

**THE ROLE OF LIMITATION LAW TO
INHERITANCE CLAIMS AND OTHER
DISPUTES OF PERSONAL LAW: A
CRITICAL EVALUATION OF LIMITATION IN
SHARIAH AND PAKISTANI LEGAL SYSTEM**

RESEARCH PROPOSAL FOR PhD (LAW)

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THESIS STATEMENT

Application of Limitation laws in inheritance and disputes of personallaw in Pakistan are not in accordance with the injunctions of Islam.

INTRODUCTION

Overtime, the laws, whether revealed or man made, have evolved. The laws generally are classified into two broad categories i.e. substantive and procedural laws. Substantive laws set out rights and liabilities, while procedural or adjective laws are the body of laws by the application of which rights are declared and liabilities or duties are imposed.

The statutes of limitation are part of the Adjective law. Whether it is a claim based on criminal, civil, service or constitutional laws, the limitation laws set the first barrier to be crossed.

The theme of limitation laws is based on the legal maxim “*interest reipublic ut sit finis litium*” — in the interest of society as a whole, litigation must come to an end. Laches is a principle of equity, which is an unreasonable delay in asserting a claim resulting in dismissal of the action. In laches there is no time limitation, however, it is for the equity court to see which claim is made in a reasonable time and which is not. Statute of limitation on the other hand fixes a time period within which a certain claim has to be filed before the competent forum and not beyond that. So in essence, a limitation statute is based on the principle of laches, however, the element of certainty is an added value of a limitation statute compared to laches in equity. The essence of limitation law is to curtail

delay. It is the delay between the accrual of a cause of action to a plaintiff or applicant and the time he actually moves a Court for commencement of formal proceedings.

The defence of laches and statutory bar of limitation are recognized in almost all legal systems across the world. In the codified legal regimes, statutes of limitations and repose have been enacted prescribing time limitations for instituting different suits and petitions or setting cut-off dates as deadlines for certain rights. Stale and water-logged claims are not entertained by the Courts.

The Limitation Act, 1908 as adopted in Pakistan, does not confer any rights on the parties rather it regulates rights. Vigilant for their rights are favoured by this law, while indolent are penalized. In Pakistan, the suit of a plaintiff is disposed of in the shape of mandatory dismissal, when it is barred under the law of limitation (Section 3 of the Limitation Act, 1908). At times, such plaintiff has all the essential evidence to establish his claim, while defendant has nothing except defence of laches, nonetheless, plaintiff cannot seek relief

due to time limitation. In such a case, the defendant, an obvious, aggressor/wrong-doer, is favoured by the Courts for all practical reasons as he is not dispossessed from the

¹Section 3: Dismissal of suits, etc., instituted, etc., after period of limitation. "Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefore by the First Schedule shall be dismissed although limitation has not been set up as a defence.

Explanation----. As it is instituted, in ordinary cases, when the plaint is presented to the proper officer, in the case of a pauper, when his application for leave to sue as a pauper is made, and, in the case of a claim against a company, which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator."

disputed immovable property or no recovery of an unlawfully retained movable property is affected from him, which is apparently a clear injustice.

In a similar fashion, a plaintiff cannot seek restoration of his suit, which is dismissed in default for non-appearance, if his application is not filed within time. Likewise, a defendant in a civil suit is declined any favour if his petition seeking setting aside of ex-parte decree against him is not within time. Yet another example is that of a decree-holder, who is denied the right of execution of the Court decree in his favour if his petition is time-barred. In all these instances, parties are knocked out technically irrespective of the merit of their claim or defence.

As stated, the law of limitation does not confer a right; it only regulates the rights of the parties. Such a regulatory enactment is allowed to extinguish vested rights, curtail remedies, although all other conditions for extinguishment of rights and curtailment of remedies were fully complied with in letter and spirit. There is no scope in law of

limitation for any equitable or ethical construction. Even justice, equity and good conscience did not override the law of limitation. The object of law of limitation was to prevent stale demands and so it ought to be construed strictly.²

One of the recurring issues in our legal system is that sharers, especially women do not demand their due share from their brothers upon the death of their fathers as per

²PLD2016SupremeCourt872.

