with reference to traditional doctrine or tenable exclusively through conventional representative democracy. The presumption that democracy paved the way for accountability is incorrect but accountability facilitated the rise of democracy. The author argued that accountability was a background principle which catalyzed the rise success of classical Athenian democracy[4]. Democracy is considered conducive to the commercial and political stability and reduced corruption is thought to be cure for bad governance[5]. However, it should be fully functional but in Pakistan, though military has retreated to the barracks but retained sufficient influence on political issues[6].

There is a conflict between biased checking the executive and neutral oversight. As indicated above, in absence of robust civil society and strong judicial system, the accountability or

[2] Shapiro, Sidney A., and Rena I. Steinzor. "The People's Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism." *Law and Contemporary Problems* 69, no. 3 (2006): 99-129.

[3] Zulfiqar Ali, "Anti-corruption Institutions and Governmental Change in Pakistan." *South Asia Multidisciplinary Academic Journal* (2018).

[4] Von Dornum, Deirdre Dionysia. "The Straight and the Crooked: Legal Accountability in Ancient Greece." *Columbia Law Review* 97, no. 5 (1997): 1483-518.

[5] Stockemer, Daniel. "Does democracy lead to good governance? The question applied to Africa and Latin America." *Global Change, Peace & Security* 21, no. 2 (2009): 241-255.

[6] Aqil Shah, and Bushra Asif. "Pakistan in 2014: Democracy under the Military's Shadow." *Asian Survey* 55, no. 1 (2015): 48-59.

executive oversight will relatively be politicized[7]. Without sufficient protections, the judiciary too cannot act independently and any law or executive action which violates the principle of independence of judiciary or its separation from judiciary is ulta vires[8]. At the same time judiciary too must be held accountable. No social institute can operate without answerable to the society. Besides individual inclination, there are powerful elements, which determine the scope of judicial function including institutional control, collective tradition and institutional character of the court in which the judge sit in the society as a whole[9].

It is said that the political executive are agent of the people and being agent perform duties on behalf of principle, usually in self-serving manner. Though, principally agent is accountable but control of political agent is more difficult and complex than a corporate agent. This complex relationship demands stringent mechanism of government transparency[10]. This agent and principle relationship differs substantially from responsibility which refers to inner control stimulated by professional or personal ethics[11]. Further all the executive does not fall within the ambit of agent being unelected. The ministerial advisors, who enjoy enough executive powers, being unelected are not the agent of the people and agency theory is not applicable between them[12]. Executive, in Parliamentary form of Government, are part and parcel of the legislature and theoretically responsible to elected representatives of the people. Theoretically, executives are to be scrutinized by the representatives of the political sovereign who

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[7] Bowen, Jeff, and Susan Rose-Ackerman. "Partisan Politics and Executive Accountability: Argentina in comparative Perspective." *Supreme Court Economic Review* 10 (2003): 157-210.

[8] *Younas Abbas v. Additional Session Judge, Chakwal*; 2016 PLD 581 SC.

[9] Shetreet, Shimon. "Judicial Independence and Accountability in Israel." *The International and Comparative Law Quarterly* 33, no. 4 (1984): 979-1012.

[10] Shapiro, Sidney A., and Rena I. Steinzor.

[11] DeLeon, Linda, B. G. Peters, and J. Pierre. "On acting responsibly in a disorderly world: individual ethics and administrative responsibility." *The Handbook of Public Administration (Concise Paperback Edition). London: Sage Publications* (2007): 351-362.

[12] Ng, Yee-Fui. "Ministerial Advisers: Democracy and Accountability." In *Law and Democracy: Contemporary Questions*, edited by Patmore Glenn and Rubenstein Kim, (ANU Press, 2014), p. 65-84.

may even dismiss them. This however, requires transfer of information coupled with honest and mutual trust[13]. Traditional parliamentary accountability is of two types: horizontal accountability and vertical accountability. The latter observe through regular, free and fair elections[14], whereas former accountability mechanism consist on constitutional check and balance including separation of power[15]. But mere regular election does not necessarily promote values of democracy or can achieve robust democratic accountability it promises[16] or merely written constitution does not make a country democratic. Observing constitutionalism is prerequisite for constitutional supremacy and democratic norms to flourish. The negation of constitutionalism makes the provisions of written constitution redundant. The existence of sustainable democracy and constitutionalism require constitutional culture for a considerable time wherein government and all segments of society are in habit of observing the basic principles of constitution[17]. However such constitutional norm could not flourish in Pakistan, like other south Asian countries, because of traditional respect for authority and habit of submission before those in authority rather than suspicions to authority. For promotion and expansion of public law to control exercise of executive power in arbitrary fashion, the culture is a big challenge, which also creates governance problems[18].

Parliamentary accountability was a robust mechanism of accountability till the King was sovereign. Once his authority removed and legislature became a governing body and started ignoring the demands of the people on the pretext that such

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[13] MacCarthaigh, Muiris. "Governance and Parliamentary Accountability." (Dublin: UCD Geary Institute, 2007).

[14] Department for international development (DFID) Decentralization and Political Accountability, the World Bank

[15] Ibid

[16] Guinier, Lani. "Beyond Electocracy: Rethinking the Political Representative as Powerful Stranger." *The Modern Law Review* 71, no. 1 (2008): 1-35.

[17] Kirkham, David M. "Constitutionalism as Protector or Disrupter of Nationalism: A Selected Central, Eastern European and Eurasian Review." *Connections* 3, no. 4 (2004): 43-52.

[18] Tan, Kevin Y. L. "The Role of Public Law in a Developing Asia." *Singapore Journal of Legal Studies*, 2004, 265-86.

demands represent a small segment of the society, whereas, they represent the whole. Parliament which was used to give consent to king's law on behalf of the people started legislating by itself. Being aggrieved from the situation, the people sought other ways for protection of their rights. In England Leveller proposed to set limits on legislatures. The idea was ignored by the English and equated the legislature with people. However, American adopted the proposal and ignored the concept of popular sovereignty and set limits while framing its constitution. Accordingly government is separate from the people thus adopted a form of strategy suggested by Leveller in England. In his view, accountability is the mean in which entire people stands apart from the government, in all its segments, and enforces the people's compact with its government. It is a way to enforce the trust placed in the representatives. He suggests the model in which an accountable system of government is not irreconcilable with the idea of an independent judiciary[19]. Accordingly government and the people could not be same and thus adopted a form of strategy suggested by Leveller in England. In his view, accountability is the mean in which entire people stands apart from the government, in all its segments, and enforces the people's compact with its government. It is a way to enforce the trust placed in the representatives. He suggests the model in which an accountable system of government is not irreconcilable with the idea of an independent judiciary[20]. However, the traditional parliamentary accountability, as being observed by Westminster model democracies, has lost much of its vigor because of several Parliamentary practices. Executives control parliamentary agenda with convenience[21]. Rise of administrative state, relatively weak second chamber, centralization of powers in Prime Minister Office away from the cabinet as a whole and rise and dominance of modern political party. These developments have created a situation in which judicial review appear to offer the individual citizens respite from the sense of powerlessness in face of

[19] Brown, Rebecca L. "Accountability, Liberty, and the Constitution." *Columbia Law Review* 98, no. 3 (1998): 531-79.

[20] Brown, Rebecca L. "Accountability, Liberty, and the Constitution." *Columbia Law Review* 98, no. 3 (1998): 531-79.

[21] Ibid., p. 19.

authority that democratic theory and political accountability seem to promise but too rarely provide[22].

2. Historical Overview

Pakistan came into being in 1947 and it opted Government of Indian Act, 1935 as an interim constitution with some modification[23]. In 1954, when constitution was yet to frame, Pakistan had to face first constitutional crises when the Governor General dissolved the constituent assembly and the same was upheld by Federal Court[24]. The constitution of 1956, just after two years of its promulgation, was abrogated by President General Askandar Mirza, who imposed Martial Law and dissolved Federal as well as Provincial Assemblies[25]. The Supreme Court of Pakistan validated the imposition of Martial Law on the basis of Doctrine of State Necessity[26], though it was declared that the country would be governed as nearly as possible according to the constitution of 1956[27]. Pakistan adopted its second constitution in 1962, with Presidential form of government. General Ayub Khan ruled till 1969 and forced to leave the throne for General Muhammad Yayha Khan, who imposed Martial Law and abrogated the constitution[28]. The Martial Law of General Yayha was declared unconstitutional after his departure by Supreme Court of Pakistan[29]. In 1971 East Pakistan was separated and the remaining Pakistan's National Assembly unanimously passed constitution of Pakistan. In 1977, once again, military came into power but this time constitution was not abrogated but hold in

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[22] GARDBAUM, STEPHEN. "Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?)." *The American Journal of Comparative Law* 62, no. 3 (2014): 613-39.

[23] Section 8 Indian Independence Act, 1947

[24] Federation of Pakistan v. Maulvi Tamizuddin khan, PLD 1955 Federal Court 240

[25] Hamid Khan, *Constitutional and political history of Pakistan*. (Karachi: Oxford University Press, 2005). p.118.

[26] *State v. Dosso,* PLD 1958 SC 533.

[27] *Province of East Pakistan v, Muhammad Mehdi Ali khan*, PLD 1959 SC 387.

[28] Hamid Khan, p. 201.

[29] Miss Asma Jilani V. government of the Punjab and another and Mrs. Zarina Gauhar V. the province of Sindh and two other, PLD 1972 SC 139

abeyance[30]. Once again Supreme Court validated the imposition of Martial Law again on the basis of Doctrine of State Necessity[31]. General Zia remained in power till his death in 1988. Though Martial Law was lifted in 1985[32]. Election was held on Non-Party basis and the newly elected Parliament passed 8th amendment wherein all the order passed by the Chief Martial Administrator were validated. Eight amendment changed complexion of the constitution all together. After the death of General Zia, election was held on party basis and Pakistan Peoples party came into power. This democratic era ended soon when General Pervez Musharraf proclaimed emergency on 14th October 1999 and it was declared that the country would be governed as nearly as possible, in accordance with constitution[33]. Once again the military's action and imposition of Emergency was declared valid by Supreme Court of Pakistan[34].

The military remained in power directly for more than 30 years and every time judiciary validated his unconstitutional acts. In-spite of having written constitution superior courts of Pakistan remained fail to observe constitutionalism, which is prerequisite for constitutional supremacy and democratic norms to flourish. Decisions of Supreme Court made the provisions of written constitution redundant. However, every time the constitution was abrogated and Martial Law was imposed, the people of Pakistan did not resist generally because people of Pakistan were not in habit of observing constitutionalism. In absence of support of masses, how five judges alone, unsupported by anyone, could declare Martial Law illegal? Asked Dorab Patel, Judge Supreme Court of Pakistan[35]. Thus being unsupported and complete lack of resistance from civil society against unconstitutional acts of the military, the Judiciary, in Pakistan, tried to avoid confrontation

[30] Proclamation of Martial Law, 5th July, 1977, PLD 1977 Central Statues, 326.

[31] Begum Nusrat Bhatto V Chief of Army Staff and Federation of Pakistan, PLD 1977 SC 657.

[32] Proclamation of withdrawal of Martial Law. PLD 1986 Central Statues 9.

[33] PLD 1999 Central Statue, 448.

[34] Syed Zafar Ali Shah V Pervez Musharraf PLD 2000 SC 869.

[35] Paula R. Newberg, *Judging the State, Courts and Constitutional Politics of Pakistan*, (Cambridge University, 2002), p. 07.

with executive and consequently lost its way to take the path of least resistance[36].The existence of sustainable democracy and constitutionalism require constitutional culture for a considerable time wherein government and all segments of society are in habit of observing the basic principles of constitution[37]. However such constitutional norm could not flourish in Pakistan, like other south Asian countries, because of traditional respect for authority and habit of submission before those in authority rather than suspicions to authority. For advancement and growth of public law to control exercise of executive power in arbitrary fashion, this culture is a big challenge, which also create governance problems[38].

Though every time judiciary validated and endorsed unconstitutional acts of military and in consequences, the Martial Law authorities damaged the very core of the independence of Judiciary and each time added more drastic provisions to control and make judiciary docile[39]. After imposition of Martial Law, General Ayub Khan appointed a constitutional commission, which was headed by retired Justice Shahabuddin who submitted its report on 6 May, 1961[40]. The commission recommended all the safeguards to ensure the independence of judiciary as was embodied in constitution of 1956. However the recommendations were modified by the cabinet sub-committee. The method of removal of judges was made different from the constitution of 1956[41]. Legislatures were declared sovereign and it was competent to decide the constitutionality of any law[42]. However, through first constitutional amendment, the judiciary were

[36] Ibid.

[37] Kirkham, David M. "Constitutionalism as Protector or Disrupter of Nationalism: A Selected Central, Eastern European and Eurasian Review." *Connections* 3, no. 4 (2004): 43-52.

[38] Tan, Kevin Y. L. "THE ROLE OF PUBLIC LAW IN A DEVELOPING ASIA." *Singapore Journal of Legal Studies*, 2004, 265-86.

[39] Shah, Amanullah. "Impact of Army on Independence of the Judiciary in Pakistan." *Gomal University Journal of Research* 25, no. 2 (2009): 1-10.

[40] President Ayub's Broadcast of 1 March 1962, Speeches and Statements of F.M. Muhammad Ayub Khan, Vol. IV, P. 170.

[41] Hamid Khan p. 148-149.

[42] Art. 133 of constitution of 1962

empowered to pass judgment over the vires of the legislature[43]. The jurisdiction of Superior court were further curtailed to the extent of decision of military courts and interpretation of Martial Law and Regulation[44] and the Judges were required to declare their assets[45]. In 1973 constitution superior courts were given enough constitutional safeguards and ample jurisdiction[46]. Bhutto government too, like previous dictators, curtailed jurisdiction of superior courts[47]. According to constitution judiciary was required to be separated from executive within three years, which was extended to five years by Constitution (Fifth Amendment) Act, 1976. Tenure for the office of Chief Justice of Pakistan and Chief Justice of High Court, unless retired earlier was fixed five and four years respectively. They were given option either to retire or serve as Judge of Supreme Court or High Court, as the case may be, after completion of tenure for office. Such Chief Justice, who continue after the completion of term of his office as senior most judge, could not again be appointed even as acting Chief Justice in absence of Chief Justice. The amendment was made applicable on sitting Chief Justice of Supreme Court or High Court. The Supreme Court was made subject to Art. 175 (2). Jurisdictions of superior courts under Art. 199 was further curtailed in matter of preventive detention. A judge of High Court could be transferred to any other High Court for the period of one year without his consent. Power of High Court under Art. 204 regarding contempt of court made subject to ordinary law. A judge of High Court who

[43] Constitution (first amendment) Act, 1963. Act I of 1964. PLD 1964 Central Statutes 33

[44] Jurisdiction of Courts (Removal of Doubts) Order, 1969. President's Order 3 of 1969. PLD 1969 Central Statues 119.

[45] Judges (Declaration of Assets) Order, 1969. President's Order 4 of 1969. PLD 1969 Central Statutes 120. Under this order enquiries were held into the financial affairs of the judges. Mr. Justice Fazal Ghani Khan of Lahore High Court resigned in result of enquiry held by Supreme Judicial Council under Presidential Order and Mr. Justice Shaukat Ali was held guilty of misconduct and removed on the recommendation of the Council. President v Justice Shaukat Ali, PLD 1971 S.C. 585.

[46] Art. 189, 190, 184, 185, 186, 199, 176, 177, 207, 209.

[47] Constitution (Fourth Amendment) Act, 1975. Act LXXI of 1975. PLD 1975 Central Statues 337. Accordingly High Courts were forbidden from issuing any order for preventative detention of a person or to grant bail to such person. Jurisdiction of High Courts were further curtailed in matter of stay of recovery, assessment, or collection of public revenues.

refused to accept his elevation to Supreme Court would be deemed to retire from his office[48]. Armed Forces lead by General Zia-Ul-Haq took over the administration of the country on 5th July 1977 and constitution was held in abeyance[49]. Once again military courts were established and declared immune from jurisdiction of civil courts by adding Art. 212-A[50]. This constitutional amendment and Martial Order 48 banning all political parties were challenged before Lahore High Court, which was admitted for regular hearing. The Martial Law authorities reacted quickly and barred jurisdiction of High Court from making any order regarding validity of any order of Martial Law authorities[51]. New constitutional court i.e. Federal Shariat Court was also established with the jurisdiction to declare invalid any law or provision of law being inconsistent with injunction of Islam as laid down in Quran and Sunnah[52]. In March 1981, a PIA plan was hijacked and Zia quickly enforced Provisional Constitutional Order (PCO) and judges had to take fresh oath under PCO[53]. Following traditional course, the court did not take long to validate PCO[54]. Zia remained at the helm of affair till his death in 1988 and democratic government headed by Benazir Bhutto came into power in August 1988 and remained Prime Minister till August 1990. Thereafter Nawaz Sharif's came into power as Prime Minister of Pakistan. In 1991 Nawaz Sharif government, the parliament passed twelfth Amendment to the constitution by adding Article 212-B and established special courts for the trial of heinous offences. This amendment created a hierarchy of courts parallel to the constitutional hierarchy consisting of High and the Supreme Court. The amendment was made temporarily for period of three

[48] Constitution (Fifth Amendment) Act, 1976. Act LXII of 1976 Central Statues 538.

[49] Proclamation of Martial Law, 5 July 1977, PLD 1977 Central Statues 327.

[50] Constitution (Second Amendment) Order 1979. President's Order 21 of 1979 Central Statues 567.

[51] Constitution (Amendment) Order, 1980. President's Oder 1 of 1980. PLD Central Statues 1980.

[5252] ibid

[53] Provisional Constitution Order, 1981. CMLA's Order 1 of 1981. PLD 1981 Central Statues 183.

[54] Tajjamal Hussain Malik v Federal Government of Pakistan, PLD 1981 Lahore 462.

years[55]. In second government of Benazir Bhutto appointments were made in superior judiciary that came before Supreme Court of Pakistan to consider constitutionality of those appointments. The Supreme Court of Pakistan settled the law for appointment of Judges by accepting the appeals against such appointments. Supreme Court held that appointment of ad hoc judges against permanent vacancies violates the constitution, acting chief justice cannot be consultee for appointment of judges, an additional judges acquires a reasonable expectancy to be considered for appointment as Permanent judge, all permanent vacancies should be filled in advance, senior most judge of a High Court has a legitimate expectancy to be considered for appointment as Chief Justice…[56]. This judgment is commonly known as judges' case and settled many questions regarding appointment of judges in superior court. The issue of appointment is directly linked with the independence of judiciary. Democratic government was once again sacked in October 1999, which too was validated by Supreme Court of Pakistan vide Syed Zafar Ali Shah case. Being annoyed from suo moto actions took by Chief Justice Iftikhar Muhammad Chaudhry, Musharraf called the Chief Justice to Army House and forced him to resign. After refusal of Chief Justice, Musharraf restrained him from performing duties by order and referred the matter to Supreme Judicial Council[57]. The Chief Justice filed a constitutional petition before Supreme, which was accepted and Chief Justice was restored[58]. In October 2007 Wajihuddin, a former judge Supreme Court of Pakistan filed constitutional petition against acceptance of nomination paper of General Musharraf for office of the President by Election Commission of Pakistan. Musharraf panicked and as pre-emptive act imposed emergency on 3 November, 2007[59] and issued Provisional Constitutional Order[60]. However he was finally reinstated to the position of Chief Justice after a long struggle by

[55] Constitution (Twelfth Amendment) Act, 1991, Act XIV of 1991, PLD 1991 Central Statues 461

[56] Hamid Khan, p. 51.

[57] *Al-Jehad Trust v. Federation of Pakistan*, PLD 1996 S.C. 324.

[58] *Mr. Justice Iftikhar Muhammad Chaudhry v President of Pakistan,* PLD 2007 S.C. 578.

[59] PLD 2008 Federal Statues 108

[60] Provisional Constitutional Order 1 of 2007, PLD 2008 Federal Statues 110.

lawyers, civil society and political parties. However after restoration judiciary set his own house in order by expelling PCO judges[61]. Above was the brief history of the judiciary, who has always be handmaiden of dictators and powerful executives, except a brief period of Chaudhry court. In return, every dictator generally and civilian government occasionally added more stringent legal provisions not only to curtailed jurisdiction of the superior courts even to humiliate the judges.

So far we discussed judiciary with reference to military governments. However judiciary exercised significant autonomy from civilian political actors not only in direct military rule but even under civilian rule[62]. As the Supreme Court invalidated many appointments in judiciary made by Prime Minister Benazir Bhutto[63], the Supreme Court got appointed the judges recommended by the Chief Justice under the dictum of Judges' case successfully, though Prime Minister Nawaz Sharif was reluctant[64]. Though, judiciary never resisted the military regimes but made recommendation of Chief Justice regarding appointment of judges binding on government subject to very sound reasons recorded by the President[65]. In 1997 Parliament adopted two constitutional amendments and repealed Art. 58(2) (b), the action was challenged through Petitions. The Supreme Court tried to enjoin their enforcement. Nawaz Sharif mounted a campaign which led to contempt of court proceedings against him. Consequently efforts to divide judiciary succeeded and ousted the Chief Justice from office[66]. During 1999 to 2008, Musharraf reigned directly or indirectly. In 2008, People Party headed by Asif Ali Zardari came into power and Zardari took the office of President of Pakistan. To pave the way for People Party, Musharraf issued National Reconciliation Ordinance, under which the cases against Mr. Zardari were dropped. In December 2009, Supreme Court took up the case of NRO to judge the vires of the Ordinance and declared it unconstitutional and ordered the

[61] Hamid Khan, p. 547-564.

[62] Gazdar, Haris. "Judicial activism vs democratic consolidation in Pakistan." *Economic and Political Weekly* 44, no. 32 (2009): 8-14.

[63] Supra 62

[64] Khan, Supra 66, p.623-625.

[65] Supra 62

[66] Asad Ali v Federation of Pakistan, 1998 PLD S.C. 161

government to reinstate all the cases withdrawn under NRO[67]. The government decided to resist the judgment consequently Supreme Court unilaterally disqualify the Prime Minister for non-compliance of its order[68]. Musharraf made university degree compulsory for members of Parliament, which was declared unconstitutional by Supreme Court headed by Abdul Hameed Dogar[69]. However the Supreme Court, headed by Iftikhar Muhammad Chaudhry, took cognizance of allegation of having false degree by various members of Parliament and ordered to the Election Commission of Pakistan to probe the degrees of the members of Parliament[70]. The provision which had been invalidated by the Supreme Court (headed by Abdul Hameed Dogar) was used by declaring the false claim of degrees as corrupt practices. In 2010, the Parliament unanimously adopted 18th amendment to the constitution, which was in line with the Charter of Democracy signed by PML (N) and PPP. The amendment reasserted the civilian supremacy, declaring the amendments made by Musharraf as unconstitutional and without lawful authority. Under 18th amendment procedure for appointment of judges was also changed by adding Art. 175-A of the Constitution. Though there was no much implication of Art. 175-A but it was challenged through various petition on various grounds mainly being contradictory to Salient features of the constitution. Though court did not pass final judgment and referred the matter to the Parliament with certain directions but Chief Justice criticized the Parliament for lack of debate over the amendment Package, another judge criticized for not taking the petitioners into confidence. Several Judges criticized the parliament for articulating why the amendment was necessary[71]. The Parliament in light of directions of Supreme Court of Pakistan adopted 19th amendment to the constitution[72]. Soon the Supreme Court

[67] Sindh High Court Bar Association v Federation of Pakistan, PLD 2009 S.C. 789

[68] Muhammad Azhar Siddique and Others v. Federation of Pakistan and Other, PLD 2012 S.C. 774

[69] Muhammad Nasir Mehmood v. Federation of Pakistan, PLD 2009 S.C. 107

[70] Muhammad Rizwan Gill V. Nadia Aziz, PLD 2010 S.C. 828

[71] Nadeem Ahmad Khan v. Federation of Pakistan, PLD 2010 S.C. 1165

[72] Constitution (19th Amendment), Act, 2010. Act 1 of 2011.

asserted supremacy over Parliamentary Committee for appointment of judges[73].

3. Judicial Autonomy

Discussion regarding Judiciary autonomy with reference to civilian institution, it has manifestly clear that, especially after the much celebrated period of challenging military regime of Musharraf, the judiciary remained overactive against weak civilian government and asserted undue autonomy. In this way judiciary has been swinging in two extreme i.e. submissive before nonelected institution and over asserted before weak elected representatives. Resultantly could not define the contours of independence of judiciary. Pakistan has experienced alternate military and civilian rule, which contributed imbalance between judiciary and other institutions. This imbalance help the unelected state institutions at the expense of weak representative institutions[74] Prevention of Anti-Corruption Act, 1947 was the first act to eradicate the evil of corruption fallowed by long line of such laws including Sindh Prevention of Bribery and Corruption Act, 1950, Public and Representative Office (Disqualification) Act, 1947, the Pakistan Criminal Law (Amendment) Act, 1958, the West Pakistan Departmental Inquiries (Powers) Act, 1958, Elective Bodies (Disqualification) Order, 1959, the West Pakistan Anti-Corruption (Establishment) Order, 1961 and the Government Servant (Conduct) Rules 1964. All the laws were applicable on public sector institutions and public servants. In second phase i.e. 1973-1989, the first most important law framed was constitution of 1973. The 1973 constitution set out Auditor General Office and Public Accounts Committee. The office of Wafaqi Mohtasib[75], Federal Investigation Agency was established. The third historical phase started in 1989 which still continue. Removal from Service (Special Powers) Order, 2000 was promulgated during Musharraf rule. National Accountability Bureau was established. All the

[73] Munir Hussain Bhatti v. Federation of Pakistan, PLD 2011 S.C 411

[74] Kalhan, Anil. "Gray Zone Constitutionalism and the Dilemma of Judicial Independence in Pakistan." *Vand. J. Transnat'l L.* 46 (2013): 1.P. 10

[75] Wafaqi Mohtasib (Ombudsman) Order, 1983

above mentioned laws were applicable to mainly to the representatives of the people and civil servants.

Perception about accountability in Pakistan remained all the time as partial and not independent, which had been used to arm twist of political opponent to get there loyalty. Public and Representative Office (Disqualification) Act, 1949 was applied to the Prime Minister, Chief Minister, Federal Ministers, Provincial Ministers, Parliamentary Secretaries, Members of Federal and Provincial Legislatures. Reference was required to be filed under this act by the Governor General or Provincial Governor before tribunal established for this purpose. The jurisdiction of were barred. The Governor General by exercising the powers conferred upon him through Public and Representative Office (Disqualification) Act, 1948 disqualified M.A Khurru, Chief Minister of Sindh for any public office for three years. Mr. Khurru challenged his disqualification and questioned the constitutionality of the vires of the PRODA but court upheld PRODA[76]. The Elective Bodies (Disqualification) Order was used by military regime effectively to neutralize the elements, who could resist the military regime. This order includes all the offences mentioned in PRODA, 1949 in addition to indulgence in subversive activities, preaching of any doctrine or doing of any act leading to destabilize the state, abuse of power, any attempt, act or abetment of misconduct. Reference to be filed before the President or the governor who referred the matter to special tribunal constituted for this purpose. In 1976 another anticorruption law was promulgated namely Holders of Representative Office (Prevention of Misconduct) Act, 1976. Accordingly the act was applicable to all the persons mentioned in PRODA, 1949. Misconduct was defined as accepting or obtaining any illegal gratification, anything valuable without consideration, dishonestly and fraudulently misappropriating public property. Civilian governments used their own peculiar accountability devices against their political rivals. The Ehtesab Bureau was established by Nawaz Sharif's government headed by Senator Saif Ur Rehman earned his own notoriety in this regard. NAB, the latest in this line is perhaps the most controversial institute of

[76] M.A. Khurru v. Federation of Pakistan, PLD 1950 Sindh 49.

Pakistan's history[77] and, like previous instruments, NAB is also being used against political opponents. It serves political purposes more than to eradicate the evil of corruption. Political figures on one sides are being victimized out of proportion whereas, the misdeeds of those from other side of political line are being conveniently ignored[78].

4. Conclusion

Constitutionalism, accountability and rule of law constituted the sword that can chop the head of impunity[79]. All the above mentioned legal devices are inseparable and sine qua non for genuine accountability in a country[80]. However, mere accountability divorced from rule of law and constitutionalism can neither chop the head of impunity nor can establish good order in the society. Unfortunately our history tells us that we, as a nation, remained failed to observe constitutionalism, rule of law and accountability in letter and spirit. Weakness in any one of such component may jeopardize the performance of other components. Thus the efficacy of accountability of one component is bound to be affected by working of the other component. On one hand a powerful segment of the state is immune from civilian accountability whereas, on the other side accountability institutions were/are being used to control political rivals. The nation has been witnessing no accountability or over accountability but not the meaningful or purposeful accountability. The judiciary, who was primarily responsible to observe constitutionalism and rule of law, during all this era did not play its role to keep the accountability institutions within the limits ordained by the constitution. Since inception of Pakistan, except short period from 2007 to 2013, the judiciary remained handmaiden of the powerful executive and remained miserably

[77] Mehboob, Ahmad Bilal. "Credibility of Accountability". Dawn 10th November, 2019

[78] Khawaja Salman Rafique Vs. National Accountability Bureau, Civil petition No. 2243-L of 2019, Supreme Court of Pakistan dated 17-03-2020

[79] Economic Freedom Fighter V. Speaker National Assembly, 2016 SCMR 1040

[80] Myth of Accountability, the Nation March, 18, 2017 by Afrasiab Khattak

failed to observe the constitution in letter and spirit[81]. Except relatively a small period of independence of Chaudhry court, the judiciary in Pakistan works to serve the deep state and unduly asserted its independence against week civilian organs of the state[82]. Even Chaudhry Court and lawyers' movement could not yield judicial power which might transfer its fruits except to a narrow unaccountable group of elite judges and lawyers[83]. Pakistan needs a robust and effective constitutional system for across the board accountability with no holy cows and no witch-hunts, which is sine qua non for good governance. Consequence of failure of accountability is bad governance. Good governance takes place when the process of governance is conducted within the framework of constitution and constitutionalism, separation of power, rule of law and due process of law[84]. Pakistan had experienced unnecessary overstepping of judiciary and armed forces, which resulted in institutional imbalance and this imbalance, serve purposes for unelected institutions. Traditional Parliamentary accountability of executive may not be result oriented unless involved by civil society, NGO, vibrant media coupled with transparency. Full functional democracy coupled with independent judiciary equipped with power of Judicial Review is also sine qua non for effective accountability. Parliamentary accountability is mainly of two types i.e. Vertical and Horizontal. Though political executive in Parliamentary form of government are directly elected representatives and presumed to be accountable to the people. But this relationship of agency is much more complex than corporate agency. Further, unelected executives who enjoy enough executive power are immune from this direct accountability of electorates. The traditional parliamentary accountability has lost its vigor because of various

[81] Khan, Muhammad Ikramullah, and Ayaz Muhammad. "An Evaluation of Separation of Powers: A Case Study of Pakistan (2007-2013)." *South Asian Studies (1026-678X)* 31, no. 1 (2016).

[82] Kalhan, Anil. "Gray Zone Constitutionalism and the Dilemma of Judicial Independence in Pakistan." *Vand. J. Transnat'l L.* 46 (2013): 1.

[83] Khan, Maryam. "Empowerment without Accountability? The Lawyers' Movement in Pakistan and its Aftershocks." (2019).

[84] Ahmad Mohiddin, Regional overview of the Impact of Failure Accountability on Poor People, Human Development Report Office, Occasional Paper, HDR 2002, United National Development Program, PP. 1-12

parliamentary practices thus impartial accountability mechanism is need. Any form of accountability divorced from the above depicted situation may not serve purpose.

Financial Action Task Force and Question of Legitimacy: A Constitutionalism-based analysis

Muhammad Naveed Khan*

Abstract

This article will analytically evaluate legal status of Financial Action Task Force (FATF), designated to set international financial standards and works as watchdog on threats of Money laundering (AML), Terrorist financing (TF) and Proliferation financing (PF). Its recommendations have universal pertinence to safeguard the global financial systems; the article finds that recommendations patronized by FATF are adherent to the United Nations conventions, international instruments thus integral to Global Administrative Law (GAL). Though, its institutional legitimacy is frequently objected by the non-member states, siding with global constitutionalism or the national sovereignty, but whether the framework truly suffers from the legal deficit, sufficient to discredit its mandate or not? However, the article at minimum settles there lies legitimacy behind FATF's recommendation. Nonetheless, it is necessary to have in place a mechanism sequel to the global constitutionalism to thwart concerns of authoritarianism and undemocratic run to constitutionalize FATF.

1. Introduction:

Criminalizing the acts of Money Laundering (ML) through international cooperation was first agreed in the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), signed by and between the G-7 and EU countries under the auspices of the United Nations.[1] Pursuant to the agreement, Financial Action Task Force (FATF), an inter-governmental body was formed in

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[1] See generally United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).

1989 to develop policies and respond threats of money laundering[2] posed to the financial institutions.

A term "Money laundering" refers to the process whereby money earned from a crime i.e. corruption, drug trafficking, fraud or tax evasion; is tried to be disguised as money earned through legitimate sources, causing losses to the banking system and the financial institutions[3].

To perform its functions, the Force was purported to examine the techniques and trends of money laundering, review of existing national and international reactions to such threats and then to come up with necessary measures to prevail over those threats[4]. Later, in April 1990, the Force issued forty (40) recommendations with extensive plan to sack the trends of money laundering i.e. money laundering as an offence, confiscation measures, record keeping, financial intelligence units and mutual legal assistance etc[5]. Later, in 2001, concerns of Terrorist Financing were also added to the mandate of Force. The term "Terrorist Financing" typically includes collection of funds and funding the acts of terror or the operations of terrorist organizations. It is different from money laundering in a way that fund for Terrorist Financing, most of times are collected from the legitimate sources i.e. funding, collection, or donations etc. The Force additionally issued eight (08) recommendations to counter issues of terrorist financing i.e. terrorist financing as offence and targeted financial sanctions etc.

Growing trends of the financial perils keeps the Force engaged in revising its standards to counter the challenging techniques. In Feb, 2012 a thorough review was conducted to monitor the vulnerability of

[2] Chohan, Usman W. (2019)' *The FATF on the Global Financial Architecture: Challenges and Implications*' 'CASS working papers on Economics and National Affairs, *EC001UC*.

[3] Waseem Ahmad Qureshi (2017) '*An Overview of Money Laundering in Pakistan and worldwide: causes, methods and socioeconomic effects*' Articles & Essays: University of Bologna Law Review 2017/2.

[4] Leonardo S Borlini, (2015)'*The Financial Action Task Force: An Introduction*' 'U4 BRIEF' 2015/2

[5] See generally: https://www.fatf-gafi.org/media/fatf/documents/recommendations(accessed on May, 15 2020).

the recommendations, and thereafter a revised version[6] of recommendations qua the financial standards was published requiring further integrity of the financial institutions with the help of benchmark measures developed by the Force[7]. The revised version also included issue of Proliferation Financing to its mandate. In addition, the Force carries a unique and diversified approach to conduct its evaluation processes.

2. The Force and its method of evaluation

Appraisal through the means of 'mutual evaluation[8]' makes the entire monitoring activity significant and unprecedented. The process is twofold; in the first phase, it examines whether the questioned country had complied to the technical requirements of the recommendations and in the next, it determines whether the domestic framework is effective to address dangers of money laundering, terrorist financing and the proliferation financing. In the technical compliance, the Force investigates the legal and institutional framework in place, powers, and procedures of competent authorities. In such a way, the Force tries to detect the effectiveness of the system[9]. However, following is a stepwise evaluation process of the Force:

First, an assessment team[10] is formed to initiate process of evaluation of a country.

Second, Regulatory framework of the targeting country is procured to study.

Third, the team conducts analytical review of such regulatory framework.

[6] The Revised version also included issue of proliferation financing to the mandate of the Force.

[7] Gray W. Sutton (2012)' '*The New FATF Standards*' George Mason Journal of International Commercial Law, 4/1: 68-75.

[8] It is a mutual peer review system to determine the levels of compliance with the international anti-money laundering and anti-terrorist financing standards.

[9] See: Fatf guidance on the risk-based approach to combating money laundering and terrorist financing: High Level Principles and Procedures (2007).

[10] The team is comprised on a group of experts from the fields of law, finance, and regulations.

Fourth, the team determines level of country's technical compliance with recommendations.

Fifth, the team separates a focus area and seeks comments from the country.

Sixth, the team, then, proceeds to visit the targeting country, meet up with the private and public sector stakeholders to examine and record effectiveness of the financial system.

Seventh, the team writes down its findings, thereafter a draft "mutual evaluation report[11]" is prepared, to be reviewed by the assessed country and the independent viewers.

Eighth, the assessment team presents key issues and findings to the plenary, where a discussion is held and if the report is approved by plenary, it is sent for review to all the global members.

Ninth, A final report with analysis and findings is published on website of the Force[12].

After publication of report, the assessed country may be required to take necessary steps to address the shortcomings appeared through the technical compliance or after adjudging the effectiveness of the system so as to ameliorate the system and qualify to be compliant in the post monitoring process[13]. Consequently, role of the Force becomes of reconstructing the structure at national and international law to regulate, monitor, evaluate and post moni-

[11] It is an assessment of a country's measures to combat money laundering and the financing of terrorism and proliferation of weapons of mass destruction. The report also includes assessment of country's actions to address the risks emanating from designated terrorists or terrorist organizations.

[12] Karl-Johan Karlsson (2017): The Financial Action Task Force (FATF) Mutual Evaluation Process https://www.youtube.com/watch?v=lrA9k3uZGRk (accessed on May, 11 2020).

[13] See generally, FATF (2013-2019), Methodology for Assessing Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems, updated February 2019, FATF, Paris, France, http://www.fatf-gafi.org/publications/mutualevaluations/documents/fatf-methodology.html.

tor the menaces of international threats to financial systems[14]. Although, there are no enforcement tools with the Force to proceed against the non-compliant states but the fear of being placed on its grey or black list and the peer pressure by other states causes the assessed country revamp the financial system in line with the recommendations and prevent grave economic implications[15]. Of course, viewing the given reasons, mere questioning status of FATF and its recommendations as undemocratic and unconstitutional would not afford non-compliant states any occasion to escape.

3. Legitimacy of the Force and recommendations:

Determining legal status of the Force is indispensable prior to steering a discourse on its recommendations and adjudging their worth, credence and force. Originally, the Force is neither an international organization nor an UN-body rather it is merely an ad-hoc inter-governmental task force[16] with mandate to set financial standards to combat money laundering, terrorist financing and proliferation financing, still it is without any enforcement powers except exclusion of non-compliant member states or placing the non-compliant states on grey or black list. Since the Force is not an arm of the United Nations; it has no vested legitimacy; more so abrupt and arbitrarily changes in its requirements frequently create resentment amongst the states and given rise to hostilities on the legal status of the organization[17].

Be that as it may, there is no denying to the fact that the Force is bent upon to exterminate international threats to the financial systems occurring due to money laundering, terrorist financing and proliferation financing, common subjects of other international organizations i.e. International Monetary Fund (IMF), UN Security Council and the European Union. Therefore, such link between Force

[14] Michael Pisa (2019), Center for Global Development, Policy Paper No. 143 of 2019, 'Does the Financial Action Task Force (FATF) Help or Hinder Financial Inclusion? A study of FATF Manual Evaluation Reports'.

[15] Chohan, *supra* note at 3.

[16] See generally https://www.tatf-gafi.org/publications/fatfgeneral/ (accessed on April, 11 2020).

[17] Koker, Louis (2011), '*Aligning anti-money laundering, combating of financing of terror and financial inclusion: Questions to consider when FATF standards are clarified*' 'Journal of Financial Crime' 18/4: 361-386.

and the Security Council is of no surprise as the Force helps the Council in identification of threats concerning money laundering and terrorist financing. Further, it closely works with the committee on Counter- terrorism and the sanctions committee of the Security Council to develop monitor and evaluate counter terrorism measures[18]. It is necessarily cited that no provision of any law restricts countries to form any consortium, force and formulate policy or issue the recommendations, in the common interest to counter and curb international financial threats.

It is purposely echoed that texts of forty-nine (49) recommendations set financial standards to impede threats of money laundering, terrorist financing and proliferation financing posed to financial systems. It is destined that the recommendations be incorporated in the domestic legal framework at national level by the states to deliver them through criminal administration of justice. The recommendations require from 180 states to implement international conventions, criminalize money launders, confiscate the proceeds, apply rules of customer's due diligence, establish a financial investigation unit to trace suspicious transactions, transparency, adopt preventive measures and promote international cooperation[19]. The recommendations not only target the primary perpetrators of threats but also cover the gatekeepers i.e. lawyers, accountants and real estate agents referred as "*designated non-financial businesses & professions*"[20].

For the maximum results, the Force is also in practice of issuing advisory papers and reports to help the stakeholders in application of risk-based approach (RBA) to anticipate consequences of threats to the financial systems. Although recommendations and other publications, issued by the Force time to time are referred to contain a "soft law[21]"; yet non-compliance by the states may risk them

[18] James Thuo Gathii (2010), *The Financial Action Taskforce and Global Administrative Law*, 'Legal Studies Research Paper Series, Albany Law School', 2010/10.

[19] See generally the text of recommendations.

[20] Laurel S. Terry (2010), '*An Introduction to the Financial Action Task Force and Its 2008 Lawyer Guidance*', Penn State Law: State University the Dickinson School of Law Legal Studies Research Paper 39'

[21] Andrew Guzman & Timothy Meyer (2014), '*Soft Law*', Research handbook on the Economics of Public International law 5

to dismember from the organization[22] and/ or being put on grey or blacklist. Incorporation of such soft law in the UN Security Council resolutions and IMF conditionality translates it into the hard law. In addition, there are series of transnational instruments, which postulate interlinks between the Force and international organizations on the joint endeavors to counter threats of money laundering and terrorist financing. However, to find out the legitimacy behind the Force's recommendations and its edicts, one may be guided from the following international events and instruments:

1. Pursuant to the Convention against illicit traffic in Narcotic Drugs and Psychotropic Substance (the Vienna convention) 1988; the inter-governmental body "Financial Action Task Force" was formed to address the menace of money laundering[23].

