

RELATIONSHIP OF EMPLOYER AND EMPLOYEE IN PAKISTANI INDUSTRIAL LAWS: A SHARĪ'AH APPRAISAL

**A DISSERTATION SUBMITTED TO THE DEPARTMENT OF SHARĪ'AH, INTERNATIONAL
ISLAMIC UNIVERSITY ISLAMABAD IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE AWARD OF DEGREE OF PH.D. IN ISLAMIC LAW AND
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2020



STATEMENT OF DECLARATION

I, Muhammad Umar Khan, do hereby declare and affirm that my Ph.D. (Islamic Law and Jurisprudence) thesis titled “Relationship of Employer and Employee in Pakistani Industrial Laws; A *Sharī’ah* Appraisal” is an original research work based on authentic sources on the subject that has never been presented in any other institution inside or outside Pakistan. I, moreover declare that any secondary information used in the thesis has been duly acknowledged. The thesis has been undertaken by me under the supervision of Dr. Muhammad Akbar Khan, Assistant Professor (Law), Faculty of *Sharī’ah* and Law, International Islamic University, Islamabad.

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DEDICATION

This Ph.D. thesis is dedicated to:

My Parents for their prayers and unconditional support,

My Teachers for motivation and guidance,

My Siblings for care,

&

Wife

ACRONYMS

ADR	Alternative Dispute Resolution
AS	<i>Alaih-is-Salām</i>
BHC	Baluchistan High Court
BIRA	Baluchistan Industrial Relations Act, 2010
CBA	Collective Bargaining Agent
CBU	Collective Bargaining Unit
CLL	Concurrent Legislative List
EER	Employer-Employee Relationship
FSC	Federal Shari'at Court
HCS	High Courts
ICEO	Industrial and Commercial Employment (Standing Orders) Ordinance, 1968
ICT	Islamabad Capital Territory

IHC	Islamabad High Court
ILO	International Labour Organization
IRA	Industrial Relations Act, 2012 (Federal legislation)
IRAs	Industrial Relations Acts (Provincial enactments)
IRO	Industrial Relations Ordinance
IRs	Industrial Relations
JMB	Joint Management Board
KIRA	Khyber Pakhtunkhwa Industrial Relations Act, 2010
LAT	Labour Appellate Tribunal
LHC	Lahore High Court
MW	Minimum Wages
NIRC	National Industrial Relations Commission
PHC	Peshawar High Court
PIAC	Pakistan International Airlines Corporation

PSPC	Pakistan Security Printing Corporation
PIRA	Punjab Industrial Relations Act, 2010
PPC	Pakistan Penal Code
SAW	<i>SallaAllaho Alaihi Wasallam</i>
SCoP	Supreme Court of Pakistan
SHC	Sindh High Court
SIRA	Sindh Industrial Relations Act, 2013
SWA	<i>Subh'ana-ho-Wata'al'a</i>
TU	Trade Union
ULPs	Unfair Labour Practices
WC	Works Council

ACKNOWLEDGEMENT

The purpose of this thesis besides the fulfillment of partial requirement for the degree of Ph.D. (Islamic Law & Jurisprudence) from International Islamic University, Islamabad is to make an effort to explore the existing industrial regime of Pakistani employer-employee relationship (EER) and examine it in the light of sources of Pakistan's industrial jurisprudence. *Sharī'ah* appraisal of the same has been undertaken on the basis of primary and secondary jurisprudential sources of Islamic law. Consequently, some humble suggestions have been offered in order to bring the existing EER laws in conformity with the injunctions of *Sharī'ah*.

I hope that this effort will not just extend a helping hand to researchers in the field but it may assist the students of *Sharī'ah* and law to explore and analyze other labour related laws and offer *Sharī'ah* appraisal accordingly.

I am extremely indebted to my teacher and supervisor Dr. Muhammad Akbar Khan for his motivation and guidance in writing this thesis. I highly appreciate his acumen and intellect in this regard. I owe my gratitude to Dr. Muhammad Mushtaq Ahmad for his guidance in preparing thesis proposal. Last but not the least I am grateful to Mr. Asfandyar, Irshad-Ur-Rahman as well as my family members who have extended me full support to complete this thesis within reasonable time period.

Muhammad Umar Khan

ABSTRACT

The employer-employee relationship (EER) regime in Pakistan is historically deemed to have been derived from the British colonial legal spirit, though currently its foundation relies on the Constitution of Pakistan 1973, the ILO's core Conventions and courts' judgments. Initially, the subject of 'labour' was a part of the Concurrent Legislative List (CLL) which has gone through various reformative phases. The last development took place when it was devolved to the provinces by virtue of the 18th Constitutional Amendment in 2010. Basically there were two principal laws to govern EER at industries in Pakistan; the Industrial and Commercial Employment (Standing Orders) Ordinance, 1968 and the Industrial Relations Ordinance, 1969. These Acts have been repealed and amended before and after the devolution by the federal and the provincial governments. This devolution led to various issues including applicability of these laws to the trans-provincial industrial establishments. Likewise, the current EER regime is alleged to be 'ineffective' that bears no fruits due to multiple reasons, inter alia, lack of government's interest in labour affairs, excess of labour force in the country, ineffective implementation mechanism, lack of workers awareness, defective inspection system, socio-economic conditions of the society, labour law as a separate branch of law, the avoidance of clear stance regarding the subject of 'labour' after devolution. Most importantly the EER laws have not been given due consideration to Islamic law which is a constitutional requirement that all laws shall be in accordance with the principles enunciated in the Qur'ān and the Sunnah. Hence, there was an immense need to critically evaluate these laws in light of the Constitution, the ILO's Conventions and rules along with standards laid down by Islamic law. The research is primarily based on doctrinal research methodology utilizing descriptive, analytical, critical, and comparative methods. The research is concluded with the finding that there are numerous provisions in the current EER laws have lacunas particularly those related to the definitions of various terms such as 'worker' and 'wages' along with the scope of these laws. It is pertinent to mention that issues such as absence of fixation criterion of minimum wages, implementation mechanism and imposition of fines on culprits have also not been considered as far as their importance is concerned. Likewise, the current EER excluded certain classes of workers to be protected under the laws. Moreover, some of the provisions of labour laws have been challenged before the FSC for the reason that they were deemed repugnant to the injunctions of Shari'ah. The thesis is also concluded with the recommendations that there are certain grey areas to be improved in respect of the current regime, inter alia, the Iddat (waiting period) leaves, separate work place for both genders, observing hijab for Muslim women or decent dress code in work place, breast feeding intervals, parental leaves for workers who have old parents, allocating a prayer place for offering prayers during working hours and extension of the right to writ petition for employees.

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CHAPTER ONE

INTRODUCTION TO THE RESEARCH

1.1.INTRODUCTION

Sharī'ah as well as Pakistani law agree that it is the employment contract that gives existence to the contractual relationship between employer and employee, the absence of which, gives no legal protection in the event of differences between the parties. In *Sharī'ah*, an employee is hired under *Ijārah Al-Ashkhās* (employment contract) for rendering certain services in individual capacity.¹

The literature review has found that Pakistan's employer-employee relationship (EER) regime had historically been inherited from the colonial period of British Era. As per Islamic law's stance, it was found that EER has normally been discussed in *Fiqh* (Islam Jurisprudence) books under the topic of *Ijārah*, though, there had been seen no precedent that indicates that there ever existed a separate codified law as 'Employer-employee Relationship law' except in the Ottoman Empire where a considerable room was given to the subject.

¹ Al-Samarqandī Abu Bakkar Alāuddīn (d.540 A.H), *Tuhfa'tul Fuqahā*, Dār-ul-Kutub Al-Ilmiyyah, Beirut, Lebanon, Ed. 2, vol. 2, 352.

1.2. AN OVERVIEW OF EMPLOYER-EMPLOYEE RELATIONSHIP (EER) PAKISTANI LEGISLATION

The EER legislation in Pakistan was initially inherited with the spirit of pre-independence Colonial period's British rule which has gone through various reformative stages. It is presumed that approach of industrial relations in that era was narrowly drawn as it was meant to preserve the British Masters' narratives than employees' interest. The current EER legislation in the country is primarily based on the constitutional² provisions including Islamic provisions that protect Islamic spirit of the laws. Pakistan, constitutionally is committed to Islamize the existing laws and not to enact any new law that is in contradiction with the injunctions of *Shari'ah*.³ To achieve the said purpose, there had been established the Council of Islamic Ideology⁴ and Federal Shari'at Court (FSC)⁵ to assist in the Islamization process.