the cannons of the Islamic law of inheritance. Sisters usually demand their fixed shares very late and the brothers usually do everything possible never to give that share to them. The questions that are brought to the courts in Pakistan on daily basis are: what is the limitation period for such women or other sharers in a similar position to demand their shares as fixed under Shariah; whether such claim would be automatically defeated if a woman waived it first and subsequently demanded the same; whether the legal heir of a woman can claim the share of her mother as she had not demanded the same during her lifetime; whether the legal heirs of such a deceased woman can demand the share of their pre-deceased mother when the property is sold and re-sold by the brothers of such a woman and the rights of other persons are accrued therein; what is the position of Shariah regarding this issue; are judges bound to follow Shariah and whether they do follow the same; whether the superior Courts in Pakistan apply the Shariah to decide cases of

inheritance; which law of limitation is applied by judges in their day-to-day work to decide cases of inheritance in which the claim is brought to the Courts very late; why are judges reluctant to apply Shariah to the issue of limitation in inheritance and other issues of Muslim personal law despite the existence of statutory provisions; what is the limitation period under Shariah in other related issues of Muslim personal law that are enumerated in Section 2 of the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 (WPMPLA, 1962); and what is the limitation period under Islamic law when the execution of the decision is delayed in inheritance, adoption, maintenance and other issues of Muslim personal law as mentioned in Section 2 WPMPLA, 1962; what is the position of Islamic law regarding limitation, especially civil claims, hudud and other related crimes? In general, all schools of thought of Islamic Law agree that a right does not extinguish with the bar of limitation. The Maliki and Hanafi School of thought prescribe certain limitation periods for a claimant to file a suit, failing which it would be considered that he has waived his right if there was no impediment for him to file claim within that period. This work aims to explore the limitation period as provided by the Muslim jurists of various schools of thought. As per the Hanafi school a case will not be entertained when the limitation period is over because not filing a suit despite having potential opportunity means that the person is not interested.³ The Maliki school of thought generally prescribes 10 years as limitation period. It is however, an agreed opinion in these schools of thought that the right remains intact though a suit will not be entertained before a court. Majority of Muslim jurists including the Hanbali, Shafii and Zahir schools of thought are of the view that a claim for a right has to be entertained by courts, howsoever it may be old.⁴

The Civil Code of Ottoman Caliphate “*Majallat ul Ahkam al Adaliyyah*” (based on Hanafi Fiqh) has specific sections dealing with the limitation periods for filing a claim in the

³ Zain Uddin Bin Ibrahim Bin Muhammad aka Ibne Nujaim Al-Misri, *AL-Bahrur aiq Sharh Kanzuddqaiq*, (Darul Kitab Al-Islami, 2nd edn., n.d.), 7:228.

⁴ Khalid Mashal Al-Atibi, “*Isqat ul Haq Bittaquadum Bain al-Shariah wa Al-Qanun*”, Journal of Faculty of Islamic Studies, vol. 34, 12.

⁵ Al-Majallah Al-Ahkam al-Adaliyyah, Book XIV, Actions, Chapter III Limitation. Available at http://www.iiu.edu.my/deed/lawbase/al_majalle/al_majalleb14.html (9 of 12) [Last accessed 18 August

2020]

Courts⁶. However, the situation in Islamic Law is almost the same as no relief is granted to a plaintiff making a claim beyond the period of limitation and no remedy is available against the wrong of a defendant, against whom a claim cannot be enforced merely due to laches. It has been opined by the Muslim jurists that such a defendant is liable in the Court of Allah/ *Dianatan*, however, his wrong cannot be remedied judicially/ *Qada'an*. They further maintained that a Hakim/ ruler of the time may deal with such an issue administratively.

Undoubtedly, justice is the first virtue of social institutions and systems of law in the same manner as truth is of schools of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Injustice is denying a person what is due to him. Through the application of principle of laches, Courts

normally deny a right to a rightful person only due to his laxity in putting up his claim beyond stipulated time.

RESEARCH PROBLEM

Pakistan has a codified legal system with roots in the British legal system, and patches of Islamic law as a constitutional requirement. The Limitation Act as enforced in Pakistan,

⁶Md. Habib ur Rahman and Noor Muhammad Osmani, “An Appraisal of *Majallatal-Ahkamal-Adliyyah: A Legal Code of Islamic Civil Transactions by the Ottoman*”, International Journal of Academic Research In Business & Social Sciences, 8: 9, September 2018, 1381 – 1393.

⁷John Rawls, *A Theory of Justice*, (Belknap Press, 1999), 3.

like most other laws, is the legacy of British colonial regime. This law was enacted in 1908 by the Colonialist regime, which was subsequently adopted in Pakistan as the main statute of limitation laws through the Indian Independence Act, 1947⁸. It has been amended from time to time. These amendments are of very minor nature, except the one carried out in 1995⁹ as a result of the decision of the Shariat Appellate Bench of the august Supreme Court of Pakistan in a famous case titled “*Maqbool Ahmad Vs Government of Pakistan*”¹⁰. Through this landmark judgment, a five member bench of the Supreme Court Shariat Appellate Bench in an appeal against the decision of the Federal Shariat Court had unanimously declared Section 28¹¹ of the Limitation Act, 1908 as repugnant to the injunctions of Islam and set it aside w.e.f. 31st August, 1991¹². The provision of section 28 (now omitted) had the effect of extinguishment of ownership right of a person if his suit for possession was found to be time barred. The rationale for this decision was that

section 28 had the status of a substantive law in a purely procedural statute regarding limitation period. The Court had rightly declared that an adverse possessor shall not be

⁸Hamid Khan, *Constitutional And Political History of Pakistan* (Oxford University Press 2005), 45.