2. The United Nations commission on Narcotics Drugs[24] noted that 40 recommendations issued by the Force, duly concurred by heads of states, government of seven major countries and president of European commission on money laundering, be adopted.

3. Economic and Social Council (ECOSOC), a central platform of United Nations for the sustainable development urged member countries to boost up co-operation with UN bodies and the Force in developing guidelines for detection, investigation, and prosecution of money laundering[25].

4. The recommendations helped countries in implementing the UN instruments including United Nations Security Council Resolution 1373, United Nations Security Council Resolution 1267, the successor resolutions, and the international convention for the suppression of the financing of terrorism as

[22] Pavlidis, G (2020), '*Financial Action task force and the fight against money laundering and the financing of terrorism: Quo vadimus?*' 'Journal of Financial Crime' Volume 27

[23] See generally, Supra at 2.

[24] The UN commission endorsed the recommendations vide its resolution No. 5 of April 24, 1996.

[25] Such expression was recorded in resolution No. 1993/30 passed on July 27, 1993.

the provisions of all these instruments have been incorporated in the recommendations[26].

5. It is expounded that revised version of the recommendations had proposed criminalization of financing of terrorism in line with the UN convention for suppression of the terrorist financing by calling asset freeing, seizing and confiscation etc[27].

6. The Strasbourg convention of 1990 also adopted recommendations of the Force to prevent money laundering through the banking and financial systems[28].

7. It is reported that on April 13, 2001, the executive board of IMF recognized 40 recommendations on money laundering and incorporated them in IMF's methods[29].

8. On July 26, 2002, the executive board of IMF added 49 recommendations conditionally to their operational standards with the participation of World Bank and the Force[30].

9. International Monetary Fund, World Bank, African Development Bank, Asian Development Bank, United Nations office on drugs and crime, and United Nations counter terrorism committee are amongst the observer members of the Force.

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[26] See generally, at http://www.un.org/sc/etc/resources/database/recommended-international-practices-codes-and-standards/united-nations-security-council-resolution-1373-2001/ (accessed on May 22, 2020).

[27] See generally, International Standards on combating money laundering and the financing of terrorism & proliferation: the FATF recommendation at https://www.fatf-gafi.org/media/fatf/documents/recommendations/

[28] See generally: preamble of the treaty No. 141: Convention on laundering, search, seizure, and confiscation of the proceeds from crime.

[29] Nadim Kyriakos-Saad Cheong-Ann Png (2008), '*Recent Developments in international monetary fund involvement in Anti-money laundering and combating the financing of terrorism matters*' in 'Current Developments in monetary and financial law, Vol 4 (Washington: IMF): 527-536

[30] See generally: http://www.imf.org/en/News/Articles/2015/09/14/01/49/pr0252 (accessed on April 13, 2020).

10. That the United Nations General Assembly admired the recommendations[31] as under: -

> "to encourage states to implement the comprehensive international standards embodied in the forty recommendations on money laundering and nine special recommendations on terrorist financing of the financial action task force, recognizing that states may require assistance in implementing them:"

11. That United Nations Security Council endorsed[32] the recommendations in the following words:

> "Strongly urges all member states to implement the comprehensive, international standards embodied in the Financial Action Task force's (FATF) forty recommendations on Money Laundering and the FATF nine special recommendations on Terrorist Financing".

Given recognition of the recommendation by the international organizations is contemplated a major milestone towards effective transformation of its soft law shaping into the hard law. Setting financial standards by the Force is treated to have opened window to global administrative law[33] in which traditional means of framing international law through diplomatic process no longer exists[34]. Although, the recommendations are not required to be inserted in the domestic legislation as a binding means, yet the rating (normally denoted through grey and black list) of the jurisdictions after the mutual evaluation process and the policy of "name-and-shame" may affect the states at large scale. Thus, texts of such law, though non-binding in letter and spirit but are with potential to shift into harden

[31] Such appreciation was recorded vide general assembly resolution No. 60/288.

[32] Recommendations were endorsed vide Security Council resolution no. 1617 dated July 29, 2005.

[33] Jared Wessel in 'Financial Action Task Force: A study in balancing sovereignty and equality in Global Administrative Law' defined it as '*Global Administrative Law refers to a developing set of norms that govern the various transnational systems of regulation and regulatory cooperation designed to manage globalization'*.

[34] Ibid.

terms as the non-compliant states may be led to face inter alia economic implications: -

- More stringent conditions will become applicable for the remittances.
- International funding to the country will become difficult due to rigorous conditions.
- There will a considerable decline in the foreign direct investment.
- International trade may suffer as the international partners will not be ready to co-operate or doing business due to threats posed to the financial systems.
- There may be procurement of imports on heavy costs resulting inflation in the domestic market.

4. The Force, its recommendations, and the Global Constitutionalism:

With the emergence of globalization, need arose for a unified and cohesive regime to regulate the social and economic life of states, and also a necessity to develop means of global governance, thus it gave birth to the Global Administrative Law (GAL). The evolving law concedes the demand of globalized inter-dependence in the fields of trade, security, financial systems etc. through the transnational regulatory framework[35] in a consensual manner. However, a discourse to Global Constitutionalism, its fundamentals and the features is central to find out the legitimacy behind the institution of Force, its recommendations, and edicts.

Constitutionalism is different from the constitution in a way that it refers to the basic ideology of a nation based on their way of life, values, beliefs and ideals whereby they could achieve the goals of parliamentary democracy, rule of law, fundamental right, separations

[35] Rajeshwar Tripathi (2011), '*Concept of Global Administrative Law: An overview*' India Quarterly: A Journal of International Affairs' 67/4: 355-372.

of powers and independence of judiciary[36]. Admittedly, there is no single document named as Global Constitution rather there are visions, ideologies, and principles, what a global constitutionalism must contain[37]. Theory of Global Constitutionalism claims that principles of rule of law, separation of powers, checks and balances, protection of fundamental rights and democracy, be respected by the transnational regulators in the spheres of global governance and sovereignty of no other state should be compromised in any manner whatsoever.

Now, to gauge the legitimacy of the institutional framework of Force and its recommendations on the scrutiny of constitutionalism, one is supposed to find out co-existence of its four dimensions i.e. social constitutionalism, institutional constitutionalism, normative constitutionalism, and analogical constitutionalism in the entire operations[38]. Before analyzing operations of Force and its recommendations from the standpoint of constitutionalism, it will be in the fitness of explanation to reiterate a brief narrative on the Force:

> "Concisely, FATF is an intergovernmental organization, which sets financial standards of universal application to combat money laundering, terrorist financing and proliferation financing. It also fosters effective implementation of legal, regulatory, and operational measures though peer reviews and the process of mutual evaluation, coupled with maintenance of black and grey list with post monitoring mechanism. Membership to the FATF is voluntary and presently, the organization has 39 full members (involved in the task of formulation of policy, framing of recommendations, conducting surveys, preparing evaluation reports and decision about placing the non-compliant states in black or grey list), 08 associate members, 30 observer members whereas more than 180 countries have been obliged to follow

[36] Anne Peter (2017) *Global Constitutionalism: the Social dimension*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3083578

[37] Christine E.J. Schwobel (2010), '*Situating the debate on global constitutionalism*' Oxford University Press', 8/3: 611-635.

[38] *See generally*, Christine E.J. (2010) *Organic Global Constitutionalism,* Jeffrey L. Dunoff and Joel P. trachtman '*A functional approach to international constitutionalization, and Ruling the world?* Constitutionalism, International law, and Global governance (2009).

the recommendations, which failure on their part may entail peer pressure from other states and also the financial implications."

The above depiction revealed that only full members of the Force are sitting in the regulatory body, and starting from the development of policy till post monitoring evaluation of the non-compliant states; non-members have no say or participation in the processes notwithstanding they are posed to financial implications in case of being non-compliant. Still, lets proceed to trace existence of fundaments of constitutionalism in the making of policies, setting recommendations, processes of mutual evaluation and reporting the results.

Social Constitutionalism necessitates the features of participation, contribution, influence, and horizontal accountability. In functions of the Force, all four essential components of social constitutionalism are missing; thus, it results in derogation from the notion of co-existence, refusal to constitutional democracy and letting the absolute power of the transnational regulator prevail. In the mechanics of the Force, non-member states have no participation in the making of policies or the recommendations, so neither there is any contribution from their side nor the influence[39]. Yet, they could be posed to similar sanctions and economic implications like the full members in cases of non-compliance; such aspect vividly frustrates their right to raise concerns on the validity of the evaluation or the decision.

From the facet of **Institutional Constitutionalism**, one is likely to gather the locus of power in the global governance and whether the same is duly approved by the stakeholders. Institutionalization of power is derived from the theory of conferment and the decision making, with the common object of general welfare. Allocation of power is always with certain limitations to exclude an overarching governmental authority or to hold the decision makers accountable

[39] Antonio Floridia (2013), *Participatory Democracy versus Deliberative Democracy: Elements for a Possible Theoretical Genealogy.* Two Histories, Some Intersections' 'Four Decades of Democratic Innovation Research: Revisiting Theories, Concepts and Methods: '7th ECPR General Conference, 19/147.

for the decisions[40]. Here, the force, is again deficient in terms of non-allocation of powers by the non-members states and the unrestricted use of powers by the force in passing of recommendations and deciding the fate of mutual evaluation results. There is, of course, neither a right of a non-compliant state to complain against the findings of the force nor any system in place for the checks and balances on their decisions. Thus, its institutional structure had disturbed substantially a global democratic order.

Distinct from the constitutional infirmities conversed in the contexts of Social Constitutionalism and the Institutional Constitutionalism; there is also a scholarship of **Normative Constitutionalism.** Certain norms and principles have global character and universal application; derived from the inherent ethical moral values of the society, which legitimacy cannot be questioned merely on the reasons of procedural disparities[41]. These fundamental norms are central to the international community and could be treated minimum standards of morality with underlying permissibility, stemmed from the humanitarian impulses, neither from the international organizations nor multilateral state governments[42]. *Jus cogens*[43] and *Erga omnes*[44] are the common examples of such norms. It is emphasized that at the core of Normative Constitutionalism; there lies universal acceptance of common interests of mankind, to which all the states impliedly agreed to submit.

In support of the validity of the higher norms, Ferrajoli stated:

[40] James N. Rosenau, (1992) '*Governance without Government, order and Change in the world politics*' Cambridge studies in international relations 20, Cambridge University Press, New York.

[41] Mark S. Schwartz (2005), '*Universal Moral Values for Corporate Codes of Ethics*', 'Journal of Business Ethics', 59/2: 27-44

[42] James Darcy (1997), '*Human Rights and international legal standards: What do relief workers need to know?* 'Relief and Rehabilitation Network, Overseas Development Institute, London: 97/19

[43] Jus Cogens refer to those principles, which form the norms of international law that cannot be set aside i.e. prohibitions against crimes, against humanity, genocide, and human trafficking.

[44] Erga omnes are the rights or obligations, which are owed towards all. For instance, a property right, enforceable against anybody infringing that right.

> "though the framework may be missing the social and institutional guarantees but the norms of common interest sequel to the global constitutionalism have already been established in the UN Charter, declarations and the international conventions[45]."

He added that theory of idealism is central to the development of Normative Constitutionalism, so it promises a future good society. More so, he applauded the normative dimension of global constitutionalism in his essay "Beyond Sovereignty and Citizenship: A Global constitutionalism"[46]. However, the recommendations to combat international threats of money laundering, terrorist financing and proliferation financing are of normative character thus, warranted, legitimate and realistic for the fabric of Normative Constitutionalism.

To concede the legitimacy of the Force and its recommendations from the preview of **Analogical Constitutionalism**; one is required to come up with harmonizing features, common to the domestic as well as global constitutionalism. Concept of Analogical Constitutionalism entails an activity of blending the key features of several domestic ideologies and constitutions to generate harmonized and standardized global constitutionalism[47]. Mr. Christian Tomuschat is a proponent of this dimension as he proposed the idea of integrated international community expounded by the theory of systemization of law[48]. At some other place, global constitutionalism was termed as law of co-ordination than that of subordination.

To undertake the exercise of standardization; constitutional principles are drawn from the domestic constitutional orders and

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[45] Luigi Ferrajoli, '*Beyond Sovereignty and Citizenship: A Global Constitutionalism*' in Richard Bellamy, ed., Constitutionalism, Democracy and Sovereignty: American and European Perspective (Aldershot: Avebury 1996)

[46] "*The legal project at the basis of global constitutionalism is, in the long term, the only realistic alternative to war, destruction, the rise of a variety of fundamentalisms, ethnic conflicts, terrorism, an increase in famines and general misery.*"

[47] Christine EJ Schwobel (2011), '*A Practical Approach to organic global constitutionalism*', Global Constitutionalism in International Legal perspective' Volume 4: 167-188

[48] See generally, Christian Tomuschat (2003), Human rights 'Between Idealism and Realism'

incorporated in the global constitutionalism to systematize, harmonize, and standardize the global constitutionalism[49]. However, the recommendations, since framed and issued without discussing and consulting domestic constitutions of states, the same may not be termed systematized or standardized globally regardless to any coherence.

5. Conclusion:

Globally, it is believed that threats of money laundering, terrorist financing and proliferation financing are universal dilemmas and an effective mechanism at national and international level to counter and curb these menaces is much needed. Further, creation of a transnational body as a force on the theory of inter-dependence and sequel to the global administrative law is, of course a significant move. However, controversy emerged, when few powerful states of the world hijacked the entire operations of the Force, starting from formulation of policy, setting financial standards, issuing recommendations, and structuring the evaluation methods, without resorting to other international partners. The resentment geared up when the non-participant community was urged to abide by the recommendations, failing which could occasion them to face severe economic implications. Model of Global Constitutionalism is an inclusive phenomenon; thus, it must require the Force to carry the characteristics of global constitutionalism i.e. democracy, checks and balances, fundamental individual rights and the accountability measures, otherwise, the Force would be exclusive, hence unconstitutional.

Testing the legitimacy of Force and its recommendations from the screening of global constitutionalism illustrates it a complex and multidimensional subject of research. A discourse to the various dimensions of the constitutionalism guided author to conclude that fundamental right of participation is unequivocally missing from the business model of the Force, which results exercise of unrestricted powers by the regulating body. Similarly, locus of power is also undemocratic as the conferment of powers and the accountability of the decision makers are also not unaccounted for.

[49] David S. Law and Mila Vesteeg (2011), '*The Evolution and ideology of Global Constitutionalism*', 'California Law Review' 99/5: 1163-1257

Conversely, recommendations of the Force to combat money laundering, terrorist financing and proliferation financing by means of preventive measures, risk based approach, promoting transparency, confiscation of proceeds and the international cooperation, are indubitably expedient to societal welfare with universal acceptability, and also coherent to the various international law conventions and the instruments. However, the model is deficient of analogical constitutionalism due to no representation of all the stakeholders in the entire functions and obliviousness from the characteristic of domestic constitutionalism. Hence, it is principally concluded that the institution of Financial Action Task Force (FATF) is unconstitutional and illegitimate body in terms of being undemocratic, devoid of accountability processes and short of standardized framework whereas mere existence of normative features in its recommendations may not help the Force to assume the status as constitutional and legitimate.

A Way Forward:

Having discussed the shortcomings of social, institutional, and analogical constitutionalism, occurring through the operations of the Force; lets advocate concept of inter-dependence through the transnational organization. Use of deliberative democracy, participative democracy, and the representative democracy, in wake of globalization, is becoming imperative as it still carried will of the people. Existence of normative constitutionalism behind the working model of the Force suggested the validity of the recommendations; yet there is an acute need to supplement the institution and processes of the Force through certain techniques so to add the components of social, institutional and analogical constitutionalism in the existing framework. Therefore, following measures are proposed: -

1. Although membership to the task force is voluntary but its policy and mutual evaluation results can have potential effects, even on the non-member states; therefore, it is recommended that any future policy, draft or the recommendations should have a prior review and input from all the stakeholder including the non-member states. Such input may be procured by means of deliberative, participative, or representa-

tive democracy.

2. To demonstrate existence of real democracy in the processes of the Force and to prevent any influence by the governing body; it is also proposed that certain weightage i.e. 50 or 60 % equivalent to the ratio of non-member states, be given to their opinion and feedback in the matters of formulation of policy, preparation of draft and issuing of future recommendations.

3. To keep the forty-nine (49) recommendations of the Force alive, the voting rights of non-compliant states could be withdrawn whenever needed.

4. In the process of mutual evaluation, the assessment team must comprise at least one nominee from the assessed/ targeting country to avoid chances of influence, erroneous reporting of facts on measures, and the effectiveness of the system.

5. It is urged that while composing the results of mutual evaluation, the decision- making body should include certain ratio of non-member state representatives to avoid chances of monopolizing the results on the behest of member states for ulterior motives.

6. The decision-making body should have considered the political conditions of the assessed country, financial difficulties posed to the governments before placing the questioned country on their targeted lists.

Islamization of the Constitution of 1956: The role of Religious, Political Parties

Muhammad Nawaz*

Abstract:

After the birth of Pakistan, the most important assignment before the Constituent Assembly was the framing of Constitution for an embryonic State. Soon after the birth of Pakistan, the question of Islamic Constitution was raised as promised by the founding father in the course of Freedom Movement. The Religious, Political Parties and some sections within the ruling Muslim League demanded Islamic Constitution. The leaders of the Religious, Political Parties within and out of the Constituent Assembly of Pakistan played an active role in the Islamization of Constitution of 1956. This article is an endeavor to disclose the possible struggle of Religious, Political Parties regarding Islamization of the Constitution of 1956.

Key Words: Pakistan, Islamization of Constitution, Religious, Political Parties, Objective Resolution.

1. Introduction:

Islam played a pivotal role in the birth of Pakistan. The founding fathers of Pakistan Movement appealed the religious sentiments of the Muslims of British India which proved instrumental in gathering the Muslims of India under the banner of All India Muslim League. Although the creation of Pakistan out of the yoke of British India was the result of multiple factors, e.g. political, socio-cultural and economic, but, the fact remains that the *raison d'eter* of the emergence of Pakistan was Islam.[1] Islam was the only cementing force which bonded the Pashtuns, Punjabis, Sindhis, Bengalis, Balochis and many small groups from different parts of

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[1] Abdullah Adnan. "Pakistan: Creation and Genesis. "The Muslim World96, no. 2 (2006): 201-217.

India under a single umbrella for the creation of Pakistan.[2] Muhammad Ali Jinnah, the founding father of Pakistan during the course of Freedom Movement promised the Muslims about the Islamic Constitution of Pakistan. The main sources of his inspiration and guidance for the national effort were Islam and the Holy Prophet Muhammad (Peace Be upon Him). About Islam the Quaid said:

> "It is not only a religion, but it contains law, philosophy and politics. In fact, it contains everything that matters to a man from morning to night. When we talk about Islam, we take it as an all-embracing word. We do not mean any ill will. The foundation of our Islamic code is that we stand for liberty, equality and fraternity".[3]

In his message on the occasion of 'Id-ul-Fitr in October 1941, he explained:

> "Islam lays great emphasis on the social side of things. Every day, the rich and the poor, the great and the small living in a locality are brought five times in a day in the mosque in the terms of perfect equality of mankind and thereby the foundation of a healthy social relationship is laid and established through prayer. At the end of Ramazan comes the new moon, the crescent as a signal for a mass gathering on the 'Id day again in perfect equality of mankind which affects the entire Muslim world."[4]

In an 'Eid message in September 1945, the Quaid-i-Azam pointed out; The Quran is the general code for the Muslims, a religious, social, civil, commercial, military, judicial, criminal and penal code. It regulates everything, from the ceremonies of religion to those of daily life, from the salvation of the soul to the health of the body, from the rights of all to those of each individual from morality to crime; from punishment here to that in the life to come, and our Holy Prophet Mohammad (Peace by

[2] Fakhr-ul-Islam and Muhammad Iqbal. "Islamizing the Constitution of Pakistan: The Role of Maulana Maudoodi." *Al-Īḍāḥ* 27 (2013): 58-59.

[3] S.M. Burke, and Salim Al-Din Qureshi, *Quaid-I-Azam Mohammad Ali Jinnah His personality and His Politics*, (Karachi: Oxford University Press, 1967), p. 367.

[4] Ibid., P. 367.

upon Him) has enjoined on us that every Muslim should possess a copy of the Quran and be his own priest. Therefore, Islam is not merely confined to the spiritual tenets and doctrines or ritual and ceremonies. It is a complete code regulating the whole Muslim society, every department of life, collective and individual.[5]

He once said, "Our religion, our culture and Islamic ideals are our driving force to achieve independence."[6]

Muhammad Ali Jinnah, the father of the nation after the birth of Pakistan several times expressed his views about the characteristics of the future Constitution of Pakistan. Some of his speeches are reproduced here. Addressing the Karachi Bar Association on the eve of the 12 Rabi-ul-Awal, the Quaid-e-Azam said:

> "I fail to understand why some people indulge in the misleading propaganda whether or not the Constitution will be in accordance with the Islamic *Shari'ah*. Islam today is as much practical religion as it was 1300 years ago. It is a standard bearer of democracy. It is Islam which guarantees justice, fair play, and equality. And the whole World will see that we will frame our Constitution in accordance to it"[7]

In February 1948, in a broadcast speech to the people of the USA he declared:

> "The Constitution of Pakistan has yet to be framed by the Constituent Assembly of Pakistan. I don't know what the ultimate shape of the constitution is going to be but, I am sure that it will be a democratic type having the essential features of Islam. Islam and its idealism have taught us democracy; it has taught equality of man, justice and fair play to everybody. We are inheritors of these glorious traditions and are fully alive to responsibilities and obligations as framers of the Constitution of Pakistan."[8]

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[5] Jamil-ud-Din Ahmed, *Speeches and Statements of Mr. Jinnah*, (Lahore: M. Ashraf, 1968), pp. 208-209.

[6] Ibid., p. 242.

[7] Ibid., p. 250.

[8] Fakhr-ul-Islam and Muhammad Iqbal, p. 60.

Soon after the emergence of Pakistan on the map of the world on August 14, 1947, a controversy over the nature of the State began. The traditionalists and modernists were trying to make it as per their wishes. The views and speeches of Muhammad Ali Jinnah before and after the creation of Pakistan were interpreted differently both by ulema and modernists. The modernists explained that Jinnah wanted a Muslim State while the traditionalists were of the view that he wanted an Islamic State.[9]

2. First Constituent Assembly of Pakistan:

The foundation of every system of Government is raised on its constitution. Every state must have its constitution; even a state governed by a dictator has a constitution. A state having no constitution cannot be called a state but a regime of anarchy. It is a body of rules according to which government is an agent of the state is carried on. These rules deal with the form of government, the structure and the functions of the various organs of the government and relations between the same.[10] The First Constituent Assembly of Pakistan came into existence as a result of transfer of power under the Indian Independence Act, July 18, 1947.[11] The inaugural session of the first Constituent Assembly of Pakistan was held in Karachi from 10 to 14 August, 1947 at the building of Sind Provincial Assembly. Mr. Jogandar Naath Mendal, a Hindu member from the East Pakistan was unanimously elected as temporary Chairman of the first session of the Assembly.[12] On August 11, 1947, Muhammad Ali Jinnah, the founder of the nascent nation was elected as the President of the First Constituent Assembly. Under Article 8 of Indian Independence Act of 1947, the Constituent Assembly adopted the Indian Act of 1935 as an Interim Constitution with certain alterations, till the Constituent Assembly of Pakistan frame its own Constitution. The Assembly had to perform dual function:

(a) Framing of Constitution

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[9] Mazhar UlHaq, *1973 Constitution of Pakistan,* (Lahore: Bookland, 1999), p. 15

[10] Ibid., p. 17.

[11] Ibid., p. 18

[12] Ibid., p. 19

(b) Day to day legislation[13]

Soon after the emergence of Pakistan the religious political parties began to struggle for making Pakistan an Islamic state. The more important among these were Jamiat al - Ulama- i- lslam (JUl), the Jami at al - Ulama- i Pakistan (JUP) , the Jammat e Islami Pakistan (JIP) , and a section of the Pakistan Muslim League (PML). On October, 26-29, 1945, the pro League *ulema* formed JUI and Maulana Shabir Ahmad Usmani was elected its *Amir* to counter the rising propaganda of pro- Congress Jamiat Ulama-e-Hind.[14] After independence the JUl was reorganized to struggle for establishing an Islamic order in Pakistan with Maulana Shabir Ahmad Usmani as its president and Maulana lhtishamul Haq Thanvi as the general secretary.[15]

The Barelvi Ulema under the banner of the All-India Sunni Conference formed in 1925 had mobilized support for the Pakistan demand and they had always been in close touch with the Muslim masses, especially in the rural areas. After the birth of Pakistan, the Barelvi Ulema and Mashaikh from different areas of Pakistan met in Multan and established Jamiat Ulama-i-Pakistan on March 28, 1948. After its birth, the JUP participated in the poetics to introduce an Islamic order in Pakistan.[16] The most well organized and well-disciplined religious political party was Jamaat e Islami, established by Sayyid Abul Ala Maududi on August 26, 1941. Although it did not support the All-India Muslim League's demand from for Pakistan, but, after independence it felt no reservations or hesitation in starting a moment for transforming Pakistan into an Islamic State.[17] Beside these religious political parties, the PML had a strong contingent in its ranks striving to establish an Islamic state in Pakistan. Among these people the more prominent were Sardar Abdul

[13] Ikram Rabbani, *Pakistan Affairs*, (Lahore: Carvan Press, 1999), PP. 1-2

[14] G.W. Choudhury, *Constitutional Development in Pakistan*, p. 15.

[15] Ibid., p.30.

[16] Riaz Ahmad. "Pakistan's First Constituent Assembly's Efforts for the Making of Constitution, 1947–1954." *Pakistan Journal of History & Culture* 23: 1, (2002).

[17] M. Rafique Afzal "Pakistan: Struggle for an Islamic State, 1947-1971." *Islam in South Asia*: P. 502.M.

Rabb Nishter,Pir Amin al-Hasanat of Manki Sharif, Mian Abd al-Bari. Maulana Akram Khan and Maulana Abdullah al-Baqi.[18]

The early years of Pakistan's history were a period of constant struggle for survival. The fluctuations in the intensity of the demand for an Islamic State were coincident with the political crisis in Pakistan. In the beginning, the demand was two-pronged: implementation of the *Shari'ah* laws and framing of an Islamic Constitution for the state. The JUI, JIP and JUP observed separately *Shari'ah* Days 'and weeks 'to press the demand and some Leaguers made an abortive attempted to establish a *Shari'ah* Group in the reorganized council of the PML.[19] The Punjab Assembly passed the Muslim Personal Laws Act to enable women to inherit property according to the *Shari'ah* and the provincial chief minister promised to introduce Islamic laws in every sphere of life. The revival of the Zakat as a State institution was also raised many a time in the constituent Assembly of Pakistan but its implementation involved restructuring of the whole economic system of the country which could be done only when an Islamic Constitution was seriously enforced.[20] The leaders of the religious parties soon realized that they could not achieve their objective unless the country had a truly Islamic Constitution. In 1948, Sayyed Abu -Ala Maududi, head of JI delivered a speech in Law College Lahore and presented a resolution which was passed by the people and was sent to the then Governor General, Prime Minister and the President of the Constituent Assembly. The resolution stressed on the following four points:

1. That the sovereignty of the State of Pakistan vests in Allah Almighty and that the Government of Pakistan shall be only an agent to execute the Sovereign's will;
2. That the Islamic Shari'ah shall form the inviolable basic code for all legislation in Pakistan;
3. That all existing or future legislation which may contravene, whether in letter or in spirit the Islamic

[18] Rafique Afzal, *Political Parties in Pakistan 1947-1958*, (Islamabad: National Institute of Historical and Cultural Research Islamabad, 1998), p.57.

[19] Mujeeb Ahmad, *Jam'iyyat Ulama-i- Pakistan* (Islamabad: National Institute of Historical and Cultural Research, 1993), p. 2.

[20] M. Rafique Afzal, p. 503.

Shari'ahshall be declared null and void and be considered ultra-virus of the Constitution; and

4. That the powers of the Government of Pakistan shall be derived from, circumscribed by and exercised within the limits of Islamic Shari'ah alone.[21]

Unfortunately, the movement for an Islamic State was blurred by the mass migration of refugees, its rehabilitation, the war in Kashmir, canal water dispute, the illness and death of Muhammad Ali Jinnah for some time. In 1949 the movement again gained momentum when the JUI organized a conference at Dakhha on 9-10, February 1949, where not only the Islamic system was demanded but, also warnings were issued that any attempt to introduce an un-Islamic order would be resisted.[22] Soon after the birth of Pakistan, the religious, political parties inside and outside of the Constituent Assembly acted as a pressure group to press the ruling elites to accept their demand for the enforcement of *Shari'ah*. Only representative of Ulama in the Constituent Assembly was Maulana Shabbir Ahmad Usmani, the president of Jami'at al-Ulama-i-Islam that politically supported the Muslim League. Maulana Usmani himself was a Muslim League member of the Constituent Assembly of Pakistan (CAP). Jamaat e Islami having no representation in the Constituent Assembly focused attention on Usmani to get a help for the demand of the Islamic constitution. In April 1948, a delegation of Jamaat comprising of Maulana Maududi, Ameen Ahasn Islahi, Mian Tufail Muhammad and Chaudhri Ghulam Muhammad met Usmani to exert pressure on the government inside the constituent Assembly for Islamic order of the State.[23]

2.1 Objective Resolution:

The campaign launched by the religious, political parties was so forceful that the government had to take decisions relating to the introduction of Shari'ah and an Islamic Constitution. Succumbed to the pressure of these parties, Liaquat Ali Khan, the then Prime

[21] M. Rafique Afzal, p. 503.

[22] Israr Ahmad, *Jamaat-i-Islami aur uska Kirdar*, (Lahore: 1966), pp. 120-124.

[23] M. Rafique Afzal, p. 504.

Minister of Pakistan presented a bill in the Constituent Assembly on March 7, 1949 and was passed on March 12, 1949 which is popularly known as Objective resolution in the Constitutional annual of Pakistan.[24]

Before examining the parliamentary debate on the resolution, the text of the Objective Resolution is hereby re produced;

> 'Whereas sovereignty over the entire universe belongs to God Almighty alone, and the authority which He has delegated to the State of Pakistan through its people for being exercised within the limits prescribed by Him is a sacred trust;
>
> 'This Constituent Assembly representing the people of Pakistan resolves to frame a constitution for the sovereign independent state of Pakistan;
>
> 'Wherein the state shall exercise its powers and authority through the chosen representatives of the people;
>
> Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam shall be fully observed;
>
> Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accord with the teaching and requirements of Islam as set out in the Holy Quran and the Sunnah;
>
> - Wherein adequate provision shall be made for the minorities freely to profess and practice their religions and develop their cultures;
> - Whereby the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed;
> - Wherein shall be guaranteed fundamental rights including equality of status, of opportunity before law, social, economic and political justice, and freedom of

[24] Dr. Fakhr-ul-Islam and Muhammad Iqbal, p. 62.

thought, expression, belief, faith, worship and association, subject to law and public morality;

- Wherein adequate provision shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;
- Wherein the independence of the Judiciary shall be fully secured;
- Wherein the integrity of the territories of the Federation, its independence and all its rights including its sovereign rights on land, sea and air shall be safeguarded.

So that the people of Pakistan may prosper and attain their rightful and honored place amongst the nations of the world and progress and happiness of humanity'.[25]

The Bill was discussed in five successive sessions of the Constituent Assembly. The members from the treasury benches Liaquat Ali Khan, the then PM of Pakistan, Maulana Shabir Ahmad Usmani, Sardar Addur Rab Nishtar, Dr. Ishtiaq Hussain Qureshi, Omar Hayat Malik, Nazir Ahmad, Dr. Muhammad Hussain. Begaum Shaista Ikram Ullah and Choudhury Zafar Ullah Khan spoke in favor of the resolution.[26]

The members of Pakistan National Congress, the Opposition party in the assembly, Sirs Chndra Chattopadhya, Bhupendra Kumar Datta, Prof. Raj Kumar Chakraverty, Prem Hari Barma, Kamini Kumar Datta and Birat Chandra Mendal vehemently opposed the resolution and proposed seventeen amendments in it. Most of the amendments were about the Islamic status of the Constitution and the nom-Muslim members of the assembly stressed on the separation of religion from politics.[27]

In response to all these amendments Liaquat Ali Khan as a leader of the house said, "Pakistan was born because the Muslims of India desired to have a piece of land where they could live according to the teachings of Islam" He assured the minorities

[25] Ibid. p.62.

[26] Muhammad Nawaz Khan, *An Evolution of Muttahida Majlis-i-Amal's Government in the light of its Election Manifesto* (M.Phil Thesis) (Peshawar: Pakistan Study Centre University of Peshawar) p. 11.

[27] Syed Mujawar Hussain Shah, *Bhutto, Zia and Islam* (Larkana: Created Publisher, 2014), p. 44.

that in Islamic State their rights and interest would be fully protected. Most of the members of the assembly referred to the first speech of Jinnah to the Constituent Assembly and opined that this speech was a clear indication that Pakistan would be based on the eternal principles of equality and democracy and the minorities deemed that speech as guarantee against the enforcement of Islamic State on them.[28]

Maulana Shabbir Ahmad Usmani, the president of JUI while answering to the objections raised by the non- Muslim members of assembly, referred to a letter of Quaid-i-Azam written to Pir Sahib of Manki Sharif, in November 1945, in which he assured him that "it is needless to emphasize that the Constituent Assembly which would be predominantly Muslim in its composition would be able to enact laws for Muslims, not inconsistent with the *Shari'ah* laws and the Muslims will no longer be obliged to abide by un-Islamic laws."[29] Sardar Abdur Rab Nishtar member from the treasury benches replied to most of the amendments tabled by nom-Muslim members of the CAP. He explained, "the concept of Divine Sovereignty was a mere statement of fact to indicate that the Almighty is the sovereign of the whole universe. It also implied the principle of brotherhood of men all over the world. He pointed out that the political sovereignty of the people was not in any way limited by the provision. He told the House that more emphasis was placed on terms like 'the people', 'the right of the people', and 'the representatives of the people and the authority of the people in the Objectives Resolution".[30]

The amendments proposed in the draft resolution by the non-Muslim members of the assembly were put to vote on March 12, 1949. 11 votes were in favor of the amendments and 21votes went against of the amendments. After the amendments were rejected, the resolution was placed before the House and was

[28] The Constituent Assembly of Pakistan Debates Official Report Vol. V, 1949 (7th to 12th March. 1949).

[29] Naushad Khan, *Pakistan Studies and Pakistan Affairs*, (Peshawar: Department of Pakistan Studies, Islamia College University, Peshawar, 2015), P. 271.

[30] Ibid., pp. 271-270.

passed on March 12, 1949 which is popularly known as the Objective Resolution in the Constitutional history of Pakistan.[31]

2.3. Basic Principles Committee:

Objective Resolution was not the entire constitution, but it laid down the fundamental principles of the future constitution of Pakistan. To incorporate the Objective Resolution in the future constitution of Pakistan, the Constituent Assembly on March 12, 1949 appointed 24 members committee (21 Members were Muslims and 3 were non- Muslims) called Basic Principles Committee headed by Mulavi Tamizuddin, the then president of the Constituent Assembly.[32] The BPC further subdivided its assignment and assigned it to three sub-committee

1) The Sub-Committee on federal and provincial Constitutions and the distribution of powers;
2) The Sub-Committee on franchise; and
3) The Sub-Committee on judiciary.[33]

On the suggestion of Shabbir Ahmad Usmani, the CAP also set up a Board of Ta'limat-e-Islamia, composed of well-versed scholar Syed Sulaiman Nadvi, Syed Shabbir Ahmad Usmani, Mufti Mohammad Shafi, Professor Abdul Khaliq, Mufti Jafar Hussain, a Shiah Mujtahid, Dr. M. Hamid Ullah". Syed Sulaiman Nadvi and Maulana Zafar Ahmad was appointed president and secretary of the Board respectively. However, the Board started its functioning without its Chairman as Syed Sulaiman Nadvi could not join the Board till after 1950. The Board submitted the following recommendations to the BPC on certain points, referred to it by various sub-committees of the BPC.[34]

1. The Board interpreted the concept of *Khiliafat* in the context of the theoretical structure of modern state.

[31] Riaz Ahmad, p. 155.

[32] Sayed Wiqar Ali Shah, *North-West Frontier Province: History and Politics* (Islamabad: National Institute of Historical and Cultural Research, 2007), p. 137.

[33] Ibid., pp. 55-56.

[34] Naushad Khan, pp. 272.

2. It recommended a presidential form of government in which the president shall be elected indirectly by the learned and pious representatives of the people.
3. The house of the representatives shall be empowered to depose the president, pass the national budget, and keep watch over the exceptive and to declare war and conclude peace.

The Board also recommended a committee of experts on *Shari'ah* to advise the president, federal and provincial governments on different issues regarding Shari'ah.[35]

Prime Minister Liaquat Ali Khan submitted the interim report of the BPC the CAP on September 28, 1950. It was claimed that the report was drafted in the light of recommendations of Board of Ta'limat-e- Islamia, but the report did not beat any traces of the Board of Ta'limat-e- Islamia. The report simply recommended that the new constitution should incorporate the Objective Resolution as directive principle of the State policy which was mere eyewash.[36] The supporters of the Islamic constitution were shocked by the first report of BPC. Realizing the intention of the government, Sayyed Sulaiman Nadvi who had just arrived in Pakistan refused to join the Board and Dr. Hamid Ullah resigned in protest and left for Paris. Mufti Shafi stated that the reports of the constitution making committee are totally void of any provision for the positive requirement of Islam and many of their contents are even against Islam and the Objective Resolution. The Bengalis as a whole stood against the federal structure of the first report of the BPC as it had converted their numerical majority to minority.[37] The agitation launched by the Religious Political Parties and Bengalis led the Constituent Assembly to postpone further debate on the report. As a result, on 21 November, 1950 Liaquat Ali Khan moved in the CAP for the withdrawal of the interim report to enable the BPC to consider any

[35] Fakhr-ul-Islam, *Constitutional Development in Pakistan: Past Profile and Future Prospects,* (Peshawar: Pakistan Study Centre, University of Peshawar, 2018), p.33.

[36] Riaz Ahmad, p. 2.

[37] M. Rafique Afzal, p. 506.

concrete and definite proposals that might be made by the ulema and people.[38]

After the creation of Pakistan, the secular forces launched a poisonous propaganda that the Ulema were so divided on sectarian lines that they were unable to agree on one concept of Islamic system. They opined that the Ulema of different school of thoughts were incapable of giving a rational and systematic Constitutional plan which could be acceptable to the Muslims of Pakistan. Accepting the challenge of the secular elements, the Ulema and the religious, political parties showed a unique sense of solidarity for an Islamic Constitution in this critical juncture. They united on one platform to propose common demands. Many factors led the unity among the ulema of different school of thoughts. The most important was the common feelings that their inactivity might deprive the people of an Islamic Constitution. The release of JI Amir, Maulana Maududi in May 1950, the JUI with the arrival of Sayyed Sulaiman Nadvi and the JUP under the new leadership had reactivated their parties with new zeal and vigor. A meeting of 31leading and eminent Ulema and scholars of various sects and school of Islamic Jurisprudence were summoned in Karachi at the head of Sayyed Suliman Nadvi from January 21-24, 1951.After four days close door talks, they came out with a consensus on "Twenty two principles of an Islamic state" which was sent to the BPC for consideration.[39]

2.4. Second Report of the Basic Principles Committee:

After the withdrawal of the first report from further deliberation in Constituent Assembly, Liaquat Ali Khan appointed a Suggestion Committee under the chairmanship of Sardar Abdur Rab Nishtar to analyze the constitutional proposals received from different walk of people. The suggestion committee was busy in finalizing of the second report of the BPC when an assassination bullet came and took the life of Liaquat Ali Khan on 16 October, 1951, while addressing a mammoth gathering in Liaquat Bagh

[38] Ibid., p. 507.

[39] G. W. Choudhry, *Documents and Speeches on the Constituent Assembly*, (Dacca: 1967,) p. 32.Mushtaq Ahmad, "Government and politics in Pakistan," *Pacific Affairs* 33: 2, (1960): 204.

Rawalpindi.[40] Khawaja Nazimuddin who was stepped down from Governor General to become the Prime Minister was well known for his religiosity and close contact with Ulema stepped down from Governor-Generalship to the Premiership of the country. Malik Ghulam Mohammed, the then Finance Minister, was moved upstairs as the Governor-General on the recommendation of the Nazimuddin Cabinet. Temperamentally, these two men were diametrically opposed to each other. Ghulam Mohammed was a sharp man with a raging temper and believed in imposing his will on everyone. On the other hand Nazimuddin was a simple man of sober temperament and was tackling problems in a gentle way.[41] After taking oath as Prime Minister, he constituted a committee including Khwaja Nazimuddin, Sardar Abdur Rab Nishtar, Fazalur Rahman and Dr. Muhammad Hussain to negotiate with the Ulema for providing the Islamic clauses for the future constitution.[42] After the installation of Nizamuddin's government, there came a silence in political arena and nobody ever heard even a whisper about the constitution. The people of Pakistan became impatient and suspicious about the intention of ruling elites. To offset any hostile moves, the Religious Political Parties decided to keep up the political pressure. Maulana Maududi once again stood up and severely criticized the dilly-dallying policy of the Constitution makers. He warned the ruling elites that the Constitution should be framed before the end of 1952 and that it should be based on the following points:

1. That the Islamic Shari'ah shall be the law of the land;
2. Whereas there shall be no such legislation which would be repugnant to the principles of the Shari'ah;
3. Wherein all such laws repugnant to the principles of the Shari'ah shall be abrogated;
4. That it shall be obligatory upon the State to uproot the voice which Islam wants to be eradicated and to uphold and enforce the virtues which Islam requires to be upheld and enforced ;

[40] Ibid., p. 43.

[41] Ibid., p.44.

[42] Riaz Ahmad, "Pakistan's First Constituent Assembly's Efforts for the Making of Constitution.1947-1954," *Pakistan Journal of History & Culture*, Vol. XXIII/1, 2002: 12.

