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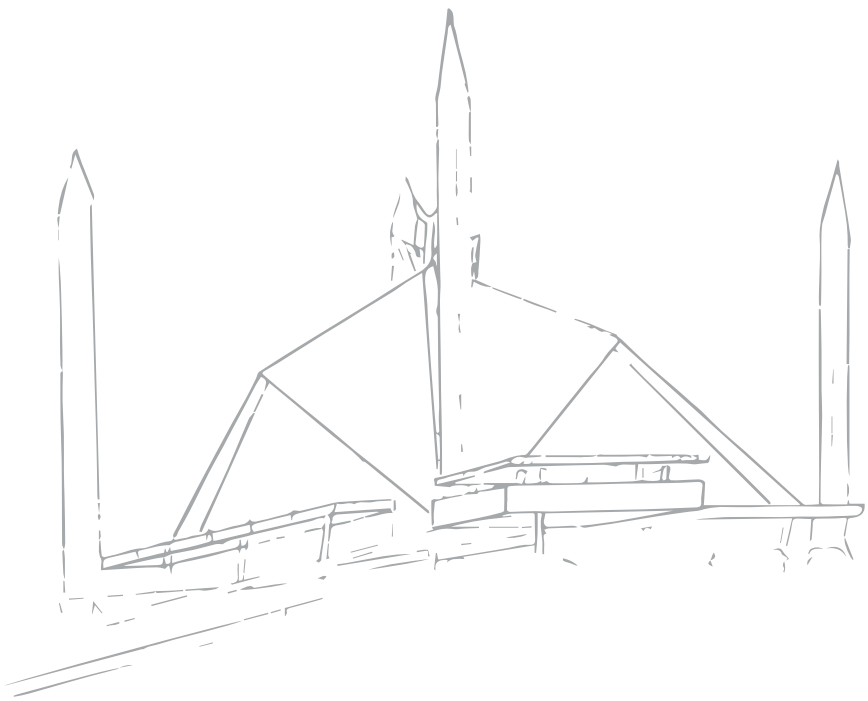

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The *Islamabad Law Review* publishes research in the field of law and allied fields like political science, international relations, policy studies, and gender studies. Local and foreign writers are welcome to write on Islamic law, international law, criminal law, administrative law, constitutional law, human rights law, intellectual property law, corporate law, competition law, consumer protection law, cyber law, trade law, investment law, family law, comparative law, conflict of laws, jurisprudence, environmental law, tax law, media law or any other issues that interest lawyers the world over.

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FACULTY OF SHARI'AH & LAW
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Preface

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

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

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

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

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The Right to a Fair Competition and Due Process of Law: An Uncommon Perspective

Muhammad Asif Khan*

Abstract

The effects of the ownership of businesses by Militaries has seldomly been investigated through a Human Rights lens. This article intends to identify one aspect of the human rights implications of the military owned businesses. A case of military owned business and its impact upon protected constitutional right of fair competition in Pakistan is selected. The case of Pakistan is relevant because the military's control of power politics makes it more influential and powerful than any other state organ. In addition, it owns assets related to its business activities worth more than a 100 billion dollars. The article adopts descriptive and analytical approach towards the human rights challenges posed by these military businesses for other relevant stakeholders. The major questions addressed are whether the military ownership of business entities poses a threat to equal opportunity? Does the right guaranteed in article 18 of the 1973 constitution protect the right to a fair competition? If yes, what is the effect of the overwhelming ownership of business by the military on the notion of unfair advantage? And what is a possible mechanism of dealing with this issue and its future implications?

Keywords:

Business and Human Rights; Milbus and Human Rights; Freedom of Trade and Business; Fair Competition; Military owned Business Entities

1. Introduction

In a Bollywood movie named 'Gangs of Wasseypur' a notorious family criminal gang in a moment decide to stay off from criminal activities and start afresh with a legal family business. Living in a coastal city they decide to invest in the fishing business. The next day they call all the fisherman in their city and warn them to leave their business and find a job other than the fishing business. The notorious gang starts a legal fishing business by keeping all the others away manipulating the market. Their wealth making becomes legal but the way they engaged in profit making makes hundreds of other fisherman jobless. In real life the Pakistan 'Rangers' - which is a paramilitary force working under the influence of Pakistan's powerful military - in early 1990s *inter alia* started fishing business in Karachi (biggest coastal city in

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Pakistan) controlling all the buying and selling prices. They would buy 40kg of fish at the price of Rupees 800/- and sell it off in the official market at Rupees 5000/- earning millions of profits defying all competition laws and practises.[1] In 2005, the local fisherman asked for help from the federal government after the provincial government turned deaf and blind over the matter for many years. Later, the parliament turned in favour of the paramilitary forces, even the political opposition were barred of discussing the matter in parliament.[2] The parliament cannot do much because the country has been controlled and its politics influenced by the military since its inception. The military has become a giant enterprise controlling state's political and economic affairs making ways for its profit-making ventures. According to *Gayer* 'Violent enterprises take part in state formation so that they create the local political context they are so closely dependent on'.[3] In this surge of more power the military becomes an enterprise, but an enterprise of a kind which only benefits its own people and dismantle the balance of an economic system required for the strengthening of a political system.

The major way how military controlled enterprises function is through forming institutionally controlled business entities.[4] The regulatory power remains with the institution; the enterprise is thus operated by officers for the financial interests of other officers. This dual role of military is sometimes dangerous for the state organs and the people dwelling in it. As a contemporary in 1827 noted with respect to the British East India Company that 'a company which carries a sword in one hand and a ledger in the other, which maintains armies and retails tea, is a contradiction'.[5] This contradiction of interest is not new to Pakistan as it is a state coming out of a legacy that the British East

[1] Laurent Gayer, 'The Pakistan Rangers: From Border Defense to Internal "Protection"', in *Organized Crime and States: The Hidden Face of Politics*, ed. Jean-Louis Briquet and Gilles Favarel-Garrigues, The Sciences Po Series in International Relations and Political Economy (New York: Palgrave Macmillan US, 2010), 15–39, https://doi.org/10.1057/9780230110038_2. at 34.

[2] 'Resolution on Fishermen Issue Disallowed', DAWN.COM, 26 November 2004, http://beta.dawn.com/news/375254/resolution-on-fishermen-issue-disallowed.

[3] Gayer, 'The Pakistan Rangers'. at 34.

[4] David Prina, 'TAKING CARE OF THEIR OWN: THE CAUSES AND CONSEQUENCES OF SOLDIERS IN BUSINESS', 2017, https://doi.org/10.13016/M2FK42.

[5] Leo J. Blanken, *Rational Empires: Institutional Incentives and Imperial Expansion* (Chicago ; London: University of Chicago Press, 2012).

India Company left. After the demise of the British colonial system it is the "elites" which have changed rather than the system which prefers power in the hands of the few.[6] The system is well enforced through the laws dating back to the British era.

Pakistan's military is involved in operating a number of enterprises that are involved in food production, equipment repair, transport, petroleum, mining, construction, real estate and other items related with daily consumption. Exactly how much money does the military make from its businesses is not declared. In 2016, the Senate (upper house in parliament) was briefed that the military runs over 50 economic projects, units and housing colonies. This may well be a distorted picture of a more giant business empire owned by the Pakistan military; as according to *Siddiqa* the investment of military foundations is in around 718 companies.[7] This number would have increased rather than decreased keeping in mind the role of the military in politics and economy since 2007 and its keen interest in China Pakistan Economic Corridor (CPEC). Some of the declared military business is operated through four different military subsidiaries – the Fauji Foundation (FF), Shaheen Foundation (SF), Bahria Foundation (BF) and Army Welfare Trust (AWT) – and the rest is undeclared through different means. All of these declared businesses work visibly under the Ministry of Defense (MoD), however the MoD does not control anything related with these businesses. The MoD is superficially operated by a civilian head (minister) but controlled by a civil-military hybrid, working under the control of the military. The actual command of military businesses lies with the three main military services i.e. Army, Navy and Air Force. Each of the services plans and runs its business activities independently, outside civilian influence and oversight.

There is a profound need of research towards the impact of these military businesses and their effect on the relevant stakeholders. The problem often is that a statistics-based research is very difficult in the circumstances where a non-military person is barred from getting any information with regards to the military business. Even the parliament is not empowered to ask

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[6] See for example Hashmatulah Khan et. al. 'Role of Elites in Pakistan',https://www.researchgate.net/publication/326985062_Role_of_Elites_in_Pakistan. accessed 15 July 2020.

[7] Ayesha Siddiqa, *Military, Inc.: Inside Pakistan's Military Economy*, 2nd Edn. (Place of publication not identified: Pluto Press, 2016). , at 237. Quoting an unidentified officer at the Securities and Exchange Commission of Pakistan.

about dubious business deals made by the military. For instance, in 2005 a sugar mill was sold by the Fauji Foundation to an entity owned by a retired military person who was not even a part of the bidding process. The issue was raised in parliament but the defence ministry failed to provide the details.[8] The study then must be conducted through descriptive and analytical methods identifying the issues. Secondly, the study of powerful military dealings is always with a risk specifically when it points out towards their financial kingdom. Thereby, this issue has not been discussed widely in academic circles. In cases where it is studied gives us a perspective on social, political and economic impacts of such businesses. It has seldomly been discussed through a legal lens, the author in this article tends to do so. This article is an effort to identify the human rights impacts of military owned businesses in Pakistan. The first part deals with the question of how the military operates as a business enterprise. The second part raise the question of equal opportunity and fair competition in Pakistan where a powerful military controls business and politics. The third part deals with the analysis of how this issue may have more human rights impacts unless resolved. The solution does not reside in completely banishing the military business in Pakistan - as it will be too much to ask for - but to regulate the businesses accordingly and making all the business entities more accountable.

2. How does Military Operate as a Business Enterprise

Military have a privileged position within a society mostly carved through the 'national security' apparatus and the dramatization of the fear from the adverse forces. This unfettered privilege breeds power which in some cases becomes unchecked and unquestioned. The physical hold over key national infrastructure comes sometimes with an advantage of unchecked business activities.[9] This unfettered and unaccountable business through enterprises is prone to unhindered corrupt practises and

[8] Elliot Wilson, "The Military Millionaires Who Control Pakistan Inc | The Spectator," accessed 29 June 2020, https://www.spectator.co.uk/article/the-military-millionaires-who-control-pakistan-inc.

[9] Kevin Goh, Julia Muravska, and Saad Mustafa, *Military-Owned Businesses: Corruption & Risk Reform: An Initial Review, with Emphasis on Exploitation of Natural Resource Assets*, 2012. available http://ti-defence.org/wp-content/uploads/2016/03/2012-01_MilitaryOwnedBusinesses.pdf. at 5.

cartelization. The impact is different in different political systems depending on how powerful the military has become.

2.1. The Historical Perspectives of Self-Sufficiency

Historically, the arrangement of the socio-political and economic model of the states forced most militaries to supply and fund themselves using various means and methods to achieve self-sufficiency. The ancient militaries were often responsible for feeding themselves rather than the state feeding them. In some cases only the economically sound people were accepted in military in the pre-modern societies; individual soldiers were often responsible for supplying their own armour and weapons.[10] This was the accepted social norm but the scarce resources made the pre-modern military rely on pillaging and looting of the surrounding battlefield, militaries lived off the land—either their own or that of their enemies—requisitioning or stealing supplies as their needs dictated.[11] For instance, the Byzantine "theme armies" in separate military districts were responsible for defending their district as well as generating the required supplies and equipment.[12] In more recent cases the militaries instead of looting and pillaging tend to adopt more advance techniques for self-sufficiency.

The process of profit making (self-sufficiency) in modern context is not abrupt but with a gradual political and social change. Initially, the purpose of self-sufficiency is for supporting the military from outside sources and decreasing economic burden on the government. The military in Russia, for example, under Czars Alexander I and Nicholas I also showed patterns of self-sufficiency. The military was initially provided with land for this purpose and these settlements would then be used for meeting basic requirements of the military. The purpose of such projects was merely 'to save money by making the troops more self-sufficient in regard to food supply and to improve their

[10] Richard Arthur Preston, Alex Roland, and S. F. Wise, *Men in Arms: A History of Warfare and Its Interrelationships With Western Society*, (Fort Worth: Holt Rinehart & Winston, 1991). at 16.

[11] Martin Van Creveld, *Supplying War: Logistics From Wallenstein To Patton*, (Cambridge ; New York: Cambridge University Press, 2004). at 9-31.

[12] James C. Mulvenon, *Soldiers of Fortune: The Rise and Fall of the Chinese Military-Business Complex, 1978-1998: The Rise and Fall of the Chinese Military-Business Complex, 1978-1998*, (Armonk, N.Y: Routledge, 2000). at 13.

condition'.[13] These settlements later underwent reforms and more land was added resulting in the increase of goods adding a surplus value for the military, further in addition to agricultural purpose the land was utilised for other enterprises such as stud farms etc.[14] This model later was diminished in favour of the state providing basic necessities as the 'military moved away from economic self-sufficiency toward reliance on the civilian market in meeting requirements for grain and other commodities.'[15] The economic empowerment of the military through this self-sufficiency model was marred with corrupt practises and thus diminished.[16] As the Russian experience most of these military economic adventures are prone to corrupt practises because there is no civilian jurisdiction over audit within the military administration. Every dispute or investigations over corrupt practises are often dealt with internally by military tribunals having strictest military secrecy.[17]

The start-up of military business in other states may also be linked with the self-sufficiency agenda in many cases as in modern militaries. For example, a similar pattern was seen in modern day Indonesia where the political and military leadership allowed military business because the government could not provide sufficient funds for sustenance of military personnel and buying weapons.[18] China and Vietnam also showed similar patterns of military business as a requirement for self-sufficiency.[19] In China the end was rather similar to the Russian model, the military was found complacent in corrupt practises which forced the government to reduce the spread of military business in 1990s.[20] In Pakistan, the first military enterprise the

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[13] *Soldiers of the Tsar: Army and Society in Russia, 1462-1874* (Oxford, New York: Oxford University Press, 1985). at 283.

[14] Ibid., p.303.

[15] Ibid., p. 306.

[16] Mulvenon, *Soldiers of Fortune*. at 16.

[17] Ibid.

[18] Lesley McCulloch, "Trifungsi: The Role of the Indonesian Military in Business," in *The Military as an Economic Actor: Soldiers in Business*, ed. Jörn Brömmelhörster and Wolf-Christian Paes, International Political Economy Series (London: Palgrave Macmillan UK, 2003), 94–123, https://doi.org/10.1057/9781403944009_6.

[19] Jörn Brömmelhörster and Wolf-Christian Paes, 'Soldiers in Business: An Introduction', in *The Military as an Economic Actor: Soldiers in Business*, ed. Jörn Brömmelhörster and Wolf-Christian Paes, International Political Economy Series (London: Palgrave Macmillan UK, 2003), 1–17, https://doi.org/10.1057/9781403944009_1. at 6.

[20] Brömmelhörster and Paes.

"Fauji Foundation" was formed to settle the issues related with pension funds of the military personnel.[21] The *modus operandi* of these military enterprises are often different and settled according to the socio-political and economic system of the country.

2.2. The Modern Milbus

With many different states emerging in modern times the socio-political differences among the states also prevail to a large extent. The extent of the military corporatism also depends upon the state's own political system. Most states however tend to provide complete financial support for the military, in order to support modern concept of apolitical civil-military relations.[22] In cases of economically developed states, the goal of complete financing has been largely accomplished; although there might be evidences of the military engaged in partnership with civilian corporate sector and sometimes the government.[23] In many other cases, militaries are funded by a combination of central fiscal contributions and internal military production and commerce.[24] In the aforementioned cases the military do not have a dominant role in political and economic affairs of a state but part of the system like other business entities. In contrast to these practises the military in some states work very closely with the governments and run their profit-making enterprises whereas in other cases like Pakistan the military become the power centres themselves and control the government directly or indirectly to enhance its profit-making. In this kind of process, the military involvement in profit-making through enterprises have its own socio-political and economic effects. It largely effects other businesses and people trying to survive in already challenging situation. In cases where the military controls the governments, political institutions and economic decisions the repercussions for civilians are adverse. The system only tends to favour businesses which are owned and controlled by the military, a way of economic gains for the individuals related with military. This use of power by military for personal gains of the military personnel and of people

[21] Siddiqa, *Military, Inc.*

[22] The relationship between civilian allocation of defence budget funds and civilian control of the military is discussed in Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil–Military Relations*, (Cambridge, Mass: Belknap Press: An Imprint of Harvard University Press, 1981).

[23] Siddiqa, *Military, Inc.* at 1.

[24] Mulvenon, *Soldiers of Fortune*. at 9.

affiliated with it through business enterprises is called as Milbus by *Ayesha Siddiqa*.[25]

The Milbus creates a situation where the Human Rights of the non-military people are strongly challenged within a society. The economic and social benefits are for the few selected people and neglects the majority of the population. The competition with civilian business entities becomes implacable when public resources are used for corporate gains. The prominent social and political status of the military allows it a special access to state resources which other civilian entities would not be entitled to.[26] The state policies favours the military enterprises by giving subsidies to specific businesses. Similarly, the raw material acquired for production purposes by the military enterprises comes tax-free or with subsidised rates, the produces are then sold at market prices.[27] It thus closes down investment opportunities for other business entities and monopolise the markets. Adding to these practises as discussed above it is historically proven that the major drawback of powerful military involvement in business is the prevalence of corrupt practises hence destabilizing the whole economic markets in a society. In addition to this where businesses related with minerals and natural resources are grappled by strong and unaccountable entities its revenue goes to the institution rather than the state. The disadvantages and autocratic nature of Milbus in this way has been investigated economically and socially by pointing out these drawbacks within the system but seldomly through the lens of Human Rights. The operative way of Milbus is different and according to the socio-political situation thereby its effect on the rights of the people will also be different accordingly. Hence the study of the effects of the Milbus on Human Rights will be more target based and relative. One common trait of the Milbus is that it always has an adverse effect on the rights of the stakeholders involved either territorially or extra-territorially. Sometimes the violations can be as grievous as involvement in international crimes.

Recently the involvement of Myanmar military also known as Tatmadaw in economic activities has been linked with some grievous violations of human rights including Genocide.[28]

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[25] Siddiqa, *Military, Inc.* at 1.

[26] 'Transparency International UK', Transparency International UK, 8 May 2012, https://www.transparency.org.uk/military-owned-businesses-corruption-risk/. at 5.

[27] Mulvenon, *Soldiers of Fortune*.

[28] 'OHCHR | MyanmarFFM Economic Interests of the Myanmar Military (16 Sept 2019)', accessed 12 July 2020,

The crimes were linked with the direct involvement of Tatmadaw in business activities. An earlier fact-finding mission of the Human Rights Council recommended financial isolation of the Tatmadaw to restrict their involvement in international crimes.[29] This involvement of the Tatmadaw in crimes like Genocide is directly related with the economic gains of the organisation through which it dominated the government for decades. This also raises a case for the study of military businesses which might support different kinds of violations of Human Rights if their economic operations goes unchecked. The way the Milbus operates might endanger several civil rights and one of them in contention is the right to an equal opportunity (fair competition) and due process.

3. Equal Opportunity and Fair Competition as a Basic Right

3.1. The Constitutional Approach

The right to a fair competition and equal opportunity as far as business and profession is concerned is protected by most democratic states and stands as a major democratic norm. It is also protected and elaborated under the laws regulating the European Union and its economic practises. It is also practised and accepted by different states, enforced through antitrust laws within local jurisdictions. The right puts an obligation upon states to refrain from giving undue advantage to certain subjects and industries.[30] The right has been protected in Pakistan through article 18 of the Constitution of the Islamic Republic of Pakistan which states that:

> *'Freedom of trade; business or profession: Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:*
> *Provided that nothing in this Article shall prevent-*
> *(a) the regulation of any trade or profession by a licensing system; or*
> *(b) the regulation of trade, commerce or industry in the interest of free competition therein; or*

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https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/EconomicInterestsMyanmarMilitary.aspx.

[29] 'OHCHR | MyanmarFFM Report of Independent International Fact-Finding Mission on Myanmar (27 August 2018)', accessed 12 July 2020, https://www.ohchr.org/en/hrbodies/hrc/myanmarFFM/Pages/ReportoftheMyanmarFFM.aspx.

[30] Ksenya Smyrnova, 'Competition Law & Human Rights Protection: Controversial New Dimensions', *Contemporary Legal Institutions* 5, no. 1 (2013): 51–55. at 53.

> *(c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.'*

There are two basic points in the above quoted article which need to be highlighted with regards to the current discussion. Firstly; the government (federal or provincial) is not barred from owning a business etc. [article 18(c)]. This may point out towards the direct ownership of a business by the governments' i.e. state-owned enterprises, for example, the Pakistan International Airlines (PIA); it also points towards the business not owned by the government directly but owned by a government organ, for example, the Fauji Foundation owned by Pakistan Military. Secondly, this right mentioned in 18(c) is not absolute but the article protects the right towards a "free competition" in trade or business as well [article 18(b)]. This has been elaborated by the Supreme Court in *Arshad Mehmood v Govt. of Punjab.* It stated that; 'a perusal of proviso (b) of Article 18 of the Constitution indicates that regulation of the trade, commerce or industry is permissible in the interest of free competition therein. Meaning thereby that without free competition amongst traders, no trade commerce or industry can be regulated.'[31] Both the rights protected shall be read collectively and realised in consonance with each other. This should also be additionally read with article 4 of the constitution which protects due process of law. The Supreme Court of Pakistan in *Attaullah Khan Malik v. the State* have clarified this in a case regarding the selling of Public land without due process by stating that;

> 'such closed and opaque process adopted for the sale or disposal of public property limits public access to new business prospects and restricts economic activity in the hands of a select few. This goes against the grain of fair competition and fundamental right guaranteed under Article 18 of the Constitution. Right of a person (public) to enter a lawful business is impaired if he is deprived of the opportunity to participate.'[32]

So, a business neglecting the principles of due process through any means and obstructing fair competition can be held liable for unlawful business practises. Thereby, a combined view of 18(b) and 18(c) clarifies that the legality of military enterprises is completely valid but the question how these enterprises make profits is contentious. Among other things related with the profit-making process we must look into the status of 18(b) i.e. fair

[31] *Arshad Mehmood v. Govt. of* Punjab (PLD 2005 SC 193) para 29.
[32] *Attaullah khan Malik v Federal of Govt of Pakistan* PLD 542.

competition in the operations of military enterprises. Hence the question is not why the military earns profits through business but how does it earn such profits.

3.2. The Practise of Fair Competition

As far as the prevalence of the right to fair competition [article 18(b)] along with due process in Pakistan is concerned the reality is very shady. Thereby the question of how the military corporations earn its profits becomes a matter to be focused. Pakistan is ranked 135 freest out of 180 countries and 32nd among 42 countries in the Asia Pacific region according to the Index of Economic Freedom by the Heritage Foundation.[33] According to the report the shady record is owed to the high-level involvement of state and governmental agencies in the decision-making of private businesses. The recent implementation of China Pakistan Economic Corridor (CPEC) projects and its lack of transparency seems to indicate the cloudy situation. The future implications for the non-military business owners and workers can be very bleak in the wake of these CPEC projects. A large chunk of the business opportunities will be taken by the military businesses and then distributed within the non-military businesses whenever required, for example the military owned Frontier Works Organisation (FWO) is already involved in large section of road construction and the management of the Sost Dry Port near Pakistan-China border is already under the National Logistics Cell [NLC (Military Owned)].[34] Moreover, the chairman of the CPEC authority established in October 2019 is a retired General (General Retd. Asim Saleem Bajwa) of the Pakistan Army, who is now also appointed as a special assistant to the prime minister on Information and Broadcasting. The authority has been made neglecting a democratic process and the opposition parties have constantly opposed the authority. Recently, it is argued that a special bill to be passed by the parliament will give all the regulatory powers to the CPEC authority chairman even removing the role of a Prime Minister.[35] The powerful role of the

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[33] 'Pakistan Economy: Population, GDP, Inflation, Business, Trade, FDI, Corruption', accessed 10 July 2020, http://www.heritage.org/index/country/pakistan.

[34] 'Removing CPEC Bottlenecks: Tunnels May Smoothen Trade in Winter | The Express Tribune', accessed 10 July 2020, https://tribune.com.pk/story/1254649/removing-cpec-bottlenecks-tunnels-may-smoothen-trade-winter.

[35] News Desk, 'CPEC Authority Bill 2020: More Powers Transfer from Parliamentarians to Un-Elected Officials?', *Global Village Space* (blog), 14 July 2020, https://www.globalvillagespace.com/cpec-

military can be gauged by the fact that a new article regarding the CPEC bill published in the newspaper "The Express Tribune" was removed a day after its online publication.[36] The influence of military cannot be negated in this kind of political economy. These kind of constraints on the economic liberties within Pakistan will not be without grievous consequences for human development which is necessary for human rights protection and promotion.[37] This is a very important issue as economic freedom is understood here as a fundamental right of every human being; recognised by the constitution of Pakistan. Unfortunately, the way how the military in Pakistan have conducted its businesses has been instrumental in dismaying this record of economic freedom.

3.3. Modus Operandi

ACTING AS A LAND MAFIA.—The involvement of military in business challenges the right to a fair competition in many possible ways protected in 18(b) of the constitution. It induces cartelization in the corporate sector. This includes disproportionate opportunities for its business and individual members.[38] For example, the role of the military has also been like that of a feudal landlord. According to an estimate by *Siddiqa* the military controls about 12 percent of the total land in Pakistan.[39] The land is either distributed among officer cadres within the military or used for private purposes. Out of a total of 69 million acres under military control only 70,000 acres is used for operational purposes. The housing authorities linked with the military have been accused of land grabbing and forcefully evacuating acres of land.[40] In 2001 the armed men from military cracked down on unarmed landless peasants killing eight and several wounded. The reason was that they (peasants) had complained about change in status of the land on which they depended for their subsistence (forcing them to pay rent in cash,

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authority-bill-2020-more-powers-transfer-from-parliamentarians-to-un-elected-officials/.

[36] The link consistently shows an error, https://tribune.com.pk/story/2254795/govt-proposes-more-powers-to-cpec-authority (last visited on 20 June 2021).

[37] 'Pakistan Economy'.

[38] Siddiqa, *Military, Inc.* at 237.

[39] Siddiqa. at 174

[40] See for example 'PAKISTAN: A Battalion of Army Grabs 3500 Acres of Land and Seals the Centuries-Old Grave Yard - Pakistan', ReliefWeb, accessed 11 July 2020, https://reliefweb.int/report/pakistan/pakistan-battalion-army-grabs-3500-acres-land-and-seals-centuries-old-grave-yard.

rather than working the land on a sharecropping basis).[41] There are numerous land grabbing issues that can be connected with the military businesses. For instance the military grabbed 3500 acres of land including a centuries old graveyard from local fisherman in the coastal areas of Karachi.[42] In case of certain private housing societies directly controlled by the military – Defence Housing Authority (DHA), Bahria Town etc. – the instances of undue advantage in profit making for officers, corruption and land grabbing is prominent.[43] Other civilian officers (including judges and journalists) are made accomplice in these practises by offering them land in these housing societies.[44] This makes the transparency in these projects questionable as the law and facts are tilted towards one specific group of businessmen (Milbus). This vandalises the right of a common man to own a house monopolising the markets, increasing the prices and to get involved in this business jeopardising article 18(b) of the constitution. In a very recent case in the Islamabad High Court, in a complaint by a citizen against the Pakistan Navy it was alleged that land has been acquired illegally in a public area and environmentally sensitive area of Islamabad (the Capitol City) and an Elite club has been built upon the land for commercial purposes without any interventions by government authorities. The court in an interim order directed to seal the premises and remarked that;

> 'No one is above the law and every citizen has to be treated equally. It has been consistently observed that it has become a norm for the Capital Development Authority and other agencies to promptly take action against those who are common citizens and who do not have the means to influence, while the privileged and elites are being treated differently. This is unacceptable for a democratic polity governed under a Constitution which guarantees fundamental rights'.[45]

The interim order hints towards the difference in status of a common business entity and that of an entity owned by the powerful military. There are numerous cases not reported in the courts and the authorities acting deaf and blind. Even the final

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Lesley McCulloch, *Aceh: Then and Now*, Minority Rights Group International Report, 2004,[4] (London: Minority Rights Group, 2005).

[41] Wilson, 'The Military Millionaires Who Control Pakistan Inc | The Spectator'.

[42] 'PAKISTAN'.

[43] See Siddiqa, *Military, Inc.* at 194-198.

[44] Siddiqa.

[45] Malik Asad, 'IHC Orders Sealing of Navy Sailing Club', DAWN.COM, 24 July 2020, https://www.dawn.com/news/1570824.

order of this specific case will be interesting to examine whether the courts change their behaviour in protecting the powerful or protecting the Fundamental Rights it referred to in the interim order.

POLITICAL INFLUENCER.—Major influence as an economic actor propel the contentious role of military in politics. The greater influence of the military in politics because of controlling the major economy also results in violations of civilian's rights to equal opportunity in business and other professions. It is highly likely that promising officers will take their knowledge and the connections they have developed in the Military and leave the military in order to make more money. They end up mostly in government owned businesses and organs after retirement and even in some cases head government organs during service as well. So, despite of getting lavish retirement perks and privileges they are employed in these public sector organisations or military owned businesses. A good example will be Lieutenant General Muhammad Afzal who is currently the chairman of National Disaster Management Authority (NDMA) which is a public sector organisation.[46] He also remained the Commander of FWO (military owned enterprise) for five years before joining the NDMA. Only one out of the last eight chairmen NDMA was a civilian and the rest serving or retired military Generals. This practise also shows an imbalance in business opportunities. The public entities which are headed by military personnel favours the military owned businesses while giving out contracts. The National Highway Authority (NHA) is mostly headed by a military (mostly retired) person allegedly favouring the FWO and NLC (both military owned corporate entities).[47] The current chairmen of Pakistan Water and Power Development Authority (WAPDA) is a retired army General (Lt. General Muzammil Hussain). WAPDA is responsible for allocating the share of already scarce electricity (which is always a big issue for industries). Imagine the state of competitiveness in business when some industries get more share in electricity and others have to use more costly power generators to survive. The matter is not limited to favourable contract but the military owned businesses operate more smoothly because of their influence. For instance, the NLC is at a greater advantage as compared to other public or private companies in securing contracts from the government. The basic requirements for running the business is provided by the

[46] 'NDMA National Disaster Management Authority Pakistan', accessed 21 July 2020, http://web.ndma.gov.pk/ChairmanNDMA.php.

[47] Siddiqa, *Military, Inc.* at 171.

state as compared to the other companies in the same business. Secondly, while operating the vehicles of the NLC always operate hinderance free whereas other private competitors have to bear the load of the corrupt individuals in the security agencies like police.[48]

The ever-increasing influence of military in politics also comes with political favours for such entities. The access to information is very limited when military business is involved as transparency succumbs to wordings like "national interest". Some public information can be generalised though, as in 2004 and 2005, the Pakistan government subsidised the Fauji Foundation, worth over Rs. 10 billion, by $20 million and $25 million.[49] According to this information one can imagine how the government subsidy system works. The military owned businesses get more government support than any other private business. In some cases the civilian governments even allowed the military companies to replace public sector departments.[50] In other cases the government machinery and property is used for commercial purposes without any justification. For instance, the AWT's Askari Aviation used the resources of Pakistan Army for commercial purposes and the income was diverted to private accounts.[51] The private Universities, Hospitals and Schools owned by the subsidiaries of Pakistan Army, Air Force and Navy are mostly built upon land given to these organisations for public purposes. These organisations are fully controlled by the military forces as most of the administrative staff are serving or retired military personnel and the profits from these organisations goes to the subsequent military branch. The civilians working in these organs are not given the retirement privileges available to the people coming from military background. Moreover, the general public (civilians) do not get any special incentives in these public organs but the military staff get their privileges accordingly (perks of getting a post retirement job and free education and health facilities). It is interesting to note the support courts have provided to military in such businesses. Despite the general public not getting any incentives from these private military businesses, the courts have accepted the usage of land by military in such cases as a "public purpose", to legalise such misappropriation of public property.[52]

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[48] Siddiqa. at 144.

[49] 'The Military in Business | Pakistan Today', accessed 10 July 2020, https://www.pakistantoday.com.pk/2012/03/08/the-military-in-business-2/.

[50] Siddiqa, *Military, Inc.* At 154

[51] Siddiqa. at 162.

[52] *Basharat Hussain v CDA*, 2004 YLR 629.

In contrast the competitors without using public property and government resources have to go through a more stringent process requiring more capital to survive in the market. As a result of such market monopolisation the civilian business owners or non-military corporate actors work mostly as a patron-client relationship with the military owned businesses. In addition to this most of these anomalies will go public through one medium that is the 'free media'; currently a retired General is appointed as the chairmen of Pakistan Telecommunication Authority (PTA) which regulates the media.[53] With already 145th position of Pakistan in the 2020 world press freedom index,[54] we can imagine the realisation of the right to information after giving regulation to the military with information minister and regulatory authority both under the Military control.

GRABBING THE NATURAL RESOURCES.—The empowerment of the Military in political affairs by grabbing the economy makes it a lone option worthy of business partnership for foreign businesses in some sectors. Currently, the Fauji Foundation have a joint venture named Pakistan Maroc Phosphore with a Moroccan company. In some cases these partnership for commercial gain ends up in human rights violations in a race for the resources. The commoners become vulnerable against the prowess of armed military in partnership with foreign business giants.[55] The involvement of Fauji Foundation in oil business through the Pak Stanvac Petroleum Project ended up in scuffles with the local people where protestors were fired upon and one women lost her life.[56] The protestors wanted a fair share in jobs for the local people. The project was later taken over completely by the Fauji Foundation and operated through Mari Petroleum Company Limited.[57] The surge for extracting minerals and natural resources still is one of the primary objectives of the Fauji Foundation. In a more recent case the military allegedly played an important role in cancelling a contract of a multinational company. It managed to cancel a copper and gold mining contract in Riko Diq area of Baluchistan province with Tethyan Copper Company (TCC). The mining contract was cancelled at a time when the copper and gold

[53] Chairman PTA, Lt. General Amir Azim Bajwa, 'Authority | PTA', accessed 28 July 2020, https://www.pta.gov.pk/en/authority.

[54] 'Pakistan : Under the Military Establishment's Thumb | Reporters without Borders', RSF, accessed 28 July 2020, https://rsf.org/en/pakistan.

[55] McCulloch, *Aceh.*

[56] Cited in Siddiqa, *Military, Inc.* at 146-147.

[57] 'Mari Petroleum Company Limited', accessed 23 July 2020, https://mpcl.com.pk/operations/.

reserves were identified. This adventure cost 5.8 billion US Dollars to Pakistan government as it lost a legal battle at the World Banks Centre of Settlement of Investment Disputes (ICSID) from TCC.[58] The ICSID *inter alia* quoted in its decision that the license of TCC was cancelled because the State had a motive of pursuing its own project at the site.[59] Since the cancellation of the license of TCC the military have taken complete control of the project. It was tried with the help of Pakistani scientists and a Chinese company Mettalurgical Corporation of China (MCC) to mine for gold and copper but all the efforts went fruitless because of the lack of expertise.[60] More recently the military owned FWO is a major stakeholder (with no experience in mining), any company which is to be given the mining contract will work jointly with military as it will provide "security" to the company.[61] The project will remain controversial with a huge impact on already vulnerable Human Rights record of Baluchistan province. In addition to all other Human Rights impacts the constitutional right to a "fair competition" is already sabotaged.

3.4. Protecting Human Rights comes with a Cost for other Business Entities

Amidst the economy of Pakistan already in a challenging situation, the state cannot afford to compromise the basic rights which can improve its economy. A better human rights record can lead towards a better economy.[62] Protecting those rights which directly relate to the economic rights of the citizens will definitely

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[58] *Jus Mundi, 'Tethyan Copper v. Pakistan, Award*, 12 July 2019', accessed 23 July 2020, /en/document/decision/en-tethyan-copper-company-pty-limited-v-islamic-republic-of-pakistan-award-friday-12th-july-2019.

[59] 'Long Read: The Reko Diq "Fiasco" in Perspective: Pakistan's Experience of International Investment Arbitration', *South Asia @ LSE* (blog), 14 August 2019, https://blogs.lse.ac.uk/southasia/2019/08/14/long-read-the-reko-diq-fiasco-in-perspective-pakistans-experience-of-international-investment-arbitration/.

[60] Husain Haqqani, 'Fool's Gold – Pakistan Could Have Made Big Money from Gold Mines, Now It's Paying Penalties', *ThePrint* (blog), 16 July 2019, https://theprint.in/opinion/fools-gold-pakistan-could-have-made-big-money-from-gold-mines-now-its-paying-penalties/263312/.

[61] Haqqani.

[62] 'Human Rights Can Help Fix the Economy. Here's How', World Economic Forum, accessed 25 July 2020, https://www.weforum.org/agenda/2018/12/its-time-to-make-human-rights-part-of-the-global-financial-system/.

have a positive effect. Removing the cartelization of the few in economic activities will improve the human rights record of the country. The powerful entities are involved in defying human rights and sometimes with the assistance of the courts. In *Army Welfare Sugar Mills v. Army Welfare Sugar Mills Workers Union* the Sindh High Court ordered to "cancel" the registration of the workers union in a military owned sugar mill because the workers unions were not allowed in installations owned by the military forces under Industrial Relations Ordinance 2002.[63] The court neglected the basic law of the state i.e. the constitution and applied a statutory law against the protection of fundamental rights. This kind of impunity to curb the voices of the people seeking their rights is linked directly with making a few entities economically stronger. Among other rights infringed the basic right of "Fair Competition" is imperilled because taking care of the rights of the stakeholders come with a financial burden; if the powerful are free of this obligation the fair competition will cease to exist.

4. Excluding Military from Business

Milbus is part of a game of power sharing for the civilian governments and power grabbing for the military administration in Pakistan. The ones who suffer in this game are the masses (mostly poor). It is the opportunity of work and business to be provided to these masses which is being compromised. The civilian governments in trying to appease the strong military establishment to save their governments provide support to the military owned enterprises.[64] In fact it is the civilian governments in whose political tenures the power of these entities have grown rather than diminished.[65] This may well be linked with the fact that the survival of these civilian governments relied upon the appeasement of the military. As the Benazir Bhutto Government in 1990 was dismissed through destabilizing the government by the Inter-Services Intelligence (ISI) because of her interference in its internal structure.[66] Irrespective of the fact whether a civilian government is in power or a military dictator the form of

[63] *Army Welfare Sugar Mills v. Army Welfare Sugar Mills Workers Union* 2006 PLC 59 Karachi.

[64] Prina, 'TAKING CARE OF THEIR OWN'. at 10.

[65] Gayer, 'The Pakistan Rangers'. at 34. See also Siddiqa, *Military, Inc.* at chapter 4 and 5.

[66] John Bray, 'Pakistan at 50: A State in Decline?', *International Affairs (Royal Institute of International Affairs 1944-)* 73, no. 2 (1997): 50, https://doi.org/10.2307/2623831. at 324.

government remains an authoritarian one in Pakistan. In the authoritarian governments the military and paramilitary forces are used as tools for political suppression, securing continuity and controlling the resources.[67] This political imbalance has mitigated a legal and political structure which favours the strong military enterprises. The laws in some cases favour the military,[68] in other cases the courts show complacency by ignoring the fundamental rights protected in the constitution.

The political and social system prevailing in Pakistan will not allow severing the military role from its enterprises. A non-unified civilian structure cannot cope with a more organised 650,000 military personnel (and many more retired) which are now used to perks and privileges of luxuries unknown to the majority civilians in Pakistan. These privileges mostly come from the businesses owned by military. The dismantling of the military-business complex will not be easy, nor will it automatically end corruption in the ranks. In addition, the economy of Pakistan is strongly based on these economic entities. The success of the effort to reduce the role of military in business will depend on a number of factors, the most important of which will be the capacity of the civilian leadership to replace the lost commercial revenue with increased central budget allocations. Further, owning of business entities by any organ of the government is not unlawful. Thereby, the government cannot stop any organ from owning such entities, specifically in Pakistan where the military is considered more powerful than the government itself. In China, the civilian government managed to reduce the role of the military as an economic entity but the task was not easy. Any civilian government wishing to sever the Peoples Liberation Army (PLA) from its enterprises or reduce corruption in the ranks faced enormous political opposition from the powerful PLA.[69] The role of military in business was diminished to an extent till the year 2000 but it still remained in few sectors. Even if the PLA were removed from business altogether, however, officers and enlisted personnel could still exploit the PLA's infrastructural advantages for corrupt gain.[70] The Chinese president Xi recently ordered the military to put an end to the paid service activities and focus on

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[67] Amos Perlmutter, *Modern Authoritarianism: A Comparative Institutional Analysis*, 1st edition (New Haven: Yale Univ Pr, 1981). at 10-16.

[68] For instance, the Industrial Relations Ordinance.

[69] Ellis Joffe, 'Party-Army Relations in China: Retrospect and Prospect', *The China Quarterly*, no. 146 (1996): 299–314. at 311-312.

[70] Mulvenon, *Soldiers of Fortune*. At 152

military trainings.[71] The ownership and control of some corporations including big multinational corporations are still speculatively with the PLA.[72] In China, the role of the military was working side by side and under an authoritarian government. The government still struggled to reduce the military's role in business. Pakistan, on the other hand is politically different and the military have a more inclusive role in politics. The accountability of military in politics or other ventures is next to impossible. In this case severing the link of military with its ever-increasing business is not a realistic solution. Keeping its political history in mind and applying *collier's* theory if the military gets discontent with its earning the chances of coup increases.[73] The government is financially not in position to provide the military with the benefits which they are used to through these business entities. The complex situation requires a socio-political discussion on how the role of military can be defused in economic activities.

The political and social situation and to an extent the legal scenario presented above do not call for the abolition of military owned enterprises. Although, the problem of the protection of the fundamental rights of the people will exist, there are other legal measures to be taken for the enhancement of the protection. The solution lies in a legal approach towards the issue. Although it is impossible in states like Pakistan to side-line the role of military in business; the government must comply with human rights principles of providing equal opportunity and fair competition with due process of law. In order to provide equal opportunity to the private business the business environment need to be more transparent. All the measures which endanger the fundamental rights must be identified and then dealt with through appropriate actions. This article identified the threat to the right to a fair competition because of certain business practises. The practises which endanger fair competition can be reduced if article 18(b) is supported with secondary legislation. Additionally, all the business entities including charities and welfare trusts need to be

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[71] Ryan Pickrell, 'China's Commander-in-Chief Orders His Military to Stop Running Kindergartens and Figure out How to Fight', Business Insider, accessed 26 June 2020, https://www.businessinsider.com/xi-tells-chinas-military-to-stop-running-kindergartens-and-learn-to-fight-2018-8.

[72] 'Huawei on List of 20 Chinese Companies That Pentagon Says Are Controlled by People's Liberation Army', Time, accessed 26 June 2020, https://time.com/5859119/huawei-chinese-military-company-list/.

[73] Paul Collier and Anke Hoeffler, 'Military Spending and the Risks of Coups d'Etats', n.d., 32.

more scrutinised through the regulatory authorities. Most importantly all the businesses complacent in irregular activities must come under the same law. The legal issues that must be looked into include the conflict of interest laws, interference and control of public service entities by any means, using the public property for private gains and explaining the meaning of public property, how to maintain transparency in big financial projects like CPEC, financial deals related with exploration of natural resources and international business partnerships by military enterprises.

5. Conclusion

The article is an attempt to bring the debate of military business and its relationship with Human Rights to a legal context. It is an inhospitable topic thereby not a lot has been written about it, the present literature is only about the political, economic or social effects of the military business but not its legal perspective. Thereby, it undoubtedly raises more questions, manages to identify major issues and answer a few convincingly. The effort may trigger a debate about this perspective of Business and Human Rights in order to move towards a free society.

A free society is not possible without economic freedom. Economic freedom comes with due process of law in economic affairs which leads to a fair competition in a financial system. Former U.S. Assistant Attorney General *Mr. James Rill* similarly stated that;

> '[n]ot only is the wide acceptance of basic procedural fairness an elemental foundation of a free economic society, it also enhances respect for the enforcement agency and confidence that its decisions constitute an impartial appraisal of the facts and legal standards with a full understanding of both.'[74]

This has been realised by a few developed states through consistently revising their Competition and Antitrust laws. In addition, a single government authority or organisation is not allowed to monopolise a specific business market. The situation can be different in other parts of the world where the political power and socio-economic structure is influenced by one specific entity. In cases where the specific entity is an armed military force

[74] James F. Rill, A Comparison of Business and Agency Views on Certain Procedural Fairness Issues, Before the ABA Section of Antitrust Law Spring Meeting 2 (Mar. 28-30, 2012), available generally at www.americanbar.org/groups/antitrust_law.html.

can lead to many Socio-Economic and Political Complications. The author have specifically tried to deal with a small part of the problem i.e. the military business interests and its effect on fair competition as a fundamental right in Pakistan. This study has attempted to produce an initial, tentative account of the relationship of military business with violations of one basic right. However, during the study it was realised that the impact may well be beyond the right to fair competition. It may well be attached with the violations of both civil and political as well as economic social and cultural rights. The author have not mentioned the facts which may lead us to the involvement of the military business in smuggling, corruption, enforced disappearances and even ethnic cleansing for grabbing natural resources in Pakistan. This requires more intense research and secondly a safe working place and environment.

The empire of military business can vary from lootings in conflicts to complicity in international crimes. It can have social, political, cultural and economic impacts upon a large quantity of individuals. It can defy a fair process for competitors by creating a Kafkaesque situation for private business entities and exploit the situation in its own favour by monopolising the market. It can rely on using public property for private business without any legal ramifications. It can use force for achieving private business goals. It can protect and favour a few individuals because of their affiliations, disrespecting the equality principles. In Pakistan's context, the issue of Milbus will have more Human Rights implications with the CPEC projects launched with minimum transparency and huge military control. The probable implications can be studied through a separate research plan. One thing which the author can identify is that the military business relies upon tactics of oppression; and the disadvantage of suppressing basic rights of the people will always be greater than economic gains of an entity. This is further acquainted by military grandeur, whereby the military considers itself as the only patriotic organ within the society and is capable enough to understand economy, society, politics and business. The military grandeur creates a legal vacuum whereby military and non-military stuff (either tangible, non-tangible, persons or objects) is treated differently from each other. The military then rephrases the political realities according to its own specific understandings and want the civilian society to believe in their narrative. As the first Pakistani Military dictator General Ayub Khan once stated the 'we are a very difficult country structurally. […] We don't know the value of freedom. Our people feel exposed and unhappy in freedom. […]

Thank God we have an Army.'[75] It is evident that it is the lack of freedom of the majority which strengthens the Military Business.

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[75] Altaf Gauhar, *Ayub Khan: Pakistan's First Military Ruler* (Oxford ; New York: Oxford University Press, 1996). At 339.

Accession to Annexation: A coercive legal measure in UN-Recognized Disputed territory of Jammu & Kashmir

Nasir Qadri*

Abstract

With the partition of British India, two independent states came into being by a result of the messy transfer of power from British colonial rule to two newly independent states of India and Pakistan. Both have celebrated over seventy anniversaries. The partition pact allowed the people to decide their future on the basis of Two-Nation theory, i.e. Hindu majority areas were to be a part of India, whereas Muslim majority areas were to be assimilated to newly-born Pakistan. The place of Kashmir, as being a Muslim-majority area, among these new nations, was hotly debated. However, an adequate solution was prevented when India sent her troops to occupy J&K forcibly under the garb of self-concocted temporary instrument of accession. This paper will discuss the partition plan juxtaposed with the Resolutions made by the United Nation on Kashmir, making of Constituent assembly till the abrogation Article 370 of Indian constitution which guaranteed special status to disputed state of Jammu Kashmir

Key words: *Indian Independence Act 1947, Instrument of Accession, United Nation Security Council, Article 370, Article 35-A Constitution of India*

1.1 Introduction:

After British India was created and was controlled and administered by British Government, as a consequence of political developments within British India and urge to share power, the British Parliament enacted Government of India Act, 1935. This Act for the first time made provision for accession of "Indian States" to the "British India". The provisions were so made keeping in view the ground realities, in particular geographical position of the "British India" and the "Indian States". The provisions of the Act intended to provide a sort of Federation where the federating unit i.e. Indian States could accede to British India in accordance with the provisions of the Act. When all of Mountbatten's efforts to keep India united failed, he asked Ismay to chalk out a plan for the transfer of power and the division of the country. It was decided that none of the Indian parties would view it before the plan was finalized. The plan was finalized in the

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Governor's Conference in April 1947, and was then sent to Britain in May where the British Government approved it.

However, before the announcement of the plan, Nehru who was staying with Mountbatten as a guest in his residence at Shimla, had a look at the plan and rejected it. Mountbatten then asked V. P. Menon, the only Indian in his personal staff, to present a new plan for the transfer of power. Nehru edited Menon's formula and then Mountbatten himself took the new plan to London, where he got it approved without any alteration. Attlee and his cabinet gave the approval in a meeting that lasted not more than five minutes. In this way, the plan that was to decide the future of the Indo-Pak Sub-continent was actually authored by a Congress-minded Hindu and was approved by Nehru himself. Mountbatten came back from London on May 31, and on June 2 met seven Indian leaders. These were Nehru, Patel, Kriplalani, Quaid-i-Azam, Liaquat Ali Khan, Nishtar and Baldev Singh. After these leaders approved the plan, Mountbatten discussed it with Gandhi and convinced him that it was the best plan under the circumstances. The plan was made public on June 3, and is thus known as the June 3rd Plan. The following were the main clauses of this Plan:

The Provincial Legislative Assemblies of Punjab and Bengal were to meet in two groups, i.e., Muslim majority districts and non-Muslim majority districts. If any of the two decided in favour of the division of the province, then the Governor General would appoint a boundary commission to demarcate the boundaries of the province on the basis of ascertaining the contiguous majority areas of Muslims and non-Muslims. The Legislative Assembly of Sindh (excluding its European Members) was to decide either to join the existing Constituent Assembly or the New Constituent Assembly. In order to decide the future of the North West Frontier Province, a referendum was proposed. The Electoral College for the referendum was to be the same as the Electoral College for the provincial legislative assembly in 1946. Baluchistan was also to be given the option to express its opinion on the issue. If Bengal decided in favour of partition, a referendum was to be held in the Sylhet District of Assam to decide whether it would continue as a part of Assam, or be merged with the new province of East Bengal.

Out of total 565 princely states, 175 were known as suzerainty throne monarchy and were under the central government of British India, and the remaining were dependents known as 'Dominions' of the provincial governments of British

India; Only 17 suzerain states were handed over to Pakistan. However, the division of three larger provinces having both Muslims and non-Muslims was divided by a Boundary Commission i.e. Redcliff Award, partition was affected by the boundary commission because awarding of three Muslim dominated Tehsils of district Pathankot to Indian dominion by Redcliff Commission was manipulated by Mountbatten to safeguard that the Jammu and Kashmir state retained that essential access to India. The awarding of Gurdaspur to India makes it possible for India to access Kashmir which was not possible to reach.

2.1 Indian Independence Act 1947:

India Independence Act 1947 was an Act passed by the Parliament of the United Kingdom (UK) that divided the British India into two new independent dominions of India and Pakistan. The Act received the assent of the royal family on July 18, 1947 after which, India came into existence on August 15 and Pakistan on August 14 in the year 1947. The Act was formulated together by UK Prime Minister Clement Attlee and the Governor General of India Lord Mountbatten after the representatives of the Indian National Congress, the Muslim League, and the Sikh community gave their consent to the Act. This act came to known as 3 June Plan or Mountbatten Plan.

2.1.1 Important provisions under this Act

- Partition of the British India into two new and fully sovereign dominions-India and Pakistan with effect from 15th August 1947;
- Division of the provinces of Bengal & Punjab among the two newly formed countries;
- The offices of Governor-General in both the countries would be set up. These Governor-General would be representing the Crown;
- The complete legislative authority would be conferred in the hands of the Constituent Assemblies of the two new countries;
- The British suzerainty over the princely states would be terminated from August 15, 1947;
- Abolishing the use of title "Emperor of India" by the British monarch;

- The Act includes the division of the armed forces between the two countries.

2.1.2 Salient features of the Act

The two new dominions, India and Pakistan came into existence after the formulation of this Act. Dominion of India will represent the desire of the all people in India for self-government, while the Dominion of Pakistan would express the demand of the Muslims for the self-government. The appointed date for the partition is 15 August 1947.

2.1.3 Territories:

Pakistan-East Bengal, West Punjab, Sind, Northwest Frontier Provinces, Sylhet divisions in Assam, Bahawalpur, Khairpur, and Chief Commissioner's Province of Baluchistan and its eight other princely states Bengal-The province of Bengal ceased to exist. Two new provinces came into existence-East Bengal and West Bengal. Punjab: Two new provinces came into being-West Punjab and East Punjab. Boundaries of new provinces would be determined by a committee headed by Sir Cyril Radcliffe. Constitution of India and Pakistan: The Government of India Act 1935 governed the two dominions until the new constitutions were framed for both the countries. Governor-General of India and Pakistan: For each of the countries, a separate Governor-General was required to be appointed by the Crown subject to the laws of the legislature of either of the new dominions. The Act also provided critical directions on the armed forces of India as well as the steps to be taken in regards to British forces in India. Naval forces were also a critical area that was dealt with by this Act. The Act also created the legislatures of both the new countries formed. It also stated that the British would cease to have any control at all in any affairs of India and Pakistan from August 15, 1947 onwards.

2.1.4 Repeal

The Indian Independence Act of 1947 was repealed in Article 395 of the Constitution of India and in Article 221 of the Constitution of Pakistan of 1956. The Act also created the legislatures of both the new countries to be formed. It also stated that the British would cease to have any control at all in any affairs of India from August 14, 1947, onwards. The same applied for Pakistan as well. It also made provisions for the constituent assemblies of both India and Pakistan. It was decided that the constituent assemblies in both these countries would have all the powers vested in them. They would also create the respective constitutions in any way

that they deemed fit. Indian Independence Act 1947 also decided the governor-generals for the new countries. It also dealt with the results of forming the new dominions. This Act also dealt with the orders that were needed to make sure that it was executed in the way it was supposed to be. It looked into the services that were to be provided by the Secretary of State. The Act also provided critical directions on the armed forces of India as well as the steps to be taken with regards to British forces in India. Naval forces were also a critical area that was dealt with by this Act.

3.1. Kashmir's Accession

After the British Suzerainty lapsed on 15th August 1947 and the complete independence for both dominions were announced, the State of J&K did not accede to any of the two dominions and maintained its independent character. However, on 12th August 1947 a standstill agreement between the rulers was concluded and it was stipulated that pending settlement of details and former execution of fresh agreements, the existing agreements would continue. It's worth to mention here that the area covers the existing arrangements related to communications, supplies, postal and telegraphic arrangements but did not extend to defence and foreign affairs[1]. The independent position of Kashmir till 2nd October 1947 until "The trouble" in Kashmir began as confirmed by the pro Indian sheikh Abdullah who made the following statement in Delhi on 21 October 1947;

> "…. The present troubles in Poonch a territory of Kashmir was caused by the un-wise policy adopted by the state. The people of Poonch had started a people's movement for the redress of their graveness. It was not communal, Kashmir started sending its troop and there was a panic in Poonch. But most of the adult population of Poonch were ex-service men in the Indian army with a close connection with people of Jhelum and Rawalpindi. They evaporated their women and children, crossed frontier and returned with arms supplied to them by willing people. The

[1] S.C.O.R third year, 229th meating,1948 page 101 the subject covered under the stands still agreement were specified in section 7. Clause 1 (c of the Indian independence act of 1947 which provides as follow: Not withstanding anything in paragraph(b) … effect shall, as nearly as maybe continue to be given to the provisions of any such agreement as is there in referred to which related to customs, transit and communications, posts and telegraphs or other like matters until the provisions in question or denounced by the ruler of Indian state or person having authority in the tribal areas on the one hand or by the dominion or province or other part of here of concern on the other hand or are superseded by the subsequent agreements.

present position was that the Kashmir state police were forced to withdraw in certain area."[2]

The Muslim population of Jammu and Poonch were ordered to evacuate their homes forthwith but before it could be implemented, an ethnic cleansing of Muslim started and peoples were cold bloodedly massacred and there village were set on fire. Reporting one incident, the *Times of London* observed "…237,000 Muslims were systematically exterminated, unless they escaped to Pakistan along the border by the forces of Dogra state, headed by the maharaja in person.[3] The news of heinous atrocities perpetrated by the despotic forces of maharaja who infiltrated from adjoining parts of India inflamed the passion of Muslims of Kashmir and Pakistan. The indigenous guerrillas of Kashmir responded the Maharaja's force and on 21/22 October, the Pathan tribesmen from the tribal area of Pakistan's North West frontier province entered the Kashmir to help their co-religionist who were facing the atrocities of forces of maharaja. *Daily Telegraph* of London 12th January 1948 also observe; "it was undoubtedly tales of horrible cruelty against their co-religionist in Jammu, coupled with hurting news of insurrection, which first set them on their course of invade"[4]

Since the maharaja force were unable to contain the disturbance, he sent his deputy prime minister R. L Batra to New Delhi on 24.10,1927 for help in form of men, arms and ammunition. Jawaharlal Nehru and Sardar Patel came to know about the Batra arrival in the same day of evening. The request of maharaja was considered at meeting of Indian defence committee, next morning, which was presided over by Lord Mountbatten, who urged that it would be dangerous to send any troops to Kashmir, unless Kashmir had first offered to accede. The chiefs of army, naval and air force, were however given directions same morning to prepare plans for sending troops to Kashmir. Simultaneously V. P Menon, the civil servant was sent to Kashmir to present the cabinet terms to maharaja while the officer accompanying him studied the military situation. Menon further advised Maharaja to leave Srinagar as according to him the raiders had reached Baramulla. The maharaja along with his wife and son left Srinagar in morning of 26. 10 .1947. After difficult seven hours trip the maharaja caravan reached Jammu the

[2] Sited by Sir Zafar Ulla khan in Security Council debate on Kashmir. S.C.O.R, 3rd year 228th meeting, 16th January 1948, p. 68.