⁹Section 2 of Act No. II of 1995.

¹⁰1991 SCMR 2063.

¹¹Section 28. At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

¹²The Order of the Court reads:

“For reasons recorded in two separate judgments, the Court is unanimous in holding that section 28 of the Limitation Act, 1908 (Act No. IX of 1908) is repugnant to the injunctions of Islam in so far as it provides for extinguishment of the right in the property at the determination of the period prescribed for instituting a suit for possession of the said property. It is further held that this decision shall take effect from 31st of August, 1991 and on this date section 28 aforesaid shall also cease to have effect.”

conferred with ownership right only because the plaintiff had filed his suit for possession after the period so prescribed i.e. 12 years. It was held that the extinguishment of the title of the rightful owner will operate to give a good title to the wrongdoer, who could also subsequently get declaration of his title from a Court of law. The Court had nonetheless, concluded that though section 28 is against the injunctions of Islam, however, the right to sue would still be negated to a time barred suit. Thus, despite the omission of section 28 from the Limitation Act, 1908, section 3 of the Act still operates against time barred suits. This is where it is seriously felt that in a situation, where a rightful person is denied right to sue because of time limitation, the advantage is certainly advanced in favour of the wrongdoer. The Courts in a codified system of law has no solution for this situation. Dismissing a *lis* at the outset owing to bar of limitation in many cases leads to an absurd legal

situation, because the non-suited plaintiff maybe rightful but the defendant (likely wrongdoer) cannot be sued due to time limitation.

Section 2 of The West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 prescribes that Muslim Personal Law shall be the “rule of decision” in all questions related to succession, marriage, divorce, dower, etc.¹³ This Section is a non-obstante clause i.e. courts are bound to apply it to the law relating to succession, marriage, divorce

¹³ Section 2: Application of the Muslim Personal Law.— “Notwithstanding any custom or usage, in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions, including waqfs, trusts and trust properties, the rule of decision, subject to the provisions of any enactment for the time being in force, shall be the Muslim Personal Law (Shariat) in case where the parties are Muslims.”

etc. between Muslim litigating parties as per their personal law. Though the Enforcement of Shariah Act, 1991, was promulgated subsequently, which declared Shariah as the supreme law of the Country¹⁴, also provides that while deciding questions of law, principles of Islamic Jurisprudence are to be taken into account¹⁵, however, it can be seen from careful study of the case law jurisprudence of Pakistan that Muslim personal law in cases related to succession (inheritance) and family disputes is not applied, when a question involves application of limitation law. In majority of judgments the rule is that bar of limitation could not be given an effect so as to deprive party from its right of inheritance. There are some other cases, where sufficiently old claims are dismissed terming the conduct of original claimant as waiver or acquiescence, though there were no express waiver. It is a majority view of the Muslim jurists that inheritance is a compulsory

right and does not extinguish even on waiver, unless one is possessed of his right and he subsequently gifts it to others.

The Constitution of Pakistan recognizes for every citizen of Pakistan the protection of law and to be treated in accordance with law as an inalienable right. The framework of the Limitation Act, 1908 is based on section 3 and First Schedule, which provides for different time periods for seeking a particular legal remedy. Section 3 read with First Schedule is mostly operated at the initial stage of a legal proceedings. At times the Court

¹⁴Section 3 of the Enforcement of Shariah Act, 1991.

¹⁵Ibid., 4.

is left with no option but to deny the right to sue, when satisfied that the suit/ petition is hit by time limitation and no evidence is required to prove it. Such a dismissal is not based on merit and is termed as technical knockout. The defendant in such a situation enjoys the outcome because there is no verdict on his wrongdoing irrespective of the fact that in post-Maqbool Ahmad judgment's scenario, the right of the rightful person does not extinguish with such a dismissal. However, the non-suited plaintiff has got no legal remedy available to him to seek relief against the wrongdoing of defendant.

The issue under discussion is a clear case of injustice, observed almost in routine in the courts of law, but without any remedy available in the law. Defence of limitation law is mostly considered an "affirmative defence", but still it is so useful that a wrongdoer uses it as an effective shield to not only rescue himself of the fallout of his wrong doing but most interestingly to continue in his wrongdoing like illegal possession or default in due payment.