EER in Pakistan has been regulated under two principal laws; the Industrial employment Standing Orders Ordinance, 1968 along with the Industrial relations Ordinance, 1969. The former law provides guidelines for industrial employment and the later regulates EER. Likewise, the Constitution of Pakistan, 1973 and the International Labour Organization (ILO) Conventions

² The Constitution provides protection scheme to the working class under articles: 11, 17, 18, 25, 37 (c, d, e).

³ Art. 227 (1), the Constitution of Islamic Republic of Pakistan, 1973.

⁴ Ibid, Arts. 228 (1) and 230.

⁵ The FSC was established under Art. 203-C of the Constitution of the Islamic Republic of Pakistan, 1973.

play important role in drafting laws on both Federal and Provincial levels.

‘Labour’ as a legislative subject, was a part of the Concurrent Legislative List (CLL) until it was devolved to the Provinces by virtue of the 18th Constitutional Amendment in 2010. The labour-related constitutional provisions and the ILO’s Conventions have not been duly considered while the statutes were enacted. The (federal and the provincial) governments’ lack of interest has resulted in ineffectiveness of the EER laws.

As per the provisions of the current industrial employment laws, EER has been established by the conclusion of contract of employment where terms and conditions of the contract play a significant role in the mutuality of obligations.⁶ This relationship leads towards the mutual adjustment of interests and goals in the industrial environment.⁷ The primary laws that deal with the terms and conditions of employment contract and other related matters, put an obligation on the employer to let the worker know and understand stipulations of the written contract.⁸

According to provisions of law, terms of the contract may be modified by

⁶ N. Countouris, Uses and Misuses of Mutuality of Obligations and the Autonomy of Labour Law, LRI, UCL Labour Rights Institute On-Line Working Papers – LRI WP1/2014.

⁷ S C Srivastava, ” Industrial Relations and Labour Laws”, Ed. 5th, VICAS publishing House (Private) Ltd, 3.

⁸ Sec.2 (a), The Khyber Pakhtunkhwa Industrial and Commercial Employment (Standing Orders) Act, 2012.

collective agreement.⁹ In case the law has been violated, penalty provisions redress the aggrieved party.¹⁰ Employer and employee are entitled to form their respective unions to protect and promote their rights and interests.¹¹ Employer is required to ensure workplace feasibility in accordance with the law as to keep the minimum work-friendly environment. In order to settle a dispute between employer and employee, Collective Bargaining Agent (CBA)¹² plays its mediating role in bridging gap between employer and employee, on its failure to do so the matter is referred to the Labour Court to be dealt with under the relevant laws.

After the incorporation of the 18th Constitutional Amendment¹³ to the constitution, the Concurrent Legislative List was abolished, consequently, labour laws were made provincial subject. The provinces were expected to introduce reforms to the existing industrial laws jurisprudence but they have adopted the same enactments with nominal modifications¹⁴ which are of no importance except in certain cases related to the application and scope of the

⁹ Ibid, 4.

¹⁰ Ibid, 7.

¹¹ Sec. 3 (a-b), The Industrial Relations Act, 2012 (federal law on EER).

¹² Ibid, sec. 19.

¹³ The 18th Constitutional Amendment was passed by the National Assembly of Pakistan on 8th April, 2010, available at: http://www.na.gov.pk/uploads/documents/1302138356_934.pdf, (last accessed: 21 January, 2017).

¹⁴ Mahmood Abdul Ghani, Industrial relations in Pakistan at a crossroads, Pakistan Law House, Ed. 1st (2011), xi (preface).

laws.¹⁵ The relevant provisions of the law provide that the contract of employment shall be in written form,¹⁶ and the terms and conditions shall be in compliance with the law.

1.2.1. BRIEF ANALYSIS OF EMPLOYER-EMPLOYEE RELATIONSHIP PAKISTANI LEGAL REGIME

The EER laws are applicable to certain industrial establishments while excluding most of the work force is out of the ambit of these laws. The overall position of these laws has been found 'defective' while considering scope of the concerned laws as they are applicable to just those industrial and commercial establishments which employ ten or more workers.¹⁷ Likewise, it does not extend to the agricultural workers which constitutes about twenty five per cent of the total economy of Pakistan.¹⁸ Likewise, the most vulnerable workers of informal sector are out of the ambit of these laws.¹⁹

The relief scheme given to the workers on special occasions is based on a

¹⁵ The Khyber Pakhtunkhwa Industrial Statistics Act, 2013 has Provided that relevant provisions of this Act shall also apply to the employees of societies registered under the Societies Registration Act, 1860 (Act No. XXI of 1860) and the Voluntary Social Welfare Originations. The same is not found in any relevant laws of the Federal and other province.

¹⁶ Standing Order: 2-A, the Industrial and Commercial Employment (Standing Orders) Ordinance, 1968.

¹⁷ Sub sec. 3 (a), sec.1, Khyber Pakhtunkhwa ICEO, 2013.

¹⁸ Ghani, Mahmood Abdul, Industrial relations in Pakistan at a crossroads, Pakistan Law House, Ed. 1st, 2011, 152.

¹⁹ The informal sector has been defined by Pakistan's Bureau of Statistics as: "Informal Sector in Pakistan is formulated in terms of household enterprise and size of Employment", Pakistan Bureau of Statistics' Report November-2015", 11. Available at: <http://www.pbs.gov.pk/content/labour-force-survey-2014-15-annual-report>, (last accessed: 10 January, 2017).

complex procedure; in case of obtaining marriage grant,²⁰ maternity benefits²¹ and paid leaves a worker has to go through formalities that are full of technicalities which make it almost impossible for the workers to take advantage of it. The law contains no provisions for the breast feeding mother workers for taking intervals for this obligatory duty in accordance with injunctions of *Shari'ah*. There has been described no procedure for paternity leaves except in the province of Punjab.²²

The provisions of workmen's compensation are very much defective as in case of fatal incident or other injuries very little amount of money has been paid to the legal heirs.²³ There are no provisions as to family responsibilities of a workman (parental leaves),²⁴ meaning thereby that if parents of a worker are old-aged and need assistance of their offspring, he will not be allowed to do so which in contravention of the injunctions of *Shari'ah*. In case of death due to fatal accident the compensation has been fixed by Rupees: four hundred thousand (400,000) which is very less amount as compare to the *Diyat* (blood

²⁰ Registration is mandatory with the Employment Workers Welfare Fund.

²¹ Sec.4 (proviso), the Maternity Benefits Act 2013 puts a condition that a female worker shall not be entitled to maternity leaves and other benefits unless she has worked in that respective industry for at least four months.

²² The Punjab government has issued a notification in this regard on October 30, 2012 that allow employees seven days leave with full pay, available at:<http://www.glxspace.com/2012/12/10/download-copy-of-notification-of-paternity-leave-maternity-leave-punjab-govt-employees/>, (last accessed: 15 January, 2017).

²³ See Schedule with Sec: 4 of the Workmen's Compensation Act, 2013.

²⁴ Family responsibility, available at: <http://www.paycheck.pk/main/labour-laws/family-responsibility>, (last accessed: 02 February, 2017).

money) amount prescribed under PPC, 1860.²⁵ The provisions of PPC are needed to be extended to labour laws in case death or injury was found to have been inflicted on criminal grounds as it has recently been done in a special case of Ali Enterprises Baldia Town fire case by the Anti-Terrorism Court that claimed 264 lives. Likewise, the court ordered *Diyat* compensation to be paid to each of the victims' families.²⁶

It is crystal clear that in contrast to the pivotal role played by workers towards the society, they are the most ignored and neglected segment of the society. Little has been done by the governments to improve working conditions, health care and fair wages. Therefore, there is no exaggeration in saying that since ancient times, the relations between 'haves' and 'have-nots' have been problematic till today. In fact, the greediness of man has always motivated him to satisfy his thirst for wealth by making his fellows society men into slaves and subordinates.²⁷ It is the reason that the working class, around the globe, had no parliamentary representation until 1867.²⁸

²⁵ Sec. 323 (1), Pakistan Penal Code (PPC), 1860. As per the notification on 1st July 2020, the *Diyat* amount of 30630 gram of silver is equal to Rs.27, 77,353 (two million seven hundred seventy seven thousand and three hundred fifty three), available at: http://www.finance.gov.pk/circulars/circular_01072020.pdf, (last accessed: 11 November, 2020).