[3] Sarwar Hassan, *Pakistan and United Nation* (New York: Manhattan publishing co, 1961) p.68

[4] Ibid., p. 98.

exhausted Hari singh went immediate to his private quarter to retire before going to sleep he called his ADC to issue his last order as ruling maharaja;

> "Wake me up only if V. P Menon returns from Delhi he said, because that will mean India has decided to come to my rescue. If he does not come before dawn shoot me in my sleep with my service revolver, because if he hasn't arrived, it will mean all his lost"[5]

While the frenzied preparations for the operations were under way, Lord Mountbatten ordered V. P Menon to fly to Jammu residence of Hari Singh. V. P Menon reached his bed side before the maharaja could make his wish which he had given his ADC. With him awaiting on the Hari Singh signature which would provide a legal framework for India's action. V. P Menon came back to his Delhi residence late on the evening of that same Sunday 26th October. He joined Britain's deputy his commissioner Alexander Symon for a drink a few minutes after the returns. Menon seems jubilant.

> "As both sat down and enormous smile spread across his face. He raised his glass to Symon. He pulled a piece of paper from his jacket pocket and waved it gaily towards the English men. Here it is, he said. 'We have Kashmir. The bastard signed the act of accession and now that we've got it, we'll never let it go"[6]

4.1 Indian Army Intervention:

There are two versions narrated by the historian pursuant to the intervention by the Indian army. As reported by the Joseph korbel, 'it has been alleged that plans were made for sending Indian forces to Kashmir at some day before 26th October on which day the raid on that state from the direction of Abbottabad began' the author has provided a time table of events as regard decision taken plans made orders given and movement started in this matter.

- On 24th October the commander in chief, Indian army received information that the tribesmen had seized Muzaffarabad.
- On 25th October the army were directed to examine and prepare plan for sending troops to Kashmir by air and road.

[5] Larry Collins and Dominique LA Pierre, *Freedom at Midnight* (New York: Harper Collins Publishers 1997, Paperback edition), p. 447.
[6] Ibid., p. 448.

- On the afternoon of 25th one staff officer of the Indian army and one Royal Indian air force were sent to Srinagar this was the first contact between officers of Indian head quarter and officer of the state Kashmir force.
- On the same afternoon an order came to be issued to an infantry battalion to prepare itself to be flown at the short notes, to Srinagar in the event of government of India decided to accept accession of Kashmir.
- On the early morning of 26th October, the staff officers who were sent to Srinagar returned and reported their meetings with a high official.
- On the afternoon of 26th October India finalized its plan for dispatch by air of troops to Kashmir.
- At first light on the morning of 27th October with Kashmir's instrument of accession, the movement by air of Indian forces to Kashmir began.[7]

The LT General L. P Sen, reported in "*The Slender was the threat; Kashmir confrontations 1947-1948* New Delhi, the first Indian unit to arrive at Srinagar air field was 1/11th. It orders for the operation were issued at 1300 hrs. On 26th October 1947 the airlift was superintended by General Sir Dudley Russell.[8] The government of Pakistan reacted against the Indian move to send his troops to Kashmir. The governor general of Pakistan, Muhammad Ali Jinnah, at midnight October 27 ordered the acting commander-in-chief general Sir Douglas D. Gracey, to dispatch troops to Kashmir the general was reluctant to follow Jinnah's instruction without the approval of Marshal Sir Claude Auchinleck, who was the supreme commander in charge of administering partition of the Indian army.

5.1 Internationalisation of Kashmir dispute:

Following the intense disturbance in Kashmir state, government of India and government of Pakistan and also British government had intense communication between each other with regard to the hostile situation. There are as many as twenty two correspondences between government of India, government of Pakistan and British government. It is not possible to provide the entire text of correspondence in the instant paper however few correspondences are worth to be reflected here, to provide the actual position;

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[7] Josef Korbel, *Danger in Kashmir*, (Oxford: Oxford University Press 1954), p. 86-87.

[8] Lt General L. P. Sen, *Kashmir Confrontation 1947-1948* (New Delhi: Bird would, 1969), p. 58.

5.1.1 The Nehru's cable to Attlee Dated October 26. 1947

"We have received urgent appeal from assistance from Kashmir government. We would be disposed to consider such a request from any friendly state. Kashmir north frontier as you are aware, runs in commonly with those of three countries, Afghanistan, the union of soviet socialist republic and china. Security of Kashmir, which must depend upon control of internal tranquillity and existence of stable government since part of southern boundaries of Kashmir and India are common. It should be clarified that question of aiding Kashmir is not designed in any way to influence the state to exceed India.[9]

5.1.2 Pundit Jawaharlal Nehru telegram to Liaqat Ali khan

Pundit Nehru sent a telegram to Liaqat Ali khan prime minister of Pakistan in which he said "I wish to assure you that government of India has been forced upon them by circumstances and improvement and grave danger to Srinagar. They have no desire to intervene in affairs of Kashmir state after raiders have been driven away and law and order established. In regard to accession also, it has been made clear that that this is subject to reference to people of the state and their decision, government of India have no desire to impose any decision and will abide by peoples wishes but those cannot be ascertained till peace and law and order prevail. Protection of Kashmir of armed raids thus becomes first objective and in this we trust, we shall have your co-operation.[10]"

5.1.3 India's Prime minister sent telegram, to prime minister of Pakistan

"our assurance that we shall withdraw our troops from Kashmir as soon as peace restores peace and order are restored and leave the decision regarding the future of the state to people of state, is not nearly a pledge to your government, but also to the people of Kashmir and to the world.[11]"

5.1.4 Nehru's telegram to Liaqat Ali khan dated 04,11,1947

"We are anxious to restore peaceful conditions in Kashmir and we invite your cooperation again to this end. This can only be done after withdrawal of raiders from state territory. As soon as raiders

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[9] Text of telegram dated October 26th, 1947 from Jawaharlal Nehru to the British by Prime Minister, Clement Attlee.

[10] K. Sarwar Hassan, *Documents on the Foreign Relations of Pakistan: The Kashmir Question* (Karachi: IIA. 1996) p. 71.

[11] Ibid.

are withdrawn, there would be no necessity for our keeping our troops there. I wish to draw your attention to broadcast on Kashmir, which I made last evening. I have stated our government policy and make it clear that we have no desire to impose our will on Kashmir, but to leave final decision to people of Kashmir. I future stated that we have agreed on impartial international agency like united nation supervising any referendum.[12]"

5.1.6 Nehru's telegram to Prime minister of Pakistan 08.11,1947

"It will thus be seen that our proposal, which we repeatedly stated are:

1. That government of Pakistan should publically undertake to do their utmost to compel the raiders to withdraw from Kashmir;
2. That government of India should repeat their declaration that they will withdraw their troops from Kashmir soil as soon as raiders have withdrawn and law and order restored;
3. That government of India and Pakistan should make a joint request to UNO to undertake a plebiscite in Kashmir at the earliest possible date[13]"

5.1.7 Nehru's telegram to Prime minister of Pakistan 21.11,1947

Prime minister of Pakistan stating;

> ". . . I have repeatedly stated as soon as raiders have been driven out of Kashmir or have withdrawn and peace and order have been established, Kashmir should decide question of accession by plebiscite or referendum under international auspices such as those of United Nations. It is very clear that no such reference to the people can be made when large bodies of raiders are despoiling country and military operations against them are being carried out. By this declaration I standi.[14]"

The written promises regarding the plebiscite made by the prime minister of India Pandit Jawaharlal Nehru, however, proved hallow as instead of adhering those commitments, he directed his representative at UN P. P Pillai, who sent a letter to president of Security Council on 1st January, 1948, and lodged complained

[12] Ibid.
[13] Ibid.
[14] Ibid.

against the Pakistan in Security Council.[15] It is worth to mention that the Indian complained was based on Article 35 of chapter IV of the UN charter which lays to the "Pacific settlements of the dispute". The complained made by the representative of India by UN was not only replied by Pakistan but it lodged a counter complained against India stating there in, besides other things that India has obtained the accession of J&K by fraud and violence and large-scale massacre and atrocities on Muslim of J&K have been perpetrated by the armed force of maharaja and Indian union and by the non-Muslim subject of the maharaja. At the conclusion of lengthy debate in the matter the Security Council adopted two resolutions by virtue of the first resolution of 17th January, 1948.[16] The UNSC asked the two governments to refrain from aggravating the situation and to do everything within their power to improve the situation. It also requested them to immediately apprised the council of any material change in the situation by virtue of second resolution adopted on 20th January it established[17] the United Nation commission for the India and Pakistan (UNCIP). On 28 January 1948 the head of the council presented the draft resolutions submitted by both India and Pakistan delegations. The Pakistani draft called upon the commission to arrange for:

A) The withdrawal of Indian armed forces and the tribes men as well as all tress passers weather belonging to Pakistan or India;
B) The repatriation of all residence of Kashmir who left on their own or who were compelled to leave as a result of the tragic events.
C) The establishment in Kashmir of an impartial interim administration; and
D) The holding of plebiscite to certain the free fair and UN fettered will of the Kashmiri's as to whether the state wished to accede to India or Pakistan.[18]

The Indian draft contrary to the promises repeatedly made by India for holding of plebiscite in Kashmir focused on "promoting the cessation of acts of hostility and violence". It envisaged a

[15] Letter of representative of India addressed to the president of Security Council, 1 Jan 1948, pp. 107-13.

[16] Resolution adopted by Security Council, 17th January, 1948 S/651 p.164.

[17] Resolution adopted by Security Council, 20th January, 1948(S/654 P.160-162).

[18] Resolution adopted by the Security Council 20 January 1948 (S/654).

period of six month for the restoration of normalcy following the end of fighting sheikh Abdullah was to head the Interim government under the Maharaja instead of an impartial administration and the plebiscite was to be held at some remote date in the presence of Indian troops. The draft made by the India foresaw the convocation of national assembly based on adult suffrage and the establishment of the national government. The reaction of the members of the security council was quite unfavourable to the draft prepare by the India e.g. commenting on it the United Kingdom representative, Mr Noel-Baker observed[19] "that a settlement arrived at quickly in the security council is real way to stop fighting he viewed the whole episode starting from the preliminary measures as to the fighting, write up to the eventual plebiscite, as one problem." Mr Austin from the United States[20] was of the opinion that "machinery that was free from suspicion and was actually impartial administration for plebiscite would have backing of all." Mr Tsiang from china[21] favoured the principle of free and impartial plebiscite for deciding the question of accession he opines "Much of the incentive to violence and the use of force would be removed." The Argentinian delegate Mr Arce minced no words when he made the following observation on the Indian draft "Both the maharaja as absolute monarch of Kashmir, and the government or government established by him, have already shown themselves biased in favour of one of the parties and cannot therefore preside over a free plebiscite. Even if they could, they should not do so, because the opposing party would not recognise the fairness of his plebiscite, even if it had been fairly conducted.

It is worthwhile remembering the Latin proverb, which says *sublata causa tollitur effectus* or in other words remove the cause and the effects will disappear. In this case, the cause of all disturbances, whether from India or Pakistan, or from the tribes, lies in the rebellion of the people of Kashmir against the absolute monarch who rules them as if he were running a farm and the 4 million inhabitants were so many heads of cattle and not human beings." On 6th February 1948 general McNaughton of Canada who was president of the council for the month following consultation with other members, presented a draft resolution it envisaged "the withdrawal of all irregular outside forces from Kashmir; the establishment of law and order followed by the withdrawal of regular armed forces; the return of all Kashmiri

[19] S.C.O.R Third Year 236th Meeting, 28 January 1948 p. 283.
[20] Ibid., p. 287.
[21] Ibid., p. 288.

refuges to the state; the establishment of an interim administration acceptable to the people of Kashmir; and finally the organisation of plebiscite under the authorities of security council.[22]

Resolution of 13th august 1948 and 5th January 1949 on the basis of negotiation conducted with leaders of both countries, the united nation commission for India and Pakistan came to the sub-continent it adopted two resolutions on 13th august 1948 and 5th January 1949. The first resolution[23], consisted of three parts. According to the part I) the government of Pakistan and India were to observe cease fire in the state of Jammu and Kashmir and according to part II), they reaffirmed their wish that that the future status of the state would be determined by the will of people of Kashmir. As far as part iii) was concerned, it stipulated the following principles as the basis for truce agreement. The part ii is of the utmost importance in light of the later controversy about the withdrawal of Pakistani troops. It reads as follow;

> "When the commission shall have notified the government of India that the tribes men and Pakistani nationals referred to in part ii hereof have withdrawn there by terminating the situation which was represented by the government of the India has having occasioned the presence of India forces in the state and further that the Pakistani forces are being withdrawn from the state of Jammu and Kashmir the government of India agreed to begin to withdraw the bulk of their forces from that state in stages to be agreed upon with a permission[24]"

India accepted this resolution the government of Pakistan also accepted with subject to condition that, "The government of India accept the condition lay down part b paragraph 6-15 both inclusive of the security council resolution of 21th April 1948, as explained by the spencer's, for a free and impartial plebiscite to decide whether the state of Jammu and Kashmir is to exceed to India or Pakistan[25]. The resolutions of 13th august and 5th January 1949 together spell out the terms and conditions for the settlement of the Kashmir dispute. The immediate positive result was the coming into the force of cease fire agreement which came effective on 1st January 1949. It is obvious from the foregoing that the commission failed in its efforts aimed at demilitarization, the

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[22] Draft resolution submitted to Security Council 6 February 1948(S/667) p. 162-63. This draft was not voted upon.

[23] Resolution adopted by the UNCIP, 13th august 1948 (S/1100, para75 P.182-83).

[24] A. G Noorani, *The Kashmir Dispute 1947-2012* (India: Oxford University Press, 2012), p.159.

[25] Ibid.

commission proposed the submission of all questions pertaining to part ii of the resolution of 13th august 1948 to arbitration. The commission proposal was strongly supported by Prime Minister Attlee and President Truman it was accepted by Pakistan but rejected by India.

Following the failure of the commission to get its arbitration proposal accepted the Security Council asked its president of the month, general McNaughton of Canada to undertake the task. Mr McNaughton proposed:

> "The reduction of armed forces of both Pakistan and India be made in stage so that it does not cost to the fair of the people and on either sides of the cease fire line Pakistan accepted these proposals and were as India rejected them[26]."

Following these developments finally on 14th march 1950 the security council adopted a resolution by virtue of which it wound up united nation commission for India and Pakistan and its place created the office of united nation representative for the purpose of de militarization of the state the first person to occupy that office was Sir Owen Dixon a judge of Australia high court and subsequently the chief justice of Australia. He also made strenuous efforts to get two countries to agree to his program of de militarization but failed to do so because of India's refusal to corporate. Sir Owen felt extremely frustrated in his mission and eventually resigned.

6.1 Making of the constitution of India:

While the Security Council was ceased of the problem, Indian constituent assembly was busy for making the constitution for India. No one represented Kashmir state in the assembly till May 1949. On October 17, 1949 article 306-A was taken up for the consideration. This article later became Article 370 with the posture taken by at home and abroad and more particularly before the world body. The constituent assembly for making of constitution of India was convened a draft of article 306-A was handed over to interim prime minister sheikh Abdullah by Sh. N. Gopala Swami Ayyanger the then minister of Railway and transport. Sheikh Abdullah placed the said draft before the working committee of national conference, who arrived at conclusion that the draft is unacceptable. The Sh. N. Gopala Swami Ayyanger informed sheikh Abdullah on 15th October 1949 that "in no case it is possible to for us to go beyond our new draft and in

[26] Resolution adopted by the UNCIP, 13th august 1948 (S/1100, para75 P.182-83).

case even this draft is not acceptable to the drafting committee, then take step to insure the postponement of the consideration by the constituent assembly of the proposed article 306-A to some other date."

The DO letter forwarded by Mr. Gopal was responded by sheikh with following words,

> "We have arrived in the conclusion that it is not possible for us to let the matter rest here. As i am genuinely anxious that no unpleasant situation should arise, I would request you to see even if now something could be done to rectify the position. In case I fail to hear from you from reasonable time I regret to say that no course is left open for us to forward our resignation from the constituent assembly.[27]"

The issue of article 306-A was finally taken up for the consideration on 17th October, 1949 and some legal issues pertaining to Interim arrangement were thoroughly debated in the constituent assembly. As a consequence of such developments and circumstances article 370 was incorporated in the constitution. While the Constitution of India was being made and the United Nations had already passed Resolutions, issue arose as to how, pending settlement of the State, Dominion of India, could make constitutional provisions for the State of Jammu and Kashmir. This issue was addressed by the Government of India, in communication dated 21.11.1949. It responded in following terms:

> "While the Constitution of India, which, inter alia provides for the relations of existing states to the Government of India was under consideration, it would have been unfair to the Government and the People of the State of Jammu and Kashmir to deny them the opportunity of participating in the discussions of that Constitution. Such participation was not intended and does not, in fact, alter the Government of India's determination to abide, in the matter of accession, by the freely declared will of the people of the Jammu and Kashmir. Should that will be against the State continuing to be part of India, if and when it comes to express in a constitutional way under conditions to peace and impartiality, the representation of the State in the Indian Parliament would automatically cease and provisions of the Constitution of India that govern the relations of the State of

[27] Jammu Kashmir High Court Bar Association, Bar Book Article 35A P10
(HCBA submitted rejoinder before Supreme court of India in a petition filed by RSS think Tank "We The citizen" later the rejoinder was published as Bar Book 2018).

> Jammu and Kashmir with the Union of India will also cease to operate.[28]"

In the meantime, Indian delegate Sir Banegal Rau in a statement made on 1st march, 1951 assured the council that action by Kashmir's constituent assembly was not intended;

> "To prejudice the issue before the Security Council[29]. A few days later on 9th march the Indian representative stated his government view that though the constituent assembly was free to express its opinion on the question of the future of the state "it can take no decision on it"[30] a similar assurance was given by pundit Jawaharlal Nehru in the Indian parliament on 28th march 1951 and in course of press conference on 11th June 1951.[31]

Even after the constitutional frame work was debated and arrived at, the united nation Security Council (UNSE) continued two deal with "Kashmir issue" and from 26.1.1950 when constitution of India came into force till 21.12.1971, as many as 13 resolution were passed. On 13th April 1951 the council appointed former American senator Frank Graham as a new UN representative he submitted six courses on demilitarization of the state. The Security Council also adopted a resolution on 23rd December 1932 which urgent the government of India and Pakistan top enter the negotiation, which Graham proposed. The government of Pakistan accepted this proposal as expected, India rejected it too.

6.1.1 Making of constitution of Jammu and Kashmir:

During the making of the Constitution of India and, having regard to indefinite and uncertain position of the State in the matter of accession, coupled with ground reality and the Resolutions of United Nations, special provision was incorporated in the Constitution of India under Article 370. The founding fathers of the Indian Constitution, in view of the peculiar position of the State accepted the position that the Constitution which was being made cannot be made applicable to the State of Jammu and Kashmir. But a mechanism can be provided to enable the Government of the State to run its affairs till the issues are finally decided and settled. Therefore, none of the provisions of the Constitution of India dealt with the State of Jammu and Kashmir,

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[28] Ibid., p. 10-11.

[29] Statement of Permanent Representative of India Sir Bangal Rau in the Security Council 1st March, 1951 p. 281.

[30] S.C.O.R 6th year 536th meeting 9th march 1951 P.3.

[31] S.M Burke, *Pakistan's Foreign Policy: An Historical Analysis* (Karachi: Oxford University Press, 1973) p.149.

except Article 370.Under this provision President was given the power to apply provisions of the Constitution of India with "exceptions" and "modifications" in view of the conditions prevailing in the State.(c) After the entire Constitution of India was made applicable to all the territories comprised in Union of India, the President of India exercising his powers under Article 370 passed the 1st Constitutional Application Order i.e. "The Constitution (Application to Jammu and Kashmir) Order, 1950"

The prime minister made a statement in the Lok Sabha on 24th July 1952, which was outcome of the talks which government of India had with the leading members of Jammu and Kashmir government at the time to define the states relationship with the union the statement is referred to as 'Delhi agreement', although no formal agreement was as such made. It was followed by the constitution (Application of Jammu and Kashmir) order, 1954 it is under the same order that the article 35-A came to be incorporated in the application for the state. In the Lok Sabha on the Delhi agreement Pandit Jawaharlal Nehru said:

> "The question of citizenship arose obviously. Full citizenship applies there. But our friends from Kashmir were very apprehensive about one or two matters. For a long time, past, in the Maharaja's time, there had been laws there preventing any outsider, which is, any person from outside Kashmir, from acquiring or holding land in Kashmir. If I mention it, in the old days the Maharaja was very much afraid of a large number of Englishmen coming and settling down there, because the climate is delectable, and acquiring property. So, although most of their rights were taken away from the Maharaja under the British rule, the Maharaja stuck to this that nobody from outside should acquire land there. And that continues, the present Government of Kashmir is very anxious to preserve that right because they are afraid, and I think rightly afraid, that Kashmir would be overrun by people whose sole qualification might be the possession of too much money and nothing else, who might buy up, and get the delectable places. Now they want to vary the old Maharaja's laws to liberalize it, but nevertheless to have checks on the acquisition of lands by persons from outside. However, we agree that this should be cleared up. The old state's subject's definition gave certain privileges regarding this acquisition of land, the services, and other minor things, I think, State scholarships and the rest. So, we agreed and noted this down: 'The State legislature shall have power to define and regulate the rights and privileges of the permanent residents of the State, more especially in regard to the acquisition of immovable

property, appointments to services and like matters. Till then the existing State law should apply."[32]

7. Article 370 & 35-A of Indian Constitution

Article 370 and Article 35A were key constitutional provisions confirming the special autonomy of J&K and provided safeguards from demographic change. According to Article 370 (1)(b)(i) the Indian Parliament can only legislate in matters limited to the areas specified in the Instrument of Accession and any new laws would be subject to the concurrent consent of J&K Constituent Assembly. The terms of the Instrument of Accession stipulate three areas where the Indian legislature may create laws for J&K. Firstly, defense which include naval, military, air force works, administration of cantonment areas, arms, firearms, ammunition and explosives; secondly, external affairs that cover international treaties and agreements with other countries, extradition, including the surrender of criminals and accused persons to parts outside India, etc.; and lastly communications, meaning post and telegraph, including telephones, wireless, broadcasting, and other like forms of communication, federal railways, maritime shipping and navigation.11 It is an arrangement comparable to the 'special status' enjoyed by Quebec in Canada, by Scotland, Wales and Northern Ireland in Britain12 and by Åland Islands with Finland.[33] Accordingly, Article 35A is contiguous with Article 370 enacted by the 3rd Presidential Order on 14th May 1954 which allowed J&K legislature to define their own 'permanent residence' an extension to the similar legal notion of 'State subjects' which now stood replaced.14 It made it forbidden for outsiders, except for Kashmiris, from permanently settling, buying land, holding local government jobs, as well as winning education scholarships in the region.

However, according to renowned Indian jurist A.G. Noorani and others, the Indian government over the past 70 years has played a part in the systematic covert erosion of J&K's aforementioned protections with 47 presidential orders that extended the Indian constitution over the region without any concurrent consent of the State of J&K. This is affirmed by Sumantra Bose who describes the 1954 Presidential Order and the

[32] A. G Noorani, "Article 35-A is beyond challenge," *Greater Kashmir* 23rd March 2017).

[33] Eve Hepburn, "Forging autonomy in a unitary state: The Åland Islands in Finland," May 5, 2015, https://www.researchgate.net/publication/263511707_Forging_autonomy_in_a_unitary_state_The_Al and_Islands_in_Finland.

ones that followed as "the end for the Article 370" deeming it "effectively… dead in letter and in spirit since that time".

7.1.2 Erosion of special status under Article 370:

The autonomy of the state under article 370 was proclaimed in 1950 by a constitution order formally issued in the name of president of India, only after four years in 1954 the formal order was rescinded by the proclamation of another dictum that legalized the write of central government to legislate in the state on the various issues like;

A) The Indian Supreme Court was given the authority to be the undisputed arbiter in Jammu and Kashmir.
B) The part third of the Indian constitution which provide many fundamental rights to Indian citizens were applied to the populance of Jammu and Kashmir as well, but with this stipulation.

When the constituent assembly validated the draft constitution in 1956 for the state of Jammu and Kashmir, the constituent assembly dissolved itself and sort the organization of midterm election at the time the jurisdiction of the election commission of India did not extend to Jammu and Kashmir. The monopolies of both houses of the assembly by sponsored by New Delhi legitimize a full-scale intervention of the central government, allowing the incorporation of Non-Kashmiri official in important, administrative positions. In December 1964 union of India declared the two-high statue of the Indian constitution would be in acted in Jammu and Kashmir: Articles 356 and 357. These articles enable the center government to dismiss any elected government if it perceived a dismantling of the law and order missionary. Moreover, the extension of direct election to the Parliament (1966), extension of Article 249 (Power of Parliament to legislate on State subject in national interest), Article 312 (All India Services e.g. IAS, IPS) included by union are directly destroying the special status provision under Article 370.

The 6th amendment in Jammu and Kashmir constitution not only changes the nomenclature but the eligibility, mode and method of appointment of head of state. The constitution of Jammu and Kashmir (6th amendment) at 1965 amended the state constitution and replaced 'Sadri-Reysat' by governor which was complete violation of the basic structure of the Jammu and Kashmir constitution. Similarly, many other orders were passed which eroded the special status of state. The presidential orders made after the dissolution of state constituent assembly except

1986 order extending article 249 (Article 249 deals with the power of the parliament to legislate with respect to a matter in the state list in national interest) except a 1986 order extending Article 249, and the present 2019 order — can be seen as the first level of dilution. This is so because for all these orders, while the concurrence of an elected State government was obtained, the State Constituent Assembly did not exist and, therefore, could not give its ratification.

When J&K was under Governor's rule as per Section 92 of the J&K Constitution, in absence of an elected council of ministers, the Governor could not have validly given the requisite concurrence to the presidential order. Even if the Governor acting without a popularly elected government can be considered as a "state government" for the purposes of concurrence, the Governor must at least have had some nexus with the State and some independence from the Centre. However, this is not the case in practice, since the Governor is not only an unelected nominee of the Central Government but also holds office during the latter's pleasure. Not surprisingly, the 1986 order was challenged in the J&K High Court; it is still pending. The Government of India is leaving no stone unturned to make the Special status of Jammu & Kashmir hallow, there are other numerous instances by which the Union of India have gone for modification or amendment to the extent of defeating the basic structure of J&K constitution. The amendment/modifications in Reservation Rules, SARFESI Act, Inclusion of General sales Tax (GST), Powers to National Investigating agency (NIA) and many other acts have violated the basic structure of State Constitution.

7.1.3 Revocation of Articles 370 and 35A

The legal mechanisms employed for abrogation of Articles 370 and 35A were through the sub-provision contained in Article 370 (3) which, as mentioned previously, required concurrent consent by the State's Constituent Assembly and Presidential Order from the central government for it to cease being operational. However, the State's Constituent Assembly stood dissolved in 1957 and before that date it never recommended abolition of the provision or its amendment. Despite this, it was still made possible through Presidential Order C.O.272. How the Indian government achieved this is noteworthy. They interpreted 'J&K Constituent Assembly' to mean 'J&K Legislative Assembly', however the Legislative Assembly itself was dissolved in 2018 and no consent was obtained. Alternatively, J&K was under governor's rule appointed by the Indian government to act as substitute for the dissolved

assembly. Within this framework, the upper chamber of the Indian Parliament passed a resolution 'recommending' to use the power in Article 370(3) to revoke Article 370 in its entirety. The resolution progressed to the lower chamber on 6th August followed by Presidential Order 273 which applied to the entire Indian constitution without any modifications or exemptions to Jammu & Kashmir. Subsequently, the Indian parliament passed the Jammu & Kashmir Reorganization Bill of 2019 which abolished the State of Jammu & Kashmir, further dividing the region into two 'union territories' of Ladakh and Jammu & Kashmir.[34] Since Article 35A emanates from Article 370 it also got revoked pursuant to the Jammu & Kashmir Reorganization Bill

7.1.4 Contempt of Indian Constitution and Judicial Precedents

The mechanisms employed have been criticized as unilateral annexation and in contravention of Article 3 of the Indian constitution which requires bills changing the name or area of any state in reference to the said state's consent[35] This is an open contempt of India's own constitution and has been confirmed as such by the Indian Congress Party as 'ultra vires' and against constitutional procedure.[36] This has been confirmed by the lawyers of the Indian Bar Association and petitions have been filed before the Supreme Court of India which challenge that this issue as to whether the president of India can make a new Article, so far as the State of J&K is concerned, a principal has already been established by the court in various decisions that the president cannot amend any provision in the application order and the word 'modification' has to be given, in the constitutional context, a wide interpretation.[37] There are at least five Indian Supreme Court judgments that point towards the finality and permanence of Article 370 and accordingly Article 35A namely, *Prem Nath Kaul v. J&K* (1959)[38] , *Sampat Prakash v. J&K* (1968)[39] , *Mohd. Maqbool Damnoo v. J&K* (1972)[40] , *SBI v. Santosh Gupta*

[34] Laya Maheshwari, "How the Indian Government Changed the Legal Status of Jammu and Kashmir," *Lawfare*, August 12, 2019, Research Society of International Law.

[35] The Constitution of India, November 9, 2015, https://www.iitk.ac.in/wc/data/coi-4March2016.pdf.

[36] "Redrawn map may set off more change in Indian-ruled Kashmir," *The Washington Post*, August 7, 2019.

[37] Petitions in SC on J&K move," *The Hindu*, August 10, 2019.

[38] 1959 AIR 749, 1959 SCR Supl. (2) 270.

[39] 1970 AIR 1118, 1970 SCR (2) 365.

[40] 1972 AIR 963, 1972 SCR (2) 1014.

(2016)[41] and *Dr. Charu Wali Khanna v. UOI*.[42] A Kashmiri lawyer says Kashmir's transformation into a Union Territory reflected:

> "a political holocaust inflicted on the people. It is the day of political betrayal and beginning of an era where violence as an argument will have justification and takers, which is very unfortunate."[43]

Hence, by repealing the special protections provided by Articles 35A and 370, India has clearly signaled its intention to abandon its decade's long commitment to the Kashmiri people and defy the law and procedure laid down by their own constitution and case law as well as their international commitments via UNSC Resolutions on Kashmir.

Conclusion

The Kashmiris in J&K have been struggling for the right of self-determination since the partition of British India and have been denied such right till date. Firstly, the Maharaja did not take Kashmiris' will into consideration when accession was signed to India. This has been recognized by the UNSC Resolution 47. Secondly, even if the Maharaja did accede, the accession was conditional upon the will of the peoples of Kashmir. Thirdly, when the Indian government proposed convening the J&K Constituent Assembly, the UNSC declared the elections as not reflective of the exercise of the right of self-determination in Resolutions 97 and 122. Despite this, the elections, which were reported to be rigged, created an avenue for negotiations of the Kashmiri peoples with the Indian government based on the conditions set out in the Instrument of Accession, Delhi Agreement 1957 and Hereditary State Subjects definition 1927 which gave birth to the so-called 'temporary provision' within the Indian constitution under Article 370 which crystalized the special autonomous status of the region. Moreover, Article 35A, which emanates from Article 370, provided an additional unequivocal protection from demographic change. However, on 5th August 2019, the Indian government revoked Articles 370 and 35A without any recourse to the Kashmiri people making material breach of the Instrument of Accession, the negotiations conducted in the Delhi Agreement, the J&K Constituent Assembly, the UNSC

[41] Hannah Ellis-Petersen, "India strips Kashmir of special status and divides it in two," *The Guardian*, October 31, 2019.

Resolutions as well as their own constitution and judicial precedents. The Indian government's siege of the region can be classified as a military occupation by the Indian occupying forces via unilateral annexation which stand in violation of International Humanitarian Law in armed conflict. Firstly, India fulfils the definition of occupation under Article 42 of The Hague Regulations 1907. Secondly, India stands in violation of the fundamental rights of civilians under The Hague Regulations and Geneva Convention IV Articles 47-48, Additional Protocol 1, Article 75 because of the infliction of serious abuses of human rights – torture, murder and detentions are all violations of fundamental rights of international law, amounting to crimes against humanity. Thirdly, India stands liable for committing the crime of aggression via unilateral annexation in contravention of Article 8 bis2 (b) of the Rome Statute. Fourthly, India has violated all four Geneva Conventions. The twin human rights covenants of ICCPR and ICESCR also showcase the human rights abuses perpetuated by the Indian occupying forces in terms of curtailment of religious rights, economic development, freedom of communications via the internet and telephone lines, journalism, education, freedom of movement, along with the imposition of curfews, infliction of torture and arbitrary detentions. In addition, India's denial of the right of self-determination is against both the colonial understanding of the right and the post-colonial interpretation which places India Kashmir's Statehood Abrogated in violation of peremptory norm which also has an *erga omnes* nature.

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Laws Relating To Polygamy in Pakistan: Rights of the Polygamous Wives

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Sami Ur Rahman**

Abstract

Polygamy continues to be the most contentious and unsettled issue throughout the contemporary Muslim world. In all the Muslim countries including Pakistan protests were made. The reason behind women going against polygamy is that they don't feel protected under polygamous marriages. Polygamous wives are deprived of their due rights and their husbands are negligent in supporting them emotionally and financially. No academic study has been conducted in Pakistan on the circumstances faced by polygamous wives. Great work has been done on the advantages and disadvantages of Polygamy but no one has touched the topic of effects of Polygamy on mistreated wives. Through this study, the researchers want to provide awareness to the legal authorities, common people and specifically the women who are directly affected by this misunderstood law of Polygamy. A detailed study, therefore, required to be done on the subject. The research study relates to the legal and social sciences therefore methods of research used in social sciences will be applied. Cases brought before the courts in Peshawar (2010-2015) will be looked into for examining the troubles faced by polygamous wives and the security provided to them.

Key Words: Polygamy, Muslim Family Laws Ordinance, Council of Islamic Ideology, District Courts

1. Background of Muslim Family Laws Ordinance

The story of the origin of the Muslim Family Laws Ordinance started in the United States shortly after emergence of Pakistan in 1947. Pakistan's elegant and magnetic representative to the United Nations, Mohammad Ali Bogra, lost his heart to Aliya Saadi, his social secretary. The smitten Bogra got married, as he knew that multiple marriages were not an issue as now the Islamic Republic of Pakistan existed. He suggested in an interview to an American

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newspaper, that polygamy was a solution to the Western practice of divorce.[1]

Prime Minister Bogra got married on April 2, 1955, without obtaining consent of his first wife. The angry first Mrs. Bogra didn't kept quiet. She associated with the wives of Pakistan's influential dignitaries, who were learned and highly linked ladies and did token acts for authorization and empowerment for Pakistan's under privileged women.[2] Collectively, the women build up a political assault, by staying away from official gatherings attended by the new Mrs. Bogra and by launching campaign for legislation that would outlaw polygamy. The ban failed, but soon Bogra was no longer prime minister. [3]General Ayub Khan, a military man took the control through imposition of military ruling. His daughter Naseem was also a part of the campaign and the first thing which the general did was to pass the Muslim Family Laws Ordinance of 1961. Democracy failed but women had won, at least to some extent.[4] According to the new legislation, polygamy was not banned but written authorization of the senior wife was made mandatory, minimum age of 18 was made compulsory for marriage, and gave stipulations under which both men and women could file petition for divorce. Although several elucidation permits of the Holy Quran Polygamy stayed lawful in Pakistan, even though some interpretation of the Holy Quran allow expository space for a ban. Years have passed, but no more steps have been taken to ban polygamy. [5]

2. Laws in Pakistan

According to the laws in Pakistan, a man is allowed to contract subsequent marriage only after attaining the approval of his first wife. Pakistani and Islamic laws subsists to dispirit this practice by imposition of strict limitations on polygamy; but, the custom of polygamy is still widespread, especially in rural areas.[6]

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[1] Akhtar Baloch, The Pakistani Prime Minister Who Drove a Locomotive, *Dawn News*, 8th September 2015 https://www.dawn.com/news/1205473

[2] Ibid.

[3] Ibid.

[4] Ibid.

[5] Zakaria. R, *Polygamy and Child Wives: Women's Rights Are Going in the Wrong Direction in Pakistan* 2014, October 24

[6] Mansoori Tahir, *Family Law in Islam, Theory and Practice*, (Sharia Academy, IIUI, 2006), p. 232-234

Government of Pakistan constituted the Commission on Marriage and Family laws for complying with the issue of polygamy, divorce and other related matters. Its objective was to propose reforms in the family laws of Pakistan.[7] The Report of the commission pointed out that the verse relating to polygamy was revealed for giving protection to orphan girls and widows who were likely to be subjugated. For that reason, Quran allowed Muslims to marry more than one wife. But restriction was imposed on this concession by revelation of one more verse which declared that Polygamy will only be acceptable if the husband could do impartiality among all his wives. But it has been noticed that men who have indulged themselves in Polygamy have overlooked the main cause behind the permission given as well as the provision attached. Hence it is the most important responsibility of the state to make available such a procedure which can curb such men who shape laws according to their own benefit.[8]

The Commission on Marriage and Family Laws in 1955 composed a Report for the protection of the woman rights. [9]Commission was headed by Justice Abdur Rasheed. It consisted of seven members, of which three were women and four were men. The Commission agreed upon the theory that Family Laws had to be modernized and gave suggestions for modifications in law. After 1956, the civilian governments kept away from making legislations on the Report, but General Ayub Khan in 1961 made some of the recommendations of the Report into law through an Ordinance. Afterwards a resolution was submitted against the Muslim Family Law Ordinance in the National Assembly but was not approved. The Ordinance was never accepted by the Ulema and was declared as against Islam. It was left as an uncompensated law by the elected parliament of 1970.

The MFLO, 1961 in section 6 also incorporated several restricted modifications in the law linking to polygamy, by introducing the condition that the husband must present an application and submit fees to the local Union Council for obtaining prior written consent for marrying subsequent wife or wives.[10] Reasons for the marriage should be stated in the

[7] Report of the commission on marriage and family laws, *The gazette of Pakistan*, (1956, June 20), p.1216.

[8] Ibid.

[9] Law and Justice Commission of Pakistan, *Reports of Ad hoc Law Reform Commissions*, http://www.ljcp.gov.pk/

[10] *The Muslim Family Law Ordinance,* (1961).

application, and it should also be mentioned whether the applicant has taken the permission of the existing wife or wives. The chairman of the Union Council builds with the representatives of existing wife or wives and the applicant an Arbitration Council for determining the need of the proposed marriage.[11] If the husband contracts polygamous marriage without prior consent of wife or wives then he must pay the whole dower to the existing wife or wives without any delay, a fine of Rs.5000/- is also imposed and he may also be imprisoned for one year as a penalty. [12]Any polygamous marriage cannot be registered under the MFLO without the approval of Union Council. However, his subsequent marriage remains lawful even if he has not obtained consent of his existing wife or the Union Council. Moreover, the complexity in enforcing resort to the application procedure to the Union Council, put together with the unwillingness of judiciary to enforce the penalties enclosed in the MFLO (as apparent from the case law), is likely to hamper the effectiveness of the reform provisions. This might be the reason why some observers portray the provisions requiring the authorization of the Arbitration Council as a simple formality.

The limitations put on polygamy by prerequisite of application to the local Union Council for consent of existing wife/wives, combined with the penal sanctions for contracting a polygamous marriage without former permission; husband's contracting polygamous marriage in infringement of legal provisions is an ample ground for first wife to obtain decree of dissolution of marriage.[13] Article 9(1) of the MFLO lays down that if a husband is unsuccessful in fulfilling the needs of his wife sufficiently, or if the husband has multiple wives and he fails to keep them justifiably, the wife may seek any legal remedy and she may also make an application to the Chairman who shall compose an Arbitration Council to resolve the issue, and the Arbitration Council may also direct the husband to pay maintenance to the wife. [14]

[11] Ibid.

[12] Ibid.

[13] Kalanauri.Z. Concept *of Polygamy in Islam and Law in Pakistan*, (The electronic copy of it is available at: https://zafarkalanauri.com/wp-content/uploads/2020/05/CONCEPT-OF-POLYGAMY-IN-ISLAM-AND-LAW-IN-PAKISTAN.pdf), pg. 4-5.

[14] Ibid.

3. Laws Proposed by Council of Islamic Ideology of Pakistan

According to Mr. Sheerani, laws on marriage should be abolished which are opposed to the Sharia in his vision. He urged that Clause (f) of Section 2 of the Dissolution of Muslim Marriage Act 1939 which permits a wife to sue her husband for divorce i.e. "If he has multiple wives, does not take care of her equitably according to the directives of the Holy Quran" should be annulled.[15] He declared that a subsequent marriage is not a justifiable ground for a woman to file divorce. He affirmed that Islam has given right to men to keep multiple wives and asked the government to modify the laws where a husband is required to seek permission from the existing wives. [16]

The law relating to Polygamy is contained in section 6 of MFLO which requires the husband to seek the written approval of the local government authorities. According to Rule 14 of the MFLO, a polygamous marriage must be "just and necessary" which may be determined on the grounds such as barrenness of the existing wife, her mental illness, her disability, her incapability to have sexual relations, or her denial to reside with her husband followed by a decree for restitution of conjugal rights against her. According to section 6(5) of the MFLO if the husband fails to adopt the required procedure, he will be liable to make the immediate payment of the entire dower whether deferred or prompt to the existing wife/wives and he can also be imprisoned up to 1 year or fine. Thus these are the procedural mechanism which subsists to check exploitation of the right to polygamy which is permitted under Islam. It must be taken into consideration that there are several countries which have amended the laws of Sharia in order to meet up the requirements of the present age and how can one go against any other interpretation except the literal one of the Holy Quran when Quran has itself validated *Ijma* and *Ijtihad*. *Ijtihad* on such matters in conformity with the era, fair dealing and utility of the situation is significantly encouraged in our religion.

Polygamy is prohibited in several Muslim countries, such as Tajikistan, Tunisia, Lebanon, Turkey, Uzbekistan and Kyrgyz Republic. In Indonesia, Malaysia, Singapore, Philippines, Bangladesh and Pakistan, polygamy is allowed but is

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[15] Ali .K, Muslim women cannot object to husbands marriages, *Dawn News*, 22 October 2014 https://www.dawn.com/news/11395

[16] Ibid.

conditional.[17] Hence the submissions which are made by Mr. Sheerani appear unneeded in the contemporary world, even inside the community of Muslim states itself. Though opposition in banning polygamy is extensive, but it must be regulated fully to put a stop to exploitation of this stipulation which is available only by way of an exception. This verse in which the law relating to polygamy is embodied was revealed during the battle of Uhud. [18]A large number of men were killed which raised the worry for widows and orphans. [19]This point should be taken into consideration that "justly" should not be understood in terms of monetary aspects only but in all the aspects relating to marriage. The elder wife must believe the second marriage of her husband just. The stress is that "only one" is better so that that you do not incline towards injustice. There is an example of a woman namely Jamila who, approached the Holy Prophet (PBUH) and without any trouble got the first khula in Islam on the ground basis of her discontentment with her husband's appearance. If Islam has given such ample rights to women which includes permitting them divorce their husbands on such basis, it is worthwhile to say they also have the right of not allowing their husbands not to contract subsequent marriages in order to safeguard the sanctity of their marriage.

Numerous studies have revealed that polygamous marriages cause grave mental issues in women arising from worry, strain, envy and uncertainty. [20]It is frequently argued that opting for marriage is better than keeping extra marital relations, but lust only cannot be recognized as a legitimate ground for subsequent marriage by putting the rights of the elder wife and children at stake. Islam has laid huge significance on integrity and harmony of family relations; therefore, it is rationally imprudent to accept this argument.[21] If we look into all the references gathered from Quran and Hadith, the argument of Maulana Sheerani hold no significance. It is undeniable fact that *khula* is a legitimate yet unwanted act, but in such situations when a woman is being deprived of her rights in a marriage then this option can be availed. Law makers should play a vital role in controlling polygamy rather restricting the rights of an individual who is

[17] Ahmad H. Sheriff. *Why Polygamy Is Allowed,* Iran: World Organization for Islamic Services

[18] Khan.*M Polygamy in Islam*. DAWAN booklets.

[19] Ibid.

[20] Hamzah.M Othman.N *Stress, quarrels and neglect: the 'normal' polygamous family* 2010, January 14.

[21] Ibid.

already disadvantaged.[22] All traditional Muslim law schools have the same opinion that a Muslim man requires no authorization to contract subsequent marriage up to the limit of four. He is not required to present himself to inspection by any organization in advance for obtaining permission for a subsequent marriage. Though, section 6 of the MFLO attempts to curb this right. A man wishing to conduct multiple marriages is required to present an application to the chairman of the Union Council mentioning the grounds for the proposed marriage as well as whether he has obtained the permission of the existing wives. If the Council considers the proposed marriage just and necessary, then it may give permission.

The Council has full authority to make the decision whether the proposed marriage is necessary or not. It looks into such circumstances such as infertility, physical unfitness for conjugal relations, willful avoidance of a decree for restitution of conjugal rights, or mental illness of an existing wife. Section 6 of the MFLO clearly states that no man shall contract subsequent marriage without obtaining the authorization of the Arbitration Council. Though, it does not explicitly states that a marriage during the continuation of an existing marriage, without the authorization of the council is illegal. The subsequent marriage remains valid though it is contracted in contravention of section 6 of the MFLO; this fact makes the authorized law less effective. Regardless of considerable move towards confining polygamy, sanctions put are minute and have not been an effectual prevention.

A number of people are indulged in polygamy without any official authorization. Arranged marriages are responsible for polygamy to a certain extent.[23] Under the customs and traditions of the family young boys are forced to marry girl cousins with the motive to keep the property within the family. [24] Such marriages fail when the boy reach manhood. He, afterwards, marries a second wife. In some cases, when men get wealth they look for younger wives. Hence, the image once again is that the boys often have two wives, first one is the traditional wife which is selected by his parents and the second one is the sociable one, which he

[22] Khan.A .*Polygamy: a choice or an exception?* 2014, December 15.

[23] *Pakistan: Practice of polygamy, including legislation; rights of the first wife versus the second, including whether she has the right to refuse a second wife* (2013, December 18) Canada: Immigration and Refugee Board of Canada.

[24] Ibid.

chooses himself. Particularly, wealthy people opt for polygamy and justify it by the first wife's infertility or in order to have a love-match". In the latter case, a second marriage is a mechanism to keep away from charges of adultery. The fundamentalists in the country assert that section 6 of MFLO must be omitted in its present form as it is against the spirit of the Holy Quran and Sunnah. No matter what the authorized law commands, the observance of polygamy is accepted and only a small number of voices are elevated against it. Thus, polygamy "continues to be a vaguely viewed reality of life.[25]

4. Landmark Ruling against Polygamy

Shahzad Saqib was an already married man who decided to contract a subsequent marriage. But he felt no need of obtaining consent from his first wife Ayesha Bibi. When she came to know about her husband's second marriage she approached the court. Her lawyers made convincing arguments saying that MFLO states that permission from the first wife for contracting subsequent marriage is necessary. Saqib, argued that Islam has given him the permission to keep four wives and no such requirement has been made essential by the sharia.[26] According to the judgment of the court he was found guilty for violating the provisions of MFLO which states that a man wishing to re- marry must submit an application to the Chairman of the Arbitration Council. If chairman is not available, then he can submit the application to the Council. He was wrong. As the verdict showed, the Family Laws Ordinance requires that any man seeking permission to marry a second time must submit a written application to the chairman of the Arbitration Council. If the required criterion is not met, then the law levies fine and such man can also be put behind bars. The known consequences of polygamy faced by women and children invite interference by the judiciary.

A small number of judges in Pakistan have implemented this law. Some are convinced with the principle that as the permission of keeping four wives has been given by the Quran, conditions relating to the union hold no weight. This issue came up before the Supreme Court recently. In that case the judges have rightly pointed out that permission of polygamy should not be

[25] Ihsan Yilmaz. *Limits of Law: Social Engineering versus Civil Disobedience in Pakistan*. P. 33-34.

[26] Zakaria. R 2017, *A lesson to all men*. 2017, November8, Retrieved from www.dawn.com.

merely taken as an authority given to men but should be recognized as an inspiration of maintaining justice among the wives. The implementation of polygamy laws will prove to be a praiseworthy step in promotion of family laws in Pakistan and will also become an example for other Muslim countries to follow.[27] The enforcement of the penal laws of the Family Law Ordinance must be appreciated. Such like steps are promising towards the safeguard of women rights under Pakistani law.[28] This landmark verdict of the judiciary in the case of Shahzad Saqib, who violated the provisions of law, will be a deterrent tale for such likeminded men. The fright of prison will definitely stop what conscience has been incapable to. [29]

5. Prevalence of Polygamy in Pakistan

No statistics are available on the prevalence of polygamy in Pakistan. Polygamy is not extensively widespread. Although Polygamy is recognized component of religious tradition, yet it is not acceptable and the second wife is not usually honored by the family. [30]Polygamy is disliked by the people in general, socially as well as culturally, though it is practiced in some parts of Pakistani society. [31] It is more prevalent among feudalists and rich land holders who can easily manage to pay for maintaining multiple wives and many children. It exists among the urban elite as well. Economic restraints and social confrontation is faced by urban middle class men for contracting subsequent marriages.[32] In such classes the number of polygamous marriages is very minimal. The lower class, either urban or rural faces financial problems for marrying for the second time. Often women endeavor to get a high amount of dower, a marriage gift which wife receives from the husband in order to hold back a man from marrying for the second time. A marriage that is conducted without the approval of the Arbitration Council is not illegal, but it cannot be officially registered, meaning thereby that no judicial relief would be granted if any objection arises from such a marriage.[33] Non-

[27] Yasin.R, POLYGAMY *or one wife?* July 24, 2017.

[28] Ibid.

[29] Ibid.

[30] Sattar.N , Multiple Marriages , *Dawn News,* 4th September 2020 https://www.dawn.com/news/1577829

[31] Ibid.

[32] Krammer.S, Polygamy is rare around the world and mostly confined to a few regions, 7th December 2020.

[33] Canada: Immigration and Refugee Board of Canada, Pakistan: Practice of polygamy, including legislation; rights of the first wife versus

registration of a marriage does not invalidate the marriage nor is illegal according to the provisions of the official law. [34]

The MFLO does not particularly states that a marriage during the continuation of subsisting marriage, without obtaining the approval of the council is invalid, void or voidable. The fact that marriages contracted in infringement of section 6 of the MFLO continues to be legal turns the authorized law less effectual against illogical and unfair polygamy. [35] Arbitration Councils hold no importance and are not approached before contracting subsequent marriages. According to the MFLO a man is required to bring in notice of the Chairman of his local government about his intent of marrying for the second time, who subsequently forms a committee to determine the reason behind the intent of the subsequent marriage and then grant permission. The laws regarding the approval of the Arbitration Council are nothing more than a formality. [36] In view of the fact that private life in society is usually harmonized in accordance with the Islamic injunctions, lack of acceptability of the laws of the Muslim Family Laws Ordinance, 1961, has created such a situation where this law is still awaiting endorsement among the public and is time and again avoided than followed.[37] The judiciary is hesitant to impose the punishments embodied in the MFLO. Sanctions placed are minute and have failed to prove as an effective deterrent.[38] Majority of the citizens are ignorant of the law, and the law is not being put into action as the cases on record are very few in number. Legally speaking, both of the wives enjoy similar rights for instance both of them get an equal share in the inheritance. But when a husband takes another wife in marriage, the senior wife may be dishonored, distressed, or acquire less attention of the husband. [39]

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the second, including whether she has the right to refuse a second wife (2011-2013), 18 December 2013, PAK104701.E, available at: https://www.refworld.org/docid/52eb9ea04.html [accessed 29 June 2021].

[34] Ibid.

[35] Shah.W, Fresh Controversy over Polygamy, marriage dissolution, 27th October 2014.

[36] Ibid.

[37] Pearl, David. "The Impact of the Muslim Family Laws Ordinance (1961) In Quetta (Baluchistan) Pakistan." *Journal of the Indian Law Institute* 13: 4 (1971): 561-69.

[38] Ibid.

[39] Hammadi. Z (2015, October 12). Retrieved from https://www.linkedin.com/pulse/negative-consequences-polygamy-zainab-al-hammadi.

Practically, a wife cannot prevent her husband from contracting a second marriage. A wife may refuse to give her consent regarding second marriage, and can seek support from the court. [40]However, this way she can only get back her dower and right to seek divorce, but she in no way can stop her husband to re-marry. A very small number of women approach the court practically and seek help from the law. Senior wives seldom are in position to refuse second wives due to the culture and financial dependence. The husband may become violent to her if a senior wife refuses to accept a second wife. He may also take away her possessions and keep her children away from her in order to obtain her consent for second marriage.

The provision in MFLO which states that elder wife's permission must be obtained is contrary to Islamic laws. According to the Muslim law, a man is not bound to take consent of his existing wife for subsequent marriage. Religious leaders in Pakistan have rejected this provision of MFLO in an outright manner. In the Sharia law, first wife has no right of stopping her husband from contracting second marriage.[41] It is fair to conclude that the MFLO 1961 is no longer sustainable as the leading law even though it has not been abolished or abrogated.[42] A man becomes suspicious in the judgment of society if he talks about polygamy. Usually people consider polygamy as a sin; still it is legalized by the law of Pakistan. Stopping someone from having multiple wives is considered to be a breach of men's rights. Fair treatment of all the wives is an essential condition for a man who wishes to marry multiple wives. But unluckily, Pakistani men lack the quality of observing equality among wives, due to this reason the ratio of polygamy in our society is low.[43]

6. Unprotected Polygamous Wives

Monogamous wives are not protected completely as men often take pleasure in extramarital relationships with no binding economic consequences; therefore, he can 'play around' exclusive of any accountability for his sexual conduct. A man having

[40] Ibid.

[41] *Pakistan: Practice of polygamy, including legislation; rights of the first wife versus the second, including whether she has the right to refuse a second wife* (2013, December 18) Canada: Immigration and Refugee Board of Canada.

[42] Ibid.

[43] Ibid.

mistresses and illegitimate offspring is left blameless in a lot of countries. Polygamy, on the other hand, means protection for women united to one man, with a legitimate child in her arms and surrounded with respect, contrary to being seduced and then cast out into the streets perhaps with illegitimate children outside the rule of law.[44] Polygamy is prevalent in places where farming is major craft. Polygamy is practiced to strengthen social and financial stability of family. Hence, some societies are proud of polygamy and growing number of offspring to ensure their social and financial status. Additionally, some societies and considered polygamy as reproductive policy by men to increase their children.

Polygamy is mainly popular in the rural areas and is taking place in little educated people. Particularly in the developing nations and rural regions men are the heads in a family.[45] Men are free to take decisions at any time to marry one, two, three or four wives. Permission to marry multiple wives shows that males have the ability in bearing responsibility.[46] The major issue faced by wives is that men will always love new wife**.** Senior wives suffer pains and distress as their husband has mistreated them because of his marriage to a new wife. Polygamy results from various factors including cultural, social, economic, emotional and psychological factors.[47] Keeping in view the cultural characteristic of polygamy, it is said that polygamy is natural and necessary because women are larger in number as compared to men, thus polygamy should be eternal. On the contrary, modern women reject polygamy and demand its elimination being an old custom. In the Middle East countries, polygamy is marked with envy and rivalry among co-wives.[48] According to several studies envy among wives may rise to different levels even they reach up to causing physical hurt by women and suicide attempts among the women. [49]Most of the

[44] Jacobs.H (2014, February 15). Retrieved from http://dailytimes.com.pk/opinion/15-Feb-14/polygamy-in-pakistan

[45] Abbo, C., Ekblad, S., Waako, P., Muhwezi, W., Musisi, S., Okello, E. (2008). Psychological distress and associated factors among the attendees of traditional healing practices in Jinja and Iganga districts, Eastern Uganda: A cross-sectional study. International Journal of Mental Health Systems, 2, 1–9.

[46] Ibid.

[47] Abu Rabia, R. *Redefining polygamy among the Palestinian Bedouins in Israel: Colonialism, patriarchy, and resistance*. American University Journal of Gender Social Policy and Law, (2011). 19, 459–493.

[48] Ibid.

[49] Ibid.

families live in congested conditions which worsen conflicts and tension between co-wives.

The major drawback of polygamy is the poor educational achievement of kids plus psychological troubles of husbands. Various researches suggest that there is a close connection between polygamy and emotional troubles among kids and wives living in such set ups**.** The first wife suffers psychologically and therefore they are at risk to visit mental health centers. Affected ratio of drop in school among children, increased addiction of alcohol, juvenile felony as well as low sense of worth has also been reported as the causes of polygamy. It was specified that polygamous wives, have more problems than other type of wives who are living in monogamy in terms of matrimonial troubles. Additionally, polygamous women are not very much contented with their life as they undergo pains, sufferings from co-wives. Although a wife in order to seek her husband's attention may prepare what she owns to her husband, but the husband may not necessarily be glad about efforts of his wife.