Prudence would demand that this issue needs to be provided with a proper remedy through legislation/amendment in the relevant law(s). Explaining delay (Section 5) and seeking its condonation is normally a cumbersome task in many cases as it is a

¹⁶ This is a **defense** in which the **defendant** introduces **evidence**, which, if found to be credible, will negate **criminalliability** or **civilliability**, even if it is proven that the defendant committed the alleged acts. https://www.law.cornell.edu/wex/affirmative_defense (last accessed 15 Sep, 2021)

consistent view of the Superior Courts of Pakistan that a delay of each day has to be satisfactorily explained¹⁷.

SIGNIFICANCE OF THE STUDY

The focus of this research is limited to claims of inheritance and family disputes only. This research has great significance as there is obvious non-application of the Muslim Personal Law of the subjects litigating before Courts in Pakistan. The legal vacuum has never remained a point for consideration in any legal literature, judgments of the superior courts

or in any of the legal reforms commissions' reports¹⁸. This dimension of the limitation law has to be discussed vis-à-vis the judgments of the superior courts of Pakistan in family disputes and claims of inheritance. The Limitation Act, 1908 and its application to the two areas under discussion needs to be critically evaluated in view of the Islamic Jurisprudence. In the Maqbool Ahmad case, the Supreme Court had discussed that in a time barred *lis*, the rightful person's proprietary right is not extinguished, however his right to sue ceases. The Court also opined that such a person can seek his remedy out of the Court. It has been observed in many criminal cases that the offender is pushed to take the law in his hands, when he fails to get any substantial relief from the

¹⁷ In a recent case, the august Supreme Court of Pakistan refused leave to appeal citing the appeal barred by three days delay and its explanation as unsatisfactory. PLD 2021 SC 937

¹⁸ S.A Rahman Law Reform Commission Report 1958, Justice Hamood ur Rahman Law Reform Commission Report 1967-70, High Powered Law Reform Committee Report 1974, Law Committee for Recommending Measures for Speedy Disposal of Civil Litigation 1978, Committee on Islamisation of Laws and Establishment of Qazi Courts 1980, Commission on Reform of Civil Law 1993, Law Reform Commission Report 1997.

Civil Courts. In a research study, conducted by the Khyber Pakhtunkhwa Judicial Academy, Peshawar, the major trend found was that the accused could not get remedy for their grievance from Civil Courts and in frustration committed offences¹⁹. The situation in this scenario under discussion is no different and a rightful person not getting his remedy from Court of law due to laches would opt for other options including use of force and violence.

Moreover, this research work also carries lot of significance for the reason that the Pakistan's limitation law since its original enactment have very rarely been amended or reformed. Law is not constant. It needs to be changed/ reformed with change of circumstances. The legal void likely resulting from the application of this law needs to be filled and wrongdoers should not be benefitted from its application against a rightful person. From the perspective of Shariah as well the likely injury accruing from the application of a valid law has to be undone.²⁰

Judges in a codified legal system are bound by the principle of '*casus omissus*'²¹ and the situation created by the harsh application of Section 3 results in a helpless situation both

¹⁹ Khurshid Iqbal, *Civil Cases Culminating into Criminal Cases: A baseline study of Criminal Cases in Malakand Division* (Judicial Academy, Peshawar 2013-14). Available on www.kpja.edu.pk [last accessed 12 Sep, 2022]

²⁰ Islamic Legal Maxim, *يزال الضرر* i.e., injury is to be undone.

²¹ The principle provides that, "where the legislature has not provided something in the language of the law, the Court cannot travel beyond its jurisdiction and read something into the law as the same would be ultra vires the powers available to the Court under the Constitution and would constitute an order without jurisdiction." 2022 SCMR 566.

for the litigant and the Court. In the words of Ronald Dworkin, the injury is gravest when an innocent person is convicted of a crime, but it is substantial enough, when a plaintiff with a sound claim is turned away from Court, or a defendant leaves with an undeserved stigma²². So, this research will try to propose an alternative model for limitation laws in inheritance and family cases so that the limitation law is applied and the likely absurdity is avoided.

It is also intended in this study to explore those criminal cases, where motive was some civil dispute where the accused could not get his remedy mainly due to application of Limitation Law. So, this research will also serve as a good data base for establishing a strong case for reform in this important procedural law.

LITERATURE REVIEW

The topic of this research is novel in the Pakistani jurisdiction as no specific writeup is found available. The reports of all the law reform commissions, constituted in Pakistan have been thoroughly studied. There is no recommendation on this issue at least. A lot of work is found on the limitation laws, the principle of laches, legal and equitable remedies and reform recommendations. Few of that are mentioned hereinafter which is most relevant to the topic along with brief review.

²²Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986), 2.