²⁶ The State vs. Abdul Rehman Bhola and others (Special case No: 11 (vii)/2017), the Anti-Terrorism Court No: VII, Central Prison, Karachi. The judgment was announced on 22-09-2020.

²⁷ Abdul Qadir Sālih, "Employer and Employee Relations in Islam", available at: <http://www.thepenmagazine.net/employer-and-employee-relations-in-islam/>, (last accessed: 24 January, 2017).

²⁸ Patrick Elias and other, *Labour Law Cases and Materials*, London Butterworth's 1980, ch. 1, 1.

1.3. SHARĪ'AH STANCE ON EMPLOYMENT CONTRACT

Islamic law approach towards EER is comparatively different from the Western concept which deems contractual relationship as that of master and servant. *Sharī'ah* emphasizes that division of society between rich and poor is a natural phenomenon as both the parties play their due role in their respective capacities. Hence, the EER in Islam has been founded on the general Islamic principles of humanity, brotherhood, sympathy, cooperation, mutual consultation, equity and equality along with the prevailing customary practices, in case they are not violative of the *Sharī'ah* injunctions.,²⁹

Contract of employment (*Ijārah Al-Ashkhās*) is the primary base that establishes EER which is preferred to be reduced into written form while containing all agreed upon terms and conditions of employment. Contract of employment is one of the binding contracts to be performed as once it took place cannot be revoked unilaterally.³⁰ Both employer and employee are required to fulfill their respective promises.³¹ It is one of the obligations of the employer to make his worker know his wages.³² In the same way a worker is entitled to full and fair wages after he has been hired for a specific task where he made himself

²⁹Al-Zuhaili, Wahba "Al-Fiqh al-Islāmi Wa Adillatuhu, Dār-ul-Fikr, Damascus, vol. 4, 70.

³⁰ 'Alā 'Uddin 'Abu Bakkar ibn Mas'ud ibn Ahmad Al-Kāsāni, (d.587 A.H), Badā'i' Al-Sanā'i' fi Tarteeb Al-Shar'āi, Dār-ul-Kutub Al-'ilmiyyah , vol. 4, 1-2.

³¹ Qur'ān.17: 34. The Āyah says: "وَأَوْفُوا بِالْعَهْدِ إِنَّ الْعَهْدَ كَانَ مَسْئُولًا", "...And fulfill [every] commitment. Indeed, the commitment is ever [that about which one will be] questioned".

³² 'Alā 'Uddin 'Abu Bakkar ibn Mas'ud ibn Ahmad Al-Kāsāni, (d.587 A.H), Badā'i' Al-Sanā'i' fi Tarteeb Al-Shar'āi, vol. 4,174.

available, even then, he was not able to render his services due to some reasons.³³ In the event of any damage has been caused to the tools in custody of a worker, he will not be held liable for that in any circumstances, unless he was found guilty of negligence or bad intention.³⁴ It is pertinent that there is an immense need that all the important employment laws in the country shall be revised in order to made Shari'ah-compliant as per the constitutional provisions,³⁵ so that the targeted goal of the labour welfare, dignity and humane treatment are achieved.

1.3.1. BASIC REQUIREMENT OF EMPLOYMENT CONTRACT

According to the classical *Fuqahā*, the employment contract must fulfil certain requirements to be considered a valid contract. It shall be concluded between parties in either individual or collective capacities.³⁶ Appointed agents or representatives may also conclude the contract on behalf of corporations or fictitious persons.³⁷ In case of natural persons as contracting parties, they must be competent to

³³ Al-Zuhaili, Wahba, *Al-Fiqh-al-Islāmi Wa Adillatuhu*, vol.5, 3847.

³⁴ *Ibid*, 3848.

³⁵ Art. 227 of the Constitution of 1973 provides for revision of the existing laws in the light of Islamic injunctions as laid down by the Holy Qur'ān and Sunnah.

³⁶ Art. 570, *M'ajall'ah Al-Ahkām Al-Adliyy'ah*, Kārkhāna Tijārah-e-Kutub, 'Arām Bāgh, Karachi.

³⁷ Imran Ahsan Khan Nyazee discussed the issue of 'fictitious person' from Islamic perspective in his book "Outlines of Islamic Jurisprudence", Ed. 6th (2016) on pages.125-126. He is of the view that it is inappropriate to say that the idea of fictitious person is an innovative concept as it existed in the *Fuqahā*'s period but they did not recognize it as a legal person. The logic behind this approach was that *dhimmah* is an '*ahad* (covenant) with the creator and the fictitious person is not able to entre such a relationship because its capacity is deficient as it cannot observe religious duties such as payment of *Zakāt*. It is therefore, recommended that the modern scholars shall consider the issue on legal grounds in order to make it Shari'ah-compliant.

conclude a legally valid contract. Likewise, the contracting parties shall be sound-minded because a contract made by an unsound man or a child who could not differentiate right and wrong is *bātil* (invalid).³⁸

The contracting parties are required to show their free consent while making offer and acceptance. This acceptance may be done through words, writing, gestures or silence in some cases.³⁹ Acceptance by employee must be fully in accordance with the ingredients of the offer. If there was found any difference between employer's offer and employee's acceptance in any aspect then the contract will stand null and void. Acceptance must be pronounced by the employee in the same session or sitting so that it must not lead to confusions in future.⁴⁰

Subject matter and nature of the contract has to be in knowledge of the parties as well as the outcome in the shape of benefits shall be agreed upon otherwise it may lead to confusions which is contrary to the spirit of the contract.⁴¹ In case of *Ajeer-e-Khās*, he must know the nature of work he will undertake along with duration of work while in case of *Ajeer-e-Mushtarak*, specification of time

³⁸ 'Alā 'Uddin 'Abu Bakkar ibn Mas'ud ibn Ahmad Al-Kāsāni, (d.587 A.H), *Badā'i' Al-Sanā'i' fi Tarteeb Al-Shar'āi Dār-ul-Kutub Al Ilmiyyah* vol. 4,176.

³⁹ Al-Samarqandī, Muhammad Ibn Ahmad Abi Bakkar Alāuddīn (d.540 A.H), *Tuhfa'tul Fuqahā, Dār-ul-Kutub Al-Ilmiyyah*, Beirut, vol. 2, 29.

⁴⁰ 'Alā 'Uddin 'Abu Bakkar ibn Mas'ud ibn Ahmad Al-Kāsāni, (d.587 A.H), *Badā'i' Al-Sanā'i' fi Tarteeb Al-Shar'āi Dār-ul-Kutub Al Ilmiyyah* , vol.5, 136.

⁴¹ Al-Zuhaili, Wahba "Al-Fiqh-al-Islāmi Wa Adillatuh, Dār-ul-Fikr, vol. 5, 3809.

period is not necessary though the assigned task must be known to him otherwise the contract is not considered valid.⁴²

1.3.2. IMPORTANCE OF WORK AND ITS ROLE IN ECONOMIC PROSPERITY

A strong economy of an individual as well as of a society is inevitably required for prevailing peace, happiness and tranquility in society. *Sharī'ah*, on one hand, is against status quo of the wealth in a few hands while on the other hand it motivates circulation of wealth so that maximum people get benefits out of it. *Sharī'ah*, even, encourages guardian of an orphan to invest his wealth in trade or other profitable business so that it may not face gradual decrease in account of payment of (the poor due) *Zakāt*.⁴³

Working capacity has been bestowed on man to satisfy his needs of life and promote wellbeing of the society. Therefore, Islam not just encourages activeness and prosperous living but also discourages laziness and wasting time that ultimately leads to poverty. A tradition of the prophet has represented this situation in words. "كاد الفقر أن يكون كفرا", "*Perhaps the poverty may lead to infidelity*".⁴⁴

⁴² Al-Samarqandī, Muhammad Ibn Ahmad Abu Bakkar Alāuddīn (d.540 A.H), *Tuhfa'tul Fuqa'hā*, Dār-ul-Kutub Al-Ilmiyyah, Beirut, vol. 4, 184.