Besides, polygamy leaves negative effects on mental healthiness of youngsters and teenagers. It is established that family structure mainly effects mental fitness of the kids; so the children will be more violent, troubled in communication and adjustment problems. Children also suffer from bad health due to poor nutrition and little attention and care with children. Furthermore, family clash is very common in polygamous families. It is found that polygamous women suffer huge problems and misery in their life. They experience low sense of worth, fear, nervousness, gloominess and aggression than monogamous wives. All such factors have negative influences on children. Kids may have psychological issues, social difficulties and poor educational level. Moreover, child-parent connection may be poor and ineffective in polygamous families. Polygamy causes rivalry and imbalanced division of the chores in household among co-wives. Furthermore, polygamy builds bitterness among the children and co-wives.[50]

7. Effects of Polygamy

There are numerous harmful effects that come from polygamous marriages including depressed co-wives against each other. Physical, psychological, and sexual abuse are often seen in

[50] Ibid.

polygamous marriages.[51] The co-wives compete with each other for the sake of seeking attention of their husband and they often feel envious when they see their husband with the other wives.[52]

7.1. Physical, Sexual, and Emotional Abuse

Abuse appears in various forms in a polygamous marriage. Often times, it is used as a tool of controlling the wives. Physical, psychological, or abuse of religion may be used by husband for controlling their wives. According to a study, in most of the cases where ruthless abuse cropped up in polygamous marriages, the women time and again entered into it reluctantly. Several husbands opted to keep subsequent marriages undisclosed to the older wives. Even if wives come to know about the additional wife, such addition cause considerable strain as it signifies a change in family unit and financial composition.[53]

In Islam, men are allowed to marry four wives provided he treats them with equity. Many polygamous wives have declared that it is the unfairness within their marriage that causes abuse and not polygamy itself. Envy and ambiguity are seen in the lives of such women. Time and again, wives feel jealousy toward the other co-wives when the husband is with them. And when the husband comes to her, she is not able to be with him sexually because she is thinking of the time when he was with the other wife and not with her. This can result into sexual abuse to the wife because the husband may coerce or compel her into it. [54]

7.2. Mental Health Issues

Islam permits women to work outside the home subject to the permission from her husband. Most of the women are not interested in doing jobs outside which creates serious financial issues as their husband has to distribute his finances among all. [55]Multiple wives, mistreatment, and financial issues create

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[51] Al-Krenawi, A. Women of polygamous marriages in primary health care centers. Contemporary Family Therapy, (1999). 21, 417–430.

[52] Ibid.

[53] Rahmanian, P., Munawar, K., Mukhtar, F. et al. Prevalence of mental health problems in women in polygamous versus monogamous marriages: a systematic review and meta-analysis. Arch Womens Ment Health 24, 339–351 (2021). https://doi.org/10.1007/s00737-020-01070-8

[54] Ibid.

[55] Al-Krenawi, A., Lev-Wiesel, R. *Wife abuse among polygamous and monogamous Bedouin-Arab families*. Journal of Divorce & Remarriage, (2008). 36, 151–165.

psychological problems polygamous wives.[56] Senior wives are usually considered as old wives whereas junior wives are viewed as young wives. Self-respect also gets lesser because senior wives consider the addition of a new wife as their failure as they were not capable to perform their duties of being a wife.

7.3. Religious Abuse, Or Exploitation of Religion

Women in Islam enjoy many rights that are granted to them by the Quran. Marriage is a social contract to which both the groom and bride agree to, but if any of the parties is not willing to continue due to any reason then divorce is allowed. Any party can seek divorce if the other party had become offensive and negligent.[57] Even in the matters of inheritance and property, a Muslim woman is not bound to share her income or inheritance with anyone. Lastly, according to the Islamic belief, Allah is the only master to women and if their husbands do not symbolize Allah then the marital bond is broken down.[58]

In spite of the rights and impartiality granted to women in the Islamic belief, religion can also sometimes turn into a form of abuse when the explanation and interpretation is used to manipulate women.[59] This is not only seen in Islam but other religions as well. According to a study husbands quote to their wives a verse according to which eternal life is promised to wife if she accepts her husband's second marriage. The wife was initially unwilling to accept her husband's second marriage unless and until her husband pressurized her to accept it by showing that Allah admire women who accepts her husband's remarriage. Often time's cruel and abusive husbands, manipulate religious content for controlling their wives in order to make them accept the polygamous marriage.[60]

7.4. Islamic Women's Spirituality

Irrespective of the religious belief, ill-treatment of women is common in almost all polygamous marriages. This mistreatment and disturbance of marital violence causes women to question their purpose of life, security and spirituality. Spirituality has always been to be both a source of strength and weakness among

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[56] Ibid.

[57] Ibid.

[58] Ibid.

[59] *The Practice of and Reasons for Polygamy*. Retrieved from http://www.religioustolerance.org/polyprac.html.

[60] Ibid.

abused Muslim women. Spirituality was a source of hope for most of the women, which made them cope with unfavorable circumstances.

8. Cases from Judicial Courts, Peshawar

8.1. *Mst Irum Shaheen vs Israr Ahmed* (Date of Institution: 02-04-2015), Status: Pending

FACTS OF THE CASE.— The Plaintiff filed a suit for the dissolution of marriage, payment of dower and maintenance. She has also filed a complaint under Section 6 of the Muslim Family Law Ordinance, 1961. The plaintiff got married to the defendant in July, 2010. 7 tola gold was fixed as deferred dower. The plaintiff also received dowry articles from her parents. Soon after the marriage, the attitude of the defendant turned brutal, and he started abusing the plaintiff on petty issues. After a month of the marriage, defendant took plaintiff to her mother's house and left her over there, and flew to Dubai after 10 days. Since then the all the expenditures of the plaintiff are borne by her parents. After the passage of some time, it came to the knowledge of the plaintiff that defendant contracted second marriage with a woman namely Mst Ismi Bibi without her permission. The defendant on the other side has turned down her plea by stating in the written statement that he asked the plaintiff time and again to re-join him but the plaintiff did not agree. Moreover, he asserted that the plaintiff has granted him permission for second marriage and refused to go back to his home. After recording of the evidence the marriage was dissolved on the basis of Khula.

DECISION.— An application was filed by the respondent for the rejection of complaint. The Respondent stated that Family Court has got no jurisdiction to entertain the application, in fact, only magistrate can take cognizance. According to section 20 of Family Courts Act, 1964, the court can exercise the power of Judicial Magistrate and has got jurisdiction while rest of the controversies will be resolved after recording pro and contra evidence of the parties.

ANALYSIS.— The suit is still pending before the Family Court. No precise system is available for the ascertainment of the fact whether the consent was acquired or not.

8.2. *Shumaila Hashmat v. Malik Shah Fahad* (Date of Institution: 18-10-2015), Status: Pending

FACTS OF THE CASE.—The plaintiff has filed a suit for dissolution of marriage as the husband has failed to provide for the maintenance and dower. He has also re-married without her prior approval. The plaintiff got married to the defendant on 14-11-2012, Rs 10 lacs and 25 tola gold were fixed her dower. Additionally, a house measuring 5 marlas was also transferred to her name. Jewellery which was given to the plaintiff in marriage was taken away from her on the fourth day after marriage. The attitude of the defendant and his mother got cruel day by day with the plaintiff. The defendant told her that the plaintiff holds no place in his heart and asked her time and again to leave his house. He also told plaintiff that he will only divorce her on the condition if she returns the House measuring 5 marla to the defendant. But the plaintiff did not agree. After a few months, the defendant went to Dubai without providing maintenance to the plaintiff. She was turned out of the house by the mother of the defendant. She also came to know through some sources that the defendant has contracted second marriage from Chitral. The defendant has denied all these allegations in his written statement except the charge of second marriage. He has claimed that prior approval was obtained from the plaintiff.

DECISION.—The case is in the process of recording of evidence.

ANALYSIS.—The case is pending. The defendant has admitted that he has contracted second marriage with the permission of the plaintiff. There is no procedure available for ascertaining whether the permission has been granted or not. This way the defendant can very easily avoid the arrest and fine.

9. Conclusion

This research paper concludes that polygamy is not a crime nor it is un-Islamic but the way husbands treat their wives is against all the fundamental rights of equality and equity. They violate all the norms of social justice by ignoring the senior wife or wives and giving more time and pleasure to the new wife or wives. If a person genuinely needs to marry again, he has to make sure that he able to fulfil all the demands of the existing as well as the new wife. This is exactly the teachings of Islam and the society we are living in. All the rights of polygamous women shall be fulfilled by

the husband; otherwise a strict legislation in this matter is the need of the hour.

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The Globalization and Sophistication of Transnational Policing and Transnational Organized Criminal Groups

Salahuddin*

Abstract

This paper briefly touches upon Transnational Organized Crimes (TOC) and the global challenges posed by the transnational organized groups involved in such crimes. In order to deal with the growing threats posed by organized criminal groups, the world community has witnessed globalization and sophistication in transnational policing through the establishment of Interpol, Europol and regional Task Forces. However, these groups have shown equal sophistication and have become more global due to their agility, adaptability and rich resources, and are constantly growing across the world.

Key words: Transnational policing, transnational organized crimes (TOC), transnational organized criminal groups, sophistication in TOC.

1. Introduction

A famous Nigerian proverb says that "*in the moment of crisis, the wise build bridges and the foolish build dams*".[1] The world today is confronted with the challenge of Transnational Organized Crimes (TOC) which pose the largest threat, alongside terrorism, to the global economic stability, democratic governance and security.[2] Police and law enforcement agencies are always at the frontline of

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[1] Penna Sue & Kirby Stuart, 'Bridge Over the River Crime: Mobility and the Policing of Organized Crime', *Mobilities,* (2013), 8:4, p. 487.

[2] R. Godson & P. Williams, "Strengthening cooperation against transnational crime", *Survival*, (1998), 40:3, p. 66, < DOI: 10.1093/survival/40.3.66> accessed 02 July 2019; French Diplomatic, "France and the fight against organized crime", (October 2014) <http://www.diplomatie.gouv.fr/en/french-foreign-policy/defence-security/organized-criminality/article/france-and-the-fight-against-20613> accessed 16 August 2018.

states' efforts to counter organized crime.[3] However, regardless of its law enforcement capacities or resources, an individual state alone cannot fight this complicated problem.[4] Carrying out extraterritorial police or military action without cooperation from other states is prone to high probability failure. This is evident from the US' unsuccessful war on drugs[5] and the so-called war on terror.[6] Realising the inevitability of a collective fight against this menace, the international community responds to TOC through bilateral and multilateral mechanisms, such as extradition and mutual assistance agreements, to ease down jurisdictional barriers for police, other law enforcement agencies and prosecuting bodies to conduct international investigations to bring groups and persons involved in TOC to trial.[7] Other responses include development of counter-TOC strategies through the involvement of international organizations such as Interpol or Europol, and the formation of special task forces.[8] Private transnational policing also plays a big role in fighting TOC.[9]

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[3] United Nations Office on Drugs and Crime (UNODC), "Law Enforcement", (2015), <https://www.unodc.org/unodc/en/organized-crime/law-enforcement.html> accessed 10 September 2019.

[4] Lemieux, Fredderic, (ed.), *International Police Cooperation: Emerging Issues, Theory and Practice*, (2010).

Uffculme, Devon, GBR: Willan Publishing. ProQuest ebrary. Web. 15 October 2015, Pp.1-6.

[5] Martha L. Cottam & Otwin Marenin, "International cooperation in the war on drugs: Mexico and the United States", *Policing and Society*, (1999), 9:3, 209.

[6] James Cockayne, "Transnational Organized Crime: Multilateral Responses to a Rising Threat. Coping with Crisis", *Working Paper Series*, (April 2007), International Peace Academy, p. 12. <http://ssrn.com/abstract=1008168> or <http://dx.doi.org/10.2139/ssrn.1008168> accessed 18 September 2020.

[7] R. Godson & P. Williams, 1998.

[8] Tom Sherman, "The internationalisation of crime and the world community's response", *Commonwealth Law Bulletin,* (1993), 19:4, 1814, <DOI: 10.1080/03050718.1993.9986329> accessed 18 September 2020.

[9] Carolin Liss & J.C. Sharman, "Global corporate crime-fighters: Private transnational responses to piracy and money laundering", *Review of International Political Economy,* (2015). 22:4, 693, <DOI: 10.1080/09692290.2014.936482> accessed 19 September 2020.

2. The Problem of Transnational Organized Crime (TOC)

TOC has existed for a very long time in human history, with examples of slavery and piracy since antiquity and opium smuggling in the last few centuries.[10] States however have witnessed an unprecedented increase in this menace since the 1990s due to globalization and advancement in modern technology, coupled with the absence of rule of law in some of the ex-USSR states in the post-cold war era and the chaos ensuing in many Eastern European states after the collapse of the Berlin Wall.[11] The traditional criminal groups such as the *Jamaican Yardies* or the *Sicilian Mafia*, are now replaced by more advanced, well-equipped and better organised transnational criminal groups, which pose newer challenges to police and other law enforcement agencies.[12]

Although there is no universally agreed upon definition of TOC, it can be said that it is illicit movement of persons, goods and services across states in a manner devoid of acceptable norms and standards.[13] In general, TOC can be divided into the following three broader categories:[14]

i. Smuggling–commodities, drugs and endangered species.

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[10] David Felsen & Akis Kalaitzidis, "A Historical Overview of Transnational Crime", In Reichel, P. (Ed.). *Handbook of transnational crime & justice*, (2005), 3-19, Thousand Oaks, CA: SAGE Publications, Inc.

[11] Chang Dae H., "World Ministerial Conference on Organized Transnational Crime", *International Journal of Comparative and Applied Criminal Justice*, (1999), 23:2, 141-180, <DOI: 10.1080/01924036.1999.9678638>; Stanislawski Bartosz H., "Transnational "Bads" in the Globalized World: The Case of Transnational Organized Crime", *Public Integrity*, (2004), 6:2, 155-170. <http://dx.doi.org/10.1080/10999922.2004.11051248>.

[12] Eavis Paul, "The hidden security threat: Transnational Organized Criminal Activity", *The RUSI Journal*, (2001), 146: 6, 45-50.

[13] Ngor Awunah Donald Ngor, "Effective Methods to Combat Transnational Organized Crime in Criminal Justice Processes: The Nigerian Perspective", *Resource Material Series* No. 58, (n.d.), 171-182.

[14] David J. Thomas, "Understanding Violent Criminals: Insights from the Frontlines of the Law Enforcement", *Forensic Psychology*, (2014), 104, Praeger.

ii. Contraband (goods subject to tariffs or quotas)–stolen cars and tobacco products, and;
iii. Services–prostitution, immigration, money laundering, indentured servitude and fraud.

3. Transnational Response to TOC - Policing Perspective

At the global level, the United Nations Convention against Transnational Organized Crime, 2000, is the core instrument in the fight against TOC which shows the recognition by Member States of the gravity of the problems posed by it, as well as the need for enhanced international cooperation in order to tackle those problems.[15] From the law enforcement perspective, transnational policing is the main global and regional response to TOC. Transnational policing is a complex assortment of multidimensional activities which is constantly expanding its tentacles across national borders to fight TOC.[16] According to Bowling and Sheptycki,[17] transnational policing is "*any form of order maintenance, law enforcement, peace-keeping, crime investigation, intelligence sharing or other form of police work that transcends or traverses national boundaries*." It is an old phenomenon, but it recently came to the global limelight due to its linkage to globalization[18] which has changed the intensity, frequency, and variety of both TOC and transnational policing.[19] The Police

[15] United Nations Convention against Transnational Organized Crime and the Protocols Thereto, 2000. <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>

[16] Loader Ian & Walker Neil, "Locating the Public Interest in Transnational Policing", *EUI Working Papers,* LAW 2007/17, 8, European University Institute, Department of Law, <http://ssrn.com/abstract=1022882>

[17] Bowling Ben & Sheptycki James, "Global policing and transnational rule with Law", *Transnational Legal Theory,* (2015), 6:1, 141-173.

[18] Sheptycki James, "Policing and contemporary governance: the anthropology of police in practice", *Policing and Society*, (2015). 1.

[19] Andreas Peter & Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations*. Cary, NC, USA: Oxford University Press, 2006, 4, ProQuest ebrary. Web. 5 November 2015.

Union of German States of 1851 is just one example of police cooperation to address transnational crimes.[20]

The world community has witnessed considerable growth in police cooperation and collaboration across international boundaries in the last two decades. The main objectives of such cooperation are to share criminal intelligence for better understanding of the cross-border suspected criminal groups, their modus operandi and intended criminal activities,[21]plan strategies to deal efficiently with such groups,[22] chase cases of transnational character,[23] and lastly to prepare strong criminal cases for prosecuting all elements involved in such crimes.[24] The current form of transnational policing is mainly 'elitist cooperation' in which only a small group of specialists from the countries concerned is involved, most of them in criminal investigation, information sharing or planning strategies. The regular police forces, except those deployed in border regions that may cooperate informally with each other for quick actions such as hot pursuit after a bank robbery, have limited role in transnational policing.[25] However, informal transnational

[20] Gerspacher Nadia, "The History of International Police Cooperation: A 150-year Evolution in the Trends and Approaches", *Global Crime*, (2008), 9:1-2, 169-184.

[21] Voronin Yuriy A., *Measures to Control Transnational Organized Crime.*, Document No. 184773, (October 5, 2000). <https://www.google.com/?gfe_rd=cr&ei=5mpHVrzHIKq40wWDw5TQBg&gws_rd=ssl#q=Voronin%2C+Yuriy+A.%2C+(October+5%2C+2000).+Measures+to+Control+Transnational+Organized>

[22] Lemieux, Fredderic, (ed.), *International Police Cooperation: Emerging Issues, Theory and Practice*, (2010), Uffculme, Devon, GBR: Willan Publishing. Pro Quest e library.

[23] Congram Mitchell, Bell Peter, Lauchs Mark, "Policing Transnational Organized Crime and Corruption: Exploring the Role of Communication Interception Technology", In M. Gill (Ed.), *Crime Prevention and Security Management*, (2013). p. 12, Palgrave Macmillan, UK.

[24] Bruns Milena, "A network approach to organized crime by the Dutch public sector", *Police Practice and Research*, (2015), 16:2, 161-174, <DOI: 10.1080/15614263.2014.972614>

[25] Aden Hartmut, "Convergence of Policing Policies and Transnational Policing in Europe", *European Journal of Crime, Criminal Law and Criminal Justice*, (2001), 9/2, 99–112, 2001. Kluwer Law

cooperation amongst police and law enforcement personnel especially in Europe is a common place in the fight against TOC.[26]

4. The International Criminal Police Organization (Interpol)

Interpol is the oldest organization in the modern world for international police cooperation. It was created in 1923 with the aim to trace or arrest offenders who fled overseas, through its notice system.[27] Each member state has a National Central Bureau (NCB) which is based in its own territory with staff from its own police force. NCB responds to any Interpol requests while standing responsible to the national hierarchies.[28] Through its successful database, which contains fingerprints, photographs and bio data of criminals, and is easily accessible to all member states, it has been helping member states to arrest criminals and fight international crimes since its inception.[29] Each year, over one million messages are transmitted through the Interpol network.[30] Its main priority areas are organized crimes and drugs, financial and high-tech crimes, public safety and terrorism, human trafficking, corruption, and fugitives.[31]

A major weakness of the Interpol is its budgetary constraints and hazy legal status which limit its operational capacities. Its consolidated annual budget for the year 2020 was

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International, Netherlands. http://web.a.ebscohost.com/ehost/pdfviewer/pdfviewer?sid=57b76661-5fcf-46af-856c-14fced36c7c3%40sessionmgr4003&vid=4&hid=4104

[26] Block Ludo, "International Policing in Russia: Police Co-operation Between the European Union Member States and the Russian Federation", *Policing and Society,* (2007), 17:4, 367-387.

[27] R. Godson & P. Williams, 1998.

[28] Bowling Ben, "Transnational Policing: The Globalization Thesis, a Typology and a Research Agenda", *Policing,* (2009), 3(2), p. 149–160.

[29] Williams Phil, *Crime, Illicit Markets, and Money Laundering,* (n.d.), 106-150, <https://carnegieendowment.org/pdf/files/mgi-ch3.pdf>

[30] Hoey Amanda, "Policing the New Europe - The Information Deficit", *International Review* of Law, (1998), *Computers & Technology,* 12:3, 501-511.

[31] INTERPOL, *Annual Report 2007*, 1, <http://www.interpol.int/>

136 million EUR[32] which is perhaps less than a few boats or planes owned by organized groups.[33] However, INTERPOL has adapted its performance over the years to prove its relevance[34] and today it benefits from and contributes to building up professional trust amongst the police forces around the world.[35] Through its regional offices, it has successfully coordinated police action against some serious transnational crimes, such as seizure of counterfeited products and arrest of suspects on an unprecedented scale.[36] In the field of intellectual property and trademark, Operation Jupiter, successfully coordinated by Interpol and World Customs Organization in South America, is a good example of the effectiveness of Interpol. The operation targeted organized counterfeiting groups with 600 arrests and the seizure of fake goods worth 500 million US dollars.[37] Other examples are operation Mamba in East Africa and operation Storm in Southeast Asia.[38] In recent years, Interpol expanded its scope of activities to include criminal intelligence analysis, coordination of international police operations, police training and professional development.[39]

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[32] INTERPOL, (n.d.), <https://www.interpol.int/en/Who-we-are/Our-funding>

[33] See Woodward Susan L. "Enhancing cooperation against trans-border crime in Southeast Europe: Is there an emerging Epistemic Community?", *Southeast European and Black Sea Studies*, (2004), 4:2, 223-240, <DOI: 10.1080/1468385042000247538>

[34] Cameron-Waller Stuart, The role of INTERPOL in the modern world: Global Developments of interest. *Commonwealth Law Bulletin*, (1993), 19:4, 1955-1959.

[35] Williams Phil, *Crime, Illicit Markets, and Money Laundering,* (n.d.), 106-150.

[36] INTERPOL, "Against Organized Crime: Interpol Trafficking and Counterfeiting Casebook", 2014, 6.

[37] INTERPOL, "Media release: Hundreds arrested in INTERPOL and Customs anti-counterfeiting operations across South America", (01 October 2010). 1. <http://www.interpol.int/News-and-media/News/2010/PR077>

[38] INTERPOL, "Operations", (n.d.), 4, <http://www.interpol.int/Crime-areas/Pharmaceutical-crime/Operations/Operation-Storm>

[39] Barnett, Michael, and Liv Coleman. "Designing Police: Interpol and the Study of Change in International Organizations." *International*

In order to augment the efforts of Interpol, states and organizations have taken additional bilateral or multilateral initiatives at various geographic and/ or sectorial levels which are tailored to the specificities of their problems.[40] Examples of bilateral initiatives are the UK-Italy cooperation for fighting trafficking in humans, drugs and other criminal activity, the US-South African anti-crime agreement,[41] and the 2001 *Kinmen Agreement* between the Red Cross Societies of China and Taiwan, with support from both governments, for swift repatriation of fugitives and criminals.[42] Examples of regional (and/or sub-regional) initiatives are the Southern African Regional Police Chiefs Co-operation Organization (SARPCCO), Caribbean Financial Action Task Force on Money Laundering, EUROPOL, the Organization of American States (OAS)'s efforts to combat corruption, Prüm Treaty (between Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria), and various initiatives to strengthen law-enforcement cooperation in the Baltic region.

5. Police Cooperation in Europe

Since the establishment of Trevi Group to combat terrorism in Europe, the EU and Council of Europe are feverishly engaged in the fight against the mushrooming growth of TOC.[43] Starting with the creation of the European Police Office (Europol), it set up the Schengen Information System for law enforcement co-operation and introduced the draft Framework Decision on sharing criminal records. Some states have gone even further at sub-regional level

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Studies Quarterly 49, no. 4 (2005): 593-619, <http://www.jstor.org/stable/3693502>

[40] Eavis Paul, "The hidden security threat: Transnational Organised Criminal Activity", 2001

[41] Schönteich Martin, "How organised is the state's response to organised crime?" *African Security Review*, (1999), 8:2, 3-12.

[42] Chang Lennon Y.C., "Formal and informal modalities for policing cybercrime across the Taiwan Strait", *Policing and Society,* (2013), 23:4, 540-555.

[43] Monica Den Boer, "Law Enforcement Cooperation and Transnational Organized Crime in Europe". In Mats Berdal and Monica Serrano (Ed.), *Transnational Organized Crime and International Security: Business as Usual,* (2002). 103, Lynne Rienner Publishers, London.

for information sharing through Prüm Convention.[44] Moreover, the introduction of quick mobility tools for law enforcement agencies, such as the European arrest warrant (EAW) and European evidence warrant (EEW), help a great deal in apprehending criminals and to carry along evidence from one jurisdiction to another for trial.[45]

Europol has played a leading role in the fight against TOC through developing common tools and mechanisms.[46] Established under the Europol Convention 1995 that came into force in 1998, it lies at the heart of EU's efforts to combat TOC amongst other serious crimes.[47] It started operating through setting up a small drug unit with the aim to improve the operational effectiveness of police cooperation among EU member states.[48] Gradually, through numerous amendments to the 1995 Convention, the scope of the Europol mandate was expanded to include other transnational crimes such as terrorism, financial crime, human trafficking etc. and to provide technical, legal and strategic advice to the senior management of the police forces of member states.[49] (Europol is playing now a key role in combating cybercrime

[44] Cameron-Waller Stuart, Interpol: a global service provider. In Steven David Brown, (Ed), (2008). *Combating International Crime: The Longer Arm of the Law,* (2008), 47, Taylor & Francis e-Library.

[45] Penna Sue & Kirby Stuart, 'Bridge Over the River Crime: Mobility and the Policing of Organised Crime', 2013.

[46] Bąkowski Piotr, "The EU response to organized crime", *Library Briefing: Library of the European Parliament*, (06 September 2013). 4. <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130625/LDM_BRI(2013)130625_REV1_EN.pdf>; Allum Felia & Monica Den Boer, "United We Stand? Conceptual Diversity in the EU Strategy Against Organized Crime", *Journal of European Integration*, (2013). 35:2, 135-150, <DOI: 10.1080/07036337.2012.689831.

[47] Gregory Frank, "Policing transition in Europe: The role of EUROPOL and the problem of organized crime", *Innovation: The European Journal of Social Science Research*, (1998), 11:3, 287-305.

[48] Carrapiço Helena & Trauner Florian, "Europol and its Influence on EU Policy-making on Organized Crime: Analyzing Governance Dynamics and Opportunities", *Perspectives on European Politics and Society*, (2013), 14:3, 357-371.

[49] Mounier Gregory, "Europol: A New Player in the EU External Policy Field?" *Perspectives on European Politics and Society,* (2009), 10:4, 582-602, <DOI: 10.1080/15705850903314841>

through setting up digital forensic, research and development facilities, and has established European Cybercrime Task Force (EUCTF) to promote a harmonized approach amongst the Member States in fighting cyber-crime.[50] Its core business lies in exchange of information and intelligence through a network of liaison officers in the member states. Moreover, as a central intelligence agency and support unit, it helps in the identification of links among criminal groups in different countries.[51] In 2010, through a Council Decision, Europol was transformed into an agency of the European Union. This, together with the Lisbon treaty, has empowered Europol to improve its operational capacities and position itself as having a central role in police cooperation, and increased its democratic accountability by subjecting it to the scrutiny of European Parliament and national parliaments.[52]

Despite its great work, Europol has been highly controversial since its birth and is often labelled as an 'unaccountable European FBI'. Unlike national police forces of the member states, Europol lacks executive powers. Its officers do not have the powers to conduct home searches or tap wires, or to arrest and investigate suspects.[53] Moreover, Europol's services for information exchange are not fully utilized by the member states as it followed a moderate approach in terms of marketing its added value to national investigations in TOC due to lack of support from police of member states.[54]

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[50] Rozée Stephen, Kaunert Christian & Léonard Sarah, "Is Europol a Comprehensive Policing Actor?", Perspectives on European Politics and Society, (2013), 14(3). 372-387, <DOI: 10.1080/15705854.2013.817808>

[51] Loader Ian, "Governing European Policing: Some Problems and Prospects", *Policing and Society*, (2002), 12:4, 291-305, <DOI: 10.1080/1043946022000005581>

[52] Mounier Gregory, Europol: A New Player in the EU External Policy Field?, 2009.

[53] Rozée Stephen, Kaunert Christian & Léonard Sarah, "Is Europol a Comprehensive Policing Actor?", 2013.

[54] Busuioc Madalina and Groenleer Martijn, "Beyond Design: The Evolution of Europol and Eurojust. *Amsterdam Centre for European Law and Governance.* Working Paper Series 2011 – 03, 5. <www.jur.uva.nl/acelg>

6. Special Task Forces

Special task forces are set up by states to address some specific pressing issues of TOC. For example, human trafficking especially of women and children for sexual exploitation is a serious transnational issue found almost everywhere in the world including Europe,[55] Canada,[56] and the US.[57] A successful fight against human trafficking requires strong coordination amongst multiple law enforcement agencies at national, regional and international levels.[58] A good example of such coordination between countries of origin, transit and destination is the Council of the Baltic Sea States Task Force against Trafficking in Human Beings (CBSS TF-THB), which has achieved considerable success in the fight against human trafficking.[59] A specialised unit, called the Anti-Trafficking National Coordination Unit (KOM), was established within TH-TFB in 2006, to provide support and coordination to counter trafficking actors on operational problems.[60]

The members of Caribbean Community (CARICOM) today are confronted with the risk of being overrun by transnational criminal activities in the coming years. The crimes that have hit

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[55] Lehti Martti & Aromaa Kauko, "Trafficking in Humans for Sexual Exploitation in Europe", *International Journal of Comparative and Applied Criminal Justice,* (2007), 31:2, 123-145.

[56] Mcdonald Lynn & Timoshkina Natalya, "The Life of Trafficked Sex Workers from the Former Eastern Bloc: The Canadian Dimension", *International Journal of Comparative and Applied Criminal Justice*, (2007), 31:2, 211-243

[57] Heil Erin & Nichols Andrea, "Hot spot trafficking: a theoretical discussion of the Potential problems associated with targeted policing and the eradication of sex trafficking in the United States", *Contemporary Justice Review*, (2014), 17:4, 421-433.

[58] Sheldon X. Zhang, *Smuggling and Trafficking in Human Beings: All Roads Lead to America*, (2007), 155, *Praeger Publishers*, Westport.

[59] Ekstedt Anna, "Current Activities of the Council of the Baltic Sea States Task Force against Trafficking in Human Beings", (n.d.), 361. <http://ifsh.de/file-CORE/documents/yearbook/english/09/Ekstedt-en.pdf>

[60] United Nations Office on Drugs and Crime (UNODC), "Human Trafficking in the Baltic Sea Region: State and Civil Society Cooperation on Victims' Assistance and Protection", (2010). 130.

hard CARICOM include trafficking in illegal drugs and guns, smuggling of contraband cigarettes, petroleum, and steel, as well as cyber-crimes such as Lotto scam[61] and are beyond the capacity of the individual national police forces.[62] To respond to this growing threat of TOC, CARICOM established the Regional Intelligence Fusion Center (RIFC) for managing intelligence environment and sharing intelligence with other relevant actors in furtherance of CARICOM's security priorities.[63]

7. Private Security and Policing

Another development in the transnational fight against TOC is the active role of private police and security agencies. The notion that state is the main apparatus for the governance of social life and policing of society has somehow changed with the emergence of private security and policing companies who are contributing to the police services provided by the state.[64] In some countries such as the US and Canada, private policing companies today have more staff and higher budgets than public police. Many large-scale corporate police organizations work across different states and countries.[65] Sophistication in TOC requires experts to construct appropriate tools and strategies, which public sector police are often lacking.[66] Moreover, in many countries public police do not enjoy full trust and confidence of the population due to inefficiency, accusations of corruption, and paying no heed to

[61] IMPACS, "CARICOM Crime and Security Strategy 2013: Securing the Region", 2013, 16.

[62] Sanders Ronald, "Crime in the Caribbean: An overwhelming phenomenon", *The Round Table*, (2003), 92:370, 377-390.

[63] CARICOM, "CARICOM Implementing Agency for Crime and Security (IMPACS)", (n.d.), <https://www.caricom.org/about-caricom/who-we-are/institutions1/caricom-implementing-agency-for-crime-and-security-impacs>

[64] Sheptycki James, "Accountability Across the Policing Field: Towards a General Cartography of Accountability for Post-Modern Policing", *Policing and Society,* (2002), 12:4.

[65] Joh, Elizabeth E., "Conceptualizing the Private Police", *Utah Law Review,* 2005, 573-617. UC Davis Legal Studies Research Paper No. 27, p. 573.

[66] Gagliardi Pete, "Transnational organized crime and gun violence. A case for Fire-arm forensic intelligence Sharing", *International Review of Law, Computers & Technology,* (2012), 26:1, 83-95.

the victims' complaints etc.[67] Therefore, in order to safeguard their reputation, many private companies and corporate organizations, such as computer software companies or banks, prefer private security companies over public police to carry out any investigations.[68]

Bayley and Shearing theorized private policing or security as a preventive action to reduce the risk of crime against private property in a physical or tangible form in a specific geographical location.[69] But the role of private-sector policing is equally important in economic and financial transactions taking place in virtual spaces. Many corporate firms today are working in forensic accounting and corporate investigation (FACI) and anti-money laundering and are playing a role not only in investigation of economic crimes but also in bringing the criminals to justice.[70]

8. Sophistication in Transnational Organized Crimes

TOC is analogous to the train service between Paris and London, which is transnational in nature, but it keeps local characteristics, i.e. when it travels in London or Paris, it is local and has local impact. In order to evade any law enforcement action, TOC may be divided into minor crimes in any single jurisdiction. For example, the process of money laundering can take place in several jurisdictions and in different ways some of which, such as losing money in gambling, may not be even crimes in some countries.[71] Similarly, as a money laundering vehicle, many complicated mechanisms are commonly used in the sale and

[67] Sarre Rick & Prenzler Tim, "The relationship between police and private security: Models and future directions", *International Journal of Comparative and Applied Criminal Justice,* (2000), 24:1, 91-113.

[68] Stephen Schneider, "Privatizing Economic Crime Enforcement: Exploring the Role of Private Sector Investigative Agencies in Combating Money Laundering", *Policing and Society*, (2006), 16:3, p. 285-312.

[69] See Rushin Stephen, "The Regulation of Private Police. *West Virginia Law Review,* (November 5, 2012), 115, 159-203.

[70] James W. Williams, "Governability Matters: The Private Policing of Economic Crime and the Challenge of Democratic Governance2, *Policing and Society*, (2005), 15:2, 187-211, <DOI: 10.1080/10439460500071671>

[71] R. Godson & P. Williams, 1998.

purchase of real estate even in developed countries which easily frustrate efforts to unearth the sources of funds obtained through transnational crimes; these mechanisms include but are not limited to appointing fake nominees, making fake mortgages, solicitor–client privilege, and legal trust accounts.[72] To give one example, according to some estimates about C$ 5.3 billion was laundered through the real estate business in British Columbia, Canada in 2018, most of which was channelized through Vancouver which is the country's largest and most expensive city.[73] To travel fast like the train, the organized groups exploit modern technology, economic markets and develop a labyrinth of complicated networks in multiple jurisdictions. They use services of specialists in information technology and communications to conduct intelligence operations or transfer money, and hire specialists in networking with accomplices within the ranks of law enforcement agencies or other criminal groups.[74] This doubles the challenge for the law enforcement agencies as they have to respond locally and globally for countering groups which are both organized and decentralized.[75]

There is a kind of reciprocal relationship between transnational policing and TOC, i.e. development by either side result in development by the other side.[76] We hear about a 'migration industry' including both legal and illegal operators

[72] Stephen Schneider, "Organized crime, money laundering, and the real estate market in Canada", *Journal of Property Research*, (2004), 21:2, 99-118, <DOI: 10.1080/0959991042000328801>

[73] Levinson-King Robin, "How gangs used Vancouver's real estate market to launder $5bn"? *BBC News, Toronto*. <https://www.bbc.com/news/world-us-canada-48231558>

[74] Shelley Louise I. & Picarelli John T., "Methods Not Motives: Implications of the Convergence of International Organized Crime and Terrorism", *Police Practice and Research*, (2002), 3:4, 305-318, DOI: 10.1080/1561426022000032079.

[75] Katina Michael, "The Paradigm Shift in Transnational Organized Crime", (2008), 20. <http://works.bepress.com/kmichael/195/>

[76] Sheptycki James, "Global Law Enforcement as A Protection Racket: Some skeptical notes on transnational organized crime as an object of global governance", In Adam Edwards and Peter Gills (Ed.), *Transnational Organized Crime: Perspective on Global Security,* (2003), 42-59, Taylor & Francis e-Library.

with an increase in human trafficking, human smuggling,[77] and an increase in drug trafficking in Europe.[78] Similarly, transnational crimes in and from Southeast Asia have achieved global outreach, thus trafficking huge quantities of high-profit drugs such as methamphetamine, massive illegal shipments of wildlife and forest products, and a wide range of counterfeit consumer and industrial goods. Not only this but that the groups involved in these crimes also smuggle migrants for the purposes of sexual and labor exploitation to other countries.[79] Nevertheless, in parallel to this growth in transnational crimes, we also hear about continuous growth of transnational policing cooperation and their success stories. A good example is the successful joint Europol and Eurojet operation, in 2012, to arrest 48 members of an Albanian organized groups involved in drug trafficking in France, Germany and Switzerland.[80] Unfortunately, despite these success stories of transnational policing, organized crimes keep on growing both in volume and form. According to the Global Financial Integrity (GFI), a Washington DC-based research and advisory organization,[81] the annual business of transnational crime is valued at an average of $1.6 trillion to $2.2 trillion.

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[77] Papadopoulos Apostolos G., « Migration and security threats in south-eastern Europe", *Southeast European and Black Sea Studies,* (2011), 11:4, 451-469, <DOI: 10.1080/14683857.2011.632545>; Long Lynellyn D., "Trafficking in women and children as a security challenge in Southeast Europe", *Southeast European and Black Sea Studies*, (2002), 2:2, 53-68, <DOI: 10.1080/14683850208454690>

[78] Haughton Suzette A., "The Jamaica – Britain border and drug trafficking", *The Round Table*, (2007), 96:390, 279-303.

[79] United Nations Office on Drugs and Crimes (UNODC), "Transnational Organized Crime in Southeast Asia: Evolution, Growth and Impact", (2019). 1-3. <https://www.unodc.org/documents/southeastasiaandpacific/Publications/2019/SEA_TOCTA_2019_web.pdf>

[80] Europol, "Successful Operation Against Albanian International Organized Crime Network", (23 October 2012), 1.

[81] Global Financial Integrity (GFI), "Transnational Crime is a $1.6 trillion to $2.2 trillion Annual "Business", Finds New GFI Report", (March 27, 2017), <https://gfintegrity.org/press-release/transnational-crime-is-a-1-6-trillion-to-2-2-trillion-annual-business-finds-new-gfi-report/>

Organized groups maneuver in the grey areas between licit and illicit exploiting the gaps in legislation or law enforcement mechanisms.[82] In the hide and seek with transnational police, they keep on changing their routes and often shift their operations towards the states where business opportunities are high compared to risks due to weak legal and bureaucratic systems and flawed politics.[83] States affected by turbulences and states with weak institutions, such as Libya, Syria or the Caribbean community, are hotbeds for organized crimes as they can easily operate with impunity in these countries.[84] Libya now offers a convergence point for the illicit trade of arms, drugs and human trafficking; cocaine coming through West Africa and illegal migrants coming from Syria, Afghanistan, and many African countries are channelized and trafficked through Libya to Europe.[85]

In pursuit of their financial gains, organized groups can go to any extreme, violating all accepted norms of a civilized world. Moreover, these groups can be disorganized or decentralized with wide networks and loose alliances of criminals amongst whom a strong brotherhood exists for the achievement of their criminal

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[82] Beare Margaret, "Structures, Strategies and Tactics of Transnational Criminal Organizations: Critical Issues for Enforcement. Paper presented at the Transnational Crime Conference convened by the Australian Institute of Criminology in association with the Australian Federal Police and Australian Customs Service and held in Canberra, (9-10 March 2000), 4-5. <http://pgil.pk/wp-content/uploads/2014/04/bearesst.pdf>

[83] Väyrynen Raimo, "Illegal Immigration, Human Trafficking, and Organized Crime", Discussion Paper No. 2003/72, UNU World Institute for Development Economics Research (UNU/WIDER), 2-3. <https://ideas.repec.org/p/unu/wpaper/dp2003-72.html>

[84] Gustafson Kristian, "Complex Threats". *The RUSI Journal*, (2010), 155:1, 72-78, <DOI: 10.1080/03071841003683500>; Bagley Bruce Michael, "Globalization and Transnational Organized Crime: The Russian Mafia in Latin America and the Caribbean", *University of Miami*. (November 15, 2001), 2. <https://www.researchgate.net/publication/242769575>

[85] Williams Matthew, "Drugs and Smugglers: Libya has become a haven for transnational crime", The Conflict Archives. (May 29, 2019). <http://theconflictarchives.com/transnational-crime/2019/5/29/drugs-and-smugglers-libya-has-become-a-haven-for-transnational-crime>

objectives.[86] Law enforcement agencies, by contrast, follow certain rules and respect their chain of command when working in their own countries and respect the rules of the other country or countries when working abroad.[87] An obvious corollary of this disparity in their modus operandi is that the former, with their flexibility, agility and quick adaptability, are seemingly gaining upper hand;[88] this is evident from the clearly visible signs of continuous growth in volume, geographic reach and profitability of organised crimes.[89] We hear about the drowning of illegal migrants on a regular basis; around 80 migrants died in the beginning of this month, i.e. July, 2019 when the boat carrying them from Libya to Europe capsized in the Mediterranean Sea near Tunisia while over 60 had drowned in May this year, to mention a few.[90]

Conclusion

Transnational policing against TOC is an old phenomenon which has gained more momentum today in response to the unprecedented growth in TOC. Realizing the gravity of the threat posed by TOC and the need for a collective action against it, states

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[86] McCarthy Dennis M. P., *An Economic History of Organized Crime A national and transnational approach,* (2011). 20-23, Taylor & Francis e-Library

[87] Ohr Bruce G., "Effective Methods to Combat Transnational Organized Crime in Criminal Justice Processes". *116th International Training Course Visiting Experts' Papers. Resource Material* Series 58, (n. d.). 40-60.

[88] Galeotti Mark, "Transnational Organized Crime: Law Enforcement as a Global Battlespace", *Small Wars & Insurgencies*, (2002), 13:2, 29-39.

[89] Schreier Fred, "Human Trafficking, Organised Crime & Intelligence", In Cornelius Friesendorf *Strategies Against Human Trafficking: The Role of Security Sector.* (September 2009), 220-221, Study Group Information, Vienna and Geneva, <https://www.dcaf.ch/content/download/36916/529049/file/Chapter%206.pdf>

[90] "More than 80 feared dead as migrant boat capsizes off Tunisia", *The Guardian,* (July 4, 2019), <https://www.theguardian.com/world/2019/jul/04/boat-with-dozens-of-migrants-capsizes-off-tunisia-coast>

are responding through various initiatives such as Interpol, Europol, Special Task Forces, and other bilateral and multilateral agreements for police cooperation and coordination. Private police and security companies are also actively involved in the fight against some TOC, which are mainly hired by big commercial organizations. Although both transnational criminal groups and transnational policing have displayed considerable growth and sophistication in the last two decades, the former have the proven ability to outwalk the former and they merrily flow and grow across borders.

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Compatibility between Modern International Humanitarian Law and Principles of Islamic Law of Conduct of War: A Comparative Analysis

Humna Sohail*

Abstract

The present study undertakes the comparative analysis of the general principles regulating the behavior of combatants in international humanitarian law and Islamic law. The article explores the fact that the regulation of the behavior of combatants during an armed conflict has a very old Islamic history as compared to the modern-day IHL practices. Its acknowledgment of the notion of military necessity is emphatically conjoined with the observance of elementary considerations of humanity that are the sine qua non for mitigating the unnecessary harm to combatants on one hand and any harm at all to civilians on the other. This balancing effort between the military necessity and humanity finds basis in the objectives of Shari'ah as well. Thus, the wholeness of Islamic law best serves as a model for refining and complementing the modern-day humanitarian regime. Conflicts are indispensable yet they must be conducted humanely. Thus, the present study concludes with the recommendations whereby both the humanitarian regimes can simultaneously be employed and reinforced for maximising the protection they offer.

Keywords: International humanitarian law; Islamic law; Maqasid al-Shari'ah; proportionality; distinction; balance.

1. Introduction

In contemporary times conflicts of different nature are common that have gruesome effects on mankind.[1] Conflicts that know no boundaries can be destructive on a mass scale. Inviolability of human life and dignity is a universal principle recognised in every religion and every legal regime.[2] This article is an attempt to analyse and compare those general principles of humanitarian law

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[1] Troy E. Smith, "Binary Terror: The Reality of Terrorism in a Virtual World," *American Intelligence Journal* 32 (2) (2015): 131.

[2] Glenn Hughes, "The Concept of Dignity in the Universal Declaration of Human Rights," *The Journal of Religious Ethics* 39 (1) (2011): 1.

and Islamic law that are applicable once the hostilities have started (*jus in bello*), irrespective of the justification of the use of force which is a distinct field of *jus ad bellum* that is beyond the scope of this article. As a starting point, the origin, sources, and general principles of conduct of hostilities in both Islamic law and humanitarian law (IHL) are discussed. This is followed by the in-depth analysis of the compatibility of general principles under said regimes. Then the central point of reference i.e. how invoking the principles laid down in Shariah can help in alleviating the sufferings resulting from hostilities, especially where it is erroneously interpreted as a reference to the arbitrary exercise of force in the conflicts in a Muslim context, is discussed. Finally, comparing those general principles if the result depicts their identical underlying principle of humanizing conflicts only then the issue of how both of the legal regimes can be simultaneously employed to afford maximum protection to civilians and combatants will be addressed.

The consequences of armed conflicts are not restricted just to the territories of warring states (in case of an international armed conflict, IAC) or the territory of the state where a non-international armed conflict (NIAC) is taking place yet it has an overall global impact.[3] So, this calls for a dire need to not just implement the provisions of IHL but to highlight the role played by every religion in minimising the effects of armed conflict. No religion in the world supports the arbitrary use of force rather acknowledges restriction in this regard. The most pressing issue faced by the contemporary world is the compliance with IHL rules by Muslim countries. This is because of the poor governing mechanisms, halted democracy, disrespect of inherent fundamental human rights, and especially because of reliance upon the erroneous interpretation of the provisions of Islamic law. But the compliance is vital not only for survival but also because IHL has the potential of limiting the effects of warfare. The dilemma is that many of the conflicts today are NIACs and the so-called Muslim armed groups involved falsely refers to the provisions of Islamic law as justifications for their acts. So, it is imperative to clarify the real position of Islam in governing the conduct of hostilities during an armed conflict in general (as these principles are the same for both IAC and NIAC). Moreover, this study is different from previous works done in the sense that it did not assess the humanitarian principles in Islam on the

[3] M. Cherif Bassiouni, "The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non State Actors," *The Journal of Criminal Law and Criminology* 98 (3) (2008): 172.

standard of IHL because the researcher believes that the humanitarian rules are, without any prejudice, not just the product of the efforts of Henry Dunant (father of modern IHL) rather it is as old as the history of Islam itself. The present-day humanitarian regime reflects those ancient and still equally applicable principles. So it will be an absolute absurdity to standardize the norms of IHL for assessing the position of Islam. Yet they may be compared to assess their objectives which if turn identical will reinforce each other and will be the basis of the widest possible protection. It is reiterated here that the present study will not discuss the justification of the use of force that whether it was legitimate or not under Islamic law or international law yet the discussion will be restricted to the behavior of combatants once an armed conflict has begun.

Contemporary humanitarian law is faced with several issues resulting especially from the asymmetric dynamics of warfare. Though it is comprehensive enough to protect any kind of conflict, a mixture of different situations[4] or any category of individual yet like any other subfield of public international law IHL is no exception to the criticism for the lacunas in its enforcement mechanisms.[5] At this very point, the religion has its role-playing and especially when religion is Islam whose followers submit absolutely to the obedience of the Divine Authority.[6]

2. Islamic law of armed conflict

2.1. Attributes of Islamic *jus in bello*

Parallel to the application of secular humanitarian regime other manifestations also emerged that strikes balance between the military necessity (i.e. to weaken the opposite forces renders certain prohibitions legal) and humanity by limiting the means and methods of warfare. One such example is of the Islamic *jus in bello* that dates back to the seventh century to the time of the

[4] See, for example, Daniela Gavshon, "The Applicability of IHL in Mixed Situations of Disaster and Conflict," *Journal of Conflict & Security Law* 14 (2) (2009): 243-263.

[5] The reference is made to the loopholes in IHL in this article where research felt it vital to the discussion.

[6] The supremacy of Word of God is very well explained by Muhammad Qasim Zaman, "The Sovereignty of God in Modern Islamic Thought," *Journal of the Royal Asiatic Society* 25 (3) 2015: 389-418.

Prophet Muhammad, (PBUH). This is marked by the paradigm shift from the nasty conduct of hostilities in the Greek and Roman era to the time of enlightenment with the rise of Islam (the Prophetic era). The fighters of adversaries were guaranteed a certain set of rights coupled with protections provided they behave per the fundamental principles including the distinction between combatants and non-combatants[7] which forms the basis of the lawful targets of attack and the immunity to women, infirms, children, and the civilian objects.[8]

2.2 Defining and categorization of armed conflicts

There is a dichotomy of armed conflicts recognized by Islamic law. The conflict not of an international character is the wars fought for the preservation and protection of public interest. This involves the conflict against the dissident Kharijites and the rebellions that oppose the imam, the communal interest, and embrace an unacceptable approach (Mazhb).[9] In contrast, the international armed conflict in Islam encompasses the armed conflict with apostates and polytheists. Concerning the former, it involves the conflict with those individuals declaring themselves Muslims but denouncing later on.[10] Each conflict has some common defined rules and restrictions which are discussed below in the light of sources of Islamic law.

2.3 Analysis of fundamental principles of Islamic jus *in bello*

2.3.1 Principle of distinction

A. Non-combatant immunity and the principle of proportionality.— As for conflicts, there is also a dichotomy of individuals called either the protected persons or unprotected persons legally referred to as combatants and non-combatants. From protection, the writer intends to refer to the immunity whereby some individuals like servants, children, women, sick,

[7] Ahmed Zaki Yamani, "Humanitarian International Law in Islam: A General Outlook," *Michigan Journal of International Law* 7, no. 1 (1985): 189-190.

[8] Muhammad Munir, "The Protection of Civilians in War: Non-Combatant Immunity in Islamic Law," *Hamdard Islámicus* 34, no. 4 (October-December 2011): 7.

[9] Yamani, "Humanitarian International Law in Islam: A General Outlook," 193.

[10] Ibid, 195.

priests, peasants cannot be, generally, subject to direct attack. The sources which the writer will rely on for establishing the non-combatant immunity are Qurʾan, Sunnah, and qawl al-sahabi. The Lawgiver says: "Fight in the cause of God those who fight you, but do not transgress limit; for God loveth not transgressors."[11] According to the interpretation of most notable commentators among sahabah and their followers, the war in the first place cannot be initiated by Muslims because it would otherwise amount to transgression (iʿtida').[12] In their interpretation, Allah by saying those who wage war against you meant those who participate in such war. Moreover, those who are not in a position to fight must be protected at all times. This viewpoint is substantiated by the traditions of Prophet Muhammad (PBUH), which are discussed in succeeding paras. Besides these prohibitions mutilation is also prohibited in the view of al-Hassan al-Basri. This verse has equal application in Islamic *jus in bello* as well as in jus ad bellum. In the jargon of IHL, this is the fundamental principle of distinction which will be discussed later in the discussion on the general principles of IHL.

There are several instances from and sayings of Prophet Muhammad (PBUH) where he reiterated the protections afforded to non-combatant by Qurʾan. There are several traditions where Prophet Muhammad (PBUH) was reported to have said about the

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[11] Al-Qur'an, II: 190.

[12] Among the companions reference is made to ʿAbd Allah b. ʿAbbas and among the followers of companions (tabiʿun) to 'Umar b. Abd al-ʿAziz. Various interpretations of this verse exist like of al-Rabiʿ b. Kesam al-Kufi who refers to Chapter IX verse 5 and 6 as superseding the verse 190 stated in the text above and focusing on the totality in fight.

One other interpretation is by Abi al-ʿAliya Rafiʿ b. Mehran who states that for the presence of *ʿillah* in the verses of chapter 9 Tauba they are absolute as compare to the verse 190 of Chapter II which is conditional for the want of *ʿillah*. He interprets *iʿtida'* as prohibition on fighting against inactives. In the words of Muhammad Abdel Haleem: "Arabic command la taʿtadu is so general that commentators have agreed that it includes prohibition of starting hostilities, fighting non-combatants, disproportionate response to aggression, etc. These interpretations are very systematically explained in the article written by Dr. Muhammad Munir titled The Protection of Civilians in War: Non-Combatant Immunity in Islamic Law published in *Hamdard Islámicus* in year 2011.

prohibition of killing children and women.[13] Even in one of the battles, Prophet made their killing prohibited after encountering a slain body of a woman[14] who perhaps would not have participated in the hostilities[15]. One report even states that Prophet commanded the Muslim commander who was said to have killed that woman to refrain from doing so and made the killing of *ʿusafaʾ* (servant) also prohibited in war.[16] By way of analogy, many other individuals are included in the meaning of *ʿusafaʾ* including medical personnel, and employees taking no active part in hostilities.[17] Moreover, when Muslim troops were ready to fight the invaders from Byzantine, Prophet Muhammad (PBUH) commanded the fighters in the following words:

> *"In avenging the injuries inflicted upon us molest not the harmless inmates of domestic seclusion; spare the weakness of the female sex; injure not the infants at the breast or those who are ill in the bed. Refrain from demolishing the houses of the unresisting inhabitants; destroy not the means of their subsistence, nor their fruit-trees and touch not the palm."*[18]

There is another hadith whereby restrictions are imposed upon the methods of warfare.[19] These are a few of the evidence from Sunnah whereby it is established that based on the categories of individuals; some of them called the combatants are protected and can't be targeted.

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[13] One such tradition is reported by Imam Ahmad b. Hanbal, *Musnad* (Cairo: Muʾassah al-Qurtabah, n.d.) volume II, 22-23 (ahadith nos. 4739 and 4747).

[14] Muhammad b. Yazid b. Majah, *Sunan* (ed. M. Foʾad ʿAbdul Baqi) (Beirut: Dar al-Fikr, n.d.) volume II, 947 (hadith no. 2841).

[15] Abu ʿUbayd al-Qssam b. Salam, *The Book of Revenue* (translated by Imran Ahsan Khan Nyazee) (Reading: Garnet Publishing, 2002), 36.

[16] Abu Bakr ʿAbdur Razzaaq, *Musannaf* (Beirut: al-Maktab al-Islami, 1403) 2nd edition, volume V, 201 (hadith no. 9382). This tradition is also reported in *Sunan* of Ibn Majah (hadith no. 2842), *al-Sunnan al-Kubra* of Imam al-Nasaʾi (hadith no. 8625) and others.

[17] For details see Muhammad Khair Haikal, *Al- Jihud wa al-Qital fi al-Siyasah al-Shar'iyyah* (Beirut: Dar al-Bayariq, 1996) 2nd edition, volume II, 1247.

[18] Anwar Ahmad Qadri, *Islamic Jurisprudence in the Modern World* (Lahore: Sh. Muhammad Ashraf Sons, 1973), 278.

[19] Muslim b. al- Hajjaj al-Nisapuri, *Sahih Muslim* (ed. M. Foʾad ʿAbdul Baqi) (Beirut: Dar Ihaʾ al-Turath al-ʾ Arabi, n.d.) volume III, 1356 (hadith no. 1731).

Now the immunity enjoyed by civilians during an armed conflict will be established through qawl al-sahabi. The ten commandments of Companion Abu Bakar ʿAbd Allah b. Abi Quhafah[20] is the most famous and is referred to whenever Islamic *jus in bello* is under discussion. It states: "I enjoin upon you ten instructions. Remember them: do not embezzle. Do not cheat. Do not breach trust. Do not mutilate the dead, nor to slay the women, elderly, and children. Do not inundate a date palm nor burn it. Do not cut down a fruit tree, nor kill cattle unless they were needed for food. Don't destroy any building. Maybe, you will pass by people who have secluded them in convents; leave them and do not interfere in what they do."[21] These principles of non-combatant immunity are general and were found in the instructions of successor Caliphs ʿUmar b. al-KhaTTab, ʿUthman b. ʿAffan and ʿAli b. Abi Talib. Based upon the underlying cause of war Shaybani argued in his book *Kitab al-Siyar al-Kabir* that only those amongst enemies can be killed who are directly participating in armed confrontations.[22] There is a consensus amongst the classical Sunni jurists (*jamhore*) on the protective immunity of civilians at times of armed conflict. Some others differ in their modes of interpretation and conclude that it is lawful to kill non-combatants but women and children.

Though the general rule is that non-combatants are protected from direct attacks yet there are three exceptions to it. Firstly, when the ab initio non-combatants start taking part in hostilities, they not only lose their non-combatant (more precisely) civilian status yet also become a lawful target of direct attack. Evidence of it is found in the words of Prophet Muhammad (PBUH) whereby he condemned the killing of a woman for her inability to fight in the battle of Hunayn. It implies that her killing would have been justified if she had participated in the war.[23] There are instances where Prophet Muhammad (PBUH) didn't

[20] He was the first successor of the Prophet Muhammad (PBUH). He gave these instructions when Muslim troops were leaving for Syria.

[21] Abu Bakr al-Ahmad b. al-Hussayn al-Bayhaqi, *Sunnan al-Bayhaqi al-Kubra with al-Jawhar al-Naqi* (ed. M. ʿAbdul Qadar Ataʾ) (Makkah: Maktab Dar al-Baz, 1994), volume IX, 85.