Major work on limitation laws can be found in the case law jurisprudence of Pakistan's Superior Courts. The most relevant case law to the topic under discussion is the above discussed judgment in "*Maqbool Ahmad Vs Government of Pakistan*"²³. The five member larger

bench of Shariat Appellate Bench of the Supreme Court of Pakistan in this judgment in Urdu language has thoroughly discussed Section 28 and Article 144 (First Schedule) of the Limitation Act, 1908 by concluding that these are repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Prophet (PBUH). It has been ruled that under the Islamic Law lapsing of a certain time could not confer ownership right on a land possessor, when its actual owner could not file a suit within 12 years period of his dispossession. On the issue of limitation laws and its scope, there are good references from the work of classic Muslim jurists belonging to different schools of thoughts. It was concluded that a plaintiff having a time barred claim would be denied remedy through Court but his right of ownership would remain intact. This judgment serves a good base for the proposed topic of this study as the theme is same that a person denied of legal remedy due to laches should not be deprived of his legal right. What should be a proper remedy for such an indolent rightful person, the judgment does not suggest a proper solution and thus the problem remains unresolved.

²³1991SCMR 2063.

In the case titled “*Dr. Mahmoodur Rahman Faisal v Government of Pakistan and others*”²⁴, the petitioner had challenged Section 3 of the Limitation Act, 1908 to be repugnant to the injunctions of Islam. The judgment rendered by the Federal Shariat Court though concluded that Section 3 of the Act could not be established to be repugnant to the injunctions of Islam, as it does not result in extinguishing of rights, however, the main reason for dismissing the petition was in fact ‘want of jurisdiction’²⁵. The law of limitation, generally speaking, falls within the domain of procedural law and has been kept outside the pale of jurisdiction of Federal Shariat Court as provided under Article 203 B(c) of the Constitution, therefore the Court was not competent to examine the said provision of the procedural law. So the aspect of harsh implementation of Section 3 of the Act and its consequences was not at all discussed in this judgment.

It has been consistently held by the Superior Courts in Pakistan that law of limitation would not be given an effect to defeat the right to inheritance. In this connection, the Supreme Court of Pakistan in case titled “*Ghulam Ali & 2 others Versus Mst. Ghulam Sarwar Naqvi*”²⁶ dismissed a petition of the petitioners when they tried to take the plea of adverse possession and sought dismissal of the respondent’s suit seeking her right of inheritance in the legacy of her predecessor-in-interest. Generally the principle of adverse

²⁴1992MLD2321[Federal Shariat Court].

²⁵Lack of judicial power to hear a case on a particular subject.

²⁶PLD1990SupremeCourt 1.

possession was being applied in the light of the then Section 28 of the Limitation Act, 1908, when such plea was raised by a defendant and the Court would non-suit a plaintiff under Section 3 of the Limitation Act, 1908 being time barred. In this case, the Supreme Court ruled that a brother cannot claim adverse possession against his sister in a dispute of inheritance. Later on, through judgment in the famous Maqbool Ahmad's case, the Supreme Court declared adverse possession un-Islamic and Section 28 of the Limitation Act, 1908 was struck down as a result of this decision.

The Supreme Court of Pakistan in a case titled "*Mst. Gohar Khanum v Mst. Jamila Jan*"²⁷ dismissed the appeal and ruled in favour of respondents. In this case, a woman/sister had challenged the inheritance mutations entered in favour of her brother some fifty years ago. The Supreme Court ruled that through inheritance brother became owner of 2/3rd of the property, while sister became owner of the remaining 1/3rd property. The sister came to own 1/3rd of the property by operation of law and not by any mutation. Mutation was meant to record legal entitlement of brother and sister, and if the mutation was erroneously made in favour of the brother (only), such mutation would not create title in favour of the brother in accordance with Sharia law of inheritance. Suit filed by sister was not time barred in circumstances.

²⁷2014SCMR 801.

In many cases though, the Supreme Court has ruled that it is a wrong view of the Courts that Limitation Law becomes irrelevant when a *lis* is based on inheritance claim as there are certain exceptions. These exceptions include waiver and acquiescence. In the case titled “*Mst. Grana through Legal Heirs and others Versus Sahib Kamala Bibi and others*”²⁸, the Supreme Court has ruled that “*It appears that in a suit which involves some element of inheritance the Courts are generally quick to declare that the law of limitation would not be attracted. It is not in all cases of inheritance that the question of limitation becomes irrelevant. Even in Ghulam Ali's case the Court recognized that there could be exceptional circumstances wherein a suit based on inheritance issue of limitation may become relevant*”. The same view has been upheld in a recent judgment of the Supreme Court in case titled “*Syed Kausar Ali Shah v Syed Farhat Hussain Shah*”²⁹. In this case the plaintiff had challenged inheritance mutations under S.4 of the Muslim Family Laws Ordinance, 1961 after lapse of 45 years, when the cause of action originally accrued. The disputed property was alienated multiple times and third party rights were recreated without any challenge. The Supreme Court set aside three concurrent judgments in favour of the respondent/ plaintiff and dismissed her suit stating that conduct of the plaintiff challenging long standing entries in the record amounted to acquiescence.