5. Whereas the basic civil rights of the people such as security of life and property, freedom of speech and expression, and freedom of association and movement shall be forfeited except when a crime has been proved in an open court of law after providing due opportunity of defense ;
6. Wherein the people shall have the rights to resort to a court of law against transgressions on the part of the legislative or the executive machinery of the State ;
7. Whereas the Judiciary shall be separated from executive branch of the government.
8. Wherein it shall be the responsibility of the state to see that no citizen remains un-provided for in respect of the basic necessities of life such as food, clothing, shelter, medical aid and education.[43]

The JI organized an "Islamic Constitution Week" throughout Pakistan from 14 to 21 November, 1952 and JUI held Nizam-i-Islam conference at Decca on 14-15 November, 1952 which was attended by a large number of people, demanded the Islamization of Constitution.[44]The demand for Islamic Constitution was raised by the people of different shade of opinion. The demand got momentum on each passing day. The Suggestion Committee made its report to the Basic Principles Committee in July, 1952 and on the basis of its findings, recommendations and the mounting pressure from public, Khawaja Nazim Uddin, the then Prime Minster of Pakistan presented the Second Report of Basic Principles Committee in Constituent Assembly of Pakistan of on December 22, 1952.[45]

The committee incorporated the following Islamic provisions in its second report:

1. The report recognized the Objectives Resolution as an integral part of the constitution of Pakistan and the legislative process, suggesting that the resolution should

[43] Manzoor Uddin Ahmad, "The political role of the 'Ulama' in the Indo-Pakistan sub-continent." *Islamic Studies*, 6(4), 1967: 327-354.

[44] Manzoor Uddin Ahmad, p. 355.

[45] Ibid. p., 360.

be incorporated into the constitution as "a Directive Principle of state policy"

2. The state of Pakistan shall take the steps to enable Muslims to order their lives, individually and collectively, in accordance with the Quran and Sunnah, with due safeguards for sectarian interests.
3. The report recommended the compulsory teaching of the Quran, prohibition of drinking, elimination of riba, promotion and maintenance of Islamic moral standards; and proper organization of Zakat, Auqaf and the Mosques.
4. The existing laws shall be brought into conformity with Islamic principles, and injunctions.
5. It was proposed to set up an organization to instruct people in Amr bil Maroof wa Nahi 'anil Munkir.
6. The recommendations of the BPC also laid down the procedure to prevent legislation repugnant to the Quran and Sunnah. The head of the state shall set up a Board comprising of not more than five persons well versed in Quran and Sunnah. If a board with majority declared any bill passed by the parliament repugnant to Quran and Sunnah, the bill shall be returned to the joint session of the bicameral federal legislature for reconsideration. However, if the joint session disagreed with the opinion of the board, it could still pass the bill by a simple majority, provided such a vote included a majority of the Muslim members. In case of differences of opinion among the members of the Board, the head of the state himself shall have the power to approve or disapprove the bill. A similar procedure was recommended for the units.[46]

2.4. Proposed Amendments in Nizamuddun's Report:

The Ulema were generally satisfied over the Islamic characteristics of the Nizamuddin Report. Maulana Zafar Ahmad Usmani, leader of JUI described it 18 percent Islamic. The draft constitution embodied most of the articles of 22 Articles of Ulema and 8 points of Maulana Maududi. On 11 to 18 January 1953, the Convention of Muslim Scholars was convened in Karachi, and after a lengthy

[46] Sayyid Abul A'la Maududi, *The Islamic Law and Constitution*, (Lahore: Islamic Publications (Pvt.) Ltd), p. 53-54.

deliberation on the issue, the ulema accepted the Report with following amendments.

1. Regarding the "Directive Principles of State Policy" the Ulama demanded that teaching of the Holy Quran and Sunnah should be made compulsory. Intoxicants, gambling, prostitution, and other evils should be banned in the light of the injunctions of the Holy Quran and Sunnah. The state should provide the basic necessities of life such as food, shelter, water, and education to all citizens of Pakistan irrespective of caste, creed, or religious background;
2. The Ulema demanded that the clause "No legislature should enact any law which is repugnant to the Holy Quran and the Sunnah" was not enough. They suggested that the Holy Quran and the Sunnah should be the main source of the law of the land;
3. The ulema demanded that a candidate for the Assembly should be a person who observed the *Faraz* (obligatory things) and desisted from *Fawahish* (Sinful deeds); non-Muslim members shall be exempted from it; and
4. That judges should be appointed on the basis of their *Taqwa* (piety) and knowledge of Shari'ah.[47]

The Nizamuddin's Report was scheduled to be discussed in the Constituent Assembly on January 1, 1953, but, on the demand of various political parties its consideration was postponed. The brief period of the Prime Ministetrship of Khwaja Nazimuddin was marred by Language issue in East Pakistan. Nizamuddin's report once again declared Urdu as a National Language and ignored the demand of Bengalis of also declaring Bengali Language along with Urdu as a National Language. The Parliamentarians and politicians from East Pakistan severely criticized the Nizamuddin's report and started agitation against the central government. Army was called to control the situation. The law and order was restored but irreparable damage was done to the national integration. Language issue was followed by foot shortage and the people gave Nizamuddin the title of Quaid-i-

[47] Safdar Mehmood, *The Constitutional Foundations of Pakistan* (Lahore: Jang Publications, 1990), p. 52.

Qillat, the leader of shortage. In 1953 Anti-Qadiani Movement led by the ulema engulfed the whole country in general and the province of the Punjab in particular. The ulema demanded the government to declare the followers of Mirza Ghulam Muhammad as non-Muslim minority and removal of Qadabis from high posts including Chaudhry Zafar Ullah Khan, the then Foreign Minister of Pakistan.[48] The Anti-Qadiani Movement getting momentum on each passing day brought Lahore, the center of the movement to chaotic paralysis. On March 6, 1953 Major General Azam, the area commander imposed Martial law in Punjab. Mumtaz Muhammad Khan Daultana, the Chief Minister of Punjab was replaced by Firoz Khan Noon. The agitation was crushed with ruthless manners and its laeading leaders were arrested. Many *Ulema* were arrested. Maulana Maududi, the *Amir* of JIand Maulana Abdu SatarNiazi were both sentenced to death by a military court at Lahore. Maududi was sentenced to death because he had "promoted feelings of enmity or hatred between different classes in Pakistan by writing a pamphlet titled *Qadiyani Maslah* (The Qadiyani Problem) while Maulana Niazi was charged for inciting a mob in Lahore mosque when a police official was murdered just outside its walls.[49]

The situation further complicated due to slashing of defence budget by 1/3 because of weak financial position of the country. This annoyed the military establishment, and the time was ripe and mature for action against Nazimuddin government.[50] Khawaja Nizamuddin government was held responsible for all these crises. On April 17, 1953 he along with his cabinet was summoned by Malik Ghulam Muhammad and was ordered to resign. Enjoying the confidence of the Constituent Assembly, Nazimuddin refused to comply with the order of Governor General. The Governor General exercised his powers under section 10 of the Indian Act 1935 (Amended) and dismissed the Ministry of Khawaja Nizamuddin on April 17, 1953 on the following ground:

[48] Ibid., p. 73.
[49] M. Rafique Afzal, p. 509-510.
[50] Fakhr-ul-Islam and Muhammad Iqbal, p. 68.

> The cabinet of Khawaja Nazimuddin has proved entirely inadequate to grapple with the difficulties facing the country. In the emergency which has arisen I have felt it incumbent upon me to ask the cabinet to relinquish office so that a new cabinet fitted to discharge its obligations towards Pakistan may be formed.[51]

2.5. Muhammad Ali Bogra Formula:

On the dismissal of Khawaja Nizamuddin, Malik Ghulam Muhammad appointed Muhammad Ali Bogra, the then ambassador in Washington as the Prime Minister of Pakistan.[52]

After the removal of Khawaja Nizamuddin, there was a change in the general political atmosphere. Sensing this change, the *Ulema* were severely criticized by the government dignitaries. The appointment of Mr. Brohi as minister of law and parliamentary affairs was taken as an ill-omened event by the 'ulama' and other proponents of an Islamic constitution. This man, who had outraged the feelings of all the religious conservatives and romantics throughout Pakistan, was now suddenly charged with the major responsibility for seeing the draft constitution through the Assembly. The apprehension of the 'ulama' was increased as a result of statements issued by Prime Minister Muhammad Ali advocating the abolition of the 'ulama' boards." The Prime Minister also expressed his personal opinion that any person who called himself a Muslim and recited the Kalima (creed) was in fact a Muslim.[53]

Chaudhury Khaliq u Zaman stated that the threat to Pakistan came from Communists and theologians. Firoz Khan Noon, the then Chief Minister of Punjab opposed the Islamic Constitution. Sardar Abdur Rashid, the Chief Minister of the North West frontier Province favored a secular state instead of Islamic State.

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[51] Rafi Ullah Shehab, *Fifty Years of Pakistan*, (Lahore: Maqbool Academy, 1990), p. 94.

[52] Janaat-i-Islami: *Trial of Maududi*, (Karachi: Jamaat-i-Islami Pakistan, n.d.), p.20.

[53] Hamid Khan, *Constitutional and political History of Pakistan*, (Karachi: Oxford University Press, 2nd ed. 2009), p. 71.

These government officials launched an anti-ulama and pro - secular constitution campaign.[54]

Under the changing political scenario, Muhammad Ali Bogra came out with an idea of an "Interim constitution "which excluded the Islamic provisions from it.[55] Sensing the intention of the Prime Minister, the Religious, Political Parties resolved to keep continue the pressure on the ruling elite for the Islamization of the Constitution. On 7 July, the working committee of JUI expressed disapproval on the interim report. Later on, in a joint statement on 26 September, 1953, the President of JUI Syed Sulaiman Nadvi, the acting Amir of JIP, Maulana Abdul Ghafar Hassan, members of BTI and some members of Constituent Assembly declared Muhammad Ali Bogra attempt a clear deviation from Objective Resolution. On 28 September 1953 JUI called a conference which was attended by the leaders of different political parties, which condemned the idea of a secular constitution. Pressure was also mounted from within the Muslim League against it.[56] Realizing the gravity of situation, the idea of the secular constitution was dropped. Muhammad Ali Bogra came out with a revises report and submitted it to the Constituent Assembly on 7 October 1953 and was adopted on 6 October, 1954 after lengthy and illuminating discussion on the different aspects of an Islamic State. This third draft of the constitution is popularly known as Muhammad Ali Bogra Formula in the constitutional history of Pakistan.[57] In the third draft of the Constituent Assembly most of the Islamic provisions of the Second draft of the Constitution were incorporated. Although the draft had not proposed a fully Islamic Constitution, yet the Ulema were satisfied with the report.[58]

The Central government has announced elections for East Pakistan Provincial Assembly to be held between 8 March to 12 March, 1954. Therefore, the session of the CAP adjourned after adopting the constitutional report to provide time to the political

[54] Syed Munawar Hussain Shah, p. 55.

[55] Rafi Ullah Shehab, p. 95.

[56] Leonard Binder, *Religion and politics in Pakistan*, (Berkeley and Los Angeles: University of California Press, 1963), p.303.

[57] Ibid., p. 304.

[58] Hassan Masud, *The Constitutional History of Pakistan* (Lahore: Abdu Sattar Press, 2001), P.60.

parties to campaign for the election in East Pakistan. Awami Muslim League led by Hussain Shaheed Suharwardy, Krishak Sramik Party led by Abul Kaseem Fazli Haq, Nizam-i- Islam Party led by Maulana Athar Ali and Ganatantri Dal led by Mehmud Ali and Haji Muhammad formed pre-electoral alliance, United Front. The Muslim League started its electioneering campaign on the basis of Islamic provisions ensured by its Central government in the future constitution of Pakistan while United Front focused its attention of the policies of the Central government and the regional grievances. Despite the efforts to avoid electoral defeat, the Muslim League was routed by the United Front. The former captured only 10 seats in the Assembly of 309 members while United Front secured 237 seats out of 309. After gaining electoral victory, the United Front elected A.K. FazliHaq as its parliamentary leader who took the oath as a Chief Minister of East Pakistan on April 3, 1954.[59] The election results in East Pakistan further complicated the political situation in Pakistan. All the League members of the Constituent Assembly were defeated in the provincial elections of East Pakistan. The United Front demanded either the dissolution of the Constituent Assembly or the resignation of the members from East Pakistan, but, this demand was rejected by the Prime Minister.[60]

The Constituent Assembly met on September 15, 1954 and assumed parliamentary debate on the BPC report. The Constituent Assembly finally adopted the Constitutional report on September 21, 1954and the adjourned to meet on October 27, 1954.[61] In addition to the constitutional report, the Constituent Assembly in the same setting passed two important bills.

1. On the motion of M.H. Gazdar (From Sindh), the PRODA under which the ministers and politicians could be disqualified was repealed.

[59] Mahboob Hassan "Islamization of the Constitution: The Role of Religious Parties. See at http://pu.edu.pk/images/journal/history/PDF-FILES/7%20Mahboob%20sahib.pdf.

[60] Syed Jaffar Ahmed, *Overview of the Constitution of Pakistan* (Lahore: Pakistan Institute of Legislative Development and Transparency), p.12.

[61] Fakhr-ul-Islam and Muhammad Iqbal, p. 68.

2. Amendments in Articles 9, 10, 10A to the Government of Indian Act, 1935 to curtail the dismissal powers of the Governor General.[62]

After the above mentioned Amendment in Articles 9, 10, 10A to the Government of Indian Act, 1935, now the Governor General required to act upon the advice of the PM and his cabinet.[63] As the Bogra Formula was according to the wishes of the Bengali leadership, so they made several moves to save the report, while the Punjabi leadership backed by the Governor General tried to set ground for the dissolution of Constituent Assembly in order to kill the report.[64] A forceful campaign was launched by the Religious Political Parties was launched to countermove the pro dissolution group. On October 9, 1954 Syed Murid Hussain Hashmi expressed his full satisfaction over the Islamic Provisions of Bogra Formula while addressing to the annual conference of JUP. The Central Executive Committee of Jamaat e Islami declared that "the proposed constitution of Pakistan was to a very great extent Islamic in character" and also demanded for its adaptation with immediate effect. Mufti Muhammad Shafi, in a statement to the press, called upon the people of Pakistan to celebrate "Islamic Constitution Day" on October 22, and to demand for the enforcement of the draft constitution.[65] When the Assembly was busy in Legislation to cut the wings of the Governor General, the latter was in official tour of the Punjab and NWFP. When he learnt about it, he rushed to Karachi to plan his countermoves.[66]

Taking into confidence the Chief Minister of Sind, Ayub Khuhro, majority of the members of United Front, Dr. khan Sahib, the Chief Minister of NWFP, Hussain Shaheed Suharwardy and

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[62] Ghulam Mustafa. "Alliance Politics in Pakistan: A Study of the United Front." *Pakistan Journal of History and Culture* 31, no. 1 (2010). p. 109-110.

[63] Ibid., p. 112.

[64] Mujeeb Ahmad, *Jami at al - Ulama- i Pakistan, 1948-1979*, (Islamabad: National Institute of Historical and Cultural Research, 1993), p. 10.

[65] M. Rafique Afzal, *Political Parties in Pakistan 1947-1958*, (Islamabad: National Institute of Historical and Cultural Research, 1998), 1: 246.

[66] Rafiullah Shehab, *Fifty years of Pakistan*, (Lahore: Maqbool Academy, 1990), p. 90.

Army Chief Muhammad Ayub Khan[67], the Governor General on October 24, 1954 issued the following proclamation;

> "The GG having considered the political crises with which the country is faced has with deep regret come to the conclusion that the constitutional machinery has broken down. He therefore has decided to declare a state of emergency throughout Pakistan, The Constituent Assembly as at present constituted has lost the confidence of the people and can no longer function. The ultimate authority vests in people who will decide all issues including constitutional issues through their representatives to be elected a fresh. Elections will be held as early as possible. Until such time as elections are held, the administration of the country will be carried on by a reconstituted cabinet. He has called upon the Prime Minister to reform the cabinet to give a country a dynamic and stable administration. The invitation has been accepted. The security and stability of the country are of paramount importance, all personal, sectional and provincial interest s must be subordinated to the supreme national interest".[68]

Following the dissolution of the First Constituent Assembly, a reconstituted cabinet was announced on October 26, 1954 headed by the previous Prime Minister, Muhammad Ali Bogra.[69] The new cabinet, the cabinet of talent included the following ministers:

1. Chaudhry Muhammad Ali
3. Dr A.M Malik
4. Ghiyyasuddin Pathan
5. Sardar Amir Azam Khan
6. Murtaza Raza Chadhury
7. M.A.H.Isphani
8. Mir Ghulam Ali Talpur
9. Dr Khan Sahib
10. Major General Skindar Mirza

[67] Ibid., p. 90.
[68] M. Rafique Afzal, p. 246-247.
[69] Ibid., p. 247.

11. General Ayub Khan Commander in Chief of Pakistan Army.[70]

The cabinet of talent could be viewed as the beginning of military taking over of civilian responsibility as it is clear from the appointment of Major General Iskandar Mirza as interior minister and Muhammad Ayub Khan, C-in- C as a Defense Minister.[71]

2.6. Moulvi Tamizuddin Khan Case:

The dissolution of the First Constituent Assembly was challenged by Maulvi Tamizuddin Khan, the then President of the Constituent Assembly in Chief Court of Sind.[72] He challenged the proclamation of unconstitutional, illegal and *ultra-virus*, without jurisdiction, inoperative and void and asked for a writ of mandamus to restrain the government from interfering with the exercise of his functions as President of the Assembly and for a writ of *quo warranto* with a view to determining the validity of certain ministers appointed by the Governor General in so called Cabinet of Talent.[73]

Full bench of Chief Court of Sind headed by Chief Justice, Justice Constantine on February 9, 1955 by its unanimously judgment declared he dissolution of the Constituent Assembly illegal, *ultra virus* and of no legal effect and issued a writ of mandamus restoring Moulvi Tamizuddin Khan as President of CA by restraining the Federation of Pakistan from interfering with his duties.[74] The Court issued the verdict that the GG had no power to dissolve the CA as it was a sovereign body created for a special purpose and it was to function till the completion of that purpose. The court also issued the writ of *quo warranto* against M.A.H. Isphani, Mir Ghulam Ali Talpur Dr. Khan Sahib, Major General Skindar Mirza and General Muhammad Ayub Khan, prohibiting them from exercising power as Ministers.[75] This

[70] Ibid., p. 248.

[71] Ibid., p. 249.

[72] Sayed Samin Ahmad, *The judiciary of Pakistan and its role in political crises*, (Karachi: Royal Book Company, 2012), P. 1-2.

[73] Rafiullah Shehab, p. 104.

[74] Ibid. p. 105.

[75] Hamid Khan, p. 79.

historic judgment of the Chief Court of Sind in favor of Moulvi Tamizuddin Khan was a great victory of the nation and the nation as a whole saluted our judiciary.[76] An appeal to the Federal Court against the decision of the Chief Court of Sind was made by the federal government. The federal bench headed by Chief Justice of Pakistan Justice Munir by a majority of four to one decided on March 21, 1955 in favor of the government and declared the decision of Chief Court of Sind null and void on the following technical grounds.[77]

1. The section 223A of the Government of Indian Act, 1935, amended on July 6, 1954 which empowered the High Courts to issue writ of mandamus and writ of *quo warranto* was not received the assent of the GG , it was not a law and therefore, the Chief Court of Sind has no jurisdiction to issue writs.[78]
2. Under Section10-A of Indian Act, 1935 which imposed on the members of the Council of Ministers the qualification of being members of the Federal Legislature, which was inserted in the Act, under Fifth Amendment in 1954 was not law because the Fifth Amendment had not received the assent of the Governor General.[79]

The verdict of the Federal Court not only justified the proclamation of October24, 1954, but also ruled that all the legislation made by the CA since its birth in 1947, were invalid because these were not assented by the GG. This part of Court decision created legal crisis in Pakistan[80].Malik Ghulam Muhammad, the GG in consultation with the Department of Law in order to avoid total breakdown and chaotic conditions, promulgated the Emergency Power Ordinance IX of 1955 ON April16, 1955. The ordinance not only validated the Acts passed by the CA but, also setup an unelected Constituent Commission to

[76] Ibid. p. 81.

[77] Amanullah Memon, *Political & constitutional development in Pakistan* (Compiled), (Islamabad: Allama Iqbal Open University, 2nd Ed, 1999), p. 114.

[78] Sayed Samin Ahmad, p. 3-4.

[79] Ibid., p. 4.

[80] Ibid., p. 9.

frame constitution for the country.[81] The Federal Court in *Usif Patel and 2 others vs Th Crown (PLD 1955 FC 387)* prohibited the GG from framing the Constitution through a Constituent Convention and issued the verdict that the Governor General should convened the New Constituent Assembly to frame the constitution.[82]

3. Second constituent assembly:

The Second Constituent Assembly was elected by the members of provincial Assemblies under on 28 May 1955. Since no single party was in a position to command a majority. A coalition government of Muslim League and United Front was formed with Choudhry Muhammad Ali as the Prime Minister.[83] The first session of the newly elected Constituent Assembly was held at Murree on 7 July, 1955. The first and highly controversial tasks done by the Constituent Assembly was the enactment of the One Unit bill, which merged four provinces and states of West Pakistan into one province on 30 September, 1955.[84] After this, the coalition government appointed a subcommittee to prepare a constitutional draft. The work for an Islamic constitution had to be done afresh since the hostility to the demand had not diminished. A substantial number of MCAs in the coalition, especially those belonging to the Nifaz-i-Islam Party led by Maulana Muhammad Athar Ali, pressed the demand for an Islamic constitution from inside the Constituent Assembly and other religious-political parties JI, JUI and JUP outside of the Assembly mobilized public opinion in its favor with new enthusiasm. The first draft of the coalition subcommittee did not include the Islamic provisions of the 1954 constitutional report. The NIP members boycotted the meeting called to re-consider this draft. The leaders and workers of JUI –JIP met or wrote to the Prime Minister, Chaudhry Muhammad Ali, and the law minister, Ismail Ibrahim

[81] Amanullah Memon, p. 115.

[82] Sayed Samin Ahmad, p. 11.

[83] Ibid., p. 11

[84] Zarina Salamat. "Pakistan, 1947-58: An Historical Review". *National Institute of Historical and Cultural Research*, 1992.

Chundrigar, impressing upon them the importance of an Islamic Constitution.[85]

The constitutional draft was prepared during November – December 1955, and these two months witnessed an unprecedented activity in support of the demand for an Islamic constitution. Hardly any day passed without a meeting being organized to voice the demand. The major events were sponsored by JIP, JUI and the JUP. The Jamaat e Islami led by Maulana Maududi continued its demand for Islamic Constitution at its annual conference in Karachi on 22 November 1955, where Jamaat Amir warned "if anything un-Islamic was enforced, it would separate the Muslims East Wing from the Muslims of West Pakistan". The JUI launched a "constitution week'' on 19 December during which similar demand was made in the mosque and public meetings. The JUP sponsored an All-Pakistan Sunni conference in Lahore on 11-12 December 1955 where the constitution-makers were warned that an un-Islamic constitution would not be accepted by the people.[86]

The constitutional bill that was presented to the CAP on 9 January was welcomed by the religious-political parties. Syed Maududi, on 12 January, commented that the draft constitution met the requirements of Islam as well as democracy to a considerable extent. In order to channelize public opinion Maulana Maududi along with Mian Tufail visited East Pakistan addressed public gatherings and appealed the people to lend their support for Constitutional Bill. He also attended the meeting of Ulema, Mashayakh and Peers organized by All Pakistan Constitution Committee at Decca on 8 February, 1956 and delivered a thought provoking speech to the gathering.[87]Maulana Ihtisham Ul Haqq Thanwi of the JUI described the draft ''commendable on the whole". The Constitutional bill was welcomed by JUP. On 10 January, 1956 JUP appointed a sub-committee to review and improve the draft, which suggested

[85] Sayed Samin Ahmad, p. 37.

[86] Paula R. Newberg. *Judging the state: Courts and Constitutional Politics in Pakistan*, (Cambridge University Press, 2002), p. 59.

[87] Rizwan Malik, *The politics of One Unit, 1955-58*, (Lahore: Pakistan Study Centre, University of the Punjab, 1988). p. 50.

some amendments in the draft to make the center strong, to provide legal guarantees to the basic human rights and Islamic Character of the Constitution. A twelve-member deputation of the JUP led Maulana Abul Hassanat Qadri congratulated the Prime Minister and submitted a memorandum suggesting amendments in the draft which called for separate electorate; Arabic as the official language; a board of ulama to interpret the injunctions of Islam and establishment of a ministry of religious affairs; and direct election of the President.[88] A few days later, leaders of five parties (Mufti Muhammad Shafi, acting president of the JUI, Maulana Syed Muslihudden, general secretary of the East Pakistan NIP, Mian Tufail Muhammad general secretary of JIP, Maulana Sayyid Abu'l-Hasanat Ahmad, president of the JUP and Dawud Ghaznavi president of the East Pakistan Jamiat-I AHL-I Hadith proposed ''an agreed'' list of seventeen amendment to the draft constitution to remove the defects from the Islamic and democratic ~~st~~andpoint.[89] The opposition to an Islamic constitution was expected from East Pakistan where the Hindus and a majority of the secularists were active against it. But the NIP, the East Pakistan JIP, the Jami'at-Ahle Hadith and the Anjuman-i-Muhajirin mobilized the public support for the Islamization of the Constitution. Maulvi Tamizuddin Khan played a vital role who had established All-Parties Islamic Front to successfully fight the secularist in achieving the Islamic constitution.[90] At last after nine years of efforts, the CAP was successful in adopting of the Constitution bill on 29 February 1956 which was signed by the Governor General on March, 2 1956 and was promulgated on 23 March 1956 proclaiming Pakistan an Islamic Republic of Pakistan.[91] Although Islam was not declared the state religion, the head of the state, the president, was required to be a Muslim. However, there was a possibility of non-Muslim becoming the head of the state. The speaker of the national assembly, for whom no condition of religion was laid down, was to function as

[88] Muhammad Waris Awan etal.,"Jama'at-i-Islami: Movement for Islamic Constitution and Anti-Ahmadiyah Campaign." *Asian Culture and History* 5: 2, (2013): 181.

[89] Waheed- U zZaman and Saleem Akhtar, p. 517.

[90] Kalim Bahadur, *TheJama'at-i-Islami of Pakistan* (Lahore: Progressive Books, 1978), p.22.

[91] Mujeeb Ahmad, *Jam'iyyatUlama-i- Pakistan* (Islamabad: National Institute of Historical and Cultural Research, 1993), p. 11.

president if the latter was absent from the country or was unable to discharge the duties of his office due to illness or other reason.[92]

The objective resolution after minor modification was retained as the preamble of the Constitution. Some important provisions were also incorporated in the directive principal of state policy. In these the state was to enable the Muslims, individually and collectively, to order their lives in accordance with the Quran and *Sunnah*.[93]The state was to endeavor (i) to provide facilities to enable them to understand the meaning of life according to the Quran and *Sunnh*; (ii) to make the teaching of Quran compulsory (iii) to secure the proper organization of zakat, Awqāf and mosque, in addition, it was to prevent prostitution, gambling, the talking of injurious drugs and the consumption of alcoholic liquor otherwise than for medicinal, and, in the case of non-Muslims, religious purposes, and eliminate Riba as early as possible. Pakistan was enjoined to strengthen the bonds of unity among the Muslims counties.[94]

Article 197 empowered the President of Pakistan to establish an organization for Islamic Research and Instruction in advanced studies to assist in the reconstruction of Muslim society on truly Islamic basis. Article 198 provided that no law shall be elected which is repugnant to the injunctions of Islam as laid down in the Holy Quran and *Sunnah* and the existing laws shall be brought in conformity of such injunctions. Whether the laws repugnant to Islam or not shall be decided by the National Assembly.[95]

The religious-political parties welcomed the 1956 constitution, although they were not fully satisfied with its provisions. They expected to amend it through the process provided in the constitution. Syed Maududi, commenting on the constitution passed by the CAP, in a public meeting in Dhaka on 2 March 1956, ''neither fully Islamic nor fully democratic but its flexibility would pave the way for evolving in course of time a fully Islamic

[92] Ibid., p. 15.

[93] Ibid., p. 20

[94] G. W. Chaudhary, *Constitutional Development in Pakistan* (Lahore: law Inn Publisher, 2005), p. 118.

[95] Hamid Khan, p. 100.

Constitution.'' Later, the Majlis-i-Shura of JIP welcomed the constitution and appealed for unity '' to make its working passible''.[96] The JUI subcommittee prepared a comprehensive report proposing amendments in the constitution.[97] It was soon realized that those in power were not serious about implementing even the Islamic provisions of the constitution. After a great deal of pressure and with much reluctance, President Iskandar Mirza did appoint a law commission headed by Justice (R) Muhammad Sharif. It was constituted to fulfil requirements of the 1956 constitution for the recommendations to bring the existing laws in conformity with the injunctions of Islam. The commission ceased to function when General Ayub Khan imposed Martial law in 1958 and it could not accomplish its assignment.[98]

4. Conclusion:

This piece of study is about the role of the then Religious Political Parties and *Ulema* from different schools of thought to tailor Islamic Constitution for the newly born Pakistan which had promised by the founding father of the country during the course of Freedom Movement. In this study, the researcher focuses on the voices raised by the Religious Political Parties to frame the first constitution of Pakistan which should have the incorporation of all Islamic values and principles comprehensively. The analysis of the *Ulemas'* struggle indicates that they explore significant foundation for the Islamic Constitution of Pakistan. The religious, political parties insideand outside of the Constituent Assembly voice for the implementation of *Shari'ah*in the country. Consequently, they were successful to approve the bill of ***OBJECTIVE RESOLUTION*** from the Constituent Assembly on March 12, 1949 and the bill presents the comprehensive shape of Islamic values. After the creation of Pakistan, the secular forces launch a poisonous propaganda that the *Ulema*s have no consensus on single concept of Islamic system. The *Ulema*s want to discourage the publicity of disagreement, therefore, all the eminent *Ulema*s from different schools of thought get together in

[96] Ibid., p. 100

[97] Gul Shahzad Sarwar, *Pakistan Studies* (Karachi: Qamar Kitab Ghar, 1999), p.166

[98] Ibid. p. 166.

Karachi under the chairmanship of Sayyed Suliman Nadvi on January 21-24, 1951. They were agreed upon on "Twenty two principles of an Islamic state" which was sent to the BPC for consideration and the 22 principles were the all-inclusive list of Islamic and *Shari'ah* values. The Nifaz-i-Islam, JI, JUI, JUP and Jamaat e Islami led by Maulana Maududi struggle unparalleled during the span of November –December 1955 for Islamic Constitution. Accordingly, they were effective to incorporate Islamic laws in the Constitution of Pakistan which is passed from the CAP in February 1956.

Pakistani laws on the use of narcotics and drug addiction: Need for Reforms

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Sami Ur Rahman**

Abstract

The use of narcotic substances and drug addiction are growing at alarming levels in Pakistan. The harsh anti-narcotics laws, which are against the spirit of the Sharia, have failed to contain this mushrooming growth and have instead added to the suffering of drug addicts. Based on the qualitative research carried out in district Swat, Khyber Pakhtunkhwa (KPK), this paper provides for the ineffectiveness of these laws and highlights the challenges in their implementation. The government's lack of interest to address this issue has also been observed through the absence of medical treatment and rehabilitation facilities for drug addicts. It is suggested that the existing laws should be reformed in favour of addicts and harm reduction programmes should be introduced in the wider interest of the society.

Keywords: Pakistan, use of drugs, addiction, KPK, Islamic law

1. Drug Use and Addiction in Pakistan

The use of controlled drugs and other narcotic substances and drug addiction are constantly growing problems in Pakistan.[1] Despite harsh anti-narcotics laws, the country has witnessed an enormous growth in the number of drug addicts in the last three decades, and today Pakistan stands as one of the most drug-affected countries in the world.[2] In the last two decades, injection of cheap drug concoctions and the use of various chemicals with

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[1] Tariq Khosa, 'Pakistan's Drug Menace' *Dawn*, (Karachi, 17 December 2012).

[2] Ghazal Pasha, 'Rising trend of substance abuse in Pakistan: a study of sociodemographic profiles of patients admitted to rehabilitation centres' (2019) 167 Public Health 34 <doi.org/10.1016/j.puhe.2018.10.020> accessed 26 June 2019.

liquor, , has become common which on various occasions led to collective deaths. [3] In one reported incident in March 2016, more than 50 people died after consuming spurious liquor in Sindh.[4] The use of Methamphetamine 'orice' has become very popular in the last few years, which results in risky, violent and hostile behaviour among the users.[5] The last decade has witnessed an increasing trend in the spread of hepatitis B, C and HIV/AIDS amongst addicts all over the country due to used syringes and needles.[6] Such an egregious situation of the problem demands a holitistc intervention on part of the government and thus needs to studied critically.

2. Root cause of the drug use in Pakistan

It is generally believed that opium and marijuana were traditionally used as narcotics in Afghanistan[7] and by extension in the tribal areas of Pakistan, but drug addiction was never a problem in Pakistan until early 1980s.[8] The mass-scale

[3] See Hassan Awan, *Literature Review of Drug related laws and policies in Pakistan: A comprehensive review of the drug laws, policies and other studies related to drug abuse, the implementation of laws and on ground situation in Pakistan* (Society for Sustainable Development 2009).

<www.ssd.com.pk/reports/Literature%20Review.pdf> 7 accessed 20 October 2015.

[4] Muhammad Hussain Khan and Hanif Samoon, 'At least 35 die after consuming spurious liquor in Tando Mohammad Khan' *Dawn,* (Karachi, 22 March 2016).

[5] Interview with Arshad Ali, Advocate High Court Peshawar (Swat, 10 July 2016); Hammad Ahmed Hammad and Gahzal Hakani, 'Awareness and use of methamphetamine (ICE) among the people of Karachi, Pakistan' *World Journal of Pharmaceutical Research* (2018) 7 (17) 34.

[6] Editorial, 'Pakistan: A victim of the destructive effects of the drug use' *Voice of America* (Urdu) (English translation done by the author of the current paper) (Washington DC, 13 December 2014) ; United Nations Office on Drugs and Crime (UNODC), 'World Drug Report 2015'

< https://www.unodc.org/wdr2015/> 4 accessed 15 March 2016.

[7] Ikarmul Haq, "Pak-Afghan Drug Trade in Historical Perspective" *Asian Survey* (1996) 36 (10), p. 945.

[8] A.Z. Hilali, "Costs & Benefits of Afghan War for Pakistan", *Contemporary South Asia* (2002) 11 (3), 291; Yahya Birt, 'Being a real man in Islam: Drugs, criminality and the problem of masculinity' (Cambridge Mosque Project, 24 December 2014) <http://masud.co.uk/being-a-real-man-in-islam-drugs-criminality-and-the-problem-of-masculinity/> para 9 accessed 13 November 2015.

introduction of drugs into the Pakistani society is linked with two important events. Firstly, when the Afghan refugees arrived in Pakistan in the late 1970s, some wealthy and influential refugees were allegedly involved in the local production and international trade of drugs in collaboration with some elements in the Pakistani establishment, to raise funds for their armed struggle against the former USSR troops in Afghanistan.[9] Secondly, after the withdrawal of the USSR troops and the ensuing anarchy, Afghanistan emerged as a major drug producer on the world scale in the 1990s; a major chunk of the drugs originating from Afghanistan, targeting international markets through Pakistan, ends up in the local markets[10] thus making access to drugs easy for everyone.[11]

Widespread poverty and fast-increasing unemployment push many people into psychological stress and anxiety which, coupled with the paucity of social nets, lead them to seek refuge in narcotic drugs and substance.[12] Due to lack of access to proper healthcare facilities, poor people use cheap drugs such as opium for various health issues including joint pains, asthma or arthritis which after prolonged use lead to addiction. Many people, especially youth from the financially well-off families, become addicts due to peer pressure or influence or sometimes by misadventures in seeking excitement through trying drugs

[9] Dessa K. Bergin-Cico, '*War and drugs: The role of military conflict in the development of substance abuse*' (Routledge, Taylor & Francis, 2015) 108.

[10] Safiya Aftab, 'Post 2014: The regional drug economy and its implications for Pakistan' (CIDOB Policy Research Project 2014).

<www.cidob.org/en/content/download/38315/597263/file/FEBRUARY_2014_SAFIYA+AFTAB.pdf > 3-4 accessed 9 December 2015.

[11] Editorial, 'Drugged up in Pakistan' *Aljazeera English* (Doha, (10 October 2014); Syed Nayyar Abbas Kazmi, 'Pakistan: Not a source but a victim country' (United Nations Asia and Far East Institute) Resource Material No. 65, available at:

<https://www.unafei.or.jp/english/publications/Resource_Material_65.html> 130 accessed 16 July 2016.

[12] Editorial, 'Poverty, joblessness pushing youth to drug addiction:, *The News International* (Karachi, February 25, 2011); Farhat Yaqub, "Pakistan's drug problem" *The Lancet* (2013) 381 (9884) 2151; Interview with Nasir Shah, Advocate High Court Peshawar (Swat, 12 July 2016).

without realising their harmful effects.[13] Something that does not appear on the radar of the relevant actors and merits investigation is biopsychosocial factor which is another reason for drug use disorders and dependence.[14]

3. Anti-Narcotics Laws

In order to gather Pakistani foot-soldiers to fight alongside Afghan *Mujahideen* against the former USSR troops, the then military ruler General Ziaulhaq was promoting religion at political, state and community levels.[15] He also introduced a 'move towards Islamisation of criminal laws' (collectively called *Hudood Order)* whereby offences under Pakistan Penal Code (PPC) and the Criminal Procedure Code (CrPC) – both based on the Common law system, were merged with the *Hudood* Order which was based on the *Hanafi* School of Islamic jurisprudence.[16]

The Prohibition of (Enforcement of *Hadd*) Order of 1979 (President's Order No.4, referred to hereafter as PHO) was the first law introduced in the country that dealt with drug use, possession, and production etc. Article 4 of PHO, which deals with owning or possession of intoxicants (Non-Muslims were exempt for keeping small quantities for religious events), reads: -

> Whoever owns, possesses or keeps in his custody any intoxicant shall be punished with imprisonment of either description for a term, which may extend to two years, or with whipping not exceeding thirty stripes, and shall also be liable to fine:
>
> Provided …. further that if the intoxicant in respect of which the offence is committed is heroin, cocaine, opium or coca leaf, and the quantity exceeds ten grams in the case of heroin or cocaine or one kilogram in the case of opium or coca leaf, the offender shall

[13] Karamat Ali, "Causes of Drug Addiction in Pakistan," *Pakistan Economic and Social Review (1980) 18 (3/4)* 102; Interview with Pardul Khan, Advocate High Court Peshawar (Swat, 14 July 2016).

[14] United Nations Office on Drugs and Crime (UNODC) & The Ministry of Interior and Narcotics Control, 'Drug Use in Pakistan 2013' <https://www.unodc.org/documents/pakistan/Survey_Report_Final_2013.pdf> 6 accessed 12 August 2016.

[15] Yahia Baiza, *'Education in Afghanistan: Developments, influences and legacies since 1901'* (Routledge, Taylor & Francis, 2013) p. 139.

[16] The Council of Islamic Ideology (CII), 'Report on *Hudood* Order'.

> be punishable with imprisonment for life or with imprisonment which is not less than two years and with whipping not exceeding thirty stripes, and shall also be liable to fine.

There were many procedural and technical flaws in PHO.[17] The sentence prescribed for trafficking, under Article 3,[18] was lenient compared to the punishment for possession/ use of small quantities of drugs, and it was difficult for police to make solid cases against drug dealers.[19] In 1997, the government introduced a secular law called the Control of Narcotics Substances Act (CNSA) to control the production, processing and trafficking of such drugs. Section 9 of CNSA (amended in 2017)[20] deals with punishment for possession, among others, of drugs and is divided into three sub-sections depending on quantities of drugs. Sub-section (a) which deals with the issue in hand reads:

> Whoever contravenes the provisions of sections 6, 7 or 8 shall be punishable with: -
>
> a) imprisonment which may extend to two years but not than less than six months and shall also be liable to fine, if the quantity of the narcotic drug, psychotropic substance or controlled substance is one hundred grams or less.

Section 6 reads:

> No one shall produce, manufacture, extract, prepare, possess, offer for sale, sell, purchase, distribute, deliver on any terms whatsoever, transport, dispatch, any narcotic drug, psychotropic substance or controlled substance, except for medical, scientific or industrial purposes in the manner and subject to such

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[17] Aarij S. Wasti, 'The Hudood Law of Pakistan: A social and legal misfit in today's society' *Dalhousie Journal of Legal Studies* 12 (2003) 63.

[18] Punishment for trafficking etc. of any intoxicants was up to five years imprisonment, whipping up to thirty stripes and a fine while punishment trafficking etc. of opium, coca leaf, and opium or coca derivatives was from two years up to life imprisonment, with whipping up to thirty stripes and a fine.

[19] *Khan*.

[20] The KPK government is working on a draft bill to add to 9(a)CNSA 'seven years imprisonment' for possessing or carrying less than 100 grams of crystal meth or ice. See Javed Aziz Khan, 'KP govt considers strictest punishment for ice dealers' *The News International* (Islamabad, 10 March 2019).

conditions as may be specified by or under this Act or any other law for the time being in force.

3.1. Differences between PHO and CNSA

The *Hudood* laws including PHO were enacted by General Zia under the influence of conservative religio-political leaders and parties such as *Jamat Islami*.[21] Based on the 'deterrence' theory of Islamic penology, these laws prescribed harsh punishments for criminal offences[22] and were subjected to severe criticism by the civil society, human rights organisations, and NGOs.[23] CNSA is more liberal and exhaustive law about narcotics as compared to PHO and under Section 76, read with Section 74, its provisions have overriding effects over PHO.

Under Article 6 of PHO, 'whoever, intentionally and without *ikrah* or *iztirar*, takes an intoxicant by any means whatsoever, whether such taking causes intoxication or not, shall be guilty of drinking.' Thus, the use of intoxicants is a serious offence under this Article.[24] Article 8 provides for whipping numbering eighty stripes if the punishment is awarded under *Hadd,* subject to confirmation by appellate court, while Article 11 provides for imprisonment up to three years or whipping not exceeding thirty stripes or with both if the punishment is awarded under *Tazir*. CNSA, in contrast to PHO, does not criminalise drug use but criminalises its possession only. Judicial interpretations suggest that 'possession' under 9(a) CNSA is not aimed at users; it has been used in a wider sense to include each step involved in trafficking such as dispatch, transportation and delivery, thereby implying it is targeted at traffickers.[25]

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[21] Farhat Haq, 'Jamaat-e Islami' in *The Islamization of Pakistan, 1979-2009* Viewpoints (Sp ed., the Middle East Institute, 2009) 28.