[22] Muhammad b. al-Hasan al-Shaybani, *Kitab al-Siyal al-Kabir*, commentary by Muhammad b. Ahmad al-Sarakhasi (ed. Muhammad Hasan al-Shafiʿi) (Beirut: Dar al-Kotob al-ʿIlmiyah, 1997) volume IV, 96.

[23] Ahmad b. ʿAli b. Hajar, *Fath al-Bari Sharh Sahih al-Bukhari* (Beirut: Dar al-Maʿrifah, 1379) volume VI, 147-148.

react to the killing of a blind man and a woman as they participated in the war against Muslims.[24]

Secondly, the *principle of proportionality* is triggered when targeting the military objectives of the enemy is not possible without the unintentional collateral damage to the non-combatants/civilians. Hence, the civilians could be attacked but it must be proportionate (committing the lesser evil) to the fulfillment of the military necessity, and no superfluous injury be inflicted upon them. The evidence of it is the *hadith* of Prophet Muhammad (PBUH) who while referring to the incidental loss to the non-combatants said: "they are from them[25]." As to the protection extended to women and children during an attack, all jurists agree unanimously, yet, the overwhelming majority of jurists consider it lawful to kill them if they participate in war.[26] Moreover, the Shariʿah permits the cutting off of needs of basic nature to force combatants to surrender in which civilian population is equally affected.[27] In Taʾif the combatants were besieged upon the command of Prophet Muhammad (PBUH) and were attacked by the catapult.[28]

Lastly, as was asked by Shaybani from Imam Abu Hanifah whether women and children be killed when they are used as a shield by enemy combatants to protect their objects, especially when those shields are Muslims. And the response was "Yes, however, the enemy shall be aimed at and not the children."[29] However, Imam Malik and Awzaʿi considered it illegal to attack enemies as such since the protection afforded to women and children is absolute.[30]

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[24] Shaybani, *Kitab al-Siyal al-Kabir*, volume IV, 190.

[25] Sulyman b. al-Ashʿath Abu Dawud, *Sunan* (ed. M. Muhi ud-din ʿAbdul Hamid) (Beirut: Dar al-Fikr, n.d.), volume II, 61 (hadith no. 2672).

[26] Abu Zakariya Yahya b. Sharaf al-Nawawi, *Sharh Sahih Muslim* (Cairo: Matbaʿ Mahmud Toufiq, n.d.), volume XII, 48-49.

[27] See Al-Qur'an, IX: 5, "and take them and besiege them".

[28] ʿAbdul Malik b. Hisham, *Al-Sira* (Beirut: Dar Ihya al-Thurath al-Arabi, n.d.), volume III, 658.

[29] Majid Khudduri, *The Islamic Law of Nations: Shaybani's Siyar* (Maryland: John Hopkins University Press, 1966), 100.

[30] Muhammad b. ʿAli b. M. al-Shaukani, *Nayl al-Awtar min Ahadith Syed al-Akhyar Sharh Muntaqa al-akbar* (Cairo: Idara al-Tabaʾa al-Muniriyyah, n.d.) volume VIII. 8, 56.

Targeting civilians in retaliation amounts to intentional murder hence it is prohibited. According to Muhammad b. Ahmad al-QurTubi the reprisal of one wrong should not be extended to his parents, relatives, or sons. The radical terrorist groups today like Al- Qaeda have an anomalous set of rules and use the principle of reciprocity as the justification of attacking a civilian. But it is the wrong usage of this principle because the rule of fiqh is that what is prohibited ab initio cannot be legal in any circumstances. This also leads us to the discussion on the use of nuclear weapons or weapons of mass destruction. Since the employment of these weapons renders the application of the imperative principles of distinction, proportionality, and avoidance of superfluous injuries ineffective thus they are said to be prohibited in the Islamic *jus in bello*. The use of mangonel as a weapon against enemies in the Prophetic era is evidence of the fact that Muslims during his time were allowed only to attack to the necessary extent.

B. No direct attack on civilian objects.—Islam prohibits the destruction of those objects that are essential for survival. One such clear manifestation is the ten commandments of Abu Bakar ʿAbd Allah b. Abu Quhafah whereby he ordered his troops that when they fight they must no inundate the palm tree, or devastate any building, or burn civilization or incur any harm to fruit trees. Attacking the means and objects of subsistence is analogous to *fasad* upon which Qurʾan says, "… and do neither evil nor mischief on the (face of the) Earth."[31] In his book, Shaybani on the permissibility of taking or leaving the belongings of enemy said, "Muslims can take away enemy's cows, goats, and other property, or they may leave it because (these) things do not strengthen the enemy to fight (the Muslims)."[32] In respect of weapons of attacks, Sarakhasi stated "it is condemnable to leave the weapons or mules (*al-silah wa al-kira'*) if the Muslim army seized them because leaving them behind would mean that the enemy could use them again against the Muslims."[33] It is noteworthy here that absolute destruction has never been asserted by Shaybani or his commentators. This is attributed to Abu Hanifah and his disciples by Ibn Jarir al-Tabari and Imam Shafiʿi. In his *Kitab al-Umm*, Imam Shafiʿi mentioned that if the "Muslims took under their control booty comprising of property or goats which they could not take away with them; they should slaughter the goats and burn the property and the meat of goats so that the infidels should not

[31] Al-Qur'an, II: 60.

[32] Shaybani, *Kitab al-Siyar al-Kabir*, volume IV, 198.

[33] Ibid.

benefit from them."[34] But what he wanted to transmit was undoubtedly not the absolute destruction as none of his two disciples Shaybani and Abu Yusuf mentioned in any of their writings.

2.3.2 Non-derogable humanitarian considerations

Few of the fundamental guarantees in Islam as to the protection of civilians have been analyzed above. In this part, the Islamic jus in bello regarding the treatment of wounded and sick soldiers of enemies at the battlefield or in the sea will be analyzed along with the protection afforded to combatants placed *hors de combat* (those who are no longer able to take part in hostilities: terminology borrowed from IHL). Upon conquering Makkah under the leadership of Prophet Muhammad (PBUH), no harm was inflicted upon any person nor was their property damaged. Besides, an announcement was made on his demand that "wounded shall not be killed, *mudbir* (anyone who turns his back and runs away from fighting) shall not be chased, the prisoner shall not be killed and whosoever shuts his door will be immune."[35] Torturous practices are discouraged by Islam as Prophet Muhammad (PBUH) said, "Verily God will punish those who torture other people in this world."[36] This prohibition is absolute and applies to all categories of individuals at all times. Since owing to sickness and disability, enemy soldiers could no longer take part in the hostilities they would be entitled to the analogous immunity of non-participants. When they fall into the hands of adversaries they enjoy the prisoner of war status (POW) and the incidental guarantees under the *jus in bello*. The treatment afforded to POWs in Islamic law is hereinbelow analyzed.

2.3.3 Prisoners of War: A privileged class of individuals

Making enemies captive is allowed to Muslims only in cases of manslaughter but not in small skirmishes. There are two verses in the Qurʾan that relate to the capturing of enemies and thus making them POWs. Firstly, in Chapter 47 Lawgiver states, "Now when ye meet in battle those who disbelieve, then it is the smiting of the necks until there has been a very extensive slaughter, then making fast of bonds; afterward either grace or ransom till the war

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[34] Muhammad b. Idris al- Shafiʿi, *Kitab al-Umm* (Cairo: al-Matbaʿa al-Amiriyya, n.d.) volume XV, 304.

[35] Bayhaqi, *Sunan*, volume VIII, 181 (hadith no. 16524).

[36] Imam Muslim, *Sahih Muslim*, volume IV, 2017 (hadith no. 2613).

lay down its burdens."[37] In another verse, the only justification of making captives is repeated that "It is not for any Prophet to have captives until there has been a very extensive slaughter in the land."[38] Once the enemy soldiers are made the prisoners then Islam very beautifully lays down the manner of their treatment. This is why the writer termed prisoners as a privileged category of individuals. Justice and compassion are at the heart of Islamic principles. Islam advises Muslims to provide prisoners with more than what they have lost and not to account for the excesses they have made rather forgive them. The Qurʾan says in this regard, "Now enjoy what ye have won, as lawful and good, (i.e. according to justice and equity), and keep your duty to Allah."[39] The immediate verse following it states, "O Prophet! Say unto those captives, who are in your hands: if Allah knoweth any good in your hearts, He will give you better than that which had been taken from you, and will forgive you."[40] The Prophetic era is the clear manifestation of the teachings of Islam about the treatment of POWs. The end of the War of Badr resulted in captives for whom Prophet Muhammad (PBUH) ordered his fellow Muslims to treat them nicely and "take heed of the recommendation to treat the Prisoners fairly."[41] And Muslims are demanded by the Lawgiver to feed the prisoners for the sake of Allah that, "(if the righteous shall) feed with food the prisoner, for love of Him, (saying): We feed you, for the sake of Allah only; we wish neither reward nor thanks from you."[42] The practice in the Prophetic era was that the expenses of prisoners were borne by Muslims who also provided them with clothes. Muslims were ordered to remove the discomforts and troubles of prisoners.[43] While in captives they are entitled to make wills of their property at home. Families cannot be generally separated from each other.

Moreover, Islam pays due regard to the respect of status the prisoners have back in their hometown. Moreover, while in captivity, enemies must be allowed the freedom of practicing their religion and their worshiping places ought not to be destroyed. A conflict does not end with a declaration of such intent rather it ends with the termination of captivity. At this point, there is a

[37] Al-Qur'an, XLVII: 4.

[38] Al-Qur'an, VIII: 67.

[39] Al-Qur'an, VIII: 69.

[40] Al-Qur'an, VIII: 70.

[41] Sarakhasi, commentary on *Kitab al-Siyar al-Kabir*, volume I, 189-362.

[42] Al-Qur'an, LXXVI: 8-9.

[43] Buẖkari, LVI: 142.

dispute amongst *fuqahaʾ*. Two ways of terminating captivity are mention in Qurʾan, firstly, *fida* or ransom, and secondly, *mann* (gratuitous freedom).[44] Around 70 enemies were made captives after the war of Badr which was the first instance whereby verses were revealed on the occasion conduct of Prophet Muhammad (PBUH) in this regard. For being a novel circumstance Prophet sought the advice of his Companions. The majority of them agreed on ransom as it were Muslims' need; however, ʿUmar b. al-KhaTTab took the plea of execution. Prophet Muhammad (PBUH) followed the advice of jamhore. The decision of ransoming the captives of Badr was followed by the revelation, in which Allah told,

> *"It does not behoove a Prophet to keep captives unless he has battled strenuously on earth. You may desire the fleeting gains of this world-but God desires [for you the good of] the life to come: and God is almighty, wise. Had it not been for a decree from God that had already gone forth, there would indeed have befallen you a tremendous chastisement on account of all [the captives] that you took. Enjoy, then, all that is lawful and good among the things which you have gained in war, and remain conscious of God: verily, God is much-forgiving, a dispenser of grace."*[45]

The most authoritative commentators of Holy Qurʾan called these verses to be situation-specific i.e. only applicable to prisoners of Badr and this view is substantiated by the subsequent verse that, "Now when you meet [in war] those who are bent on denying the truth, smite their necks until you overcome them fully, and then tighten their bonds; but thereafter [set them free,] either by an act of grace or against ransom so that the burden of war may be lifted: thus shall it be."[46] Thus the captivity is time being and is to be terminated on freedom bought by ransom or unconditional or conditional freedom.[47] Now the modes of termination of captivity from the traditions of Prophet Muhammad (PBUH) need to be analyzed. Eighty Makkans were released *gratis* and are one of the incidents where captivity ends with *mann*.[48] Another instance of the gratuitous release includes the release of a member of clans of

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[44] Al-Qur'an, XLVII: 4.

[45] Al-Qur'an, VIII: 67-68.

[46] Al-Qur'an, XLVII: 4.

[47] Muhammad b. Ahmad al-Qurtubi, *al- Jamiʿ li Ahkam al-Qur'an* (Cairo: Matbaʿah Dar al-Kutub al-MiSriyyah, 1950), VIII: 150.

[48] Yahya b. Sharaf al-Nawawi, *Sharh Sahih Muslim* (Cairo: Matbaʿat Mahmud Tawfiq, n.d.), 7: 463.

Hunayn, Hawazin, Banuʾl-MusTaliq, Banu Fazarah, and Yemen.[49] The Prophetic tradition of pardoning was followed by his successors as well (*qawl al-sahabi*). Al- ʿAshʿath b. Qays was set free by the first Caliph Abu Bakar. Then there is the instance of the pardoning of Iranian commander by second Caliph ʿUmar.[50] He also released thousands of Iraqis who were made captive upon conquest and *jizyah* was imposed on them. The only instance in Islamic history (during the era of Prophet Muhammad (PBUH)) where captivity was terminated by ransom was the prisoners of Badr. Thereafter prisoners were pardoned. Abu ʿUbayd thereupon argued that "the latter precedent from the Prophet (PBUH) is to be acted upon," and the practice of pardoning follows the events of Badr. So unconditional pardoning has mostly been found as a mode of ending the captivation.

It is also important to point here that some pro-execution *fuqahaʾ* assert that prisoners should be killed. But their argument is very weak for want of substantial evidence from Sunnah. Throughout the life of the Prophet in which several battles were fought, there are just two to three reported instances where the prisoners were executed. Some reports suggest that out of seventy captives of Badr only two were executed while some reports suggest that only ʿUqbah b. Abu MuʿayaT was executed[51] and that too for the suffering and persecution by him being a military commander during the first thirteen years of Muslims in Makkah post-migration. Abu ʿUbayd states that ʿUqbah went to the extremes of tormenting Prophet Muhammad (PBUH) especially at the times of offering prayer. So his execution cannot be employed as precedent with regards to the execution of prisoners yet it was an exceptional punishment for the heinous crimes perpetrated against Prophet Muhammad (PBUH). The second such instance found in the life of Prophet was the execution of Abu ʿIzzah al-Jumahi following the Uhud battle. He was first captivated after the battle of Badr but was freed on the condition that he will not use his poetry for instigating enemies to wage war against Muslims but he breached it. Thereafter he was made captive again in the battle of *Uhud* and his clemency appeal was rejected by Prophet Muhammad (PBUH) and said that "I swear to God you will not wipe your cheeks in Makkah saying that you have mocked he

[49] Abu ʿUbayd b. Sallam, *Kitab al-Amwal*, (translation by Imran Ahsan Khan Nyazee) (Reading: Garnet Publishing Ltd., 2002) 116- 120.

[50] Al- Baladhuri, *Kitab Futuh al-Buldan* (translated by Francis Clark Murgotten) (New York: Columbia University, 1924), II: 118-119.

[51] Ismaʿil b. ʿUmar b. Kathir, *Al-Bidayah wa ʾl-Nihayah* (Beirut/Riyadh: Maktabat al-Maʿarif/ Maktabat al-NaSr, 1966), 3:35.

Muhammad twice: A believer never get stung twice from the same burrow,"[52] and thus was ordered to be executed. One last instance of executing prisoners was at the time of the conquest of Makkah. Excluding some seven to eleven prisoners (charged with horrific crimes against Muslims[53]), for the rest of the prisoners, Prophet announced a general amnesty. Only one of the left-outs, ʿAbd Allah b. KhaTal was executed. He was charged on the accounts of high treason, renunciation of Islam, the killing of a servant, embezzlement of public money, and blasphemy and did not mended his ways thereafter. All in all, during the life of the Prophet there is no such evidence whereby execution solely on the ground of being a prisoner can be established. Moreover, the majority of jurists acknowledge the fact that there was a unanimous discouragement amongst the Companions of Prophet Muhammad (PBUH) on the execution of prisoners.[54] From the time of Prophet Muhammad (PBUH) till the time of third Caliph 'Umar b. 'Abdul 'Aziz (first century of Islamic military history), at the maximum there are just six to seven cases and in which execution was not on the ground of being a prisoner because it is not an offense per se. PBUH

As regards the freeing prisoners on ransom is concerned, there is a dichotomy in opinions of *fuqahaʾ*. On one hand, Abu Hanifa rejects the freeing of the enemy on ransom because it will strengthen the enemy manpower and that they must be killed (Qurʾan, IX:5), on the other hand, his pupils Abu Yusuf[55] and Shaybani[56] agree regarding ransom in necessity. Moreover, they agree on the exchange of Muslim POWs with enemy POWs.[57] Many jurists argue that the political head of the state has the option of freeing on ransom. According to Abu ʿUbayd, there is only one instance of freeing with ransom where few prisoners of Badr were freed that way yet others who could not pay money were required to teach the children of Muslims to get released

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[52] Abu Bakr Muhammad b. Ahmad b. Abi Sah al-Sarakhsi, *Kitab al-Mabsut*, ed. Samir MuStafa Rabab (Beirut: Dar Ihyaʾ al-Turath al-ʿArabi, 2002), 10: 26.

[53] Ibn Hajar al-ʿAsqalani, *Fath al-Bari* (Beirut: Dar al-Maʿrifah, 1379 AH), 4: 60-61.

[54] Shaybani, *Kitab al-Siyar al-Kabir*, volume IV, 198.

[55] Yaʿqub b. Ibrahim Abu Yusuf, *Kitab al-Kharaj* (Peshawar, Maktabah Faruqiyyah, n.d.), 378.

[56] Shaybani, *Kitab al-Siyar al-Kabir*, volume IV, 300.

[57] Ibid, 302, 337-378.

from captivity.[58] As discussed earlier the latter practice of Prophet is an established precedent and must be followed. The latter practice of the Prophet was *mann* or gratuitous freedom. So far Muslim prisoners are concerned they must be free by paying money from *Bayt al-Mal*.[59] Moreover, Muslims shall take care of the families of Muslim POWs till they are captive (e.g. letter sent by ʿUmar b. ʿAbd al-ʿAziz to the Muslims in captives in Constantinople).

A more liberal approach is adopted by Islam in the treatment of POWs.[60] As was discussed earlier Prophet Muhammad (PBUH) divided the prisoners of Badr amongst Muslims and directed them to seek his recommendation in treating prisoners.[61] Thereupon Muslims provided the best food they had to prisoners while they rely themselves on dates only.[62] And for them, God says, "and who give food- however great be their own want of it – unto the needy, and the orphan, and the captive [saying], We feed you for the sake of God alone: we desire no recompense from you, nor thanks."[63] Food and drinks are considered to be the basic necessity of prisoners. Moreover following the tradition of the Prophet (PBUH) captives must be provided with clothes. Torture is prohibited as those torture people on earth will meet a similar fate.

2.5 Maqasid al-Shariʿah: The Basis of Humanitarian Protections

The discussion on *Maqasid al-Shari'ah* is necessary whenever recourse is made to the Islamic law because all of it is premised on the unanimously agreed purposes that law strives to achieve. The purposes based on inner strength have been classified into three kinds with necessities (*Ḍarurat*) at the top. The other two are the needs and complementary goals. Without the protection and preservation of necessities, there would be complete chaos and

[58] Abu ʿUbayd, *Kitab al-Amwal*, 116, 120.

[59] Abu Yusuf, *Kitab al-Kharaj*, 380.

[60] James J. Bustuttil, "Slay Them Wherever You Find Them: Humanitarian Law in Islam," *Revue de Droit Penal Militaire et de Droit de la Guerre* 30 (1991), 113-126.

[61] Abu Ja'far Muhammad b. Jarir al-Tabari, *Tarikh al-Umam wa 'l-Muluk* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1407 AH), volume II, 39.

[62] Shibli Nu'mani and Sayyid Sulaiman Nadvi, *Sirat al-Nabi* (Lahore: al-Faisal Nashiran-i Kutub, n.d.), volume 1, 311.

[63] Al-Qur'an, LXXVI: 8-9.

anarchy in the society.[64] The aims in necessities which shall be protected and preserved at all times include hifz ʿala al-din, hifz ʿala al-nafs, hifz ʿala al-nasl, hifz ʿala al-ʿaql, and hifz ʿala al-mal. The supreme interest to protect and preserve is of Islam. For that as a "last" resort war with enemies of religion is demanded. The writer will not go into the discussion on justifications for the use of force as it is beyond the scope of this article. Then come the protection and preservation of life. The Lawgiver had defined rules whereby civilians are to be protected in times of attack and their killing is prohibited as is evidenced from Sunnah as well in details above. Secondly, the family and progeny are demanded to be protected and preserved for which, concerning war, the principle of distinction is laid down in Islamic law and the unbridled warfare have been restricted to means and methods of warfare that will not cause unnecessary sufferings. Thirdly, the intellectual capacity is required to be protected and preserved for which, again Islamic law draws a clear distinction between what is allowed and what is prohibited in war. Lastly, the rules as to the protection of civilian objects, and food necessary for their subsistence aims at fulfilling the necessity of protecting and preserving the property. All in all, in the light of purposes of Islamic law the following acts are deemed permitted at the time of conflict:

i. It is lawful for a Muslim to injure[65], kill[66], pursue[67] or capture[68] an enemy combatant. As o the non-combatants they are immune generally yet in some exceptional cases they can be targeted.
ii. Ruses of war (*Khidʿah*) is permitted as is attributed to Prophet Muhammad (PBUH) in the Muslim military literature.
iii. The attack and the means and methods of warfare must be proportionate to the direct military *advantage* anticipated.[69] It is not lawful to cause unnecessary suffering.
iv. The supplies to enemy combatants can be cut off even if there is some collateral damage as well.
v. Food and fodder are permitted to be bought from the enemy but if they decline to sell then they can be forced.

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[64] Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 2000), 199.

[65] Al-Qur'an, VIII: 12.

[66] Ala' al-Din al-Kasani, *Bada'i' al-Sana'i'* (Beirut: Dar al-Kotob al-ʿIlmiyah, n.d.) volume VII, 107.

[67] Al-Qur'an, XLVII: 4.

[68] Al-Qur'an, IV: 104; III: 172.

[69] Sarakhasi, commentary on *Kitab al-Siyar al-Kabir*, volume I, 183.

As to the prohibitions following acts are to be avoided in armed conflicts:

i. The saying of Prophet Muhammad (peace be on) him that, "Fairness is prescribed by Allah in every matter," prohibits the acts that amount to torture and unnecessary harm must be avoided.
ii. Those who are no longer participating in the hostilities cannot be attacked including children, women, and those slaves who only accompany their masters and have no involvement in the armed conflict, hermits, blinds, and monks, persons with defective physical or legal capacity.[70]
iii. Mutilation is prohibited in Islam. POW cannot be decapitated.
iv. Perfidy and treachery are strictly forbidden.[71]
v. Unnecessary destruction to harvest and cutting of trees is to be avoided.
vi. Animals of the enemy can only be taken in dire need of food but slaughtering more than needed is not allowed.
vii. The dignity of even the captured women is inviolable and adultery and fornication are sinful.
viii. Even in the presence of an agreement clause for killing the enemy hostages in retaliation, Islam forbids the killing of hostages.
ix. The old tradition of serving the falling enemy's head was brought to end by Islam as it is *makruh* (abominable) and was forbidden by the immediate successor Abu Bakar ʿAbd Allah b. Abi Quhafah.
x. When Muslim prisoners are employed as a shield by enemies
xi. Genocide or massacre is strictly forbidden. Prophet Muhammad (peace be on) granted general amnesty with six outlaws.
xii. Killing the relatives of enemies even if those enemies have killed Muslim fellows is forbidden and they can only be targeted when such infliction of harm is unavoidable.
xiii. Non- participating peasants shall not be killed as they enjoy civilian protection. This immunity extends to traders, businessmen, merchants, and contractors provided they do not take direct part in hostilities.
xiv. The burning of human beings or animals is strictly forbidden in Islam be it in times of peace or war and be it belongs to enemies.
xv. A treaty otherwise valid cannot be breached (analogous to pacta sunt servanda principle).

[70] Sahih Muslim (Istanbul ed.), VI, 72.

[71] Tirmiḏẖi, XIX, 48; Abu Dawud, XV, 110.

3. Discussion on general principles of IHL

3.1. Armed conflicts recognized by IHL

Before going into the analysis of general principles of IHL it is important to discuss at this point the dichotomy of conflicts recognized by IHL. Firstly, when an armed conflict is between two State Parties it is termed as an International Armed Conflict (hereinafter referred as IAC).[72] The relevant Geneva treaty law includes the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field (hereinafter referred as GC I), the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces in the Sea (hereinafter referred as GC II), the Geneva Convention relative to the Treatment of Prisoners of War (hereinafter referred as GC III), the Geneva Convention relative to the Protection of Civilian Persons in time of War (hereinafter referred as GC IV), and the Protocol Additional to the Geneva Convention of 1949 and Relating to the Protection of Victims of International Armed Conflicts (hereinafter referred as AP I). The national liberation movements are also included in IAC.[73] One other category of armed conflict is the Non-International Armed Conflict (hereinafter referred as NIAC) is a conflict not of an international character which means that it is fought between the State and its dissident armed organized group or between such groups only.[74] The relevant treaty law is Common Article 3 to all Geneva Conventions and the Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter referred as AP II).

But the demarcation is not as simple as it is defined. Two important concepts here are foreign intervention and spillover. When a third state intervenes in a NIAC then it has the potential of changing the character of the conflict to IAC if it supports the armed groups fighting against the State. Furthermore, if the NIAC extends to the territory of the neighboring state, for instance, the group members hide in neighboring countries after crossing their borders then if that neighboring country did not assent in

[72] Article 2 of GC I. it also includes the cases of occupation.

[73] Article 1 (4) of AP I.

[74] Article 1 (1) of AP II which also sets out the criteria for the dissident groups. However the immediate sub section excludes the acts of violence and sporadic acts which have not reach the threshold of required intensity.

extraterritorial attacks, it would amount to conflict between states which is a case of IAC.

3.2. Analysis of fundamental principles of modern IHL

The principles governing IHL have a very systematic application. Starting with the primary rule of non-combatant protection and for that, the second principle of precaution to be exercised in planning, plotting, and executing attacks comes into play. At the same time, IHL acknowledges the possibility of incidental harm to civilians and their objects. So albeit the attack intended against military objectives and required caution in terms of methods and means of warfare is exercised, yet in the achievement of objective collateral damage to protected ones is inevitable, the last protection afforded by IHL is proportionality. All these are critically analyzed concerning the relevant treaty and customary rule, resolutions of the Security Council, judicial decisions.

3.2.1 Balancing military necessity and humanity: A grund norm

The essence of IHL is the maintenance of balance between humanitarian considerations and military necessity. Thus it acknowledges the use of force where such use is inevitable and to cause injury, destruction, or death thereof and to derogate from certain principles applicable at the time of peace. But this does not mean the command is given a blank cheque (*carte blanche*) for wagging arbitrary war. Rather, certain limitations should be placed in the exercise of authority by not only restricting the means and methods of warfare[75] but also by affording protections to categories of individuals. It is stated in Hague Regulations of 1899 and 1907 that "the right of belligerents to adopt the means of injuring the enemy is not unlimited."[76] Hague Regulation IV, according to the International Court of Justice (ICJ) has emerged

[75] Means refer to weapons and methods, generally, refer to tactics.

[76] Convention with Respect to the Laws and Customs of War on Land of 1899 (hereinafter referred as Hague Regulation II) annex art. 22; Convention Respecting the Laws and Customs of War on Land of 1907 (hereinafter referred as Hague Regulation IV) annex art. 22. Cross-reference: article 35 (1) of AP I: "In any armed conflict, the rights of the Parties to the conflict to choose methods or means of warfare is not unlimited."

as customary law.[77] Every rule of IHL is a dialectical compromise between the opposing concerns. Marten clause inserted in the Hague Regulation IV also conjoins the military necessity with the humanity, as it states that:

> *"Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."*

International law is permeated by the elementary considerations of humanity.[78] Being human is given but keeping our humanity is a choice. IHL ensures human treatment to all categories of individuals as its birth was an effort for ameliorating the sufferings of the injured participants of the Battle of Solferino in 1859.[79] Those who are not taking a direct part in hostilities are to be humanely treated.[80] Even if the necessity demands conflict the warfare has to be restricted. This balancing requirement is well articulated in article 16 of the Lieber Code of 1863 which states that "Military necessity does not admit of cruelty—that is, the

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[77] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (2004) ICJ 136, 172; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (1996) ICJ 226, 257. Its customary nature was also discussed in the Nuremberg Trials of 1947.

[78] Corfu Channel case: *UK v. Albania* (1949) ICJ 4, 22.

[79] Henry Dunant wrote a book titled *A Memory of Solferino* in 1863 after witnessing the horrors of Solferino war and presented his idea that efforts are needed in two areas. Firstly there shall be a neutral organisation with the objective of extending support to victims of ear irrespective of their participation in war and secondly there should be the legislation for mitigating the effects of war. For his contributions he is called by many the "Father of IHL."

[80] See for example, common article 3 to all Geneva Conventions; article 75 (1) of AP I; article 4 (1) of AP II; article 5 and 27 para.1 of GC IV; article 22 of Lieber Code; para. 4 of Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia of 1991; para. 1 of Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina of 1992; section 7.1 of UN Secretary-General's Bulletin of 1999; para. 10 of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of IHL of 2005.

infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility that makes the return to peace unnecessarily difficult. Here, the principle of proportionality is also relevant whereby the coercive response should not outweigh the intended military aim that is to weaken the forces of the adversary but not to exterminate them.[81] The principle of distinction and the discussion on collateral damage is also relevant here. So it is not possible to distinguish them satisfactorily as they are not separable rather correlated concepts. The writer for ease of analyzing covers all the general principles of IHL under the main head of principle of balance between humanity and military necessity and is analyzed below.

3.2.2 Principle of distinction: A restriction to unbridled hostilities

For the very first time, the principle of distinction was laid down in the St. Petersburg Declaration which states while defining military objective as "[the] only legitimate object which State should endeavor to accomplish during war is to weaken the military forces of the enemy."[82] Thereafter though no explicit principle of distinction was a part of Hague Regulations yet a reference to it was made in article 25 whereby it is prohibited to attack by any means the civilian undefended objects including their dwellings and buildings. Articles 48, 51 (2), and 52 (2) of AP I which are without any reservation agreed upon codifies the distinction principle (since any such reservation which undermines the very object of a treaty is not allowed[83]). Here it is important to mention that this prohibition extends to both offensive and defensive attacks.[84] The negation of such an attack

[81] Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (New York: Cambridge University Press, 2004), 12.

[82] *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight* (1868) preamble. The said declaration will hereinafter referred as St. Petersburg Declaration as is popularly named.

[83] Statement made at the Diplomatic Conference leading to the adoption of the Additional Protocols in Mexico.

[84] AP I, article 49.

by any side to the armed conflict constitutes a war crime.[85] The significance of this principle can be assessed from the fact that though some states are not the party to Additional Protocols to Four Geneva Conventions yet their military manuals do incorporate the distinction rule.[86]

During the conduct of hostilities, the distinction is to be made by the parties to the conflict between combatants and non-combatants and between civilian objects and military objectives. Non-combatants include civilians, as well as the soldiers, place *horse de combat* (out of combat). However civilian immunity is qualified as when they start taking an active part in hostilities they lose the civilian status for time being and thus are no more entitled to civilian protections under IHL. It is an undisputed rule of IHL that protection is afforded to civilians against the dangers arising from military direct attacks, "unless and for such time as they take a direct part in hostilities."[87] The Israeli military court reiterated that the non-combatant immunity based on the principle of distinction is a cornerstone of IHL.[88] In other words, this principle is a cardinal and intransgressible principle of IHL.[89] The principle of distinction is equally applicable in NIAC.[90] UN Security Council has repeatedly condemned the killing of civilians in the armed conflicts with special reference to Yemen, Iraq, Syria,

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[85] *Rome Statute of International Criminal Court,* article 8 (2) (b) (i).

[86] Amongst the States not ratified AP I the most notable is the United States Military Manual. Other examples include that of United Kingdom, France, Indonesia, Israel, Sweden and Kenya.

[87] *AP I*, article 51 (3); *AP II*, article 13 (3);

[88] *Military Prosecutor v. Omar Mahmud Kassem et al.* (1969) file no. 4/69 decided by Israeli Military Court sitting in Ramallah.

[89] The principle of distinction as a customary norm was discussed in the *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ 2 (Advisory Opinion).

[90] See, for example, article 13 (2) of *AP II*; article 3 (7) of *Amended Protocol to the Convention on Certain Conventional Weapons* of 1980 (hereinafter referred as CCW); preamble of *The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* of 1997 (commonly referred as Ottawa Convention); *Rome Statute of International Criminal Court* article 8 (2) (e) (i) (hereinafter referred as ICC Statue). And the leading judgments in which applicability of distinction principle was discussed in detail are: ICTY, *Prosecutor v. Dusko Tadic* (1994) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction); ICTY, *Prosecutor v. Martić* (1996) (Review of Indictment); ICTY, *Prosecutor v. Zoran Kupreškić* et al. (2000) Judgment.

Palestine, Rwanda, Somalia, Afghanistan, and few others.[91] Thus, the unbridled cruelty has been limited by the balancing requirement. The principle of proportionality (will be discussed in detail below) determines the placement of fulcrum whereby both opposite poles (necessity and humanity) could be balanced.[92]

The contemporary asymmetric warfare has shifted the paradigm of war that was once fought on the battlefield at distance from the densely populated civilian population but is now taking place in the center. This has led to the frequent involvement of civilians in military operations. Many private security and law enforcement agencies today have been included in the realm of armed conflicts due to the outsourcing of functions that were once considered the sole prerogative of armed forces of a state in the case of IAC. These have made the application of the principle of distinction extremely doubtful. So, civilians are vulnerable to direct attack owing to anomalous war-like situations.

3.2.3 Principle of Proportionality: The Balancing of Torques

The differentiation principle, as aforementioned, requires the exercise of caution in distinguishing between combatants and non-combatants and their objects respectively.[93] But this distinction is not as simple as it seems. In conventional warfare, the intermingling of civilians with combatants and their objects makes it difficult to distinguish between them or where military aim cannot be achieved except by causing suffering to otherwise protect which raises the concern of breach of non-combatant immunity.[94] This triggers the application of the proportionality principle and the relevant test would be whether the actions in terms of their nature and extent were proportionate to the

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[91] *UN Security Council Resolutions* 564, 771, 794, 819, 853, 904, 912, 913, 918, 925, 929, 935, 950, 978, 993, 998, 1001, 1019, 1041, 1049, 1050, 1072, 1073, 1076, 1089, 1161, 1173, 1180, 1181.

[92] Myers S. McDougal, Florentino P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order* (New Haven: Yale University Press, 1961), 523.

[93] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Oxford: Oxford University Press, 2004), 82; Chirs af Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War," *Harvard Law International Journal* 35 (1994): 29.

[94] Gardam, *Necessity, Proportionality and the Use of Force by States*, 7.

anticipated military objective?[95] Thus the proportionality requirements, as said before, serves the function of fulcrum for balancing the two opposing forces of necessity and humanity.[96] The legal basis of the principle of proportionality can be found, primarily, in article 51 (5) (b) of AP I while defining indiscriminate attacks include: "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[97] The shortcoming of this article is that it only describes the standard against which attacks are to be carried out yet it is silent as to who is responsible to ensure compliance with the proportionality principle. Other legal instruments also upheld the prohibition against the attack which renders the required distinction ineffective.[98] Though no explicit reference is made to the principle of proportionality in the case of *NIAC* in *AP II* yet its preamble does indirectly refer to it due to its inherent nature. In recent times it is made the substantive part of modern treaties.[99] Most significantly this principle also forms the essential part of customary law.[100]

The term "concrete and direct military advantage" is interpreted by *ICRC* as an advantage "substantial and relatively close, and that advantages which are hardly perceptible and those

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[95] Craig J.S. Forrest, "The Doctrine of Military Necessity and the Protection of Cultural Property during Armed Conflicts," *California Western International Law Journal* 37 (2) (2007): 194

[96] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), 25.

[97] Prohibition against indiscriminate attacks is repeated in article 57 (2) (a) (iii) of AP I."

[98] Article 3(3) (c) of the *Protocol II* to CCW; article 8(2) (b) (iv) of *ICC Statute*; section 6(1) (b) (iv) of *UN Transitional Authority East Timor (UNTEAT) Regulation* of 2000.

[99] Article 3(8) (c) of *Amended Protocol II* to CCW; Memorandum of Understanding on the Application of IHL between Croatia and the SFRY, para. 6; Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, para. 2.5; San Remo Manual, para. 46(d); article 15 of Lieber Code; article 24(4) of Hague Rules of Ari Warfare of 1923; article 20(b)(ii) of ILC Draft Code of Crimes against the Peace and Security of Mankind of 1996. Moreover the Military Manuals of various countries incorporates the principle of proportionality.

[100] See, ICRC, Rule 14. *Proportionality in Attack,* Customary IHL Database.

which would appear only in long term should be disregarded."[101] The proportionality criteria were laid down in *Galic case* which states that, inter alia, "In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack."[102] Prohibiting the use of weapons resulting in indiscriminating attacks the ICJ held that "the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, means that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to enquire into the question of whether tactical nuclear weapons exist which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defense in accordance with the requirements of proportionality."[103] Shortly, from the above discussion, it is established that the decision of proportionality demands assessment. But the question here arises whether such assessment should be subjective or objective? In the *Galic* case, the ICTY applied the reasonable person test whereby it held that assessing the proportionality of attack depends on the examination that "whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack."[104] This has now been established as the popularly employed standard of a *reasonable military commander*.[105]

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[101] Yves Sandoz; Christophe Swinarski; Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987), § 2209.

[102] ICTY, *Prosecutor v. Stanilav Galic* (2003) IT-98-29-T (Judgment), § 58.

[103] ICJ, *Advisory Opinion in Legality of the Threat or Use of Nuclear Weapons*, para 43.

[104] ICTY, *Prosecutor v. Stanilav Galic* (2003) IT-98-29-T (Judgment).

[105] Ian Henderson; Kate Reece, "Proportionality under International Humanitarian Law: The "Reasonable Military.

Commander" Standard and Reverberating Effects," *Vanderbilt Journal of Transnational Law* 51 (2018): 835.

Here again, the issue is the same as that emanates from the wars being fought in the cities. By estimation, approximately 2/3rd of the world population is expected to live in urban cities by 2030. Conflicts have moved into the living areas and cities have changed into battle zones. The armed conflicts fought from and in urban areas have a huge impact on civilians and civilian objects. The provision of health services is halted, communication infrastructures are destroyed, access to basic facilities including clean drinking water and education stops, and most significantly it results in internal displacement which has its negative socio-economic impacts. The protected civilians become vulnerable to direct attacks. The situation deteriorates when the adverse party uses explosive weapons in the densely populated cities resulting in an indiscriminate attack that undermines the very protections of IHL. Moreover, another dark aspect of it is how to categorize those who are civilians in the daylight and fighters in dark. These asymmetries have ended in grave violation of IHL. These challenges faced by IHL need a satisfactory redressal.

3.2.4 Principle of Precaution: A sine qua non for attack

IHL bounds the attacker withers undertaking the feasible and reasonable precautions in attack. This care and caution are to be exercised not only throughout the attack but also in the stages of planning, deciding, and launching an attack.[106] It is interrelated with the principle of distinction afore discussed. Attackers are required to spare the protected individuals and objects in the conduct of hostilities.[107] This protection is also extended to the civilians and their objects in NIAC.[108] Moreover, this precaution principle has evolved as a customary norm not only because it fleshes out the general principles which pre-exit but also because no state including those who have not yet ratified AP I have not contested it. When in an attack against military objectives loss is incurred onto civilians then ICTY noted that "international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not

[106] Article 24 (2) of the Draft of AP II.

[107] Article 57 (1) and (4) of AP I. Also, stated in the preamble of the Convention on Cluster Munitions of 2008; article 2 (3) of Hague Convention (IX) of 1907

[108] See, for example, Article 13 (1) of AP II which states that "The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations."

needlessly injured through carelessness."[109] Moreover refereeing to the Martens clause the tribunal held that: "The prescriptions of … [Article 57 of the 1977 Additional Protocol I] (and of the corresponding customary rules) must be interpreted to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, to expand the protection accorded to civilians."[110] Furthermore, it is a customary rule of IHL that the combatants have to exercise the feasible precaution for minimizing the injury to civilians and their objects if such harm is inevitable for the attainment of the military objective.[111]

Sates have interpreted the term feasible attack to include only those precautions which are practicable in the given circumstances and taking into account the military and humanity considerations.[112] The issue here is that who is responsible in the event it is established the authority fails to exercise required precaution? After much debate, it was opined by several states that this responsibility lies on the shoulder of such a commander who has the prerogative of canceling or suspending the attack.[113] Moreover, such a responsible commander needs to take the best available intelligence information through all reasonable means in this regard. This principle is conjoined with the responsibility in terms of target verification[114], assessment of the attack aftermaths[115], target selection[116], warning[117], control to be exercised

[109] ICTY, *Kupreškić case* (2000), para. 524.

[110] Ibid, para. 525.

[111] Jean-Marie Henckaerts; Louise Doswald-Beck, *Customary International Humanitarian Law* (Volume I: Rules) (Cambridge: Cambridge University Press, 2005), Rule 15.

[112] To quote some see he state practices of Algeria, Australia, Belgium, Canada, France, Italy, India, United States, United Kingdom and Spain.

[113] For example, Declaration made by Switzerland upon signature and reservation made upon ratification of Additional Protocol I and then at the Diplomatic Conference that lead to its adoption; Statement made by Austria at the Diplomatic Conference leading to the adoption of APs and the UK's reservations and declarations made upon ratification of AP I.

[114] Customary IHL, Rule 16.

[115] Ibid, Rule 18.

[116] Ibid, Rule 21.

[117] Ibid, Rule 20.

during the attack[118] , and the choice of means and methods of warfare[119].

3.2.5 Prisoners' treatment under IHL

GC III is a convention explicitly dealing with the prisoners of war which is a term used only in IAC. The status determination criteria for combatant status is laid down in Article 4 (A) of the said convention which includes that when the members of armed forces inclusive of the militias and volunteer groups in forces, resistant armed groups, forces regularly recruited in armed forces which shows allegiance towards government not recognized by adverse Party, *levee en masse* falls into the hands of the adverse party then they are the prisoners of war and they should be duly treated. It is one of the three combatant privileges accorded by IHL.[120] If there is a doubt as to the prisoner status of an individual detained till the time his actual status is determined by a competent tribunal he is to be given the protections of status he is claiming.[121] The onus of proof lies on the Detaining Power and in absence of any successful rebuttal such an individual is presumed to be a prisoner of war.[122] When an enemy combatant is captured he is to be treated humanely without any prejudice on any basis[123], protected from any harm[124] and public curiosity[125], provided with food, medical assistance, and clothing[126], be afforded the judicial guarantees of a fair trial[127], and cannot be made an experimental group for any medical or scientific research. Informing the detainee of the charges against him is his inherent right unless the same is done for some penal reasons. [128] Then he must be given the right of a fair trial for which access to

[118] Ibid, Rule 19.

[119] Ibid, Rule 17.

[120] The combatant privileges are three fold: firstly, combatant has a right to take direct part in hostilities and cannot be later on prosecuted for mere participation unless committed some war crime including perfidy, secondly, they are the lawful targets of direct attack, and thirdly, when the fell into the hands of enemies they afforded the POW status.

[121] Article 5 (2) of GC III.

[122] This presumption is reflected in the article 45 (1) & (2) of AP I.

[123] Article 16 GC III.

[124] Ibid, article 19.

[125] Ibid, article 13.

[126] Ibid, article 20.

[127] Ibid, article 84.

[128] Article 75 (3) of AP I.

counsel is necessary.[129] Except for the details necessary for their identification they cannot be coerced to spill other information.[130] As soon as the hostilities end the POWs are to be released without any justifiable delay.[131] But here the concern arises for individuals detained such as those belonging to the Taliban which if released as required will pose a great threat to the Detaining Power. And another debate is the status of unlawful belligerents once they are captured and how they will be protected if they are negated the status of civilians or combatants correspondingly the status of prisoners of war. So there are several pressing debatable issues concerning the determination of prisoner status and the protection thereof.

4. Compatibility Test of Islamic *jus in bello* and IHL

The hands of its fighters have always been cuffed by Islam. These limitations have given the war an ideological cum ethical dimension.[132] Long before the codification of IHL in Geneva Law, its protections in basic form could be found in the Islamic teachings.[133] The compatibility of both the humanitarian regimes will now be tested in parts from the general discussion done in detail above.

a. Concerning aims and principles, both legal systems converge for the attainment of peace and to mitigate the sufferings of war in necessity.
b. There is a slight difference in the nature of necessary attacks in international law and Islam. In event of military necessity, the limited attack is permissible while in Islamic law the same is not mere permission rather an obligation,

[129] For further details, see, the ICRC Commentary on article 75 (4) of AP I.

[130] Article 17 of GC III. What is lawful to inquire is he capturer's name, date of birth, rank and serial number.

[131] Article 118 of GC III. Although if the detainee is charged with some offences then it is an exception to repatriation rule as per article 119 of GC III.

[132] Mustansir Mir, Jihad in Islam, in the *Jihad and its Times Dedicated to Andrew Stefan Ehrenkreutz,* ed. Hadia Dajani Shakeel and Ronald A. Messier (Ann Arbor: University of Michigan, 1991), 114.

[133] Hamed Sultan. The Islamic Concept of International Humanitarian Law in *International Dimensions of Humanitarian Law*, Jiri Toman (ed.) (Paris: UNESCO, 1988), 33.

although both are conjoined with humanitarian considerations.[134]

c. The attacks on the non-combatant objects and buildings are prohibited in binding terms in both legal systems. Moreover, both of them upheld the obligation to spare those who are out of combat including medical and religious personnel. Perfidy that is hiding the combatant status to unlawfully gain the trust of the enemy and then attack him is strictly forbidden in both legal systems. The usage of means and methods of warfare are also restricted and no superfluous injury can be inflicted.
d. Mutilation is prohibited in both legal systems.
e. The proportionality balancing test in Islam weighs the expected good out of war and the evil or harm likely to cause (which has already been discussed as IHL's general principle). Thus only if the harm to be corrected outweighs the harm likely to cause to protect only then such an attack can be executed.
f. The modern interpretation of Islamic *jus in bello* in affording protections does not differ in Muslims and non-Muslims because the sole criterion is of public welfare (*maslahah*) and administration of justice.[135] These protections are also indiscriminately accorded by IHL.
g. Respecting the dignity and fundamental rights of Prisoners of War is demanded in both legal regimes, yet from the discussion on the treatment of prisoners of war, a difference in the termination of captivity in Islamic law and IHL can be argued but that difference, according to the majority of jurists, does not exist. Since only a few like Imam Abu Hanifa favors the killing of prisoners of war so to curtail the manpower of the enemy instead of freeing them on ransom. They argue it, as already referred, to the tradition found in the life of Prophet Muhammad (PBUH) where he ordered the execution of just a few prisoners but it is established in the detailed discussion above that those enemies were executed for other offenses and that the latter practice was of gratuitous release. However, about the general treatment of prisoners of war, once they are captured, both IHL and Islamic law are on the same plane.

[134] This point has been raised since there is some overlapping between jus ad bellum on jus in bello.

[135] Public welfare and justice are always the overriding principles.

Though difference exists but that do not materially affect the application of general principles, there are, broadly speaking, similar protections like the distinction between combatants and non-combatants based on which civilians and their objects are to be spared, treatment of prisoners of war, and their repatriation, property protection including the environment. Not only in terms of protection there is coherency but also in the terms of responsibility and punishment for those who violate such rules. The researcher is of the view that especially in NIAC the protections and general principles are not only coherent with IHL but also surpasses it. Even in the Human Rights and Humanitarian gatherings it has never been argued that Islamic standards at times of war different rather their congruence has always been stressed. As has already been mentioned in beginning Islamic law reiterates the honoring of treaties[136] whereby the treaties signed by state *plenipotentiaries* bind its citizens. Thus even the compliance of Geneva Law is religiously binding on the so-called Muslim combatants who have made their manuals inconsistent with the basic teachings of Islam that are in line with IHL.[137]

5. Conclusion and Recommendations

This leads to the conclusion that the only difference lies in the release of prisoners and that too to the claim of a faction of jurists. Nevertheless, it can rightly be concluded that both legal systems complement each other; thus it is in line with the argument from where this article started and now recommendation will be made for maximising the output in terms of their application.

The compatibility of Islamic *jus in bello* and IHL albeit some disagreements in few areas exhibits the universality of the general principles of conduct of war. But in the Muslim world, the gap between theory and practice needs to be bridged. For that, firstly, the dissemination of the knowledge of Islamic rules governing the hostilities conjoined with the study of IHL is necessary not only in educational institutions but also to all the relevant stakeholders including law enforcement agencies. Secondly, the pressing issues of the modern world in the Muslim context should be talked about instead of just discussing past events. Researchers should be carried out on contemporary challenges the most notable being the ISIS and other extremist

[136] Al-Qur'an, V: 1; IX: 4.

[137] However, some neo-classical scholars who constitute a minority argues that Islam and international law are irreconcilable. Yet there arguments are baseless.

terrorist groups. Moreover, the religious scholars and institutions must spread the actual word of God and promote respect for the laws that are consistent with Islam even if such laws are mostly codified by the West. Other platforms can be fruitfully employed for promoting the convergence of Islamic jus in bell and IHL. Muslims should be educated and make aware of the fact that the underlying IHL principles are deeply rooted in the injunctions of Islam which are binding upon them in any case. It is important to make them realize this because, like any other subfield of Public International law, IHL does face huge criticism on its enforcement mechanisms and doubting its sanctity as law or terming it as a subfield of positive morality. Moreover, the application of IHL is doubted by many in the modern asymmetric war fares for instance there is a huge debate on the legal implications of the activities of Al-Qaeda and Taliban. These lacunas can be effectively filled by religion and especially when such religion is Islam to which its subjects surrender. Legislators and judiciary are equally responsible in the Muslim countries. Islamic clerics must be engaged in joint conferences and workshops with IHL experts. So, IHL and Islamic law owing to their consistency in the underlying aim can jointly be employed for maximising the protections they offer as the sum is greater than its parts. Lastly, if people follow the words of ʿAli ibn Abi Talib that, "There are two types of people: your brothers in religion or your peers in humanity,"[138] then there can be no violation of IHL.

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[138] ʿAli ibn Abi Talib, Nahj al Balaghah, ed. Sobhi Salih (4th edition) (Cairo: Dār al-Kitāb al-Maṣri, 2004), 427.

The Gap between the Juvenile Justice System Act 2018 within the criminal justice system of Pakistan: Time to reform the Act

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Abstract

This article presents the current juvenile justice system act 2018 within the criminal justice system of Pakistan. The only major law dealing with children rights within the criminal justice system is Juvenile Justice System Ordinance 2000 which was repealed and Juvenile Justice Act 2018 was introduced. Effective legislation is needed for the implementation of the Act in Pakistan. Unfortunately, neither the Juvenile Justice System Ordinance 2000 was implemented nor the Juvenile Justice System Act 2018 has been implemented with its true spirit in the country. On a paper it is good to get the guidance and sometime good for academic purposes however no practical steps have been taken so far in the implementation of the law seriously. This paper examined all aspects of the issues, gaps and defects in legislation as well as the non-existence of separate institutions in the context of rehabilitation, placement and reformation of juvenile offenders.

Keywords: Juvenile Justice System, rehabilitation, Juvenile courts, psychosocial support program.

1. Introduction

Children in any country are one of the greatest national asset and resource. They deserve a healthy environment and it is the responsibility of the state to provide them with equal opportunity for example education, health facilities and life security. For the development of children, especially during the period of growth there is a need of reducing inequality and ensuring social justice. Pakistan is one of the signatory to the Convention on the Rights of Child (CRC).According to Article 37 of the convention, "States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by

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persons below eighteen years of age."[1] Even the Constitution of Pakistan, 1973 protects and safeguards the rights of the children. Being the signatory to the Convention on the Rights of Child (CRC), Pakistan introduced the first ever Ordinance which was called Juvenile Justice Ordinance, 2000 that was subsequently repealed and Juvenile Justice System Act, 2018 was introduced. Since the main purpose was to introduced new laws in the Juvenile Justice System Act 2018, unfortunately, those laws were missing in the previous ordinance. No data is available regarding the number of juveniles in the jails in different provinces of Pakistan. According to the juvenile justice ordinance 2000,any offender below the age of 16 will be entitle to the concession of bail irrespective of the nature of the offence. Similarly, if the offender is above 16 years of age then it is up to the court to use their own discretion. However in the current JJS Act 2018 has defined the juvenile as a child who has not attained the age of 18 years. In both the cases, the main element which is the implementation of the act was missing in the previous as well as in the current JJS act 2018.

2. Juvenile Justice within the context of Pakistan

2.1. Concepts and Definition

The Act defines a child as 'a person who has not attained the age of eighteen years'[2]. The children in any country are the most vulnerable not only because of their tender age but also the environment where they are living and therefore they are more prone to abuse. One of their fundamental rights is that they must be treated in a dignified way and their honor must be protected at any cost. To ensure this some of the High Courts in Pakistan have designated juvenile courts for the trial of children. Pakistan is not a single country on the globe where the juvenile are involved in different kind of offenses but around the globe whether it is developed or developing countries, they have more or less juvenile cases. However most of the developed countries have a separate system and laws for Juvenile offenders. For instance in the UK, USA and most of the European countries they have a well-established Juvenile justice system. In fact, it is basically one of the part of a criminal justice system specialized in dealing with those children who are involved in less or more heinous offenses. Through this system justice for all juveniles can be achieve.

[1] Convention on the Rights of the Child (CRC).

[2] The Juvenile Justice System Act, 2018.

2.2. Definition of Juvenile:

The Juvenile Justice System Act 2018 define juvenile as *"Child means for the purposes of this act a person who has not attained the age of eighteen years"*[3] According to Article 1 of the UN Convention on the Rights of Child "CRC", a child *means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier*".[4]

There is lot of factors which is responsible for the criminal conduct of the juveniles as well as adults. This is because where they do not have the complete knowledge of the nature as well as the severity of the offence. The child is the most vulnerable and can easily become the victim of circumstances, the result of which exhibits his criminal conduct, apparently, because of the lack of understanding of the act or sometime abuse of the others. The main responsibility of his criminal act cannot be attributed to one factor but it could be the parents, the society the education institution as well as work place. It has been established that neither conviction nor the punishment of a juvenile offender will help him or her in reforming as well as eliminating the crime from the society. Owing to this fact in most of the developed countries a separate juvenile justice system has been established which is gaining popularity and is now being followed and applied in legal justice system internationally.

3. International Law

A glance over the International Convention on the Rights of Child shows that all the articles specifically emphasis on the dignity, honour and safe guard against all types of discrimination. According to Article 2 of the International Convention on the Rights of Child:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of

[3] Ibid

[4] Convention on the Rights of the Child.

discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Similarly, ***Article 3***

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.[5]

Apart from the above mentioned Convention, there are also other human rights laws worldwide which recommend least guidelines corresponding to the treatment of adolescent reprobates and their restoration in the general public; for or example, the Beijing Rules 1985; the Riyadh Guidelines 1990 the UN Rules 1990. All these Rules describe the treatment of juvenile in the institutions.

4. National Legislation in Pakistan

When it comes to the National legislation in Pakistan, Article 10 and 10-A of the Constitution of Pakistan specifically describe the safeguards of Juvenile against arrest and detention. According to Article 10, "Safeguards as to arrest and detention. The same is stated in Article 10-A. Right to fair trial: This shows the civil rights of any person irrespective of his age especially in criminal offenses /cases a fair trial is his fundamental right. If the person detained he will be immediately informed of the grounds of his/her arrest,

[5] Convention on the Rights of the Child (https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx)

Secondly he/she will be produced before the court of law and thirdly he /she will be provided the assistance of a legal counsel in order to ensure the protection of child.

According to Juvenile Justice System Act 2018 it has clearly mentioned at section 6(3) that if a juvenile is arrested either minor or major offences in any case the juvenile will be treated as he has been arrested for the commission of minor offense. Similarly in the same act, a juvenile is entitled to the concession of bail even in non-bail able offence. Similarly in a case of any juvenile below the age of 15, he/she must be referred to a reformatory school and if there is any need training should be given to such juvenile. Even the court has been empowered in criminal cases in terms of juvenile to release those juveniles who are convicted for the first time. Similarly, the court, having regard to the age of a convicted person imprisoned for up to two years, may release him after due admonition.[6] However, The Government has done very little in the context of implementing the above constitutional rights of the juvenile. Though some bills have been approved for example Child Offender Bill" separate juvenile courts been proposed, unfortunately all these bills and recommendation has been gone to a cold storage. Now the time is to give a practical shape to all these bills and recommendations proposed by the legislature of the country.

5. Recommendations to reform

5.1. Separate Juvenile Courts and Juvenile Institutions

Throughout the country the judiciary has been overloaded with the pendency as well as disposal of cases. According to the institution of cases the ratio of judges in each district is very low. Therefore access to justice cannot be achieved with a small number of judges recruited in different districts of the country. Due to theses gaps and due to the non-compliance of laws, the juvenile are the most who are facing trial or detention and facing lot of difficulties. Not a single government till date has allocated a separate budgetary head for the juvenile cases, reformative schools and education establishment where they can feel like a normal child and not like a culprit. There is need to make a setup for juvenile within the existing courts for example separate time or days may be allocated for Juvenile cases. Similarly, the number of judicial officers/judges may increase and will ultimately resolve the problem. Presently there are few separate juvenile institutions in the country. Throughout the country there is no separate Juvenile institution .Therefore separate Juvenile

[6] Section 562(1A).

institution may be established not at provincial level but at district level. The juveniles in prison must be separated from adults as well as necessary steps must be taken to ensure that they are also safe in judicial custody.. It is the duty of the government to established committee's which will be responsible for making policies and rules for juvenile institutions. The segregation of juvenile from adults will not be enough; the environment within such places must also take into account and practical steps must be ensure where they will be exposed to opportunities like education, psychosocial support program and vocational trainings etc.