²⁸PLD2014SupremeCourt167.

²⁹2022SCMR 1558

In a case titled, “*Ghulam Qasim and others v Mst. Razia Begum and others*”³⁰, the Supreme Court ruled that a cause of action in a dispute of inheritance will only accrue, when a legal heir is denied his share in the legacy of his predecessor in interest. The Court then went on to rule further that limitation in such a dispute would become relevant, when the conduct of a claimant “demonstrates” acquiescence especially where a third party interest has been created. The case was decided in favor of the respondents with the direction that their share shall be determined as per their personal law.

One ruling in a criminal case by the Lahore High Court is interesting for discussion here.

In a case titled “*State through Prosecutor General Punjab v Muhammad Esa*”³¹, the Court ruled that Law of limitation is not merely a reflection of public policy, rather it creates and extinguishes rights of parties with the efflux of time. This view may not be in consonance with what the bulk of the consistent rulings of the higher courts, however, as discussed above it is the practical outcome of some cases, which is the focus of this research.

Regarding the limitation period for recovery of dower and maintenance amount, the superior courts of Pakistan have no consistent view. Article 103 of the Limitation Act,

1908 provides three years limitation period for recovery of prompt dower when it is demanded by wife or refused by husband and if not demanded then upon divorce or death

³⁰PLD2021SupremeCourt812.

³¹2020PCr.LJ1084[Lahore(RawalpindiBench)]

of husband it has been paid. Similarly, Article 104 provides three years limitation period for recovery of deferred dower, when a marriage is dissolved on divorce or death. In case titled, “*Muhammad Saeed v Additional District Judge*”³², Lahore High Court has ruled that in case of deferred dower, if a period is specified in the Nikahnama, then the three years period will start running from it, otherwise it has to be paid on divorce or death of husband. The Balochistan High Court in case titled “*Muhammad Ali Khan Paracha Versus Mst. Binish and two others*”³³, while interpreting Article 103, allowed a petition after six years of dissolution of marriage on divorce, ruling that the limitation period of three years would start running after refusal of husband and not from the date of divorce.

The statute of limitation under Article 181 provides that where no limitation period is provided for a petition, then three years period is prescribed when the right to apply accrues. Normally limitation for execution petition are dealt with under Article 181 of the Limitation Act. In case titled “*Syed Muhammad Versus Mst. Zeenat and others*”³⁴, the Supreme Court has ruled that no specific period for seeking execution of a decree for recovery of dower can be fixed. The court thus ruled within time an execution petition for implementation of Family Court decree after lapse of about 17 years.

³²2019CLC1008 [Lahore]

³³2016MLD258[Balochistan]

³⁴PLD2001SupremeCourt 128

In a quite recent judgment on adoption of child, the Islamabad High Court in case titled *“Malik Muhammad Rafiq v Public at large”*³⁵, the Court after detailed discussion on the adoption of child from the Islamic perspective, also discussed the question of limitation in light of Article 119 of the Limitation Act, 1908. The view of the Court is that the limitation period of six years would start counted from the time the adoption is interfered with and not necessarily from the time of the actual adoption.

For recovery of maintenance, the Courts have a consistent view that unpaid maintenance could be recovered for past six years only. This view has been based on the reasoning that since the statute does not provide any limitation period therefore, Article 120 of the Limitation Act comes into play, which provides that where no limitation period is provided for a suit, it has to be filed within six years, when cause accrues. These rulings on maintenance and dower, however, do not take into account the Muslim Personal Law of the litigating subjects.

The Arabic article of Khalid Mash'al Al-Atibi, *Isqat ul Haq Bittaqadum Bain al-Qanun Wa Al-Shariah*³⁶ is helpful to understand the concept of limitation, especially from the Islamic perspective. He has elaborated different classifications of rights, its enforcements through litigation and the effect of limitation periods. The article also discusses the approaches of major schools of thought of Islamic law regarding the application of

³⁵ Unreported judgment in R.F.A No. 620 of 2022.

³⁶ Khalid Mash'al Al-Atibi, "*Isqatal-Haqbial-Taqadumbainal-Shariahwaal-Qanun*", *Mujallah Kuliyyath Al-Dirasat Al-Islamiyah*, 34 (2017), 3285-3302.

limitation bars in different claims. The author has concluded that the unanimous view of all jurists of Islam is that the bar of limitation does not extinguish a vested right rather bars the remedy for its enforcement.