[22] Abdullah Saeed, *The Qur'an: An Introduction* (Routledge, 1st ed., 2008) 177.

[23] Tahir Wasti, *The Application of Islamic Criminal Law in Pakistan: Sharia in Practice* (Brill, 2009) p. 4.

[24] Rahat Imran, 'Legal Injustices: The Zina Hudood Order of Pakistan and its implications for women' *Journal of International Women's Studies* 7 (2005) (2), 78; Martin Lau, 'Twenty-Five Years of Hudood Orders: A Review' *Wash. & Lee L. Rev. (2007) 64* 1291.

[25] *Mehrab Khan v The State* PLD 2002 Quetta 58; *Ghulab Ali Alias Ghulabo v The State*, PCrLJ Lahore 1649.

Another major difference is that CNSA provides for treatment and rehabilitation of addicts which PHO does not. The introduction to CNSA states, amongst others: 'whereas it is expedient to regulate the treatment and rehabilitation of narcotics addicts and for matters connected therewith and incidental thereto'. Sections 52 and 53 of CNSA obligate the government to identify, register (and issue registration cards), treat and rehabilitate drug users. The two statutes therefore offer two different regimes and it is unclear whether an addict, when arrested by police, finds himself in prison for violating PHO or can seek treatment under CNSA.[26]

3.2. The *Sharia* on ¾ PHO and 9(a) CNSA

The *Sharia* prohibits the use of drugs to ensure 'protection of human life and intellect' as well as to prevent any potential harm to the society. According to two former *Muftis* of Azhar University, Sheikh Alzawahiri and Sheikh Saleem, alcohol befogs mind while narcotics mars the senses of thought and cognizance as well as lead to indolence, withdrawal and negligence towards family.[27] However, the *Qur'an and Sunnah* did not fix any punishment for drug use. Some Muslim jurists compare drugs with alcohol and suggest *Hadd* punishment while others such as Ibn Taymiyyah and the *Hanafi* School do not equate it with alcohol and thus propose *Tazeer* punishment that allows the judge and the rulers discretion to waive or award punishment.[28]

In his famous exegesis 'An Introduction to the Understanding of the Quran', Maududi, the founder of Jamat Islami and a Muslim revolutionary ideologue, while interpreting chapter five verse 90 of the Qur'an related to the use of alcohol, writes: 'it is the bounden duty of an Islamic government to enforce

[26] United Nations Office on Drugs and Crime (UNODC) Regional Office for South Asia, 'Legal and policy concerns related to IDU harm reduction in SAARC countries' (2007).

[27] Khalid bin Abelrahman Al-Humaidi, 'Incitement to the Crime of Drug Usage' (MA dissertation at Naif Arab University for Security Sciences 2008.

[28] Muhammad Mushtaq Ahmad, "The Doctrine of *Siyasah* in the Hanafi criminal law and its relevance for the Pakistani legal system" (2015) *Islamic Studies* 52 (1) 29.

this prohibition'.[29] However, according to Sayyed Qutb, a renowned Egyptian revolutionary ideologue and a contemporary of Maududi, the *Sharia* can only be implemented in its true spirit when the Muslim society develops its moral character to a level where it is easily accepted by the social order.[30] Before the emergence of modern nations states the *Sharia* was a socially embedded system, a mechanism and a process created for the social order keeping in view of cultural and moral norms,[31] a good example of which is the gradual prohibition of alcohol. Looking into the order of revelations, the *Quran* first described its harms, then expressed a disliking for it and finally, when the Muslim society of Medina was ready to accept its prohibition, God prohibited its use.[32] Maududi's interpretation, therefore, may still hold ground according to some scholars, but the Pakistani society is still far from accepting the prohibition on the use of drugs, thus rendering these laws nothing but a futile legislative exercise.[33]

The *Sharia* is silent on the nature of addiction, but many modern Muslim scholars acknowledge that addiction is a disease or psychological disorder that needs the attention of family, society, religious community and the public health services.[34] Under the Islamic medical ethics, it is the right of the people in need to receive medical care.[35] Moreover, Islam is a religion of

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[29] Syed Abul A'ala Maududi, *An Introduction to the understanding of the Qur'an* (tr. Zafar Ishaq Ansari 1972) <www.tafheem.net/tafheem.html> accessed 14 September 2015.

[30] Luke Loboda, 'The Thought of Sayyid Qutb' (Ashbrook Statesmanship Thesis 2004) <www.ashbrook.org/wp-content/uploads/2012/06/2004-Loboda-The-Thought-of-Sayyid-Qutb-PDF.pdf> 17-18 accessed 8 September 2015.

[31] Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009) 165

[32] Khashan Ammar, "The Quran's Prohibition of Khamr (Intoxicants): A Historical and Legal Analysis for the Sake of Contemporary Islamic Economics" *Kyoto Bulletin of Islamic Area Studies* (2016) 9 p. 97.

[33] The law could perhaps be more effective if the people, police, prosecution and the judiciary truly followed Islam. See Wasti.

[34] Judith K. Muhammad, 'Islam against Drug Abuse' (Islam for Christians) <http://www.islamforchristians.com/islam-drug-abuse/> para13 accessed 7 November 2015.

[35] World Health Organisation (WHO) Regional Office for the Eastern Mediterranean, 'Islamic code of medical and health ethics' (EM/RC 52/7

kindness and compassion. The Prophet Muhammad is reported to have said, 'be merciful to the inhabitants of the earth and He who is in Heaven will be merciful to you' and that 'the one who is not compassionate, God will not be compassionate to him'.[36] In another Hadith the Prophet is reported to have said,

> God will say on the Day of Resurrection: O son of Adam, I fell ill, and you visited Me not. He will say: O Lord, and how should I visit You when You are the Lord of the worlds? He will say: Did you not know that My servant so-and-so had fallen ill, and you visited him not? Did you not know that had you visited him you would have found Me with him?[37]

The Prophet also stressed on the rights of neighbours and said, 'he is not a believer who eats his fill whilst his neighbour beside him goes hungry'.[38] Therefore, it is a collective sin on the part of society and the state to deprive addicts – the most vulnerable people in the community, from receiving support and medical treatment[39] and to leave them, on the one hand, at the mercy of the notorious police and drug mafia and, on the other hand, let them be demonised by the community.[40] It is the responsibility of the state and the society to embrace addicts and help them overcome this problem.[41]

2005) <https://apps.who.int/iris/handle/10665/122351> 3-5 accessed 2 October 2015.

[36] Mohamed Imran Mohamed Taib, 'The central role of compassion in Muslim ethics' (6 March 2016) Islamcity <www.islamicity.org/9990/the-central-role-of-compassion-in-muslim-ethics/> accessed 8 May 2016)

[37] Mulim b. al-Ḥujjāj al-Qushayrī, *Ṣaḥīḥ* Muslim Kitāb al-Birr wa'l-Ṣilah wa'l-'Ādāb. Ḥadīth No. 18.

[38] Abu Bakr Ahmed Al-Baihaqi, *Sunan al-Kubra,* Hadith no. 19049.

[39] Siama Rashid, Alex Copello and Max Birchwood, "Muslim faith healers' views on substance misuse and psychosis" Mental Health, Religion & Culture, (2012) 15 (6) p. 653.

[40] Shaul M. Gabbay, 'The treatment of drug offences in Sharia-Based Countries: The case of Pakistan' *International Journal of Humanities and Social Science* (2014) 4 (10), 57; Salah Uddin, 'Globalized Consumption of Intoxicant Drugs and Narcotics: An Analytical Study in Islamic Perspective Subsequent to Iranian Experimentation' *Istidrak* (2019) 1 (2) 27.

[41] Interview with Sabir Jan, Advocate High Court Peshawar (Swat, 9 July 2016).

4. Effectiveness of ¾ PHO and 9(a) CNSA

The participants were equally divided on the effectiveness of the existing legal regime. According to Arshad,[42] Nasir,[43] and Sabir,[44] despite harsh anti-narcotics laws the business of drug trafficking is flourishing day by day; in parallel, the use of drugs is also increasing in the society. Pardul was of the view that many rich people are using drugs for fun without any action by the Police while the poor addicts pay a heavy price in the form of frequent arrests by the police, prolonged imprisonment, delays in trials, lack of access to medical care and social stigmatisation.[45] Hussain[46] and Nawab[47] mentioned that laws could be more effective if implemented in their true spirit while now they appear 'exclusionary' because they are applied discriminately against the poor. Ajmal[48] and Bacha[49] were satisfied with the effectiveness of the laws saying that in the absence of these laws the use of drugs would be rampant all over the country.

It is difficult to measure the effects of criminal sanctions on a disapproved behaviour but a decrease in the subsequent criminal activity is still a good test about the effectiveness of the law.[50] Although there is no authentic statistics available, there is an average 50,000 annual increase in the number of drug addicts in the country.[51] According to a report jointly published by the UNODC and the Ministry of Interior and Narcotics Control, around 6.7 million people used drugs in 2012 of whom 4.25

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[42] *Ali.*

[43] *Shah.*

[44] *Jan.*

[45] *Khan.*

[46] Interview with Hussain Ahmad, Advocate High Court Peshawar (Swat, 14 July 2016).

[47] *Bahadur.*

[48] Interview with Ajmal Akhunzada, Advocate High Court Peshawar (Swat, 18 July 2016).

[49] Interview with Bacha Rahman, Advocate High Court Peshawar (Swat, 20 July 2016).

[50] Allott Anthony, 'The Effectiveness of Laws' *Valparaiso University Law Review* (1981) 15 p. 229.

[51] 'Pakistan burns tons of narcotics to observe World Drug Day' *Bayanihan* (Philippines, 28 June 2012),
<http://bayanihan.org/2012/06/28/pakistan-burns-tons-of-narcotics-to-observe-world-drug-day/> accessed 2 September 2015.

million were addicts.[52] While briefing the Senate Standing Committee on Interior and Narcotics Control, the then Director General of the Anti-Narcotics Force mentioned that there were around seven million drug addicts in Pakistan in 2015. Out of this seven million, three million were those who used medicines without prescription. He also stated that 700 people die every day from drug addiction.[53] These numbers confirm that the existing anti-narcotics laws are ineffective and have badly failed to put the genie back in the bottle.

5. Challenges in implementation of the laws

Six participants were against the existing laws due to immense challenges in their implementation. According to Nasir, Arshad and Sabir, PHO was introduced without taking into consideration the local realities as traditionally marijuana and cannabis have been widely used in this region for centuries. In contrast, CNSA was introduced 18 years later when the successive civilian governments realised that production and trafficking of drugs became a big challenge which was brining bad name to the country in the world community; however, it is difficult to implement CNSA as a strong drug mafia, with close connections to some powerful elements in the establishment, are running the drug trafficking business.[54] According to Pardul, Hussain and Nawab, Police enjoy unfettered powers under ¾ PHO which they mostly misuse either to extract money from the poor addicts or to show their performance.[55]

Though Ajmal and Bacha confirmed that these laws were misused by the police,[56] Ajmal sees them as the only solution otherwise drugs will make their way to each house in the country. According to Bacha, drugs are a religious and moral evil and a menace to the society; drug users and addicts can go to any extremes including forcing their wives into prostitution to get some money for buying drugs. The extremely limited reported

[52] *UNODC,* 13.

[53] 'Around 7 million drug addicts in Pakistan, Senate told' *Dawn* (Karachi, 6 July 2015).

[54] *Shah*; *Ali*; *Jan.*

[55] *Khan*; *Ahmad*; *Bahadur.*

[56] *Akhunzada*; *Rahman*.

decisions of the higher judiciary confirm the challenges related to the implementation of these laws especially their misuse by the law enforcement agencies. In Mst. *Zubaida Sadruddin v The State*, while reversing conviction order of the lower court, the Peshawar High Court held:

> 'not only in this case but in a number of other cases this Court has observed that investigating agencies, be it Police, Anti-Narcotics Force, Customs Department or the Airport Security Force etc. have generally failed to properly investigate the cases, either because of their incompetence or because of lack of training or for any other reason.[57]

In an appeal against a judgement of Lahore High Court whereby bail was refused to the petitioner in a case registered under ¾ PHO and 9(b) CNSA for possession of 250 grams of charas, the Supreme Court held: 'It is not proper to keep a person of such an offence for an indefinite period in jail without submission of challan and permit the police to frustrate the provisions of law on the subject'.[58] The august court also held in the same judgement:

> 'It is general tendency that without proper check and restraints on the powers of the police officials and locating the fault in public functionaries the burden of negligence and inefficiency of police is put either on the shoulders of innocent people at the cost of public time and exchequer or it is shifted to the Courts to be held responsible for the delay in disposal of cases. The delay of more than one year in submission of challan in such petty cases without any legal justification, would amount to delay in the disposal of cases by the Courts and curtailment of liberty of persons involved in such cases through abuse of the process of law.'

Despite the overriding effect of CNSA, the police still use ¾ PHO as this way the addicts find it difficult to get the concession of bail when arrested.[59] By simply adding 'trafficking'

[57] *Mst. Zubaida Sadruddin v The State* PLD 2006 Peshawar 128.
[58] *Subhan Khan v The State* SCMR 2002 1797.
[59] *Nauroz Khan v The State* PCrLJ 2000 Peshawar 1222.

to 'possession'[60] in the FIR, they change the nature of the case as the punishment for trafficking is 'life imprisonment' in which case it is difficult to get an accused out on bail while maximum punishment under 9(a) CNSA is two years which is a bailable offence.[61] The main reason given by the police and prosecution for using ¾ PHO instead of or together with 9(a) CNSA is that the latter gives a *carte blanche* to the accused for repeating similar crimes.[62] Although some of those in possession of small quantities of drugs, or addicts, may be involved in trafficking, these small-time unskilled workers are easily replaceable by an already available big pool of poor people who will happily jump on any such opportunity.[63] Since the lower courts do not easily grant bails in offences when the prescribed punishment is more than ten years, a few addicts knock at the doors of higher courts, using the services of *pro bono* young lawyers, where they are either granted bail or acquitted.[64] The cost of prohibition thus outweighs the intended benefits of legislation due to the misuse of these laws by the police.

6. Treatment and Rehabilitation of Addicts

The participants unanimously agreed that addiction is a relapsing disorder and expressed the need for the treatment and rehabilitation of the addicts. Nasir, Arshad, Sabir and Hussain referred to the sections of the CNSA that require for the provision of such facilities to the addicts, but that the state has failed in ensuring its availability.[65] Pardul and Nawab said that we as a society, will be responsible to God for not taking measures for the treatment of the addicts.[66] Even Ajmal and Bacha who are very much supportive of the existing, emphasised on the need for treatment as addicts are helpless in coping with their suffering.[67]

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[60] Possession of small quantity for personal consumption which is not an offence under CNSA.

[61] *Said Muhammad v The State* Peshawar High Court CrM. No. 642/2004 PHC 2059.

[62] *Daud Khan v The State* Cr.M. No. 290/2004 PHC 2033.

[63] See Klein Axel, 'Drugs and the World' (2008) (Reaktion Books) 56.

[64] *Niaz Ali v The State* Cr.M.No. 1282/2003 PHC 1983.

[65] *Shah*; *Ali*; *Jan*; *Ahmad*.

[66] *Khan*; *Bahadur*.

[67] *Akhunzada*; *Rahman*.

There are different theories of addiction but in general it is considered as a chronically relapsing disorder[68] or a condition characterised by a compulsion to use an addictive substance on which one has become physically and psychologically dependent due to repeated consumption.[69] It seems the drafters of the CNSA were aware that addiction is a disease or a disorder thus they introduced some provisions for the treatment and rehabilitation. However, these provisions were never translated into concrete measures by the government. There are a few treatment and rehabilitation centres in some parts of the country which work mostly in isolation from the mainstream health system.[70] In 2012, there were around 73 treatment centres, mostly run by NGOs. According to official figures,[71] treatment facilities were available in these centres only for 30,000 addicts per annum. Dost Foundation, a Peshawar-based NGO, started working on emergency basis with the KPK government in 2014 and launched four rehabilitation centres in Peshawar city to offer treatment to 4000 addicts over a period of 30 months; nevertheless, no public report is available about the outcome of this project.[72] Moreover, the overall problem is much beyond the scope of such limited facilities.[73]

In a highly ambitious five-year (2010-2014) master plan, the Ministry of Narcotics Control and the Anti-Narcotics Force (ANF) aimed at upgrading the existing and setting up new treatment and rehabilitation centres.[74] So far, six centres are

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[68] SF Ali and others, 'Understanding the global problem of drug addiction is a challenge for IDARS Scientists' *Current Neuropharmacology* (2011) 9 (1) p. 2.

[69] Alan I Leshner, 'Addiction is a brain disease, and it matters' *Science* (1997) 278 (5335) p. 45.

[70] *Khosa*.

[71] Farhat Yaqub, 'Pakistan's drug problem' *The Lancet* (2013) 381 (9884) p. 2151.

[72] Dost Welfare Foundation, Peshawar <https://www.dostfoundation.org/> accessed 21 June 2019.

[73] *Kazi*.

[74] The Ministry of Narcotics/ Anti-Narcotics Force, Government of Pakistan, 'Drug Abuse Control Master Plan 2010-2014', (2010) visit:

<https://www.aidsdatahub.org/sites/default/files/documents/Drug_Abuse_Control_Master_Plan_2010_14.pdf> 30-35 accessed 3 October 2019.

established but only two are operational, one in Islamabad and one in Karachi. The ANF's website shows that these two centres, established in 2016, have offered services to less than 3000 addicts.[75] In brief, all efforts in this regard are ad-hoc and the treatment facilities are short-termed due to lack of proper allocation of funds and the government's lack of interest in addressing this issue.[76]

It is pertinent to mention here that many countries have switched from punitive laws and simple treatment and rehabilitation programmes to Harm Reduction programmes with very positive results.[77] Harm Reduction is based on the notion that complete abstinence from drugs is not possible for everyone, therefore, efforts should made to mitigate the adverse effects of addiction.[78] Following a multi-tier approach, it is medication-assisted treatment (MAT) - with the use of methadone, buprenorphine, and naltrexone, coupled with counselling and behavioural therapies to help addicts overcome addiction.[79] Due to the low costs involved in its implementation,[80] it is more suitable for poor countries like Pakistan. Moreover, it is compatible with the *Sharia* as the protection of human life and dignity are the key goals of the *Sharia*[81] and that the Islamic medical ethics allow for the removal of a harm, i.e. addiction,

[75] <http://anf.gov.pk/ddr_matrc.php> accessed 23 June 2019.

[76] See Browne David, 'How Pakistan succumbed to a hard-drug epidemic?' *The Telegraph* (London, 23 March 2014).

[77] Cook Catherine and others, 'The Case for a Harm Reduction Decade: Progress, potential and paradigm shifts' (2016) Harm Reduction International <www.hri.global/files/2016/03/10/Report_The_Case_for_a_Harm_Reduction_Decade.pdf> 4 accessed 24 June 2019.

[78] Harm Reduction International, 'What is Harm Reduction?' <https://www.hri.global/what-is-harm-reduction> accessed 3 August 2015.

[79] Neil Hunt and others, 'A review of the evidence-base for harm reduction approaches to drug use' (2003) Forward Thinking on Drugs < www.forward-thinking-on-drugs.org/review2-print.html> 9 accessed 17 December 2015.

[80] Gerald A. Juhnke and W. Bryce Hagedorn, *Counselling addicted families: An integrated assessment and treatment model* (Routledge, Taylor & Francis 2006) 16.

[81] *Uddin*.

through a lesser harm, i.e. use of drugs for treating addicts.[82] Iran and Malysia, both Muslim countries, have successfully implemented such programmes with encouraging outcomes.[83]

7. Is decriminalisation and option?

Five participants were of the view that small quantities of drugs should be decriminalised while three were against the idea of decriminalisation. Nasir suggests that small quantities should be allowed for truck drivers, security guards or those already addicted while Sabir suggests that allowing up to five grams each of *charas* and heroin is okay.[84] They said that before the merger of the former princely Swat State with Pakistan in 1969, alcohol and drugs were allowed under 'special permits' at certain locations in the state which helped the police to know about the drug users and dealers. Hussain looks at the issue from the perspective of the rights and duties of the state and he sees no reason why the state should assert itself while it has failed in fulfilling its duties. He is of the view that soft drugs having minor effects may be decriminalised in limited quantities. He also gave the example of Swat state but added that these permits were issued only to Hindus and Sikhs and that those using drugs and alcohol were not appreciated by the communities.[85] According to Pardul, drugs including marijuana and *hasheesh* have been used in the Indo-Pak sub-continent for centuries during the rules of both Muslims and non-Muslims. He added that even some Muslim saints used *hasheesh* for devotional prayers and today the shrines of various saints are the most commonly used places for marijuana and cannabis consumption; therefore, these laws are against the local customs and tradition.[86] Arshad said that ¾ PHO and 9(a) CNSA were irrelevant for the rich and affluent drug users but it is a

[82] Aasim I. Padela, 'Islamic medical ethics: A primer' (2007) *Bioethics* 21 (3) 169 <https://doi.org/10.1111/j.1467-8519.2007.00540.x> accessed 14 December 2015.

[83] Suresh Narayanana, Balasingam Vicknasingamb and Noorzurani Robson, 'The transition to harm reduction: Understanding the role of non-governmental organisations in Malaysia' (2011) 22 *International Journal of Drug Policy* 311 <www.elsevier.com/locate/drugpo> accessed 17 January 2016.

[84] *Shah* (n 12); *Jan*.

[85] *Ahmad*.

[86] *Khan*.

sword hanging over the heads of the poor and addicts; therefore, the poor could be protected through revoking these laws.[87]

Among the three participants who were in favour of the existing laws, Sabir did not rule out decriminalisation but he added that keeping in view the country's vulnerability to drugs, decriminalisation would add to the spread of drugs.[88] Ajmal and Bacha said that the existing legal regime should be reformed through having more checks on the powers of police.[89] Ajmal added that the widespread availability of drugs will only exacerbate the problem and lead to more people becoming addicts.

Lack of adequate enforcement mechanisms or frequent misuse defeat the objective of the law, no matter how good it is.[90] The use of *charas*, *hasheesh* or other opiates for pleasure is in general socially accepted.[91] Rich people use them merrily without any action by police. Substance use is also very common in colleges and universities, and *charas* can easily be smelled in the corridors of students' dorms.[92] Many politicians, civil servants, judges, military and police officers use *charas* and other opiates in their private and relax gatherings.[93] Not only this but in some

[87] *Ali*.

[88] *Jan*.

[89] *Akhunzada* (n 58); *Rahman* (n 59).

[90] Anthony Allott, 'The Effectiveness of Laws' (1981) 15 Valparaiso University Law Review 229 <http://scholar.valpo.edu/vulr/vol15/iss2/1> accessed 19 January 2016.

[91] See Shahid Abbasi , 'Drugs and sex at parties in Karachi, Lahore', *The News Tribe* (3 August 2011).

<www.thenewstribe.com/2011/08/03/drugs-and-sex-at-parties-in-karachi-lahore/> accessed 5 April 2015.

[92] Kayani Ahsan Ul Haq, Mark J. King & Judy Fleiter, 'A qualitative investigation of drug use among Pakistani road users' () (20th International Council on Alcohol, Drugs and Traffic Safety Conference, Brisbane, 25-28 August 2013) <https://eprints.qut.edu.au/65300/> 2 accessed 28 February 2016; Arfan Riasat, 'Causes and Complications of Injectable Drugs Use in District Faisalabad' (2010) <http://ssrn.com/abstract=1672776> accessed 4 March 2016.

[93] 'Getting high comes at a higher price' *Pakistan Today* (10 September 2012)

parts of the country including Islamabad, narcotics drugs are openly sold in some public places with no action from the law enforcement agencies.[94] So, the use of drugs is *de facto* legalised but criminalised under ¾ PHO and 9(a) CNSA. An independent member of the National Assembly raised this matter on the floor of the House and accused parliamentarians of using *charas* in the parliament lodges. However, he was forced by the major political parties to keep quiet and to apologise.[95] A few years back, a human rights lawyer filed a petition in the Supreme Court for legalisation of *charas* and *hasheesh*, but it was turned down.[96]

8. Conclusion

The existing anti-narcotics legal regime has failed to contain the growing problem of drug use and addiction for various reasons including, but not limited to, the unwillingness of the Pakistani society to respect these laws, misuse of the existing laws by police against the poor and addicts, and the government's lack of interest in treatment and rehabilitation of addicts. Pakistan follows the *Hanafi* School of Islamic jurisprudence according to which it is the discretion of the judges and the legislature to propose any measures for drug use and addiction including decriminalisation. Due to the overriding effect of the CNSA, there is no ground for ¾

<https://www.pakistantoday.com.pk/2012/09/10/getting-high-comes-at-a-higher-price/> accessed 5 March 2016; 'High and dry: Pakistan´s penchant for hash', *The News International* (Islamabad, 18 December 2017) <https://www.thenews.com.pk/latest/257633-high-and-dry-pakistans-penchant-for-hash> accessed 19 June 2019.

[94] Seshatha, 'Cannabis in Pakistan' *Sensi Seeds,* (03 March 2014) <https://sensiseeds.com/en/blog/cannabis-in-pakistan/> accessed 15 April 2015; Saleha Javaid, 'Islamabad's Drug Culture' *Saleha's Blog: Reporting the Facts,* <https://salehajavaid.wordpress.com/2011/03/19/islamabads-drug-culture/> accessed 25 February 2016.

[95] 'Jamshed Dasti: Women, Drugs, Liquor being brought to Parliament Lodges' *Sach News* (27 February 2014) <https://www.suchtv.pk/pakistan/general/item/9198-jamshid-dasti-liqour-drugs-women-being-brought-to-parliament-lodges.html> accessed 25 June 2019

[96] 'SC returns petition seeking legalization of bhang' *Dawn* (Karachi, 26 June 2016).

<http://www.dawn.com/news/1267345/sc-returns-petition-seeking-legalisation-of-bhang> accessed 25 August 2016.

PHO to exist and it should be revoked while 9(a) CNSA should also be reformed in line with the *Sharia's* teachings and modern understanding of addiction. It is also suggested to introduce Harm Reduction Programmes on an urgent basis as they are easy to implement due to low costs involved. Moreover, they will give addicts a feeling of belongingness to the society and will protect them from the inhumane clutches of police.

اردو مقالات

فہرست

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علتِ ربٰو میں فقہائے کرام کا اختلاف اور کرنسی نوٹ پر اس کا اثر: ایک فقہی اور تنقیدی جائزہ

اسد اللہ *

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Abstract

There has been a difference of opinion among the jurists regarding the Sharī'ah *ruling of the currency notes. The reason that led to this difference was the lack of elaborations in classical* fiqh, *as at that time the only prevailing currencies were gold and silver. Metal coins namely* fulūs *were also available but their usage was limited to only those transactions that involved low-priced goods. The status of currency notes remained controversial in the past until eventually the contemporary scholars accepted currency notes as gold and silver while applying the* Sharī'ah *rulings of* Ribā *and* Bay' Ṣarf *on them. Contrarily, numerous scholars from the Indo-Pak subcontinent have rejected the idea of applying the rulings of* Ribā *and* Bay'*Sarf on Currency Notes on the basis of the Hanafi school's elaborated effective cause of* Ribā *('*Illat al-Ribā*). The reason for this difference of opinion is the variety of viewpoints available among scholars regarding the effective cause of* Ribā. *In the current literature, the majority of the research is carried out regarding the juristic nature and other aspects of this issue. However, this paper discusses the actual cause of the contradiction in the effective cause of* Ribā *and its impact on the currency note.*

Keywords: 'Illat al-Ribā, fulūs, *Gold and Silver*, Ṣarf, Thaman.

تعارف

مروجہ کرنسی نوٹ آج کی ترقی یافتہ دور کا شاخسانہ ہے۔ کسی زمانے میں سونا چاندی کے ڈھلے ہوئے سکے (درہم و دینار) آلۂ تبادلہ کے طور پر رائج تھے، لیکن وقت گزرنے کے ساتھ کرنسی نوٹ وجود میں آگیا۔ کرنسی نوٹ کے وجود میں آنے کے بعد اس کے حکم میں فقہائے کرام کا آپس میں اختلاف ہوا۔ اس اختلاف کی وجہ یہ تھی کہ اس کے بارے میں متقدمین فقہاء کے ہاں کوئی تصریح نہیں تھی، کیونکہ ان کے زمانے میں سونا چاندی کے سکے بطورِ

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کرنسی رائج تھے۔ فلوس کے نام سے کچھ دھاتی سکے بھی رائج تھے لیکن اس کا استعمال صرف معمولی اور کم قیمت اشیا کی لین دین تک محدود تھا۔

ماضی میں اس مسئلے میں کافی اختلاف رہا، لیکن بالآخر معاصر فقہاء کی اکثریت نے اس کو باقاعدہ طور پر بیعِ صَرف اور ربٰو کے معاملے میں سونے اور چاندی کی طرح مستقل ثمن کے طور پر تسلیم کر لیا، البتہ برصغیر پاک وہند کے بیشتر فقہاء نے احناف کی علتِ ربٰو والے مؤقف کی بنا پر ایک اور رائے اختیار کی کہ کرنسی نوٹ پر بیعِ صَرف اور ربٰو کے پورے احکام جاری نہیں ہوتے، چنانچہ مفتی محمد تقی عثمانی صاحب نے کرنسی نوٹ کو امام محمدؒ کے قول کے مطابق فلوس کے حکم میں قرار دے دیا، جس کی تائید برصغیر پاک وہند کے اکثر علما نے کی۔ بیشتر محققین نے اس موضوع پر لکھا ہے لیکن انہوں نے اس معاملے کی حقیقت، فقہی تکییف اور دیگر مباحث کی طرف توجہ دی ہے، جب کہ زیرِ نظر مقالے میں اس اختلاف کی اصل اور بنیادی سبب کو زیرِ بحث لایا جائے گا جو درحقیقت علتِ ربٰو میں اختلاف ہے۔

کرنسی نوٹ میں اختلاف کی بنیاد:

کرنسی نوٹ کے سلسلے میں علماء کی آرا مختلف ہیں۔ برصغیر پاک وہند کے بعض علمائے کرام کے نزدیک کرنسی نوٹ دَین کے "وثیقہ" کے حکم میں ہے، اس لیے اس پر ثمن کے احکام جاری نہیں ہوں گے، چنانچہ ان کا خیال یہ ہے کہ یہ مکمل طور پر سونا اور چاندی کی رسید ہے، البتہ بعض حضرات کی رائے کے مطابق یہ سامان (عروض) کی طرح ہے۔ بعض علماء نے اسے ثمن کے حکم میں قرار دیا۔ پھر ثمنیت کے سلسلے میں بھی علماء میں اختلاف پیدا ہوا، بعض نے کہا کہ یہ مستقل طور پر سونا چاندی کے حکم میں ہے اور اس پر سونا چاندی کے تمام احکام جاری ہوں گے، جب کہ بعض نے اسے فلوس کے حکم میں شمار کیا ہے۔

اس اختلاف کی بنیاد درج ذیل دو سوالات پر ہے:

۱۔ کیا کرنسی نوٹ کی پشت پر سونا اور چاندی ہیں؟

۲۔ کیا ثمنیت صرف سونا اور چاندی میں منحصر ہے؟

معاصر علماء اس بات پر متفق ہیں کہ کرنسی نوٹ ثمن ہے اور اس کی پشت پر کسی معدن یعنی سونا چاندی وغیرہ کا وجود ضروری نہیں ہے، تاہم اس کے باوجود ربٰو اور بیعِ صَرف کے احکام کے سلسلے میں ان کا آپس میں اختلاف ہے کہ کیا یہ احکام کرنسی نوٹ پر جاری ہوں گے؟ اس اختلاف کا انحصار "ربٰو کی علت" کے سلسلے میں منقول مختلف اقوال پر ہے اور فقہی تکییف کے حوالے سے اختلاف کی حیثیت ثانوی ہے۔ چنانچہ وزن اور جنس کو ربٰو کی علت قرار دینے

کے بعد یہ ممکن نہیں کہ کرنسی نوٹ پر بیعِ صَرف کے احکام جاری ہونے کی رائے اختیار کی جائے، اگرچہ کرنسی نوٹ کو مستقل طور پر نقد بھی قرار دیا جائے۔ جن حضرات کے نزدیک علتِ ربٰو "مطلق ثمنیت" ہے ان کے مطابق کرنسی پر سونا چاندی کے احکام جاری ہوں گے اور جن حضرات کے نزدیک ربٰو کی علت "ثمنیتِ غالبہ" ہے تو ان کے قول کا تقاضا یہ ہے کہ کرنسی پر بیعِ صَرف اور ربٰو کے احکام جاری نہ ہوں، کیونکہ انہوں نے علت کو سونا، چاندی میں منحصر کر دیا، جب کہ کرنسی نوٹ نہ سونا ہے نہ چاندی۔ اس سے معلوم ہوا کہ اختلاف کی اصل بنیاد علتِ ربٰو میں اختلاف ہے، چنانچہ ذیل میں اسی نقطے پر بات کی جائے گی۔

سونا اور چاندی میں علتِ ربٰو کے سلسلے میں علماء کی آراء:

ربٰو کی حرمت قرآن وسنت سے واضح ہے۔ سورۃ البقرہ کی آیت نمبر ۲۷۵، ۲۷۸، اور سورۃ آل عمران کی آیت نمبر ۱۳۰ اور متعدد دیگر آیات کی رُو سے سودی معاملات قطعی طور پر حرام قرار دیئے گئے۔ احادیث میں ربٰو الفضل کے احکام کی وضاحت اس حدیث سے ہو رہی ہے جس میں چھے چیزوں کا تذکرہ ہے جو مختلف طرق سے مروی ہے، چنانچہ حضرت عبادہ بن صامت رضی اللہ عنہ سے روایت ہے کہ رسول اللہ ﷺ نے فرمایا:

"الذهب بالذهب والفضة بالفضة والبر بالبر والشعير بالشعير والتمر بالتمر والملح بالملح مثلا بمثل سواء بسواء يدا بيد، فإذا اختلفت هذه الأصناف فبيعوا كيف شئتم إذا كان يدا بيد"[1]۔

اس حدیث میں سونا، چاندی، گندم، جو، کھجور اور نمک میں ہم جنس تبادلے کے وقت برابری اور فی الفور قبضے کو ضروری ٹھہرایا گیا ہے اور خلافِ جنس تبادلے کے وقت صرف قبضے کو ضروری قرار دیا ہے۔ بعض احادیث میں ان چھے اشیا کا تذکرہ ہے، جب کہ بعض میں صرف سونا چاندی کے تذکرہ پر اکتفا کیا گیا ہے، جیسا کہ صحیحین میں حضرت ابو سعید خدری رضی اللہ عنہ سے روایت ہے[2]۔ علتِ ربٰو کے حوالے سے سب سے اہم حدیث یہی ہے جس میں مذکورہ چھے اشیا کا تذکرہ ہے۔ ظاہری مکتبِ فکر کے علمائے کرام کے ہاں یہ حکم صرف ان چھے اشیا میں منحصر

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١ - مسلم بن الحجاج ، **الصحيح**، كتاب البيوع، باب الصرف وبيع الذهب بالورق نقدا.

٢ - محمد بن إسماعيل البخاري، **الجامع الصحيح**، كتاب البيوع، باب بيع الفضة بالفضة، ومسلم، **الصحيح**، كتاب البيوع، باب الربا.

ہے[3]، یہی رائے امام قتادہؒ، حنابلہ میں سے ابنِ عقیلؒ[4] اور امام الحرمینؒ[5] کی بھی ہے۔ جمہور علمائے کرام کے ہاں یہ حکم دیگر اشیا کی طرف بھی متعدی ہے۔ جمہور فقہاء کے نزدیک ربٰو صرف ان اشیا میں منحصر نہیں بلکہ ان اشیا کا تذکرہ صرف بطورِ مثال ہے کیونکہ اس زمانے میں عمومی لین دین انہی اشیا کے ذریعے ہوا کرتی تھی[6]۔ مؤخر الذکر رائے کے قائل ائمہ کرام نے مذکورہ چھے اشیا کو دو قسموں پر تقسیم کیا ہے:

1۔ سونا اور چاندی　　2۔ باقی چار اشیا

حنفیہ کی رائے-وزن اور جنس:

حنفی فقہائے کرام کے نزدیک سونا چاندی میں علتِ ربٰو "وزن اور اتحادِ جنس" ہے[7]، حنابلہ کا مشہور قول بھی یہی ہے[8]، دیگر ائمہ میں سے امام نخعیؒ، امام زہریؒ، امام ثوریؒ اور امام اسحاقؒ کی بھی یہی رائے ہیں[9]۔ ان حضرات کا

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٣ – أبو محمد علي بن أحمد، ابن حزم الظاهري ، **المحلى بالآثار**، (دار الكتب العلمية بيروت، الطبعة الأولى ١٤٢٥هـ)، ص: ٧/ ٤٠٣. شمس الدين ابن قيم الجوزية، **إعلام الموقعين عن رب العالمين**، (دار الجيل بيروت سنة ١٩٧٣م)، ص: ٢/ ١٥٦.

٤ – ابن قيم الجوزية، **إعلام الموقعين**، ص: ٢/ ١٥٦.

٥ – إمام الحرمين أبو المعالي عبد الملك بن عبد الله الجويني، **البرهان في أصول الفقه**، (دار الكتب العلمية بيروت، الطبعة الأولى ١٤١٨هـ)، ص: ٢/ ٣٨.

٦ – كمال الدين ابن الهمام، **فتح القدير شرح الهداية**، (دار الفكر بيروت)، ص: ٧/ ١٢.

٧ – زين الدين بن إبراهيم، ابن نجيم المصري، **البحر الرائق شرح كنز الدقائق**، (دار الكتاب الإسلامي، الطبعة الثانية)، ص: ٦/ ١٣٧. ابن الهمام، **فتح القدير**، ص: ٧/ ٤. علاء الدين الكاساني ، **بدائع الصنائع في ترتيب الشرائع**، (دار الكتب العلمية، الطبعة الثانية ١٤٠٦هـ)، ص: ٥/ ١٨٣. فخر الدين الزيلعي ، **تبيين الحقائق شرح كنز الدقائق**، (المطبعة الكبرى الأميرية القاهرة، الطبعة الأولى ١٣١٣هـ)، ص: ٤/ ٨٦.

٨ – علاء الدين علي بن سليمان المرداوي، **الإنصاف في معرفة الراجح من الخلاف على مذهب الإمام أحمد بن حنبل**، (دار إحياء التراث العربي بيروت، الطبعة الأولى ١٤١٩هـ)، ص: ٥/ ١٣. موفق الدين عبد الله بن أحمد، ابن قدامة المقدسي، **المغني في فقه الإمام أحمد بن حنبل الشيباني**، (دار الفكر بيروت، الطبعة الأولى ١٤٠٥هـ)، ص: ٤/ ١٣٥. منصور بن يونس البهوتي، **كشاف القناع عن متن الإقناع**، (دار الكتب العلمية)، ص: ٣/ ٢٥١. عبد الرحمن

مستدل قرآنِ حکیم کی وہ تمام آیات ہیں جن میں اللہ تعالیٰ نے وزن پورا کرنے اور وزن میں کمی کرنے سے بچنے کا حکم فرمایا ہے جیسے سورۃ الشعراء کی آیت نمبر ۱۸۱، ۱۸۲، سورۃ ھود کی آیت نمبر ۸۵ اور سورۃ مطففین کی ابتدائی تین آیات۔ ان کے علاوہ دیگر وہ آیات جن میں کیل اور وزن پورا کرنے کا حکم ہے اور پورا نہ کرنے والوں کے لیے وعید کا تذکرہ ہے، ان سب میں اس طرف اشارہ پایا جاتا ہے کہ جن چیزوں کو تولا یا ناپا جاتا ہے ان میں برابری ضروری ہے ورنہ ان آیات کی مخالفت لازم آئے گی۔ اس سے اس بات کی طرف اشارہ ملتا ہے کہ اس کے پیچھے مؤثر علت "وزن یا کیل" ہی ہے [10]۔

احادیث سے دلائل:

1. حضرت ابوہریرہ اور حضرت ابوسعید رضی اللہ عنہما سے روایت ہے کہ حضور ﷺ نے قبیلہ بنو عدی کے کسی فرد کو خیبر میں سرکاری کارندہ مقرر فرمایا۔ وہ وہاں سے کچھ کھجور لے کر آیا، تو آپ ﷺ نے فرمایا: کیا خیبر کی تمام کھجوریں ایسی ہیں؟ کہا: نہیں، بلکہ ہم دو صاع کے بدلے ایک صاع خریدتے ہیں، تو آپ ﷺ نے انہیں ایسا کرنے سے منع فرمایا اور متبادل طریقہ کار بتلاتے ہوئے فرمایا کہ درمیانی درجے کی کھجور بیچ کر اس کی قیمت سے اعلیٰ قسم کی کھجور خریدیں۔ حضور ﷺ نے یہ بھی اضافہ فرمایا: "وكذالك الميزان" یعنی یہی حکم وزنی اشیا کا بھی ہے [11]۔ علامہ زیلعیؒ نے اس حدیث کو مذکورہ بالا مؤقف پر سب سے مضبوط دلیل قرار دیا ہے [12]۔
2. ان حضرات کا مستدل وہ روایت بھی ہے جس میں چھے چیزوں کی حرمت کے ذکر کے ساتھ وزن کی تصریح بھی ہے، چنانچہ حضرت ابوہریرہ رضی اللہ عنہ کی روایت میں ہے: "الذهب بالذهب

بن محمد، ابن قدامة المقدسي، **الشرح الكبير على متن المقنع**، (دار الكتاب العربي للنشر والتوزيع)، ص: ٤/ ١٢٥- ١٢٦.

٩ - عبد الرحمن بن محمد، ابن قدامة، **الشرح الكبير**، ص: ٤/ ١٢٥-١٢٦. ابن قدامة، **المغني**: ص: ٤/ ١٣٥.