5.2. Administrative Structure:

Similarly, the government must ensure a proper mechanism and a structure for the juvenile within the juvenile justice system. The staff that is responsible to look after the juvenile should be equipped with training as well as they should be train in giving psychosocial support to the Juvenile offenders. The government should also follow the similar training program already exists in western countries. The must be sensitize about the issues of the juvenile and must be well equipped with all the necessary training. Apart from the staff working in juvenile placement institutions, police officers staff from prosecution department, judges, lawyers, probation officers, and jail staff.

5.3. Legislative Measures

Currently, the legislative measures for Juvenile justice system are not enough .To give a feeling of security as well as to protect the juvenile from every kinds of discrimination, juvenile delinquency and to safe guard them against the damage to their personality the government must do proper legislation to bring at par with constitutional requirements and international conventions and standards**.** Unfortunately, presently one juvenile law exists which is struck down by Lahore High court and no final decision has been made so far by the Honorable Supreme Court of Pakistan. The legislatures should come up with a proper legislation which will address all the issues pertaining to the best welfare of child offenders. Most importantly, the lawyers' role is very crucial and they must be involved to come up with the proper law reforms and legislation for the child offenders.

5.4. Juvenile Age for Criminal Liability

In Penal Code of Pakistan (PPC) minimum and maximum age from the exemption from criminal liability is prescribed, that is 7 years, is

minimum and 12 years is maximum, with the exception that the court must firstly satisfied that whether the offender had enough maturity of understanding the intensity of the crime. This practice of minimum and maximum age is different in different around the globe. However, we have the example of some of the countries in the world where the liability in the context of a crime is still not decided on when we talk about the age but decision is taken on the basis of the mental capability of child offender as well as the environment where he is living .Since the changes in the Pakistan Penal code may be very difficult, however the proposed law may be practiced in a such away and the juvenile court may hear the cases of juvenile offenders. The juvenile courts must decide the cases on the basis of his/her own experience and professionalism.

6. The Death of a juvenile in one of the police station Peshawar v. The law of detention of Juvenile offender under section 5 of JJS Act 2018

The Juvenile Justice System Act 2018 defines the detention of Juvenile offender in the following terms:[7]

Section 5. Arrest of Juvenile, (1) the arrested juvenile shall be kept in an observation home and the officer –in-charge of the police station shall as soon as possible,

a. *Inform the guardian of the child, if he can be found, of such arrest and inform him of the time, date and name of the Juvenile Court before which the child shall be produced; and*
b. *Informed the concerned Probation Officer to enable him to obtain such information about the Juvenile and other material circumstances which may be of assistance to the juvenile Court for making inquiry.*

(2) No Juvenile shall be arrested under any of the laws dealing with preventive detention or under the provisions of Chapter VIII of the Code.

(3) The report under section 173 of the Code shall also describe the steps taken by the officer-in-charge for referring the matter to the Juvenile Justice Committee for disposal of case through diversion, where it was so required under section 9.[8]

[7] The Juvenile Justice System Act 2018.

[8] Ibid.

Alone in 2019 ,2020 and 2021 only few cases have been reported where the juvenile offenders were taken into the police custody and later on sometime they were found dead or brutally tortured. The recent death of the 14 years old child dated 14 March 2021 in the custody of the police is an example that the juvenile justice system act is very interesting while reading it but on other hand it shows that no serious compliance has been so far made to implement the Juvenile justice system act 2018 in the country. In such like cases the only action taken by the government is to suspend the concern police officer. In such like cases the story ends with a compromise with the victim family. It is obvious that government still needed to do effective legislations. Most importantly, the JJS Act 2018 is completely salient regarding the misuse of power by the police officer in relation to JJS Act. Therefore strong legislation is needed in the terms of the abuse of any law of JJS Act by any police officer vice versa.

6.1 Procedure of Juvenile cases

The dignity of any child offender is very important within the meaning of this act. Since we are living with a complex oriented society and it is very easy to get stigmatised. Therefore, it is important that the cases involving minor penalties may be dispose promptly and in a very dignified way. Similarly, the probation officer must be responsible for the supervision of the Juvenile offenders as well as other train staff of the institution. In the same way the parents of the Juvenile must be sensitize and should also arrange awareness session for them. Keeping in view the International standards and to improve the exciting Juvenile administration system, serious steps must be taken in order to dispose of the juvenile cases like compensation, supervision of the child offender ,involvement of parents/guardians, referral mechanism must be specified. [9]

Conclusion

Due to week legislation and improper mechanism in the terms of Juvenile offenders, therefore there is a possibility that the Juvenile offenders may be maltreated and sexually abused in prisons and cases like the 14 years old child will be repeated in different ways. Therefore, it is the duty of the government to take practical steps and ensure the establishment of separate juvenile rehabilitation centers for both male and female Juvenile offenders. The government must allocate sufficient budget to ensure and protect

[9] Pakistan ratified the Convention on 12 November 1990.

the well-being of the Juvenile offenders. It is also recommended that since there is no proper data available regarding the juvenile offenders in the country therefore a proper mechanism must be in place to get the data on monthly basis from each province. Similarly, each province may come up with legislations and Provincial Acts for juvenile justice system. Since each province has a different geography, culture and modes of committing crimes therefore each province will need its own legislation and act.[10]

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[10] Article 1 & 37(a) of the Convention on the Rights of the Child 1898; and Article 6 of the International Covenant on Civil and Political Rights 1966.

HEC Curriculum of Compulsory Islamic Studies Course in all Bachelor Degree Programs in Pakistani Universities: A Critical and Analytical Study

Muhammad Ajmal Farooq*

Abstract

Islamic Republic of Pakistan is an Islamic state constitutionally as well as by the International Charter. In its constitution, the state will promote Islamic manner, education and the atmosphere for worship to Allah Almighty among its masses. Keeping in view, the Higher Education Commission developed the curriculum of compulsory course; Islamic Studies for all Bachelor Degree Programs in Pakistani Universities. The Curriculum was arranged by the educationists, subject specialists and experts of Islamic education. It stipulates to focus the aims: (1) to provide basic information about Islamic Studies, (2) to enhance understanding of Islamic Civilization, (3) to improve student's skill to perform prayers and other worships, (4) to enhance the skill of the students for understanding of issues related to faith and religious life. This paper ventures to highlight the merits and demerits of the HEC Curriculum for the compulsory course of Islamic Studies. It examines the given aims and objectives in the curriculum are achieved by this course with the following key questions: Is there given aims meet the contemporary challenges facing students for the promotion of Islamic knowledge? What is current problems of the bachelor degree students? How can we fulfil the thrust of the student about Islamic knowledge? Does the Islamic Studies Curriculum update time to time for enhancing the students about the modern challenges of Islam in the world? This study analysis unites of the curriculum one by one and to improve with new topic and units for the development of Islamic education in the university students.

Keywords: Islamic Education, Pakistani Universities, HEC Curriculum, Islamic Studies, Compulsory Course

1. Introduction

Education gives awareness and knowledge to upgrade and update everyday sciences in humanity. With knowledge by God, human preference is accepted upon the angles after the creation of universe. Islamic civilization starts from the first revelation "*iqra'*" by God to the last Prophet (PBUH). The first revelation consists upon first five verses of *surah al-'Alaq* which describe to get knowledge with reading and writing with pen four time to promote humanity. The important direction of this first revelation

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is to highlight the knowledge and source of knowledge even for the recognition of God. Knowledge accordingly has pivotal role. Without knowledge, man can not recognize his creator. The universe and the creation of the universe attract human mind to understand the creation of the creator but the all process of this episode comes with education and knowledge.

The knowledge and education develops not only a person but it also promotes nation economically, socially and politically. Islam do not divide the education into its parts being its need in the world i.e. Islamic studies or non-Islamic studies. This division was arranged by the western scholars they adopted education according to sciences being Islamic studies is a part of social sciences. In this case, western universities established the branches of the knowledge which relates to the one part of the world studding its culture, religion and society. According to Western phenomenon, Islam exists in the society as religion and Muslim civilization has grown in different part of the world, with the evaluation of this system Islamic studies was adopted, as course, in the institutions. Islamic studies as a part of education, western scholars specified few approaches to get the research accordingly.

After independence, Muslim nation of Pakistan devoted to establish society according to Islamic faith and *Sharī'ah*. Government of Pakistan has taken place few steps for the reconstruction of the society according to Islam in newly established state. The University Grant Commission later on Higher Education Commission (HEC) decided to introduce the compulsory course; Islamic Studies in degree classes. With the passage of time, curriculum and syllabus was set with the cooperation of experts of Islamic studies from different institutions of the country. By last modified curriculum of HEC in 2015, that was arranged for all bachelor programs either they belong to sciences or technologies it was compulsory for all equally.

This article explores the curriculum of HEC that was compiled for bachelor programs in the education of Pakistan that meets the aims and objectives or not. The curriculum has aims and objectives to promote Islamic knowledge and education among youth of the country. It aims to establish Muslim nation for facing challenges and problem by the non-Muslims and ditheists in current era. This papers presents merits and demerits of this curriculum with analysis and critical methodology. This research aims to provide way out to promote Islamic education system

developing the youth of Pakistan with the curriculum of bachelor degree programs.

2. Overview of the Study

In Pakistan, the Islamic Studies course has two dimensions: classical and modern. The classical dimension is running in traditional institutions like *madāris* etc. and modern system has been adopting in schools, collages, and universities. According of Islamic perception of Pakistan, reconstruction of Islamic society is a prime need which had been moving the legislation system of the country to lunch Islamic studies course in educational institutions. In the constitution of the country, Islamic education was declared a compulsory subject for the basic education system. Education ministry advised all provincial text book boards to compile Islamic Studies book to teach the compulsory as course from grade first to degree class. In this process, HEC organized a curriculum committee to compile Islamic Studies curriculum to enhance Islamic tradition among Muslim youth. The HEC curriculum of Islamic Studies Compulsory Course was developed or updated, last time in 2015 which is uploaded now on HEC webpage[1] under the title Curriculum Archive in all bachelor programs either engineering or sciences. As annexure C, the Islamic Studies outline is attached with each curriculum of the program.

3. Analyzing the Objectives of the Outline

The outline starts from the objectives which were focused to improve skills of the students during teachings. It is initially, analyzed these objectives with observing the need of the students and society. There were mentioned four objectives:

1. To provide Basic information about Islamic Studies.
2. To enhance understanding of the students regarding Islamic Civilization.
3. To improve Students skill to perform prayers and other worships.
4. To enhance the skill of the students for understanding of issues related to faith and religious life.

The imperative study of the course is to set according to the level of the student with keeping in knowledge their previous studies

[1] https://www.hec.gov.pk/english/services/universities/RevisedCurricula/Pages/Curriculum-Archive.aspx accessed 23-10-2020.

as pre requisite course before degree class. The students have been acquired basic teaching of Islam from grade one to intermediate classes. They have gotten the Islamic education from basic roots to describe the doctrines, worships and ethics of the religion. Even somehow, the students have been practically adopted some good values of the religion but they sue these habits regularly. In this regard, it does not display the current condition of the students to require knowledge about Islam with initial stage. The repeating of the matter about worthy religion with higher philosophy and skills can give higher techniques for improving human habits according to understanding. The factual knowledge about first said objective expresses to get basic education of Islamic studies although the students have already gotten these basic concepts about Islam repeating in previous classes. Basic education of Islam is divided with three categories: doctrine, system of worship and ethics. The students have been learnt these knowledge from different previous steps. The said outline requires improved objectives according to degree class level. Understanding of Islamic Civilization is not core issue of Muslim *Ummah* which has need to discuss among the student especially in the students of university level. The universe has been changing with global village to promote global ideas with the awareness of materialistic tools. The young mind has self-analyzing power to satisfy his or her body with mater escaping soul satisfaction which is not significantly objective in the modern time. In current time, the students ought to aware Islamic Civilization with the comparison to other civilizations exist in modern era especially with the western civilization because it has influence materialistically in the humanity promoting financial development of the man. Islamic civilization promotes both side of the humanity; mater and soul while western civilization focuses mater only which has root in this world and that has to die in there as well. The students must be award by this comparison in both civilization otherwise basic education of Islamic civilization was conveyed to them.

It is effective and attractive way to explain worship system of Islam with the needs human body by its benefits rather than to explain improvement of skills of worship. Wish to perform worship and duty does not acquire with improvement of the skills but it comes with strong relations by creating strong personal accountability in hereafter. Willing to say prayer produces self-assessment regarding personal relationship with God. It mostly depends upon the habit of practice in whole previous life not in few months. The process of lesson with repeating Islamic knowledge in one semester it truly drops desire in the heart of the

student for improvement of this practice regarding prayer and other compulsory duties by God.

Today, Islam and Muslim *Ummah* are facing many issues either in one Muslim country or in whole Muslim community in the world. Some issues were adopted individually and some others are growing in Muslim societies with collective misdeeds. For addressing such issues, there is no need to include skill in compiling the objectives of the study of Islamic education. The Islamic Studies faculty should understand the background of those students they come to different discipline to the universities in bachelor level. The objectives should be compiled accordingly to grow their thoughts on strong Islamic foundation. They should convey the authentic knowledge to compete modern challenges grown by the western thoughts such as naturalism, atheism, humanism, Marxism etc. The thoughts provide to get dynamics of the society which develop societies on soft foundation. The foundation generates strong and positive relations with other nations to enhance human dignity and peace for the recognition fruit and conclusion of that foundation.

4. Analyzing the Course of the Outline

The improvement of the syllabus is educational science to give updated knowledge with time to time according to need of the course. It is not difficult to grow the knowledge with facing challenges. The HEC curriculum of Islamic studies as compulsory subject for degree classes was not updated after 2015. The curriculum is analyzed with the needs of the time and challenges faced by the Muslim youth especially in the country. The table shows the previous topics in the said curriculum and new topics which can be include in that outline.

Previous Topics	**Current Suggested Topics**
Introduction to Quranic Studies a. Basic Concepts of Quran b. History of Quran c. *Uloom-ul –Qur'ān* (Difficult to understand)	**Human thrust to religion: Islam** a. Comparison and Preference b. Introduction to other religions c. Progressive and growing religion in the world

	d. Characteristics of Islam
Study of Selected Text of Holly Quran a. Basic *Qur'ān*ic Teachings of Faith related to Surah Baqarah Verse 284-286 b. Verses of *Sūrah Al-Mumanoon* Related to Characteristics of faithful people (Verse No-1-11)	**Introduction to Reveled books** a. The Holy Bible b. *Qur'ān* c. Comparison between reveled books d. Revelation and writing by human text
Study of Selected Text of Holy *Qur'ān* c. Faith on the Day of Judgment with Verses of *Sūrah Al-Hashar* (18,19,20) Related to Day of Judgment	**Study of Selected Text about challenge to Arabs** a. Arabian language and *Qur'ān*ic Text b. Protection and significance c. Challenges by Modern Orientalists
Seerat of Holy Prophet (S.A.W) I a. Important Events with Lessons Derived from the life of Holy Prophet in Makkah *b.* Basic *Qur'ān*ic Teachings of *Adab-e-Nabi* relate to *Sūrah Al-ahzāb*	***Sīrah* of Holy Prophet (S.A.W) I** a. *Risālah* and *Nabūwah* b. *Sīrah* for all the time c. Role Modal in every age d. Blessed in indoor and outdoor activities e. Study of Makkan

	and Medinian Times
Seerat of Holy Prophet (S.A.W) II a. Important Events with Lessons Derived from the life of Holy Prophet in Makkah b. Basic *Qur'ān*ic Teachings of *Adab-e-Nabi* relate to *Surah Al-ahzāb*	***Sīrah* of Holy Prophet (S.A.W) II** a. Finality of the Prop hood b. Ware and Peace in the *Sīrah* c. Status of the Prophets and Religious personalities d. Cartoon Issue and Western civilization
Introduction to *Sunnah* a. Basic Concepts of Hadith b. History of Hadith *c. Uloom –ul-Hadīth* d. Kinds of *Hadīth* e. Sunnah & *Hadīth* f. Legal Position of *Hadīth*	**Introduction to *Ḥadīth*** Added: Modern challenges to *Hadīth*
Introduction to Islamic Law and Jurisprudence a. Basic Concepts of Islamic Law and Jurisprudence. b. History and Importance of Islamic Law and Jurisprudence. c. Sources of Islamic Law and Jurisprudence.	**Introduction to Islamic Law** a. Basic Concepts of Islamic Law and Jurisprudence. (Same) b. Comparison between Islamic Law and Manmade law

d. Nature of Differences in Islamic Law. e. Islam and Sectarianism.	c. Sources of Islamic Law and Jurisprudence. (Same) d. Compatible with the time e. *Ijtihād;* the modern phenomenon of Islam
Islamic Culture and Civilization a. Basic Concepts of Islamic Culture and Civilization. b. Historical Development of Islamic Culture and Civilization. c. Characteristics of Islamic Culture and Civilization. d. Islamic Culture and Civilization and Contemporary Issues.	**Islamic Civilization** a. Foundation of Islamic Civilization: Iqra' (Knowledge and Science) b. Historical Development of Islamic Culture and Civilization. (Same) c. Comparison in Islamic Civilization and others d. Islamic Civilization local Muslim culture e. *Khilāhpat* System in Islam
Islam and Science a. Basic Concepts of Islam and Science. b. Contributions of Muslims in the Development of Science. c. Quran and Science.	**Development of Sciences in Islam** a. Creation of the universe and Islam b. Science and Knowledge c. Introduction to Muslim Sentences and their role d. Science and

	modern Muslims
Islamic Economic System a. Basic Concepts of Islamic Economic System. b. Means of Distribution of wealth in Islamic Economics. c. Islamic Concept of *Ribā*. d. Islamic Ways of Trade and Commerce.	**Economical System of Islam-I** a. Islamic Economic System. (*Kitāb ul Byuū' and Fiqh ul Mua'āmlāt)* b. Means of Distribution of wealth c. Halal Source of *Rizq* d. Islamic Concept of *Ribā*
Political System of Islam a. Basic Concepts of Islamic Political System. b. Islamic Concept of Sovereignty. c. Basic Institutions of Govt. in Islam	**Economical System of Islam-II** a. Islamic Banking & Finance b. Comparison between Conventional and Islamic Banking system c. Welfare Tex and *Zakāh* d. *Sadāqat* and *infāq*
Islamic History A. Period of *Khilāft-E-Rāshida*. B. Period of Ummayyads. C. Period of Abbasids.	**Preaching System (*Da'wah*) in Islam** a. What is *Da'wah* b. *Da'wah* according to *Sīrah* c. Modern techniques for *Da'wah* d. Modern Challenges to *Da'wah* e. *Da'wah* in Muslim and Non-Muslim Society
Social System of Islam A. Basic Concepts of Social	**Social System of Islam** A. Basic Concepts of

System of Islam. B. Elements of Family. C. Ethical Values of Islam.	Social System of Islam. B. Elements of Family. C. Ethical Values of Islam. D. Human Rights in Islam
	Muslim and Non-Muslim Relation a. Relations with Non-Muslim neighbor b. Country vid Relations c. Worldwide Relations

The modern needed topics were included in said outline under the title of current suggested topics. Some relevant topics should be consisted under the major field. The outline needs to deliver the students with effective way by interested mythology that depends upon the faculty.

5. Analyzing the Referral Material

According to the topic, the faculty should get martial from specified books and that should be mentioned at the end of outline. In the HEC outline of Islamic Studies course, most of referral books were consisted by the discipline of Islamic Law although in only one class the Islamic Law should discuss among the student. For rest of the classes, only three books were consulted these were by Dr. Muhammad Hamidullah. The referral books should be consulted by different Muslim and Muslim scholars presenting unified material among the students. With this methodology they may analyze the concepts of Islam. The student can get the updated and approved knowledge from the basic sources of Islam.

6. Conclusion and Recommendation

According to specified material, the HEC outline was analyzed to improve the student's knowledge with current and important issues which have to be taught to the bachelor degree classes. The

paper suggests new avenues for the improvement and betterment of the youth. Every challenge made stands in the society it must be addressed and the paper critically suggested replacement of the old curriculum. The old curriculum, almost was compiled all sides of Islamic studies but it was not briefed with removing those topics the student had touched in previous grades while new suggested curriculum removed taught material by the students. It gives awareness and knowledge to the students with new challenges in contemporary world due to need of the modern time. The bachelor degree programs in Pakistani Universities are the mostly signals for the students to earn and stable their practical life in the society. The suggested curriculum of the compulsory course, Islamic Studies guides the students to keep themselves on right way with meeting righteousness (*Khair*) in this world and achieving Jannah in hereafter.

By keeping in view the above findings and conclusion the study found that there is a need to improve the HEC curriculum with new topics that were the challenges of the Islamic Studies.

1 The curriculum of Islamic studies should be updated according to the need of time and society. The faculty should deliver relevant material according to the student of that sciences.
2 With the both theoretical and practical approaches should be employed into the course to mold the mind of the student to the Islamic true spirit.
3 The teachers should change the motives for creating interest in their teaching with modern techniques.
4 Modern challenges should be addressed in suggested curriculum to uplift the student to face current challenges under the Islamic tools and guidance.
5 Every degree programs should allow to change few topics according to the specialization of the degree background.
6 Major changes should be acquired to all degree programs like: Islamic concept of Interest, Islamic mode of business, Islamic Idea of administration, Blasphemy Law, Human rights in Islam etc.

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Book Review

Shifa Haq. *In Search of Return: Mourning the Disappearances in Kashmir*. London, Lexington Books, 2021. ISBN: 9781498582483.

Manahil Tayyeb Khan*

The phenomenon of enforced disappearances emerged in Kashmir after 1989, after the outbreak of armed conflict. Armed Rebels, their sympathizers, political activists and large number of innocent persons have become the victims of ED. Multiple problems are faced by the victims of ED, they suffer from physiological and psychological disorders, from constant agony, trans-generational trauma to post traumatic stress disorders. The disappearances have economical dimensions too for example with the case of half widows as they get deserted from their in-laws along with their children. They become burden on their parents and this economic dependence affects the future of their children. The grief of victim's family, how they choose to mourn over it. The historical context of disappearances in Kashmir perspective, different cases of disappearances and how their memories are preserved through art. All these aspects have been discussed in this book in five chapters.

Chapter 1 deals with the manner of mourning in psychoanalysis, what a successful mourning is and what is its failure and the role of language in understanding the complexity of mourning. The author talks about how dreams can occur after going through a trauma and what they may mean. According to the author, the knowledge of loss remains a difficult object to repress for a mourner hence we sometimes see the objects in a dream which is a method of opening doors to memories. In some, grief may take melancholic roots, in some others, a profound mourning, likes of which may or may not be healed by time. In mourning, the world without the object is left empty, in melancholia, the ego itself is made empty. The mourner enters a relationship of anxiety, loss and control with these objects, the new object world protected and guarded throughout one's life. The author discusses what a successful mourning is. That is when we relive our memories and ties with the lost object in order to

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decathlete from the object that exists no longer. It is suggested that the dead be put to death again. The pain of loss can be turned round upon the subject's own self, showing how the need to punish turns into self-torture and self-punishment. The survivor may not remember anything of the traumatic event or the disturbing effect but may act out the disturbed inner state in displaced situations. Author says that massive trauma overwhelms the ego's capacity to bear the excitations caused by the painful event. As the trauma seeps into community life or its social fabric, waves of shock are felt by members.

In Chapter 2 the historical context of disappearance has been discussed along with its effects on the body politic with special reference to Kashmir. Author emphasize on how disappearances in Kashmir were part of the larger policy of repression used by the Indian state including other means such as extra-judicial killings, custodial torture, rape, forced labour. In June 2003, the Jammu and Kashmir Government announced that 3,931 persons had disappeared since 1990, however the figure given by APDP was of more than 8,000. Author criticizes the impunity acts like AFSPA which gives the armed forces power to arrest any person without a warrant under a cognizable offence or a suspicion. The enforcement of the AFSPA has unleashed horrific human rights violations and it contradicts with the constitution of India itself. Torture was relegated to new locations, such as prisons and detention camps, where punishments are carried outside public witnessing and the body as the major target of penal subjugation is disappeared. In disappearance, the body once snatched from communal life is isolated from history without its claims on life and death.

Chapter 3 focuses on the voices of mourners in the context of disappearance in Kashmir. The stories of the slow ingestion of loss through mourning privately and publically. The author put light of on the harsh reality that the effects of militarization in Kashmir have been mostly borne by women and children. She talks about the struggle of Parveena Ahangar, whose 16 year old son got missing in 1990. Parveena Ahangar and other families of the disappeared came together to form the Association of Parents of Disappeared Persons (APDP). APDP has become a collective expression of mourning and appeal for reparative justice. In Kashmir militarization makes itself legible as a state of terror. This chapter is a passage into the inner world of mourners left by the

trauma of disappearance and their path between memories and haunt for the truth. The traumatization of the community at large, affects immediate members and bystanders. Through public mourning, the mothers of the disappeared give form to the pain of disappearance by rendering it immediate and alive to the children who never saw their fathers, members of the families who do not weep, and the members of the Kashmiri community who did not witness disappearance but can imaginatively connect to the pain of the mourners. The writer narrates the story of Rasool Ahmed whose 13 year old son got disappeared in 1993. The dehumanization caused by and deceit in the official denial of the traumatic event that he experienced through the judicial process. The writer also talks about the story of Sameena and her daughter Amna who went through a trauma of her father's disappearance. According to Sameena meaning of disappearance as loss is to first lose one's mind, to tip over the edge of cohesion or sanity. Another story the writer describes is of Aasa's whose son Ajeet got disappeared in 1999. As a Kashmiri Sikh woman she would blame the Muslim Kashmiri's for her son's disappearance. Aasa had accepted her son's disappearance as her destiny believing what has happened has happened and that she would sit there silently.

Chapter 4 imitates on the evolving meaning of disappearance in Kashmiri perception. The chapter focuses on the work of artists and poet-writers as they describe disappearance through their imagination and address the dilemma of disappearance in the cultural fabric of Kashmir. The author talks about Nilima Sheikh's work, 'Each Night Put Kashmir in your Dreams', her empathic inwardness to dream the aspects of traumatic moments in Kashmiri history. Through the use of photographs, souvenirs and art, people listen to and produce private variations in mourning stories to preserve and attribute meaning to the individual struggles and collective survival. The Survivor art attempts to give artists and the community a chance to imagine the events in an aesthetic cultural history as well as moral imagination. The focus of survivor art revolves around bodily damage, the breakdown of cities and structures, philosophical perils and the insufficiency of traditional symbols. Such an impulse is illustrated in the works of Kashmiri artists and poets as they bear witness to collective trauma. Masood Hussain, a Kashmiri artist, expresses the encounters in artistic expression as a graphic designer and works in advertising and watercolor

paintings. Some of his famous works have been discussed like 'Those Who Disappeared' (2004) and 'Look behind the Canvas' (2011). Along with paintings poems invoke a close proximity with the actual event. In the context of disappearances in Kashmir, the Kashmiri poet, Naseem Shafaie, demonstrates the witnessing most notably in two collections of poems, Open Windows (1999) and Neither Shadow nor Reflection (2017) from which the trauma of disappearances can be imagined. In the emerging cinematic representation the demonstration of trauma's can be seen in films such as Hamid directed by Aijaz Khan (2018), No Fathers in Kashmir directed by Ashvin Kumar (2019) and The Dear Disappeared (2018) by the Kashmiri documentary film maker Iffat Fatima.

Chapter 5 traces the emerging meaning of mourning, its shape and outlines, to offer a possible reworking of existing perspectives. The chapter seeks to reclaim what mourning does to politics and how can psychoanalysis contribute to imagining collective suffering. Through their mourning, mourners of the disappeared in Kashmir give us an idea about their sufferings that we may learn to recover the disappeared as a percolating shape in the individual and the collective memory. In ambiguous loss such as a disappearance, the work of mourning involves the search for the lost object inside as well as the search for the one lost in the outside. Mourning in the case of disappearances is a response to the context of militarization, the mourners are also victims of massive trauma and state repression. The traumatic loss due to disappearance and the widespread exposure to violence have a deep impact on the survivors. Mourning in Kashmir implied 'tackling violence, terror and death through methods of somatic, sensory, affective, semiotic, symbolic, phenomenological, linguistic, performative and social historical constructions. In Kashmir the mourners' grief is a counter-resistance to the wounds afflicted on the ones dominated and forced to purge memory or to commit to forgetting. The mourners who take on the complex work of waiting for the return of the disappeared turn forgetting into a taboo, the mourners reclaim their attachment with the missing as a form of political protest. While state repression makes the body a hostage, it is one's ties with 'the missing' that cannot be erased. The mothers and wives, fathers and children, by incorporating the lost object, prevent the decay of the lives of the missing individual by preserving them in the inner crypts of their personal and collective memory. At the community level too, the

memory of the disappeared, is kept alive through fantasies, fears and concern about the past and the future. Like martyrs who sacrificed for the community, the disappeared persons and their family are imagined as permanently imperiled. The practice of disappearances in Kashmir will have continuing impact on the generations to come.

This book is rich in content. The title reflects the whole idea of the book. It scrutinizes how societal remembrances and mourning is voiced. Authors referencing to poems and paintings linked to disappearances illustrate that there are creative ways of remembering losses and horrors which makes the book even more interesting to read. The author managed to refer different psychoanalysts with their thoughts and theories about the subject and it is hoped that the readers will gain knowledge about the long-lasting effects of disappearances and other traumas in Kashmir, which will go along with the generations to come.

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اردو مقالات

فہرست

مقالہ نگاران

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امام محمد بن الحسن شیبانیؒ کی کتابوں میں روات حدیث کے بارے میں جرح وتعدیل کے مباحث: ایک تحقیقی جائزہ

اسد اللہ خان پشاوری*

Abstract

The sciences of Ḥadīth, *founded by Muslim scholars, are unprecedented. One among such sciences is* Jarḥ wa Ta'dīl *that illuminates the ways for measuring the characters of the ḥadīth narrators. This paper sheds light on the views of a luminary of* Ḥanafī *School of law,* Imām Muḥammad b. al-Ḥasan al-Shaybānī *who had attained the knowledge of* ḥadīth *with the celebrity of his own time,* Imām Mālik *and many others. In addition to his profound contribution in* fiqh, Imām Shaybānī *contributed largely in the sciences of* Ḥadīth. *The present paper analyses his views concerning the science of Jarḥ o Ta'dīl. Imam* Shaybānī *reaffirmed many scholars and emphasized his students to attain education with them and, similarly, he critically evaluated many others. In the following lines his views are analyzed.*

Keywords: 'Ulūm al-Ḥadīth, Jarḥ o Ta'dīl, Imām Muḥammad b. al-Ḥasan al-Shaybānī, Imām Mālik, Muḥaddithūn.

تعارف

مسلمانوں نے نبی کریم ﷺ کی احادیث اور تاریخی اخبار کی تحقیق کے لیے علوم حدیث اور جرح وتعدیل کی جس علم کی بنیاد ڈالی ہے، اس کی نظیر دوسری اقوام کے ہاں ملنا مشکل ہے، اس میں مسلمانوں کو اولیت کا شرف حاصل ہے۔ مشہور عیسائی مستشرق اسد رستم باز (ت ۱۹۶۵ء) نے اس بارے میں تحقیق کے بعد اعتراف کیا ہے کہ "سب سے پہلے جس نے تاریخی روایات کی تنقید کی اور اس کے لیے قواعد وضع کیے وہ دین اسلام کے علماء ہیں"۔ ان کے الفاظ ہیں: "وأول من نظّم نقدَ الرِّواياتِ التَّاريخية ووَضَعَ القواعدَ لذلك علماءُ الدِّين الإسلامي".[1]

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(1) الدكتور أسد رستم باز ، **مصطلح التاريخ**، (بيروت : المكتبة العصرية، الطبعة الأولى : 2002ء)، ص: ۵۔

امام محمد بن حسن شیبانیؒ (ت۱۸۹ھ) عالم اسلام کے ان نامور شخصیات میں سے ہیں جنہوں نے نہ صرف علم حدیث کی روایتی پہلو سے تدوینی کردار ادا کیا ہے، بلکہ علم حدیث کی درایتی پہلو سے بھی ان کی تحریرات سے رہنمائی حاصل کی جاسکتی ہے۔ امام محمدؒ نے اسلام کی بنیادی علوم کے بارے میں قیمتی کتابوں کا جو ذخیرہ چھوڑا ہے، ان میں سے اکثر کتابیں شائع بھی ہو گئی ہیں۔امام محمدؒ کی بعض کتابیں خالص فقہی مسائل پر مشتمل ہیں جیسے جامع صغیر ہو گئی،اور بعض کتابیں خالص علم حدیث کے روایتی پہلو پر ہیں جیسے کتاب الآثار اور الموطا، اگرچہ اس میں بھی جابجاعلوم حدیث اور جرح وتعدیل کے درایتی پہلو کے چند مباحث کا ذکر ہے۔البتہ امام محمدؒ کی بعض کتابوں میں علوم حدیث کے مباحث زیادہ ہیں، جیسے کتاب الاصل اور کتاب الحجہ علی اہل المدینہ۔"کتاب الاصل" میں ذکر کردہ احادیث کی تعداد ایک ہزار بتیس (۱۶۳۲) ہیں اور جابجااس میں "علوم حدیث" کا استعمال ہے۔[2] اور "الحجہ علی اھل المدینہ" میں اہل کوفہ اور اہل مدینہ کے اختلافی مسائل کا مدلل بیان ہے اور جابجااس میں علوم حدیث اور جرح وتعدیل کے قواعد استعمال کیے گیے ہیں۔ زیر نظر مضمون میں امام محمدؒ کی کتابوں میں علوم حدیث کے دیگر مباحث سے قطع نظر صرف جرح وتعدیل کے مباحث ذکر کیے جائیں گے۔

تنبیہ: متقدمین کے ہاں جرح وتعدیل کے مباحث زیادہ نہ ہونے کی وجوہات

واضح رہے کہ امام محمدؒ کا زمانہ متقدمین کا زمانہ تھا اور متقدمین کے زمانے میں راویوں کے جرح وتعدیل کے مباحث کم سے کم ہوتے تھے،اس کی وجوہات دو ہیں، ایک تو اس وجہ سے کہ سند کے راویوں کا سلسلہ مختصر ہوتا ہے،سند عالی ہوتی تھی، لہذا راویوں کی تعداد کم ہونے کی وجہ سے اس بارے میں بہت جلدی ہی فیصلہ ہو جاتا ہے۔ سند کے راویوں سے متعلق مباحث جس قدر زمانہ گزرتا رہا، زیادہ ہوتے رہے۔دوسری وجہ یہ ہے کہ متقدمین کے ادوار میں روات میں کذب کا شیوع نہیں تھا، جس کی وجہ سے روات میں کلام و جرح کے مباحث کم تھے، بعد کے زمانے میں ضعیف راویوں کی کثرت ہوئی، جس کی وجہ سے بعد کے علماء کے جرح وتعدیل کے مباحث بھی زیادہ ہو گئے۔

مگر اس کے باوجود امام محمدؒ سے جرح وتعدیل کے کئی اقوال منقول ہیں۔سب سے پہلے صحابہ کرام کے بارے میں ان کے تعدیل وتوثیق کے اقوال نقل کرتے ہیں،اس کے بعد دیگر روات حدیث کے بارے میں تعدیل اور پھر جن کے بارے میں جرح کے اقوال منقول ہیں، نقل کرتے ہیں۔

(ا)امام محمدؒ اور صحابہ کرام رضی اللہ عنہم کی تعدیل وتوثیق

ا۔صحابہ کی مدح:

(2) بوينوكالن ، الدكتور ، محمد ، **مقدمة الأصل** ، (قطر: وزارة الأوقاف ، الطبعة الأولى : ۲۰۱۲ء)۔ ص:197.

امام محمدؒ نے کتاب الحجہ میں ایک جگہ صحابہ کی شاندار تعریف کی ہے، اور لکھا ہے کہ ان کا علم و فقہ بعد والوں سے زیادہ ہے، ملاحظہ ہو:

"قيل لهم: وكيف جاز هذا في ذلك الزّمان ولم يَجُز في هذا الزّمان ما جاء غير الأول أو جاء قوم أفقه من الأوّلين، ما العلمُ إلا علمَ الأوّلين الّذين رخصوا في ذلك، وما الفقهُ إلا فقهُهم، وهم كانوا أعلمَ بأمر رسول الله ﷺ وأقربَ به جهدا مِنّا، فلو رأوا ذلك قبيحا ما فعلوه". [3]

[ان سے کہا جائے گا کہ یہ بات کیسے اُس زمانے میں جائز ہو سکتی تھی اور اِس زمانے میں ناجائز ہو سکتی ہے، کیا پہلے زمانے کے لوگوں سے بھی بڑے فقہاء آئے ہیں کیا؟ علم تو وہی علم ہے جو پہلوں سے منقول ہے اور فقہ بھی انہیں کا ہے۔ صحابہ، نبی کریم ﷺ کے کاموں کے زیادہ علم رکھتے تھے، وہ نبی کریم ﷺ کے زیادہ قریب تھے، ہم سے زیادہ جہود اور خدمات والے تھے، اگر وہ اس کو برا سمجھتے تو کبھی نہ کرتے]۔

۲۔ صحابہ کے مابین اختلافی مسائل میں ادب کا لحاظ رکھنا:

امام محمدؒ صحابہ کرام کے اختلافی مسائل میں ادب کا خیال رکھتے تھے، دونوں طرف کے اقوال کو حق سمجھتے تھے، چنانچہ ایک جگہ لکھتے ہیں:

"وقد رُوي ذلك عن أمير المؤمنين عمرَ بن الخطاب رضي الله عنه. قَال مُحمد: قولُ العامّة على قول زيد بن ثابت وكُلٌّ إن شاء الله حسنٌ جميلٌ "[4]

[امیر المومنین حضرت عمر رضی اللہ عنہ سے یہ منقول ہے، امام محمدؒ فرماتے ہیں کہ عام علماء کا فتوی حضرت زید بن ثابت رضی اللہ عنہ کے قول پر ہے، اور یہ دونوں قول ان شاءاللہ اچھے اور بہتر ہے]۔

۳۔ حضرت عمر رضی اللہ عنہ علم حدیث میں حضرت عائشہ سے بڑے ہیں

امام محمدؒ کتاب الاصل میں ایک جگہ حضرت عمر رضی اللہ عنہ کی روایت حضرت عائشہ رضی اللہ عنہا کی روایت سے راجح قرار دیتے ہیں، کیونکہ حضرت عمر رضی اللہ عنہ، حضرت عائشہ رضی اللہ عنہا سے علم حدیث میں بڑھ کر ہے، ان کی عبارت ملاحظہ ہو:

"وكان حديثُ عمرَ أوثَق عندنا، وكان عمر أعلم بحديث رسول الله ﷺ من عائشة رضي

(3) الشَّيباني، **الحجة على أهل المدينةِ**، 1 : 290۔

(4) الشَّيباني، **الحجة على أهل المدينةِ**، ٤ : ٢٠٩، ٢: ٤١٧)، یہاں مہدی حسن صاحب کی تعلیق قابل مطالعہ ہے۔

الله عنها".[5] [یہاں پر امام محمدؒ نے حضرت عمر رضی اللہ عنہ کو حضرت عائشہ رضی اللہ عنہ پر فضیلت دی ہے، لیکن آگے آرہا ہے کہ جہاں نبی کریم ﷺ کے گھریلو زندگی سے متعلق حدیث ہو وہاں حضرت عائشہ رضی اللہ عنہ کی روایت کو ترجیح دی ہے]۔

۴۔گھریلوں امور میں حضرت عائشہ رضی اللہ عنہا کے قول کو ترجیح دینا

"وقَال محمَّدُ بن الحَسَن: الآثَارُ في ذلك أنّه لا وضوءَ فيه، كثيرةٌ مَعرُوفةٌ، وهذا أمرٌ كان ابن مسعود يقولُه ولم نعلمه عن أحد إلا عن ابن مسعود، فأما ابنُ عباس فقَال: ليس في القبلة وضوءٌ، وأنَّ عليّ بن أبي طالب رضي الله عنه كان يقولُ: ليس في ذلك وضوء. والحَديثُ المشهورُ المَعرُوف عن عائشة رضي الله عنها أنّها كانت تقول: إن رسول الله ﷺ كان يتوضأ ثم يقبّل بعض نسائه ثم يمضي إلى الصّلاة ولا يُحدث وضوءا. **فعائشةُ أعلم بذلك من غيرها** ولا نراها كانت تعني بذلك إلا نفسها".[6] [امام محمدؒ فرماتے ہیں کہ اس بارے میں احادیث بہت زیادہ ہیں کہ بوسہ لینے سے وضو نہیں ٹوٹتا، صرف ابن مسعود رضی اللہ عنہ اس کے قائل ہے کہ ٹوٹتا ہے، ان کے علاوہ کسی اور سے مجھے یہ قول معلوم نہیں ہے۔ابن عباس رضی اللہ عنہ، علی رضی اللہ عنہ بھی فرماتے ہیں کہ بوسہ میں وضو نہیں ہے۔اور عائشہ رضی اللہ عنہا کی مشہور حدیث ہے کہ نبی کریم ﷺ وضو فرماتے اس کے بعد اپنی بیویوں میں سے کسی ایک کو بوسہ دیتے اور نماز کے لیے چلے جاتے، دوبارہ وضو نہیں کرتے۔ حضرت عائشہ رضی اللہ عنہا اس بارے میں دیگر صحابہ سے زیادہ جاننے والی ہیں، اور بظاہر میرا خیال ہے کہ اِس سے مراد اُن کی اپنی ذات ہے]۔

یہاں امام محمدؒ نے حضرت عائشہ رضی اللہ عنہ کو فضیلت دی ہے کیونکہ نبی کریم ﷺ کے گھریلو زندگی سے متعلق حضرت عائشہ رضی اللہ عنہ کو زیادہ علم تھا۔

۵۔اکابر صحابہ کی روایات کو حضرت بسرہ رضی اللہ عنہا کی روایت پر ترجیح دینا

شرمگاہ کو ہاتھ لگانے سے وضو ٹوٹنے کی روایت جو حضرت بسرہ بنت صفوان رضی اللہ عنہا[7] سے منقول ہے، اور وضو نہ ٹوٹنے کی روایت حضرت علی بن ابی طالب، حضرت عبد اللہ بن مسعود، حضرت عمار بن یاسر، حضرت حذیفہ بن یمان اور حضرت عمران بن حصین رضی اللہ عنہم سے منقول ہیں، امام محمدؒ فرماتے ہیں کہ کہاں بسرہ بنت صفوان اور کہاں یہ جلیل القدر صحابہ!۔اور امام محمدؒ مزید لکھتے ہیں کہ ایک طرف روایت کرنے والے سارے مرد

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(5) الشَّيباني، **الاصل** 6ص :380-

(6) الشَّيباني ، **الحجة على أهل المدينة** ، ج :1ص : 65 ۔ حضرت عبد اللہ بن مسعود رضی اللہ عنہ کی روایت کے لیے ملاحظہ ہو: البيهقي، **السنن الكبرى** ، ج:1،ص:124، كتاب الطهارة، باب الوضوء من الملامسة.

(7) بسرہ رضی اللہ عنہا کے حالات ملاحظہ ہو:ابن حجر ، **الإصابة في تمييز الصحابة** ، 7 : 536.

ہیں، اور دوسری طرف صرف ایک عورت ہے، اس کے ساتھ کوئی مرد نہیں ہے۔ اور عورتیں کمزور عقل والی ہوتی ہیں۔ اس کے بعد امام محمدؒ اپنے لئے دلیل کے طور حضرت عمر رضی اللہ عنہ کے طرز عمل سے استدلال کرتے ہیں کہ انہوں نے ایک عورت فاطمہ بنت قیس رضی اللہ عنہا کی روایت کو اس وجہ سے رد کیا کہ ہم نبی کریم ﷺ کی روایت کو ایک عورت کی وجہ سے کیسے چھوڑ دے معلوم نہیں اس نے صحیح یاد کیا یا نہیں۔ امام محمدؒ کی عبارت ملاحظہ ہو:

"والذي لا اختلافَ فيه عندنا أن علي بن أبي طالب وعبد الله بن مسعود وعمار بن ياسر وحذيفة بن اليمان وعمران بن حصين رضي الله عنهم لم يروا في مس الذكر وضوءا، فأين هؤلاء من بسرة ابنة صفوان، وهل ذكرتموه عن أحد غيرها".[8]

"فكيف تترك حديثَ هؤلاء كلهم واجتماعهم على هذا على حديث بسرة ابنة صفوان امرأة ليس معها رجل والنساء إلى الضعف ما هن في الرواية وقد اخبرت فاطمة بنت قيس عمر بن الخطاب رضي الله عنه أن زوجها طلقها ثلاثا فلم يجعل لها رسول الله ﷺ سكنى ولا نفقة فأبى عمر رضي الله عنه أن يقبل قولها وقال: ما كُنَّا لنجيز في ديننا قولَ امرأة لا ندري أحفظت أو نسيت فكذلك بسرة ابنة صفوان لا نجوز قولها مع من خالفها من أصحاب رسول الله ﷺ".[9]

(۶) عبداللہ بن مسعود اور علی رضی اللہ عنہما، عبداللہ بن عمر رضی اللہ عنہما سے بڑے عالم تھے

عدم رفع یدین کی روایات حضرت عبداللہ بن مسعود اور حضرت علی رضی اللہ عنہما سے منقول ہیں اور رفع یدین کی روایت حضرت عبداللہ بن عمر رضی اللہ عنہما سے منقول ہے۔ امام محمدؒ عدم رفع یدین کی روایات کو اس طرح راجح قرار دیتے ہیں کہ حضرت عبداللہ بن مسعود اور حضرت علی رضی اللہ عنہما، نبی کریم ﷺ کے احوال جاننے کے بارے میں حضرت عبداللہ بن عمر رضی اللہ عنہما سے بڑے علماء تھے، کیونکہ یہ حضرات علم و عمر میں بڑے تھے، اور نبی کریم ﷺ کی ہدایت تھی کہ نماز میں میرے قریب علم و عقل والے رہیں۔ اس وجہ سے پہلی اور دوسری صف میں بدری صحابہ کھڑے ہوتے تھے۔ اور حضرت عبداللہ بن مسعود اور حضرت علی رضی اللہ عنہما بدری تھے۔ لہذا ان حضرات نے نبی کریم ﷺ کی نماز کے احوال اچھے طریقے سے دیکھے ہیں، جبکہ حضرت عبداللہ بن عمر رضی اللہ عنہما جیسے چھوٹی عمر کے صحابی دور کھڑے ہوتے تھے۔

(8) الشَّيباني، **الحجة على أهل المدينةِ**، ج: 1 ص: 60

(9) الشَّيباني، **الحجة على أهل المدينةِ**، ج: 1 ص: 64.

ملاحظہ ہو:

"وقَال محمَّد بن الحَسَن: جاء الثّبتُ عن علي بن أبي طالب وعبد الله بن مسعود أنهما لا يرفعان في شيء من ذلك إلا في تكبيرة الافتتاح. فعلى ابن أبي طالب وعبدالله بن مسعود كانا أعلم برسول الله ﷺ من عبدالله عمر، لأنه قد بلغنا أن رسول الله وسلم ﷺ قَال: إذا أقيمت الصّلاة فليليني منكم أولو الأحلام والنهى ثم الذِين يلونهم ثم الذِين يلونهم. فلا نرى أن أحدا كان يتقدم على أهل بدر مع رسول الله ﷺ إذا صلى، فترى أن أصحاب الصف الأول والثاني أهل بدر ومن أشبههم في مسجد المسلمين، وأن عبدالله بن عمر رضي الله عنهما ودونه من فتيانهم خلف ذلك، فنرى عليا وابن مسعود رضي الله عنهما ومن أشبههما من أهل بدر أعلم بصلاة رسول الله ﷺ لأنهم كانوا أقرب إليه من غيرهم وأنهما أعرف بما يأتي من ذلك. (10)

(۷) حضرت علی رضی اللہ عنہ کے قول کو حضرت عمر رضی اللہ عنہ پر ترجیح دینا:

امام محمدؒ ایک جگہ فرماتے ہیں کہ حضرت علی رضی اللہ عنہ کا قول ہمیں حضرت ابن عمر رضی اللہ عنہ کے قول سے زیادہ پسند ہے، فرماتے ہیں:

"قال محمَّد بن الحَسَن: قولُ علي بن أبي طالب رضي الله عنه أحبُّ إلينا أن نأخذ به من قول أبن عمر". (11)

(۸) حضرت عمر رضی اللہ عنہ اَوثق اور بڑے قاضی ہیں

امام محمدؒ ایک جگہ اہل مدینہ پر رد کرتے ہوئے فرماتے ہیں کہ حضرت عمر رضی اللہ عنہ اَوثق اور بڑے قاضی ہیں، فرماتے ہیں:

"وقَال محمد: هذا أمرٌ لم أكن أظن أن بين الناس فيه اختلافا للحديث المَعرُوف فيه عن عمر رضي الله عنه أنه يقرد بعيره بالسقيا وقَال أهل المدينةِ ليس على هذا العمل. **قَال محمدٌ: أخبرونا عنه هل جاء اختلافٌ للحديث فيه عن عمر أم جاء الحَديث عن غيره من هو أوثَق وأقضى منه ما عندهم في ذلك حديث عمن هو أوثَق من عمر رضي الله عنه وما يجحدون**

(10) الشَّيباني، **الحجة على أهل المدينةِ**، ج: 1ص: 94.

(11) الشَّيباني، **الحجة على أهل المدينةِ**، ج: 1ص: 311

حدیثه". [12]

[امام محمدؒ فرماتے ہیں کہ میرا اس کے بارے میں یہ خیال نہیں ہے کہ اس میں اختلاف ہوگا، کیونکہ اس بارے میں حضرت عمر رضی اللہ عنہ سے مشہور حدیث منقول ہے کہ حضرت عمر رضی اللہ عنہ اونٹ سے پسو کو علیحدہ کرتے تھے سقیا مقام پر۔ اہل مدینہ کہتے ہیں اس پر عمل نہیں ہے۔ امام محمدؒ فرماتے ہیں کہ ہمیں ان کی طرف سے یہ بات نہیں پہنچی کہ انہوں نے یہ حدیث کیوں نہیں لی، اس میں حضرت عمر سے کوئی اور قول پہنچا ہے یا ان کے علاوہ حضرت عمر سے بھی بڑے ثقہ اور بڑے قاضی کا قول پہنچا ہے کہ اُن کی حدیث کا انکار کرتے ہیں]۔

(۹) عبداللہ بن عمر رضی اللہ عنہ مسلمانوں کے اماموں میں سے ہیں

امام محمدؒ ایک جگہ فرماتے ہیں:

"فإن قَالوا: إن عثمان بن عفان رضي الله عنه قد رأى ما قُلنَا، قُلنَا لهم: أجل قد رأى ما قلتم، ورأى عبد الله بن عمر ما قُلنَا فمن أخذ بقول عبد الله بن عمر لم يُسيء فهو إمام من أئمة المُسلمين مع ما بلغنا في ذلك عن زيد بن ثابت". [13]

[اگر وہ یہ کہے کہ حضرت عثمان رضی اللہ عنہ اس کے قائل ہیں جو ہمارا مسلک ہے، تو ہم ان کو کہیں گے کہ بالکل یہ بات ٹھیک ہے، لیکن عبداللہ بن عمر رضی اللہ عنہ اس کے قائل ہیں جو ہمارا مسلک ہے، جس نے ان کے قول پر عمل کیا تو اس نے برا نہیں کیا کیونکہ وہ بھی مسلمانوں کے اماموں میں سے ہیں، اس کے ساتھ اس جیسا ہمیں زید بن ثابت سے بھی منقول ہے]۔

(۱۰) عبداللہ بن عباس رضي الله عنهما حدیث میں سب بڑے عالم ہیں، ان کے جیسا تقوی اور فضیلت میں اور کوئی نہیں ہے۔ [14]

امام محمدؒ لکھتے ہیں:

"مع ما جاء عن ابن عباس مما رويتم وعبد الله بن عباس رضي الله عنهما أعرف بحديث رسول الله ﷺ. [15] وهذا ابن عباس قد رأى كل شيء مثل الطّعام فهل عندكم في هذا رجل

(12) الشَّيباني، **الحجة على أهل المدينةِ**، ج :2ص : 260، باب ما يجوز للمحرم أن يفعله

(13) الشَّيباني، **الحجة على أهل المدينةِ**، ج :2ص : 512

(14) الشَّيباني، **الحجة على أهل المدينةِ**، ج :2ص : 650

(15) الشَّيباني، **الحجة على أهل المدينةِ**، ج :2ص : 664

مثل ابن عباس في فضله وفقهه أنه رخص في ذلك". [16]

[تمہاری یہ روایت عبد اللہ بن عباس رضی اللہ عنہما سے بھی منقول ہے اور وہ حدیث میں بہت بڑے عالم تھے"۔ابن عباس رضی اللہ عنہما سب کو کھانے جیسا سمجھتے ہیں کیا تمہارے پاس ان کے جیسا تقوی اور فضیلت میں اور کوئی ہے جس نے اس کی اجازت دی ہو]۔

(۱۱)حضرت عمر رضی اللہ عنہ حدیث میں بڑے عالم ہیں:

امام محمدؒ لکھتے ہیں کہ حضرت عمر رضی اللہ عنہ حدیث میں بڑے عالم ہیں۔

"حديث عمر بن الخطاب رضي الله عنه المَعرُوف المشهور وهو كان اعلم بحديث رسول الله ﷺ"[۱۷]

(۱۲)حضرت علی رضی اللہ عنہ، حضرت ابوہریرہ رضی اللہ عنہ سے زیادہ ثقہ ہیں:

امام محمدؒ لکھتے ہیں:

"فقد جاء الحديث عن علي بن أبي طالب رضي الله عنه أنه قال في الموت: أنه أسوة الغرماء **وعلي أعلم بحديث رسول الله ﷺ ممن تروون عنه وإنما تروون حديثكم هذا عن أبي بكر بن عبد الرحمن بن الحارث بن هشام عن أبي هريرة رضي الله عنه وعلي أوثَق في حديث رسول الله ﷺ من أبي هريرة**". [18]

[حضرت علی رضی اللہ عنہ سے حدیث میں منقول ہے کہ موت کی صورت میں وہ قرض خواہ کے ساتھ برابر کے شریک ہوں گے "اور حضرت علی رضی اللہ عنہ حدیث میں اُن سے بڑے عالم تھے جو آپ دیکھ رہے ہیں۔ تمہاری یہ حدیث ابو ہریرہ رضی اللہ عنہ سے منقول ہے اور حضرت علی رضی اللہ عنہ، حضرت ابوہریرہ رضی اللہ عنہ سے زیادہ ثقہ ہیں]۔

اس سے اگلی عبارت میں فرماتے ہیں:

"قُلنَا لهم ما أسرعكم إلى الاحتجاج بالأثر الذي كان عندكم فهلا احتججتم بالأثر فيما مضى مما أبطلتم من البيوع بالظنون لو كان عندكم في ذلك آثار لاحتججم بها كما احتججتم في هذا مع أن الأثر عن أبي هريرة رضي الله عنه لا يعدل عندنا ما قال علي بن أبي طالب رضي الله عنه

(16) الشَّيباني ، **أيضا**، ج :2ص : 716

(17) الشَّيباني ، **أيضا** ، ج :2ص : 691

(18) الشَّيباني ، **أيضا** ، ج :2ص : 720

لأنّ قول علي رضي الله عنه عندنا أثبت من رواية أبي هريرة رضي الله عنه". [19]

[ہم اُن سے کہیں گے کہ تم اس حدیث سے استدلال کرنے میں کیوں جلدی کر رہے ہو، تم گزری ہوئی حدیث سے استدلال کیوں نہیں کرتے جس سے کئی بیوع کو ناجائز قرار دیا تھا، اگر تمہارے پاس وہاں کوئی اور دلیل ہوتی تو اس سے استدلال کرتے جیسے یہاں کسی اور سے استدلال کیا ہے۔ اس کے علاوہ حضرت علی رضی اللہ عنہ کی حدیث ہمارے نزدیک حضرت ابوہریرہ رضی اللہ عنہ کی حدیث کے برابر نہیں ہے، کیونکہ ہمارے نزدیک حضرت علی رضی اللہ عنہ، حضرت ابوہریرہ رضی اللہ عنہ سے زیادہ ثقہ ہیں]۔

(۱۳) حضرت عبداللہ بن عمر رضی اللہ عنہ اور حضرت عمر رضی اللہ عنہ کی تعریف:

امام محمدؒ نے ایک جگہ حضرت عبداللہ بن عمر رضی اللہ عنہ اور حضرت عمر رضی اللہ عنہ کی تعریف کی ہے کہ ان دونوں کا مقام بلند ہے اور نیک ہیں۔

"أرايتم لو كان عبد الله بن عُمَر وأبوه عُمَر بن الخطاب رضي الله عنهما في فضلهما وصلاحهما...". [20]

(۱۴) حضرت علی رضی اللہ عنہ راسخین فی العلم میں سے ہیں:

امام محمدؒ لکھتے ہیں:

"قَالوا: أفترغب عن قول عُمَر ابن الخطاب رضي الله عنه؟ قيل لهم: لا ينبغي لأحد أن يرغب عن قول عُمَر بن الخطاب رضي الله عنه ولكن وجدنا قول علي بن أبي طالب رضي الله عنه فإنه فيها من الرّاسخين في العلم". [21]

[آپ حضرت عمر رضی اللہ عنہ کے قول سے اعراض کر رہے ہیں ایسا کرنا کسی کے لئے مناسب نہیں ہے، ہاں ہمیں حضرت علی رضی اللہ عنہ کا قول ملا ہے جو راسخین فی العلم میں سے ہیں]۔

(۱۵) عبداللہ بن مسعود رضی اللہ عنہ، ابوہریرہ رضی اللہ عنہ سے افضل ہیں

امام محمدؒ نے ایک جگہ لکھا ہے کہ عبداللہ بن مسعود رضی اللہ عنہ، ابوہریرہ رضی اللہ عنہ سے افضل ہیں۔

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(19) الشَّيباني، **أيضا**، ج :2ص : 720

(20) الشَّيباني، **أيضا**، ج :4ص : 96

(21) الشَّيباني، **أيضا**، ج :4 ص : 198

"وقَال محمَّد بن الحَسَن: هذا قول أبي هريرة ولا أعلم أهل المدينةِ رووه عن أحد غيره وقول عبد الله بن مسعود رضي الله عنه أحق أن يؤخذ به من قول أبي هريرة".[22]

(۱۶)عبداللہ بن عمر اور جابر ابن عبداللہ رضی اللہ عنہم اَوثق و اَفقہ ہیں

امام کے پیچھے قراءت کے مسئلے میں فریق مخالف نے قاسم بن محمد، عروہ بن زبیر، رافع بن جبیر بن مطعم اور ابن شہاب کے آثار سے استدلال کیا ہے تو امام محمدؒ فرماتے ہیں کہ ترک قراءت خلف الامام حضرت عبداللہ بن عمر اور حضرت جابر بن عبداللہ رضی اللہ عنہم سے منقول ہے، اور یہ دونوں حضرات مذکورہ حضرات سے زیادہ ثقہ اور زیادہ فقیہ ہیں۔

"قَالوا: لأن القاسم بن محمد وعروة بن الزبير ورافع بن جبير بن مطعم وابن شهاب كانوا يقرؤن خلف الإمام فيما لا يجهر فيه الإمام بالقراءة. قيل لهم: فهؤلاء كانوا عندكم أعلم وأوثَق أم عبد الله بن عُمَر وجابر ابن عبد الله؟ قَالوا: بل عبد الله وجابر... فهذان أفقه ممن أخذتم عنه القراءة وفقيهُكم روى الحَديثين جميعا مع أحاديث كثيرة من أحاديث وترك قولكم".[۲۳]

(۲) امام محمدؒ کا مبہم شخصیات کی پہچان کرانا

امام محمدؒ نے بعض جگہوں پر مبہم شخصیات کی پہچان کرائی ہے، جیسے ایک حدیث میں ایک شخص کا ذکر ہے تو امام محمدؒ فرماتے ہیں کہ ان سے مراد معقل بن سنان رضی اللہ عنہ مراد ہے۔ اور ایک اور جگہ کتاب الآثار میں حضرت جابر بن زیدؒ سے روایت نقل کی ہے، اس کے بعد ان کا تعارف کیا ہے کہ جابر بن زید، ابوالشعثاء ہے۔ ان دونوں کی تفصیل درج ذیل ہے:

ا۔ حدیث میں رجل سے مراد حضرت معقل بن سنان رضی اللہ عنہ

امام محمدؒ نے کتاب الآثار میں ایک مقام پر ایک حدیث نقل کی ہے، جس میں ہے کہ کسی نے حضرت عبداللہ بن مسعود رضی اللہ عنہ سے ایسی عورت کے بارے میں مسئلہ پوچھا، جس کا خاوند فوت ہو جائے اور اس کے لئے مہر مقرر نہ کیا گیا ہو، اور خاوند نے دخول بھی نہ کیا ہو۔ تو حضرت عبداللہ بن مسعود رضی اللہ عنہ نے فرمایا کہ مجھے اس بارے نبی کریم ﷺ کی کوئی حدیث نہیں پہنچی ہے۔ اس شخص نے کہا کہ آپ اپنی رائے بتادیں۔ تو حضرت عبد

(22) الشَّيباني، **الحجة على أهل المدينةِ**، ج :1، ص : 299

(23) الشَّيباني، **الحجة على أهل المدينةِ**، ج:۱، ص:۱۱۷

اللہ بن مسعود رضی اللہ عنہ نے فرمایا کہ میرا خیال یہ کہ اس عورت کو پورا مہر ملے گا اور اس عورت پر عدت بھی لازم ہے، اور اس کو میراث بھی ملے گا۔ اس مجلس میں بیٹھے ایک شخص نے کہا کہ اللہ کی قسم آپ نے اس میں وہ فیصلہ کیا ہے جو نبی کریم ﷺ نے بروع بنت واشق اشجعیہ کے بارے میں فیصلہ کیا تھا۔ حضرت عبد اللہ بن مسعود رضی اللہ عنہ اس پر اتنے خوش ہوئے کہ اس سے پہلے کسی اور بات پر اتنے خوش نہیں ہوئے تھے۔

اب اس قصہ میں وہ شخص مبہم ہے جس نے یہ کہا ہے کہ یہ نبی کریم ﷺ کا فیصلہ ہے۔ امام محمدؒ نے اس کی تحقیق کی ہے کہ یہ راوی معقل بن سنان رضی اللہ عنہ ہے، اور یہ صحابی ہے۔ یہ بات جہاں امام محمدؒ کی رجال کے بارے میں معرفت کی دلیل ہے وہاں اصول حدیث میں ایک اہم باب "مبہمات" کے متعلق بھی ان کی معرفت کا ثبوت ہے۔

کتاب الآثار کی عبارت ملاحظہ ہو:

"قَال محمد: أخبَرَنا أبوحَنِيفة، عن حماد، عن إبراهيم، عن عبد الله بن مسعود: أن رجلا أتاه فسأله عن رجل تزوج امرأة فلم يفرض لها صداقها ولم يدخل بها حتى مات. قَال: ما بلغني في هذا عن رسول الله ﷺ شيء. قَال: فقل فيها برأيك. قَال: أرى لها الصداق كاملا، ولها الميراث وعليها العدة. فقَال رجل من جلسائه: قضيت والذي يُحلف به بقضاء رسول الله ﷺ في بروع بنت واشق الأشجعية. قَال: ففرح عبدالله بن مسعود فرحة ما فرح قبلها مثلها بموافقة رأيه قول رسول الله ﷺ.