To take guidance from the reform initiatives of other countries, some relevant literature has been studied for this topic. From foreign jurisdiction, the report of the Law Reform Commission of Ireland is one great contribution in this area³⁷. The report analyses existing limitations enactments in Ireland, with a brief discussion on the historical origins of limitations laws in the State and the scope of the Statute of Limitations 1957. It also outlines the current issues relating to the legislation. It then outlines the guiding principles for analysing this topic, and which are necessary to be considered in proposing reforms to future limitations legislations. These guiding principles are reflective of the fact that the Commission, while outlining it, was mindful that a limitations system must take account

of the competing rights and interests of the parties, as well as the public interest, in light of the Constitution of Ireland and as set out in the European Convention on Human Rights. The intention behind balancing these interests is to ensure fairness to both the plaintiff and the defendant, as much as possible. The report also includes a general comparative analysis of the limitation systems of other jurisdictions. Based on it, the Commission has recommended for enactment of a core limitation law for regulation of

³⁷ Law Reform Commission Report, *Limitation of Actions*, 2011, available at www.lawreform.ie, (last accessed 28 July, 2020).

most common claims including contractual claims, besides personal injuries actions. The report also explains procedures which are adopted when a defendant takes defence of laches claiming that the case is time barred. It also discusses the effect of a successful defence in a statute barred case and as to how limitation period is calculated in different cases. The Commission lays down the blueprint of the proposed core limitation regime, to provide for a uniform basic limitation period. The Commission then provides a summary of the key features of the basic limitation period, the advantages it lends to a limitations system, its length and the commencement date. These features are examined in detail, including a comparative analysis of how such a uniform basic limitation period has been viewed and implemented in other jurisdictions. The Commission recommends that a uniform basic limitation period of 2 years commencing from the date of

discoverability should be introduced. This would have the effect that the plaintiff would have 2 years from the date he or she discovered the cause of action to initiate proceedings.

The Commission then discusses in detail the key elements of the proposed discoverability test, namely, what constitutes discovery and knowledge.

The Commission in its report considers the ultimate limitation period or “long-stop” in the Ireland limitation laws. An ultimate limitation period is the period beyond which no suit or action can be brought. It also discusses the history and function of the ultimate limitation period. It then gives recommendation for fixing long-stop in certain cases like personal injuries actions.

The exceptional circumstances and application of limitation laws are discussed in the report. These are the circumstances, where the plaintiff’s inability to file action within the long-stop or ultimate limitation period is obvious maybe due to his inability to discover the wrong or may be due to incompetence because of minority age. In the Pakistan’s Limitation Act, such cases are covered under section 5. The Commission then suggests that such instances should be covered in the limitation laws by extension in time or disapplication of the limitation laws subject to a certain and clearly defined statutory criteria. The last part of the report provides summary of the Commission’s recommendations. This exhaustive report will be very helpful in analysing the Pakistan’s Limitation Law regime and bringing material reform therein.

Another phenomenal work on the limitation law jurisprudence is the work of G E Dal Pont’s “Law of Limitation³⁸”. This voluminous work discusses the roots of limitation laws and is focused on the Australian trajectory. In the first part of this book, the author

has tried to explore how the English law has influenced the law of limitation in Australia. For this, the historical developments have been catalogued and explanations/ rationales have been provided for stipulation of limitation periods for different causes. Followed by this backdrop, the book provides discussion on the nature of the traditionally procedural nature of the statutory time bars. It explains how a right remains intact but remedy for the same cannot be availed due to time constraint. Scope of the limitations enactments are

³⁸Gino Evan Dal Pont, *Law of Limitation*, Lexis Nexis Butterworths, (2016).

also discussed in the book with prescription of parameters regarding the application of relevant time bars. The core concepts governing the law of limitation are discussed for instance what is cause of action and when does it accrue. The third Part of the book outlines those instances, where despite accrual of a particular cause of action, the law of limitation is suspended and its application is deferred. The Courts powers regarding pardoning delay in particular cases and extension in the limitation periods are also discussed. The last part of the book (Part V) provides an overview of the various law reform recommendations in Australia and in other common law jurisdiction and identifies and evaluates prime objectives for the reform of limitation law. This book will also prove helpful to take benefit of the reform initiatives in the limitation law of Australia and analyze the Pakistan's limitation law for the same purpose.