⁴³ Al-Tirmidhi, Muhammad ibn Esā, *Sunan Al-Tirmidhi*, Ch. Zakāt of wealth of an orphan, Hadith no. 641, Albāni declared this Hadith as: 'dhaeef'.

⁴⁴ Al-Rāghib Al-Asfahāni, Abul Qāsim Hussain Ibn Muhammad (d. 502 A.H), *Al-Mufradāt fi Ghareeb Al-Qur'ān*, Hadith reported by Abu Naeem in *Al-Hilyah* from 'Anas (RA) as Hadith dha'eef, vol. 1, 641.

The most dignified earning is the one that has been praised by the Prophet of Allah (SWA) in his words.

"مَا أَكَلَ أَحَدٌ طَعَامًا قَطُّ خَيْرًا مِنْ أَنْ يَأْكُلَ مِنْ عَمَلِ يَدِهِ، وَإِنَّ نَبِيَّ اللَّهِ دَاوُدَ عَلَيْهِ السَّلَامُ، كَانَ يَأْكُلُ مِنْ عَمَلِ يَدِهِ"

"No one has ever eaten food better than that which his hands have earned. Indeed, Prophet Dawūd (peace be upon him) used to eat from the earnings of his own hands".⁴⁵

Sharī'ah appreciates its followers to lead dignified life in this world because human beings have been sent to build this world and lead a proud life as a tradition says:

"الْيَدُ الْعُلْيَا خَيْرٌ مِنَ الْيَدِ السُّفْلَى، وَالْيَدُ الْعُلْيَا الْمُنْفِقَةُ، وَالسُّفْلَى السَّائِلَةُ"

"The upper hand is better than the lower hand, the upper hand is that of the giver and the lower (hand) is that of the beggar"⁴⁶

1.3.3. RELATIONSHIP OF WORK WITH 'IBĀDAH (WORSHIP)

Quest for earning one's living in a lawful manner is considered a religious observance that is why workers are advised to perform their duties accordingly in a professional manner and to the best of their abilities. A tradition of the Prophet says:

"الْعَامِلُ إِذَا اسْتَعْمَلَ فَآخَذَ الْحَقَّ وَأَعْطَى الْحَقَّ كَالْمُجَاهِدِ فِي سَبِيلِ اللَّهِ حَتَّى يَرْجِعَ إِلَى بَيْتِهِ"

"A worker when takes what is right and gives what is right, is like a Mujāhid (the one who struggles for the cause of Allah) till he returns home".⁴⁷

⁴⁵ Al-Bukhāri, Abū Abdullah Muhammad ibn Ismail, Al-J'āmi' Saheeh Al-Bukhāri, Dār-ul-fikar, Beirut , Hadith no. 2072.

⁴⁶ Al-Nishābori, Muslim Ibn Al-Hajjāj, Saheeh Muslim, Dār Ihyā Al-Turāth Al-Arabi, Beirut, Hadith no. 1033. Al-Hākim declared it: "Saheeh".

⁴⁷ Sulaimān ibn Ahmad Al-Tibrāni (d.360 A.H), Al-Mu'jam Al-Kabeer, Hadith no. 281.

Sharī'ah emphasizes on *Halāl* (legal) earning as it is not just a form of *'Ibādah* (worship) in its self but it also enhances motivation for doing good deeds as Allah (SWA) commanded the prophets to set an example for the rest of the community.

”يَا أَيُّهَا الرُّسُلُ كُلُوا مِنَ الطَّيِّبَاتِ وَاعْمَلُوا صَالِحًا...”

“O Prophets! Eat from *Halāl* (legal) foods and do good deeds...”⁴⁸

The Prophets, therefore, used to motivate their society-men that they have spent a considerable time among them to be a role model. In the same way, Muslims have been addressed in the same way to eat from *Halāl* (legal) and be thankful to Allah (SWA) for that.⁴⁹ Earning through *Harām* (illegal) means is not deemed just a sin but it also causes unacceptability of divine reward for worship one does.⁵⁰

1.3.4. WORK AS A MATTER OF RIGHT

Making a living is a prerequisite for fulfillment of basic human needs. Work, therefore, is considered by Islam as a personal obligation (*Fardh-e-āiyn*) and one of the basic human rights.⁵¹ It is duty of every Muslim to fulfill and provide basic needs and provisions of life to himself as well as to his family i.e.

⁴⁸ Al-Qur'ān: 23: 51.

⁴⁹ Ibid: 2: 172.

⁵⁰ Al-Nishābori, Muslim Ibn Al-Hajjāj, Saheeh Muslim, Ch. Acceptance of *Sadaqah* (charity) from *Halāl* (permissible) wealth, Hadith no. 1015.

⁵¹ Hamza Al-Jamī' Al-Damohi, 'Awāmil al-'Int'āj fi al-Iqtisād al-Islāmi, 210.

food, clothing and shelter (housing), medical care in case of illness, necessary education for illiterate and general Islamic instructions for all.⁵²

1.3.5. INVIOABILITY OF WORK

Earning living has been considered by *Sharī'ah* as one of the sacred and beloved actions in the eyes of Allah (SWA). Almost all the messengers have engaged themselves in one or the other profession of their time as our Prophet (SAW) once said: "مَا بَعَثَ اللَّهُ نَبِيًّا إِلَّا رَعَى الْغَنَمَ، فَقَالَ أَصْحَابُهُ: وَأَنْتَ؟ فَقَالَ: نَعَمْ، كُنْتُ أَرْعَاهَا عَلَى قَرَارِيطٍ لِأَهْلِ مَكَّةَ",

"Every prophet used to gaze sheep, the companions asked: and you? He replied: I too used to gaze for Makkans on wages".⁵³

1.3.6. STRESS UPON *HALĀL* (LEGAL) EARNING

Islam places great emphasis on work in its various forms in order to maintain body and soul connected. It therefore commands its followers to eat permitted things: "يَا أَيُّهَا النَّاسُ كُلُوا مِمَّا فِي الْأَرْضِ حَلَالًا طَيِّبًا", "O people! Eat from what is *Halāl* (legal) and good on the earth".⁵⁴

Earning and eating *Halāl* has been considered as a pre-condition for Allah's (SWA) worship as a verse of the Holy Qur'ān says:

"يَا أَيُّهَا الَّذِينَ آمَنُوا كُلُوا مِنْ طَيِّبَاتِ مَا رَزَقْنَاكُمْ وَاشْكُرُوا لِلَّهِ إِنْ كُنْتُمْ إِيَّاهُ تَعْبُدُونَ"

*"O you who believe! Eat of the lawful foods we have provided you with, and be grateful to Allah, if it is indeed, He Whom you worship."*⁵⁵

⁵² Munawar Iqbal, distributive justice and need fulfilment in an Islamic economy, 258.

⁵³ Al-Bukhāri, Abū Abdullah Muhammad ibn Ismail, Al-J'āmi' Saheeh Al-Bukhāri, Ch. Al-'Ijārah, Hadith no. 2262.

⁵⁴ Al-Qur'ān: 2:168.

⁵⁵ Ibid: 2:172.

Most of the earnings are *Halāl* (legal) except in cases where it is in contravention of someone's life, wealth, intelligence and honor.⁵⁶ There are certain cases where it is clearly prohibited to engage one-self in earning from sources like intoxicants (all kinds of alcoholic drinks), gambling, *Al-Ansāb*, *Al-Azlām*,⁵⁷ dead animals, blood, flesh of pigs⁵⁸ and *Ribā* (usury).⁵⁹

1.4. BRIEF OVERVIEW OF THE DERIVATIVE SOURCES OF EMPLOYER-EMPLOYEE RELATIONSHIP-RELATED PAKISTANI LAWS

EER laws in Pakistan have been derived from various sources such as the Constitution of Pakistan 1973, statutes and courts' decision. Likewise, Pakistan is a signatory to various worker-related ILO Conventions that have been taken into account while drafting labour laws and policies. A brief account of these legal sources has been given in the following.