قال محمد: وبه نأخذ، لايجب الميراث والعدة حتى يكون قبل ذلك صداق، وهو قول أبي حَنِيفة. **قَال محمد: والرجل الذِي قَال لعبد الله بن مسعود ما قَال: معقل بن يسار (والصواب: سنان) الأشجعي، وكان من أصحاب رسول الله ﷺ.**(٢٤)

حافظ ابن حجرؒ نے بھی الایثار میں اسی وجہ سے معقل بن سنان کے حالات میں لکھے ہیں، ان کی عبارت ملاحظہ ہو:

"(362) عبدالله بن مسعود أتى رجل من أهل الطائف فرحل الناقة الحديث هو الأسلع بن شريك أخرجه الطبراني من حديثه وعنه أن رجلا استفتاه في قصة بروع بنت واشق فقال له

(24) الشَّيباني، **كتاب الآثار**، (تحقيق: المعصراوي) ج : ١ ص : ٤٢٨ ، رقم الحديث: ٤٠٩. الشَّيباني، **كتاب الآثار**، طبعة (كراتشي: الرحيم أكيدمي) ، أيوب الرشيدي، **الجمع بين الآثار**، ص٢٥٥ ، الرقم: ٤٠٦ ، وص٤١٤ ، رقم ٢٣٨. لیکن ان تمام مقامات میں معقل بن یسار ہے، جبکہ درست معقل بن سنان ہے، جیسا کہ حافظ ابن حجرؒ کی کتاب الایثار میں ہے، نیز یہ حدیث **مصنف ابن ابی شیبہ** ج:۹ص۳۱۵میں ہے، محقق شیخ محمد عوامہ لکھتے ہیں کہ صحیح معقل بن سنان ہے۔

الرجلُ المستفتي ما عرفته، والقائل هو معقل بن سنان الأشجعي ووقع مبينا في الأصل".[۲۵]

معقل بن سنان رضی اللہ عنہ کے حالات:

علامہ ذہبیؒ لکھتے ہیں: معقل بن سنان اشجعی، صحابی ہے اور ان کی احادیث ہیں۔ انہوں نے فتح مکہ کے موقع پر اپنے قوم کا جھنڈا اٹھایا تھا، حدیث بروع کے راوی ہے۔ ان کے شاگرد: علقمہ، مسروق، اسود، سالم بن عبد اللہ بن عمر حسن بصری وغیرہ ہیں۔ ان کے اساتذہ: نبی کریم ﷺ، نعمان بن مقرن رضی اللہ عنہ ہے۔ ابن سعد کہتے ہیں کہ ہمارے علم میں صحابہ میں ان کے علاوہ کسی کی ابو علی کنیت نہیں ہے۔[۲۶] حافظ ابن حجر فرماتے ہیں کہ ۶۳ھ میں ان کا انتقال ہوا ہے۔[27]

۲۔ابو الشعثاء سے مراد جابر بن زید رضی اللہ عنہ ہے

امام محمدؒ نے کتاب الآثار میں ایک جگہ حضرت جابر بن زیدؒ سے روایت نقل کی ہے، اس کے بعد ان کا تعارف کیا ہے کہ جابر بن زید، ابو الشعثاء ہے۔ ملاحظہ ہو:

"قَال محمد: أخبَرَنا أبوحَنِيفة، قَال: حدَّثنا عمرو بن دينار، عن جابر قَال: إذا خير الرجلُ امرأته فقامت من مجلسها فلا خيار لها. قَال محمد: وبه نأخذ، وهو قول أبي حَنِيفة. قَال محمد: الذِي روى عنه جابر بن زيد أبو الشعثاء".[۲۸]

امام محمدؒ نے کتاب الاصل میں بھی ایک جگہ ان کا تذکرہ اس طرح کیا ہے: "وبلغنا عن جابر بن زيد أبي الشعثاء".[۲۹]

حافظ ابن حجرؒ نے بھی "الإيثار برواة الآثار" میں امام محمدؒ کی بات ذکر کی ہے، اور اس کے ساتھ اتفاق کیا ہے: "أبو الشعثاء هو جابر بن زيد".[۳۰]

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(25) ابن حجر، **الإيثار بمعرفة رواة الآثار**، ص: 218.

(26) الذهبي، **تاريخ الإسلام**، ج: 5، ص: 251.

(27) ابن حجر، **الإصابة في تمييز الصحابة** 6، ص: 181.

(28) الشَّيباني، **كتاب الآثار**، (تحقيق: المعصراوي) ج: ۲ ص: ٥٤٠، رقم الحديث: ٥٣٨. الشَّيباني، **كتاب الآثار**، (كراتشي: الرحيم أكيدمي) ص۲۸۸ الرقم: ٥٣٣، **أيوب الرشيدي، الجمع بين الآثار**، ص٤٥٦، الرقم: ۲۸٥۔

(29) الشَّيباني، **الأصل**، ج: ۱۰، ص: ۲٥٦۔

(30) ابن حجر، **الإيثار بمعرفة رواة الآثار**، ص: ۲۰٦۔

ابوالشعثاء جابر بن زید کے حالات:

ابوالشعثاء جابر بن زید ازدی یحمدی، یہ ابن عباس رضی اللہ عنہما کے بڑے شاگردوں میں سے تھے، ان سے عمرو بن دینار، قتادہ، ایوب سختیانی روایت کرتے ہیں۔ ابن عباس رضی اللہ عنہما فرماتے ہیں کہ اگر اہل بصرہ جابر بن زید کے قول کو حاصل کریں تو ان کو کتاب اللہ کے بارے میں وسیع علم والا پائیں گے"۔ اور ابن عباس رضی اللہ عنہما فرماتے ہیں کہ تم مجھ سے مسائل پوچھتے ہو جبکہ تمہارے پاس جابر بن زید ہیں۔ ان کا انتقال ۹۳ھ میں ہوا ہے، بعض کہتے ہیں کہ ایک سو تین ہجری میں ان کا انتقال ہوا ہے۔[31]

(۴) امام محمدؒ کی توثیق وتعدیل کے اقوال

(۱) امام محمدؒ کی امام زہریؒ کی تعریف

امام محمدؒ، امام زہریؒ سے متعلق کہتے ہیں کہ وہ اہل مدینہ میں سے حدیث رسول اللہ ﷺ کے بارے زیادہ علم اور فقہ والے ہیں۔

"والأحاديث في ذلك كثيرة عن رسول الله ﷺ مشهورة مَعرُوفة أنه جعل دية الكافر مثل دية المسلم وروى ذلك **أفقههم وأعلمهم في زمانه وأعلمهم بحديث رسول الله ﷺ ابن شهاب الزهري** فذكر أن دية المعاهد في عهد أبي بكر وعمر وعثمان رضي الله عنهم مثل دية الحر المسلم فلما كان معاوية رضي الله عنه جعلها مثل نصف دية الحر المسلم **فإن الزهري كان أعلمهم في زمانه بالأحاديث فكيف رغبوا عما رواه أفقههم الى قول معاوية**".[32]

[اس بارے میں نبی کریم ﷺ کی احادیث مشہور ومعروف زیادہ ہیں کہ نبی ﷺ نے کافر کی دیت مسلمان کی دیت جتنی ہے، اس کو ابن شہاب زہری نے روایت کیا ہے جو حدیث رسول میں اپنے زمانے میں سب بڑے عالم اور بڑے فقیہ تھے، انہوں نے بیان کیا ہے کہ ذمی کی دیت ابو بکر، عمر اور عثمان رضی اللہ عنہم کے زمانے میں آزاد مسلمان جتنی تھی، حضرت معاویہ رضی اللہ عنہ نے اپنے زمانے میں اس کو آدھا کر دیا، تو امام زہریؒ اپنے زمانے میں سب سے بڑے فقیہ تھے تو انہوں نے ان سے اعراض کر کے حضرت معاویہ رضی اللہ عنہ کا قول کیوں اختیار کیا]۔

(۲) عروہ بن زبیرؒ حدیث وسنت میں ابن شہاب زہریؒ سے بڑے عالم ہے

امام محمدؒ ایک جگہ عروہ بن زبیرؒ کو امام زہریؒ پر ترجیح دی ہے کہ عروہ بن زبیرؒ حدیث وسنت میں ابن شہاب زہریؒ

(31) الذهبي، **تاريخ الإسلام**، ج: ٦، ص: ٥٢٤

(32) الشَّيباني، **الحجة على أهل المدينةِ**، ج:۴، ص:۳۵۱

سے بڑے عالم ہے۔

"فهذا قول عروة بن الزبير، وهو كان أفقه وأعلم بالرواية والسنة من ابن شهاب".[۳۳]

(۳)عطاء خرسانی ہمارے نزدیک ثقہ ہے

امام محمدؒ نے ایک جگہ راوی عطاء خرسانی کے بارے میں کلام کیا ہے کہ عطاء خرسانی اگرچہ ہمارے نزدیک ثقہ ہے لیکن اہل مدینہ کو اپنے امام سعید بن المسیبؒ کا قول عطاء خرسانی سے نقل نہیں کرنا چاہئے۔ "أما أني لم أرد بذلك عيب عطاء الخرساني وإن كان عندنا لثِقَة".[۳۴]

عطاء خرسانیؒ کے حالات میں بھی اگر دیکھا جائے تو محدثین نے ان کو ثقہ قرار دیا ہے، لیکن سعید بن المسیب سے ان کی روایت کو کمزور قرار دیا ہے، یہی بات امام محمدؒ نے بھی فرمائی ہے۔

عطاء خرسانیؒ کے حالات:

عطاء بن ابی مسلم خراسانی، مہلب بن ابی صفرہ کے آزاد کردہ غلام تھے، صحاح ستہ کے راوی ہے، کئی صحابہ سے مرسلا روایت نقل کرتے ہیں، عکرمہ اور یحیی بن یعمر اور ان کے طبقے سے روایت کرتے ہیں۔ ان سے عثمان، اوزاعی، مالک اور شعبہ روایت کرتے ہیں۔ جہاد میں ساری رات جاگ کر نماز ادا کرتے، سحری کے وقت تھوڑا سوتے تھے۔ ۱۳۵ھ میں ان کا انتقال ہوا۔[35]

حافظ ابن حجرؒ **تقريب التهذيب** میں فرماتے ہیں:

"عطاء بن أبي مسلم أبو عثمان الخراساني واسم أبيه ميسرة وقيل عبدالله صدوق يهم كثيرا ويرسل ويدلس من الخامسة مات سنة خمس وثلاثين لم يصح أن البخاري أخرج له.[۳۶]

[یہ صدوق ہیں لیکن ان سے بہت وہم ہوتے ہیں، ارسال اور تدلیس بھی کرتا تھا، ۱۳۵ھ میں ان کا انتقال ہوا ہے، یہ بات درست نہیں ہے کہ امام بخاری نے اس کی حدیث اپنے صحیح میں ذکر کی ہے]۔

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(33) الشَّيباني ، **الحجة على أهل المدينةِ** ، ج : ۱: ۳۸ ـ۳۹.

(34) الشَّيباني ، **الحجة على أهل المدينةِ** ، ج : ۱،ص:۱۶۹

(35) الذهبي ، **الكاشف في معرفة من له رواية في الكتب الستة**، ج:۲ص: ۲۳

(36) ابن حجر ، **تقريب التهذيب** ، ص:۳۹۲

مزید تفصیل کے لیے ملاحظہ ہو: **تاریخ الاسلام، تہذیب التہذیب۔**[۳۷]

(۴) داود بن ابی ہندؒ، سعید بن المسیبؒ سے زیادہ حدیث میں ماہر ہیں:

امام محمدؒ فرماتے ہیں: "داود بن ابی ہندؒ، سعید بن المسیبؒ سے زیادہ حدیث میں ماہر ہیں"

"وداود بن أبي هند كان أعرف عندنا بحديث (سعيد بن المسيب) من عطاء الخرساني".[۳۸]

داود بن ابی ہند کے حالات:

حافظ ابن حجرؒ فرماتے ہیں کہ داود بن ابی ہند قشیری، ثقہ اور متقن تھے لیکن آخر میں ان کو وہم ہوتا تھا"۔ ملاحظہ ہو:

"داود بن أبي هند القشيري مولاهم أبو بكر أو أبو محمد البصري ثِقَة متقن كان يهم بأخرة من الخامسة مات سنة أربعين وقيل قبلها خ ت م 4"۔[39]

ان کا انتقال ۱۳۹ھ میں ہوا ہے، ابن المدینیؒ فرماتے ہیں کہ ۱۴۰ھ میں ہوا ہے۔ ملاحظہ ہو تفصیلی حالات کے لیے **تاریخ الاسلام۔**[40]

(۵) جابر جعفی کا درجہ امام محمدؒ کے نزدیک

جابر الجعفی کے بارے میں امام ابو حنیفہؒ کی مشہور جرح ہے: "ما رأيتُ أحدا أكذب من جابر الجعفي، ولا أفضل من عطاء بن أبي رباح".[41] "میں نے جابر جعفی سے بڑا کذاب نہیں دیکھا اور نہ عطاء بن رباح سے افضل کسی کو دیکھا"۔

لیکن امام محمدؒ کے طرز سے ایسا معلوم ہوتا ہے کہ ان کے نزدیک جابر الجعفی حجت ہے، چنانچہ موطا میں اسرائیل

(37) الذهبي، **تاريخ الإسلام**، ج:8، ص:490، ابن حجر، **تهذيب التهذيب**، ج:7، ص:191

(38) الشَّيباني، **الحجة على أهل المدينةِ**، ج:۱، ص:۱۷۱

(39) ابن حجر، **تقريب التهذيب**، ص:۲۰۰

(40) الذهبي، **تاريخ الإسلام**، ج:۸، ص:۴۱۳

(41) الترمذي، **علل الترمذي الكبير**، ج:۲، ص: ۴۴۷

سبیعی کے واسطے سے اُن سے روایت نقل کی ہے۔[42] تو ایسا معلوم ہوتا ہے کہ اس بارے میں اُن کا اجتہاد امام ابو حنیفہؒ سے مختلف تھا، چنانچہ علامہ کوثریؒ لکھتے ہیں:

"على أن جرح الرجال مما تختلف فيه أنظار أهل العلم، فجابر الذِي يكذبه أبوحَنِيفة يروي عنه الثوري ومحمَّد بن الحَسَن، ويحتجان بروايته، وهما غير ملزمين بمتابعة أبي حَنِيفة في تجريح جابر، والمجتهد إنما يتابع اجتهاد نفسه".[43]

دراویوں کے بارے میں جرح و تعدیل بھی ایک اجتہادی فن ہے جس میں اہل علم کی آراء مختلف ہو سکتی ہیں، چناچہ جابر جعفی کو امام ابو حنیفہؒ کذاب قرار دیتے ہیں جبکہ امام محمدؒ اور امام سفیان ثوریؒ اُن سے روایت کرتے ہیں، اور ان کی روایت سے استدلال کرتے ہیں، اور یہ دونوں اس جرح میں امام ابو حنیفہؒ کے پابند نہیں ہیں، مجتہد تو اپنے اجتہاد کا پابند ہوتا ہے]۔

اور علامہ کوثریؒ "تانیب الخطیب" میں لکھتے ہیں:

"ثم جابر الجعفي، روى عنه شعبة مع تشدده، ووثقه الثوري، فلا لوم على محمَّد بن الحَسَن إذا ترجح عنده كونه ثِقَة، وليس بواجب عليه أن يأخذ بقول أبي حَنِيفة فيه، المنقول في "علل الترمذي"، لأن محمَّد بن الحَسَن مجتهد مثله، يوثق و يضعف بما يلوح له من الأدلة".[44]

[شعبہ باوجود متشدد ہونے کے جابر جعفی سے روایت کرتے ہیں، اور سفیان ثوریؒ نے جابر جعفی کو ثقہ قرار دیا ہے۔ اس لیے امام محمدؒ پر کوئی ملامت نہیں کہ انہوں نے جابر جعفی کو ثقہ قرار دیا ہے، نہ ان پر یہ لازم ہے کہ اس بارے میں امام ابو حنیفہؒ کے قول کو اختیار کرے جو علل ترمذی میں منقول ہے۔ کیونکہ امام محمدؒ بھی خود مجتہد ہیں، وہ راویوں کو اپنے دلائل سے ثقہ اور مجروح کرتے ہیں]۔

علامہ ابن عبد البرؒ نے امام محمدؒ پر ایک حدیث سے استدلال کرتے ہوئے رد کیا جس میں جابر جعفی ہے، وہ لکھتے ہیں: "قَال أبو عُمَر: قد احتج محمَّد بن الحَسَن لقوله ومذهبه في هذا الباب بالحَديث الذِي "ذكره" أبو المصعب أن رسول الله ﷺ قَال لا يؤمن أحد بعدي قاعدا وهو حديث لا يصح عند أهل العلم بالحَديث إنما يرويه جابر الجعفي عن الشعبي مرسلا وجابر الجعفي لا يحتج بشيء يرويه مسندا فكيف بما يرويه مرسلا؟"[45]

(۶) امام ابو یوسفؒ کی توثیق:

(42) الشَّيباني، **موطا** ص: ۱۵۹۔

(43) الكوثري، **النكت الطريفة**، ج:1ص:196۔

(44) الكوثري، **تأنيب الخطيب**، ص:۳۵۸۔

(45) ابن عبد البر، **التمهيد لما في الموطأ من المعاني والأسانيد**، ج: 6، ص : 143۔

امام محمدؒ نے امام ابو یوسفؒ کے بارے میں کئی جگہ توثیق کے کلمات لکھے ہیں، ملاحظہ ہو:

أخبَرَنا الثِّقة من أصحابنا. [46] حاشیہ میں علامہ مہدی حسن صاحبؒ لکھتے ہیں کہ اس سے مراد امام ابو یوسفؒ ہیں۔

أخبَرَنا الثِّقة من أصحابنا. [47] أخبَرَنا الثِّقة من أصحابنا، قَال: أخبَرَنا محمد بن جابر الحنفي. [48] أخبَرَنا الثِّقة من أصحابنا قَال أخبَرَنا أبن لهيعة. [49] أخبَرَنا الثِّقة من اصحابنا قَال أخبَرَنا أبن لهيعة. [50] أخبَرَنا الثِّقة من أصحابنا. [51] محمد قَال أخبَرَنا الثِّقة من اصحابنا عن عبد الله بن لهيعة. [52] محمد قَال أخبَرَنا الثِّقة من اصحابنا عن هشام بن عروة. [53]

(۷) امام مالکؒ کی توثیق:

امام محمدؒ نے کئی جگہ امام مالکؒ کو توثیق اور تعریف کے الفاظ سے یاد کیا ہے، ملاحظہ ہو:

وقَال محمَّد بن الحَسَن قد روي فقيه أهل المدينةِ مالك بن أنس غير ما قَال اصحابه.[54]

یہاں امام مالک کو فقیہ اہل المدینہ کہا ہے، کئی جگہ إمامكم لکھا ہے۔ ایک جگہ لکھتے ہیں: "وقد روى فقيهكم مالك بن أنس". [55]

(۸) ابن ابی ذئب اور ابن شہاب زہری کی توثیق

(46) الشَّيباني، **الحجة على أهل المدينةِ**، ج :١، ص : ٢٣٢)

(47) أيضا، ج :١، ص : ٣٤٦

(48) أيضا، ج :١، ص : ٤٦٠

(49) أيضا، ج :١، ص : ٤٦١

(50) أيضا، ج :١، ص : ٤٦٠

(51) أيضا، ج :١، ص : ٤٦١

(52) أيضا، ج :٣، ص : ٤٠٤

(53) أيضا، ج :٣، ص : ٥٠٢

(54) الشَّيباني، **الحجة على أهل المدينةِ**، ج :1، ص : 212)

(55) الشَّيباني، **الحجة على أهل المدينةِ**، ج :1، ص : 229)

امام محمدؒ فرماتے ہیں:

"قال: فعجبا لقول أهل المدينةِ لا قضاء لمن أحصر بالعدو وهذه أحاديثهم تدل على غير ذلك، قال: وكان ابن أبي ذئب وابن شهاب عندهم غير متهمين في حديثهم". (56)

(9)عبدالرحمن بن ابی الزناد علم فرائض میں سب بڑے عالم تھے

امام محمدؒ نے ایک جگہ لکھا ہے کہ عبدالرحمن بن ابی الزناد علم فرائض میں سب بڑے عالم تھے۔

امام محمدؒ فرماتے ہیں: "فكيف ترك أهل المدينةِ هذا الحَديث وهو حديث عندي إنما رواه أهل المدينةِ وقد سألنا عبد الرحمن بن ابي الزناد **وكان من أعلمهم بالفرائض** فقَال هذا حديث رويناه وعرفناه ولكنا لا نأخذ به قيل له وهذا من الحجج عليك انك تدع الحَديث عن رسول الله ﷺ". (57)

(۱۰)ابن عمر، سعید بن جبیر اور علی رضی اللہ عنہم بہتر ہیں سعید بن المسیب سے

امام محمدؒ نے ایک جگہ لکھا ہے کہ ابن عمر، سعید بن جبیر اور علی رضی اللہ عنہم سعید بن المسیبؒ سے بہتر ہیں۔

"وقَال محمَّد بن الحَسَن لم يرو أن المقيم يتم الصلاة إذا أجمع على أربع ليال عن أحد من الناس نعلمه إلا سعيد بن المسيب وقد جاء عن ابن عمر وغيره خلاف ذلك أخبَرَنا هشيم عن جعفر بن اياس عن سعيد بن جبير (أنه كان إذا أجمع على إقامة خمسة عشر يوما أتم) وبلغنا عن علي بن ابي طالب رضي الله عنه أنه كان يقول إذا أجمع على إقامة خمسة عشر يوما أتم الصلاة **فهؤلاء أحق أن نأخذ بقولهم من سعيد بن المسيب**". (58)

(۱۱)امام محمدؒ کا امام واقدی: محمد بن عمر (ت ۲۰۷ھ) پر اعتماد کرنا

امام محمدؒ پر یہ اعتراض کیا جاتا ہے کہ انہوں امام واقدی پر اعتماد کیا ہے جو حدیث میں ضعیف ہے۔ علامہ کوثریؒ اس کے جواب میں فرماتے ہیں:

"وقَال ابن أبي حاتم عن أبيه - في الجرح والتعديل 7ص: 227- إن في كتاب السير لمحمَّد بن الحَسَن صاحب الرأى عن الواقدي أحاديث، فلم يضبطوا عن محمَّد بن الحَسَن، ورووا عن

(56) الشَّيباني، **الحجة على أهل المدينةِ**، ج :2، ص : 201

(57) الشَّيباني، **الحجة على أهل المدينةِ**، ج :٤، ص : ٢٣٢

(58) الشَّيباني، **الحجة على أهل المدينةِ**، ج :1، ص : 172

محمَّد بن الحَسَن عن الواقدي أحاديث وروى الباقي عن محمَّد بن الحَسَن عن مشايخ الواقدي مثل خارجة بن عبد الله بن سليمان بن زيد بن ثابت، وعن محمد بن هلال، وعن الضحاك بن عثمان. وهذا كله عن الواقدي، فجعلوه عن محمَّد بن الحَسَن عن هؤلاء المشايخ."اهـ

إن كان يريد بالكلام المذكور الطعن في تلك الأحاديث باعتبار أنها مروية بطريق الواقدي، فالواقدي وثقه غير واحد من الأقدمين، وإن طعن فيه أناس لأسباب، لكنها غير مقبولة عند هؤلاء. وإن كان يريد أنه يروي مرة عن الواقدي عن المشايخ، ثم يروي أحاديث أخر عن هؤلاء المشايخ مباشرة من غير توسط الواقدي، فما المانع من أن يكون محمد سمع أحاديث من الواقدي عن مشايخه، وسمع أحاديث أخر عن هؤلاء المشايخ مباشرة؟ ومحمد قديم الحج، وقد أدرك مَن هو في طبقة هؤلاء من مشايخ المدينة، كأسامة الليثي وعبيد الله العُمري وابن أبي ذئب.

قد قَال البدر العيني رواية عن أبي حفص: "إن الواقدي كان يأتي إلى محمَّد بن الحَسَن فيقرأ عليه محمد كتاب المغازي، ويقرأ عليه الواقدي كتاب الجامع الصغير. ومثله في "مناقب الكردري"-ص٤٢٤-. وهذا من رواية الأقران بعضهم في بعض، وكيف يستغني محمد عن مثل الواقدي في المغازي؟! ولم يستغن أبويُوسُف عن محمد بن إسحاق في ذلك.[۵۹]

اس کا مفہوم یہ ہے کہ:

(۱) واقدیؒ کے ضعف پر اتفاق نہیں ہے، بلکہ بعض نے ان کو ضعیف قرار دیا ہے، جبکہ کئی محدثین نے ان کی توثیق کی ہے۔

(۲) امام واقدیؒ، امام محمدؒ کے معاصر ہیں، امام محمدؒ ان سے مغازی میں استفادہ کرتے اور اور امام واقدیؒ، امام محمدؒ سے علم فقہ میں استفادہ کرتے تھے۔ اور یہ بات طے شدہ ہے کہ امام واقدیؒ مغازی میں امامت کے درجے پر فائز تھے، اس لیے امام محمدؒ پر اس بارے میں یہ اعتراض درست نہیں ہے۔

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(59) الكوثری، **بلوغ الأماني في سيرة الإمام محمد بن الحسن الشيباني**، ص١٦١- ١٦٢). واقدی کی توثیق کے بارے میں تفصیل بحث **قواعد فی علوم الحدیث** ص۳۴۶۔۳۵۰

(۴)امام محمدؒ کے جرح کے اقوال

امام محمدؒ کا جہم بن صفوان اور جہمیہ پر رد:

اعتقاد کی وجہ سے جرح کا حکم کیا ہے، حافظ ابن حجرؒ نے نزہۃ النظر میں اس کی مکمل تفصیل لکھی ملاحظہ ہو۔[60] دوسری صدی میں مسلمانوں کا کئی فکری وعقائدی فرقوں سے واسطہ پڑا، ان میں سے سب سے بڑا فرقہ جہم بن صفوان (ت۱۲۸ھ)[61] کا فرقہ تھا، جس کا خیال تھا کہ خدا تعالی کو ایسی صفات کے ساتھ متصف نہیں کرنا چاہئے جس کے ساتھ مخلوق متصف ہو سکتی ہے، اسی مذہب کے نتیجے میں قرآن کریم کی مخلوق ہونے کے قول کو تائید ملی۔ جہم بن صفوان اور اس کے فرقے کے بارے میں امام محمدؒ کے کئی نصوص موجود ہیں کہ انہوں نے اس پر واضح الفاظ میں رد کیا ہے۔ علامہ لالکائیؒ (۴۱۸ھ) نے اپنی کتاب "شرح اصول اعتقاد اہل السنۃ" میں امام محمدؒ کے کئی اقوال نقل کئے ہیں، ملاحظہ ہوں:

(۱) قول امام محمدؒ: قرآن کلام اللہ ہے مخلوق نہیں ہے

"(474) ... سأل رجل محمَّد بن الحَسَن عن القُرآن، مخلوق هو؟ فقال: القُرآن كلام الله وليس من الله شيء مخلوق".[62] [ایک شخص نے امام محمدؒ سے قرآن کے بارے میں پوچھا کہ قرآن مخلوق ہے کیا؟ تو انہوں نے فرمایا کہ قرآن کلام اللہ ہے اور مخلوق بالکل نہیں ہے۔]

(۲) قول امام محمدؒ: قرآن کو مخلوق کہنے والوں کے پیچھے نماز مت پڑھو

(475) ... أبا سليمان الجوزجاني يقول: سمعت محمَّد بن الحَسَن يقول: **من قَال: القُرآن مخلوق ؛ فلا تصلوا خلفه.**[63] [امام محمدؒ نے فرمایا کہ جو قرآن کو مخلوق کہے اس کے پیچھے نماز مت پڑھو"۔

(۳) قول امام محمدؒ: جہم بن صفوان کا قول اجماع کے خلاف ہے

(740) ... محمَّد بن الحَسَن يقول: **اتفق الفقهاء كلهم من المشرق إلى المغرب على الإيمان بالقُرآن والأحاديث التي جاء بها الثقات عن رسول الله ﷺ في صفة الرب عز وجل من غير تغيير ولا وصف ولا تشبيه، فمن فسر اليوم شيئا من ذلك، فقد خرج مما كان عليه النبي ﷺ**

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(60) ابن حجر ، **نزهة النظر في توضيح نخبة الفكر في مصطلح أهل الأثر** ، ص: 126)

(61) جہم بن صفوان کے حالات کے ملاحظہ ہو: الزركلي ، الأعلام ، ج: 2 ، ص : 141.

(62) اللالكائي ، أبو القاسم ، هبة الله بن الحسن بن منصور ، (ت۴۱۸ھ) ، **شرح أصول اعتقاد أهل السنة و الجماعة** (السعودية : دار طيبة ، الطبعة الثانية : ١٤١١ه، تحقيق : أحمد سعد حمدان) ، ج:۱ص:۲۷۱.

(63) اللالكائي ، **شرح أصول اعتقاد أهل السنة والجماعة** ، ج : 1 ص: 271.

، وفارق الجماعة ، فإنهم لم يصفوا ولم يفسروا ، ولكن أفتوا بما في الكتاب والسنة ثم سكتوا ، فمن قَال بقول جهم فقد فارق الجماعة ؛ لأنه قد وصفه بصفة لا شيء. [64] وقَال النخعي: حدَّثنا محمد بن شاذان الجوهري، قَال: سمعت أبا سليمان الجوزجاني ومعلى بن منصور الرازي يقولان: **ما تكلم أبوحَنِيفة ولا أبو يُوسُف ولا زفر ولا محمد ولا أحد من أصحابهم في القُرآن، وإنما تكلم في القُرآن بشر المريسي وابن أبي دؤاد، فهؤلاء شانوا أصحاب أبي حَنِيفة.** [65]

[امام محمدؒ نے فرمایا کہ مشرق سے لیکر مغرب تک تمام فقہاء کا اتفاق ہے کہ قرآن، احادیث پر ایمان لانا، اللہ کی صفات پر بغیر تغییر، وصف اور تشبیہ کے ایمان لانا ضروری ہے۔ جس نے ان میں سے کسی کی تفسیر کی تو نبی کریم ﷺ کی دین سے خارج ہو گیا اور اجماع کی مخالفت کی، کیونکہ اہل علم نے اس کی تشریح و تفسیر نہیں کی ہے، انہوں نے قرآن و حدیث میں موجود باتوں پر فتوی دیا ہے اور باقی خاموش ہوئے ہیں، جس نے جہم کا قول اختیار کیا اس نے اجماع کی مخالفت کی، کیونکہ جہم نے خدا تعالی کو صفت لاشئ کے ساتھ متصف کیا"۔ ابو سلیمان جوزجانی اور معلی بن منصور فرماتے ہیں کہ امام ابو حنیفہؒ، امام ابو یوسفؒ، امام زفرؒ، امام محمدؒ اور ان کے شاگردوں میں سے کسی ایک نے بھی قرآن میں کلام نہیں کیا ہے، در اصل قرآن کے بارے میں بشر مریسی، ابن ابی دواد نے گفتگو کی، انہوں نے امام ابو حنیفہؒ کے شاگردوں کو بدنام کیا۔]

(۴) قول امام محمدؒ: صفات باری تعالی پر ایمان لانا اور تاویل نہ کرنا

(741) ... عن محمَّد بن الحَسَن ، في الأحاديث التي جاءت : « إن الله يهبط إلى سماء الدنيا » ونحو هذا من الأحاديث : **إن هذه الأحاديث قد روتها الثقات ، فنحن نرويها ونؤمن بها ولا نفسرها.** [٦٦]

[شداد بن حکم نے امام محمدؒ سے اس جیسی احادیث کہ "اللہ تعالی آسمان دنیا کی طرف اترتے ہیں" فرمایا کہ یہ احادیث ثقہ راویوں نے روایت کی ہیں ہم اس پر ایمان لاتے ہیں اور اس کی تفسیر بیان نہیں کرتے]۔

(۲) امام محمدؒ کا ہشام بن عروہ پر وہم کی جرح

ہشام بن عروہ امام ابو یوسف کے شیخ ہے، امام محمد نے ان کے واسطے سے ان سے کئی روایات نقل کئے ہیں۔ امام محمدؒ نے کتاب الاصل میں ایک مقام پر مشہور راوی ہشام بن عروہ پر یہ کلام کیا ہے کہ اس کو وہم ہوا ہے۔ ڈاکٹر محمد

(64) اللالكائي ، **شرح أصول اعتقاد أهل السنة والجماعة** ، ج: 2 ، ص: 431.

(65) الخطيب البغدادي، **تاريخ بغداد** ، ج : 13، ص : 383.

(66) اللالكائي ، **شرح أصول اعتقاد أهل السنة والجماعة** ، ج : 2 ، ص: 431.

بوینوکالن لکھتے ہیں:

"يوجد في الأصل نقد لمتن حديث يرويه هشام بن عروة. ومضمون هذا النقد أن النبي – عليه الصلاة والسلام – لا يأمر بباطل ولا بما يؤدي إلى خداع أحد الطرفين، ولذلك فيحكم بوهم هشام وخطئه في رواية هذا الحَديث".[٦٧] [**کتاب الاصل** میں بعض جگہ ہشام بن عروہؒ کے متن حدیث پر امام محمدؒ نے نقد کیا ہے، جس کا مفہوم یہ ہے کہ نبی ﷺ کسی غلط بات کا حکم نہیں کر سکتے اور نہ ایسی بات کا حکم کر سکتے ہیں جس میں طرفین میں کسی کو دھوکہ دہی ہو، اسی وجہ سے انہوں نے ہشام پر روایت حدیث میں وہم اور خطا کا حکم لگایا ہے]۔

سب سے پہلے امام محمدؒ کی عبارت ملاحظہ ہو:

باب اشتراط الولاء. محمد عن يعقوب عن محدث عن الزهري أن عبد الله بن مسعود – رضي الله عنه – اشترى من امرأته الثقفية جارية وشرط لها أنها لها بالثمن الذِي اشتراها إذا استغنى عنها. فسأل عُمَر – رضي الله عنه – عن ذلك. فقَال: أكره أن تطأها ولأحد فيها شرط[٦٨] **وكان حديث عمر أوثَق عندنا، وكان عُمَر أعلم بحديث رسول الله – ﷺ – من عائشة – رضي الله عنها –. ونرى أن حديث هشام هذا وهم من هشام؛ لأنه لا يأمر النبي – ﷺ – بباطل ولا يُغَرِّر. ولا يُعرَف حديث هشام، وهو عندنا شاذ من الحَديث.**[٦٩] [باب ولاء کی شرط کے بارے میں۔ عبداللہ بن مسعود رضی اللہ عنہ نے اپنی بیوی سے ایک باندی خریدی اور اس کے لیے اس ثمن کی شرط لگائی جس پر اس کو خریدا تھا، جب اس کو اس کی ضرورت نہ ہو۔ عمر رضی اللہ عنہ سے اس بارے میں پوچھا گیا تو انہوں نے فرمایا کہ ایسی باندی جس میں شرط ہو اس کے ساتھ وطی جائز نہیں ہے۔ عمر رضی اللہ عنہ کی حدیث ہمارے نزدیک زیادہ صحیح ہے، اور عمر رضی اللہ عنہ حدیث رسول کے بارے میں عائشہ رضی اللہ عنہا سے زیادہ علم والے تھے، اور حدیث ہشام میں ہشام سے وہم ہوا ہے کیونکہ نبی کریم ﷺ غلط بات اور دھوکہ کا حکم نہیں دے سکتے۔ اور ہشام کی حدیث غیر معرُوف ہے کیونکہ وہ حدیث میں شاذ ہے]۔

اس چھوٹی سی عبارت میں امام محمدؒ نے کئی علمی و تحقیقی تبصرے کئے ہیں: ایک تو ہشام بن عروہ کا وہم بتلایا ہے۔ دوسرا یہ کہ حدیث عمر کو زیادہ قوی بتلایا ہے اور کہا ہے کہ حضرت عمر رضی اللہ عنہ، حضرت عائشہ رضی اللہ عنہا کی

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(67) محمد بوينو كالن ، مقدمة الأصل ، ص : 194۔

(68) ڈاکٹر محمد بوینوکالن تخریج میں لکھتے ہیں: (رواه الإمام محمد أيضاً عن مالك عن الزهري عن عبيد الله بن عبد الله بن عتبة عن ابن مسعود. انظر: **الموطأ برواية محمد**، 3، ص : 249. وانظر: **الموطأ**، البيوع، 5، والآثار لأبي يوسف، 186؛ **والمصنف لعبد الرزاق**، 8، ص : 56؛ **والسنن الكبرى** للبيهقي، 5، ص : 336).

(69) الشَّيباني، **الاصل** 6، ص :380-

بنسبت احادیث کے بڑے عالم تھے۔ تیسرے: حدیث ہشام شاذ ہے۔

وہم کے جرح کا مطلب:

حافظ ابن حجرؒ لکھتے ہیں:

"ثم الوهم: -وهو القِسْم السادس، وإنما أُفْصِحَ به لطول الفصل- إن اطُّلِعَ عليه، أي الوهم، بالقرائن الدالة على وهَم راويه -مِن وصْلِ مرسلٍ أو منقطعٍ أو إدخالِ حديثٍ في حديثٍ، أو نحو ذلك مِن الأشياء القادحة، وتَحْصل معرفة ذلك بكثرة التتبع وجَمْع الطرق- فهذا هو المعلَّل. وهو مِن أَغْمضِ أنواعِ علومِ الحَديث وأدقِّها، ولا يقوم به إلا مَنْ رزقه الله تعالى فهماً ثاقباً، وحفظاً واسعاً، ومعرفةً تامة بمراتب الرواة، وملَكَةً قويةً بالأسانيد والمتون؛ ولهذا لم يَتكلم فيه إلا القليل مِن أهل هذا الشأن: كعلي". [70] [وہم، جرح کی چھٹی قسم ہے، اگر قرائن سے راوی کا وہم معلوم ہو جائے جیسے مرسل یا منقطع کو متصل کرنا یا کسی ایک حدیث کو دوسرے میں داخل کرنا یا اس جیسا کوئی اور وہم، تو اس حدیث کو معلل کہتے ہیں، اور اس کی جانچ کا یہ طریقہ کثرت تلاش اور طرق واسانید کو اکھٹے کرنے سے حاصل ہوتا ہے۔ یہ فن علوم حدیث کے انواع میں سے سب سے زیادہ مشکل اور دقیق ہے، جس کو خدا تعالی نے تیز فہم، وسیع حافظہ اور راویوں کے مراتب کے بارے میں مکمل معرفت دی ہو، وہی اس کو جان سکتا ہے۔ اسی وجہ سے محدثین میں سے بہت کم حضرات نے اس پر گفتگو فرمائی ہے جیسے امام علی بن المدینی ہو گئے]۔

ہشام بن عروہ کے حالات:

ہشام بن عروہ، ابو عبداللہ اور ابوالمنذر کنیت ہے، مشہور صحابی زبیر بن عوام کے پوتے تھے، ان کے والد عروہ بھی تابعی اور مدینہ کے ساتھ مشہور فقہا میں سے ایک تھے۔ ولادت: 61ھ ہے۔ صحابہ میں انہوں نے عبداللہ بن عمر رضی اللہ عنہما کو دیکھا تھا، صحابہ میں انہوں نے صرف اپنے چچا عبداللہ بن زبیر رضی اللہ عنہ سے استفادہ کیا تھا۔ ان کے شاگردوں میں ذہ میں یحییٰ بن سعید، ایوب سختیانی، امام مالک وغیرہ قابل ذکر ہیں۔ وفات: 146ھ ہے۔ ان کی توثیق اور بعض جرحوں کے بارے میں ملاحظہ ہو، حافظ ابن حجرؒ کی کتاب **تہذیب التہذیب**۔[71]

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(70) ابن حجر، **نزهة النظر في توضيح نخبة الفكر في مصطلح أهل الأثر**، ص: 113)

(71) ابن حجر، **تہذیب التہذیب**، ج :11، ص : 44۔

بچوں کی شادی کا قانون

(ایک مجوزہ قانون سازی)

مفتی شعیب عالم*

دفعہ ۱۔ تعریفات:

قانون ہذا میں درج ذیل الفاظ سے وہ معانی مراد ہوں گے، ذیل میں جن کی تصریح گئی ہے مگر یہ کہ کسی جگہ برعکس معنی کی تصریح ہو یا سیاق وسباق عبارت اس سے مخالف ہو۔

۱۔ ولی اقرب: وہ شخص کو جس شرعاً ولایت حاصل ہو اور کوئی اس سے زیادہ زیر ولایت کے قریب نہ ہو، اگر کوئی اور ہو تو اس کے مساوی یا اس سے بعید ہو۔

۲۔ ولی ابعد: اقرب کے متصل وہ ولی جس سے قریب یا تو کوئی ولی نہ ہو یا ہو تو اس کے مساوی یا اس سے بعید ہو، مثلاً باپ غائب ہو اور دادا، بھائی اور چچا موجود ہوں تو ولایت جد کو ہے، جد نہ ہو تو بھائیوں کو ہے اور پھر چچا کو ہے۔

۳۔ مجنون: پاگل مراد ہے۔

۴۔ جنون مطبق: مسلسل اور مستقل جنون جو مفتی بہ قول کے مطابق ایک ماہ تک مسلسل ہو۔ جنون اگر زمانہ صغر سے ہی لاحق ہو اور بلوغ کے بعد بھی قائم ہو تو زیر ولایت پر ولی کی ولایت برقرار رہتی ہے اور اگر بلوغت کے بعد طاری ہوا ہو تو ولی کی ولایت اس پر لوٹ آتی ہے۔

۵۔ جنون غیر مطبق: جو ایک ماہ تک مسلسل نہ ہو۔ جنون غیر مطبق کی صورت میں مجنون کسی دوسرے کے زیر ولایت نہیں رہے گا اور اس کے حالت افاقہ کے تصرفات نافذ ہوں گے اور حالت جنون میں اگر اس کے منفعت یا دفع مضرت کے لیے ضرورت لاحق ہوئی تو ولی کو اس پر ولایت حاصل ہو جائے گی۔

۶۔ معتوہ: جس کی گفتگو الجھی، کام اور اقدام غیر معقول اور سمجھ کم ہو مگر مجنون کی طرح مارتا اور گالیاں نہ بکتا ہو۔

۷۔ جد: جد سے مراد جد صحیح ہے جس سے رشتے میں مونث کا واسطہ نہ آتا ہو۔

۸۔ کفو: جس لڑکے سے نکاح مطلوب ہو اس کے نسب یا کردار یا پیشہ میں لڑکی کی خاندان بہ نسبت کوئی ایسا عیب یا نقص نہ ہو جس کے سبب لڑکی کے اولیاء کو ننگ وعار لاحق ہو، نہ ہی وہ ایسا محتاج ہو کہ اگر لڑکی بالفعل قابل جماع ہو تو نفقہ پر قادر نہ ہو یا کسی قدر مہر کی ادائیگی اگر از روئے عرف یا حسب شرط معجل ہو تو اس کی ادائیگی پر قدرت نہ رکھتا ہو۔

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۹۔ غبن فاحش: مہر میں اتنی کمی یا زیادتی جو عام طور پر گوارہ نہ کی جاتی ہو مثلاً صغیرہ کا مہر پچاس ہزار باندھا جائے جب کہ اس کا مہر مثل ایک لاکھ ہو یا صغیر کی زوجہ کے لیے ایک لاکھ مہر مقرر کیا جائے جب کہ زوجہ کا مہر مثل پچاس ہزار ہو۔ ایک دوسرے قول کے مطابق مہر میں دسواں حصہ کمی و بیشی غبن فاحش ہے۔

صغیرہ کی طرح صغیر کا بھی کفو میں رشتہ ضروری ہے۔

۱۰۔ مہر مثل: عورت کے پدری رشتہ دار عورتوں کا عام طور پر جتنا مہر رائج ہو، مہر مثل کہلاتا ہے۔

۱۱۔ معروف بسوئے اختیار: باپ اور دادا کے لیے اس اصطلاح کا استعمال ہوتا ہے یعنی وہ ولایت کے غلط استعمال میں مشہور ہوں۔ باپ یا دادا سوء اختیار میں معروف اس وقت کہلائے گا جب وہ اپنے زیر ولایت کا نکاح مہر مثل میں غبن فاحش کے ساتھ کر دے یا غیر کفو میں کر دے اور اس سے پہلے بھی وہ اپنے کسی زیر ولایت کے متعلق اس قسم کا خلاف شفقت پدری، فعل برت چکا ہو، اگر پہلا نکاح خلاف شفقت پدری ہو اور اس سے پہلے وہ کسی غیر مکلف کا نکاح اس کے صریح مفاد کے خلاف نہ کر چکا ہو تو وہ اختیار کے غلط استعمال میں معروف نہ کہلائے گا۔

۱۲۔ فسق: فسق زوال ولایت کا باعث نہیں مگر جب اس قدر ہو کہ فاسق کو اپنی عزت و آبرو کی پروانہ ہو تو نکاح کے نفاذ کے لیے شرط ہو گا کہ مہر مثل کی رعایت کے ساتھ اور کفو میں ہو، اسی کو کتب فقہ میں یوں تعبیر کیا گیا ہے کہ باپ دادا معروف بسوء الاختیار نہ ہوں۔

۱۳۔ فاسق متہتک: جسے اپنی عزت و آبرو کی پروانہ ہو۔ رجل منهتك ومتهتك ومستهتك لا يبالي أن تهتك ستره، شامی اول کتاب الولی

۱۴۔ ماجن: جسے اپنے کیے اور لوگوں کے کہے کی پرواہ نہ ہو:

۱۵۔ غیبت منقطعہ:

غیبت کی تفسیر میں فقہ حنفی میں مختلف اقوال ملتے ہیں:

۱۔ ولی مدت قصر کی مسافت پر ہو۔

۲۔ ولی جہاں ہو وہاں سال بھر میں ایک مرتبہ قافلہ جاتا ہو۔

۳۔ ولی ایک ماہ کی مسافت کے بقدر دور ہو۔

۴۔ ولی مفقود الخبر ہو۔

۵۔ ولی بیس منزل دور ہو۔

۶۔ ولی پچیس منزل دور ہو۔

۷۔ ولی کے رائے حاصل کرنے میں دشواری ہو۔

۱۶۔ غیبت غیر منقطعہ:

جو غیبت منقطعہ نہ ہو۔

۱۷۔ عصبہ:۔ جس کا غیر مکلف سے بلاواسطہ مونث رشتہ ہو، یا جس کو ذوی الفروض کے ساتھ ان کا بقیہ اور اکیلے ہو تو کل مال ملتا ہے۔

دفعہ ۲۔ ولایت کی تعریف:

شرعی قدرت، جس کی بدولت دوسرے پر تصرف کے نفاذ کی قدرت حاصل ہو۔

دفعہ 3۔ ولی کی تعریف:

وہ شخص جو اپنے زیر ولایت کا نکاح اپنی مرضی سے کر سکتا ہو۔

دفعہ ۴۔ ولی کی شرائط:

ولی، خواہ مرد ہو یا عورت، اس کا آزاد، عاقل، بالغ ہونا شرط ہے۔ اگر زیر ولایت مسلم ہو تو ولی کا مسلمان ہونا بھی شرط ہے، مگر یہ کہ:

الف: ولی آقا ہو اور زیر ولایت اس کا غلام یا باندی

ب: ولی قاضی ہو یا اس کا مجاز نمائندہ ہو۔

توضیح: مرتد کسی کا ولی نہیں ہو سکتا۔

تشریح

ولایت کے لیے اتحاد دینی شرط ہے بنابرایں:

کافر دوسرے کافروں کا ولی ہو سکتا ہے مگر مسلمان کا نہیں

مسلمان بھی سوائے درج بالا مستثنیات کے کسی کافر کا ولی نہیں ہو سکتا البتہ کافر کو اپنے ہم مذہبوں پر ولایت حاصل ہے۔

دفعہ ۵۔ ولایت کے اسباب:

ولایت کے اسباب چار ہیں:

۱۔ قرابت

۲۔ ولاء

۳۔ امامت

۴۔ ملک

دفعہ ۶۔ زیر ولایت افراد جو کسی دوسرے کے ولی بھی نہیں ہو سکتے:

الف۔ نابالغ خواہ:

لڑکا ہو یا لڑکی

سمجھ دار ہو یا ناسمجھ

لڑکی ہو تو کنواری ہو یا غیر کنواری

غیر کنواری ہو تو نکاح سے قبل کنوارہ پن زائل ہو چکا ہو یا نکاح کے بعد بوجہ دخول کنواری نہ رہی ہو۔

ب۔ مجنون، خواہ مذکر ہو یا مؤنث، بالغ ہو یا نابالغ، جنون اصلی ہو یا طاری، اگر طاری ہو تو ایک ماہ تک مسلسل رہا ہو۔

ج۔ معتوہ، خواہ مذکر ہو یا مؤنث، بالغ ہو یا نابالغ

تشریح

درج افراد کا قدر مشترک غیر مکلف ہونا ہے۔ غیر مکلف اشخاص خود زیر ولایت رہتے ہیں اس لیے کسی دوسرے کے ولی نہیں ہو سکتے۔ علاوہ ازیں ولایت کی علت حصول مصلحت اور دفع مضرت ہے اور متذکرۃ افراد سے ان مقاصد شرع کا حصول ناممکن ہے۔

دفعہ ۷۔ بقا، عود اور زوال ولایت:

ولی کی ولایت زائل ہو جائے گی، اگر

الف۔ نابالغ بالغ ہو جائے، یا

ب۔ مجنون یا معتوہ کو افاقہ ہو جائے، یا

ج۔ ولی خود جنون کا شکار ہو جائے، اگر جنون مطبق نہ ہو صرف حالت جنون کے وقت ولایت زائل ہو گی۔

(۲) اگر باپ مجنون یا معتوہ ہو جائے تو بیٹے کو اس پر ولایت نفس نہ کہ ولایت حاصل ہو گی۔

(۳) الف۔ ولایت لوٹ آئے گی، اگر بیٹا بلوغت کے بعد مجنون ہو جائے۔

ب۔ ولی غیبت منقطعہ کے ساتھ غائب ہو اور پھر لوٹ آئے تو اس کی ولایت بحال اور ولی بعید کی زائل ہو جائے گی، مگر ولی بعید کے تصرفات نافذ قرار پائیں گے۔

(۱) نابالغ بالغ ہو جائے یا

(۲) مجنون کو افاقہ ہو جائے اور وہ نابالغ نہ ہو تو ولی کا اختیار ان سے زائل ہو جاتا ہے۔

(۳) نابالغ یا مجنون جنون کی حالت میں بلوغ کو پہنچیں تو زیر ولایت رہیں گے۔

(۴) باپ مجنون یا معتوہ ہو جائے تو بیٹے کو اس پر ولایت نفس نہ کہ ولایت مال حاصل ہو جائے گی۔

(۵) ولی جنون مطبق کا شکار ہو جائے تو ولایت کھودے گا اور اگر کبھی جنون اور کبھی افاقہ ہوتا ہو تو حالت افاقہ کے تصرفات نافذ قرار پائیں گے۔

(۶) باپ مجنون ہو جائے تو بیٹے کو اور بیٹا بلوغ کے بعد مجنون ہو جائے تو باپ کو اس پر دوبارہ ولایت حاصل ہو جائے گی۔

(۷) ولی غیبت منقطعہ کے ساتھ غائب ہو اور پھر لوٹ آئے تو اس کی ولایت بحال اور ولی بعید کی زائل ہو جائے گی، مگر ولی بعید کے تصرفات نافذ قرار پائیں گے۔

دفعہ ۸۔ عصبہ کا حق ولایت اور ان میں ترتیب:

دفعہ ۶ میں درج زیر ولایت افراد کے نکاح کا حق میراث کی ترتیب کے مطابق حسب ذیل افراد کو ہے:

(۱) بیٹا

(۲) پوتا

(۳) پڑپوتا، اگرچہ کئی پشت کا فاصلہ ہو

(۴) باپ

(۵) دادا

(۶) پردادا، اگرچہ کئی پشت اوپر ہو

(۷) سگا بھائی

(۸) باپ شریک بھائی

(۹) سگے بھائی کا لڑکا یعنی سگا بھتیجا

(۱۰) باپ شریک بھائی کا لڑکا، یعنی سوتیلا بھتیجا

(۱۱) سگا چچا

(۱۲) باپ شریک چچا، یعنی سوتیلا چچا

(۱۳) سگے چچا کا لڑکا

(۱۴) باپ شریک چچا کا لڑکا، یعنی سوتیلے چچا کا بیٹا

(۱۵) باپ کا حقیقی چچا

(۱۶) باپ کا پدری چچا

(۱۷) باپ کے حقیقی چچا کا بیٹا

(۱۸) باپ کے سوتیلے چچا کا بیٹا

(۱۹) دادا کا حقیقی چچا

(۲۰) دادا کا پدری چچا

(۲۱) دادا کے حقیقی چچا کا بیٹا

(۲۲) دادا کے سوتیلے چچا کا بیٹا

توضیح ۱ : کسی پاگل عورت کا باپ اور بیٹا ہے یا دادا اور بیٹا ہے تو اس کا ولی بیٹا ہے، اگر نکاح کرنا چاہیں تو بہتر یہ ہے کہ باپ اس کے بیٹے کو نکاح کرنے کا حکم دے تاکہ بلا اختلاف نکاح درست ہو جائے۔

دفعہ ۹۔ عصبہ کے علاوہ دیگر رشتہ داروں کا حق ولایت:

دفعہ ۔دفعہ ۸ درج افراد نہ ہوں یا اہلیت نہ رکھتے ہوں تو ولایت نکاح بالترتیب متذکرۃ الذیل رشتہ داروں کو منتقل ہو جائے گی:

(۱) ماں
(۲) دادی
(۳) نانی
(۴) بیٹی
(۵) پوتی
(۶) نواسی
(۷) پسر کی پوتی نواسی
(۸) دختر کی پوتی نواسی
(۹) نانا
(۱۰) سگی بہن
(۱۱) سوتیلی بہن
(۱۲) ماں کی اولاد جو باپ شریک نہیں
(۱۳) سگی بہن کی اولاد
(۱۴) سوتیلی بہن کی اولاد
(۱۵) ماں کی اولاد پھوپھی
(۱۶) ماموں
(۱۷) خالہ
(۱۸) چچازاد بہن اور پھر اسی ترتیب سے پھوپھی ماموں اور خالہ وغیرہ کی اولاد

توضیح: نکاح کے باب میں حضانت کے برعکس ذووالارحام کا محرم ہونا شرط نہیں۔

دفعہ ۱۰۔ قرابت داروں کے بعد قاضی کا حق ولایت:

نسبی ولی نہ ہو تو ولایت:

سلطان کو ہے پھر

اس کے نائب کو پھر

قاضی کو پھر

اس کے مجاز نمائندہ کو حاصل ہے۔

توضیح : قاضی کے لیے شرط ہے کہ اسے نابالغوں کے نکاح کا اختیار دیا گیا ہو، اگر اس کے پروانہ تقرری میں یہ خدمت تفویض نہ ہو اور اس نے نکاح کر دیا اور پھر اسے سلطان کی طرف سے یہ خدمت تفویض ہوئی اور اس نے نکاح کو نافذ کر دیا تو نافذ ہو گیا۔

دفعہ ۱۱۔ علماء اور جماعت مسلمین کا حق ولایت:

قاضی نہ ہو تو ولایت علاقہ کے علماء کو اور

اگر علماء متعدد ہوں تو ان میں سے اعلم کو اور

اگر اہل علم نہ ہوں تو جماعت مسلمین کو حاصل ہے۔

دفعہ ۱۲۔ باپ دادا کا کیا ہوا نکاح:

زیر ولایت کو اس کے باپ نے یا باپ کی عدم موجودگی یا عدم اہلیت کی وجہ سے دادا نے نکاح میں دیا یا مجنون یا مجنونہ کا نکاح اس کے بیٹے نے کیا تو نکاح منعقد، صحیح، نافذ ولازم ہے اور بلوغت کے بعد زیر ولایت کو خیار بلوغ بھی حاصل نہیں، خواہ

نابالغ کو نکاح پسند ہو یا نہ ہو

نابالغہ کنواری ہو یا ثیبہ

مہر مثل نکاح میں باندھا گیا ہو یا اس میں کمی فاحش یا زیادتی فاحشہ کی گئی ہو

نکاح کفو میں ہو یا غیر کفو میں ہو، مگر شرط یہ ہے کہ:

الف۔ معاہدہ نکاح کے وقت باپ یا دادا نشہ میں نہ ہوں

ب۔ ولی (باپ، دادا) اس سے پہلے کسی زیر ولایت کا غیر کفو میں یا مہر میں کمی غبن فاحش کرنے کی وجہ سے معروف بسوئے الاختیار نہ ہو چکا ہو۔

اگر باپ بوقت نکاح نشہ میں ہو یا معروف بسوئے الاختیار ہو مگر متذکرہ نکاح مہر مثل کے ساتھ یا اس میں معمولی غبن کے ساتھ کیا ہو اور نکاح کفو میں ہو تو نکاح لازم و نافذ ہے۔

دفعہ ۱۳۔ باپ دادا، بیٹا کے علاوہ اولیاء کا نکاح کب لازم ہے:

باپ دادا کے علاوہ کسی ولی نے زیر ولایت کا نکاح کیا تو نکاح کی صحت کے لیے شرط ہو گا کہ:

الف۔ مہر مثل میں کمی فاحش نہ کی ہو

ب۔ نکاح کفو میں کیا ہو

شرائط بالا میں سے کسی شرط کی فقدان کی وجہ سے نکاح سرے سے منعقد نہ ہو گا۔

دفعہ ۱۴۔ قاضی کو نکاح کی ولایت کب حاصل ہے:

قاضی کو زیر ولایت کے نکاح کا حق حاصل ہے جب کہ :

الف۔ اس کے پروانہ تقرری میں صراحت ہو۔

ب۔ قاضی سے قریب زیر ولایت کا ولی نہ ہو

ج۔ ولی ہو مگر اہلیت نہ رکھتا ہو

د۔ اہلیت رکھتا ہو مگر معقول سبب کے بغیر نکاح سے گریز کر رہا ہو

مگر شرط ہو گا کہ قاضی اپنے آپ کے ساتھ یا اپنے اصول و فروع میں سے کسی کے ساتھ زیر ولایت کے نکاح کا مجاز نہ ہو گا۔ قاضی کے بر خلاف چچازاد اپنی چچازاد بہن سے خود نکاح کر سکتا ہے اور دیگر اولیا اپنے زیر ولایت کا نکاح اپنے فروع سے کر سکتے ہیں۔

دفعہ 15۔ تعدد اولیاء کی صورت میں ولی کون ہے:

ولی اگر ایک ہو تو اسے ہی نکاح نابالغ کا اختیار ہے۔

اگر اولیاء ایک سے زیادہ ہوں اور سب مساوی حیثیت کی ولایت رکھتے ہوں تو ایک یا چند کا نکاح نابالغ پر رضامند ہو جانا کافی ہے، دوسروں کو فسخ کا اختیار نہیں

اگر سب مساوی حیثیت نہ رکھتے ہوں تو اقرب کا رضامند ہو جانا کافی ہے کیونکہ حقیقت میں وہی ولی ہے۔

دفعہ ۱۶۔ اولیاء کے تصرفات کا حکم:

(۱) مساوی درجے کے اولیاء میں سے کوئی نابالغ کا نکاح کر دے تو نافذ ہے خواہ دوسرا اجازت دے یا مسترد کرے.