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١١ - مسلم بن الحجاج، **الصحيح**، كتاب البيوع، باب بيع الطعام مثلا بمثل. البخاري، **الصحيح**، كتاب الوكالة، باب الوكالة في الصرف والميزان.

١٢ - فخر الدين الزيلعي ، **تبيين الحقائق** ، ص: ٤/ ٨٦.

وزنا بوزن... [13]" یعنی جب سونے کا تبادلہ سونے کے ساتھ ہو تو وزن برابر سرابر ہو۔ امام سرخسیؒ کے مطابق گویا اس حدیث کے بموجب "وزن" کا علت ہونا منصوصی ہے [14]۔ اسی طرح کا مضمون حضرت ابو سعید خدری [15]، حضرت فضالہ بن عبید [16] اور حضرت ابن عمر [17] رضوان تعالیٰ علیہم اجمعین کی روایات میں بھی وارد ہے [18]۔

3. تیسری دلیل ابو سعید خدری کی روایت ہے کہ حضور ﷺ ایک دن اپنی اہلیہ ام سلمہ رضی اللہ عنہا کے ہاں تھے، تو عجوہ کھجور کھانے کی خواہش ظاہر کی، حضرت ام سلمہ رضی اللہ عنہا نے انصار کے ایک آدمی کے پاس دو صاع کھجور بھیجے تو وہ آدمی دو صاع کے بدلے ایک صاع عجوہ کھجور لے آیا۔ حضرت ام سلمہ رضی اللہ عنہا نے وہ کھجور آپ ﷺ کی خدمت میں پیش کی۔ جب آپ ﷺ نے اسے دیکھا تو آپ ﷺ کو اچھی لگی، چنانچہ ایک کھجور کھانے کے بعد آپ ﷺ رک گئے اور فرمایا: تیرے پاس یہ کھجور کہاں سے آگئی؟ حضرت ام سلمہ رضی اللہ عنہا نے صورتِ حال کی وضاحت کی۔ آپ ﷺ نے وہ کھجور اپنے سامنے سے پھینکتے ہوئے فرمایا: "اسے واپس کرو، مجھے اس کی کوئی حاجت نہیں، کھجور کا تبادلہ کھجور کے ساتھ، گندم کا تبادلہ گندم کے ساتھ، جو کا تبادلہ جو کے ساتھ، سونے کا تبادلہ سونے کے ساتھ اور چاندی کا تبادلہ چاندی کے ساتھ ہو تو برابر سرابر اور نقد ہو گا، جس نے اس پر

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١٣ - مسلم، **الجامع الصحيح**، كتاب البيوع، باب الصرف وبيع الذهب بالورق نقدا.

١٤ - شمس الأئمة محمد بن أحمد السرخسي ، **كتاب المبسوط**، (دار الفكر بيروت، الطبعة الأولى ١٤٢١هـ)، ص: ١٢/ ٢٠٣-٢٠٤.

١٥ - مسلم، **الصحيح**، كتاب البيوع، باب الربا.

١٦ - مسلم، **الصحيح**، كتاب البيوع، باب بيع القلادة فيها خرز وذهب.

١٧ - أبو عبد الله أحمد بن محمد بن حنبل الإمام، **المسند**، مسند عبد الله بن عمر، (دار الحديث، القاهرة، الطبعة الأولى، ١٤١٦هـ)، ص: ٧/ ٢٧، رقم: ٥٨٨٥.

١٨ - ستر بن ثواب الجعيد، **أحكام الأوراق النقدية والتجارية في الفقه الإسلامي**، رسالة ماجستير، جامعة أم القرى مكة المكرمة، سنة: ١٤٠٥- ١٤٠٦هـ، ص: ٨٨-٨٩. منصور بن يونس البهوتي، **كشاف القناع**: ٣/ ٢٥٤. السرخسي، **المبسوط**: ١٢/ ٢٠٣-٢٠٤. فخر الدين الزيلعي، **تبيين الحقائق**، ص: ٤/ ٨٧.

اضافہ کیا (زیادتی کی) تو وہ سود ہے"۔ پھر فرمایا: "كذلك ما يكال ويوزن أيضا[19] "یعنی یہی حکم ہر کیلی اور وزنی چیز کا ہے۔

4. دار قطنی میں حضرت عبادہ اور حضرت انس بن مالک رضی اللہ عنہما سے مرفوعاً روایت ہے: "ما وزن مثل بمثل إذا كان نوعا واحدا وما كيل فمثل ذلك، فإذا اختلف النوعان فلا بأس به[20]. یعنی وزنی چیز کا تبادلہ اگر اس کے ہم جنس چیز سے ہو تو برابری ضروری ہے اور کیلی چیز کا تبادلہ اگر اس کے ہم جنس چیز سے ہو تو بھی برابری ضروری ہے۔ ہاں اگر تبادلہ کسی اور جنس کے ساتھ ہو تو پھر کمی بیشی میں کوئی حرج نہیں۔ امام زیلعیؒ فرماتے ہیں کہ اس حدیث سے معلوم ہوتا ہے کہ حضور ﷺ نے اس حکم کو جنس اور قدر کے ساتھ مربوط فرمایا ہے جو کہ اس کی علت ہونے پر دلالت کرتا ہے۔ اس کی وجہ یہ ہے کہ جب بھی کسی حکم کو اسمِ مشتق کے ساتھ جوڑ لیا جائے تو یہ اس بات کی علامت ہوتی ہے کہ وہ اس حکم کی علت ہے۔ بالفاظِ دیگر اس حدیث کا یہ مطلب ہوگا کہ ہر کیلی اور وزنی چیز کا کیل یا وزن اور جنس کی وجہ سے برابر سرابر ہونا ضروری ہے[21]۔

5. امام طحاویؒ حضرت عمار رضی اللہ عنہ سے ان کا قول نقل کرتے ہیں: بسا اوقات ایک غلام دو غلاموں سے بہتر ہوتا ہے اور ایک کپڑا دو کپڑوں سے بہتر ہوتا ہے، چنانچہ جب لین دین نقد ہو تو کوئی مضائقہ نہیں، جہاں تک سود کا تعلق ہے تو وہ ادھار میں ہوتا ہے الّا یہ کہ وہ چیز کیلی یا وزنی ہو[22]۔ اس اثر سے استدلال واضح ہے۔

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١٩ - أبو عبد الله محمد بن عبد الله الحاكم، **المستدرك على الصحيحين**، كتاب البيوع، (دار الكتب العلمية بيروت، الطبعة الأولى ١٤١١هـ)، ص: ٢/ ٤٩، رقم: ٢٢٨٢.

٢٠ - أبو الحسن علي بن عمر الدارقطني، **السنن**، (مؤسسة الرسالة بيروت، الطبعة الأولى، ١٤٢٤هـ)، ص: ٣/ ٤٠٧، رقم: ٢٨٥٣.

٢١ - الزيلعي، **تبيين الحقائق**، ص: ٤/ ٨٦.

٢٢ - أبو جعفر أحمد بن محمد الطحاوي، **شرح مشكل الآثار**، باب بيان مشكل ما روي عن رسول الله صلى الله عليه وسلم في الأشياء الموزونات أنها كالأشياء المكيلات في دخول الربا فيها كدخوله في الأشياء المكيلات، (مؤسسة الرسالة بيروت، الطبعة الأولى ١٤١٥هـ)، ص: ٣/ ٣٣٨. أبو محمد علي بن أحمد، ابن حزم الظاهري ، **المحلى بالآثار**، (دار الكتب العلمية بيروت، الطبعة الأولى ١٤٢٥هـ)، ص: ٧/ ٤٢٤.

6. ابن حزم نے محلّیٰ میں حضرت عمر بن خطاب رضی اللہ عنہ کے حوالے سے نقل کیا ہے کہ انہوں نے حضرت ابو موسیٰ رضی اللہ عنہ کو لکھا کہ جن چیزوں کو صاع سے ناپ کر بیچا جاتا ہے ان کا تبادلہ اگر ہم جنس چیز سے ہو تو برابری ضروری ہے اور اگر جنس مختلف ہو تو پھر مضائقہ نہیں، پھر فرمایا کہ وزنی اشیا کا بھی یہی حکم ہے[23]۔

دلائل کی تنقیح:

جہاں تک قرآنِ حکیم کی مذکورہ بالا آیات سے استدلال کا تعلق ہے تو اس کا جواب یہ دیا گیا ہے کہ جو حضرات طعم اور ثمنیت کو ربٰو کی علت قرار دیتے ہیں، ان کا قول ان آیات کے مخالف نہیں، اس لیے کہ ان کے قول کے مطابق بھی تمام کھائی جانے والی چیزوں اور بطورِ ثمن استعمال ہونے والی چیزوں میں برابری ضروری ہے اور یہ برابری کیل یا وزن ہی سے ہوتی ہے۔ اس لیے دیگر اقوال کو اختیار کرتے ہوئے بھی ان آیات پر عمل ہو رہا ہے۔ جہاں تک خیبر کی کھجور والی حدیث کا تعلق ہے جس میں "وکذلک المیزان" کا اضافہ وارد ہے تو امام بیہقیؒ کے نزدیک یہ اضافہ حضرت ابو سعید خدری رضی اللہ عنہ کی طرف سے ہے، حدیثِ مرفوع میں اس طرح کا اضافہ نہیں ہے[24]۔ وہ احادیث جن میں وزن یا کیل کا تذکرہ ہے، ان سے استدلال اس وجہ سے کمزور ہے کہ احادیث میں ان کا تذکرہ لین دین میں برابری پر زور دینے کے لیے کیا گیا ہے، علت کا بیان اس سے مقصود نہیں ہے۔ چنانچہ امام نوویؒ فرماتے ہیں کہ کیل کو محض برابری کا ذریعہ قرار دینے سے یہ بات لازم نہیں آتی کہ اسی پر حکم کا دار و مدار بھی ہو[25]۔ امام شوکانیؒ نے بھی یہ بات فرمائی ہے کہ کیل اور وزن کا ذکر محض برابری کو لازم قرار دینے کے لیے ہیں، اس کو بنیاد بنا کر باقی کیلی اور وزنی چیزوں کی طرف حکم کو متعدی کرنا درست نہیں[26]۔

جہاں تک حضرت ابو سعید رضی اللہ عنہ والی روایت کا تعلق ہے تو اس روایت کا جواب یوں دیا گیا ہے کہ امام بیہقیؒ کے نزدیک یہ اضافہ حضرت ابو سعید خدری رضی اللہ عنہ کی طرف سے ہے جیسا کہ خیبر کی کھجور والی راویت میں

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٢٣ - ابن حزم، **المحلى بالآثار**: ٧/ ٤٢٤.

٢٤ - أبو بكر أحمد بن الحسين البيهقي، **السنن الكبرى**، كتاب البيوع، باب من قال بجريان الربا فى كل ما يكال ويوزن، (دار الكتب العلمية، الطبعة الثالثة ١٤٢٤هـ)، ص: ٥/ ٤٦٩، بعد الحديث رقم: ١٠٥٢٠.

٢٥ - يحيى بن شرف النووي، **المجموع شرح المهذب**، (دار الفكر)، ص: ٩/ ٤٠٢.

٢٦ - محمد بن علي الشوكاني، **السيل الجرار المتدفق على حدائق الأزهار**، (دار ابن حزم بيروت، الطبعة الأولى ١٤٢٥هـ)، ص: ٥٠٧.

اس کا تذکرہ ہو چکا ہے۔ انہوں نے اس بات پر استدلال داود بن ابی ہند کی روایت سے کیا ہے کہ انہوں نے ابو نضرۃ کے حوالے سے حضرت ابو سعید خدری رضی اللہ عنہ سے اس طرح کا قصہ نقل کیا ہے جس میں حضور ﷺ کا اتنا ارشاد منقول ہے: "أربیت، إذا أردت ذلک فبع تمرک بسلعۃ ثم اشتر بسلعتک أي تمر شئت"، یعنی تم نے سودی معاملہ کیا، جب بھی تم اس طرح کرتے ہو تو پہلے اپنی کھجور بیچا کرو، اس سے جو قیمت حاصل ہو جائے تو اس سے جو کھجور چاہو، خرید لو۔ حضرت ابو سعید خدری رضی اللہ عنہ فرماتے ہیں: "فالتمر بالتمر أحق أن یکون ربا أم الفضۃ بالفضۃ"، یعنی کھجور کو کھجور کے ساتھ بیچنے میں سود کا احتمال زیادہ ہے یا چاندی کو چاندی کے ساتھ بیچنے میں؟ اس روایت سے معلوم ہوتا ہے کہ اصل روایت میں صرف کھجور کا ذکر تھا، حضرت ابو سعید خدریؓ نے اس بابت چاندی کو کھجور پر قیاس کیا، بعد کے راویوں نے اسے حدیثِ مرفوع کا حصہ بنا دیا [27]۔ ابن حزمؒ نے اس احتمال کا ذکر بھی کیا ہے کہ ممکن ہے کہ یا اضافہ ابو مجلز نے کیا ہو اس لیے کہ دیگر ثقہ راویوں نے حضرت ابو سعید خدریؓ سے یہ روایت اس لفظ کے بغیر نقل کی ہے [28]۔ امام طحاویؒ کی تخریج کے مطابق بھی اصل روایت میں یہ اضافہ نہیں ہے [29]۔

مزید برآں یہ اضافہ صرف حیان ابن عبید اللہ العدوی کی روایت میں مروی ہے اور وہ ضعیف راوی ہے۔ امام بیہقیؒ فرماتے ہیں: ابو مجلز کی بیان کردہ احادیث میں سے اس حدیث میں حیان نے تفرد اختیار کیا ہے، اور حیان کے معاملے میں محدثین نے کلام کیا ہے [30]۔ جہاں تک حضرت انسؓ اور حضرت عبادہؓ کی حدیث کا تعلق ہے، تو امام دار قطنیؒ کے ہاں اس حدیث میں سند اور متن کے اعتبار سے اختلاف ہے [31]۔ نیز راوی ربیع بن صبیح متکلم فیہ ہے، چنانچہ علامہ شوکانیؒ فرماتے ہیں: "اس روایت کی اسناد میں ربیع بن صبیح ہے جن کی روایت میں امام احمدؒ کے نزدیک کوئی مضائقہ نہیں ہے البتہ یحیٰی بن معینؒ، ابن سعدؒ اور امام نسائیؒ کے نزدیک وہ ضعیف ہے۔ ابو زرعہؒ اور ابو حاتمؒ کے

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٢٧ - البيهقي، **السنن الكبرى**، كتاب البيوع، باب من قال بجريان الربا فى كل ما يكال ويوزن، ص: ٥/ ٤٦٩.

٢٨ - ابن حزم، **المحلى**، ص: ٧/ ٤٢٢-٤٢٣.

٢٩ - أبو جعفر أحمد بن محمد الطحاوي ، **شرح معاني الآثار**، كتاب الصرف، باب الربا، عالم الكتب، الطبعة الأولى ١٤١٤هـ، ص: ٤/ ٦٦، رقم: ٥٧٦١.

٣٠ - البيهقي، **السنن الكبرى**، كتاب البيوع، باب من قال بجريان الربا فى كل ما يكال ويوزن، ص: ٥/ ٤٦٩، بعد الحديث رقم: ١٠٥٢٠. مزید تفصیل کے لیے ملاحظہ ہو: ستر الجعيد، **أحكام الأوراق النقدية**، ص: ٩٩-١٠٠.

٣١ - علي بن عمر الدارقطني، **السنن**، ص: ٣/ ٤٠٧.

نزدیک وہ نیک آدمی ہیں، البتہ ان کے نیک ہونے سے یہ لازم نہیں ہوتا کہ حدیث کے معاملے میں بھی وہ ثقہ ہو۔ صاحبِ تقریب نے ان کو صادق قرار دینے کے ساتھ ساتھ سیئ الحفظ بھی قرار دیا ہے۔ لہٰذا اس طرح کی روایت ربٰو جیسے بڑے حکم کے ثبوت کے لیے بطورِ حجت پیش نہیں کی جاسکتی[32]۔

حضرت عمارؓ کے قول کو بطورِ دلیل پیش کرنے کو علامہ ابن حزمؒ نے مسترد کیا ہے، اس لیے کہ اس کے الفاظ اس طرح ہیں: "فماكان يدا بيد فلا بأس، إنما الربا في النسأ إلا ما كيل أو وزن" اب نحوی لحاظ سے دیکھنا یہ ہے کہ "إلا ما كيل أو وزن" کو کس جملے سے استثنا قرار دیا جائے، اگر اس کو "إنما الربا في النسأ" سے استثنا قرار دیا جائے تو پھر اس کا مطلب یہ ہوگا کہ سود کا تعلق صرف ادھار اور کیلی اور وزنی اشیا سے ہے، حالانکہ یہ حنفیہ کی رائے نہیں، اور اگر اس کو "فماكان يدا بيد فلا بأس" سے استثنا قرار دیا جائے تو پھر اس کا مطلب ہوگا کہ کیلی چیز کا تبادلہ وزنی چیز سے ہاتھوں ہاتھ بھی درست نہیں، دونوں صورتوں میں کسی کے بھی حنفیہ قائل نہیں اور کوئی تیسری توجیہ ممکن نہیں، اس لیے یہ دلیل کمزور ہے[33]۔ لیکن ابن حزمؒ کا یہ اعتراض کمزور اس لیے ہے کہ حضرت عمارؓ کے قول کا مطلب یہ ہے کہ ربا النسیئہ صرف قرض کے معاملات میں ہی لازم آتا ہے البتہ کیلی اور وزنی چیزوں میں ربا الفضل بھی لازم آتا ہے[34]۔ تاہم یہ کہا جاسکتا ہے کہ یہ صحابی کی ذاتی رائے ہے جس سے اختلاف کی گنجائش ہے۔ جہاں تک حدیثِ عمر کا تعلق ہے تو ابن حزمؒ نے اسے انقطاع کی وجہ سے رد کیا ہے[35] کیونکہ اس حدیث کی روایت عمرو بن شعیبؒ نے حضرت عمرؓ سے بلاواسطہ کی ہے، جب کہ عمرو بن شعیبؒ نے حضرت عمرؓ کا زمانہ نہیں پایا، اس اعتبار سے یہ روایت منقطع ہے[36]۔

وزن کو علت قرار دینے والے مؤقف پر وارد اعتراضات:

متذکرہ بالا رائے پر فقہی نوعیت کے کچھ اشکالات بھی وارد ہوتے ہیں جن کا ذکر حسبِ ذیل ہے۔

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٣٢ - محمد بن علي الشوكاني، **السيل الجرار**، ص: ٥٠٧.

٣٣ - ابن حزم، **المحلى**، ص: ٧/ ٤٢٥.

٣٤ - ستر بن ثواب الجعيد، **أحكام الأوراق النقدية**، ص: ٩٧.

٣٥ - ابن حزم، **المحلى**، ص: ٧/ ٤٢٥.

٣٦ - ستر بن ثواب الجعيد، **أحكام الأوراق النقدية**، ص: ٩٧-٩٨.

۱۔ نقضِ علت:

اس رائے پر سب سے اہم اعتراض یہ وارد ہوتا ہے کہ جب کسی وزنی چیز میں بیعِ سلم کیا جائے اور سونا یا چاندی کو قیمت بنالیا جائے تو اس علت کے مطابق چونکہ دونوں وزنی چیزیں ہیں اور دو وزنی اشیا کا آپس میں بیعِ سلم درست نہیں ہوتا، اس لیے یہ عقد بھی ناجائز ہونا چاہیے، جب کہ حنفیہ کے ہاں ایسا عقد جائز ہے، تو اس کا مطلب یہ ہوا کہ علتِ ربٰو کے معاملے میں سونا، چاندی اور دیگر موزونات کا حکم مختلف ہے، لہٰذا "وزن" کو علتِ ربٰو قرار دینا کسی صورت درست نہیں[37]۔ علامہ ابن القیمؒ فرماتے ہیں کہ جب علت بغیر کسی مؤثر فرق کے حکم پر اثر انداز نہ ہو سکے تو ایسی چیز کو علت قرار دینا درست نہیں۔[38] حنفیہ نے اس اشکال کا جواب کچھ یوں دیا ہے کہ سونا چاندی بھی وزنی ہے اور باقی اشیا بھی وزنی ہیں مگر دونوں کے وزنی ہونے میں اس لحاظ سے فرق ہے کہ سونے چاندی کو بہت دقیق ترازو سے تولا جاتا ہے اور متعین کرنے سے متعین نہیں ہوتے جب کہ دیگر وزنی اشیا ایسی نہیں، اور اس عقد سلم کی اباحت حدیث سے بھی ثابت ہے چنانچہ حضور صلی اللہ علیہ وسلم نے کیلی اور وزنی اشیا میں سلم کی اجازت دی[39] حالانکہ اس زمانے کی رائج کرنسی درہم اور دینار ہی تھے۔[40] لیکن یہ جواب اس لحاظ سے کمزور ہے کہ ترازو کا مختلف ہونے کے باوجود یہ تمام چیزیں پھر بھی وزنی تو ہیں، اس لیے ابن ہمامؒ فرماتے ہیں کہ بہتر یہ ہے کہ اس کو عمومی حکم سے مستثنیٰ قرار دیا جائے ورنہ تو سلم کا دروازہ بند ہو جائے گا۔[41]

۲۔ وزن ایک اتفاقی وصف ہے:

وزن کو علت قرار دینا ایک غیر متعلقہ وصف کو علت قرار دینے کے مترادف ہے جب کہ اصولیین کے ہاں علت اور حکم کے مابین ایک گونہ مناسبت ضروری ہے، امام ماوردیؒ فرماتے ہیں: ثبوتِ حکم کے معاملے میں علت وہ وصف ہونا چاہیے جو مقصودی ہو یعنی اتفاقی نہ ہو[42]، جب کہ وزن کو علت قرار دینا محض ایک اتفاقی چیز کو علت قرار دینا ہے جس کی اصل حکم کے ساتھ کوئی مناسبت نہیں۔ علامہ ابن القیمؒ نے بھی اس مؤقف کو اسی وجہ سے رد کیا

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۳۷ - أبو الحسن علي بن محمد الماوردي، **الحاوي الكبير في فقه مذهب الإمام الشافعي (شرح مختصر المزني)**، (دار الكتب العلمية بيروت، الطبعة الأولى ١٤١٤هـ)، ص: ٥/ ٩١-٩٢.

۳۸ - ابن قيم الجوزية، **إعلام الموقعين**، ص: ٢/ ١٥٦.

۳۹ - مسلم ، **الصحيح**، كتاب البيوع، باب السلم.

٤٠ - الزيلعي، **تبيين الحقائق**، ص: ٤/ ٨٨.

٤١ - ابن الهمام، **فتح القدير**، ص: ٧/ ١٤.

٤٢ - الماوردي، **الحاوي الكبير**، ص: ٥/ ٨٧.

ہے۔[43] شاہ ولی اللہ دہلویؒ کے نزدیک بھی شریعت کے قوانین کے ساتھ زیادہ موافق یہ ہے کہ سونا، چاندی میں "ثمنیت" کو علت قرار دے کر متعلقہ احکام کو انہی دونوں کے ساتھ مختص کیا جائے، کیونکہ شریعت نے مجلسِ عقد میں تقابض کو واجب قرار دینے جیسے اکثر احکام میں "ثمنیت" ہی کو مدار بنایا ہے۔[44]

۳۔ جگہ اور اشیا کے اختلاف کی وجہ سے علت میں اختلاف:

ایک اعتراض یہ بھی وارد ہوتا ہے کہ بعض چیزیں بعض علاقوں میں کیل کے ذریعے بیچی جاتی ہیں، جب کہ بعض دیگر جگہوں پر وزن کر کے بیچی جاتی ہیں، کبھی اس کے برعکس ہوتا ہے، چنانچہ کھجور حجاز میں کیل کر کے بیچی جاتی ہیں اور بصرہ اور عراق میں وزن کر کے بیچی جاتی ہیں۔ اسی طرح گندم بھی کسی زمانے میں کیل کے ذریعے بیچی جاتی تھی، اس کے بعد وزن کے ذریعے اس کی خرید و فروخت شروع ہوئی۔ اس تفصیل سے یہ بات معلوم ہوئی ہے کہ ایک ہی جنس کے اندر بعض علاقوں میں ربٰو پایا جاسکتا ہے جب کہ بعض علاقوں میں اسی جنس کے اندر ربٰو کا احتمال بھی نہیں ہے، نیز اسی طرح بعض زمانوں میں پایا جاسکتا ہے اور بعض میں نہیں، جب کہ حکم کی علت کے لیے تو ضروری ہے کہ ہر زمانے اور ہر جگہ میں یکساں ہو۔ اگر ہم یہ کہہ دیں کہ ہم ہر ملک اور علاقے کی عادت کو اعتبار دیں گے تو دین کھلواڑ بن جائے گا۔ جب بھی اس علاقے کے لوگ حرام چیز کو حلال کرنا چاہیں گے تو جس چیز کو وہ کیل کر کے بیچتے تھے، اس کو وزن کر کے بیچنا شروع کر دیں گے اور جو چیز وزن کر کے بیچتے تھے، اس کو کیل کر کے بیچنا شروع کر دیں گے، چنانچہ ایک حرام چیز وہ اپنے اختیار کے ساتھ حلال ٹھہرا سکیں گے[45]۔

۴۔ سونا چاندی کے علاوہ چیزوں میں ربٰو کی حکمت کا وجود:

شیخ ابن منیع فرماتے ہیں کہ حرمتِ ربٰو کی حکمت یعنی دفع ظلم وعدوان ہر اس چیز میں پائی جاتی ہے جو بطورِ ثمن رائج ہو، بلکہ سونا چاندی میں حرمتِ ربٰو کے معاملے میں جس ظلم کی رعایت رکھی جاتی ہے، وہ کرنسی نوٹ کے لین دین میں بھی پایا جاتا ہے، لہٰذا وزن کو علت ٹھہرانا ثمن کی تمام قسموں کو شامل نہیں، اس لیے علت ایسی ہونی چاہیے جو

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٤٣ - ابن قيم الجوزية، **إعلام الموقعين**، ص: ٢/ ١٥٦.

٤٤ - شاه ولي الله الدهلوي، **حجة الله البالغة**، (دار إحياء العلوم بيروت، الطبعة الثانية ١٤١٣هـ)، ص: ٢/ ١٢٤.

٤٥ - الماوردي، **الحاوي الكبير**، ص: ٥/ ٨٧. ابن حزم، **المحلى**، ص:٧/ ٤٢٣-٤٢٤.

ان تمام اقسام کو شامل ہو۔ [46] حنفیہ کی جانب سے ان اعتراضات کے کچھ جوابات بھی دئے گئے ہیں جو کتبِ فقہ میں موجود ہیں۔

دوسری رائے: ثمنیتِ غالبہ

علتِ ربا کے حوالے سے دوسری رائے یہ ہے کہ ربا کی علت "جنس بمع ثمنیتِ غالبہ" ہے، جس کو "ثمنیتِ جوہریہ" بھی کہا جاتا ہے۔ یہ علت نقود کے علاوہ فلوس وغیرہ کی طرف متعدی نہیں ہوتی۔ یہ امام شافعیؒ[47] کا قول ہے، نیز امام مالکؒ کا مشہور قول بھی ہے[48]، امام احمدؒ سے بھی ایک روایت ہے[49] اور شاہ ولی اللہؒ نے بھی اسے اختیار کیا ہے۔[50]

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٤٦ - عبد الله بن سليمان بن منيع، **الورق النقدي، حقيقته تاريخه قيمته حكمه**، (طبعة المصنف، الطبعة الثانية ١٤٠٤هـ)، ص: ٨٩-٩٠.

٤٧ - شيخ الإسلام زكريا بن محمد الأنصاري، **أسنى المطالب في شرح روض الطالب**، (دار الكتب العلمية بيروت، الطبعة الأولى ١٤٢٢ه)، ص: ٢/ ٢٢. شمس الدين محمد بن أحمد الخطيب الشربيني، **الإقناع في حل ألفاظ أبي شجاع**، (دار الفكر بيروت)، ص: ٢/ ٢٧٩. النووي، **روضة الطالبين وعمدة المفتين**، (المكتب الإسلامي بيروت، سنة ١٤٠٥هـ)، ص: ٣/ ٣٧٨.

٤٨ - امام عدوی فرماتے ہیں کہ ربوا کی علت کے بارے میں اختلاف ہے، مشہور قول کے مطابق علت ثمنیت غالبہ ہے، دوسرا قول مطلق ثمنیت کا ہے، پہلے قول کے مطابق ربٰو کا حکم فلوس کو شامل نہیں جب کہ دوسرے قول کے مطابق یہ حکم فلوس کو بھی شامل ہے۔ ملاحظہ ہو: الشيخ علي العدوي، **حاشية العدوي**، (مطبعة محمد آفندي مصطفى مصر)، ص: ٣/ ٤٤١. ابن عبد البر النمري، **التمهيد لما في الموطأ من المعاني والأسانيد**، (مؤسسة القرطبة)، ص: ٤/ ٨٩. أحمد بن غنيم النفراوي، **الفواكه الدواني على رسالة ابن أبي زيد القيرواني**، (دار الكتب العلمية، الطبعة الأولى ١٤١٨هـ)، ص: ٢/ ١١٩.

٤٩ - ابن قدامة، **المغني**، ص: ٤/ ١٣٥. عبد الرحمن بن محمد، ابن قدامة ، **الشرح الكبير**، ص: ٤/ ١٢٦.

٥٠ - شاه ولي الله الدهلوي، **حجة الله البالغة**، ص: ٢/ ١٢٤.

دلائل:

ان حضرات کی ایک دلیل یہ ہے کہ اس بات پر اجماع ہے کہ درہم اور دینار کے بدلے کسی بھی وزنی چیز کو بیعِ سلم کے ذریعے خریدا جاسکتا ہے حالانکہ اگر وزن علت ہوتا تو یہ ناجائز ہونا چاہیے تھا جیسے کہ جو کے عوض گندم میں سلم کرنا جائز نہیں ہے اور دینار کے عوض دراہم میں سلم جائز نہیں[51]، نیز امام ابو حنیفہؒ نے تانبہ، لوہا اور سکہ کی بنی ہوئی اشیا کی بیع کو آپس میں کمی بیشی کے ساتھ جائز قرار دیا ہے، اگر علت وزن ہوتی تو پھر اسے ناجائز ہونا چاہیے تھا[52]۔ امام شیرازی فرماتے ہیں: یہ اس بات کی دلیل ہے کہ سونا چاندی میں علت ایک ایسا وصف ہے جو ان دونوں کے علاوہ کسی اور چیز کی طرف متعدی نہیں ہوتا اور وہ معنٰی ان کا "اثمان کے جنس میں سے ہونا" ہے۔[53]

ان کی ایک دلیل یہ بھی ہے کہ علت اور حکم کے مابین مناسبت ضروری ہے۔ جب ہم ربٰو سے متعلق احادیث پر نظر دوڑاتے ہیں تو معلوم ہوتا ہے کہ حضور پاک ﷺ نے بعض احادیث میں چھے چیزوں کا تذکرہ فرمایا ہے، جب کہ بعض میں صرف سونا چاندی کا ذکر فرمایا ہے تو مناسب یہ ہے کہ ان دونوں کے لیے مستقل طور پر ایک مناسب اور الگ علت تلاش کی جائے۔ جب ہم ان اوصاف میں غور کرتے ہیں جن میں علت بننے کی صلاحیت موجود ہے تو وصفِ ثمنیت ایک ایسا مناسب وصف معلوم ہوتا ہے جو علت بننے کے لائق ہے۔[54] ماوردیؒ کے مطابق اصول یہ ہے کہ سونا، چاندی کے بارے میں کوئی حکم دیا جائے تو وہ حکم ان دونوں کے ساتھ خاص ہوگا اور کسی اور چیز کو ان پر قیاس نہیں کیا جائے گا، چنانچہ ہم دیکھتے ہیں کہ زکوٰۃ کا حکم ان دونوں کے ساتھ ہی خاص ہے، ان دونوں کے علاوہ پیتل، تانبہ اور دیگر موزونی اشیا کی طرف یہ حکم متعدی نہیں، نیز جب سونا، چاندی کے برتنوں کا استعمال حرام قرار دیا گیا تو یہ ممانعت کا حکم صرف ان دونوں کے ساتھ خاص ہو گیا، ان کے علاوہ دیگر اشیا کی برتنوں کی طرف متعدی نہیں ہوا، اسی طرح یہاں بھی ضروری ہے کہ ربٰو کا حکم بھی ان دونوں کے ساتھ ہی خاص ہو اور کسی اور کی طرف متعدی نہ ہو۔[55]

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٥١ - ابن قيم الجوزية، **إعلام الموقعين**، ص: ٢/ ١٥٦، الماوردي، **الحاوي الكبير**، ص: ٥/ ٩١-٩٢.

٥٢ - النووي، **المجموع**، ص: ٩/ ٣٩٣.

٥٣ - أبو اسحاق إبراهيم بن علي بن يوسف الشيرازي ، **المهذب في فقة الإمام الشافعي**، (دار الكتب العلمية بيروت، الطبعة الأولى ١٤١٦هـ)، ص: ٢/ ٢٦.

٥٤ - ملاحظہ ہو: ابن نجيم، **البحر الرائق**، ص: ٦/ ١٣٨.

٥٥ - الماوردي، **الحاوي الكبير**، ص: ٥/ ٩٢.

مذکورہ دلائل کی تنقیح:

ان دلائل پر کچھ اعتراضات کیے جاتے ہیں جس کی تفصیل درج ذیل ہے:

علتِ قاصرہ:

سب سے پہلے اعتراض یہ کیا گیا ہے کہ یہ علت صرف سونا چاندی کے ساتھ خاص ہے جس کو علتِ قاصرہ کہا جاتا ہے اور علتِ قاصرہ میں کوئی فائدہ نہیں ہوتا کیونکہ یہ متعدی نہیں ہوتی جب کہ علتِ وزن متعدی ہے[56]، چنانچہ اگر سونا، چاندی کی علت کو ثمنیت مان لیا جائے اور پھر وہ ثمنیت صرف ان کے ساتھ ہی خاص رہے، کسی اور چیز کی طرف متعدی نہ ہو تو اس سے یہ بہتر ہے کہ سونا، چاندی ہونا ہی علت قرار دیا جائے، یعنی چاندی کا چاندی ہونا اور سونے کا سونا ہونا ہی علت ہو، لیکن اس طرح کرنا عدمِ تعدی کی وجہ سے درست نہیں ہے، لہٰذا عدمِ تعدی ہی کی وجہ سے ثمنیتِ غالبہ کو بھی علت ٹھہرانا درست نہیں ہے[57]۔ یہی وجہ ہے کہ امام الحرمینؒ نے اپنے اس قول سے رجوع کرتے ہوئے اہلِ ظواہر کی موافقت اختیار فرمائی کہ ربٰو کا حکم چھے اشیا کے ساتھ خاص ہے[58]۔

علت جامع مانع نہیں:

دوسرا اعتراض یہ ہے کہ ثمنیت کی علت جامع اور مانع نہیں، کیونکہ فلوس بعض جگہوں پر ثمن کی حیثیت رکھتے ہیں اور آپ کے نزدیک اس میں کوئی ربٰو نہیں ہے تو علت کے پائے جانے کے باوجود حکم موجود نہیں۔ اسی طرح سونا، چاندی کے برتنوں میں ربٰو جاری ہوتا ہے باوجود یہ کہ یہ برتن ثمن نہیں ہے[59]۔

علتِ قاصرہ ہونے سے جواب:

شافعی فقہائے کرام نے اس کا جواب یہ دیا ہے کہ علتِ قاصرہ کی بنیادی وجہ یہ ہے کہ قدیم فقہاء کے ہاں سونا، چاندی کے علاوہ اور چیزوں میں یہ اوصاف نہیں پائے جا سکتے، اس وجہ سے انہوں نے حرمت کو صرف ان

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٥٦ - النووي، **المجموع**، ص: ٩/ ٣٩٣.

٥٧ - الماوردي، **الحاوي الكبير**، ص: ٥/ ٩١.

٥٨ - الجويني، **البرهان في أصول الفقه**، ص: ٢/ ٥٣٩.

٥٩ - علي بن محمد الماوردي، **الحاوي الكبير**، ص: ٥/ ٩١.

دونوں تک محدود رکھا[60]، نیز انہوں نے اس کے کچھ فوائد بھی ذکر کیے ہیں، منجملہ ان فوائد میں سے ایک فائدہ حکم کا اسی علت پر مقصور ہونا ہے، تاکہ اس پر مزید قیاس نہ کیا جائے۔ دوسرا فائدہ یہ ہے کہ ممکن ہے کہ مستقبل میں کسی ایسی چیز کا وجود آجائے جو من کل الوجوہ سونا چاندی کی جگہ لے لے تو اس کو بھی سونا چاندی کے ساتھ ملحق کیا جائے[61]۔

دوسرے اشکال کا جواب:

دوسرے اشکال کا جواب یہ دیا گیا ہے کہ جہاں تک فلوس یعنی دھاتی سکوں کی بات ہے تو اس میں مکمل ثمنیت موجود ہی نہیں، صرف چند شہروں میں اس کا رواج تھا، اس لیے اس کا حکم میں داخل نہ ہونا چنداں مضر نہیں، البتہ سونا چاندی کی برتنوں میں علت موجود ہے، کیونکہ علت میں مطلق ثمنیت کی بات کی گئی ہے جو کہ ان برتنوں میں موجود ہے۔[62] یہ جواب بھی دیا گیا ہے کہ سونا چاندی میں ربٰو نص سے ثابت ہے اور وہ نص عام ہے، وہاں سونا، چاندی سے بنے ہوئے برتن، زیور اور دیگر اشیا میں کوئی فرق نہیں ہے اور اس پر اجماع بھی ہے[63]۔

تیسری رائے: مطلق ثمنیت:

علتِ ربٰو کے حوالے سے تیسری رائے یہ ہے کہ علت "مطلق ثمنیت" ہے چاہے سونا، چاندی ہو یا فلوس یا اس کے علاوہ کوئی اور چیز ہو جس میں ثمنیت کے اوصاف متحقق ہوں۔ اس رائے کے حاملین میں سے بعض نے صراحت کے ساتھ ثمنیت کے علت ہونے کا تذکرہ کیا ہے، جب کہ بعض نے علت کی بابت تو کچھ نہیں کہا، لیکن فلوس پر سونا چاندی کے احکام انہوں نے جاری کر دیئے، جس کا لازمی تقاضا یہ ہے کہ ان کے ہاں علت "مطلق ثمنیت" ہے۔ یہ رائے امام مالکؒ سے منقول ہے[64]، نیز امام یحیی بن سعیدؒ، امام ربیعہ[65]، امام زہریؒ[66] اور

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٦٠ - الدكتور أحمد حسن، **الأوراق النقدية**، ص: ٢٤٨.

٦١ - النووي، **المجموع**، ص: ٩/ ٣٩٤، ومثله عند الماوردي، في **الحاوي الكبير**، ص: ٥/ ٩٢.

٦٢ - الماوردي، **الحاوي الكبير**، ص: ٥/ ٩٣، ومثله في **المجموع شرح المهذب**: ٩/ ٣٩٣.

٦٣ - ستر بن ثواب الجعيد، **أحكام الأوراق النقدية**، ص: ١٢٤.

٦٤ - علي العدوي، **حاشية العدوي**، ص:٣/ ٤٤١، وقال: هو خلاف المشهور، أحمد بن غنيم النفراوي، الفواكه الدواني، ص: ٢/ ١١٩. الإمام مالك بن أنس، **المدونة الكبرى رواية الإمام سحنون بن سعيد التنوخي عن الإمام عبد الرحمن بن قاسم**، (دار الكتب العلمية)، ص: ٣/ ٥.

امام ابن تیمیہؒ کا رجحان بھی اسی طرف ہے[67]۔ مالکیہ میں سے امام ابن عربیؒ نے اس کو راجح قرار دیا ہے۔[68] بعض معاصر اہلِ علم نے اس قول کو امام محمد بن حسنؒ اور بعض احناف کی طرف بھی منسوب کیا ہے[69] لیکن یہ نسبت درست نہیں ہے کیونکہ امام محمدؒ نے اس کی تصریح نہیں کی، اگرچہ وہ فلوس کی ثمنیت کے قائل ہیں اور ایک فلس کی بدلے دو فلوس کی بیع کو منع فرمایا ہے لیکن اس سے یہ بات لازم نہیں ہوتی کہ ان کے نزدیک "مطلق ثمنیت" ہی علت ہے۔ شیخ ابن منیعؒ[70] اور ان سے قبل ابن تیمیہؒ[71] نے اس قول کو امام ابو حنیفہ طرف منسوب کیا ہے، لیکن یہ قول احناف کی کتابوں میں منقول نہیں ہے، لہٰذا اس روایت کی صحت یقینی نہیں ہے، اور نہ ہی اس روایت کی بنیاد معلوم ہے۔

معاصر اہلِ علم میں اس بات پر اختلاف پایا جاتا ہے کہ کیا امام احمدؒ سے "مطلق ثمنیت" کے علت ہونے کے متعلق کوئی روایت منقول ہے؟ بعض حضرات اس کا اثبات کرتے ہیں جب کہ بعض انکار کرتے ہیں۔ اس کی وجہ یہ ہے کہ اکثر ائمۂ حنابلہ نے سونا، چاندی کے علتِ ربٰو کے متعلق دو آراء ذکر کیے ہیں:

پہلی رائے احناف کی طرح "وزن مع الجنس" کی ہے۔

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٦٥ - يعلم ذلك من منعهم عن صرف الفلوس بالدراهم إلا يدا بيد. انظر: الإمام مالك بن أنس، **المدونة الكبرى**، ص: ٣/ ٥.

٦٦ - أبو بكر عبد الله بن محمد بن أبي شيبة، **المصنف**، كتاب البيوع والأقضية، باب في رجل يشتري الفلوس، (طبعة الدار السلفية الهندية القديمة)، ص: ٧/ ٢٦٧، رقم الأثر: ٢٣٥٣٢.

٦٧ - تقي الدين أحمد بن عبد الحليم بن تيمية، **مجموع الفتاوى**، (دار الوفاء مصر، الطبعة الثالثة ١٤٢٦هـ)، ص: ٢٩/ ٤٧١.