1.4.1. THE CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973

Being supreme law of the land, the Constitution of Pakistan contains a range of provisions with regard to labour rights that form part of the fundamental

⁵⁶ Munawar Iqbal, *Distributive Justice and Need Fulfillment in an Islamic Economy*, 14.

⁵⁷ Al-Qur'ān: 5:90. The āyah says:

"يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رِجْسٌ مِنْ عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ",

"O believers! Intoxicants, gambling, idols, and drawing lots for decisions are all evil of Satan's handiwork. So shun them so you may be successful".

⁵⁸ Ibid, 2:173. The āyah says: " ... إِنَّمَا حَرَّمَ عَلَيْكُمُ الْمَيْتَةَ وَالْدَّمَ وَالْحَمَّ الْخَنِزِيرِ ... ", "He has only forbidden you to eat carrion, blood, swine...".

⁵⁹ Ibid: 2:275. The āyah says: "وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا", "Allah has permitted business and prohibited Ribā (usury)".

Rights⁶⁰ which lay down general protection to all citizens especially, to working class. The focal point of these constitutional provisions is that slavery in all its forms including forced labour as well child labour shall be discouraged.⁶¹

In order to give protection to various segments of the society, almost all citizens have been given the right to exercise freedom of association and to form unions for achieving this purpose⁶² through collective bargaining. Some reasonable restrictions have been imposed in this regard to preserve boundaries of the greater national interest along with security of the state. Any lawful profession and business may be adopted by the citizens in accordance with their qualification and experience.⁶³

As per the constitutional provisions, the state shall ensure equality of all citizens before law so that there shall take no discrimination on the basis of sex.⁶⁴ Moreover, an employer is constitutionally required to provide and maintain just, fair and humane working conditions in work place especially in case of children and women.⁶⁵

⁶⁰ The fundamental rights have been mentioned in Chapter one of the Constitution, 1973.

⁶¹ Art. 11, the Constitution of Pakistan, 1973.

⁶² Ibid, art. 17.

⁶³ Ibid, art. 18.

⁶⁴ Ibid, art. 25.

⁶⁵ Ibid, art. 37 (e).

1.4.2. MAJOR STATUTES ON THE EMPLOYER-EMPLOYEE RELATIONSHIP

EER regime contains many enactments that cover and regulate employment affairs in industrial establishments from employment contract till old-age benefits. However, some of the laws have been considered here which deal with the basic scheme of industrial employment relations.

1.4.2.1. WORKMEN'S COMPENSATION ACT, 1923

The Workmen's Compensation Act 2013⁶⁶ covers most of the issues related to workmen's compensation in case of injury and the liability of the concerned employer thereto and other ancillary issues are regulated by the Act. All such cases are to be dealt with by the officially appointed commissioners by the provincial government inside certain specific jurisdiction.⁶⁷

In case of fatal accident, the employer is required to report it to the commissioner within seven days in order to compensate heirs of the diseased worker accordingly. In ordinary situation where death has not been resulted out of the injuries, the worker concerned is legally required to present himself for medical examination in order to provide him with medical treatment.⁶⁸

The Act also contains, along with sections, four schedules at the end where

⁶⁶ After the devolution of labour to the Provinces, Khyber Pakhtunkhwa (KP) like other provinces enacted its own Workmen's Compensation Act in 2013.

⁶⁷ Sec. 13, the Workmen's Compensation Act in 2013.

⁶⁸ Ibid, sec. 15.

various types of occupational diseases and accidental disabilities⁶⁹ as well as their proportionality have been measured in percentage of disability and the amount of compensation has been given respectively.⁷⁰ The amount, fixed as compensation for death or total disablement is equal though very low in a way which is in contravention of the injunctions of *Shari'ah*. The measurement in respect of percentage of partial disability of and calculation of its compensation has been determined in contravention of *Shari'ah* rules of injuries. The Islamic criminal law concept of *Diyat*⁷¹ (blood money) need to be extended to the EER laws in case of negligence by the employer that may be categorized under *Qatl shibh-e-'am'ad* (homicide resembling murder)⁷² as it has recently been done in a special case of Ali Enterprises Baldia Town fire case by the Anti-Terrorism Court that claimed 264 lives. Likewise, the court ordered *Diyat* compensation to be paid to each of the victims' families.⁷³

⁶⁹ Ibid, schedule-I to be read with sec. 2 (1) and (4).

⁷⁰ Ibid, schedule. IV to be read with sec.4.

⁷¹ Under Islamic Criminal Law, *Diyat* is the payment of "blood money" to compensate for death or injury caused by a serious offense against a person and to provide the perpetrator relief from retaliation in kind. The *Diyat* compensation has been fixed 30630 grams of silver under PPC, 1860, Sec: 323 (1). *Diyat* amount is revised every year by the Federal government. As per notification issued on 1st July, 2020, *Diyat* amount for 30630 gram of silver is equal to Rs.27, 77,353 (two million seven hundred seventy seven thousand and three hundred fifty three), available at: http://www.finance.gov.pk/circulars/circular_01072020.pdf (last accessed: 11 November, 2020).

⁷² *Qatl shibh-e-'ama'd* has been defined under sec. 315 that is punishable under sec. 316 of the PPC, 1860.

⁷³ The State vs. Abdul Rehman Bhola and others (Special case No: 11 (vii)/2017), the Anti-Terrorism Court No: VII, Central Prison, Karachi. The judgment was announced on 22-09-2020.

1.4.2.2. FACTORIES ACT, 1934

Factories Act, 1934 governs the conditions of work of industrial labour, applies to factories, employing ten or more workers.⁷⁴ The Provincial Governments are further empowered to extend the provisions of the Act, to even those industrial establishments where five workers are undertaking work. It regulates most of the stipulations regarding the contractual relationship of employment between employers and employees i.e. working hours of adults, young and children workers, various types of leaves and holidays.⁷⁵

The Act lays down that the periods and hours of work for all classes of workers in each shift must be notified and posted on a prominent place in commonly understandable principal languages in the industrial establishment. The law further provides that no worker shall be required to work continuously for more than six hours where an interval for rest or meals shall be assigned for at least one hour.⁷⁶ The Act also provides certain rules for factories that undertake business in a particular seasons which are termed by the Act as “seasonal factories”.⁷⁷ It is mandatory for all the factories to ensure availability of safety measures inside industrial establishment.

The Act apparently seems to have been drawn narrowly, though the

⁷⁴ Sec: 2 (j), the Factories Act, 1934.

⁷⁵ Ibid, Ch. 5: Restrictions on working hours of adults.

⁷⁶ Ibid, sec. 34.

⁷⁷ Ibid, sec. 4.

competent authority has got legal discretion to extent it, if it thinks fit, to certain other classes of workers. In a petition before the Federal Shari'at Court, scope of the Act was challenged, to which the court responded that the Factories Act also extends to the brick kiln workers in such a manner that they shall be deemed protected like factory workers.⁷⁸

1.4.2.3. PAYMENT OF WAGES ACT, 1936

The Payment of Wages Act, 1936,⁷⁹ regulates payment of wages to certain classes of industrial workers. The primary objective of the Act is to ensure payment of legally specified wages that are determined by the government almost every year. It applies to all those workers who are employed in factories and railways' administration either employed directly or through contractors.⁸⁰

The stipulated time period for payment of wages has been specified by seven days, if the number of workers employed therein is less than a thousand.⁸¹ In all other cases, the time limit for payment of wages has been prescribed by ten days. No deduction can be made from the wages of the workers except in cases of fines, breach of contract and the cost of damage or loss incurred to the

⁷⁸ PLD 2006 FSC 1, Shabbir Hussain Kazmi and others vs Government of Pakistan.

⁷⁹ The Act was initially passed and implemented by the British government in the United India in 1936 that was subsequently adopted by Pakistan and minor changes were incorporated accordingly.

⁸⁰ Sub.sec.4, sec.1, the Payment of Wages Act, 1936.