(۲) اگر یکے بعد دیگرے نکاح کریں تو اول کا نکاح نافذ اور ثانی کا کالعدم ہے۔

(۳) اگر دونوں ایک ساتھ نکاح کر دیں یا دونوں نکاحوں میں تقدیم و تاخیر معلوم نہ ہو تو دونوں باطل ہیں۔

(۴) اسی طرح ولی قریب و بعید نے ایک ساتھ اپنے زیر ولایت کا نکاح کر دیا یا

(۵) ایک ساتھ تو نہ کیا مگر مقدم موخر کا علم نہیں ہو سکتا تو دونوں نکاح باطل قرار پائیں گے۔

(۶) ولی اقرب کے ہوتے ہوئے ولی ابعد نے زیر ولایت کا نکاح کیا تو ولی اقرب کی اجازت پر موقوف رہے گا۔ لیکن اگر:

الف۔ ولی اقرب اہلیت نہ رکھتا ہو مثلاً نابالغ یا مجنون ہو

ب۔ یا اہلیت رکھتا ہو مگر غیبت منقطعہ کے ساتھ غائب ہو تو ولی ابعد کا کیا ہو نکاح نافذ قرار پائے گا۔

استثناء: شق ثالث کی صورت میں اگر نابالغہ ایک نکاح کی تقدیم کی مدعیہ ہو تو دعوی درست قرار دیا جائے گا۔

تشریح

شق اول کی وجہ یہ ہے کہ ولایت ناقابل تقسیم ہے۔ شق ثانی میں نکاح ثانی کے بطلان کی وجہ عدم محل ہے۔ شق ثالث میں کوئی وجہ ترجیح نہیں اس لیے ہر دو باطل ہیں۔

دفعہ ۱۷۔ ولی اقرب کا نکاح سے گریز:

ولی اقرب، اگرچہ باپ یا دادا ہو، مگر کسی معقول شرعی عذر کے بغیر نابالغہ کے نکاح سے گریز کر رہا ہے مثلاً جوڑ کا رشتہ بھی دستیاب ہے اور وہ مہر مثل کی ادائیگی پر بھی آمادہ ہے اور کوئی اس جیسا یا اس سے بہتر رشتہ دستیاب بھی نہیں ہے اور دستیاب کفو ولی اقرب کی رائے کا انتظار نہ کرتا ہو تو عدالت ولی اقرب کی نیابت میں نابالغہ کو نکاح میں دے سکتی ہے اور کوئی اور اس نکاح کی تنسیخ کا بھی مجاز نہ ہو گا، لیکن اگر ولی اقرب کا انکار کسی معقول سبب کے باعث ہے مثلاً دستیاب رشتہ کفو نہیں ہے یا مہر مثل کی ادائیگی پر تیار نہیں ہے یا کوئی اور رشتہ ہے جو دستیاب بھی ہے، کفو بھی ہے اور مہر مثل کی ادائیگی پر پر تیار ہے تو عدالت یا ولی بعید کو نابالغہ کے نکاح کا اختیار نہ ہو گا۔

دفعہ ۱۸۔ ولی کی رضامندی کب ثابت ہو گی:

ولی کی رضامندی دو طرح ثابت ہو گی:

۱۔ صریحاً: مثلاً کہہ دے کہ میں راضی ہوں یا میں نے منظور کیا یا نافذ کیا یا اجازت دی یا اس کے مثل کوئی اس طرح کا کلمہ جس سے نکاح کی منظوری دینے کا اظہار ہوتا ہو۔

۲۔ دلالتہً: مثلاً ولی مہر پر قبضہ کر لے یا مہر کا مطالبہ کرے یا منکوحہ کو رخصت کر دے وغیرہ مگر ولی کا محض سکوت رضامندی نہیں، اگرچہ سکوت مجلس نکاح میں ہو

دفعہ ۱۹۔ ولی اقرب کی غیر موجودگی میں ولی ابعد کا نابالغ کا نکاح کرنا:

(۱) ولی ابعد نے ولی اقرب کی غیبت غیر منقطعہ میں زیر ولایت کا نکاح کر دیا تو نکاح ولی اقرب کی اجازت پر موقوف رہے گا، چاہے تو برقرار رکھے یا فسخ کر دے۔

(۲) گر غیبت منقطعہ ہو تو نکاح منعقد، لازم و نافذ ہو گا مگر شرط ہو گا کہ:

الف۔ نکاح کفو میں ہو

ب۔ مہر مثل میں غبن فاحش نہ ہو

ج۔ ولی اقرب کے جواب آنے تک حاضر کفو انتظار نہ کرے۔

د۔ کوئی اور خواستگار نکاح ایسا نہ ہو جو ولی کا جواب آنے تک انتظار پر آمادہ ہو۔

توضیح: ولی اقرب جہاں ہے وہاں اگر اس نے صغیر یا صغیرہ کا نکاح کر دیا تو نکاح نافذ ہے، اگرچہ ولی کی غیبت منقطعہ ہو (ایک دوسری رائے یہ ہے کہ نکاح نافذ نہیں)

دفعہ ۲۰۔ ولی کا صغیرہ کے نکاح کا اقرار:

ولی نابالغہ کے نکاح کا اقرار کرتا ہے تو گواہان کی شہادت یا بلوغت کے بعد نابالغہ کی تصدیق درکار ہو گی۔

دفعہ ۲۰۔ ولی کا اپنے ولایت سے کیے ہوئے نکاح سے انکار:

ولی نے اپنی ولایت سے کفو میں نابالغہ کا نکاح کیا اور پھر اپنے ولی ہونا کا انکار کرتا ہے تو قابل قبول نہیں البتہ اگر ولایت ظاہر نہ ہو تو نکاح درست نہ ہوگا۔

دفعہ ۲۱۔ غیر مکلف کی ایک سے زائد شادیاں:

ولی کو زیر ولایت کی ایک سے زائد شادیوں کی اجازت نہیں۔

دفعہ ۲۲۔ نابالغ کے نکاح میں بھی کفاءت کا اعتبار ہے:

باپ دادا کے علاوہ کسی ولی کو صغیرہ کی طرح صغیر کا نکاح بھی غیر کفو میں کرنا درست نہیں۔

دفعہ ۲۲۔ مندرجہ ذیل افراد کو نکاح نابالغان کا اختیار نہیں:

الف۔ وصی کو، چاہے غیر مکلف کے باپ نے اسے وصیت کی ہو یا نہ ہو کی ہو، اور خواہ باپ نے اپنے حین حیات ہی کسی کو متعین کیا ہو یا نہ کیا ہو،

ب۔ پرورش کنندہ کو

ج۔ متبنی کو

د۔ لاوارث بچے کے پالنے والے کو، مگر یہ کہ ان میں سے کسی کو ازروئے قرابت ولایت حاصل ہو۔

تشریح

باپ یا دادا نے کسی کو وصیت کی کہ میرے بعد نابالغ کا نکاح کر دینا تو وصیت کی رو سے وہ نکاح نابالغ کا مجاز نہ ہوگا البتہ اگر وہ قریب کا رشتہ دار ہے اور ولایت کی ترتیب کے مطابق اسے استحقاق حاصل ہے تو پھر بحیثیت ولی وہ مجاز ہوگا کیونکہ اب وہ ولی بھی ہے، اسی طرح پرورش کنندہ کو اگر ازروئے قرابت ولایت حاصل نہ ہو تو محض حضانت کی بنا پر اسے نکاح نابالغ کا اختیار نہ ہوگا۔ یہی حکم اس شخص کا بھی ہے جو کسی لاوارث بچے کو پالتا ہے یا کسی بچے کو متبنی بنالیتا ہے۔

حصہ ثانی

زیر ولایت اشخاص کے تصرفات کا حکم

دفعہ ۲۳۔ نابالغ کا نکاح کب باطل ہے:

1۔ نابالغ نے خود نکاح کیا ہو اور ولی نے رد کر دیا ہو

2۔ نابالغ نے نکاح کیا ہو اور دفعہ 8، 9، 10، 11 کے احکام کے تحت کوئی اس کی اجازت دینے والا نہ ہو

3۔ قانون ہذا کے تحت نکاح نابالغ موقوف ٹھہرتا ہو اور نکاح کے نفاذ سے قبل زوجین میں سے کسی ایک کا انتقال ہو جائے، مثلاً: ایک شخص نہ خود بالغ ہونہ نکاح ولی کی اجازت سے ہوا ہو نہ ولی نے بعد از نکاح صراحۃ یا دلالۃ اجازت دی ہو نہ خود نابالغ نے بلوغ کے بعد اجازت دی ہو اور نابالغ کا انتقال ہو جائے۔

4۔ باپ، دادا اور بیٹے کے علاوہ کسی اور ولی نے نابالغ کا نکاح غیر کفو میں یا مہر میں غبن فاحش کے ساتھ کیا ہو

5۔ باپ یا دادا نے نابالغ کا نکاح کیا ہو مگر بحالت نشہ کیا ہو یا معروف بسوئے الاختیار ہوں اور مہر میں کمی فاحش ہو یا غیر کفو میں نکاح کیا ہو۔

6۔ بلوغ کو پہنچے کے بعد نابالغ نے خود نکاح کو مسترد کیا ہو اور اس سے قبل ولی نے اور بلوغت کو پہنچنے کے بعد خود نابالغ نے نکاح کی اجازت نہ دی ہو۔

دفعہ ۲۴۔ عقد جس کی اجازت نہ ہو یا اجازت دینے والا کوئی نہ ہو:

الف۔ ہر ایسا عقد جس کی از روئے شرع اجازت نہ دی جاسکتی ہو

ب۔ یا جس کی اجازت دی جاسکتی ہو مگر اجازت دینے والا کوئی نہ ہو تو وہ باطل ہے، بنابرایں:

نابالغہ کا کوئی ولی ہے اور نہ اس مقام پر کوئی قاضی ہے اور اس نے نکاح کر لیا تو نکاح بلوغت کے حصول پر اس کی اجازت پر موقوف رہے گا کیونکہ سلطان اس کی اجازت دے سکتا ہے، لیکن اگر مقام عقد پر سلطان کی عمل داری بھی نہ ہو مثلاً سمندر یا جنگل یا صحراء ہو جو کسی کے زیر ولایت نہ ہو، تو عقد باطل قرار پائے گا۔

دفعہ ۲۵۔ نابالغ کا نکاح کب قابل نفاذ ہے:

الف۔ ولی نے نکاح کیا ہو

ب۔ سمجھ دار نابالغ نے خود نکاح کیا ہو یا کسی اور نے کیا ہو مگر ولی نے اجازت دے دی ہو

ج۔ سمجھ دار نابالغ نے نکاح کیا ہو اور ولی نے مسترد کیا ہو نہ اجازت دی ہو اور بلوغ کو پہنچے کے بعد نابالغ نے اس کی اجازت دے دی ہو۔

توضیح: جو حکم سمجھدار نابالغ کا ہے وہی معتوہ اور ایسے مجنون کا ہے جس کا جنون مسلسل نہ ہو اور اس نے حالت افاقہ میں نکاح کیا ہو۔

تشریح

پسر یا دختر بلا رضامندی اپنے شرعی ولی کے نکاح ٹس کر سکتے مگر جو نابالغ سمجھ دار ہو اس کا نکاح بالکل کالعدم نہیں بلکہ اس کا جواز مانند دیگر معاہدات کے جو کسی نابالغ نے کیے ہوں، ولی کی اجازت پر موقوف رہتا ہے یا اس شخص کی اجازت پر، جو بجائے ولی کے ہوتا ہے۔ معتوہ بمنزلہ صبی عاقل کے ہوتا ہے اور جنون اگر مسلسل ہو تو صبی غیر عاقل کے حکم میں ہے اور مسلسل نہ ہو تو حالت افاقہ کے تصرفات مثل عاقل نافذ ہیں بشرطیکہ نابالغ نہ ہو۔

الحاصل ناسمجھ نابالغ کے تصرفات، خواہ مفید ہوں یا غیر مفید، سب باطل ہیں اور سمجھدار کے فائدہ مند تصرفات جیسے قبول ہبہ وغیرہ نافذ ہیں۔ معتوہ صبی ممیز کے حکم میں ہے اور جنون اگر مسلسل ہو تو مجنون، صبی غیر ممیز کے حکم میں ہے اور اگر مسلسل نہ ہو تو حالت افاقہ کے تصرفات ایک عاقل شخص کی طرح نافذ ہیں۔ لہذا

ا۔ نابالغ حصول بلوغت کے بعد اپنے نکاح کو نافذ کرنے کا مجاز ہے۔

۲۔ نابالغ کے ازخود کیے ہوا نکاح کو اگر مجاز ولی نے منظور یا مسترد نہ کیا ہو تو بعد از بلوغت نابالغ کو اس کے رد یا نفاذ کا اختیار ہو گا۔

3۔۔ نابالغ ممیز نے ازخود یا فضولی نے اس کا نکاح کیا تو نکاح ولی کی اجازت پر موقوف رہے گا۔ اگر ولی نے اجازت دی تو نکاح نافذ اور اگر رد کیا تو نکاح کالعدم اور اگر نابالغ کی زمانہ نابالغی تک نہ اجازت دی اور نہ رد کیا بلکہ سکوت کیا یا اسے نکاح کی اطلاع ہی نہ ہوئی اور نابالغ بلوغ کو پہنچ گیا تو اگر نابالغ نے قولا یا فعلا یا حالا نکاح کو منظور کیا تو نکاح نافذ ہے اور اگر رد کر دیا تو نکاح باطل ہے، مگر محض بلوغت سے جب کہ نکاح کو مسترد نہ کرے نکاح رد نہ ہو گا۔

دفعہ ہذا پر مبنی ہندیہ کا جزئیہ ہے کہ نابالغ نے بالغہ سے نکاح کیا اور پھر غائب ہو گیا اور عورت نے دوسرا نکاح کر لیا تو اگر نابالغ نے بلوغ کے بعد اس نکاح کو نافذ کر دیا تھا اور عورت نے اس کے بعد دوسرا نکاح کیا تو عورت کا نکاح باطل ہے اور اگر نابالغ کے جائز کرنے سے قبل اس نے دوسرا نکاح کیا تو یہ دوسرا نکاح درست ہے۔

دفعہ ۲۶۔ بلوغت اور عدم بلوغت میں اختلاف کا حکم:

لڑکی بلوغت کا دعوی کر کے ولی کے نکاح کو مسترد کرتی ہو اور لڑکی کا شوہر یا ولی اس کا نابالغہ ہونا بیان کرتے ہیں تو اگر لڑکی کی عمر نو برس ہو اور مراہقہ ہو تو اس کا دعوی معتبر ہے، اگر جانبین گواہان پیش کریں تو بلوغ کے گواہوں کو ترجیح ہو گی۔

دفعہ ۲۷۔ نابالغہ سے تعلقات زن شوئی:

نابالغہ کی صحت جسمانی اگر ایسی ہے کہ جماع کے قابل ہے اور مرض کا اندیشہ نہیں تو اس سے جماع جائز ہے، اگرچہ اس کی عمر نو سال سے کم ہی کیوں نہ ہو اور اگر وہ بوجہ لاغری و کمزوری جماع کا تحمل نہ کر سکتی ہو اور بیماری کا خدشہ ہو تو اس سے تعلق زن شوئی کا قیام ناجائز ہے، اگرچہ اس کی عمر زیادہ ہو۔

دفعہ ۲۸۔ رخصتی کا بیان:

شوہر مہر کی ادائیگی کر چکا ہے اور بیوی کی رخصتی چاہتا ہے، جب کہ بیوی کا باپ کہتا ہے کہ اس کی دختر ابھی چھوٹی ہے اور مردوں کے قابل اور جماع کا تحمل نہیں کر سکتی تو اگر بیوی گھر سے نکلا کرتی ہے تو عدالت نزاع کے تصفیہ کے لیے اسے حاضر عدالت کرے گی تاکہ اس کی صحت جسمانی کا جائزہ لیا جا سکے، اگر بیوی پردہ نشین ہو تو عدالت قابل اعتبار عورتوں کو اس کی صحت جسمانی کی رپورٹ دینے کے لیے مقرر کرے گی۔

تشریح

کونسل کی سفارش یہ ہے کہ نابالغہ کا نکاح درست مگر رخصتی درست نہیں

دفعہ ۲۹۔ عقد کے وقت ولایت نہ ہو مگر اجازت کے وقت کے حاصل ہو جائے:

اگر کسی شخص نے نابالغ کا نکاح کیا اور اس وقت اسے نابالغ پر ولایت حاصل نہ تھی، مگر پھر اجازت کے مرحلہ کے وقت اسے ولایت حاصل ہو گئی اور اس نے نکاح کی اجازت دے دی تو نکاح نافذ ہو گا، مثلا

باپ نے اپنے بالغ بیٹے کا نکاح کیا اور بیٹے نے ابھی اجازت نہ دی تھی کہ بیٹا مجنون ہو گیا اور باپ نے اجازت دے دی تو نکاح نافذ ہو گیا۔

اسی طرح ولی اقرب کے موجودگی میں ولی ابعد نے نکاح کیا اور پھر ولی اقرب غائب ہو گیا یہاں تک کہ ولایت ولی ابعد کو منتقل ہو گئی تو انتقال ولایت کے بعد اجازت دینے سے نکاح نافذ ہو سکتا ہے۔

حوالہ جات

دفعہ ا۔ تعریفات:

اصطلاح اول وثانی کے لیے ملاحظہ کیجیے:

حاشية رد المختار على الدر المختار - (٣ / ٨١)

المراد بالأبعد من يلي الغائب في القرب كما عبر به في كافي الحاكم وعليه فلو كان الغائب أباها ولها جد وعم فالولاية للجد لا للعم

قال في الاختيار ولا تنتقل إلى السلطان لأن السلطان ولي من لا ولي له وهذه لها أولياء إذ الكلام فيه اه

اصطلاح ۳، ۴، ۵

-الفتاوى الهندية - (7 / 23)

وإذا جن الولي جنونا مطبقا تزول ولايته ، وإن كان يجن ويفيق ؛ لا تزول ولايته وتنفذ تصرفاته في حالة الإفاقة ، كذا في الذخيرة .وقدر الإمام الإطباق في رواية بشهر وبه يفتى ، كذا في الوجيز للكردري وهكذا في البحر الرائقوإذا بلغ الابن معتوها أو مجنونا تبقى ولاية الأب عليه في ماله ونفسه ، كذا في فتاوى قاضي خان

ردالمحتار3/ 77

ومقتضى النظر أن الكفء الخاطب إذا فات بانتظار إفاقته تزوج موليته وإن لم يكن مطبقا وإلا انتظر على ما اختاره المتأخرون في غيبة لولي الأقرب على ما سنذكره

حاشية رد المختار على الدر المختار - (٣ / ٨٣

قوله (وولي المجنونة والمجنون) أي جنونا مطبقا وهو شهر كما مر وتقدم أيضا أن المعتوه كذلك

قوله (ولو عارضا) أو ولو كان جنونها عارضا بعد البلوغ خلافا لزفر

قوله (اتفاقا) أي بخلاف الولاية في النكاح ففيها خلاف محمد فهي عنده للأب أيضا وعندهما للابن

وأشار المصنف إلى أن للولي إنكاح المجنون والمجنونة إذا كان الجنون مطبقا فالمراد أن للولي إنكاح غير المكلفة جبرا

قال في الولوالجية الرجل إذا كان يجن ويفيق هل يثبت للغير ولاية عليه في حال جنونه إن كان يجن يوما أو يومين أو أقل من ذلك لا تثبت لأنه لا يمكن الاحتراز عنه

۹۔ غبن فاحش:

حاشية رد المختار على الدر المختار – (3 / 66)

قوله (ولو بغبن فاحش) هو ما لا يتغابن الناس فيه أي لا يتحملون الغبن فيه احترازا عن الغبن اليسير وهو ما يتغابنون فيه أي يتحملونه قال في الجوهرة والذي يتغابن فيه الناس ما دون نصف المهر كذا قاله شيخنا موفق الدين وقيل ما دون العشر اه فعلى الأول الغبن الفاحش هو النصف فما فوقه وعلى الثاني العشر فما فوقه تأمل

قوله (أو زوجها بغير كفء) بأن زوج ابنه أمة أو ابنته عبدا وهذا عند الإمام وقالا لا يجوز أن يزوجها غير كفء ولا يجوز الحط ولا الزيادة إلا بما يتغابن الناس ح عن المنح ولا ينبغي ذكر المثال الأول لأن الكفاءة غير معتبرة في جانب المرأة للرجل أفاده في الشرنبلالية ونحوه في ط

۱۱۔ معروف بسوءِ اختیار:

حاشية رد المختار على الدر المختار – (٣ / ٦٧)

والحاصل أن المانع هو كون الأب مشهورا بسوء الاختيار قبل العقد فإذا لم يكن مشهورا بذلك ثم زوج بنته من فاسق صح وإن تحقق بذلك أنه سيىء الاختيار واشتهر به عند الناس فلو زوج بنتا أخرى من فاسق لم يصح الثاني لأنه كان مشهورا بسوء الاختيار قبله بخلاف العقد الأول لعدم وجود المانع قبله ولو كان المانع مجرد تحقق سوء الاختيار بدون الاشتهار لزم إحالة المسألة أعني قولهم ولزم النكاح ولو بغبن فاحش أو بغير كفء إن كان الولي أبا أو جدا

حاشية رد المختار على الدر المختار – (3 / 67)

وكذا السكران لو زوج من غير الكفء كما في الخانية وبه علم أن المراد بالأب من ليس بسكران ولا عرف بسوء الاختيار اه

قلت ومقتضى التعليل أن السكران أو المعروف بسوء الاختيار لو زوجها من كفء بمهر المثل صح لعدم الضرر المحض ومعنى قوله والظاهر من حال الصاحي أنه يتأمل أي أنه لوفور شفقته بالأبوة لا يزوج بنته من غير كفء أو بغبن فاحش إلا لمصلحة يزيد على هذا الضرر

كعلمه بحسن العشرة معها وقلة الأذى ونحو ذلك وهذا مفقود في السكران وسيىء الاختيار إذا خالف لظهور عدم رأيه وسوء اختياره في ذلك

قوله (أي غير الأب وأبيه) الأولى أن يزيد والابن والمولى لما مر

۱۲۔فسق:

الفسق لا يمنع الولاية ، كذا في فتاوى قاضي خان

الدر المختار(3 / 54)

وشرعا (البالغ العاقل الوارث) ولو فاسقا على المذهب ما لم يكن متهتكا

رد المختار على الدر المختار – (3 / 54)

قوله (ما لم يكن متهتكا) في القاموس رجل منهتك ومتهتك ومستهتك لا يبالي أن يهتك ستره اه قال في الفتح عقب ما نقلنا عنه آنفا نعم إذا كان متهتكا لا ينفذ تزويجه إياها بنقص عن مهر المثل ومن غير كفء وسيأتي هذا اه

وحاصله أن الفسق وإن كان لا يسلب الأهلية عندنا لكن إذا كان الأب متهتكا لا ينفذ تزويجه إلا بشرط المصلحة ومثله ما سيأتي من قول المصنف ولزم ولو بغبن فاحش أو بغير كفء إن كان الولي أبا أو جدا لم يعرف منهما سوء الاختيار وإن عرف لا اه وبه ظهر أن الفاسق المتهتك وهو بمعنى سيىء الاختيار لا تسقط ولايته مطلقا لأنه لو زوج من كفء بمهر المثل صح كما سيأتي بيانه

۱۳۔فاسق متہتک:

رجل منهتك ومتهتك ومستهتك لا يبالي أن يهتك ستره،شامی اول کتاب الولی

۱۴۔ماجن:

حاشية رد المختار على الدر المختار – (٣/ ٦٦)

وفي المغرب الماجن الذي لا يبالي ما يصنع وما قيل له ومصدره المجون والمجانة اسم منه والفعل من باب طلب اهالماجن الذى لايبالى ما يصنع وماقيل له-شامی باب الولی،مقولہ:۱۱۶۱۰،طبع جدید دمشق-

البحر الرائق شرح كنز الدقائق – (٣/ ١٣٣)

وقيد بالكفر لأن الفسق لا يسلب الأهلية عندنا على المشهور وهو المذكور في المنظومة وعن الشافعي اختلاف فيه أما المستور فله الولاية بلا خلاف فما في الجوامع أن الأب إذا كان فاسقا للقاضي أن يزوج الصغيرة من كفء غير معروف نعم إذا كان متهتكا لا ينفذ تزويجه إياها بنقص عن مهر المثل ومن غير كفء وسيأتي هذا كذا في فتح القدير

۱۵۔غیبت منقطعہ وغیر منقطعہ:

جو غیبت منقطعہ نہ ہو۔

الفتاوى الهندية - (٧ / ٢٧)

وإن زوج الصغير أو الصغيرة أبعد الأولياء فإن كان الأقرب حاضرا وهو من أهل الولاية توقف نكاح الأبعد على إجازته ، وإن لم يكن من أهل الولاية بأن كان صغيرا أو كان كبيرا مجنونا جاز ، وإن كان الأقرب غائبا غيبة منقطعة ؛ جاز نكاح الأبعد ، كذا في المحيطالفتاوى الهندية – (7 / 28)ثم قدر الغيبة بمسافة القصر وهو اختيار أكثر المتأخرين وعليه الفتوى. وقال شمس الأئمة السرخسي ومحمد بن الفضل الأصح أنه مقدر بفوات الكفء الحاضر الخاطب إلى استطلاع رأيه وهذا أحسن ، كذا في التبيين. وعليه الفتوى ، كذا في جواهر الأخلاطي. حتى لو كان مختفيا في البلدة لا يوقف عليه يكون غيبة منقطعة ، كذا في شرح مجمع البحرين. فإن كان الأقرب جوالا لا يوقف على أثره أو كان مفقودا لا يعرف مكانه أو مختفيا في البلد لا يوقف عليه قال القاضي الإمام أبو الحسن علي السغدي : يكون هو بمنزلة الغائب غيبة منقطعة فإن كان زوجها الأبعد ثم ظهر أنه كان مختفيا في المصر جاز نكاح الأبعد ، كذا في فتاوى قاضي خان.

واختلف مشايخنا في ولاية الأقرب أنها تزول بالغيبة أم بقيت ؟ .

قال بعضهم : إنها باقية إلا أنه حدث للأبعد ولاية بغيبة الأقرب فتصير كأن لها وليين مستويين في الدرجة كالأخوين والعمين ، وقال بعضهم : تزول ولايته وتنتقل إلى الأبعد وهو الأصح ، كذا في البدائع .

فلو زوجها حيث هو لا رواية فيه وينبغي أن لا يجوز لانقطاع ولايته ، كذا في محيط السرخسي ، وإن زوجها الأقرب حيث هواختلفوا فيه والظاهر هو الجواز ، كذا في فتاوى قاضي خان والظهيرية

البحر الرائق شرح كنز الدقائق – (3 / 135)

واختلف في حد الغيبة فذهب أكثر المتأخرين إلى أنها مقدرة بمسافة القصر لأنه ليس لأقصاها غاية فاعتبر بأدنى مدة السفر واختاره المصنف وعليه الفتوى كما في التبيين واختار أكثر المشايخ

كما في النهاية أنها مقدرة بفوت الكفء الخاطب باستطلاع رأيه وصححه ابن الفضل وفي الهداية وهذا أقرب إلى الفقه لأنه لا نظر في إبقاء ولايته حينئذ وفي المجتبى والمبسوط والذخيرة وهو الأصح وفي الخلاصة وبه كان يفتي الشيخ الإمام الأستاذ وفي فتح القدير ولا تعارض بين أكثر المتأخرين وأكثر المشايخ ا هـ وهنا أقوال أخر لكنها ضعيفة والحاصل أن التصحيح قد اختلف والأحسن الإفتاء بما عليه أكثر المشايخ وعليه فرع قاضيخان في شرحه أنه لو كان مختفيا بالمدينة بحيث لا يوقف عليه تكون غيبة منقطعة وهذا حسن (((أحسن))) لأنه النظر ويتفرع على ما في المختصر أنه لا يزوج الأبعد إذا كان الأقرب بالمدينة مختفيا.

۱۷۔عصبہ:۔

البحر الرائق شرح كنز الدقائق - (٣ / ١٢٧)

وفسر المصنف رحمه الله الولي بالعصبة وسيأتي في الفرائض أنه **من أخذ الكل إذا انفرد والباقي مع ذي سهم** وهو عند الإطلاق منصرف إلى العصبة بنفسه **وهو ذكر يتصل بلا توسط أنثى أي يتصل إلى غير المكلف** ولا يقال هنا إلى الميت فلا يرد العصبة بالغير كالبنت تصير عصبة بالابن فلا ولاية لها على أمها المجنونة وكذا لا يرد العصبة مع الغير كالأخوات مع البنات

حاشية رد المختار على الدر المختار - (٣ / ٧٦

قوله (العصبة بنفسه) **خرج به العصبة بالغير كالبنت تصير عصبة بالابن ولا ولاية لها على أمها المجنونة وكذا العصبة مع الغير كالأخوات مع البنات ولا ولاية للأخت على أختها المجنونة كما في** المنح والبحر والمراد خروجهما من رتبة التقديم وإلا فلهما ولاية في الجملة يدل عليه قول المصنف بعد فإن لهم يكن عصبة الخ

والحاصل أن ولاية من ذكر بالرحم لا بالتعصيب وإن كانت في حال عصوبتها كالبنت مع الابن الصغير فإنها تزوج أمها المجنونة بالرحم لا بكونها عصبة مع الابنقوله (وهو من يتصل بالميت) الضمير للعصبة المذكور المراد به المعهود في باب الإرث بقرينة قوله على ترتيب الإرث والحجب فيكون تعريفه ما عرفوه به في باب الإرث فلا يرد ما قيل إنه لا ميت هنا فالأولى أن يقال وهو من يتصل بغير المكلف فافهم هذا **وفي النهر هو من يأخذ كل المال إذا انفرد والباقي مع ذي سهم وهذا أولى من تعريفه بذكر يتصل بلا واسطة أنثى** إذ المعتقة لها ولاية الإنكاح على معتقها الصغير حيث لا أقرب منها اه

ادفعہ ۲۔

البحر الرائق شرح كنز الدقائق - (3 / 117)

باب الأولياء والأكفاء **شروع في بيان ما ليس بشرط لصحة النكاح عندنا وهو الولي** وله معنى لغوي وفقهي وأصولي **فالولي في اللغة خلاف العدو والولاية بالكسر السلطان والولاية النصرة** وقال سيبوية الولاية بالفتح المصدر والولاية بالكسر الاسم مثل الإمارة والنقابة لأنه اسم لما توليته وقمت به فإذا أرادوا المصدر فتحوا كذا في الصحاح **وفي الفقه البالغ العاقل الوارث فخرج الصبي والمعتوه والكافر على المسلمة** وفي أصول الدين هو العارف بالله تعالى وبأسمائه وصفاته حسبما يمكن المواظب على الطاعات المجتنب عن المعاصي الغير المنهمك في الشهوات واللذات كما في شرح العقائد **والولاية في الفقه تنفيذ القول على الغير شاء أو أبى وهي في النكاح نوعان ولاية ندب واستحباب وهي الولاية على العاقلة البالغة بكرا كانت أو ثيبا وولاية إجبار وهي الولاية على الصغيرة (((الصغير))) بكرا كانت أو ثيبا وكذا الكبيرة المعتوهة والمرقوقة**

*تقریرات میں ہے کہ ولایت دراصل ایک صفت ہے اور تنفیذ القول اس کا اثر ہے۔*لكن ها فى التحقيق صفة تقوم بشخص والتقييد المذكور اثرها۔

دفعہ ۳۔ولی کی تعریف:

حاشية رد المختار على الدر المختار - (3 / 54)

قوله (الوارث) كذا في الفتح وغيره **قال الرملي وذكره مما لا ينبغي إذ الحاكم ولي وليس بوارث اه قلت وكذا سيد العبد فالتعريف خاص بالولي من جهة القرابة**قوله (والولاية الخ) بفتح الواو وما ذكره تعريفها الفقهي كما في البحر وإلا فمعناها اللغوي المحبة والنصرة كما في المغرب **لكن ما ذكره تعريف لأحد نوعيها وهو ولاية الإجبار بقرينة قوله وهي هنا نوعان وأفاد أن المذكور في المتن غيرخاص بهذا الباب بل منه ولاية الوصي وقيم الوقف وولاية وجوب صدقة الفطر بناء على أن المراد بتنفيذ القول ما يكون في النفس أو في المال أو فيهما معا** والمراد في هذا الباب ما يشمل الأول والثالث دون الثاني قوله (تثبت) أي الولاية المذكورة **والمراد هنا ولاية الإجبار في هذا الباب فقط** ففيه شبهة الاستخدام وإلا فالولاية المعرفة أعم كما علمت وحيث كانت أعم فليس المراد بها الثابتة لخصوص الولي المعروف بالبالغ العاقل الوارث حتى يرد أنه ليس في الملك والإمامة إرث وحينئذ فلا حاجة إلى التكلف في الجواب بأن المراد بالإرث المأخوذ في تعريف الولي هو أخذ المال بعد الموت من باب عموم المجاز فالإمام يأخذ مال من لا

وارث له ليضعه في بيت المال والولي يأخذ كسب عبده المأذون في التجارة بعد موته وإن لم يكن ذلك إرثا حقيقة فإنه كما قال ط لا دليل على هذا المجاز والتعريف يصان عن مثل هذا فافهم.

دفعہ ۴۔ ولی کی شرائط:

الفتاوى الهندية – (7 / 22

ولا ولاية لصغير ولا مجنون ولا لكافر على مسلم ومسلمة ، كذا في الحاوي. ولا لمسلم على كافر وكافرة ، كذا في المضمراتقالوا : وينبغي أن يقال : إلا أن يكون المسلم سيد أمة كافرة أو سلطانا ، كذا في البحر الرائق. وللكافر ولاية على مثله ، كذا في التبيين. **ولا ولاية للمرتد على أحد لا على مسلم ولا على كافر ولا على مرتد مثله** ، كذا في البدائع

البحر الرائق شرح كنز الدقائق – (3 / 132)

(ولا ولاية لصغير وعبد ومجنون) لأنه لا ولاية لهم على أنفسهم فأولى أن لا يثبت على غيرهم ولأن هذه ولاية نظرية ولا نظر في التفويض إلى هؤلاء أطلق في العبد فشمل المكاتب فلا ولاية له على ولده كذا في المحيط لكن للمكاتب ولاية في تزويج أمته كما عرف وأراد بالمجنون المطبق وهو شهر وعليه الفتوى

وفي فتح القدير لا يحتاج إلى تقييده به لأنه لا يزوج حال جنونه مطبقا أو غير مطبق ويزوج حالة إفاقته عن جنون مطبق أو غير مطبق لكن المعنى أنه إذا كان مطبقا تسلب ولايته فتزوج ولا ينتظر إفاقته وغير المطبق الولاية ثابتة له فلا تزوج وتنتظر إفاقته كالنائم ومقتضى النظر أن الكفء الخاطب إن فات بانتظار إفاقته تزوج وإن لم يكن مطبقا وإلا انتظر على ما اختاره المتأخرون في غيبة الولي الأقرب ا هـ قوله (ولا لكافر على مسلم) لقوله تعالى { ولن يجعل الله للكافرين على المؤمنين سبيلا } النساء 141 ولهذا لا تقبل شهادته عليه ولا يتوارثان **قيد بالمسلم لأن للكافر ولاية على ولده الكافر لقوله تعالى { والذين كفروا بعضهم أولياء بعض } الأنفال 73 ولهذا تقبل شهادتهم على بعضهم ويجري بينهما التوارث** وكما لا تثبت الولاية لكافر على مسلم كذلك لا تثبت لمسلم على كافرة أعني ولاية التزويج بالقرابة وولاية التصرف في المال قالوا وينبغي أن يقال إلا أن يكون المسلم سيد أمة كافرة أو سلطانا

قال السروجي لم أرهذا الاستثناء في كتب أصحابنا وإنما هو منسوب إلى الشافعي ومالك قال في المعراج وينبغي أن يكون مرادا ورأيت في موضع معزوا إلى المبسوط ***الولاية بالسبب العام تثبت للمسلم على الكافر كولاية السلطنة والشهادة فقد ذكر معنى ذلك الاستثناء ا هـ***

دفعہ ۵۔ ولایت کے اسباب:

حاشية رد المختار على الدر المختار - (3 / 55) قوله (قرابة) دخل فيها العصبات والأرحام قوله (وملك) أي ملك السيد لعبده أو أمته قوله (وولاء) أي ولاء العتاقة والموالاة كما سيأتي قوله (وإمامة) دخل فيها القاضي المأذون بالتزويج لأنه نائب عن الإمام قوله (شاء أو أبى) احترز به عن ولاية الوكيل

الفتاوى الهندية - (7 / 19)

تثبت الولاية بأسباب أربعة بالقرابة والولاء والإمامة والملك ، كذا في البحر الرائق.

دفعہ ۶۔ زیر ولایت افراد جو کسی دوسرے کے ولی بھی نہیں ہو سکتے:

حاشية رد المختار على الدر المختار - (٣/ ٧٧

وبالتكليف عن الصغيرة والمجنونة فلا يزوج في حال جنونه مطبقا أو غير مطبق ويزوج حال إفاقته عن المجنون بقسميه لكن إن كان مطبقا تسلب ولايته فلا تنتظر إفاقته وغير المطبق الولاية ثابتة له فتنتظر إفاقته كالنائم ومقتضى النظر أن الكفء الخاطب إذا فات بانتظار إفاقته تزوج موليته وإن لم يكن مطبقا وإلا انتظر على ما اختاره المتأخرون في غيبة لولي الأقرب على ما سنذكره

فتح وتبعه في البحر والنهر والمطبق شهر وعليه الفتوى.

دفعہ ۷۔ بقاء، عود اور زوال ولایت:

-الفتاوى الهندية - (7 / 23)

وإذا جن الولي جنونا مطبقا تزول ولايته ، وإن كان يجن ويفيق ؛ لا تزول ولايته وتنفذ تصرفاته في حالة الإفاقة ، كذا في الذخيرة .وقدر الإمام الإطباق في رواية بشهر وبه يفتى ، كذا في الوجيز للكردري وهكذا في البحر الرائقوإذا بلغ الابن معتوها أو مجنونا تبقى ولاية الأب عليه في ماله ونفسه ، كذا في فتاوى قاضي خان .وفي فتاوى أبي الليث رجل زوج ابنه الكبير امرأة فلم يجز حتى جن جنونا مطبقا فأجاز الأب ذلك النكاح ؛ يجوز .وذكر الفقيه أبو بكر في غير هذه الصورة خلافا فقال : الابن إذا بلغ عاقلا ثم جن أو عته فعلى قول أبي يوسف رحمه الله تعالى لا تعود ولاية الأب قياسا حتى لو تصرف في ماله أو زوجه امرأة لا يجوز بل تعود الولاية إلى القاضي وعلى قول محمد رحمه الله تعالى الولاية إلى الأب استحسانا قال الفقيه أبو بكر الميداني : تعود ولاية الأب عند علمائنا الثلاثة ، كذا في الذخيرة والأب إذا جن أو عته ؛ لا تثبت للابن

الولاية في ماله وفي حق التزويج تثبت عند أبي حنيفة وأبي يوسف – رحمهما الله تعالى – ، كذا في الوجيز للكردري .وهو الصحيح هكذا في الغياثية.

دفعہ ۸۔ عصبہ کا حق ولایت اور ان میں ترتیب:

البحر الرائق شرح كنز الدقائق - (٣ / ١٢٧)

وأفاد بقوله بترتيب الإرث أن الأحق الابن وابنه وإن سفل ولا يتأتى إلا في المعتوهة على قولهما خلافا لمحمد كما سيأتي

ثم الأب ثم الجد أبوه ثم الأخ الشقيق ثم لأب (((الأب)))

وذكر الكرخي أن الأخ والجد يشتركان (((يشاركان))) في الولاية عندهما وعند أبي حنيفة يقدم الجد كما هو الخلاف في الميراث والأصح أن الجد أولى بالتزويج اتفاقا وأما الأخ لأم فليس منهم

ثم ابن الأخ الشقيق ثم ابن الأخ لأب ثم العم الشقيق ثم لأب ثم ابن العم الشقيق ثم ابن العم لأب ثم أعمام الأب كذلك الشقيق ثم لأب ثم أبناء عم الأب الشقيق ثم أبناؤه لأب ثم عم الجد الشقيق ثم عم الجد لأب ثم أبناء عم الجد الشقيق ثم أبناؤه لأب وإن سفلوا كل هؤلاء تثبت لهم ولاية الإجبار على البنت والذكر في حال صغرهما وحال كبرهما إذاجنا.

دفعہ ۹۔ عصبہ کے علاوہ دیگر رشتہ داروں کا حق ولایت:

(قَوْلُهُ يُدْفَعُ إلَى ذَوِي الْأَرْحَامِ عِنْدَ أَبِي حَنِيفَةَ كَأَخٍ مِنْ أُمٍّ إلَخْ) أَفَادَ أَنَّ الْمُرَادَ مِنْ ذَوِي الْأَرْحَامِ هُنَا غَيْرُ ذَوِي الْأَرْحَامِ الْمَذْكُورِينَ فِي الْفَرَائِضِ فَإِنَّ ذَا الرَّحِمِ فِي الْفَرَائِضِ كُلُّ قَرِيبٍ لَيْسَ بِذِي سَهْمٍ وَلَا عَصَبَةٍ فَالْأَخُ مِنْ الْأُمِّ لَيْسَ مِنْ ذَوِي الْأَرْحَامِ لِأَنَّهُ صَاحِبُ سَهْمٍ، وَأَمَّا ذُو الرَّحِمِ هُنَا فَالْمُرَادُ بِهِ كُلُّ قَرِيبٍ ذِي رَحِمٍ مَحْرَمٍ مِنْ الْمَحْضُونَ، وَهُوَ غَيْرُ عَصَبَةٍ فَإِنَّ كُلًّا مِمَّنْ ذَكَرَهُ الشَّارِحُ مِنْ الْأَخِ لِلْأُمِّ وَالْعَمِّ مِنْ الْأُمِّ وَالْخَالِ قَرِيبٌ ذُو رَحِمٍ مَحْرَمٍ مِنْ الْمَحْضُونَ، وَهُوَ غَيْرُ عَصَبَةٍ لَهُ، وَإِنَّمَا فَسَّرْنَا ذَا الرَّحِمِ هُنَا بِمَا ذَكَرْنَاهُ بِدَلَالَةِ التَّمْثِيلِ، وَلِأَنَّا لَوْ أَجْرَيْنَا قَوْلَهُ يُدْفَعُ إلَى ذَوِي الْأَرْحَامِ عَلَى إطْلَاقِهِ لِيَشْمَلَ مَنْ كَانَ ذَا رَحِمٍ مِنْ النِّسَاءِ وَلَمْ يَكُنْ مُحَرَّمًا لَتَنَاقَضَ مَعَ قَوْلِهِ سَابِقًا، وَلَا حَقَّ لِبَنَاتِ الْعَمَّةِ وَالْخَالَةِ فِي الْحَضَانَةِ لِأَنَّهُنَّ غَيْرُ مَحْرَمٍ فَإِنَّ قَوْلَهُ، وَلَا حَقَّ لِبَنَاتِ الْعَمَّةِ نَكِرَةٌ فِي سِيَاقِ النَّفْيِ فَتَعُمُّ فَلَا يَكُونُ لِبَنَاتِ الْعَمَّةِ وَالْخَالَةِ فِي الْحَضَانَةِ حَقٌّ فِي حَالَةٍ مَا مِنْ الْحَالَاتِ وَالتَّعْلِيلُ الْمَذْكُورُ، وَهُوَ قَوْلُهُ لِأَنَّهُنَّ غَيْرُ مَحْرَمٍ يُفِيدُ أَنَّ حَقَّ الْحَضَانَةِ لَا يَسْتَحِقُّهُ مِنْ النِّسَاءِ إلَّا مَنْ اتَّصَفَتْ بِالْمَحْرَمِيَّةِ

بِخِلَافِ وِلَايَةِ الْإِنْكَاحِ فَإِنَّهَا لَا تُفِيدُ بِالْمُحْرَمِيَّةِ، وَقَدْ ذَكَرَ فِي الْبَزَّازِيَّةِ أَنَّ بِنْتَ الْعَمَّةِ لَهَا وِلَايَةُ الْإِنْكَاحِ. وَالْحَاصِلُ أَنَّ وِلَايَةَ الْإِنْكَاحِ مَنُوطَةٌ بِالرَّحِمِيَّةِ فَقَطْ، وَحَقُّ الْحَضَانَةِ مَنُوطٌ بِالرَّحِمِيَّةِ مَعَ الْمُحْرَمِيَّةِ هَذَا مَا ظَهَرَ لِكَاتِبِهِ حَالَ الْمُطَالَعَةِ، وَاَللَّهُ أَعْلَمُ بِالصَّوَابِ. حاشية الشلبي على التبيين ، ٣: ٣٨ ط. بولاق ، مصر. البحر الرائق شرح كنز الدقائق - (3 / 133)

قوله (وإن لم يكن عصبة فالولاية للأم ثم للأخت لأب وأم ثم لأب ثم لولد الأم ثم لذوي الأرحام ثم للحاكم) وهذا عند أبي حنيفة رحمه الله تعالى وعندهما ليس لغير العصبات من الأقارب ولاية وإنما الولاية للحاكم بعد العصبات لحديث الإنكاح إلى العصبات ولأبي حنيفة رضي الله عنه أن الولاية نظرية والنظر يتحقق بالتفويض إلى من هو المختص بالقرابة الباعثة على الشفقة وقد اختلفوا في قول أبي يوسف ففي الهداية الأشهر أنه مع محمد وفي الكافي الجمهور أنه مع أبي حنيفة وفي التبي والجوهرة والمجتبى والذخيرة الأصح أنه مع أبي حنيفة وفي تهذيب القلانسي وروى ابن زياد عن أبي حنيفة وهو قولهما لا يليه إلا العصبات وعليه الفتوى ا هـ وهو غريب لمخالفته المتون الموضوعة لبيان الفتوى ولم يذكر المصنف بعد الأم البنت لأن خاص بالمجنون والمجنونة فبعد الأم البنت ثم بنت الابن ثم بنت ابن الابن ثم بنت بنت البنت

البحر الرائق شرح كنز الدقائق - (3 / 133)

وأفاده المصنف رحمه الله بتقديم الأم على الأخت تضعيف ما نقله في المستصفي عن شيخ الإسلام خواهر زاده رحمه الله ونقله في التجنيس عن عمر النسفي رحمه الله من أن الأخت الشقيقة أولى من الأم لأنها من قبل الأب ووجه ضعفه أن الأم أقرب منها وصرح في الخلاصة بأنه يفتي بتقديم الأم على الأخت وسيأتي في آخر المختصر أن ذا الرحم قريب ليس بذي سهم ولا عصبة وأن ترتيبهم كترتيب العصبات فتقدم العمات ثم الأخوال ثم الخالات ثم بنات الأعمام ثم بنات العمات كترتيب الإرث وهو قول الأكثر وظاهر كلام المصنف أن الجد الفاسد مؤخر عن الأخت لأنه من ذوي الأرحام وذكر المصنف في المستصفى أن الجد الفاسد أولى من الأخت عند أبي حنيفة وعند أبي يوسف الولاية لهما كما في الميراث وفي فتح القدير وقياس ما صح في الجد والأخ من تقدم الجد تقدم الجد الفاسد على الأخت ا هـ فثبت بهذا أن المذهب أن الجد الفاسد بعد الأم قبل الأخت وفي القنية أم الأب أولى في التزويج من الأم

دفعہ ۱۰۔ قرابت داروں کے بعد قاضی کا حق ولایت:

البحر الرائق شرح كنز الدقائق - (3 / 134)

وأطلق في الحاكم فشمل الإمام والقاضي لكن قالوا إن القاضي إنما يملك ذلك إذا كان ذلك في عهده ومنشوره فإن لم يكن ذلك في عهده لم يكن وليا كذا في الظهيرية وغيرها وفي المجتبى ما يفيد أن لنائب القاضي ولاية التزويج حيث كان القاضي كتب له في منشوره ذلك فإنه قال ثم السلطان ثم القاضي ونوابه إذا اشترط في عهده تزويج الصغار والصغائر وإلا فلا ا هـ بناء على هذا الشرط إنما هو في حق القاضي دون نوابه ويحتمل أن يكون شرطا فيهما فإذا كتب في منشور قاضي القضاة فإن كان ذلك في عهد نائبه منه ملكه النائب وإلا فلا ولم أر فيه منقولا صريحا وفي الظهيرية فإن زوجها القاضي ولم يأذن له السلطان ثم أذن له بذلك فأجاز القاضي ذلك جاز استحسانا وفي غاية البيان ولو زوج القاضي الصغيرة من ابنه كان باطلا

الدر المختار شرح تنوير الأبصار في فقه مذهب الإمام أبي حنيفة – (٣/ ٧٩

ثم للسلطان ثم لقاض نص له عليه في منشوره) ثم لنوابه إن فوض له ذلك وإلا لا

حاشية رد المختار على الدر المختار – (٣/ ٧٩)

قوله (نص له عليه في منشوره) أي على تزويج الصغار والمنشور ما كتب فيه السلطان إني جعلت فلانا قاضيا ببلدة كذا وإنما سمي به لأن القاضي ينشره وقت قراءته على الناس قهستاني وسنذكر في مسألة عضل الأقرب أنه تثبت الولاية فيها للقاضي وإن لم يكن في منشوره أي لأن ثبوت الولاية له فيها بطريق النيابة عن الأب أو الجد الفاضل دفعا لظلمه فيحمل ما هنا على ما إذا ثبتت له الولاية لا بطريق النيابة تأمل قوله (أن فوض له ذلك وإلا فلا) أي وإن لم يفوض للقاضي التزويج فليس لنائبه ذلك لما في المجتبى ثم للقاضي ونوابه إذا شرط في عهده تزويج الصغار والصغائر وإلا فلا اه

قال في البحر هذا بناء على أن هذا الشرط إنما هو في حق القاضي دون نوابه ويحتمل أن يكون شرطا فيهما فإذا كتب في منشور قاضي القضاة فإن كان ذلك في عقد نائبه منه ملكه النائب وإلا فلا ولم أر فيه منقولا صريحا اه

وحاصله أن القاضي إذا كان مأذونا بالتزويج فهل يكفي ذلك لنائبه أم لا بد أن ينص القاضي لنائبه على الإذن وعبارة المجتبى محتملة والمتبادر منها الأول وما في النهر من أن ما في المجتبى لا يفيد عدم اشتراط تفويض الأصيل للنائب كما توهمه في البحر رده الرملي بأن كيف لا يفيد مع إطلاقه في نوابه والمطلق يجري على إطلاقه ووجهه أنه لما فوض لهم ما له ولايته التي من جملتها التزويج صار ذلك من جملة ما فوض إليهم وقد تقرر أنهم نواب السلطان حيث أذن له بالاستنابة عنه فيما فوضه إليه اه فافهم

قلت لكن قال في أنفع الوسائل الظاهر أن النائب الذي لم ينص له القاضي على تزويج الصغائر لا يملكه لأنه إن كان فوض إليه الحكم بين الناس فهذا مخصوص بالرافعات فلا يتعدى إلى التزويج وكذا لو قال استنبتك في الحكم أما لو قال له استنبتك في جميع ما فوض إلى السلطان فيملكه حيث عمم له اه ثم استظهر في أنفع الوسائل أنه إذا ملك التزويج ليس له أن يأذن به لغيره لأنه بمنزلة الوكيل عن القاضي وليس للوكايل أن يوكل إلا بإذن اه قوله (وليس للوصي) أي وصي الصغير والصغيرة بحر واليتيم بوزن فعيل يشملهما

دفعہ ۱۱۔ علماء اور جماعت مسلمین کا حق ولایت:

حاشية رد المختار على الدر المختار - (٣ / ٦٧)

ثم قال وكذا السكران لو زوج من غير الكفء كما في الخانية **وبه علم أن المراد بالأب من ليس بسكران ولا عرف بسوء الاختيار اه قلت ومقتضى التعليل أن السكران أو المعروف بسوء الاختيار لو زوجها من كفء بمهر المثل صح لعدم الضرر المحض** ومعنى قوله والظاهر من حال الصاحي أنه يتأمل أي أنه لوفور شفقته بالأبوة لا يزوج بنته من غير كفء أو بغبن فاحش إلا لمصلحة يزيد على هذا الضرر كعلمه بحسن العشرة معها وقلة الأذى ونحو ذلك وهذا مفقود في السكران وسيىء الاختيار إذا خالف لظهور عدم رأيه وسوء اختياره في ذلك سوء اختيار

قوله (وإن عرف لا يصح النكاح) استشكل ذلك في فتح القدير بما في النوازل لو زوج بنته الصغيرة ممن ينكر أنه يشرب المسكر فإذا هو مدمن له وقالت لا أرضى بالنكاح أي ما بعد ما كبرت إن لم يكن يعرفه الأب بشربه وكان غلبة أهل بيته صاحلين فالنكاح باطل لأنه إنما زوج على ظن أنه كفء اه قال إذ يقتضي أنه لو عرف الأب بشربه فالنكاح نافذ مع أن من زوج بنته الصغيرة القابلة للتخلق بالخير والشر ممن يعلم أنه شريب فاسق فسوء اختياره ظاهر **ثم أجاب بأنه لا يلزم من تحقق سوء اختياره بذلك أن يكون معروفا به فلا يلزم بطلان النكاح عند تحقق سوء الاختيار مع أنه لم يتحقق للناس كونه معروفا بمثل ذلك اه**

والحاصل أن المانع هو كون الأب مشهورا بسوء الاختيار قبل العقد فإذا لم يكن مشهورا بذلك ثم زوج بنته من فاسق صح وإن تحقق بذلك أنه سيىء الاختيار واشتهر به عند الناس فلو زوج بنتا أخرى من فاسق لم يصح الثاني لأنه كان مشهورا بسوء الاختيار قبله بخلاف العقد الأول

لعدم وجود المانع قبله ولو كان المانع مجرد تحقق سوء الاختيار بدون الاشتهار لزم إحالة المسألة أعني قولهم **ولزم النكاح ولو بغبن فاحش أو بغير كفء إن كان الولي أبا أو جدا**

وكذا السكران لو زوج من غير الكفء كما في الخانية وبه علم أن المراد بالأب من ليس بسكران ولا عرف بسوء الاختيار اه

قلت **ومقتضى التعليل أن السكران أو المعروف بسوء الاختيار لو زوجها من كفء بمهر المثل صح لعدم الضرر المحض** ومعنى قوله والظاهر من حال الصاحي أنه يتأمل أي أنه لوفور شفقته بالأبوة لا يزوج بنته من غير كفء أو بغبن فاحش إلا لمصلحة يزيد على هذا الضرر كعلمه بحسن العشرة معها وقلة الأذى ونحو ذلك وهذا مفقود في السكران وسيىء الاختيار إذا خالف لظهور عدم رأيه وسوء اختياره في ذلك

قوله (أي غير الأب وأبيه) الأولى أن يزيد والابن والمولى لما مر

دفعہ ۱۳۔ باپ دادا، بیٹا کے علاوہ اولیاء کا نکاح کب لازم ہے:

الدر المختار شرح تنوير الأبصار في فقه مذهب الإمام أبي حنيفة – (٣/ ٦٦)

ولزم النكاح ولو بغبن فاحش) بنقص مهرها وزيادة مهره (أو) زوجها (بغير كفء إن كان الولي) المزوج بنفسه بغبن (أبا أو جدا) وكذا المولى وابن المجنونة (لم يعرف منهما سوء الاختيار) مجانة وفسقا(وإن عرف لا) يصح النكاح اتفاقا وكذا لو كان سكران فزوجها من فاسق أو شرير أو فقير أو ذي حرفة دنيئة لظهور سوء اختياره فلا تعارضه شفقته المظنونة

بحر (وإن كان المزوج غيرهما) أي غير الأب وأبيه ولو الأم أو القاضي أو وكيل الأب لكن في النهر بحثا لو عين لوكيله القدر صح (لا يصح) النكاح (من غير كفء أو بغبن فاحش) أصلا) وما في صدر الشريعة صح ولهما فسخه وهم (وإن كان من كفء وبمهر المثل صح و) لكن (لهما) أي لصغير وصغيرة وملحق بهما (خيار الفسخ) ولو بعد الدخول (بالبلوغ أو العلم بالنكاح بعده) لقصور الشفقة

القاضي إذا زوج صغيرة من نفسه فهو نكاح بغير ولي ؛ لأنه رعية في حق نفسه ، وإنما الحق للذي هو فوقه وهو الوالي وهو في حق نفسه أيضا رعية وكذلك الخليفة في حق نفسه رعية ، كذا في المحيط .ويجوز لابن العم أن يزوج ابنة عمه من نفسه ، كذا في الحاوي والقاضي إذا زوج الصغيرة من ابنه لا يجوز بخلاف سائر الأولياء ، كذا في التجنيس والمزيد .