Another important area in this research is whether an agreement to reduce limitation period. At times contracting parties make a stipulation regarding the time for filing of claims before

the Court in the event of breach of terms of the contract by either party. In his article “*Is Limitation Act Subject to Contract?*”³⁹, the author Tarun Jain has discussed this phenomenon. In the commercial world, companies tend to stipulate shorter limitation periods than what the statutes actually provide for the sake of their own convenience discrediting their clients. These contracts include insurance, bank loans and share

³⁹Tarun Jain, “*Is Limitation Act Subject to Contract?*”, *All India Reporter* (2005), 377-384, available online at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1195622> (last accessed 25 July, 2022).

certificates. The author has concluded that legally parties to a contract cannot change the express provision of law, so any stipulation of a shorter limitation period than the statutory limitation period shall be void ab-initio⁴⁰. Notwithstanding anything contained in any agreement between the contracting parties vis-à-vis time for filing of suits, the limitation period shall be calculated in accordance with the Limitation Act. However, the legal position as in vogue is not so. Such contracts specifically stipulate that if a party failed to sue within the stipulated short time, his right accruing thereafter would be forfeited or extinguished. This situation is explained with reasoning that since the very terms of the contract as agreed between the parties put that any right accruing after the stipulated time shall cease to exist, therefore, there shall be no remedy for a right which is non-existent. The reasoning is based on differentiation between shortening of limitation time and extinction of right or to say wilful waiver of a right by a party. This reasoning is actually a

pro-business construction of the express provision of Section 28 of the Contract Act, 1872 and a case of accepting limited liability on the part of a business entity.

There is no room for such a construction keeping in view the intent and clear wording of the *ibid* provision. To tackle this ugly situation, on the recommendation of the Law Commission, India amended Section 28 of the Contract Act to the effect of declaring void any contractual term resulting in extinction of a right if remedy is not sought within the stipulated short time.

⁴⁰Section 28 of the Contract Act, 1872.

OBJECTIVES OF RESEARCH

This study aims to explore and highlight the cardinal issue of limitation with the focus on its application in inheritance claims and other family law cases in Pakistan; It investigates whether Courts in Pakistan which are bound to apply statutory laws in deciding inheritance cases where someone's share is claimed by that person after a very long period of time as well as when it is claimed by the legal heir of the sharer after his/her death. It investigates the formulations of Muslim jurists regarding limitation in general and inheritance claims in particular. It delves into a critical evaluation of many judgments of the superior judiciary whether such judgements have applied the rule of shariat as per the Statutory provisions of WPMPLA, 1962. It critically evaluates the often-conflicting

findings of the decisions of the superior Courts in Pakistan that invoke limitation in some cases but do not apply the same in other cases. It aims to analyse whether the outcomes of the main cases decided by the august Supreme Court would have been different had it applied the cardinal principles of limitations in Shariah, especially in inheritance, adoption, dower, and maintenance cases. This research aims to come up with recommendations for reforming the existing limitation law of Pakistan in view of the Islamic jurisprudence and will attempt to present a new model of limitation statute by a more meaningful application of the principle of laches, so that an indolent is certainly penalized but not to deprive him of his due. It aims to recommend certain remedies for allowing an apparently time-barred case.

RESEARCH QUESTIONS

- i. What is the concept of laches and limitation in Islamic law, common law, and equity?
- ii. What is the historical background, purposes and significance of limitation in Islamic Law?
- iii. Whether the concept of statutory bar of limitation is compatible with the principles of Islamic jurisprudence, especially in Inheritance claims and family disputes?
- iv. Whether Courts in Pakistan apply the Statutory Provisions of Islamic Law

regarding Inheritance and other family disputes and whether the formulations of Muslim Jurists are resorted to in deciding such disputes?

v. Whether the shares of legal heirs whether males or females devolve automatically upon them on the death of the prepositus as per the rulings of the superior Courts as well as Shariah?

vi. Is and should an affirmative defence be an absolute defence by a wrongful defendant leaving no legal remedy for an indolent claimant?

vii. Does the Limitation Act, 1908 (as it exists now), an enactment based on public policy, advance the cause of justice or is there scope and need for its reforms?

viii. What claims have been excluded from the application of limitation laws and why?

RESEARCH METHODOLOGY

The concept of laches and limitation laws is based on the theory of vigilant exercise of one's right to making a formal claim. Doctrinal legal research methodology, which is also referred to as black letter methodology, focuses on the letter of the law rather than the law in action. Using this method, it is intended to give a descriptive and detailed analysis of Pakistan's Limitation Act, 1908 and other legal rules on the subject found in primary sources like case law, statutes, and regulations vis-à-vis the Muslim Personal Law contained in the treatises of different schools of thought of Islamic Law. The purpose is to see whether the prime objective of this statute is achieved or its blind application in

disregard to the injunctions of Islam, particularly of the Section 3 of the Limitation Act, 1908 results in injustice.

It is also intended to do quantitative research by collecting data of those cases, where an obvious claim was denied by the Courts by outright application of the limitation laws and affirmative defence, resulting in an obvious favour to a wrong doer.

TENTATIVE OUTLINE

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Historical Evolution of the Principle of Laches in Common Law

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Ultimate Time Bars: A new Schedule

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CONCLUSION AND RECOMMENDATIONS

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