⁸¹ Ibid. Sec.5.

factory in any way other than an accident.⁸² A worker shall not be terminated without any genuine reason where he shall be heard for why he shall not be terminated. In a situation where it became necessary that worker has to be terminated, then he should be paid his dues not later than the second working day after the discharge.⁸³

1.4.2.4. THE INDUSTRIAL AND COMMERCIAL EMPLOYMENT (STANDING ORDERS) ORDINANCE, 1968

The Industrial and Commercial Employment (Standing Orders) Ordinance was initially enacted in 1968 to address the relationship between employer and employee and the contract of employment. It is the main legislation that governs employment-related issues of workers. The Ordinance applies to all industrial and commercial establishments throughout the country employing twenty or more workers and provides for security of employment.⁸⁴ The Act also extends to brick kilns as per the minimum rate of wages, working hours and holidays etc. are concerned as it was held by the FSC in a petition.⁸⁵

The Act divides workers to various classes on the basis of their employment contract. In a petition, it was held by the FSC that there is no harm if the

⁸² Ibid. Sec.7.

⁸³ Ibid. sub. sec. 2, sec.5.

⁸⁴ Ibid, sub sec. 1 (a), sec.1.

⁸⁵ PLD 2006 FSC 1, Shabbir Hussain Kazmi and others vs. Government of Pakistan.

classification of workers is based on reasonableness and intelligibility.⁸⁶

Employers in industrial establishment are required to issue a formal appointment letter at the time of employment of each worker. The obligatory contents of each labour contract, if written, are confined to the main terms and conditions of employment, namely nature and tenure of appointment, pay allowances and other fringe benefits and termination from employment.

1.4.2.5. THE BONDED LABOUR SYSTEM (ABOLITION) ACT, 1992

There have been described various indicators that determine work to forced labour on the ground that the worker has taken an advance (*Peshgī*).⁸⁷ Though the Act has abolished⁸⁸ Bonded Labour System⁸⁹ even then this inhuman tendency is still prevailing in various parts of the country. In a petition⁹⁰ before the FSC numerous petitioners (land lords) have challenged the Act on the ground that its provisions are in contravention to the injunctions of Shari'ah but they failed to argue their pleas accordingly.

In regard to most of the petitions before the FSC, it is apparently perceived that the court has resort to a flexible approach towards employment related matters. Importance of workers' problems and the court's approach could be understood from the point that it has never tried workers' petitions on *suo*

⁸⁶ PLD 1989 FSC 31, Abdul Majid Qureshi vs Islamic Republic of Pakistan.

⁸⁷ Sec.2 (a), The Bonded Labour System (Abolition) Act, 1992.

⁸⁸ Ibid. Sec.4.

⁸⁹ Ibid. Sec.2 (e).

⁹⁰ PLD 2006 FSC 1, Shabbir Hussain Kazmi and others vs Government of Pakistan.

moto grounds. Various petitions that were brought before the court by virtue of their being exploitative towards the working class, were either not dealt with zeal or not fairly presented by petitioners.

In examining the existing Pakistani laws related to employer-employee relations, the FSC's jurisdiction appears to have been drawn extraordinarily while in practice, it has been proved to be very restrictive as an ex-justice of the SCoP Appellate Bench, Muhammad Taqi Usmani, has pointed out in his book⁹¹ that it is not duty of the FSC and SCoP to examine a law or a provision on the basis of equity, fairness, logic or public opinion rather it had to see just one point and that is to see if the law under discussion is contrary to the injunctions of Islam. Holding this view point, certain customary practices prevailing in the brick kiln industry have been declared to be in contradiction of Islamic injunctions such as bonded labour, advance debt (*Peshgī*) and *Jamadārī*.⁹²

The District Coordination Officer (DCO) on district level has been given the responsibility to ensure that this inhuman custom shall no longer takes place.⁹³

⁹¹ Usmani, Muḥammad Taqī, judgments of the Sharī'at Bench of Supreme Court of Pakistan, 303-304.

⁹² *Jamadārī* was a supervisory system under which a man used to watch and dog those who have been taken *Peshgī* so that they shall be employed under the bonded labour system in order to satisfy their past debts. The system has already been abolished by the SCoP by virtue of its decision (1989 SCMR 139), before the Bonded Labour system (Abolition) Act was promulgated.

⁹³ Sec.9, the Bonded Labour System (Abolition) Act, 1992.

Moreover, penal provisions of the criminal law have been extended in case violation of the Act has been proved.⁹⁴ Likewise, there shall be a vigilance committee⁹⁵ to keep an eye on working of the law and to assist the district administration in enforcement of the Act and to ensure welfare of the victim workers.

1.4.2.6. INDUSTRIAL RELATIONS ACT, 2012

The Industrial Relations Act (IRA) 2012⁹⁶ is one of the primary enactments that regulate employer-employee relations in certain industrial establishments. The Constitutional right of freedom of association for workers and employers has been expanded through the Act that enables both the contractual parties to exercise their right to organize in their respective work places. Provisions of the Act contain rules regarding representation of workers as well as the employers by forming and joining trade unions and associations of their own choice. A comprehensive procedure of registration of a trade union and association with a registrar has been provided under the Act.⁹⁷

For workers to be represented in a work place, there shall exist a Collective Bargaining Agent (CBA) which is required to be appointed after a secret ballot.

⁹⁴ Ibid. Sec.14.

⁹⁵ Ibid. Sec.15.

⁹⁶ The initial draft of the Industrial Relations Act was adopted by Pakistan with title: “the Industrial Relations Ordinance 1969” which has gone through various developmental changes when it was in the domain of the CLL. After the 18th Constitutional Amendment in 2010 the CLL stood abolished. The Federal as well as the Provincial governments have passed their own industrial relations' laws.

⁹⁷ Ss.6-10, the IRA, 2012.

The elections shall take place to elect a representative union (CBA) from among the trade unions that operate inside an industrial establishment. The CBA on one hand represents workers in the event of an industrial dispute while on the other hand it gets involved in the affairs of the work place through committees, boards and commissions.⁹⁸ The CBA is entitled to undertake collective bargaining with the employer on matters connected with employment, non-employment, the terms and conditions of employment or any right guaranteed or secured to any worker by or under any law, or any award or settlement of an industrial dispute.⁹⁹

A comprehensive procedure has been given for staging a legal strike or lock-out, in case a dispute has not been resolved amicably. In case a lock-out or strike was held without following proper legal procedure they are deemed to be violative of the Act¹⁰⁰ that ultimately lead to a disciplinary action. The Federal and the Provincial Governments have been given with the discretion to issue an order in writing for prohibiting a strike or lock-out at any time before the expiry of legal time period of thirty days.¹⁰¹

The IRA permits a CBA and employers' association to apply to the Labour Court for the enforcement of any right guaranteed or secured by law or any

⁹⁸ Ibid, sub sec (2), sec.19.

⁹⁹ Ibid, sec.20.

¹⁰⁰ Ibid, sec.43.

¹⁰¹ Ibid, sub sec. (3), sec. 42.

award or settlement. Any party aggrieved by an award or a decision of the National Industrial Relations Commission (NIRC)¹⁰² may go for appeal to full Bench of the Commission.¹⁰³ Decision of the Commission shall be considered final which could not be challenged in any court.¹⁰⁴

1.4.3. THE INTERNATIONAL LABOUR ORGANIZATION'S CONVENTIONS

Being the United Nations' specialized agency, the International Labour organization (ILO) plays pivotal role through its Conventions and rules in drafting labour legislation around the globe. Pakistan is one of the ILO's members and has ratified its core Conventions related to industrial employment that include Convention no. 87 on Freedom of Association and Convention no. 98 on Right to Organize and Collective Bargaining. While legislating laws in respect of EER in Pakistan, these Conventions have been taken into consideration as a reference has been given in the introductory part of the IRA, 2012, the federal government's legislation on the subject. Likewise, the ILO has recently played a leading role in partly compensating the victims of the Baldia Town fire Case.¹⁰⁵

¹⁰² The NIRC deals only in resolution of industrial disputes that arise out in the ICT or in trans-provincial industrial establishments.

¹⁰³ Sec.58, IRA 2012.

¹⁰⁴ Ibid, Sec.59.

¹⁰⁵ The State vs. Abdul Rehman Bhola and others (Special case No: 11 (vii)/2017), the Anti-Terrorism Court No: VII, Central Prison, Karachi. The judgment was announced on 22-09-2020.

1.5. LIMITATIONS OF THE STUDY

The research is mainly focused on analysis of EER industrial laws from *Sharī'ah*, though, there have been found certain limitations.