٦٨ - محمد بن عبدالله، أبو بكر ابن العربي ، **عارضة الأحوذي شرح الترمذي**، (دار الكتب العلمية)، ص: ٥/ ٣١٠.

٦٩ - ستر بن ثواب الجعيد، **أحكام الأوراق النقدية**، ص: ١٢٥.

٧٠ - عبد الله بن سليمان بن منيع، **الورق النقدي**، ص: ٨٧.

٧١ - چنانچہ انہوں نے امام ابو حنیفہ کی طرف اس بات کی نسبت کی ہے کہ ان کے ہاں فلوس کو دراہم کے بدلے ادھار بیچنا درست نہیں، ملاحظہ ہو: تقي الدين ابن تيمية، **مجموع الفتاوى**، ص: ٢٩/ ٤٦٨.

دوسری رائے شافعیہ کی طرح "ثمنیتِ غالبہ" کی ہے۔ اسی وجہ سے بعض معاصرین تیسری رائے کا انکار کرتے ہیں۔[72]

لیکن حنابلہ کی کتابوں میں غور و فکر کرنے سے معلوم ہوتا ہے کہ ان کے نزدیک ایک روایت کے مطابق فلوس کو دراہم کے عوض ادھار بیچنا ممنوع ہے اور اس روایت کی نسبت امام احمدؒ کی طرف کی گئی ہے۔ حافظ ابن تیمیہؒ فرماتے ہیں: جہاں تک چاندی کو فلوس کے عوض بیچنے کا تعلق ہے تو کیا اس میں فوری قبضہ ضروری ہے؟ اس سلسلے میں امام احمدؒ سے دو اقوال منقول ہیں۔ پہلی رائے یہ ہے کہ فی الفور قبضہ ضروری ہے، اس لیے کہ یہ بیعِ صَرف کی جنس سے ہے، کیونکہ فلوس باقی اثمان کی طرح ہی ہیں۔[73] ایک اور جگہ فلوس کو دراہم کے عوض بیچنے کے متعلق فرماتے ہیں کہ اس معاملے میں ادھار کے جائز ہونے کے متعلق امام ابو حنیفہؒ اور امام احمد بن حنبلؒ سے دو مشہور اقوال منقول ہیں، چنانچہ پہلے قول کی تصریح کے مطابق یہ عقد جائز نہیں ہے۔ امام احمدؒ کے علاوہ امام مالکؒ کا بھی یہی قول ہے۔[74] اسی طرح امام مرداوی فرماتے ہیں: کہ اگر فلوس کو سونے کے عوض یا چاندی کے عوض بیچا جائے تو صحیح رائے کے مطابق اس میں ادھار جائز نہیں۔ اکثر حضرات کا یہی قول ہے۔[75] امام زرکشی فرماتے ہیں: کیا فلوسِ نافقہ ثمن کے قائم مقام ہو سکتے ہیں؟ تاکہ اس میں ربٰو جاری ہو جائے۔ اگر "مطلق ثمنیت" کو علت قرار دیا جائے تو اس میں ربٰو جاری ہو گا۔ ابو الخطاب سے بھی یہ منقول ہے[76]۔

مذکورہ بالا نصوص سے پتہ چلتا ہے کہ امام احمدؒ کے نزدیک علت ایک روایت کے مطابق "مطلق ثمنیت" ہے کیونکہ پہلے دو اقوال کے مطابق ان کے نزدیک فلوس پر بیعِ صَرف کے احکام جاری کرنا ممکن نہیں ہے۔

اس مؤقف کے دلائل:

دوسری رائے کے دلائل پر اضافہ کرتے ہوئے اس رائے کے قائل فقہاء کی دلیل یہ ہے کہ ثمنیت سے مقصود سونا اور چاندی بذاتِ خود نہیں ہے، بلکہ ثمنیت سے مقصود ان خصوصیات کا تحقق ہے جو سونا، چاندی میں پائی جاتی

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٧٢ - أحمد حسن، **الأوراق النقدية**، ص: ٢٢٠.

٧٣ - ابن تيمية، **مجموع الفتاوى**، ص: ٢٩/ ٤٥٩.

٧٤ - ابن تيمية، **مجموع الفتاوى**، ص: ٢٩/ ٤٦٨.

٧٥ - المرداوي، **الإنصاف**، ص: ٥/ ٣٥.

٧٦ - شمس الدين أبو عبد الله الزركشي، **شرح الزركشي على مختصر الخِرقي**، (دار الكتب العلمية، سنة ١٤٢٣هـ)، ص: ٢/ ١٦. المرداوي، **الإنصاف**، ص: ٥/ ١٦.

ہیں۔ فلوس میں بھی چونکہ وہی خصوصیات پائی جاتی ہیں، لہٰذا علت اس کو بھی شامل ہونی چاہیے، جہاں تک اس دعوی کا تعلق ہے کہ ثمنیت کے لیے صرف سونا چاندی کی تخلیق ہو چکی ہے تو دلائل سے یہ مؤقف ثابت نہیں ہوتا۔[77] شیخ ابن تیمیہؒ فرماتے ہیں کہ ثمن بنیادی طور پر چیزوں کی قیمت معلوم کرنے کے لیے بطورِ معیار استعمال ہوتا ہے اور وہ بذاتِ خود قابلِ انتفاع چیز نہیں، لہٰذا جب فلوس کو اثمان قرار دیا گیا تو اس کو کسی اور ثمن کے بدلے ادھار نہیں بیچا جائے گا۔[78] اسی طرح علامہ محمد رشید رضا فرماتے ہیں کہ سونا، چاندی کے علاوہ کسی اور چیز میں جب ایک علت پائی جائے اور گندم، جو، کھجور اور نمک کے علاوہ کھانے کی کسی اور چیز میں اگر کوئی علت پائی جائے تو مذکورہ چھے اجناس پر ان دونوں کا قیاس کرنا درست ہوگا، اس لیے کہ سود کی حرمت کی حکمت اس میں بھی موجود ہے۔[79] تاہم اس قول پر یہ اعتراض وارد ہوتا ہے کہ سونا، چاندی اور فلوس کے درمیان بہت بڑا فرق ہے۔ سونا، چاندی اصلاً اثمان ہیں، اور اس کی ثمنیت لوگوں کے اتفاق سے باطل نہیں ہو سکتی۔ فلوس کا معاملہ اس سے مختلف ہے۔ اس کی ثمنیت حکومتِ وقت کے حکم نامے اور پھر لوگوں کے تعامل کی مرہونِ منت ہے، نیز حکومت کی طرف سے اس کی ثمنیت ختم کرنے کے بعد اس کی کوئی قیمت باقی نہیں رہتی۔ علماء نے اس اعتراض کا جواب یہ دیا ہے کہ مقصود سونا، چاندی یا فلوس کی ذات نہیں بلکہ مقصود ان کے ذریعے اشیا کی خرید و فروخت ہے اور یہ مقصد فلوس کے اندر بھی پایا جاتا ہے، پھر اس صفت کا ہر زمانے اور ہر مقام میں پایا جانا مقصودِ اصلی سے الگ معاملہ ہے، اس لیے اگر حکومت فلوس کو ختم کر دے تو اس کی ثمنیت بھی ختم ہو جائے گی، اس لیے کہ حکم کا دار و مدار علت پر ہوتا ہے اور علت کے زوال پذیر ہونے سے حکم بھی زائل ہو جاتا ہے[80]۔

راجح قول:

ائمہ کے اقوال اور دلائل میں غور کرنے سے احناف اور حنابلہ کا موقف نصوص کے زیادہ قریب معلوم ہوتا ہے، ان کے مؤقف کی تائید نصوص کے اشارۃ النص اور بعض اوقات دلالۃ النص سے ہوتی ہے، البتہ وزن اور سونا، چاندی کے مابین کوئی مناسبت نہیں ہے، کیونکہ ان دونوں کا موزونی ہونا ایک اتفاقی امر ہے، علیت کے ساتھ اس کا کوئی تعلق نہیں ہے، اور انہوں نے جو دلائل ذکر کیے ہیں اس پر بھی اشکالات و اعتراضات ہیں۔ مزید اگر علت

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٧٧ - ستر بن ثواب الجعيد، **أحكام الأوراق النقدية**، ص: ١٣١.

٧٨ - ابن تيمية، **مجموع الفتاوى**، ص: ٢٩/ ٤٧١.

٧٩ - محمد رشيد بن علي رضا، **تفسير المنار**، (الهيئة المصرية العامة للكتاب، سنة ١٩٩٠م)، ص: ٧/ ١٥٣.

٨٠ - ستر بن ثواب الجعيد، **أحكام الأوراق النقدية**، ص: ١٣٢-١٣٣.

وزن ہو تو پھر سونا، چاندی، چونا اور لوہے میں کوئی فرق نہیں ہونا چاہیے کیونکہ ان میں سے ہر ایک چیز موزونی ہے تو سونا چاندی کی بیع کو کیوں الگ کر کے بیعِ صَرف کا نام دیا گیا؟ اس سے معلوم ہوتا ہے کہ سونا، چاندی کے اندر ایک اضافی خصوصیت ہے جو باقی چیزوں میں نہیں ہے اور وہ "ثمنیت" ہی ہے۔ لیکن چونکہ علتِ ربا اور کرنسی نوٹ کی فقہی تکییف باہم لازم وملزوم ہیں کیونکہ اگر ہم علتِ وزن کو ترجیح دیں گے تو اس کا مطلب یہ ہوگا کہ کرنسی نوٹ پر بیعِ صَرف کے احکام جاری نہیں ہوں گے اور اگر ہم مطلق ثمنیت کو راجح قرار دیں تو پھر اس اعتبار سے کرنسی نوٹ پر بیعِ صَرف کے احکام مطلقاً جاری ہوں گے، لہٰذا کرنسی نوٹ کی فقہی تکییف پر بحث کرنے کے بعد ہم ان آرا میں سے راجح رائے ذکر کریں گے۔

کرنسی نوٹ کی فقہی تکییف کے سلسلے میں معاصر اہلِ علم کی آرا

معاصر جمہور اہلِ علم کی رائے:

معاصر جمہور اہلِ علم کے ہاں کرنسی نوٹ اپنی ذات کی اعتبار سے مستقل نقدی کی حیثیت رکھتا ہے اور اس پر وہ تمام احکام جاری ہوں گے جو سونا اور چاندی پر جاری ہوتے ہیں۔ ربٰو اور زکوٰۃ سے متعلقہ تمام احکام کرنسی نوٹ پر جاری ہوں گے، نیز سلم، شرکت اور مضاربت کے لیے اس کو رأس المال بنانا بھی درست ہوگا۔ کرنسی نوٹ کو علتِ ربٰو کے تحت لانے کے لیے انہوں نے "ثمنیت" کو علتِ ربٰو قرار دیا۔ شیخ عبداللہ بن سلیمان بن منیع[81]، شیخ عبدالرحمان الساعاتی[82]، ڈاکٹر وھبہ زحیلی[83] اور معاصر جمہور اہلِ علم نے یہی مؤقف اپنایا ہے۔ سعودی عرب کے علمائے کرام کی اعلیٰ سطحی کمیٹی کا فتوی بھی یہی ہے[84]۔ نیز رابطہ عالمِ اسلامی کے تحت مجمع الفقہ الاسلامی[85] اور

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٨١ - عبد الله بن سليمان بن منيع، **الورق النقدي**، ص: ١١٣-١٢٧.

٨٢ - أحمد عبد الرحمن الساعاتي ، **بلوغ الأماني من أسرار الفتح الرباني**، (دار إحياء التراث العربي بيروت)، ص: ٨/ ٢٥١.

٨٣ - وهبة الزحيلي ، **الفقه الإسلامي وأدلته**، (دار الفكر دمشق، الطبعة الرابعة)، ص: ٥/ ٣٦٧٢.

٨٤ - هيئة كبار العلماء بالمملكة العربية السعودية، **أبحاث هيئة كبار العلماء، طبعة الرئاسة العامة لإدارات البحوث العلمية والإفتاء والدعوة والإرشاد الرياض**، (الطبعة الأولى ١٤٠٩هـ)، ص: ١/ ٥٧.

٨٥ - **مجلة مجمع الفقه الإسلامي الصادرة عن منظمة المؤتمر الاسلامي بجدة**، العدد الثالث، قرار رقم: ٩، ص: ٢٣.

AAOIFI نے اس حوالے سے قرارداد بھی منظور کیے ہیں۔[86] اس قول سے واضح طور پر معلوم ہوتا ہے کہ علتِ ربٰو "مطلق ثمنیت" ہے یا "ثمنیتِ غالبہ" ہے، لہٰذا جن حضرات نے اس رائے کو ترجیح دی ہے، انہیں لازمی طور پر "مطلق ثمنیت" کو علت قرار دینے کے سلسلے میں مالکیہ کی رائے کو ترجیح دینی پڑے گی یا "غالب ثمنیت" کو علت قرار دینے کے سلسلے میں شافعیہ کی رائے کو ترجیح دینی ہو گی اور دوسری رائے کو اختیار کرنے کے بعد یہ بھی ماننا پڑے گا کہ کرنسی نوٹ میں سونا، چاندی کی طرح ثمنیتِ غالبہ موجود ہے۔ اس کے علاوہ سونا چاندی کے تمام احکام کرنسی نوٹ پر جاری کرانے کے لیے کوئی چارہ نہیں ہے۔

مذاہبِ فقہاء کے تحت اس رائے کی تخریج:

علتِ ربٰو کے حوالے سے فقہاء کرام کی آراء پر اس رائے کی تخریج دو طرح سے ہو سکتی ہے:

اکثر حضرات نے اس کی تخریج مالکیہ کی رائے کے مطابق کی ہے کیونکہ ان کے نزدیک سونا، چاندی میں علتِ ربٰو "مطلق ثمنیت" ہے اور یہی علت کرنسی نوٹ میں بھی پائی جاتی ہے، لہٰذا اس تخریج کے مطابق سونا، چاندی، فلوس اور کرنسی نوٹ کے درمیان کوئی فرق نہیں ہے، ان سب پر بیعِ صَرف اور ربٰو کے احکام جاری ہوں گے۔ بعض محققین نے اس کی تخریج جمہور کی رائے کے موافق "ثمنیتِ غالبہ" پر کی ہے۔ جمہور کا لفظ اس لیے ہم نے استعمال کیا کہ یہ شوافع کا مسلک بھی ہے، مالکیہ کا مشہور قول بھی یہی ہے اور حنابلہ سے بھی اس طرح کا ایک قول منقول ہے جس کی تفصیل گزر چکی ہے۔ "ثمنیتِ غالبہ" سے مراد وہ ثمن ہے جس کا استعمال غالب ہو اور وہی سکہ رائج الوقت ہو۔ یہ وصف چونکہ کرنسی نوٹ میں ایک لحاظ سے سونا اور چاندی سے بھی زیادہ ہے، لہٰذا علتِ ربٰو اس کو بھی شامل ہے، اور بعض حضرات نے جو ثمنیت جوہریہ کے الفاظ سے اس کی تعبیر کی ہے، وہ سونے کے برتن وغیرہ کو علتِ ربٰو میں شامل کرنے کے لیے کی ہے، کرنسی نوٹ کا اخراج مقصود نہیں۔[87] مزید یہ کہ بعض شافعی فقہاء نے اس کی تعبیر "ثمنیتِ غالبہ کی صلاحیت" سے کی ہے[88] جو کہ کرنسی نوٹ میں بدرجۂ اتم موجود ہے۔ اس کی تائید بعض حنبلی فقہاء کی عبارات میں بھی ملتی ہے، مثلاً امام مرداوی نے جہاں فلوس کو علتِ ربو کے تحت داخل نہ کرنے کی وجہ یہ لکھی ہے کہ اس میں ثمنیتِ غالبہ موجود نہیں، وہاں یہ تصریح کی ہے کہ جو لوگ اس

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٨٦ - هيئة المحاسبة والمراجعة للمؤسسات المالية الإسلامية، **المعايير الشرعية** ١٤٣١هـ، رقم المعيار: ١، ص: ٤.

٨٧ - أحمد حسن، **الأوراق النقدية**، ص: ٢٤٤-٢٥١.

٨٨ - النووي، **روضة الطالبين**: ٣/ ٣٨٠.

بات کے قائل ہیں، اگر فلوس بھی سونا، چاندی کی طرح علی الاطلاق بطورِ ثمن استعمال ہونے لگے تو ان پر لازم ہو گا کہ فلوس کو اس علت کے تحت داخل کریں[89]۔ ابن مفلح نے الفروع میں بھی یہی بات لکھی ہے[90]۔ علامہ ابن حجر ہیتمی فرماتے ہیں کہ اگر فلوس سونا، چاندی کی طرح رائج ہو گئے تو سونا چاندی کے احکام اس پر بھی جاری ہوں گے۔[91] اس تخریج پر ایک اعتراض یہ وارد ہوتا ہے کہ جن حضرات نے "ثمنیتِ غالبہ" کو علت تسلیم کیا ہے تو انہوں نے اس بات کی تصریح بھی کی ہے کہ یہ صرف سونا، چاندی تک محدود ہے، تو کسی اور چیز کو اس پر قیاس کرنا کیسے ممکن ہے؟ اس کا جواب یہ دیا گیا کہ انہوں نے علت کو صرف سونا، چاندی میں اس لیے منحصر رکھا کہ اس زمانے میں ان دونوں کے علاوہ کوئی اور چیز نقدی کے طور پر رائج نہیں تھی، نہ ہی کوئی ایسی چیز وجود میں آئی تھی جس میں سونا، چاندی کے جملہ اوصاف موجود ہوں اور اس کو سونا، چاندی پر قیاس کیا جا سکے۔ فلوس اگرچہ رائج تھے لیکن وہ مکمل طور پر سونا، چاندی کے قائم مقام نہیں تھے، لہٰذا علتِ متعدیہ میں انہیں کوئی فائدہ نظر نہیں آیا۔ امام ماوردی فرماتے ہیں کہ فلوس اگرچہ بعض شہروں میں ثمن کے طور پر رائج تھے لیکن بہت ہی نادر تھے۔[92] ان فقہائے کرام کی رائے یہ نہیں تھی کہ قیاس کو سرے سے ممنوع قرار دیا جائے، ورنہ پھر وہ علت کو "سونا اور چاندی ہونا" قرار دے دیتے۔ جب انہوں "جنسِ ثمنیت یا ثمنیتِ غالبہ" کو علت ٹھہرایا تو اس کا مطلب یہ ہے کہ اگر کوئی اور ایسی چیز وجود میں آ گئی جس میں ثمنیت کے اوصاف موجود ہوں تو ان کے نزدیک قیاس درست ہو گا۔[93] اس تخریج کے مطابق فلوس سونا، چاندی کے ساتھ ملحق نہیں ہیں، البتہ کرنسی نوٹ سونا چاندی کے ساتھ ملحق ہے[94]۔

مذکورہ بالا رائے پر مرتب ہونے والے احکام:

کرنسی نوٹ کو اگر سونا، چاندی کے ساتھ ملحق کیا جائے تو مندرجہ ذیل احکام پر اس کا اثر مرتب ہو گا:

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٨٩ - المرداوي، **الإنصاف**، ص: ٥/ ١٢.

٩٠ - محمد بن مفلح المقدسي، **الفروع مع تصحيح الفروع للمرداوي**، (مؤسسة الرسالة بيروت ودار المؤيد رياض، الطبعة الأولى ١٤٢٤هـ)، ص: ٦/ ٢٩٤.

٩١ - ابن حجر الهيثمي، **الفتاوى الفقهية الكبرى**، (المكتبة الإسلامية)، ص: ٢/ ١٨٢.

٩٢ - الماوردي، **الحاوي الكبير**، ص: ٥/ ٩٣.

٩٣ - ملاحظہ ہو: أحمد حسن، **الأوراق النقدية**، ص: ٢٤٤-٢٥١.

٩٤ - عبد الرحمن بن أبي بكر، جلال الدين السيوطي، **الحاوي للفتاوى**، (دار الكتب العلمية، الطبعة الأولى ١٤٢١هـ)، ص: ٢/ ٣٠٥.

أ. سونا، چاندی میں ربٰو کے دونوں انواع یعنی ربٰوالفضل اور ربٰوالنسیئہ جاری ہوں گے؛

ب. ادھار معاملہ کسی بھی صورت میں جائز نہیں ہوگا، لہٰذا ایک ملک کے کرنسی نوٹوں کا دوسرے ملک کے کرنسی نوٹوں کے عوض ادھار بیچنا یا سونا یا چاندی کے عوض ادھار بیچنا مطلقاً ناجائز ہوگا، مثلاً: سعودی ریال کی ادھار بیع پاکستانی روپے کے عوض ناجائز ہوگی؛

ج. ایک ہی ملک کی کرنسی کا آپس میں تبادلہ کے وقت تفاضل جائز نہیں ہوگا، چاہے ادھار ہو یا نقد، مثلاً دس پاکستانی روپے کا تبادلہ گیارہ روپے سے ناجائز ہوگا؛

د. دو ملکوں کی کرنسی کا آپس میں تبادلہ کرتے وقت تفاضل جائز ہوگا، البتہ دونوں طرف سے قبضہ کرنا شرط ہے؛

ہ. جب کرنسی کی قیمت سونا یا چاندی کے دونوں نصابوں میں سے کسی ایک نصاب تک پہنچ جائے یا اس کے علاوہ دیگر اثمان اور سامانِ تجارت سے مل کر نصاب مکمل ہو جائے تو زکوٰۃ واجب ہو جائے گی؛

و. سلم اور شراکت داری کے معاملوں میں کرنسی نوٹ بطورِ رأس المال (Capital) استعمال کیا جا سکے گا۔[95]

اس رائے کی سب سے اہم دلیل یہ ہے کہ ان حضرات نے علتِ ربٰو کے معاملے میں "مطلق ثمنیت" کو ترجیح دی ہے جیسا کہ امام مالکؒ کا قول ہے اور جسے محققین کی ایک جماعت نے راجح قرار دیا ہے[96]۔ اس قول کی بنا پر جو بھی ثمن ہو، اس کے ساتھ نقدین کا حکم ملحق ہو جائے گا، جب تک کہ وہ حکم صرف ان دونوں کے ساتھ خاص نہ ہو، چنانچہ جن دلائل سے انہوں نے علتِ ربٰو کے سلسلے میں استدلال کیا ہے، وہ یہاں بھی پیش کرتے ہیں۔ شیخ ساعاتی فرماتے ہیں: میرے خیال میں برحق مؤقف یہ ہے کہ کرنسی نوٹ زکوٰۃ کے معاملے میں بالکل سونا، چاندی کی طرح ہے، کیونکہ اس کے ساتھ مکمل طور پر نقدین کا برتاؤ کیا جاتا ہے، نیز کرنسی نوٹ کے مالک کے لیے اپنی چاہت کے مطابق کسی بھی وقت اس کا خرچ کرنا اور اس سے اپنی ضروریات پوری کرنا ممکن ہے۔[97]

نقد کی تعریف میں انہوں نے اس بات کو راجح قرار دیا ہے کہ یہ ہر اس چیز کو شامل ہے جو مختلف اشیا کے لیے معیار کے طور پر استعمال ہوتا ہو، یہ ضروری نہیں کہ وہ صرف سونا اور چاندی ہی ہو۔ جہاں تک سونا، چاندی کا ثمنِ خلقی ہونے کی بات ہے تو دلائل سے یہ بات ثابت نہیں ہوتی۔ جن حضرات نے اسے ثمنِ خلقی قرار دیا ہے، انہوں نے

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٩٥ - قرارات المجمع الفقهي الإسلامي التابع لرابطة العالم الإسلامي بمكة المكرمة، (طبعة الرابطة، ص: ١٠١-١٠٢. أبحاث هيئة كبار العلماء)، ص: ١/ ٥٧.

٩٦ - اس کی تفصیل شروع میں گزر چکی۔

٩٧ - الساعاتي، **بلوغ الأماني**: ٨/ ٢٥١.

اپنی اس بات پر کوئی صریح دلیل پیش نہیں کی جس سے ان کا مؤقف ثابت ہو سکے۔ ان فقہائے کرام نے نقد کی تعریف میں امام مالکؒ کے قول کو بھی بطورِ دلیل پیش کیا ہے۔ وہ فرماتے ہیں:

اگر لوگ چمڑے کو بھی بطورِ ثمن استعمال کرنا شروع کر دیں تو سونا، چاندی کے عوض اس کی ادھار بیع کو میں ناپسند کروں گا[98]۔ گویا کہ ان کے ہاں سونا چاندی کے احکام چمڑے سے بنی کرنسی پر بھی رائج ہوں گے۔ امام ابن تیمیہؒ کے قول کو بھی انہوں نے بطورِ دلیل پیش کیا ہے کہ انہوں نے فرمایا کہ درہم اور دینار کی کوئی لگی بندھی تحدید نہیں، بلکہ اس میں عرف کو مدِ نظر رکھا جائے گا، اس لیے کہ اصلاً یہ کوئی مقصودی چیز نہیں ہے بلکہ اس سے مقصود ایک ایسا معیار ہے جس پر لوگوں کا تعامل ہو، گویا کہ دراہم اور دنانیر بذاتِ خود کوئی مقصودی چیز نہیں ہے بلکہ یہ تعامل کے لیے ایک وسیلہ ہے۔ اسی وجہ سے یہ اثمان ہیں، البتہ دیگر اموال کا معاملہ ان سے مختلف ہے کیونکہ وہاں بذاتِ خود اس سے انتفاع لینا مقصود ہوتا ہے اور وسیلہ محض کا کسی خاص مادے یا خاص شکل کے ساتھ کوئی سروکار نہیں، بلکہ اس سے مقصود حاصل ہونا چاہیے، چاہے وہ جس شکل میں بھی ہو[99]۔ ان حضرات کے اور بھی دلائل ہیں جس کی تفصیل میں ہم نہیں جانا چاہتے، اس لیے کہ یہاں ہمارے مدِ نظر ان آرا کی مکمل وضاحت نہیں، بلکہ بنیادی مطمحِ نظر یہ ہے کہ علتِ ربٰو میں اختلاف کی وجہ سے کرنسی نوٹ کی فقہی تکییف میں اختلاف کیسے پیدا ہو جاتا ہے۔

برِ صغیر کے جمہور علمائے کرام کی رائے:

برِ صغیر کے جمہور علمائے کرام کے نزدیک بیعِ صَرف کے احکام کرنسی نوٹ پر جاری نہیں ہوتے، اس لیے کہ علتِ ربٰو کرنسی نوٹ میں موجود نہیں ہے۔ دراصل یہ حضرات امام ابو حنیفہؒ کے مذہب کی تقلید کرتے ہیں اور چونکہ امام صاحبؒ کے نزدیک علتِ ربٰو قدر اور جنس ہے (قدر سے مراد وزن یا کیل ہے)، لہٰذا ان کے نزدیک وہ اشیا جو گنتی کر کے بیچی جاتی ہوں، ان میں ربٰو کے احکام جاری نہیں ہوتے[100]۔ سونا، چاندی چونکہ وزنی چیزیں ہیں، اس لیے ان میں ربٰو کے احکام جاری ہوتے ہیں، البتہ فلوس چونکہ عددی ہیں، لہٰذا اس پر ربٰو کے احکام جاری نہیں ہوتے، نیز اس میں معاملہ کرتے وقت تقابض بھی شرط نہیں ہے۔ جو حضرات علتِ ربٰو کے معاملہ میں امام ابو حنیفہؒ کی رائے کو راجح سمجھتے ہیں، ان کے نزدیک کرنسی نوٹ پر بیعِ صَرف کے احکام جاری کرنا اور اسے سونا اور چاندی کے حکم میں یکساں قرار دینا ممکن نہیں ہے، لہٰذا فقہی تکییف اور احکام کے اعتبار ان کو فلوس کے ساتھ ملحق کرنا ہوگا۔ فلوس کے سلسلے میں احناف دو طرح کی رائے رکھتے ہیں: (1) امام ابو حنیفہؒ اور امام ابو یوسفؒ کے نزدیک جب بائع اور مشتری فلوس کو متعین کر دیں تو اس میں تفاضل جائز ہے۔ (2) جب کہ امام محمدؒ کے نزدیک اس میں تفاضل جائز

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٩٨ - مالك بن أنس، **المدونة**، ص: ٣/ ٥.

٩٩ - ابن تيمية، **مجموع الفتاوى**، ص: ١٩/ ٢٥١-٢٥٢.

١٠٠ - الكاساني، **بدائع الصنائع**، ص: ٥/ ٢٤٥.

نہیں ہے کیونکہ تفاضل کے وقت اس میں کچھ فلوس ایسے ہوں گے جس کے بالمقابل عوض نہیں ہوگا جو کہ سود ہے۔ جہاں تک سونا، چاندی کا فلوس کے عوض ادھار بیچنے کا تعلق ہے تو احناف اس بیع کے جواز پر متفق ہیں۔ برِصغیر کے بعض علماء کرنسی نوٹ کے معاملے میں امام ابو حنیفہؒ کی وہ رائے اپناتے ہیں جو انہوں نے فلوس کے بارے میں قائم کی تھی، جیسے شیخ احمد رضا خان اور ان کے ساتھ کچھ دیگر علماء، البتہ اکثر حضرات اس سلسلے میں امام محمدؒ کی رائے کو بہتر سمجھتے ہیں[101]، کیونکہ امام ابو حنیفہؒ کی رائے پر فتوی دینا سود کا دروازہ کھول دینے کے مترادف ہے۔ یہی رائے عصرِ حاضر میں مفتی محمد تقی عثمانی صاحب کی بھی ہے۔

برِصغیر کے علاوہ باقی دنیا میں بھی کثیر تعداد میں ایسے علماء موجود ہیں جو کرنسی نوٹ کو فلوس کے حکم میں خیال کرتے ہیں، ان حضرات میں سے اکثر کے ہاں کرنسی پر ربٰو کے احکام جاری نہیں ہوتے، جس طرح کہ جمہور فقہاء فلوس کے بارے میں یہی رائے رکھتے ہیں[102]، کیونکہ ان کے خیال میں فلوس کی مشابہت سونا، چاندی کی بنسبت عروض سے زیادہ ہے۔ اس وجہ سے معاصر محققین میں سے اکثر کا خیال یہ ہے کہ کرنسی نوٹ کو فلوس کے ساتھ ملحق کر کے فتوی دینے سے سود کا دروازہ کھل جائے گا، اس وجہ سے انہوں نے اس رائے کو قبول نہیں کیا۔ البتہ برِصغیر کے علماء کی رائے پر تفصیلی بحث سے پتہ چلتا ہے کہ اس رائے کے مطابق سود کا دروازہ کھل جانے کا خدشہ نہیں ہے۔ اس کی وجہ یہ ہے کہ انہوں نے اس بارے میں امام محمدؒ کی رائے کو ترجیح دی ہے۔ امام محمدؒ کے قول پر یہ اعتراض کیا جاتا ہے کہ علتِ ربٰو کے سلسلے میں ان کا قول "قدر اور جنس" کا ہے جب کہ فلوس وزنی ہیں، نہ کیلی، بلکہ عددی ہیں، اس لیے اس میں تفاضل جائز ہونا چاہیے تھا اور باہم تبادلے کے وقت فوری قبضہ بھی ضروری نہیں ہونا چاہیے تھا، اس لیے کہ یہ سارے احکام علتِ ربٰو کے تحت داخل ہونے کے بعد ہی جاری کیے جا سکتے ہیں۔

اس اعتراض کا جواب یہ دیا گیا ہے کہ ربٰو القرآن سے مراد وہ اضافی چیز ہے جو مقابل میں عوض سے خالی ہو، تو اگر ایک فلس کی بیع دو فلس کے عوض ہو تو اس صورت میں ایک فلس بغیر کسی عوض کے ہے اور یہ عقد میں مشروط بھی ہے، لہٰذا یہ ربٰو القرآن کے تحت داخل ہونے کی وجہ سے ناجائز ہے۔[103] جہاں تک فی الفور قبضے کی بات

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101 - تفصیل کے لیے ملاحظہ ہو: أسد الله، إنعام الله، "موقف إلحاق الورق النقدي بالفلوس –دراسة فقهية نقدية"، بحث مطبوع في مجلة **"برجس"** المحكمة، الصادرة من جامعة بنّو للعلوم والتكنولوجيا، المجلد الخامس، العدد الأول، يناير–يونيو ٢٠١٩م، ص: ٩١–١١٧.

102 - تفصیل کے لیے ملاحظہ ہو: أسد الله، إنعام الله، **موقف إلحاق الورق النقدي بالفلوس –دراسة فقهية نقدية**، ص: ٩١–١١٧.

١٠٣ - أكمل الدين البابِرتي ، **العناية شرح الهداية**، دار الفكر بيروت، ص: ٧/ ٢٠، ابن الهمام، **فتح القدير**، ص: ٧/ ٢١.

ہے تو یہ بات فقہ میں مسلم ہے کہ صرف جنس بھی ربٰو النسیئۃ کو حرام قرار دینے کے لیے کافی ہوتا ہے[104]۔ اس لیے فلوس کا تبادلہ اگر فلوس کے ساتھ ہو تو طرفین سے قبضہ ضروری ہے۔ امام محمدؒ کی رائے بیان کرنے کے بعد ہم اختصار کے ساتھ کہہ سکتے ہیں کہ کرنسی نوٹ کے سلسلے میں برِصغیر کے علماء کا بعینہ وہی مؤقف ہے جو امام محمدؒ کا فلوس کے سلسلے میں ہے۔ مفتی تقی عثمانی صاحب کے نزدیک کرنسی نوٹ کے بعینہ وہی احکام ہیں جو امام محمدؒ کے نزدیک فلوس کے ہیں، لہٰذا جب کرنسی نوٹ کی بیع اپنے ہی جنس کے ساتھ ہو تو اس پر وہ احکام جاری ہوں گے جو فلوس کی بیع فلوس ہی کے ساتھ کرتے ہوئے جاری ہوتے ہیں اور جب اس کی بیع کسی اور ملک کی کرنسی یا سونا ،چاندی کے ساتھ ہو تو اس پر وہ احکام جاری ہوں گے جو فلوس کی بیع سونا، چاندی کے ساتھ کرتے ہوئے جاری ہوتے ہیں۔[105] ہندوستان کے اسلامک فقہ اکیڈمی کے اراکین میں سے اکثر نے شیخ تقی عثمانی کے مؤقف کو راجح قرار دیا ہے۔[106]

مذکورہ بالا رائے پر مرتب ہونے والے احکام:

۱. جب کرنسی نوٹ نصاب تک پہنچ جائیں تو ان میں زکوٰۃ واجب ہو گی؛
۲. سلم اور دیگر مالی عقود کے لیے یہ رأس المال (Capital) بن سکتا ہے؛
۳. اس کے عوض سونا، چاندی اور زیورات کی خرید و فروخت ادھار بھی جائز ہے؛
۴. اس کی بیع جب اپنے ہی جنس کے ساتھ ہو تو اس میں ربٰو کے احکام جاری ہوں گے، لہٰذا تفاضل اور ادھار معاملہ ناجائز ہو گا؛
۵. جب اس کی بیع کسی اور جنس کے ساتھ ہو تو تفاضل اور ادھار دونوں جائز ہوں گے۔[107]

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١٠٤ - ابنِ نجیم فرماتے ہیں: إن الجنس بانفراده يحرم النسأ، یعنی صرف جنس کا اتحاد بھی ادھار معاملے کی حرمت کے لیے کافی ہے۔ **البحر الرائق**: ٦/ ١٣٩.

١٠٥ - محمد تقي العثماني، **بحوث في قضايا فقهية معاصرة**، (دار القلم دمشق، الطبعة الثانية ١٤٢٤هـ)، ص: ١٤٣-١٧٢. محمد تقي العثماني، **فقه البيوع على المذاهب الأربعة مع تطبيقاتها المعاصرة مقارنا بالقوانين الوضعية**، (مكتبة معارف القرآن كراتشي، الطبعة الأولى ١٤٣٦هـ)، ص: ٢/ ٧٣٣-٧٣٦.

١٠٦ - مجمع الفقه الإسلامي بالهند، **جدید فقہی مباحث**، (إدارة القرآن والعلوم الإسلامية كراتشي، سنة ٢٠٠٩م)، ص: ٤/ ٥٥ فما بعدها.

١٠٧ - العثماني، **فقه البيوع**، ص: ٢/ ٧٣٣.

دلائل:

جو حضرات کرنسی نوٹ کو فلوس کے ساتھ ملحق ٹھہراتے ہیں، اُن کے دلائل حسبِ ذیل ہے:

أ. دراصل اس رائے کے قائل حضرات علتِ ربٰو کے معاملے میں حنفی مذہب کو راجح سمجھتے ہیں، چنانچہ حنفیہ کے مؤقف کے مطابق کرنسی نوٹ پر بیعِ صَرف کے احکام کا اجرا ممکن نہیں ہے کیونکہ یہاں وزن مطلقاً مفقود ہے۔ اس کی وجہ یہ ہے کہ صَرف کوئی مستقل چیز نہیں ہے بلکہ وہ ربٰو سے متفرع ہے کیونکہ اس کے احکام ان احادیث سے مستنبط ہیں جو ربٰو کے متعلق وارد ہو چکے ہیں اور بعض احادیث میں خصوصیت کے ساتھ سونا اور چاندی کا تذکرہ ہے، ان احادیث میں بھی صرف انہی احکامات کا ذکر ہے جو احادیثِ ربٰو میں مذکور ہیں۔ یہی وجہ ہے کہ حنفیہ کے علاوہ دیگر فقہاء نے "باب الصَرف" کا تذکرہ الگ سے نہیں کیا بلکہ انہوں نے اس پر بحث ربٰو کے احکام کے ضمن میں کی ہے۔ علت کے علاوہ انہوں نے ربٰو اور صَرف کے درمیان احکام کے اعتبار سے کوئی فرق نہیں کیا۔ البتہ حنفیہ نے "باب الصَرف" کو الگ سے بیان کیا ہے، لیکن انہوں نے ربٰو اور صَرف میں علت کے معاملے میں فرق نہیں کیا، لہٰذا "وزن کی علت" جس طرح دیگر موزونات کو شامل ہے، اسی طرح، سونا چاندی کو بھی شامل ہے۔[108] اس لحاظ سے صَرف اور ربٰو کے ابواب ایک دوسرے میں ضم ہیں، اس لیے جب تک کسی چیز کے اندر ربٰو کی علت متحقق نہ ہو جائے، اس وقت تک اس پر صَرف کے احکام جاری کرنا ممکن نہیں ہے اور حنفیہ کے قول کے مطابق یہ علت کرنسی نوٹ میں نہیں پائی جاتی۔

ب. جب ہم سونا، چاندی، کرنسی نوٹ اور فلوس میں غور کرتے ہیں تو معلوم ہوتا ہے کہ کرنسی نوٹ، سونا چاندی کی بنسبت فلوس کے زیادہ قریب ہیں، اس لیے کہ سونا، چاندی اپنے اصل کے اعتبار سے ثمن ہیں، ثمنیت کے لحاظ سے یہ کسی حکومت یا فرد کے محتاج نہیں ہیں اور ان دونوں میں قرار اور ثبات بھی ہیں جبکہ یہ اوصاف کرنسی نوٹ میں موجود نہیں ہیں۔

ج. کرنسی نوٹ فلوس کی طرح ہیں کیونکہ ان دونوں میں سے ہر ایک اپنے اصل کے اعتبار سے سامان (عروض) ہے اور حکومتی سرپرستی کی وجہ سے ثمن ہے بلکہ کرنسی نوٹ کی ثمنیت فلوس کی بنسبت زیادہ واضح طور پر اعتباری ہے کیونکہ فلوس کے اندر موجود مٹیریل کی ایک قیمت ہوتی ہے، یا تو یہ دھات سے بنی ہوتی ہے یا اس طرح کی کسی اور چیز سے، جب کہ کرنسی نوٹ کا معاملہ اس سے مختلف ہے۔[109]

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108 - البتہ حنفیہ نے سونا، چاندی اور دیگر موزونات میں "بیع الغائب بالناجز" کے نام سے فرق کیا ہے جس کی تفصیل گزر چکی ہے۔

١٠٩ - محمد تقي العثماني، **فتاوی عثمانی**، (مكتبة معارف القرآن كراتشي، سنة ١٤٣١هـ)، ص: ٣/ ١٤٣.

د. جو حضرات نقد کو فلوس کے ساتھ ملحق کرنے والے مؤقف کی تردید کرتے ہیں، وہ بنیادی اعتراض یہ پیش کرتے ہیں کہ اس کے ساتھ سود کا دروازہ کھل جائے گا، لیکن یہ اعتراض مفتی تقی عثمانی صاحب کی رائے پر وارد نہیں ہوتا، اس لیے کہ ان کے ہاں اتحادِ جنس کے وقت تفاضل اور ادھار معاملہ دونوں حرام ہیں، البتہ اگر جنس مختلف ہوں تو پھر ادھار معاملہ اور تفاضل دونوں جائز ہیں، ہاں ادھار معاملہ کرتے وقت ان کے نزدیک شرط یہ ہے کہ عقد بازاری قیمت کے مطابق مکمل ہو، تاکہ یہ کہیں سود کے لیے وسیلہ نہ بن جائے۔ اس شرط کے ساتھ سود کا ممکنہ دروازہ بند ہو جاتا ہے[110]۔

ترجیح:

ترجیح کا تعلق دو مسائل سے ہے: ایک یہ کہ کیا کرنسی نوٹ امام محمد بن حسنؒ کے مذہب کے مطابق فلوس کے ساتھ ملحق ہوں گے یا سونا، چاندی کے ساتھ؟ دوسرا یہ کہ سونا، چاندی میں علتِ ربٰو "وزن" ہے یا "مطلق ثمنیت" یا "ثمنیتِ غالبہ"؟ چونکہ ان دونوں میں سے ہر ایک دوسرے میں ضم ہے، لہٰذا دونوں کو الگ الگ بیان کرنے کی ضرورت نہیں ہے بلکہ دونوں کو ایک ہی بحث کے تحت بیان کرتے ہیں۔

ہماری رائے کے مطابق جمہور کی رائے بہتر و اولیٰ ہے، کیونکہ ان کی رائے پر مضبوط قسم کے اعتراضات بھی وارد نہیں ہوتے، نیز ان کی رائے قیاس کے موافق بھی ہے، کیونکہ "مطلق ثمنیت" کی علت میں حکم کے ساتھ مناسبت بھی ہے اور اس شدت کے ساتھ بھی جوڑ رکھتی ہے جو شارع علیہ السلام نے سونا، چاندی کے معاملے میں کی ہے۔

معاصر جمہور اہلِ علم نے اسی قول کو اختیار فرمایا ہے، نیز اس مؤقف کی تائید میں اکثر معاصر فقہی اکیڈمیوں نے قرارداد بھی منظور کیے ہیں۔ سعودی عرب کے علمائے کرام کی اعلیٰ سطحی کمیٹی کا فتویٰ بھی یہی ہے[111]۔ نیز رابطہ

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110 - تفصیل کے لیے ملاحظہ ہو: أسد الله، "السلم في الأوراق النقدية بين الشريعة والتطبيق المصرفي"، بحث منشور في **مجلة الدراسات الإسلامية**، الصادرة من مجمع البحوث الإسلامية، الجامعة الإسلامية العالمية في إسلام آباد، أبريل-مايو ٢٠١٨م، ص: ٤٧-٧٢.