الفتاوى الهندية – (٧/ ٢٠

القاضي إنما يملك إنكاح من يحتاج إلى الولي إذا كان ذلك في عهده ومنشوره ، وإن لم يكن ذلك في عهده لم يكن وليا فإن زوجها القاضي ولم يأذن السلطان له بذلك ثم أذن له بذلك فأجاز القاضي ذلك النكاح ؛ جاز استحسانا ، كذا في فتاوى قاضي خان وهو الصحيح ، كذا في محيط السرخسي

البحر الرائق شرح كنز الدقائق - (٣ / ١٢٨)

إذا كان أحدهما أقرب من الآخر فلا ولاية للأبعد مع الأقرب إلا إذا غاب غيبة منقطعة فنكاح الأبعد يجوز إذا وقع قبل عقد الأقرب.

دفعہ 15۔ تعدد اولیاء کی صورت میں ولی کون ہے:

البحر الرائق شرح كنز الدقائق - (٣ / ١٢٨)

إذا كان أحدهما أقرب من الآخر فلا ولاية للأبعد مع الأقرب إلا إذا غاب غيبة منقطعة فنكاح الأبعد يجوز إذا وقع قبل عقد الأقرب

الفتاوى الهندية - (٧ / ٢٦)

وإذا اجتمع للصغير والصغيرة وليان مستويان كالأخوين والعمين فأيهما زوج جاز عندنا ، كذا في فتاوى قاضي خان. سواء أجاز الآخر أو فسخ بخلاف الجارية بين الاثنين زوجها أحدهما لا يجوز إلا بإجازة الآخر قال في الفتاوى : والجارية بين الاثنين إذا جاءت بولد فادعياه حتى ثبت النسب من كل واحد منهما ينفرد كل واحد منهما بالتزويج ، كذا في السراج الوهاج. زوجاها على التعاقب جاز الأول دون الثاني ، وإن زوجها كل واحد منهما من رجل آخر فوقعا معا أو لا يعلم أيهما أول ؛ بطل العقدان ، كذا في فتاوى قاضي خان

دفعہ ۱۶۔ اولیاء کے تصرفات کا حکم:

الفتاوى الهندية - (٧ / ٣٠)

فإن وقع عقد الأقرب والأبعد معا فلا يجوز كلاهما وكذلك إذا كان لا يدرى السابق من اللاحق هكذا في شرح الطحاوي.

فإن زوج كل واحد من الوليين رجلا على حدة فالأول يجوز والآخر لا يجوز وإن وقعا معا ساعة واحدة لا يجوز كلاهما ولا واحد منهما وإن كان أحدهما قبل الآخر ولا يدري السابق من اللاحق

فكذلك لا يجوز لأنه لو جاز جاز بالتحري والتحري في الفروج حرام

حاشية رد المختار على الدر المختار – (٣ / ٨١)

قوله (فإن لم يدر) ينبغي أنها لو بلغت وادعت أن أحدهما هو الأول يقبل لما في الفتح ولو زوجها أبوها وهي بكر بالغة بأمرها وزوجت هي نفسها من آخر فإيهما قالت هو الأول فالقول لها وهو الزوج لأنها أقرت بملك النكاح له على نفسها وإقرارها حجة تامة عليها وإن قالت لا أدري الأول ولا يعلم من غيرها فرق بينهما وكذا لو زوجها وليان بأمرها **اه**

الفتاوى الهندية – (٧ / ٢٦

وإذا اجتمع للصغير والصغيرة وليان مستويان كالأخوين والعمين فأيهما زوج جاز عندنا ، كذا في فتاوى قاضي خان. سواء أجاز الآخر أو فسخ بخلاف الجارية بين الاثنين زوجها أحدهما لا يجوز إلا بإجازة الآخر قال في الفتاوى : والجارية بين الاثنين إذا جاءت بولد فادعياه حتى ثبت النسب من كل واحد منهما ينفرد كل واحد منهما بالتزويج ، كذا في السراج الوهاج. زوجاها على التعاقب جاز الأول دون الثاني ، وإن زوجها كل واحد منهما من رجل آخر فوقعا معا أو لا يعلم أيهما أول ؛ بطل العقدان ، كذا في فتاوى قاضي خان.

دفعہ ۱۷۔ ولی اقرب کا نکاح سے گریز:

البحر الرائق شرح كنز الدقائق – (3 / 136)

لكن ما المراد بالعضل فيحتمل أن يمتنع من تزويجها مطلقا ويحتمل أن يكون أعم من الأول ومن أن يمتنع من تزويجها من هذا الخاطب الكفء ليزوجها من كفء غيره وهو الظاهر ولم أره صريحا

البحر الرائق شرح كنز الدقائق – (3 / 136)

وقيد بالغيبة لأن الأقرب إذا عضلها يثبت للأبعد ولاية التزويج بالإجماع كذا في الخلاصة وبه اندفع ما ذكره السروجي من أنه تثبت للقاضي وقيد بالتزويج لأنه ليس للأبعد التصرف في المال وهو للأقرب لأن رأيه منتفع به في مالها بأن ينقل إليه ليتصرف في مالها كذا في المحيط قالوا وإذا خطبها كفء وعضلها الولي تثبت الولاية للقاضي نيابة عن العاضل فله التزويج وإن لم يكن في منشوره لكن ما المراد بالعضل فيحتمل أن يمتنع من تزويجها مطلقا ويحتمل أن يكون أعم من الأول ومن أن يمتنع من تزويجها من هذا الخاطب الكفء ليزوجها من كفء غيره وهو الظاهر ولم أره صريحا

البحر الرائق شرح كنز الدقائق – (3 / 136)

دفعہ ۱۸۔ ولی کی رضامندی کب ثابت ہوگی:

حاشية رد المختار على الدر المختار - (٣/ ٨١)

أن البالغة لو زوجت نفسها غير كفء فللولي الاعتراض ما لم يرض صريحا أو دلالة كقبض المهر ونحوه فلم يجعلوا سكوته إجازة والظاهر أن سكوته هنا كذلك فلا يكون سكوته إجازة لنكاح الأبعد وإن كان حاضرا في مجلس العقد ما لم يرض صريحا أو دلالة

دفعہ ۱۹۔ ولی اقرب کی غیر موجودگی میں ولی ابعد کا نابالغ کا نکاح کرنا:

فلو زوجها حيث هو لا رواية فيه وينبغي أن لا يجوز لانقطاع ولايته ، كذا في محيط السرخسي ، وإن زوجها الأقرب حيث هواختلفوا فيه والظاهر هو الجواز ، كذا في فتاوى قاضي خان والظهيرية.

دفعہ ۲۰۔ ولی کا صغیرہ کے نکاح کا اقرار:

البحر الرائق شرح كنز الدقائق - (٣/ ١٢٧)

وقيد المصنف بالإنكاح لأن الولي إذا أقر بالنكاح على الصغيرة لم يجز إلا بشهود أو بتصديقها بعد البلوغ عند أبي حنيفة رضي الله عنه وقالا يصدق. حاشية رد المختار على الدر المختار - (3 / 65)

قيد بالإنكاح لأن إقراره به عليها لا يصح إلا بشهودأو بتصديقها بعد البلوغ كما سيذكره المصنف آخر الباب ولو قال وللولي إنكاح غير المكلف والرقيق لشمل المعتوه ونحوه. ولو أقر ولي صغير أو صغيرة أو) أقر (وكيل رجل أو امرأة أو مولى لعبد النكاح لم ينفذ) لأنه إقرار على الغير بخلاف مولى الأمة حيث ينفذ إجماعا لأن منافع بضعها ملكه (إلا أن يشهد الشهود على النكاح) بأن ينصب القاضي خصما عن الصغير حتى ينكر فتقام البينة عليه (أو يدرك الصغير أو الصغيرة فيصدقه) أي الولي المقر. حاشية رد المختار على الدر المختار - (٣/ ٨٣

قوله(ولو أقر الخ) قال الحاكم الشهيد في الكافي الجامع لكتب ظاهر الرواية وإذا أقر الأب أو غيره من الأولياء على الصغير أو الصغيرة بالنكاح أمس لم يصدق على ذلك إلا بشهود أو تصديق منهما بعد الإدراك في قول أبي حنيفة--- وقال أبو يوسف ومحمد الإقرار من هؤلاء في جميع ذلك جائز وكذلك إقرار الوكيل على موكله على هذا الاختلاف اه. ونقل في الفتح عن المصفى عن أستاذه الشيخ حميد الدين أن الخلاف فيما إذا أقر الولي في صغرهما وإليه أشار في المبسوط وغيره قال وهو الصحيح وقيل فيما إذا بلغها وأنكرا فأقر الولي أما لو أقر في صغرهما يصح اتفاقا واستظهره في الفتح وقد علمت أن الأول ظاهر الرواية وأنه الصحيح

دفعہ ۲۰۔ ولی کا اپنے ولایت سے کیے ہوئے نکاح سے انکار:

البحر الرائق شرح كنز الدقائق - (٣ / ١٢٨)

وفي الظهيرية صغيرة زوجها وليها من كفء ثم قال لست أنا بولي لا يصدق ولكن ينظر إن كانت ولايته ظاهرة جاز النكاح وإلا فلا اه.

دفعہ ۲۱۔ غیر مکلف کی ایک سے زائد شادیاں:

الدر المختار٣ / ٨٤

فرع هل لولي مجنون ومعتوه تزويجه أكثر من واحدة لم أره ومنعه الشافعي وجوزه في الصبي للحاجة. حاشية رد المختار على الدر المختار - (٣ / ٨٤)

قوله (هل لولي مجنون الخ) البحث لصاحب النهر والظاهر أن الصبي في حكم من ذكر ط قوله (ومنعه الشافعي) لاندفاع الضرورة بالواحدة قوله (وجوزه) أي تزويج أكثر من واحدة

وفی فقہ الحانبلة ان ابا بكر قال ليس للاب تزويج البالغ المعتوه بحال،وير القاضی جواز تزويجه عند الحاجة كاشافعی اما المجنونة فيرى اند لا يزوجها الاالحاكم وراى ابن حزم فی المجنون والمجنونة الكبيرين ناه لايزوجها احد لااب ولاغيره-زرقاوی

دفعہ ۲۲۔ نابالغ کے نکاح میں بھی کفاءت کا اعتبار ہے:

حاشية رد المختار على الدر المختار - (٣ / ٦٨)

مطلب مهم هل للعصبة تزويج الصغير امرأة غير كفء له تنبيه ذكر في شرح المجمع أن تزويج الأب الصغير والصغيرة من غير كفء أو بغبن فاحش جائز عنده لا عندهما ثم قال وفي المحيط الوكيل بالنكاح إذا زاد أو نقص عن مهر المثل فعلى هذا الاختلاف اه

وهذا خلاف ما ذكره الشارح تبعا لما في البحر عن القنية . وقد يجاب بأن الوكيل في عبارة شرح المجمع ليس المراد به وكيل الأب بل وكيل الزوج أو الزوجة البالغين بقرينة ما في البدائع حيث ذكر الخلاف السابق ثم قال وعلى هذا الخلاف التوكيل بأن وكل رجل رجلا بأن يزوجه امرأة فزوجه بأكثر من مهر مثلها مقدار ما لا يتغابن الناس في مثله أو وكلت امرأة رجلا بأن يزوجها من رجل فزوجها بدون صداق مثلها أو من غير كفء اه. وقدمناه أيضا عن البزازية وعليه فلا منافاة فتدبر . قوله (لا يصح النكاح من غير كفء) مثله قول الكنز ولو زوج طفلة غير كفء أو بغبن فاحش صح ولا يجز ذلك لغير الأب والجد ومقتضاه أن الأخ لو زوج أخاه الصغير

امرأة أدنى منه لا يصح وفيه ما مر عن الشرنبلالية من أن الكفاءة لا تعتبر للزوج كما سيأتي في بابها أيضا .

وقدمنا أن الشارح أشار إلى ذلك أيضا وقد راجعت كثيرا فلم أر شيئا صريحا في ذلك نعم رأيت في البدائع مثل ما في الكنز حيث قال وأما إنكاح الأب والجد الصغير الصغيرة فالكفاءة فيه ليست بشرط عند أبي حنيفة لصدوره ممن له كمال النظر لكمال الشفقة بخلاف إنكاح الأخ والعم من غير كفء فإنه لا يجوز بالإجماع لأنه ضرر محض اه

فقوله بخلاف الخ ظاهر في رجوعه إلى كل من الصغير والصغيرة وعلى هذا فمعنى عدم اعتبار الكفاءة للزوج أن الرجل لو زوج نفسه من امرأة أدنى منه ليس لعصباته حق الاعتراض بخلاف الزوجة وبخلاف الصغيرين إذا زوجهما غير الأب والجد هذا ما ظهر لي وسنذكر في أول باب الكفاءة ما يؤيده والله أعلم

دفعہ ۲۲۔ مندرجہ ذیل افراد کو نکاح نابالغان کا اختیار نہیں:

حاشية رد المختار على الدر المختار – (3 / 55) – (3 / 68)

سواء أوصى إليه الأب بذلك أم لا وفي رواية يجوز وكذا سواء عين له الموصي رجلا في حياته أو لا خلافا لما في فتح القدير كما سيأتيقوله (لو عين لوكيله القدر) أي الذي هو غبن فاحش نهر وكذا لو عين له رجلا غير كفء كما بحثه العلامة المقدسي

الفتاوى الهندية – (٧ / ٢٢). الوصي لا ولاية له في إنكاح الصغير والصغيرة سواء أوصى إليه الأب أو لم يوص إلا إذا كان الوصي وليهما فحينئذ يملك الإنكاح بحكم الولاية لا بحكم الوصاية ، كذا في المحيط .ولو كان الصغير والصغيرة في حجر رجل يعولهما كالملتقط ونحوه فإنه لا يملك تزويجهما ، كذا في فتاوى قاضي خان . البحر الرائق شرح كنز الدقائق – (3 / 135)

وأشار المصنف إلى أن وصي الصغير والصغيرة إذا لم يكن قريبا ولا حاكما فإنه ليس له ولاية التزويج سواء كان أوصى إليه الأب في ذلك أو لم يوص وروى هشام عن أبي حنيفة إن أوصى إليه الأب جاز له كذا في الخانية والظهيرية وبه علم أن ما في التبيين من أنه ليس له ذلك إلا أن يفوض إليه الموصي ذلك رواية هشام وهي ضعيفة واستثنى في فتح القدير ما إذا كان الموصي عين رجلا في حياته للتزويج فيزوجها الوصي كما لو وكل في حياته بتزويجها ا هـ

وفيه نظر لأنه إن زوجها من المعين قبل موت الموصي فليس الكلام فيه لأنه ليس بوصي وإنما هو وكيل وإن كان بعد موته فقد بطلت الوكالة بموته وانقطعت ولايته فانتقلت الولاية للحاكم عند عدم قريب وفي الظهيرية ومن يعول صغيرا أو صغيرة لا يملك تزويجهما.

دفعہ ۲۳۔ نابالغ کا نکاح کب باطل ہے:

الفتاوى الهندية – (٧ / ٣٣)

سئل القاضي بديع الدين عن صغيرة زوجت نفسها من كفء ولا ولي لها ولا قاضي في ذلك الموضع قال : ينعقد ويتوقف على إجازتها بعد بلوغها ، كذا في التتارخانية. **البحر الرائق شرح كنز الدقائق – (3 / 134)**

صغيرة زوجت نفسها ولا ولي لها ولا قاضي في ذلك الموضع قال يتوقف وينفذ بإجازتها بعد بلوغها ا هـ مع أنهم قالوا كل عقد لا مجيز له حال صدوره فهو باطل لا يتوقف ولعل التوقف فيه باعتبار أن مجيزه السلطان كما لا يخفى وفي النوازل والذخيرة امرأة جاءت إلى قاض

الدر المختار شرح تنوير الأبصار في فقه مذهب الإمام أبي حنيفة – (٣ / ٨٠)

صغيرة زوجت نفسها ولا ولي ولا حاكم ثمة توقف ونفذ بإجازتها بعد بلوغها لأنه له مجيزا وهو السلطان

حاشية رد المختار على الدر المختار – (٣ / ٨٠)

قوله (ولا حاكم ثمة) أي في موضع العقد توقف الخ هذا قول بعض المتأخرين ففي أحكام الصغار **فإن كانت في موضع لم يكن فيه قاض إن كان ذلك الموضع تحت ولاية قاضي تلك البلدة ينعقد ويتوقف على إجازة ذلك القاضي وإلا فلا ينعقد وقال بعض المتأخرين ينعقد ويتوقف على إجازتها بعد البلوغ اه واستشكله في البحر بأنهم قالوا كل عقد لا مجيز له حال صدوره فهو باطل لا يتوقف**

ثم قال التوقف فيه باعتبار أن مجيزه السلطان كما لا يخفى اه وهذا مبني على كفاية كون ذلك المكان تحت ولاية السلطان وإن لم يكن تحت ولاية قاض وعليه فبطلان العقد يتصور فيما إذا كان في دار الحرب أو البحر أو المفازة ونحو ذلك بخلاف القرى والأمصار ويدل عليه ما في الفتح في فصل الوكالة بالنكاح حيث قال **وما لا مجيز له أي ما ليس له من يقدر على الإجازة يبطل كما إذا كانت تحته حرة فزوجه الفضولي أمة أو أخت امرأته أو خامسة أو زوجه معتدة أو مجنونة أو صغيرة يتيمة في دار الحرب أو إذا لم يكن سلطان ولا قاض لعدم من يقدر على الإمضاء حالة العقد فوقع باطلا اه**

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دفعہ ۲۷۔ نابالغہ سے تعلقات زن شوئی:

نابالغہ کی صحت جسمانی اگرایسی ہے کہ جماع کے قابل ہے اور مرض کا اندیشہ نہیں تو اس سے جماع جائز ہے، اگرچہ اس کی عمر نو سال سے کم ہی کیوں نہ ہو اور اگر وہ بوجہ لاغری و کمزوری جماع کا تحمل نہ کر سکتی ہو اور بیماری کا خدشہ ہو تو اس سے تعلق زن شوئی کا قیام ناجائز ہے، اگرچہ اس کی عمر زیادہ ہو۔

الفتاوى الهندية - (٧ / ٣٨)

واختلفوا في وقت الدخول بالصغيرة فقيل لا يدخل بها ما لم تبلغ وقيل يدخل بها إذا بلغت تسع سنين ، كذا في البحر الرائق وأكثر المشايخ على أنه لا عبرة للسن في هذا الباب وإنما العبرة للطاقة إن كانت ضخمة سمينة تطيق الرجال ولا يخاف عليها المرض من ذلك ؛ كان للزوج أن يدخل بها ، وإن لم تبلغ تسع سنين ، وإن كانت نحيفة مهزولة لا تطيق الجماع ويخاف عليها المرض لا يحل للزوج أن يدخل بها ، وإن كبر سنها وهو الصحيح

البحر الرائق شرح كنز الدقائق - (٣ / ١٢٨)

واختلفوا في وقت الدخول بالصغيرة فقيل لا يدخل بها ما لم تبلغ وقيل يدخل بها إذا بلغت تسع سنين وقيل إن كانت سمينة جسيمة تطيق الجماع يدخل بها وإلا فلاتتمة ليس لغير الأب والجد أن يسلم الصغيرة قبل قبض ما تعورف قبضه من المهر ولو سلمها الأب له أن يمنعها أفاده ط وتمامه في البحر قلت وليس له تسليمها للدخول بها قبل إطاقة الوطء ولا عبرة للسن كما سيدكره الشارح في آخر باب المهر

دفعہ ۲۸۔ رخصتی کا بیان:

الفتاوى الهندية - (٧ / ٣٨)

وإذا نقد الزوج المهر وطلب من القاضي أن يأمر أبا المرأة بتسليم المرأة فقال أبوها : إنها صغيرة لا تصلح للرجال ولا تطيق الجماع وقال الزوج بل هي تصلح وتطيق ينظر إن كانت ممن تخرج أخرجها وأحضرها وينظر إليها فإن صلحت للرجال أمر بدفعها إلى الزوج ، وإن لم تصلح لم يأمره ، وإن كانت ممن لا تخرج أمر من يثق بهن من النساء أن ينظرن إليها فإن قلن : إنها تطيق الجماع وتحتمل الرجال أمر الأب بدفعها إلى الزوج ، وإن قلن : لا تحتمل الرجال لا يؤمر بتسليمها إلى الزوج ، كذا في المحيط . قال بعضهم : إنها باقية إلا أنه حدث للأبعد ولاية بغيبة الأقرب فتصير كأن لها وليين مستويين في الدرجة كالأخوين والعمين ، وقال بعضهم : تزول ولايته وتنتقل إلى الأبعد وهو الأصح ، كذا في البدائع .

البحر الرائق شرح كنز الدقائق - (٣ / ١٢٨)

وفي الخلاصة صغيرة زوجت فذهبت إلى بيت زوجها بدون أخذ المهر فلمن هو أحق بإمساكها قبل التزويج أن يمنعها حتى يأخذ من له حق أخذ جميع المهر وغير الأب إذا زوج الصغيرة وسلمها إلى الزوج قبل قبض جميع الصداق فالتسليم فاسد وترد إلى بيتها

قال رحمه الله هذا في عرفهم أما في مما زماننا فتسليم جميع الصداق ليس بلازم والأب إذا سلم البنت إليه قبل القبض له أن يمنعها بخلاف ما لو باع مال الصغير وسلم قبل قبض الثمن فإنه لا يسترد اه والفرق أن حقوق النقد في الأموال راجعة إليه بخلاف النكاح ولذا ملك الإبراء عن الثمن ويضمن ولا يصح الإبراء عن المهر من الولي .

دفعہ ۲۹۔ عقد کے وقت ولایت نہ ہو مگر اجازت کے وقت کے حاصل ہو جائے:

ولو زوجها الأبعد حل قيام الأقرب حتى توقف على إجازة الأقرب ثم غاب الأقرب وتحولت الولاية إلى الأبعد لا يجوز ذلك النكاح الذي باشره الأبعد إلا بإجازة منه بعد تحول الولاية إليه هكذا في الظهيرية .واختلف مشايخنا في ولاية الأقرب أنها تزول بالغيبة أم بقيت ؟ .

قال بعضهم : إنها باقية إلا أنه حدث للأبعد ولاية بغيبة الأقرب فتصير كأن لها وليين مستويين في الدرجة كالأخوين والعمين ، وقال بعضهم : تزول ولايته وتنتقل إلى الأبعد وهو الأصح ، كذا في البدائع .

الفتاوى الهندية – (٧ / ٢٤

وفي فتاوى أبي الليث رجل زوج ابنه الكبير امرأة فلم يجز حتى جن جنونا مطبقا فأجاز الأب ذلك النكاح ؛ يجوز. وذكر الفقيه أبو بكر في غير هذه الصورة خلافا فقال : الابن إذا بلغ عاقلا ثم جن أو عته فعلى قول أبي يوسف رحمه الله تعالى لا تعود ولاية الأب قياسا حتى لو تصرف في ماله أو زوجه امرأة لا يجوز بل تعود الولاية إلى القاضي وعلى قول محمد رحمه الله تعالى الولاية إلى الأب استحسانا قال الفقيه أبو بكر الميداني : تعود ولاية الأب عند علمائنا الثلاثة ، كذا في الذخيرة.

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نظرِ ثانی کے متعلق سپریم کورٹ کا ایک اہم فیصلہ

محمد مشتاق احمد*

سپریم کورٹ کے دس رکنی بنچ نے ۱۹ جون ۲۰۲۰ء کو جسٹس قاضی فائز عیسیٰ صاحب کے خلاف ریفرنس کو خارج کر دیا تھا۔ تاہم ان دس جج صاحبان میں سات جج صاحبان نے ایف بی آر کو جسٹس صاحب کی اہلیہ اور بچوں کے ٹیکس کا معاملہ دیکھنے کا حکم دیا تھا۔ دس رکنی بنچ کے اس فیصلے کے خلاف جب نظرِ ثانی کی درخواستیں دائر کی گئیں تو ابتدا میں ان کی سماعت کے لیے چھ رکنی بنچ تشکیل دیا گیا اور اس کی وجہ یہ ذکر کی گئی کہ تین جج صاحبان نے تو اختلافی نوٹ لکھا تھا اور ایک جج صاحب اس دوران میں ریٹائر ہوگئے ہیں۔ اس بنچ پر کئی اعتراضات وارد ہوئے جن میں ایک یہ تھا کہ جب پورا کیس دس جج صاحبان نے سنا تھا تو نظرِ ثانی بھی دس جج صاحبان کو ہی کرنی چاہیے تھی اور اس لیے اختلافی نوٹ لکھنے والے تین جج صاحبان کو بھی اس بنچ میں ہونا چاہیے تھا اور ریٹائر شدہ جج صاحب کی جگہ ایک اور جج کو بٹھایا جانا چاہیے تھا۔ مزید یہ کہ اگر ایک لمحے کے لیے مان بھی لیا جائے کہ نظرِ ثانی تو "فیصلے" کے خلاف ہوتی ہے اور فیصلے کی حیثیت یا تو متفقہ فیصلے کو حاصل ہوتی ہے یا اکثریتی فیصلے کو، تو سوال یہ ہے کہ سات رکنی بنچ کے فیصلے پر چھ رکنی بنچ کیسے نظرِ ثانی کر سکتا ہے؟

۲۲ فروری ۲۰۲۱ء کو اس چھ رکنی بنچ نے ان سوالات اور دیگر متعلقہ سوالات پر اپنا فیصلہ سنا دیا جو اس نے دسمبر میں محفوظ کیا تھا۔ دلچسپ بات یہ ہے کہ خود یہ بنچ بھی تقسیم ہو گیا ہے اور پانچ جج صاحبان نے اکثریتی فیصلہ سنایا ہے، جبکہ ایک جج صاحب نے اکثریتی فیصلے کے ایک نکتے سے اتفاق کرتے ہوئے باقی نکات سے اختلاف کیا ہے۔ ہم پہلے اسی اکثریتی فیصلے پر تبصرہ پیش کریں گے۔ اس کے بعد جسٹس منظور اے ملک کے الگ فیصلے کا جائزہ لیں گے۔

اہم نتائج

جسٹس عمر عطا بندیال صاحب نے اکثریتی فیصلہ لکھا ہے جس کی رو سے نتیجہ یہ نکالا ہے کہ:

۱. نظرِ ثانی کی سماعت میں ججز کی تعداد کم از کم اتنی ہونی چاہیے جتنی اصل بنچ میں تھی، یعنی اختلافی نوٹ لکھنے والے جج صاحبان کی تعداد کو بھی اس میں شامل مانا جائے گا؛ اس تعداد میں اضافہ ہو سکتا ہے لیکن کم از کم اتنی تعداد کا ہونا ضروری ہے۔ (اس وجہ سے جسٹس قاضی فائز عیسیٰ کیس میں نظرِ ثانی کی سماعت کے لیے کم از کم دس رکنی بنچ تشکیل دینا ضروری ہو گیا۔)

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۲. نظرِ ثانی کے بنچ میں کون ہو اور کون نہ ہو، یہ بنیادی طور پر چیف جسٹس کے تمیزی اختیارات (discretionary powers) میں آتا ہے لیکن اس بنچ میں اس جج کو ضرور ہونا چاہیے جس نے متفقہ یا اکثریتی فیصلہ لکھا ہے۔ اگر متفقہ یا اکثریتی فیصلہ لکھنے والا جج میسر نہ ہو، تو ان جج صاحبان کو بنچ میں ہونا چاہیے جنھوں نے اس متفقہ یا اکثریتی فیصلے سے اتفاق کیا ہو۔

۳. چیف جسٹس چاہیں تو نظرِ ثانی کے بنچ میں ججز کی تعداد اصل بنچ کے ججز کی تعداد سے بڑھا بھی سکتا ہے۔

ان تینوں اصولوں کو ملا کر پڑھنے سے معلوم ہوتا ہے کہ جسٹس بندیال صاحب نے نظرِ ثانی کے بنچ میں اپنی پوزیشن تو مستحکم کر لی، ساتھ ہی اپنے ساتھ اتفاق کرنے والے جج صاحبان کو شامل کرنے کے لیے بھی راہ ہموار کر لی، لیکن اختلافی نوٹ لکھنے والے تین جج صاحبان کی جگہ تین دیگر جج صاحبان کو شامل کرنے، یا انھی تین کے ساتھ چند اور جج صاحبان کو شامل کرنے، کی گنجائش بھی پیدا کر لی!

۴. اختلافی نوٹ لکھنے والے جج صاحبان اگر نظرِ ثانی کے بنچ میں شامل بھی ہوں تو انھیں بہت زیادہ برداشت کا مظاہرہ کرنا ہوگا تاکہ وہ اکثریتی جج صاحبان پر اثرانداز نہ ہوں۔

اس بات کو جسٹس بندیال کی جانب سے جسٹس منصور علی شاہ، جسٹس مقبول باقر اور جسٹس یحیٰ آفریدی کو کنٹرول کرنے کی کوشش کے طور پر دیکھا گیا۔

"چیف جسٹس کی مرضی؟"

بنچ بنانے کے اختیار کو چیف جسٹس کی مرضی پر منحصر کرنے کے لیے جسٹس بندیال کے استدلال کی بنا سپریم کورٹ رولز پر ہے۔ یہاں یہ بات قابلِ ذکر ہے کہ سپریم کورٹ کو نظرِ ثانی کا اختیار دستور کی دفعہ ۱۸۸ کے تحت حاصل ہے لیکن اس اختیار کے متعلق دستور کی اس دفعہ میں یہ تصریح کی گئی ہے کہ اس اختیار کو پارلیمان کے بنائے گئے قانون یا سپریم کورٹ کے بنائے گئے رولز کے تحت استعمال کیا جائے گا۔ اس دفعہ کے تحت پارلیمان کو باقاعدہ قانون سازی کرنی چاہیے تھی لیکن اس نے ابھی تک یہ فریضہ ادا نہیں کیا۔ البتہ سپریم کورٹ نے رولز بنائے ہیں۔ چنانچہ جسٹس بندیال کے پورے فیصلے کا انحصار اس بات پر ہے کہ سپریم کورٹ رولز اس معاملے میں حتمی اتھارٹی کی حیثیت رکھتے ہیں۔

پتہ نہیں کیوں وہ اس بات کو نظرانداز کر گئے ہیں کہ ہمارے قانونی نظام کی رو سے رولز کو ضمنی قانون کی حیثیت حاصل ہے جو پارلیمان کے بنائے گئے قانون کے ماتحت ہوتے ہیں اور پارلیمان کا بنایا گیا

قانون دستور کے ماتحت ہوتا ہے۔ چنانچہ اگر پارلیمان نے اس ضمن میں کوئی قانون نہیں بنایا، تب بھی یہ رولز دستور کے ماتحت ہی ہیں اور ان کو دستور پر بالاتر حیثیت حاصل نہیں ہے۔ یہ بات قانون کے عمومی قواعد کی رو سے بھی واضح تھی اور اس بات کی تصریح آگے دستور کی دفعہ ۱۹۱ میں بھی کی گئی ہے جس میں صراحتاً قرار دیا گیا ہے کہ "دستور اور قانون کے ماتحت" (Subject to the Constitution and law) سپریم کورٹ اپنی پریکٹس اور طریقِ کار کے لیے رولز بنا سکتی ہے۔ کیا یہ بات حیران کن نہیں ہے کہ دستور کی دفعہ ۱۸۸ میں مذکور نظرِ ثانی کے اختیار کو تو انھوں نے سپریم کورٹ کے رولز کے ماتحت قرار دیا لیکن خود سپریم کورٹ کے رولز کو دستور اور قانون کے ماتحت ہونے کے پہلو سے نہیں دیکھا؟

بہر حال سپریم کورٹ رولز کو حتمی اتھارٹی مان کر انھوں نے یہ نتیجہ نکالا کہ بنچ بنانے، بنچ میں ججز کی تعداد مقرر کرنے، بنچ میں کون ججز ہوں اور کون نہ ہوں، ان سارے امور کے متعلق اختیارات چیف جسٹس کو حاصل ہیں کیونکہ وہ "ماسٹر آف روسٹر" کی حیثیت رکھتے ہیں! یہ اصول طے کرنے کے بعد ان کے سامنے یہ سوالت آئے کہ نظرِ ثانی کے بنچ میں کتنے اور کون سے جج ہونے چاہئیں؟ ان کا جواب تو یہ ہونا چاہیے تھا کہ "چیف جسٹس کی مرضی" لیکن چونکہ سپریم کورٹ رولز کے آرڈر ۲۶، رول ۸ میں یہ تصریح کی گئی ہے کہ جہاں تک ممکن ہو (as far as practicable) نظرِ ثانی کی سماعت "وہی بنچ" (the same bench) کرے گا جس نے اصل فیصلہ یا حکم سنایا ہو، اس لیے انھیں اس بحث میں جانا پڑا کہ "جہاں تک ممکن ہو" سے مراد کیا ہے اور "وہی بنچ" کا مفہوم کیا ہے؟ اہم بات یہ ہے کہ چونکہ نظرِ ثانی کے رولز کو "قانون اور سپریم کورٹ کی پریکٹس" کے ماتحت کیا گیا ہے (آرڈر ۲۶، رول ۱)، اس لیے جسٹس صاحب کو سپریم کورٹ کی پریکٹس کا بھی جائزہ لینا پڑا۔ جیسا کہ پیچھے ذکر کیا گیا، انھوں نے نتیجہ تو دونوں سوالات کا یہ نکالا کہ "مرضی چیف جسٹس کی" لیکن ان کی راہ میں ایک بڑی رکاوٹ کے طور پر ذوالفقار علی بھٹو کیس کا نظرِ ثانی کا فیصلہ حائل ہو گیا۔

بھٹو کیس کی رکاوٹ

بھٹو کیس میں سات رکنی بنچ نے سزاے موت کے خلاف اپیل کی سماعت کی تھی جس کے بعد تین جج صاحبان نے اپیل منظور کی لیکن چار جج صاحبان نے سزاے موت برقرار رکھی۔ اس فیصلے کے بعد جب نظرِ ثانی کی درخواست دائر کی گئی تو اس درخواست کی سماعت تمام سات جج صاحبان نے کی۔ یہ الگ بات ہے کہ نظرِ ثانی کی درخواست مسترد کرنے پر ساتوں جج صاحبان نے اتفاق کیا، لیکن اہم بات یہ ہے کہ بنچ میں اختلاف کرنے والی اقلیت بھی شامل تھی۔ یہ بات بھی اہم ہے کہ یہ فیصلہ ۱۹۷۹ء کا ہے جبکہ سپریم کورٹ رولز ۱۹۸۱ء میں بنائے

گئے اور ان میں تصریح کی گئی تھی کہ نظرِ ثانی کے رولز "قانون اور سپریم کورٹ کی پریکٹس" کے ماتحت ہیں۔ چنانچہ ۱۹۷۹ء کی یہ پریکٹس ان رولز پر حاوی بھی ہے، ورنہ رولز کی تعبیر تو جسٹس بندیال نے ایسی کر لی تھی کہ سارا معاملہ ہی چیف جسٹس کی مرضی پر منحصر ہو گیا تھا۔ ۱۹۷۹ء کی اس پریکٹس کو منسوخ کرنے یا ناقابلِ اتباع قرار دینے کا راستہ بھی بند تھا کیونکہ مذکورہ بنچ سات ججز پر مشتمل تھا جس کے فیصلے سے انحراف کے لیے سات سے زائد ججز پر مشتمل بنچ درکار تھا، جبکہ موجودہ بنچ چھ ارکان پر مشتمل تھا۔ چنانچہ خواہی نخواہی، جسٹس بندیال صاحب کو ماننا پڑا کہ نظرِ ثانی بنچ میں اختلافی نوٹ لکھنے والے جج صاحبان کی تعداد بھی شامل ہونی چاہیے۔ یہ بات البتہ مدِ نظر رہے کہ انھوں نے تعداد ہی کی بات کی ہے، یعنی اگر سات ججز نے مقدمہ سنا تو نظرِ ثانی بھی سات ہی کریں، اور دس نے مقدمہ سنا تو نظرِ ثانی بھی دس ہی کریں، لیکن وہ سات یا دس جج کون ہوں، یہ فیصلہ چیف جسٹس نے کرنا ہے کیونکہ وہ "ماسٹر آف روسٹر" ہیں!

کیا رول ۸ کی یہ تعبیر مناسب ہے کہ اس میں "وہی بنچ" سے مراد صرف "ججز کی وہی تعداد" ہے؟ کم از کم سپریم کورٹ کی پریکٹس سے تو یہ معلوم ہوتا ہے کہ یہ تعبیر درست نہیں ہے۔ نظرِ ثانی میں ہمیشہ کوشش یہ کی گئی ہے کہ صرف تعداد ہی اتنی نہ ہو بلکہ ججز بھی وہی ہوں، الا یہ کہ کسی وجہ سے کوئی جج صاحب شریک نہ ہو سکتے ہوں (جیسے مثلاً وہ ریٹائر ہو گئے ہوں)۔ چنانچہ اسی استثنائی امکان کے لیے رول ۸ میں "جہاں تک ممکن ہو" کے الفاظ استعمال کیے گئے ہیں۔ بھٹو کیس میں بھی یہی ہوا تھا کہ چونکہ ساتوں جج صاحبان دستیاب تھے، اس لیے انھی سات جج صاحبان پر مشتمل بنچ نے نظرِ ثانی کی سماعت کی۔ تاہم جسٹس بندیال نے "جہاں تک ممکن ہو" کی ایسی عجیب تعبیر کی کہ یہ معاملہ بھی چیف جسٹس کی مرضی پر معلق کر دیا اور فرمایا کہ چونکہ چیف جسٹس "ماسٹر آف روسٹر" ہے، اس لیے اسے انتظامی اور دیگر مسائل کو بھی مدِ نظر رکھنا پڑتا ہے اور اس لیے اس معاملے میں حتمی فیصلہ چیف جسٹس کا ہی ہوگا! بھٹو کیس سے انحراف تو وہ کر نہیں سکتے تھے لیکن اسے کمزور کرنے کی عجیب کوشش انھوں نے یہ کی کہ قرار دیا کہ چونکہ اس وقت سپریم کورٹ میں سات ہی جج صاحبان باقی تھے، اس لیے "جہاں تک ممکن ہو" میں اس کے علاوہ کوئی امکان باقی نہیں تھا کہ وہی سات جج صاحبان اس کی سماعت کریں! بہ الفاظِ دیگر، اگر کوئی اور جج ہوتے تو یہ ممکن ہوتا کہ اس بنچ میں ان کو شامل کیا جاتا۔ یہ محض مفروضہ ہی ہے اور محض مفروضے پر کیسے اتنی بڑی عمارت تعمیر کی جاسکتی ہے؟ میرے نزدیک پیرا ۲۶، جہاں جسٹس صاحب نے یہ عمارت تعمیر کرنے کی کوشش کی ہے، اس فیصلے کا کمزور ترین پیرا ہے۔

دلچسپ بات یہ ہے کہ یہ پریکٹس، کہ نظرِ ثانی میں وہی جج شامل ہوں جنھوں نے اصل مقدمے کی سماعت کی تھی، الا یہ کہ وہ ریٹائر ہو گئے ہوں یا کسی اور وجہ سے ان کی شمولیت ممکن نہ ہو، ۱۹۸۱ء کے رولز

کے بعد بھی مسلسل جاری رہی ہے۔ مثلاً ۱۹۹۹ء میں ربا کے بارے میں سپریم کورٹ کے پانچ رکنی شریعت اپیلیٹ بنچ نے اپیل کی سماعت کی (اگرچہ فیصلہ لکھتے وقت اس میں چار باقی رہ گئے تھے)۔ پھر جب ۲۰۰۲ء میں نظرِ ثانی کی سماعت ہوئی، تو اس وقت تک جسٹس وجیہ الدین احمد اور جسٹس خلیل الرحمان خاں کو پی سی او کے تحت حلف نہ اٹھانے کی بنا پر برطرف کیا گیا تھا، جبکہ مولانا تقی عثمانی صاحب کا کنٹریکٹ ختم ہو چکا تھا۔ چنانچہ بنچ کے صرف ایک رکن جسٹس منیر اے شیخ رہ گئے تھے۔ ان کے ساتھ چار دیگر ججز کو شامل کر کے پانچ رکنی بنچ تشکیل دیا گیا اور اس بنچ سے نظرِ ثانی کروائی گئی۔ اسی طرح پاناما کیس میں میاں نواز شریف کے خلاف ۲ جج صاحبان نے فیصلہ سنایا اور ۳ نے جے آئی ٹی کی تشکیل کا کہا۔ بعد میں جب نظرِ ثانی کا موقع آیا تو پانچ رکنی بنچ ہی تشکیل پایا اور اس میں اقلیتی ۲ جج بھی شامل تھے اور اکثریتی ۳ جج بھی۔ مزید اہم بات یہ ہے کہ پانچوں "وہی جج صاحبان" تھے جنھوں نے اصل کیس کی سماعت کی تھی، یعنی بات صرف تعداد پوری کرنے تک ہی محدود نہیں رہی تھی۔

اختلافی آواز کو خاموش کرنے کی کوشش؟

اس ساری بحث سے معلوم ہوا کہ اگر بھٹو نظرِ ثانی کیس کا فیصلہ سامنے نہ ہوتا، تو شاید جسٹس بندیال صاحب یہاں تک لکھ دیتے کہ نظرِ ثانی صرف اکثریتی فیصلہ لکھنے والے یا اس کی حمایت کرنے والے جج صاحبان ہی کریں گے لیکن چونکہ بھٹو کیس میں ایسا نہیں ہوا تھا، اس لیے انھوں نے مجبوراً یہ مان لیا کہ تعداد کے لحاظ سے بنچ اتنے ہی جج صاحبان پر مشتمل ہو جتنے جج صاحبان نے اصل کیس کی سماعت کی، خواہ بعد میں وہ فیصلے پر تقسیم ہو گئے ہوں۔ یاد کیجیے کہ وہ پہلے ہی قرار دے چکے ہیں کہ نظرِ ثانی سپریم کورٹ کے فیصلے پر ہوتی ہے اور "سپریم کورٹ کے فیصلے" کی حیثیت متفقہ یا اکثریتی فیصلے کو ہی حاصل ہے کیونکہ صرف وہی فیصلہ قابلِ تنفیذ ہوتا ہے۔ جسٹس بندیال کے فیصلے کا یہ حصہ بھی بہت کمزور ہے اور انھوں نے یہ تسلیم کیا ہے کہ اس پہلو پر الگ سے تفصیلی بحث ہونی چاہیے۔

ہم بھی اس پہلو کو سردست نظرانداز کر کے آگے ان باتوں کی طرف توجہ دلانا چاہتے ہیں جو انھوں نے اس کمزور بات کو بنیاد بنا کر کی ہیں۔ ان میں دو باتیں بہت اہم ہیں:

ایک یہ کہ اگرچہ بنچ کی تشکیل اور اس میں مخصوص جج صاحبان کی موجودگی کا فیصلہ چیف جسٹس کی مرضی پر منحصر ہے لیکن اس مرضی سے ایک استثنا موجود ہے؛ یعنی چیف جسٹس چاہیں یا نہ چاہیں، وہ جج صاحب تو اس بنچ میں ضرور ہوں گے جنھوں نے متفقہ یا اکثریتی فیصلہ لکھا۔ اگر وہ نہ ہوں، تو پھر ان ججز میں کوئی ضرور ہوں جنھوں نے اس متفقہ یا اکثریتی فیصلے سے اتفاق کیا۔

دوسری یہ کہ اگر چیف جسٹس اختلافی نوٹ لکھنے والے جج صاحبان کو بنچ میں شامل بھی کر لیں تو ان جج صاحبان کی ذمہ داری یہ ہو گی کہ وہ زیادہ سے زیادہ تحمل کا مظاہرہ کریں اور اکثریتی جج صاحبان پر اثرانداز نہ ہوں۔ اس ضمن میں انھوں نے جسٹس دوراب پٹیل کے فیصلے سے ایک حصہ نقل بھی کیا ہے۔ جسٹس پٹیل ان تین جج صاحبان میں تھے جنھوں نے بھٹو کی اپیل منظور کی تھی۔ (جسٹس بندیال کے فیصلے میں یہاں ایک دلچسپ کتابت کی غلطی بھی ہے کیونکہ یہاں قرار دیا گیا ہے کہ وہ اس تین رکنی اقلیت میں تھے جس نے بھٹو کی اپیل مسترد کی تھی!)

کیا اس طرح جسٹس بندیال نے جسٹس منصور علی شاہ، جسٹس مقبول باقر اور جسٹس یحیٰ آفریدی کو خاموش کرنے کی کوشش کی ہے؟ واضح رہے کہ یہ ایک ضمنی بات تھی اور اس پر مقدمے کے فریقوں کی جانب سے کوئی خاص گفتگو بھی نہیں کی گئی تھی (کم از کم ایسی کسی گفتگو یا دلائل کا حوالہ جسٹس بندیال نے نہیں دیا)۔ اس لیے اس نکتے کی حیثیت محض ایک passing remark یا obiter dictum کی ہے لیکن یہ بات دیکھنے کی ہے کہ اس obiter dictum کے لیے جسٹس بندیال نے تین صفحات مختص کیے!

جسٹس منظور اے ملک کا فیصلہ

بظاہر اس افسوسناک فیصلے میں ایک روشن پہلو یہ سامنے آیا ہے کہ جسٹس بندیال اس چھ رکنی بنچ کو، جس کی وہ سربراہی کر رہے تھے، اختلاف سے نہ روک سکے۔ چنانچہ بنچ کے ایک رکن جسٹس منظور اے ملک نے ان کے فیصلے کے صرف اس ایک نکتے سے ہی اتفاق کیا کہ نظرِ ثانی کے بنچ میں ججز کی تعداد اتنی ہی ہو گی جتنی اصل کیس کی سماعت میں تھی، خواہ فیصلہ متفقہ ہو یا اکثریتی۔ دیگر نکات پر وہ متفق نہیں ہو سکے۔ انھوں نے اپنا تفصیلی فیصلہ ۲۸ اپریل ۲۰۲۱ء کو جاری کیا۔ یاد رہے کہ اس سے دو دن قبل ۲۶ اپریل ۲۰۲۱ء کو نظرِ ثانی کا فیصلہ بھی سنایا گیا اور اس میں جسٹس منظور اے ملک اور جسٹس مظہر عالم میاں خیل نے اپنے سابقہ فیصلے سے رجوع کر کے جسٹس مقبول باقر، جسٹس سید منصور علی شاہ اور جسٹس یحیٰ آفریدی کے ساتھ اتفاق کیا۔ نیز اس دوران میں جسٹس فیصل عرب ریٹائر ہو گئے تھے اور ان کی جگہ نظرِ ثانی بنچ میں تعداد پوری کرنے کے لیے جسٹس امین الدین خان کو شامل کیا گیا۔ انھوں نے بھی ان پانچ ججز کے ساتھ اتفاق کیا۔ یوں سابقہ فیصلے کی حمایت میں صرف ۴ جج رہ گئے اور ۴ کے مقابلے میں ۶ کی اکثریت سے فیصلہ مسز درخواست گزاروں کے حق میں ہو گیا۔ اس فیصلے کے ۲ دن بعد جسٹس ملک نے نظرِ ثانی بنچ کے متعلق اپنا تفصیلی فیصلہ سنایا اور اس کے ۲ دن بعد ۳۰ اپریل کو وہ ریٹائر ہو گئے۔ ۱۰ صفحات پر مشتمل جسٹس منظور اے ملک کا یہ فیصلہ بہت اہم ہے اور

اگر یہ نظرِ ثانی کے فیصلے سے قبل جاری کیا جاتا تو شاید پہلے ہی سے واضح ہو چکا ہوتا کہ نظرِ ثانی کے فیصلے میں وہ کہاں کھڑے ہوں گے لیکن شاید انھوں نے سسپنس باقی رکھنا مناسب سمجھا۔

جسٹس ملک نے نظرِ ثانی کے متعلق قواعد کا جائزہ لینے کے بعد ایک تو یہ نتیجہ نکالا کہ اس بنچ میں صرف ججز کی تعداد کا پورا کرنا ہی ضروری نہیں بلکہ یہ بھی ضروری ہے کہ وہی ججز اس کی سماعت کریں جنھوں نے اصل فیصلہ سنایا تھا، الا یہ کہ ان کا سماعت میں شریک ہونا ممکن نہ رہے۔ انھوں نے جسٹس بندیال کی اس دلیل کو بھی مسترد کر دیا کہ بھٹو نظرِ ثانی کیس میں وہی جج اس لیے بیٹھ گئے تھے کہ سپریم کورٹ میں کوئی اور جج تھے ہی نہیں۔ اس کے خلاف انھوں نے نظرِ ثانی کے متعلق کئی نظائر پیش کیے جن سے اس بات کی غلطی واضح ہوتی ہے۔ اس سے زیادہ اہم ان کے اس فیصلے کا وہ حصہ ہے جس میں وہ اختلافی رائے رکھنے والے ججز کو تحمل سے کام لینے کو ججز کی آزادی اور ان کے اختیارات کو محدود کرنے اور انھیں متاثر کرنے کے مترادف قرار دیتے ہیں۔ جسٹس بندیال نے تحمل اور خاموشی کے لیے استدلال کرتے ہوئے بھٹو کیس سے جسٹس دوراب پٹیل کا اقتباس پیش کیا تھا۔ جواب میں جسٹس منظور ملک اسی فیصلے سے جسٹس دوراب پٹیل کی رائے نقل کر کے دکھاتے ہیں کہ جسٹس دوراب پٹیل اصل فیصلے میں اختلافی رائے رکھتے تھے اور پھر نظرِ ثانی میں بھی انھوں نے کیس پر باقاعدہ اپنی رائے دی ہے۔

میرے نزدیک جسٹس منظور ملک کے اس فیصلے کا آخری پیراگراف بہت اہم ہے۔ جسٹس بندیال نے اپنے فیصلے میں مسلسل اس بات کا اعادہ کیا تھا کہ بنچ کی تشکیل چیف جسٹس کا اختیار ہے کیونکہ وہ "ماسٹر آف روسٹر" کی حیثیت رکھتے ہیں۔ جسٹس منظور ملک نے اس پر تنقید کرتے ہوئے لکھا ہے کہ "ماسٹر آف روسٹر" کا یہ مطلب نہیں ہے کہ سب کچھ چیف جسٹس کی مرضی پر منحصر ہے۔ اس کے برعکس انھوں نے قرار دیا کہ اس مرضی کو اصول اور قواعد کے مطابق ہی استعمال کیا جا سکتا ہے۔

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