Firstly, the EER regime of those workers and employers has been discussed who are covered under the two principal laws; the Industrial and Employment (Standing Orders) Ordinance, 1968 and the Industrial Relations Ordinance, 1969. Hence, those workers and industrial establishments are not subject of this study where less than five¹⁰⁶ workers are employed as well as seasonal factories. Likewise, agriculture sector, home-based workers, self-employed, public transport, workshops and bakery workers, those employed by private security agencies and private educational institutions as well as employees of the Export Processing Zones are out of the ambit of this study.

Secondly, a brief account of the judgments of the SCoP, provincial HCs, the FSC and the NIRC have been quoted in the sphere of industrial relations where validity of certain provisions had been challenged before the courts on multiple grounds soon after the 18th Constitutional Amendment in 2010.

Thirdly, *Sharī'ah* appraisal of the relevant constitutional provisions along with the principal statutes that regulate industrial EER and the ILO's Conventions have been undertaken in light of the primary and secondary jurisprudential sources of *Sharī'ah*.

¹⁰⁶ Sec.1 sub sec. 4 (a), Employees Old Age Benefits Act, 1976.

Fourthly, for discussion and reference purposes the Federal laws have been given preference over provincial laws, though, the provincial laws have also been considered occasionally.

Fifthly, the available data on the subject is limited and general in nature in a sense that it does not cover statistics of each and every industrial establishment as far as perspective of EER is concerned. As far as the Islamic law literature on the subject is concerned, there has not been found any codified law, except in case of the Ottoman's *M'ajall'ah Al-Ahkām Al-Adliyy'ah*.

Sixthly, the laws related to the contract of employment of government servants is also not business of the current research.

1.6. SIGNIFICANCE OF THE STUDY

The today's product-based living shows much more dependence on machines as well as on the working class as behind every product there are workers, an important and integral part of production.¹⁰⁷ By realizing this fact, *Sharī'ah* like most of the economic systems, stresses upon worker-friendly workplace rules based on both legal as well as ethical basis regarding humane treatment, timely payment of due wages and allocating rest time etc. Governments, around the globe, are introducing reforms to their existing labour laws in accordance with the socio-economic capabilities

¹⁰⁷ Afzal-ur-Rahman, *Economic Doctrines of Islam*, 18.

of their respective countries by following the ILO's Conventions to uphold working class's living standard.¹⁰⁸ Peaceful and productive environment in work place is, thus, the primary goal of labour legislation, which is achievable only when EER is based on cooperation, mutual respect and human treatment and the workers are not regarded as a commodity¹⁰⁹ but partners and contributors towards the finality of the products.

Pakistan has adopted, though gradually, the inherited master-servant concept based EER laws from the colonial United India after incorporating minor changes and reforms thereto. Indeed, little attention was paid to the adaptation of worker-related Constitutional provisions and the ILO's Conventions ratified by Pakistan in order to improve working conditions and consequently life and living style of the working class.

The most ignored segment of the working class is female and children workers engaged in various sectors yet out of the ambit of the existing laws. These sectors include domestic work, home-based work, agriculture, transportation, workshops, restaurant, hotels, private schools, colleges and universities along with small industries and seasonal business etc. Moreover, the defective and inefficient mechanism of industrial dispute resolution has paved way to further exploitation of the working class. To be benefited from

¹⁰⁸ Since 1919, the ILO has adopted more than 180 Conventions and 190 Recommendations covering almost all aspects of workers' employment laws, "Briefing Paper No.40 (June 2011), strengthening democracy and democratic institutions in Pakistan", Pakistan Institute of Legislative Development and Transparency (PILDAT) Lahore, ISBN. 978-969-558-210-7,12.

¹⁰⁹ Walter E. Oberer and others, Labour law Collective Bargaining in a Free Society, West Publishing Co. St. Paul, MINN., 1986, Ed. 3rd, 3.

the worker-related welfare funds and grants various technicalities and procedures have made obstacles.

It was expected that after the 18th Constitutional Amendment, after abolition of the Concurrent Legislative List that the provinces will give the laws its due weightage by incorporate worker-friendly reforms but in vain. In fact, the whole labour code is in a dire need to be revised in the light of Constitutional provisions backed by general Islamic principles of brotherhood, cooperation, respect and humane treatment with subordinates. The ILO's Conventions may be taken into consideration as they are of pivotal importance.

1.7. LITERATURE REVIEW

The variety of Islamic law as well as Pakistani law literature on the subject denote that *Fuqahā* have thoroughly analyzed the EER under the employment contract (*Ijārah Al-Ashkhās*) where employees have been classified¹¹⁰ to personal employee (*Ajeer-e-Khās*) and common employee (*Ajeer-e-Mushtarak*). Based on this classification their respective rights and obligations have been determined soon after the employment contract has been concluded between the parties.¹¹¹

In order to create a contractual relationship, contracting parties are required to have the legal capacity to enter into a legal contract of employment as to

¹¹⁰ Al-Sarakhsi, Al-Mabsūt, Book: *Ijārāt*, vol. 15, 80.

¹¹¹ Alā 'Uddin 'Abu Bakkar ibn Mas'ud ibn Ahmad Al-Kāsāni, (d.587 A.H), *Badā'i' Al-Sanā'i' fi Tarteeb Al-Shar'āi*, Ch. Meaning and conditions of *Ijārah*, Dār-ul-Kutub Al-'ilmiyyah vol.4, 174.

perform their respective promises have been clearly specified.¹¹² Other issues such as fixation of terms and conditions in respect of wages of a worker,¹¹³ uncertainty or ambiguity in the terms and other related issues like; the status of commodity in the custody of workers¹¹⁴ etc. shall be discussed thoroughly. There are certain matters of pivotal nature that are existing in the current age employment contracts that did not exist at the *Fuqahā* period; such as decent living, award of minimum (official) wages, job security and satisfaction, occupational safety and health, paid holidays, casual leaves, employees' compulsory insurance, health facilities, old age benefits so on and so forth. The mentioned issues have been considered to have legal effect and therefore they have been evaluated and analyzed by the modern scholars in the light of general principles of *Sharī'ah*.

In the contemporary world, modern Islamic Jurists have expanded the already existing employment relations literature in accordance with the needs of the time but, mostly, that is regarding the major labour issues. Unlike their efforts, problems are two-fold to be presented with the real Islamic spirit. As per this doctoral study is concerned, very few authors have discussed Pakistan's employment relations laws, in the light of general principles of cooperation, contribution towards society, respect, equity and equality, but none of them have done *Sharī'ah* appraisal of the prevailing

¹¹² Ibid, vol.5, 135.

¹¹³ Arts: 23-25. M'ajall'ah Al-Ahkām Al-'Adliyy'ah, ch. 1st: general principles of a contract, Kārkhāna Tijārat Kutub, Ar'ām Bāgh, Karachi.

¹¹⁴ Al-Fiqh Al'ā Madhāhib Al-Arb'ā, Ch. Liability of a worker, vol.3, 132.

workers- related employment laws in the light of classical and modern Islamic jurisprudence along with the judgments of the Federal Shari'at Court. Keeping in mind the above facts, the following partial work was found on the subject by various authors who have dealt with the issue to some extent. In his MS dissertation¹¹⁵, Mr. Abdul Kareem, has primarily focused on the concept and basics of hiring in Islam in the light of the opinions of classical *Fuqahā* in a very brief way while reference to the relevant Pakistani laws had very rarely been made. Moreover, he has discussed the theoretical aspects of hiring in a more traditional way while the contemporary issues of working class related to the terms and conditions of the employment contract, working hours, paid leaves and labour force welfare have not been due weightage. Likewise, neither of the worker-related laws had been analyzed from *Shari'ah* perspective in the light of contemporary socio-economic situation of the workers nor the ILO's Conventions have been taken into consideration on which the labour-related laws are based.

The author, Mr. Mahmood Abdul Ghani,¹¹⁶ in his book has beautifully examined various industrial relations related issues of workers and forwarded valuable suggestion for the introduction of reforms to the current labour laws in accordance with the current socio-economic situation prevailing in the country. As a senior advocate of the Supreme Court of

¹¹⁵ Shah Abdul Kareem, ""Ijārah al-manāfi fi Al-Shari'ah wa Al-Qanoon ", MS Shari'ah thesis, International Islamic University, Islamabad.