١١١ - هيئة كبار العلماء بالمملكة العربية السعودية، **أبحاث هيئة كبار العلماء**، ص: ١/ ٥٧.

عالم اسلامی کے تحت مجمع الفقہ الاسلامی[112] اور AAOIFI نے اس حوالے سے قرار داد بھی منظور کیے ہیں[113]۔

۱) ۔اس رائے کی تائید میں اہم بات یہ ذکر کی جاتی ہے کہ "ثمنیت" سونا، چاندی کے ساتھ وصفِ مناسب ہے، اس لیے اسی کو علت قرار دینا چاہیے، امام مالکؒ اور ان کے علاوہ کچھ محققین کا یہی قول ہے ۔نیز اس کی تخریج شافعیہ کے قول کے مطابق بھی ممکن ہے جیسا کہ گزر چکا۔

۲) مفتی محمد تقی عثمانی صاحب کی رائے کے مطابق علتِ ربٰو چونکہ "وزن مع الجنس" ہے اور کرنسی نوٹ میں چونکہ یہ علت نہیں ہوتی، تو مناسب یہ ہے کہ اتحادِ جنس کے وقت بھی کرنسی نوٹ میں تفاضل جائز ہو جیسا کہ علت کا تقاضہ ہے، لیکن مفتی تقی عثمانی صاحب نے ربٰو الفضل کو یہاں اس وجہ سے حرام قرار دیا کہ یہ فضل خالی عن العوض ہو گا جو کہ ربٰو ہے جس کی ممانعت قرآنِ حکیم نے بیان فرمائی ہے۔

اس پر یہ اعتراض وارد ہوتا ہے کہ یہ بات تو فسادِ علت کی متقاضی ہے کیونکہ علت موجود نہیں ہے اور اس کے باوجود حکم موجود ہے۔ مزید برآں پھر کرنسی کے ہم جنس تبادلے کے وقت ادھار بھی جائز ہونا چاہیے تھا، اس لیے یہ کہنا کہ یہاں ربٰو کی ایک علت موجود ہے جو کہ ادھار کی حرمت کے لیے کافی ہے، یہ حکم ربٰو الحدیث سے مستنبط ہے، تو کرنسی کو ایک جگہ پہ ربٰو القرآن کے تحت داخل کیا گیا اور دوسری جگہ پہ ربٰو الحدیث کے تحت۔

۳) جب ہم ربٰو کے متعلق احادیث میں غور و فکر کرتے ہیں تو معلوم ہوتا ہے کہ حضورِ پاک ﷺ نے چھے چیزوں کا تذکرہ فرمایا ہے۔ بعض روایات میں صرف دو چیزیں یعنی سونا، چاندی مذکور ہیں، جس سے پتہ چلتا ہے کہ سونا، چاندی کے اندر کوئی ایسی خاص چیز ہے جو دیگر چار چیزوں میں نہیں ہے، اسی وجہ سے حنفیہ نے قبضہ کے معاملے میں سونا، چاندی اور دیگر اشیا میں فرق روا رکھا ہے، چنانچہ انہوں نے سونا، چاندی میں بیع الغائب بالناجز کی بھی اجازت نہیں دی ہے جب کہ دیگر وزنی اشیا میں اس کی اجازت ہے۔ بیع الغائب بالناجز کی صورت یہ ہے کہ گندم کو گندم کے عوض بیچا جائے اور ایک طرف سے قبضہ ہو جائے، جب کہ دوسرا فریق کہہ دے کہ گندم میرے پاس گھر میں موجود ہے اور

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۱۱۲ - **مجلة مجمع الفقه الإسلامي الصادرة عن منظمة المؤتمر الاسلامي بجدة**، العدد الثالث، قرار رقم: ۹، ص: ۲۳.

۱۱۳ - هيئة المحاسبة والمراجعة للمؤسسات المالية الإسلامية، **المعايير الشرعية** ۱٤۳۱هـ، رقم المعيار: ۱، ص: ٤.

میں کسی وقت تک آپ کو دے دوں گا، اس طرح سے عقد درست ہو جائے گا اور گندم متعین ہو جائے گا۔ یہ بیع النسیئۃ نہیں ہے، اس لیے کہ بیع النسیئۃ میں مدت متعین ہوتی ہے اور اس مدت سے قبل مطالبہ نہیں کیا سکتا، جب کہ یہاں پر مدت متعین نہیں ہے، بلکہ قبضے کو تھوڑی دیر کے لیے مؤخر کیا گیا، جو کہ احناف کے ہاں جائز ہے۔ سونا، چاندی میں ان کے ہاں ایسا کرنا بھی جائز نہیں، اس لیے کہ سونا، چاندی قبضہ کرنے سے ہی متعین ہو سکتے ہیں، اس لیے اس میں قبضہ ضروری ہے[114]۔

اس سے یہ بات معلوم ہوتی ہے کہ چھے اشیا کے دو فریق ہیں اور دونوں کے مابین فرق ہے۔ اگر ہم غور کریں تو اس زمانے کی جن چھے چیزوں کے بارے میں احادیث وارد ہو چکی ہیں، ان میں چار اشیا کھانے پینے کی چیزیں اور مبیعہ تھیں اور سونا، چاندی ثمن تھے، لہٰذا عقل ان دونوں انواع کے درمیان فرق کا تقاضہ کرتا ہے کہ پہلی چار اشیا کی علت الگ ہو اور سونا چاندی کی علت الگ ہو جو کہ صرف سونا، چاندی ہی کے ساتھ خاص ہو اور ان کے علاوہ کسی اور طرف متعدی نہ ہو، جب تک کہ وہ چیز ان دونوں کی مثل نہ ہو۔ اگر باقی اشیا کی طرح "وزن" کو سونا، چاندی کے لیے بھی علت ٹھہرایا جائے تو یہ بات عقلی طور پر درست نہیں ہے۔

۴) ربٰو کے بارے میں وارد ہونے والی احادیث میں تطبیق یوں بھی ممکن ہے کہ سونا، چاندی میں "ثمنیت" کو علت ٹھہرایا جائے اور نصوص میں "وزن یا کیل" کی ترجیح کے حوالے سے جو اشارات ملتے ہیں، اس کو باقی چار اشیا کے ساتھ خاص کر دیں۔ اس طرح نصوص اور قیاس کے مابین تطبیق بھی ہو جائے گی۔ یہ بات اپنی جگہ مسلم ہے کہ نص کے مقابلے میں قیاس کو ترجیح نہیں دی جاتی، لیکن یہاں جو نص موجود ہے، اس میں یہ صراحت نہیں کہ "وزن" ہی علت ہے، بلکہ اس طرف صرف اشارہ ہے۔

۵) اگر سونا، چاندی کے وزنی ہونے میں غور کیا جائے تو پتہ چلتا ہے کہ یہ وصف محض اتفاقی ہے، حکم کے لیے مدار بننے کی صلاحیت نہیں رکھتی۔ اس کی مثال ایسی ہے جیسے حضور پاک ﷺ کے زمانے میں اکثر اسفار اونٹ اور گھوڑے کے ذریعے ہوا کرتے تھے، تو اگر کوئی یہ کہے کہ قصر کی حکمت "دفعِ مشقت" ہے اور علت "اونٹوں یا گھوڑوں کے ذریعے سفر کرنا" ہے اور حدِّ سفر اڑتالیس میل ہے، اس لحاظ سے آج کل کے زمانے کے اسفار پر قصر کے حکم کا اطلاق نہیں ہوگا۔ ایسا کہنا اس لیے غلط ہوگا کہ اونٹ یا گھوڑے کے ذریعے سفر کرنا محض اتفاقی معاملہ تھا، اس کو حکم کے لیے مدار بنانا درست

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114 - محمد تقی عثمانی، **اسلام اور جدید معاشی مسائل**، (ادارہ اسلامیات لاہور، طباعت اول ۱۴۲۹ھ)، ص: ۲/۴۴.

نہیں، اسی طرح سونا، چاندی کا وزنی ہونا بھی محض ایک اتفاقی وصف ہے، جس کو حکم کے لیے مدار بنانا درست نہیں ہے۔

۶) یہ بات مسلم ہے کہ حکم کا مدار علت پر ہوتا ہے نہ کہ حکمت پر، کیونکہ حکمت ایک مخفی امر ہے جس میں حالات اور اشخاص کی تبدیلی سے ردوبدل ہو سکتا ہے، اس لیے اس کو حکم کا مدار بنانا درست نہیں ہے، البتہ اس بات کی وجہ سے حکمت کے وجود کا انکار نہیں کیا جا سکتا۔ اب سوال یہ پیدا ہوتا ہے کہ وہ کون سی حکمت ہے جس کا لحاظ رکھتے ہوئے شریعت نے سونا، چاندی کو بعض احکام کے ساتھ مخصوص کر دیا؟ یہ کہنا تو ممکن نہیں کہ اس کے پسِ پردہ کوئی حکمت ہے ہی نہیں، اگر اس میں کوئی حکمت ہے تو وہ حکمت کرنسی نوٹ اور فلوس کے اندر بھی پائی جاتی ہو گی، اگر نہیں تو وہ کون سی دلیل ہے جو اس حکمت کو سونا، چاندی کے ساتھ خاص کرتی ہے؟

۷) غالب گمان یہ ہے کہ فقہائے کرام علت میں اس کا لحاظ رکھتے تھے کہ یہ غیر منصوص چیزوں کو شامل ہو، چونکہ قدیم فقہاء کے زمانے میں رائج کرنسی صرف سونا اور چاندی تھی، لہٰذا فقہائے کرام کا خیال یہ تھا کہ اگر "ثمنیت" کو علت ٹھہرایا جائے تو اس میں کوئی فائدہ نہیں ہے، کیونکہ ان دونوں کے علاوہ ثمن کوئی نہیں ہے، تو سونا چاندی کو دیگر اشیا سے مستقل کر کے ایک خاص صنف بنانے اور ان دونوں کے لیے مستقل علت ٹھہرانے کا داعیہ نہیں تھا۔ جہاں تک فلوس کی بات ہے تو اس کی مشابہت عروض کے ساتھ زیادہ تھی اور اس زمانے میں اس بات کا کوئی تصور تک نہیں کیا جا سکتا تھا کہ کرنسی نوٹ کی طرح ایک مستقل چیز وجود میں آئے گی، اس کے برعکس بعض فقہاء نے اس صورتِ حال کو بھانپ لیا تھا، چنانچہ انہوں نے سونا، چاندی کی تعلیل ایک مستقل علت کے ساتھ کر دی تاکہ کرنسی نوٹ کی طرف اس کا متعدی کرنا ممکن ہو جائے۔ غالب گمان یہ ہے کہ اگر متقدمین فقہائے کرام آج موجود ہوتے اور آج کے حالات کا مشاہدہ کرتے کہ کیسے کرنسی نوٹ بازاروں میں رائج ہیں اور ان کے بعد معاشی نظام میں کیسی کیسی تبدیلیاں رونما ہوئیں، تو وہ بھی ان حضرات کی تائید فرماتے جنہوں نے "ثمنیت" کو علت ٹھہرایا ہے۔ یہی وجہ ہے کہ معاصر جمہور اہلِ علم نے اس رائے کو اختیار فرمایا ہے باوجود یہ کہ ان حضرات میں سے حنفی، شافعی اور حنبلی بھی ہیں، انہوں نے اس معاملے میں اپنے ائمہ کے ساتھ اختلاف کرتے ہوئے وہ رائے اور مؤقف اپنا لیا جو اُن کی نظر میں درست ہے۔

۸) ایک اور اہم بات سے بھی صرفِ نظر کرنا ممکن نہیں کہ شارع علیہ السلام نے اثمان کے معاملے میں شدت جب کہ سامان و عروض کے معاملے میں رخصت سے کام لیا ہے، اگر اس مؤقف کو اختیار کیا جائے تو اس میں صورتِ حال برعکس ہے، بایں طور کہ جو کے عوض گندم کی ادھار بیع اس مؤقف کے

مطابق ناجائز ہے اور ڈالر کے عوض روپے کی ادھار بیع جائز ہے، اس طرح سے انہوں نے سامان کی نسبت اثمان میں زیادہ رخصت دی۔ یہ بات مسلم ہے کہ یہ حکم علت کی وجہ سے ہے، لیکن یہ علت کے ضعف کی علامت ہے کہ اس کے ماننے سے مقاصدِ شریعت کے برعکس ایک مؤقف کو تسلیم کرنا پڑتا ہے۔

متقدمین احناف نے سونا، چاندی، اور لوہے کو حکم کے اعتبار سے برابر ٹھہرایا تھا کیونکہ ان کے نزدیک سب میں علت "وزن" ہی ہے، لیکن اس کے باوجود انہوں نے سونا، چاندی میں مزید قیود لگادیئے، چنانچہ انہوں نے اس میں بیع الغائب بالناجز کو ناجائز قرار دیا، جو ان کے ہاں لوہے اور دیگر وزنی اشیا میں جائز ہے، جب کہ اس مؤقف میں صورتِ حال برعکس ہے۔

حنفی مؤقف کے حوالے سے مفتی تقی عثمانی صاحب کی رائے:

مذکورہ بحث سے یہ بات واضح ہو جاتی ہے کہ علت کے حوالے سے حنفیہ کا مؤقف کمزور ہے۔ مفتی تقی عثمانی صاحب نے اپنی تصنیف "تکملہ فتح الملہم" میں بھی اس مؤقف کو ضعیف قرار دے کر مالکیہ کی رائے کو قوی قرار دیا ہے[115]"۔ چنانچہ وہ فرماتے ہیں کہ میری رائے کے مطابق مالکیہ کی رائے نظری اعتبار سے اور عملی اعتبار سے زیادہ راجح ہے۔ نظری اعتبار سے اس طرح کی حضورِ پاک ﷺ نے ربٰو الفضل کو سدِ ذریعہ کے طور پر حرام فرمایا کہ اس کو ربٰو النسیئۃ کی طرف رستہ نہ بنایا جائے جو کہ نصِ قرآن کی رو سے حرام ہے۔ اب اس ربٰو کی طرف تدریجی طور پر بڑھنا ان اشیا میں ممکن ہے جو اثمان کے قبیل سے ہو یا تعامل کے اعتبار سے اثمان کے قائم مقام ہو۔ اہلِ عرب اور خصوصاً دیہاتی لوگ سونا، چاندی کو بہت کم استعمال کیا کرتے تھے۔ ان کے زیادہ تر معاملات ان اشیا کے ذریعے ہوا کرتے تھے جو ان کے پاس آسانی سے موجود ہوتی تھیں، جن چھے چیزوں کا حدیث میں ذکر آیا ہے، یہی چیزیں وہ بطورِ ثمن استعمال کیا کرتے تھے، اس لیے ان چیزوں میں قدرِ مشترک یہ ہے کہ یہ بطورِ ثمن استعمال ہوتی تھیں، ان میں سونا، چاندی خلقی طور پر ثمن تھے، جب کہ باقی چیزیں تعامل کی وجہ سے ثمن کی طرح تھیں۔ یہ نکتہ باقی وزنی اور کیلی اشیا میں موجود نہیں۔ عملی لحاظ سے اس طرح کہ قدر کو علت قرار دینے کے باعث حنفیہ کو عملی طور پر کئی طرح کے مشکلات کا سامنا ہے، جو درج ذیل ہیں:

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١١٥ - محمد تقي، **تكملة فتح الملهم**، دار إحياء التراث العربي بيروت، الطبعة الأولى ١٤٢٦هـ)، ص: ١/ ٥٤٣-٥٤٤.

۱. مثلاً: روئی کو چاندی کے دراہم کے عوض ادھار بیچنا حنفی فقہاء کی بیان کردہ علت کے مطابق حرام ہونا چاہیے، جب کہ حنفی فقہاء نے اس کو جائز قرار دیا ہے[۱۱۶]۔

۲. فلوس چونکہ وزنی نہیں ہیں، اس لیے اس کو فلوس کے بدلے بیچتے وقت قیاس کا تقاضا یہ ہے کہ اس میں تفاضل جائز ہو، لیکن حنفیہ نے اسے حرام قرار دیتے ہوئے فرمایا کہ یہ اصطلاحی اعتبار سے اثمان ہیں اور اثمان متعین کرنے سے متعین نہیں ہوتے۔

۳. حنفیہ کے قول کے مطابق علت (قدر) موجود ہونے کی وجہ سے کسی وزنی چیز میں بیعِ سلم کرنا اور سونا، چاندی کو اس کی قیمت بنانا ناجائز ہونا چاہیے تھا، لیکن انہوں نے ربٰو الفضل کی حرمت سے اسے مستثنیٰ قرار دیا ہے۔

حنفیہ کی بیان کردہ علت پر حضرت مفتی تقی عثمانی صاحب نے اس اعتراض کی طرف بھی اشارہ فرمایا ہے جس ک کا تذکرہ ہم پچھلے صفحات میں کر چکے ہیں کہ کسی چیز کا کیلی یا وزنی ہونا زمانے اور جگہ کے اعتبار سے مختلف ہوتا رہتا ہے۔ یہی وجہ ہے کہ حنفیہ کے ہاں یہ بات زیرِ بحث رہی ہے کہ کیلی اور وزنی چیز میں فرق کیسے کیا جائے؟ چنانچہ ان کے ہاں مشہور یہ ہے کہ کسی چیز کے کیلی یا وزنی ہونے پر اگر نص وارد ہو تو وہ ہمیشہ اسی طرح ہی رہے گی، البتہ جہاں نص نہ ہو وہاں معاملہ عرف پر محمول کیا جائے گا، البتہ امام ابو یوسفؒ کا مؤقف اس سلسلے میں دیگر احناف سے مختلف ہے، ان کے نزدیک تمام اشیا کے کیلی یا وزنی ہونے کا دار و مدار صرف عرف پر ہے۔ علامہ ابن ہمامؒ کا میلان بھی اسی طرف ہے۔ شیخ نے آخر میں لکھا ہے: جہاں تک مالکیہ کی تعلیل کا تعلق ہے تو وہاں عملاً یہ مشکلات نہیں پائی جاتیں، کیونکہ ان کی بیان کردہ دونوں علتیں یعنی "ثمنیت اور غذا ہونا" ربٰو الفضل کے احکام کو باہم مربوط بنا دیتی ہیں اور یہ تدریجی طور پر ربٰو النسیئۃ کی طرف لے جانے والی اس منصوصی حکمت کے قریب بھی ہے[117]۔ یہ بات بھی مدِ نظر رہے کہ حضرت شیخ نے یہاں مالکیہ کی طرف جس قول کی نسبت کی ہے، اس سے مراد وہ قول ہے جس میں امام مالک سے سونا، چاندی میں " مطلق ثمنیت " کا علت ہونا مروی ہے۔ حضرت شیخ نے اپنے رسالہ

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۱۱٦ - امام زیلعی فرماتے ہیں: ويشترط أن يجمعهما الوزن من كل وجه، وإن لم يجمعهما جاز النسأ أيضا كالنقدين مع القطن ونحوه؛ لأن صفة وزنهما مختلف، الزيلعي، **تبيين الحقائق**، ص: ٤/ ٨٨.

۱۱۷ - محمد تقي العثماني، **تكملة فتح الملهم**: ١/ ٥٤٣-٥٤٤.

"أحكام الأوراق النقدية" میں اس بات کی تصریح کی ہے کہ "ثمنیتِ مطلقہ" کو ربٰو کی علت قرار دینا مالکیہ کی رائے ہے۔[118]

مذکورہ بالا تفصیل سے یہ بات معلوم ہو گئی کہ سونا، چاندی میں "وزن" کو علت قرار دینا علمی اور عملی طور پر کمزور مؤقف ہے۔ قیاس کا تقاضا یہ ہے کہ سونا، چاندی میں یا تو "ثمنیتِ مطلقہ" کو علت قرار دیا جائے یا "ثمنیتِ غالبہ" کو بایں طور علت قرار دیا جائے جو کرنسی نوٹ کو بھی شامل ہو، کیونکہ کرنسی نوٹ بھی مروجہ ثمن ہے، لہٰذا اس بات کا لازمی نتیجہ یہ ہو گا کہ ربٰو اور صَرف کے احکام سونا، چاندی اور کرنسی نوٹ پر یکساں طور پر لاگو ہوں گے۔

خاتمہ:

مذکورہ بالا تفصیل سے یہ نتائج اخذ کیے جا سکتے ہیں:

۱- کرنسی نوٹ بذاتِ خود ثمن ہے جس پر ربٰو اور صَرف کے احکام جاری ہو سکتے ہیں۔

۲- کرنسی نوٹ کو فقہی احکام میں سونا، چاندی کے ساتھ ملحق کرنا فقہی لحاظ سے زیادہ قرینِ قیاس ہے۔

۳- کرنسی نوٹ کو بعض بنیادی فروق کی وجہ سے فلوس یعنی دھاتی سکوں کے ساتھ ملحق کرنا درست نہیں۔

۴- سونا، چاندی میں علتِ ربٰو کے حوالے سے مالکیہ کی رائے زیادہ درست اور شرعی مقاصد سے زیادہ ہم آہنگ ہے۔

۵- علت کے بارے میں حنفیہ کی رائے پر کافی اشکالات وارد ہوتے ہیں جس کی تفصیل گزر چکی ہے۔

۶- کرنسی نوٹ کے بارے میں مفتی تقی عثمانی صاحب کی رائے اگرچہ حنفیہ کی رائے پر مبنی ہے لیکن اس پر مضبوط قسم کے اعتراضات وارد ہوتے ہیں، اس لیے جمہور کی رائے اس کے مقابلے میں زیادہ لائقِ اعتنا، قرینِ قیاس اور اقرب الی الصواب ہے۔

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۱۱۸ - شیخ لکھتے ہیں: "فأما الإمام مالك بن أنس رحمه الله، فلأنه يعتبر الثمنية علة لتحريم التفاضل والنسيئة، سواء كانت الثمنية جوهرية، كما في الذهب والفضة، أو عرفية مصطلحة، كما في الفلوس"، العثماني، "أحكام الأوراق النقدية"، ضمن **بحوث في قضايا فقهية معاصرة**، ص: ١٦٣-١٦٤.

جنگی قیدی کو غلام بنانے کا شرعی اور قانونی تصور عصر حاضر کے تناظر میں

احسان اللہ چشتی*

Abstract:

This paper aims to explain the issue of enslavement of prisoners of war in Islamic Law and existing international Laws. Because in present time, some scholars claimed that slavery is of a prisoner of war is not permissible in Islamic Law at all, and the continuation of slavery in early Islamic era was based on custom of Arabs. Therefore, I clarified the opinions of Muslim Jurists in the light of Qur'an and Sunnah*, and tried to clear it that this issue stipulated in legal texts, and there is no legal text that revokes or repeals this ruling. I concluded that the jurists agree on the legality of enslavement in Islamic law as choice depends on the discretionary power of rulers. Therefore, Rulers has the choice between killing of prisoners, Enslavement, Bestow upon, and redemption. In fact, the ruling on enslavement is a matter of relief, because before that the Imam was only obliged to kill the prisoners of war. Presently, International laws prohibit enslavement and determine it as a crime against Humanity, but unfortunately, the practice is worse than in the past.*

Keywords: *War, Enslavement, Prisoners, international law, Islamic law, Redemption, Killing,*

مقدمہ:

تاریخ انسانی کی یہ ایک ناقابل تردید حقیقت ہے کہ ہمیشہ انسان اپنی فطری تقاضوں کے مطابق ایک دوسرے کے ساتھ انفرادی اور اجتماعی طور پر نبرد آزما رہا ہے، کیونکہ انسان فطری طور پر ایک دوسرے پر برتری کا خواہاں ہوتا ہے، جب کہ کچھ معاشرتی وجوہات بھی باہم جنگ وجدل کے سبب بن جاتے ہیں۔ ابتدائی طور پر مالی، معاشرتی اور قبائلی برتری کے لئے جنگیں لڑی جاتی تھی بعد میں جب باقاعدہ ریاستیں قائم ہوئیں، توحکومتیں باہم لڑائی اور جھگڑوں میں الجھ گئیں۔ اس قسم کے نفرت آمیز اور مذموم مقاصد پر مبنی سرگرمیوں کے علاوہ کچھ ممدوح اور مستحسن مقاصد کے حصول کے لئے بھی جنگیں لڑی جاتی رہی، جس میں ظلم اور استیصال کے خاتمے کے لئے مذہبی بنیادوں پر قتال کی صورت سب سے اہم ہے کیوں کہ تمام مذاہب سماویہ نے اللہ سبحانہ وتعالیٰ کے احکامات کی تنفیذ اور

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انسانوں کو انسانوں کی غلامی سے نکال کر صرف معبود برحق کی بندگی کی طرف لانے کے لئے قتال کی اجازت دی ہے، لیکن یہ اجازت مطلق قتل وغارت پر مبنی اجازت نہیں بلکہ اس بابت بہت سارے حدود وقیود بیان کئے گئے ہیں تاکہ اس اجازت سے کوئی ناجائز فائدہ نہ اٹھا سکے۔

جنگ بہر حال جنگ ہوتی ہے جس کے اثرات معاشرے اور اس کے افراد پر براہ راست مرتب ہوتے ہیں، چنانچہ اس حوالے سے قبل از اسلام جو رسم ورواج رائج رہا ہے اس میں سے ایک جنگی قیدیوں سے متعلق ہے، ظہور اسلام سے قبل جنگی قیدی کا تصور اسے غلامی کی زنجیروں میں جکڑنا تھا جس کی وجہ سے اللہ جل شانہ کے آزاد بندے ہمیشہ کے لئے نہ صرف خود بلکہ ان کی نسلیں بھی اس ذلت آمیز زندگی سے دوچار ہو جاتی تھیں۔ اور یہ لوگ کسی بھی دوسری چیز کی طرح سر بازار بکتے رہتے تھے، جن کے انسانی حقوق یکسر سلب ہو جاتے تھے اور حیوانوں کی طرح ان کے ساتھ سلوک روا رکھا جاتا تھا، ان کے مالک ان کے ساتھ ہر قسم کے سلوک روا رکھنے کو اپنا حق سمجھتے تھے، اسلام کے ظہور سے قبل اور ظہور کے بعد مکہ مکرمہ میں غلاموں کے احوال تاریخ کے آوراق میں محفوظ ہے، جس سے اندازہ لگانا مشکل نہیں کہ اس وقت غلاموں کے ساتھ انتہائی سفاکانہ اور ظالمانہ رویہ روا رکھا جاتا تھا، اس بابت سیدنا بلال حبشیؓ کے احوال پڑھ کر رونگٹے کھڑے ہو جاتے ہیں، حضرت سلمان فارسی رضی اللہ عنہ اور دیگر بہت سارے صحابہ کرام رضوان اللہ تعالیٰ عنہم اجمعین اس قسم کے مصائب سہہ چکے تھے۔

موجودہ دور میں باوجود ٹیکنالوجی، سائنس کی ترقی اور دنیا کے گلوبل ویلج بننے کے جنگی قیدیوں کے ساتھ ناروا سلوک کیا جاتا ہے، ان پر غیر انسانی اور وحشیانہ ظلم وبربریت کے پہاڑ انسانی حقوق کے تحفظ کے نام پر ڈھائے جاتے ہیں، اور یہ سب کچھ تہذیب وتمدن کے اعلیٰ مرتبے پر فائز ہونے کے دعویدار بڑی جراءت اور ڈھٹائی سے کرتے جارہے ہیں، جس کی بے شمار مثالیں حالیہ جنگی نتائج کی صورت میں قید ہونے والے جنگجوؤں کی صورت میں ہمارے سامنے ہیں۔ مزید برآں عصر حاضر میں جہاں ایک طرف انسانی حقوق پر نہایت زور دیا جاتا ہے، اور مختلف حوالوں سے اس بابت دنیا کے اقوام کو انسانی حقوق کی پاسداری پر مجبور کیا جاتا ہے، اسی طرح بین الاقوامی قوانین اور مختلف ممالک کے ملکی قوانین میں غلام بنانے کو ممنوع قرار دیا گیا ہے وہاں عملی طور پر بدترین سلوک جنگی قیدیوں سے روا رکھا جاتا ہے، اور انسانی سمگلنگ کا سلسلہ پسماندہ ممالک سے بھرپور طریقے سے جاری ہے۔

اس لئے اس بات کی ضرورت ہے کہ اس بابت شریعت اسلامیہ کے احکامات کا مطالعہ کیا جائے اور اس کی روشنی میں مربوط لائحہ عمل تیار کیا جائے، تاکہ دنیا پر واضح ہو جائے کہ شریعت کے احکام ہی وہ واحد ذریعہ ہے جس کے ذریعے انسانی مسائل کا تدارک اور ان کے حقوق کا کما حقہ تحفظ ممکن ہے۔

شریعت اسلامیہ کے ظہور کے بعد اس بابت جناب رسول اللہ ﷺ نے جنگی قیدیوں کے بارے میں اس جاہلانہ رسم ورواج میں اصلاح کی بنیاد رکھی کیونکہ جناب رسول اللہ صلی اللہ علیہ وسلم کے پیش نظر جنگ کا مقصد صرف اعلائے کلمتہ اللہ تھا نہ کہ مال ودولت اور سلطنت کا حصول تھا، اور ان کے متعلق مختلف مواقعوں پر مختلف قسم کا تعامل روا رکھا گیا، چنانچہ سب سے پہلے جنگ بدر کے قیدیوں کے بارے میں فدیہ کے بدلے ان کی آزادی کا حکم صحابہ کرام رضی اللہ عنہم سے مشورہ کے بعد فرمایا کیونکہ اصحاب رسولؐ اس بابت مختلف الرائے تھے، یہ جناب رسول اللہ صلی اللہ علیہ وسلم کا اجتہادی فیصلہ تھا اور اس فیصلے کے بعد قرآن کریم نے اس کی تائید نہیں کی۔ اس طرح کی اور بھی مثالیں عہد نبویؐ میں پائی جاتی ہیں جس کا تذکرہ اس مقالے میں کیا جائے گا۔ اس تعامل میں اختلاف کی وجہ سے مسلمان فقہاء کی آراء بھی بعد کے ادوار میں اس بابت مختلف رہی ہیں۔ اس تحقیقی مقالے میں قرآن کریم، جناب رسول اللہ ﷺ کے تعامل اور فرامین مبارکہ کے علاوہ فقہی طور پر اس مسئلے کا تحقیقی مطالعہ عصر حاضر کے تناظر میں کیا جائے گا۔ جس میں دو اہم بنیادی سوالات کو مد نظر رکھا گیا ہے ۔ ایک اہم سوال یہ ہے کہ کیا جنگی قیدی کو غلام بنانا شرعاً ناجائز یا حرام قرار دیا جاچکا ہے؟ یا یہ محض تعامل کی وجہ سے مفقود ہو گیا ہے؟ دوسرا نکتہ یہ ہے کہ موجودہ دور میں جنگی قیدیوں کے ساتھ کیا سلوک روا رکھا جائے گا؟ اور اس بابت بین الاقوامی قوانین کس حد تک اسلامی احکامات کے ساتھ ہم آہنگ ہے؟۔

جنگی قیدی کا مفہوم:

جنگی قیدی سے مراد وہ لوگ ہیں جو مسلمانوں کے ساتھ برسر پیکار ہونے کی حالت میں میدان جنگ سے زندہ قید ہو جائے، علامہ ماوردی نے اس کی تعریف بیان کی ہے کہ : فَهُمْ

الْمُقَاتِلُونَ مِنَ الْكُفَّارِ إِذَا ظَفَرَ الْمُسْلِمُونَ بِأَسْرِهِمْ أَحْيَاءَ۔[1] اس لئے مقاتلین کے علاوہ دوسرے لوگ اس میں شامل نہیں ہونگے، چنانچہ فقہاء نے اس ضمن میں دو مختلف اصطلاحات وضع کئے ہیں ا: **اسری ۲: سبی**، اول الذکر سے مراد جنگی قیدی ہے جنہوں نے عملاً جنگ میں حصہ لیا یا کسی بھی دوسرے طریقے سے جنگ میں شریک ہوئے۔ ثانی الذکر سے مراد وہ لوگ جو جنگ کا حصہ نہیں، یا وہ جنگ میں حصہ لینے کے بوجوہ قابل نہیں، اس میں بچے اور خواتین شامل ہیں، انہیں قید کیا جاسکتا ہے لیکن ان پر جنگی قیدی کا اطلاق نہیں ہوگا، بلکہ وہ مال غنیمت متصور ہوں گے اور انہیں قتل نہیں کیا جائے گا، بلکہ مال غنیمت کی طرح انہیں مجاہدین میں تقسیم کیا جائے گا۔

جہاں تک موجودہ بین الاقوامی قوانین میں جنگی قیدی کے تصور کا تعلق ہے تو "جنیوا کنونشن ۱۹۴۹"[2] نے اس میں وسعت پیدا کی ہے، چنانچہ اس کنونشن کے مطابق جو بھی شخص کسی بھی صورت میں منظّم فوج کا حصہ ہو، اسے اگر مقابل فریق پکڑنے میں کامیاب ہوجائے، تو وہ جنگی قیدی کہلائے گا۔ اس لئے اس میں صرف براہ راست مقاتلین کے علاوہ سول سروسز فراہم کرنے والے لوگ بھی شامل ہونگے جو میدان جنگ میں شریک ہونگے۔ اس لئے جنیوا کنونشن کے Rule 106 میں اس کی تصریح کی گئی ہے کہ: جنگی قیدی کے حقوق حاصل کرنے کے لئے میدان جنگ میں شریک افراد کو اپنی شناخت واضح کرنی چاہئے۔ اگر کوئی شخص بغیر شناخت کے پکڑا گیا، تو اسے جنگی قیدی کے حقوق حاصل نہیں ہونگے۔ بلکہ وہ غیر قانونی قیدی تصور ہوگا۔[3]

قرآن کریم کے نصوص:

جنگی قیدیوں کو غلام بنانے کا حکم قرآن مجید کے نصوص سے ثابت ہے، اللہ جل شانہ کا ارشاد مبارک ہے:

1– إبوالحسن علی بن محمد الماوردی، **الأحكام السلطانية** (القاہرۃ: دارالحدیث بدون الطبعۃ والتاریخ) ص، ۲۰۷، إبو یعلی الفراء محمد بن الحسین الحنبلی، **الأحكام السلطانية** (بیروت: دار الكتب العلمية، ۱۴۲۱ھ) ط۲، ص ۱۴۱۔

2– جنیوا کنونشن بین الاقوامی طور پر مسلمہ معاہدات کا تسلسل ہے، جو ۱۸۶۴ سے لے کر ۱۹۴۹ تک وجود میں آئے، ۱۹۷۷ میں جنیوا کنونشن ۱۹۴۹ میں مزید دو پروٹوکولز کا اضافہ کیا گیا۔

3– Geneva Convention, 1949, Rule 106, Condition for Prisoner-of – War Status.

وَخُذُوهُمْ وَاحْصُرُوهُمْ[4]

امام ابن قتیبہ رحمہ اللہ نے خذوھم کا معنی لکھا ہے : وَخُذُوهُمْ أي أسروهم.[5] یعنی انہیں اسیر اور غلام بناو، کیونکہ عرب میں غلام کو "أخيذ" کہا جاتا ہے۔

اللہ جل شانہ نے ایک اور مقام پہ حکم فرمایا ہے کہ :

حَتَّىٰ إِذَا أَثْخَنْتُمُوهُمْ فَشُدُّوا الْوَثَاقَ[6]

تو ان کو مضبوط باندھ لو،

اس آیت کریمہ میں۔" فَشُدُّوا الْوَثَاقَ" کنایہ ہے غلام بنانے سے، اس کا مطلب یہ ہے کہ انہیں باندھ کر رکھو تاکہ بھاگنے نہ پائے۔ وثاق کا معنی وہ رسی ہے جس کے ذریعے جنگی قیدی کو باندھا جاتا ہے۔[7]

جہاں تک جنگی قیدیوں کے ساتھ معاملات کا تعلق ہے تو قرآن کریم میں اس بابت دو بنیادی آیات کریمات نازل ہوئی ہے، پہلے جنگ بدر کے قیدیوں کے بارے میں ایک آیت مبارکہ کا نزول ہوا، جس میں اللہ جل شانہ نے واضح طور پر جنگی قیدیوں کے قتل سے متعلق سید نا عمر رضی اللہ عنہ کی رائے کو شارع کے منشاء کے مطابق قرار دیا۔ چنانچہ اللہ جل شانہ کا ارشاد ہے :

مَا كَانَ لِنَبِيٍّ أَنْ يَكُونَ لَهُ أَسْرَىٰ حَتَّىٰ يُثْخِنَ فِي الْأَرْضِ تُرِيدُونَ عَرَضَ الدُّنْيَا وَاللَّهُ يُرِيدُ الْآخِرَةَ وَاللَّهُ عَزِيزٌ حَكِيمٌ.[8]

ترجمہ : یہ بات کسی نبی کے شایان شان نہیں ہے کہ اس کے پاس قیدی رہیں جب تک کہ وہ زمین میں (دشمنوں کا) خون اچھی طرح نہ بہا چکا ہو (جس سے ان کا رعب پوری طرح ٹوٹ جائے) تم دنیا کا

4– القرآن، ۹: ۵۔

5– عبداللہ بن مسلم بن قتیبۃ الدینوری، **غریب القرآن** (بیروت: دار الکتب العلمیۃ، ۱۳۹۸ھ) ص، ۱۵۹۔

6– القرآن، ۴۷: ۴۔

7– محمد محمود الحجازی، **التفسیر الواضح**، (بیروت: دار الجیل الجدید، ۱۴۱۳ھ) ج ۳، ص ۴۵۸۔

8– القرآن، ۸: ۶۷۔

سازوسامان چاہتے ہو اور اللہ (تمہارے لیے) آخرت (کی بھلائی) چاہتا ہے، اور اللہ صاحب اقتدار بھی ہے، صاحب حکمت بھی۔

دوسری آیت کریمہ میں ارشاد باری تعالیٰ ہے:

فَإِذَا لَقِيتُمُ الَّذِينَ كَفَرُوا فَضَرْبَ الرِّقَابِ حَتَّىٰ إِذَا أَثْخَنتُمُوهُمْ فَشُدُّوا الْوَثَاقَ فَإِمَّا مَنًّا بَعْدُ وَإِمَّا فِدَاءً حَتَّىٰ تَضَعَ الْحَرْبُ أَوْزَارَهَا ذَٰلِكَ وَلَوْ يَشَاءُ اللَّهُ لَانتَصَرَ مِنْهُمْ وَلَٰكِن لِّيَبْلُوَ بَعْضَكُم بِبَعْضٍ وَالَّذِينَ قُتِلُوا فِي سَبِيلِ اللَّهِ فَلَن يُضِلَّ أَعْمَالَهُمْ[9]

ترجمہ: پس جب ان کافروں سے تمہارے مقابلہ کی نوبت آئے تو ان کی گردنیں اڑاؤ، یہاں تک کہ جب ان کو اچھی طرح چور کر دو تو ان کو مضبوط باندھ لو، پھر یا تو احسان کر کے چھوڑنا ہے، یا فدیہ لے کر، یہاں تک کہ جنگ اپنے ہتھیار ڈال دے۔ یہ کام ہے تمہارے کرنے کا، اور اگر اللہ چاہتا تو خود ہی ان سے انتقام لے لیتا، لیکن اس نے تم کو یہ حکم اس لئے دیا کہ ایک کو دوسرے سے آزمائے اور جو لوگ اللہ کی راہ میں قتل ہوئے اللہ ان کے اعمال ہر گز رائیگاں نہیں کرے گا۔

ان آیات کریمات سے متعلق مختلف مباحث جڑے ہوئے ہیں جو تفصیل طلب ہے چنانچہ ذیل میں ان کی وضاحت کی جاتی ہے تاکہ زیر بحث موضوع کے اصولی اور اساسی بنیادیں واضح ہو جائے:

ا: نسخ کا حکم:

بعض حضرات جیسے قتادۃ، سدی، ضحاک اور جریج رحمہم اللہ کی رائے یہ ہے، کہ یہ آیت کریمہ منسوخ ہو چکی ہے، اور اس کے ناسخ آیات کریمات میں سے ایک آیت فَإِمَّا تَثْقَفَنَّهُمْ فِي الْحَرْبِ فَشَرِّدْ بِهِم[10] (لہٰذا اگر کبھی یہ لوگ جنگ میں تمہارے ہاتھ لگ جائیں تو ان کو سامان عبرت بنا کر ان لوگوں کو بھی تتر بتر کر ڈالو جو ان کے پیچھے ہیں، تاکہ وہ یاد رکھیں) اور دوسری آیت فَاقْتُلُوا الْمُشْرِكِينَ حَيْثُ

9– القرآن، ۴۷: ۴۔

10– القرآن، ۸: ۵۷۔

وَجَدْتُمُوهُمْ (تو ان مشرکین کو (جنہوں نے تمہارے ساتھ بد عہدی کی تھی) جہاں بھی پاؤ قتل کر ڈالو) ہے۔[11]

اسی طرح ان حضرات کا دعویٰ ہے کہ سورۃ محمدؐ چونکہ سورۃ توبۃ کے بعد نازل ہوئی ہے اس لئے سورۃ محمدؐ میں اختیار کا حکم منسوخ ہے۔[12] لیکن یہاں ''نسخ'' کے اطلاق سے زیادہ بہتر ''تخصیصِ حکم'' ہو سکتا ہے کیونکہ اہل کتاب سے متعلق یہ حکم بہر حال برقرار ہے۔ جب کہ ابن عباس رضی اللہ عنہ اور دیگر اہل علم کے ہاں یہ آیت محکمات میں سے ہے اور مسلمانوں کے پاس اختیار ہے کہ احوال کے مطابق وہ جس طرح چاہے کسی ایک حکم پر عمل کر سکے یہی امام شافعی، اہل مدینہ اور ابو عبید رحمہم اللہ کا مذہب ہے۔[13]

امام ابو منصور ماتریدیؒ نے بھی توافق کا قول اختیار کیا ہے کہ دونوں آیات کے مدلول یا زمانہ مختلف ہے۔[14] جب کہ فقہائے احناف کے ہاں بھی مشرکین کے قتل کا حکم عرب کے مشرکین کے ساتھ خاص ہے چنانچہ فقہ حنفی کی رو سے مشرکین عرب اور مرتد کا استرقاق جائز نہیں اس کے علاوہ قیدیوں کے بارے میں وہ اختیار کے قائل ہیں البتہ ظاہر الروایۃ کے مطابق مال کی صورت میں فدیہ ان کے ہاں جائز نہیں۔[15]

ان آیات کریمات میں مذکور احکام بظاہر باہم متعارض نہیں، جب کہ ان کے درمیان تطبیق ممکن ہے، اس لئے نسخ کی بجائے اسے محکم ہی ماننا راجح ہے، جس میں تیسیر کا پہلو غالب ہے۔

مزید برآں مشرکین کے قتل کا عام حکم سورۃ براءت میں خاص حالات کے تناظر میں تھا، کیونکہ مشرکین مکہ نے صلح حدیبیہ کی مخالفت کی تھی اور نقض عہد کے مرتکب قرار پائے تھے، جس کی وجہ سے انہیں مزید مہلت نہیں دی جاسکتی تھی، البتہ اشہر حرم کی وجہ سے حرمت کے مہینوں کے اختتام کے متصل بعد ان کے قتل عام کا حکم دیا گیا، اس لئے اس آیت کریمہ کو ناسخ قرار نہیں دیا جا

11– احمد بن محمد بن ابراہیم الثعلبی، **الكشف والبيان عن تفسير** القرآن (بیروت: داراحیاء التراث العربی) ج۹ ص۲۹۔

12– الجصاص، احمد بن علی ابو بکر الرازی، **أحكام القرآن**، (بیروت: دار احیاء التراث العربی) ص۲۶۹ ج۵۔

13– مکی بن ابی طالب حموش، **الهداية إلى بلوغ النهاية** (مجموعۃ بحوث الکتاب والسنۃ، جامعۃ الشارقۃ) ج۱۱ص ۶۸۸۳۔

14– محمد بن محمد ابو منصور الماتریدی، **تأويلات أهل السنة** (بیروت لبنان: دارالکتب العلمیۃ) ج۹ ص۲۶۵۔

15– الکاسانی، ابو بکر بن مسعود، **بدائع الصنائع في ترتيب الشرائع** (بیروت: دارالکتب العلمیۃ) ج۷ ص۱۱۹۔

سکتا، اور نہ ہی اس کی وجہ سے دوسرے اختیارات کی نفی کی جاسکتی ہے۔ چنانچہ عبد اللہ بن عباس رضی اللہ عنہ سے مروی روایت میں اس کی بہترین وضاحت کی گئی ہے کہ :

عبد اللہ بن عباس رضی اللہ عنہ سے مروی ہے کہ بدر کے قیدیوں کے بارے میں نازل شدہ آیت مبارکہ اس وقت کے اِحوال وظروف کی وجہ سے تھی، کیونکہ مسلمان اس وقت باعتبار تعداد کم تھے، البتہ جب تعداد اور قوت وسطوت بڑھ گئی، تو اللہ سبحانہ وتعالیٰ نے اختیار کا حکم نازل فرمایا، کہ چاہے قتل کرو یا احسان کر کے یا فدیہ لے کر رہا کر دو۔[16]

عہد نبویؐ میں فدیہ کے واقعات:

عہد نبوی علی صاحبہ الصلاۃ والسلام میں اس قسم کے واقعات پائے جاتے ہیں کہ جنگ میں قید شدہ افراد کو فدیہ لے کر رہا کیا گیا، سب سے پہلے جنگ بدر کے قیدیوں کا مسئلہ تھا جس کی بابت جناب رسول اللہ ﷺ نے فدیہ کا فیصلہ کیا۔

اسی طرح عمران بن حصین سے مروی ہے کہ بنو عقیل کا ایک شخص جب گرفتار کیا گیا اور وہ بنو ثقیف کے حلیف تھے۔ آپؐ نے اسے فدیہ کے بدلے رہا کیا جب کہ اس کا فدیہ بنو ثقیف کے ہاں دو مسلمان قیدیوں کی رہائی قرار دیا گیا۔[17]

عہد نبوی ﷺ میں "من" کی مثالیں:

عہد نبویؐ میں اس بابت وفد ہوازن کا واقعہ نظیر کی طور پر ملتا ہے کہ جب ان کا وفد اپنے جنگی قیدیوں کی بابت جناب رسول اللہ ﷺ کی خدمت میں حاضر ہوا تو آپؐ نے ان کے سامنے دو اختیار رکھے جس میں سے ایک اپنے اموال کو واپس حاصل کرنے کا تھا جب کہ دوسرا جنگی قیدیوں کی آزادی کا تھا۔ وفد نے باہم صلاح ومشورہ کے بعد جنگی قیدیوں کی آزادی پر اتفاق رائے حاصل کر کے مطالبہ کیا، اس موقع پر جناب رسول اللہ ﷺ نے ارشاد فرمایا:

أَمَّا بَعْدُ: فَإِنَّ إِخْوَانَكُمْ هَؤُلاَءِ جَاءُوا تَائِبِينَ، وإِني قَدْ رَأَيْتُ أَنْ أَرُدَّ إِلَيْهِمْ سَبْيَهُمْ، فَمَنْ أَحَبَّ مِنْكُمْ أَنْ يُطَيِّبَ ذَلِكَ فَلْيَفْعَلْ،

16– الجصاص، **أحكام القرآن**، ج ۵ ص ۲۶۹۔

17– النیسابوری، مسلم بن حجاج القشیری، **صحیح مسلم**، باب لا وفاء لنذر فی معصیة الله، رقم الحدیث ۱۶۴۱۔

وَمَنْ أَحَبَّ مِنْكُمْ أَنْ يَكُونَ عَلَى حَظِّهِ حَتَّى نُعْطِيَهُ إِيَّاهُ مِنْ أَوَّلِ مَا يفيء اللهُ عَلَيْنَا فَلْيَفْعَلْ[18]

سارے حاضرین مجلس نے جناب رسول اللہ کی تجویز پر رضامندی کا اظہار کیا لیکن مزید تاکید اور اطمینان کے لئے ان کو حکم دیا کہ اپنے اپنے قبیلے اور خاندانوں کے ذریعے اپنی رضامندی کا اظہار کیا جائے، چنانچہ مکمل اطمینان کے بعد جنگی قیدیوں کی آزادی کا حکم صادر فرمایا۔

قیدی کے قتل کا حکم:

اس بابت فقہائے کرام کی رائے مختلف فیہ ہے کیونکہ نصوص قرآنیہ اور سنت نبوی علی صاحبہا الصلاۃ والسلام میں مختلف اختیارات مذکور ہیں جس کی وجہ سے ان نصوص اور واقعات کی بنیاد پر استنباط میں اختلاف پایا جاتا ہے، چنانچہ ذیل میں فقہی مکاتب فکر کی آراء بمعہ مستدلات ذکر کئے جاتے ہیں تاکہ یہ واضح ہو جائے کہ کہاں تک فقہاء کا باہم اختلاف پایا جاتا ہے اور اس اختلاف کی روشنی میں عصر حاضر میں مسلمانوں کے لئے جنگی قیدیوں کے ساتھ کس قسم کے سلوک کی گنجائش ممکن ہے۔

ا: فقہائے احناف کی رائے:

فقہائے احناف کا مذہب اس بابت امام کے پاس تین اختیارات میں سے کسی ایک پر عمل ہے:

ا: قتل:

امام چاہے تو انہیں قیدی بنانے کے بعد قتل کرے کیونکہ نصوص قرآنیہ سے یہ حکم واضح ہے جیسا کہ اللہ جل شانہ کا ارشاد مبارک ہے: فَاضْرِبُوا فَوْقَ الْأَعْنَاقِ[19] اس کے ذریعے امام کفار پر مسلمانوں کا رعب و دبدبہ قائم کر سکتا ہے۔ اور اس کے متعلق سنت نبویؐ سے بھی قولی و عملی ثبوت ملتے ہیں۔

18– سلیمان بن الاشعث، **السنن**، باب في فداء الأسير بالمال، حدیث نمبر ۲۶۹۵، (بیروت: دار الکتاب العربي) ج ۱۴ ص ۳۔

19– القرآن، ۸: ۱۲۔

۲: غلام بنانا

اگر امام چاہے تو انہیں احوال وظروف کو مد نظر رکھ کر غلام بنائے، اور مسلمانوں میں تقسیم کرے، کیونکہ یہ بھی باقی اموال غنیمت کی طرح جنگ کے نتیجے میں مسلمانوں کے ہاتھ آئے ہیں، البتہ مشرکین عرب اور مرتد کی سزا صرف قتل ہے، کیونکہ استرقاق کا مقصد انہیں اسلام کی طرف راغب کرنا ہے جب کہ مشرکین عرب اور مرتد میں یہ نہیں پایا جاتا، اس لئے اللہ تعالی نے حکم دیا کہ : فَاقْتُلُوا الْمُشْرِكِينَ حَيْثُ وَجَدْتُمُوهُمْ[20] اس کے برعکس عرب مشرکین کی اولاد اور خواتین عجم مشرکین، ان کی اولاد اور خواتین کو غلام بنایا جاسکتا ہے جس طرح کہ ہوازن کے لوگوں کی خواتین اور بچوں کو عہد نبویؐ میں غلام بنایا گیا تھا حالانکہ یہ عرب کا اہم قبیلہ تھا۔

۳: احسان بصورت ذمہ

امام کے پاس یہ اختیار بھی ہے کہ انہیں آزاد چھوڑ کر اہل ذمہ میں شامل کرے سوائے مشرکین عرب اور مرتد کے کیونکہ ان کا حکم صرف قتل ہے۔ اہل ذمہ بنانے کے نظائر میں سے سیدنا عمر رضی اللہ عنہ کا معاملہ سواد عراق کے ساتھ ہے، مزید برآں اس طرح کا احسان جزیہ کو بھی شامل ہیں اس لئے یہ حکماً جزیہ کے معنی میں ہے۔[21]

خلاصہ کلام یہ ہے کہ احناف کے ہاں مذکورہ بالا تینوں صورتیں امام کے لئے قابل عمل ہے اور ان میں سے جس کے مطابق وہ معاملہ کرنا چاہے اسے اجازت ہے، البتہ فدیہ لے کر جنگی قیدی کو چھوڑنا فقہائے احناف کے ہاں جائز نہیں، جب کہ امام محمد رحمہ اللہ کے ہاں بوڑھے قیدی کو فدیہ بدلے رہا کرنا جائز ہے بشرط یہ کہ اس بوڑھے سے افزائش نسل کی امید ختم ہو چکی ہو۔ اس کی توجیہ فقہائے احناف یہ بیان فرماتے ہیں کہ، جنگی قیدیوں کے بارے میں شریعت کا اصل حکم قتل کا ہے جب کہ انہیں غلام بنانا یا احسان بصورت ذمہ فرع ہے، جب کہ فدیہ کی صورت میں جنگی قیدی کو دوبارہ کفار کی طرف لوٹانا انہیں مسلمانوں کے خلاف جنگی طور پر مزید طاقتور بنانے کے مترادف ہے، اس لئے یہ جائز نہیں۔ بہر صورت احناف فقہاء کے ہاں یہ ایک صوابدیدی اختیار ہے جسے خلیفۃ المسلمین یا

20– القرآن، ٦: ٥۔

21– مزید تفصیل کے لئے دیکھئے: کاسانی، **بدائع الصنائع**، ج ۷ ص ۱۹۔

امام احوال وظروف کی روشنی میں متعین کر سکتا ہے، کیونکہ مختلف حالات کے تقاضے مختلف ہوتے ہیں جس کی وجہ سے کسی ایک خاص حکم کو متعین کرنا خلاف مصلحت ہے۔

فقہائے مالکیہ کا موقف :

فقہی اعتبار سے فقہائے مالکیہ کا موقف اہل عرب کے جنگی قیدیوں کو غلام بنانے کے بارے میں المدونۃ میں لکھا ہے، امام مالک سے اس بابت کوئی قول منقول نہیں کہ انہیں غلام بنایا جا سکتا ہے یا نہیں، چنانچہ وہ عجمیوں کے حکم میں ہے اور انہیں غلام بنانا درست ہے۔[۲۲]

جب کہ ان کے ہاں بھی امام کے پاس اختیار ہے کہ وہ چاہے :

۱: انہیں قتل کر دے، یہ حکم ماقبل میں مذکور نصوص پر مبنی ہے۔

۲: انہیں غلام بنا دے مالکیہ کے ہاں غلام بنانے میں کوئی استثنی نہیں، اور یہ حکم مبنی بر عموم ہے، جیسا کہ المدونۃ کی عبارت سے واضح ہوتا ہے۔

۳: ان پر جزیہ لاگو کر دے،[۲۳] چنانچہ اہل کتاب کے علاوہ اس حکم میں مجوس، تمام عجمی مشرکین اور مشرکین مکہ کو بھی اس میں شامل کیا گیا ہے،[۲۴] جزیہ کے متعلق حکم کو جو حضرات اہل کتاب کے ساتھ خاص کرتے ہیں ان کی توجیہ یہ ہے کہ چونکہ آیت مبارکہ میں صرف اہل کتاب کا ذکر ہے اس لئے حکم بھی ان کے ساتھ خاص ہوگا۔ جب کہ مالکیہ کے ہاں اس کا حکم عام ہے کیونکہ جناب رسول اللہ ﷺ جب سریہ بھیجتے تو ان کو ہدایت فرماتے کہ مخالفین کے سامنے تین مختلف اختیار رکھیں، ان میں سے ایک جزیہ بھی ہوتا تھا، جب کہ سورۃ براءۃ میں مشرکین کے ساتھ قتال کا حکم یا آیت مبارکہ میں اہل کتاب کا تذکرہ اس بات کو مستلزم نہیں کہ جزیہ مشرکین پر لاگو نہیں ہو سکتا، اور نصوص میں عموم خصوص کا تقدم وتاخر نسخ کو لازم نہیں۔

22– مالک بن انس الاصبحی، **المدونة الكبرى** (بیروت: دار الكتب العلمية) ج۱ص ۵۱۲۔

23– عبد الوہاب بن علی، **المعونة على مذهب أهل المدينة** (مکہ مکرمہ: المكتبة التجارية) ص۲۶۱۔

24– محمد بن احمد بن رشد القرطبی، **بداية المجتهد ونهاية المقتصد** (القاہرۃ: دار الحدیث، ۱۴۲۵ھ) ج۲ص۱۵۱۔

۴: انہیں فدیہ کے بدلے رہا کر دے، اس بابت ان کا مستدل اللہ جل شانہ کا ارشاد مبارک ہے:

فَإِمَّا مَنًّا بَعْدُ وَإِمَّا فِدَاءً[25]۔

یا تو احسان کرے یا ان سے فدیہ لے کر رہا کر دے، اس کا مطلب یہ ہے کہ یہ آیت مبارکہ فقہائے مالکیہ کے ہاں منسوخ نہیں، جب کہ اس کے بارے میں بدر کے قیدیوں کے ساتھ جناب رسول اللہ ﷺ کا کیا گیا معاملہ بھی ان کا مستدل ہے کہ آپ ﷺ نے ان سے فدیہ لے کر انہیں رہا کیا تھا۔

فقہائے شافعیہ کا موقف:

فقہائے شافعیہ کے ہاں مرد جنگی قیدی کے بارے میں امام کے پاس اختیار ہے قتل، من، فداء اور غلام بنانے میں سے کسی ایک پر وہ عمل کر سکتا ہے جیسا کہ اس کی وضاحت الحاوی الکبیر میں کی گئی ہے:

"لِأَمِيرِ الْجَيْشِ خِيَارًا فِي الرِّجَالِ بَيْنَ الْقَتْلِ وَالْفِدَاءِ وَالْمَنِّ وَالِاسْتِرْقَاقِ، فَلَمْ يَتَعَيَّنِ الِاسْتِرْقَاقُ إِلَّا بِالِاخْتِيَارِ"[26]

امیر لشکر کے پاس مرد جنگی قیدیوں کے معاملے میں تین اختیارات میں سے کسی ایک کے انتخاب کا حق ہے: قتل، فدیہ، احسان، غلام بنانا۔ چنانچہ اس میں غلام بنانے کا حکم ایک اختیار ہے، اس کے علاوہ بھی دیگر اختیارات پر عمل کیا جا سکتا ہے۔

فقہائے حنابلہ کی رائے:

امام احمد رحمہ اللہ اور ان کے متبعین فقہائے کرام کے ہاں امام یا اس کے نائب کے پاس چار اختیارات میں سے کسی ایک کو اختیار کرنے کا حق ہے جب تک کہ وہ مسلمان نہ ہو جائے، البتہ امام احمد بن حنبلؒ کی ایک رائے کے مطابق اگر جنگی قیدی مشرف بہ اسلام ہو جائے تو اس صورت میں اس

25– القرآن، ۴۷: ۸۔

26– ابو الحسن الماوردی، **الحاوی الکبیر** (بیروت: دار الکتب العلمیۃ، ۱۴۱۹ھ) ط۱، ج ۱۴، ص ۲۴۱۔

کو غلام بنانا جائز نہیں، کیونکہ استرقاق ایک سزا کے طور پر مشروع حکم ہے جب کہ قبول اسلام کے بعد سزا کی ضرورت یا وجہ جواز باقی نہیں۔[۲۷]

بین الاقوامی قوانین کی تصریحات:

عصر حاضر میں قومی ریاستوں کے قیام کے بعد بین الاقوامی قوانین کی تشکیل کی گئی ہے، اور نظری طور پر غلامی کو ممنوع اور جرم قرار دیا ہے۔غلامی کی تعریف بین الاقوامی قوانین کے مطابق یوں کی گئی ہے:

Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. [28]

اس تعریف کے مطابق کسی شخص پر کسی کا انفرادی یا اجتماعی ملکیت کا قائم ہونا غلامی کہلاتا ہے۔

چنانچہ جنیوا کنونشن میں اس کی تصریح یوں کی گئی ہے:

"The Slavery and Slave Trade in all their forms are [۲۹]prohibited"

اس Rule کے مطابق غلامی اور غلاموں کی خرید وفروخت کسی بھی صورت میں جائز نہیں۔

اس سے یہ واضح ہوتا ہے کہ بین الاقوامی قانون کی رو سے جنگی قیدی کو غلام بنانا ممنوع ہے، اور جنگی قیدیوں کی بابت یہ قانون ایک منظّم طریقہ کار وضع کر چکا ہے، اس کے علاوہ ان کے حقوق کا تعین بھی کیا جا چکا ہے، لیکن جیسا کہ اس کے مفہوم میں یہ بات ذکر کی جا چکی ہے کہ جنگی قیدی کا إطلاق انہیں لوگوں پر کیا جائے گا جو شناخت کے حامل ہونگے، البتہ اگر ایسی کوئی شناخت نہ ہو تو اس صورت میں وہ غیر قانونی مقاتلین "Unlawful Combatant" متصور ہونگے، اور ان

27– إبو یعلی الفراء محمد بن الحسین الحنبلی، **الأحکام السلطانیة**، ص ۱۴۱۔

28 – Slavery Convention 1929, Section 1 (1).

29 – Geneva Convention, Rule 94, Slavery and Slavery Trade.

حقوق سے مستفید نہیں ہو سکیں گے۔ یہی وجہ ہے کہ افغان جنگ میں طالبان کو جنگی قیدیوں کے حقوق نہیں دیئے گئے، اور ان حقوق کے نہ دینے کی وجہ یہی بتائی گئی تھی کہ ان کے پاس جنگی قیدی کا شناخت نہیں، یعنی کہ وہ کسی تسلیم شدہ ریاست کے جنگی فوج کا حصہ نہیں تھے۔

تجزیہ:

مذکورہ بالا بحث سے یہ بات ثابت ہو رہی ہے کہ جہاں تک فقہی طور پر استرقاق کا حکم ہے تو مذاہب اربعہ کے مطابق جنگی قیدیوں کو غلام بنانا جائز ہے، اور امام کے پاس یہ اختیار ہے کہ اگر وہ استرقاق کو زیادہ اصلح اور انفع سمجھتا ہو تو انہیں قتل یا فدیہ یا احسان کرنے کی بجائے غلام بنا سکتا ہے، یہ حکم جس طرح عہد رسالت اور اس کے بعد کے ادوار میں برقرار تھا اسی طرح آج بھی یہ حکم موجود ہے، کیونکہ منصوص احکام کو سوائے شارع کے کوئی اور منسوخ کرنے کا استحقاق نہیں رکھتا، جب کہ عہد رسالت میں ایسا کوئی نص یا حکم یا فعل موجود نہیں جس سے واضح طور پر یا اشارۃ اس کا منسوخ ہونا ثابت کیا جاسکے، البتہ تخصیص کی حد تک اس میں سے مشرکین مکہ نکال دیئے گئے ہیں جن کے لئے صرف قتل کا حکم باقی رہا، لیکن وہ نص ہی کے ذریعے تخصیص شدہ ہے اور استرقاق سے زیادہ سخت حکم ان کی بابت نازل ہوا کہ انہیں صرف قتل کیا جائے گا اور باقی اختیارات ان کے حق میں استعمال نہیں ہو سکتے۔

اسی طرح جناب رسول اللہ ﷺ کے فعل سے بھی یہ ثابت ہوتا ہے کہ استرقاق میں کوئی شرعی قباحت نہیں، جہاں تک بنو ہوازن کے قضیے کا تعلق ہے تو اس میں احسان پایا جاتا ہے لیکن احسان سے پہلے ان کا تقسیم کیا جانا استرقاق کے حکم کو مزید تقویت پہنچاتا ہے، اگر استرقاق جائز نہ ہوتا تو آپ علیہ السلام کبھی بھی انہیں مسلمان مجاہدین کے درمیان تقسیم نہ فرماتے۔

استرقاق کی بابت فقہاء نے یہاں تک تصریح کی ہے کہ اگر جنگی قیدی قید میں آنے کے بعد اسلام قبول کرے تب بھی ان کو غلام بنانا جائز ہے، جیسا کہ علامہ شامی نے تصریح کی ہے:

وَإِسْلَامُهُ لَا يَمْنَعُ اسْتِرْقَاقَهُمْ، مَا لَمْ يَكُنْ قَبْلَ الْأَخْذِ كَذَا فِي الْمُلْتَقَى وَشَرْحِهِ[30]

30– محمد امین المعروف بابن عابدین، **رد المحتار علی الدر المختار** (بیروت: دار الفکر، ۱۴۱۲) ج ۴ ص ۱۳۹۔

البتہ اگر قید میں آنے سے پہلے وہ مشرف بہ اسلام ہو جائے تو اس صورت میں وہ آزاد ہونگے

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اخلاق، دیانت اور تقویٰ کا تقاضہ یہ ہے کہ غلام بنانے سے گریز کیا جائے، اور امام اگر جنگی قیدیوں کو آزاد کرنا چاہے تو اس میں کوئی قباحت نہیں کیونکہ احسان کا اختیار بہر حال اس کے پاس موجود ہے، اسی طرح انفرادی طور پر اسلام نے مسلمانوں کو ترغیب دی ہے کہ وہ غلاموں کو آزاد کریں، اور اس بابت مختلف کفارات میں غلام کی آزادی کو مستحسن قرار دیا گیا ہے جب کہ مختلف نصوص میں عمومی حالات میں اصحاب ثروت کے غلام کو آزادی دلانے کو باعث اجر وثواب قرار دیا گیا ہے۔

اس لئے ان دونوں کا باہم کوئی تعارض نہیں، بلکہ غلام بنانے کا حکم تخفیف اور رحمت خداوندی پر مبنی ہے، کیونکہ اس سے پہلے جنگی قیدیوں کے بارے میں صرف قتل کا حکم تھا، اس کے بعد جب مسلمانوں کو قوت حاصل ہوئی اور افرادی قوت بڑھ گئی، تو اللہ تعالی نے قتل کے علاوہ غلام بنانے، احسان کرنے اور فدیہ کے بدلے رہائی کا اختیار بھی عطاء فرمایا، کیونکہ اسلام کا مقصد جہاد سے محض انتقام یا خون بہانا نہیں بلکہ اس کا مقصد اعلائے کلمتہ اللہ اور ظلم کا خاتمہ ہے، تاکہ لوگ اپنے رب کی پہچان حاصل کر کے صرف اس کی عبادت کر سکے۔

مزید برآں اس تخفیف کے ساتھ ساتھ اسلام نے جنگی قیدیوں کی تقسیم سے پہلے حقوق مقرر کیے ہیں مثلا بچوں، خواتین، کمزور افراد اور غیر مقاتلین کے لئے قتل کا حکم نہیں دیا بلکہ ان کے لئے صرف غلامی کا حکم ہے، اسی طرح غلام بنانے کے بعد ان کے حقوق کا تعین کیا گیا، اور ان کے ساتھ غیر انسانی، ظلم پر مبنی اور وحشیانہ سلوک سے منع فرمایا گیا، بلکہ اگر اسلامی تاریخ کا جائزہ لیا جائے تو مسلمانوں نے غلاموں کی تربیت کا بہترین انتظام کیا اور انہیں معاشرے کے مفید افراد بنانے کی بھر پور کوشش کی، یہی وجہ کہ اسلامی تاریخ کے نامور فقہاء، محدثین، مفسرین، اور دیگر شعبہ ہائے حیات میں بیش بہا کارنامے سرانجام دینے والوں میں کثیر تعداد موالیوں کی ہیں۔ اسی طرح ان کی آزادی کے لئے مختلف النوع راستے فراہم کئے گئے، یہ بذات خود ایک ضخیم کتاب کا متقاضی موضوع ہے، لیکن سر دست اس مضمون کے موضوع کا خلاصہ یہی ہے کہ جنگی قیدیوں کو غلام بنانا جائز ہے۔

شریعت اسلامیہ کی رو سے جیسا کہ ما قبل بحث سے واضح ہوا کہ امام یا مسلمان حکمران کے پاس حالات کے مطابق اختیار ہے کہ وہ کسی بھی ایک اختیار، قتل، استرقاق، احسان اور فدیہ پر عمل کر سکتا ہے، اور اس میں کوئی ایک اختیار پر ہی عمل کرنا فرض یا واجب نہیں، بلکہ کسی ایک کو اختیار کیا جاسکتا ہے ، یا مختلف قیدیوں کے اعتبار سے مختلف اختیارات کو اختیار کیا جاسکتا ہے ، جیسا کہ بعض قیدیوں سے متعلق احسان والا معاملہ اختیار کیا جائے جب کہ بعض خطرناک نوعیت کے قیدی قتل کئے جائے، اور بعض کے بدلے فدیہ یا مسلمان قیدیوں کی رہائی کا معاملہ طے کیا جائے، اس لئے یہ بھی لازمی نہیں کہ صرف ایک ہی اختیار پر عمل ہو بلکہ بہ یک وقت کئی اختیارات پر عمل جائز ہے۔ چنانچہ جنگی قیدی کو غلام بنایا جاسکتا ہے، بشرط یہ کہ ان کے متعلق شریعت کے احکامات کا مکمل لحاظ رکھا جائے ، لیکن چونکہ عملا عالم اسلام میں غلامی کا تعامل عرصہ دراز سے مفقود ہے، اس لئے مسلمان حکمران باقی اختیارات میں سے اگر کسی پر عمل کرے تو یہ عصر حاضر کے تقاضوں کے مطابق زیادہ اصلح اور انفع ہے۔

جہاں تک موجودہ بین الاقوامی قوانین کا جنگی قیدیوں سے متعلق رویہ ہے تو وہ مبنی بر تضاد ہے، کاغذ کے ٹکڑوں اور زبانی جمع خرچ کی حد تک جنگی قیدی کو غلام بنانا جائز نہیں اور ان کے حقوق بھی بیان کئے گئے ہیں لیکن عملانہ تو اس کی پشت پر کوئی قوت نافذہ ہے نہ ہی اس پر عمل درآمد کی کوئی صورت نظر آتی ہے، استعماری قوتوں نے ہمیشہ جنگی قیدیوں کے ساتھ سفاکانہ رویہ اختیار کیا ہے، گوانتانا مو اور عراق کا ابو غریب جیل ان بے رحمانہ اور وحشیانہ سلوک کی زندہ مثالیں ہیں۔ اس وقت کے بین الاقوامی قوانین کی دھجیاں خود اس کے سب سے بڑے علم بردار اڑا رہے ہیں، یہاں تک کہ جنگی قیدی کے علاوہ اگر ان کے مخالفین میں سے کوئی ان کے قید میں آجائے تو اس کے ساتھ بھی ان کا رویہ انتہائی بے رحمانہ اور نامناسب ہوتا ہے۔

وڈیو سکینڈل کیس میں سپریم کورٹ کا فیصلہ

محمد مشتاق احمد*

قانون کے شعبے سے تعلق رکھنے والے لوگوں کے لیے اس فیصلے کی اہمیت کئی پہلوؤں سے زیادہ ہے۔ اس لیے سلسلے میں مختصر نکات پیشِ خدمت ہیں۔ سپریم کورٹ نے اس کیس میں پانچ تنقیح طلب امور متعین کیے ہیں اور پھر ان پر الگ الگ فیصلہ دیا ہے:

۱. میاں محمد نواز شریف صاحب کے مقدمے کے تناظر میں کون سی عدالت اس وڈیو کو دیکھ کر یہ فیصلہ کر سکتی ہے کہ میاں صاحب کے خلاف فیصلہ قانوناً درست تھا یا نہیں؟
۲. اس وڈیو کو بطورِ "ثبوت" "مستند مان لینے کی شرائط کیا ہیں؟
۳. بطورِ ثبوت مستند مان لیے جانے کے بعد اس وڈیو کو عدالت میں کیسے ثابت کیا جائے گا؟
۴. بطورِ ثبوت مستند مان لیے جانے اور عدالت میں ثابت کیے جانے کے بعد اس وڈیو کا میاں صاحب کے خلاف فیصلے پر کیا اثر پڑتا ہے؟
۵. فاضل جج جناب محمد ارشد ملک کا اس سارے معاملے میں کردار۔

پہلا امر: وڈیو کے متعلق فیصلہ کرنے کی مجاز عدالت کون سی ہے؟

سپریم کورٹ نے تصریح کی ہے کہ "اس معاملے میں دو رائیں نہیں ہو سکتیں" کہ اس وقت اسلام آباد ہائی کورٹ ہی وہ عدالت ہے جو شواہد کی بنا پر میاں صاحب کی سزا برقرار رکھنے، اس میں تبدیلی کرنے یا اسے ختم کرنے کی مجاز ہے اور یہ کہ انکوائری کمیشن یا کمیٹی حکومت نے بنائی ہو یا اس عدالت نے، وہ اس معاملے میں صرف رائے دے سکتی ہے، فیصلہ نہیں۔ عدالت نے مزید یہ قرار دیا ہے کہ متعلقہ وڈیو میاں صاحب کو کوئی فائدہ نہیں دے سکتی جب تک یہ تین کام نہ ہوں کہ:

أ. اسے باقاعدہ اسلام آباد ہائی کورٹ کے سامنے زیر التوا اپیل میں پیش کیا جائے؛
ب. اس کا مستند ہونا ثابت کیا جائے؛ اور
ج. پھر قانون کے مطابق اسے عدالت میں ثابت کیا جائے۔

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دوسرا امر: کیسے معلوم ہوگا کہ وڈیو مستند ہے؟

اس کا سادہ جواب سپریم کورٹ نے یہ دیا کہ فارنسک تجزیے کے بغیر اسے مستند ماننا ممکن نہیں ہے اور آڈیو یا وڈیو ٹیپس کے متعلق کسی حقیقی شبے کی موجودگی میں اسے قابلِ اعتماد نہیں مانا جاسکے گا۔

تیسرا امر: وڈیو مستند ہو تو اسے عدالت میں کیسے ثابت کیا جائے گا؟

میرے نزدیک اس فیصلے کا یہ حصہ سب سے اہم ہے اور نہ صرف موجودہ کیس کے تناظر میں، بلکہ بالعموم آڈیو /وڈیو ٹیپس کے متعلق قانونی اصولوں کی وضاحت کے لیے اس حصے کا تجزیہ بہت ضروری ہے۔ سپریم کورٹ نے بہت سارے کیسز کا تفصیلی جائزہ لینے کے بعد یہ اصول طے کیے ہیں:

۱. کسی آڈیو/وڈیو ٹیپ پر اس وقت تک عدالت اعتماد نہیں کر سکتی جب تک پہلے یہ ثابت نہ ہو کہ وہ مستند ہے اور اس میں کوئی ڈاکٹرنگ یا ٹیمپرنگ نہیں کی گئی؛

۲. اس ضمن میں پنجاب فارنسک سائنس ایجنسی کی فارنسک رپورٹ کو عدالت کے سامنے پیش کیا جاسکتا ہے؛

۳. قانونِ شہادت کی دفعہ ۱۶۴ کے تحت ایسی کسی آڈیو یا وڈیو ٹیپ کے پیش کیے جانے یا نہ کیے جانے کا اختیار متعلقہ عدالت کے پاس ہے؛

۴. عدالت کی جانب سے اجازت دیے جاچکنے کے بعد متعلقہ آڈیو یا وڈیو کو قانونِ شہادت کے اصول و ضوابط کے مطابق ہی عدالت میں پیش کیا جائے گا؛

۵. ریکارڈنگ کا صحیح ہونا لازماً ثابت کیا جائے گا اور ٹیمپرنگ کے امکانات کی نفی کے لیے براہِ راست یا واقعاتی شہادتیں پیش کی جانی ضروری ہیں؛

۶. کسی گفتگو یا واقعے کی ریکارڈنگ ہوئی تو اصلی ریکارڈنگ، جب گفتگو ہوئی یا واقعہ ہوا، پیش کرنا ضروری ہے؛

۷. جس شخص نے ریکارڈنگ کی ہے، اس کا پیش کیا جانا ضروری ہے؛

۸. ضروری ہے کہ جس شخص نے ریکارڈنگ کی ہے، وہ خود ریکارڈنگ کی آڈیو/وڈیو ٹیپ پیش کرے؛

۹. آڈیو/وڈیو ٹیپ کا عدالت میں چلانا ضروری ہوگا؛

۱۰. آڈیو/وڈیو ٹیپ کا واضح طور پر قابلِ سماعت/قابلِ رویت ہونا ضروری ہوگا؛

۱۱. ضروری ہوگا کہ بات کرنے والے شخص/دیکھے جانے والے شخص کو ریکارڈنگ کرنے والا خود پہچانے یا کوئی اور شخص جو اسے پہچانتا ہو، اس کی گواہی دے؛

۱۲. موقع پر موجود کوئی اور شخص بھی گفتگو/واقعے کے متعلق گواہی دے سکتا ہے؛

۱۳. جو آوازیں ریکارڈ کی گئیں، یا جو اشخاص نظر آئے، ان کی صحیح پہچان لازمی ہوگی؛

۱۴. آڈیو/وڈیو کے ذریعے جو ثبوت پیش کیا جارہا ہو، اس کے متعلق ضروری ہوگا کہ وہ مقدمے سے متعلق ہو، یا کسی اور سبب سے مقدمے میں پیش کیے جانے کی قانوناً اجازت ہو؛

۱۵. ریکارڈنگ سے لے کر عدالت میں پیش کیے جانے تک ریکارڈنگ کی حفاظت ثابت کرنی ہوگی؛

۱۶. آڈیو/وڈیو ریکارڈنگ کا ٹرانسکرپٹ خود مختار نگرانی اور کنٹرول میں تیار کیا جائے گا؛

۱۷. آڈیو/وڈیو ریکارڈ کرنے والا شخص وہ ہوگا جس کے روزمرہ کے فرائض میں آڈیو/وڈیو ریکارڈ کرنا شامل ہو اور وہ ایسا شخص نہیں ہوگا جس نے ثبوت حاصل کرنے کے لیے جال بچھانے کی غرض سے آڈیو/وڈیو ریکارڈنگ کی ہو؛

۱۸. آڈیو/وڈیو کا ماخذ ظاہر کرنا لازم ہوگا؛

۱۹. جو شخص آڈیو/وڈیو ریکارڈنگ عدالت میں پیش کر رہا ہو، اس پر لازم ہوگا کہ وہ ریکارڈنگ کی تاریخ ظاہر کرے؛

۲۰. عدالتی کارروائی میں نسبتاً تاخیر سے پیش کی جانے والی آڈیو/وڈیو ٹیپ کو شک کی نگاہ سے دیکھا جائے گا؛

۲۱. عدالت میں آڈیو/وڈیو ٹیپ کو بطورِ ثبوت پیش کرنے والے شخص پر لازم ہوگا کہ وہ عدالت کو اس ضمن میں باقاعدہ درخواست دے۔

ان اصولوں کے طے کیے جانے کے بعد سپریم کورٹ نے اس مقدمے کے تناظر میں قرار دیا ہے کہ چونکہ ٹرائل کورٹ فیصلہ دے چکنے کے بعد قانوناً اپنے فریضے سے سبکدوش ہو چکی ہے، اور اس فیصلے کے خلاف اپیل اسلام آباد ہائی کورٹ میں زیرِ التوا ہے، اس لیے متعلقہ وڈیو کے بارے میں ان اصولوں کی روشنی میں فیصلہ کرنے کا اختیار اسلام آباد ہائی کورٹ ہی کے پاس ہے۔ یہاں سپریم کورٹ نے مجموعۂ ضابطۂ فوجداری کی دفعہ ۴۲۸ کا حوالہ دیا ہے جس کی رو سے اپیلیٹ کورٹ کو اختیار ہے کہ وہ اضافی شواہد بھی لے سکتی ہے۔

چوتھا امر: بطورِ ثبوت مستند مان لیے جانے اور عدالت میں ثابت کیے جانے کے بعد اس وڈیو کا میاں صاحب کے خلاف فیصلے پر اثر

اگر مذکورہ اصولوں پر وڈیو مستند ثابت ہو جائے اور اسلام آباد ہائی کورٹ کے سامنے ثابت بھی کی جائے تو اسلام آباد ہائی کورٹ نے یہ دیکھنا ہو گا کہ اس مستند اور ثابت شدہ وڈیو میں جج کا جو کردار دکھایا گیا، کیا وہ فیصلے پر اثر انداز ہوا ہے یا نہیں؟ اس کے بعد وہ قانون کے مطابق جیسے مناسب سمجھے فیصلہ کر سکتی ہے اور اس سلسلے میں اسے اختیار ہے کہ خود شواہد کا جائزہ لے کر میرٹ پر فیصلہ کرے یا مقدمہ واپس ماتحت عدالت میں بھیج دے کہ وہاں از سرِ نو پورا مقدمہ چلایا جائے۔ سپریم کورٹ اس اصولی موقف سے آگے مزید تفصیل میں نہیں گئی تاکہ وہ اس معاملے میں قانون کے مطابق فیصلہ کرنے میں اسلام آباد ہائی کورٹ پر اثر انداز نہ ہو۔

پانچواں امر: فاضل جج جناب محمد ارشد ملک کا اس سارے معاملے میں کردار

سپریم کورٹ نے صراحتاً قرار دیا ہے کہ فاضل جج کی جانب سے ۷ جولائی کو جاری کی جانے والی پریس ریلیز اور ۱۱ جولائی کو جاری کیا جانے والا بیانِ حلفی خود اس کے خلاف باقاعدہ چارج شیٹ ہیں۔ ان دستاویزات سے جو کردار ابھر کر سامنے آتا ہے وہ پوری عدلیہ کے لیے بدنامی کا باعث ہے۔ وہ اعتراف کر چکے ہیں کہ:

۱. ان کا ماضی داغ دار تھا جس کی بنا پر اسے بلیک میل کیا جا سکتا تھا؛
۲. مقدمات کے دوران میں وہ ان لوگوں سے ملتے رہے جو ان مقدمات کے ملزموں کے ہمدرد تھے؛
۳. انھیں دھمکیاں دی گئیں اور لالچ بھی دیے گئے لیکن انھوں نے اپنے حکام بالا کو نہیں بتایا نہ ہی خود کو مقدمات سے علیحدہ کرنا پسند کیا؛
۴. سزا سنا چکنے کے بعد وہ سزا یافتہ شخص سے ایک اور شہر میں اس کے گھر پر ملے؛
۵. وہ اس سزا یافتہ شخص کے بیٹے سے بھی ایک اور ملک میں ملے؛ اور
۶. اس نے سزا یافتہ شخص کو خود اپنے ہی فیصلے کے خلاف اپیل دائر کرنے میں مدد دی اور اسے اپنے فیصلے کی کمزوریاں بتائیں۔

فاضل جج کے اس انتہائی افسوسناک کردار کا جائزہ لینے کے بعد سپریم کورٹ نے قرار دیا ہے کہ اٹارنی جنرل نے یقین دہانی کرائی ہے کہ متعلقہ جج کی خدمات واپس لاہور ہائی کورٹ بھیجی جائیں گی اور سپریم کورٹ نے توقع ظاہر کی کہ لاہور ہائی کورٹ اس کے خلاف فوری انضباطی کارروائی کرے گی۔

آخر میں سپریم کورٹ نے کہا ہے کہ میاں صاحب کی سزا پر اس وڈیو کے اثرات پر وہ اس لیے بات نہیں کرے گی کہ اب یہ معاملہ مجاز عدالت (اسلام آباد ہائی کورٹ) کے سامنے زیرِ التوا ہے۔