¹¹⁶ Abdul Ghani Mahmood, "Industrial Relation in Pakistan at a Cross Road at Pakistan", Pakistan Law House, 2011.

Pakistan, he has scrutinized most of the relevant aspects of EER's law and pointed out the existing lacunas and forwarded solutions thereto. While discussing some industrial issues analysis has been made between Indian labour laws with relevant Pakistani laws, though, his primary focus has been on the abject condition of the working class and how the government's response is in this regard. A brief account of labour-related Islamic provisions has been given in almost six pages in a general way while no specific aspect of the relevant laws has been discussed in the light of Islamic jurisprudence.

Dr. Ali Muhyuddin, authored a book¹¹⁷ on the subject of hiring services of men where he has compared Islamic concept of *Ijārah* with the existing legal systems and quoted various examples of Arab countries on very few occasions. Though, he has addressed the topic theoretically in the light of opinions of classical *Fuqahā*, unfortunately, has discussed most of the relevant issues generally and has not been pointed out the existing lacunas in the employment laws. Moreover, employer-employee relations have been assigned very little space which is the spirit of all economic activities. The author has discussed nothing regarding the existing employment laws of Pakistan and the abject situation of the country's work force.

¹¹⁷ "Al-'Ijārah Alā Manāfi Al-Ashkhās from perspective of Sharī'ah and Law".

The author, M. Ramzan Akhtar,¹¹⁸ in his article has beautifully pointed out that the employer-employee relationship, in Islamic economy, is regulated, protected and maintained by legal as well as moral institutions. He further discussed that primary institutions, in order to guard this contractual relationship, are brotherhood (*Al-Ukhuwah*), justice (*Al-adl*) and benevolence (*Al-Ihsān*). He is of the view that if these institutions were applied in letter and spirit it would bring work place harmony. He has creatively contributed towards the amicable solution of disputes that normally arise between employer and employee. The author's contribution is valuable in the field of industrial relations but his research is not a legal one; it is not based on the worker-related employment laws prevailing in the country. His approach is morality-based rather than law-based which is going to be the focused area of this doctoral research.

In his research paper, "An Islamic Perspective of Industrial Relations: The Case of Pakistan", Mr. Jawad Syed¹¹⁹ focuses mainly on one of the important areas of labour laws; the contractual relationship that takes place from the time a contract of employment has been concluded between employer and employee. In order to argue his view point, he quotes various Qur'ānic verses

¹¹⁸ M. Ramzan Akhtar, "An Islamic Framework for Employer-employee Relations", available at: http://iepistemology.net/v1/attachments/354_V9N2%20Summer%2092%20-%20Akhtar%20-%20Employee-Employee%20Relationships.pdf, (last accessed: 02 February, 2017).

¹¹⁹ Syed, J, "An Islamic perspective of industrial relations: the case of Pakistan", Journal of Management, Spirituality and Religion, (2008), 5(4): 417-440, available at: https://mpra.ub.uni-muenchen.de/13684/1/MPRA_paper_13684.pdf, (last accessed: 02 February, 2017).

and traditions of the Prophet (SAW) to emphasize that earning is both obligation and virtue. In fact, both employer and employee are vicegerents of Allah (SWA) on the earth for the great and sacred goal to contribute towards the welfare of mankind and building the earth. After analyzing different aspects of the industrial relations, he has come up with the conclusion that in Pakistan, the reasons behind the ineffectiveness of industrial laws is ambiguous application and establishment of trade unions.

The author, in order to support his stance, has presented a case study of EER in this regard as well. Moreover, he has pointed out some of the aspects of employer-employee relationship which provide base to the industrial disputes while he had ignored the other important issues such the employment contract which is the governing base of this contractual relationship. Likewise, he has discussed none of the existing industrial relations laws in the light of the available Islamic literature in the classical *Fiqh* (jurisprudence) books.

The research paper "Religion and Labour: Perspective in Islam" authored by Mr. Iftikhar Ahmad¹²⁰ describes that the true source of human welfare is the Qur'ān and the Sunnah which could be used by Islamic World to adopt a unanimously agreed upon labour code. For the purpose of its interpretation a

¹²⁰ Iftikhar Ahmad "The Journal of Labour and Society" · 1089-7011, Vol. 14, Dec- 2011, 589-620, available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1743-4580.2011.00363.x/pdf> , (last accessed: 23 July, 2016).

view point shall be followed which is in favour of common Muslims and not that one which favors the rulers. The role of government and *Al-Hisbah* (*ombudsman*) has also been given room in the paper to explain that under certain situations the government, being the custodian of the Muslim community shall interfere in the market affairs for regulating the stakeholders' behaviors. The researcher, however, had not taken any of the labour-related laws into consideration for the purpose to point out the lacunas and forward valuable suggestions in order to make the existing laws worker-friendly by making them *Shari'ah*-compliant.

In his short book Mr. Khalil-ur-Rehman¹²¹ has quoted various Qur'ānic verses and traditions of the Prophet (SAW) along with the sayings of the companions regarding the status of permitted earning. The author had stressed upon the protection and wellbeing of workers from the *Shari'ah* perspective, especially, emphasized on payment of minimum living wages. On the other hand he discourages unionism and grouping in the workplaces either by employers or employees. For this, he is of the view that various factors shall be taken into consideration while calculating and determining rates of wages for a worker. He is of the view that wages of a worker should be enough to meet his and his family's requirements of food, clothing, shelter, medical aid, children's education and other necessities.

¹²¹ Mr. Khaleel Ur Rehman, "The Concept of Labour in Islam", available at: <https://www.amazon.com/Concept-Labur-Islām-Khalil-Rehman/dp/1441570888>, (last accessed: 24 July, 2016).

The researcher has, almost, focused on just one aspect of the industrial laws; determination and fixation of fair wages that will lead to the workplace peace and tranquility, while he has not discussed anything regarding the arbitrary provisions of the existing labour regime. His research also lacks to have been based on the perspective of *Shari'ah* in the light of classical and modern Islamic jurisprudence.

In this paper Mr. Adnan A. Zulfiqar¹²² has pointed out that an Islamic Labour Code shall be drafted in the light of general principles of *Shari'ah* while jurists of every country shall interpret it in accordance with their surroundings backed by Islamic principles only. Moreover, he is of the opinion that this Code shall function in the same manner as the ILO's eight guiding Conventions are followed in most of the world including Western World. The author, though, has not examined any of the worker-related law in the light of classical and modern Islamic jurisprudence. Likewise, his research is not supported by strong evidence from *Qur'an* and *Sunnah* that could enable the research to be made ground for the model provisions of labour laws.

In the research article "Islamic Provisions in Labour Laws" the point has been highlighted that there exist various provisions of worker-related Pakistani laws which are in contradiction with the Injunctions of the Holy *Qur'an* and

¹²² Adnan A. Zulfiqar, "Religious Sanctification of Labour Law: Islamic Labour Principles and Model Provisions", available at: [https://www.law.upenn.edu/journals/jbl/articles/volume9/issue2/Zulfiqar9U.Pa.J.Lab.&Emp.L.421\(2007\).pdf](https://www.law.upenn.edu/journals/jbl/articles/volume9/issue2/Zulfiqar9U.Pa.J.Lab.&Emp.L.421(2007).pdf) (last accessed: 26 July, 2016).

Sunnah.¹²³ Some of the provisions, he has mentioned, are: non-consideration of observing *Iddat*¹²⁴ (waiting period) for a woman after the death of her husband or divorce, intervals for breast feeding, different criteria for termination of permanent and temporary workers, non-inclusion of sexual diseases to misconduct and other related issues.

The author emphasizes on the point that when Pakistan, constitutionally, is required to Islamize the existing laws and not to enact any law in future against the injunctions of the Holy Qur'ān and Sunnah, then why the existing laws have not been considered to be made in accordance with the *Sharī'ah*. Unfortunately, the author has not analyzed each and every provision to highlight anti-*Sharī'ah* provision of the worker-related employment laws. Moreover, he has not conducted his research in the light of classical and modern Islamic jurisprudence.

The research paper, '18th Constitutional Amendment and Devolution of Labour Ministry'¹²⁵ has focused on some of the employer-employee relationship's related core issues that have arisen out after the devolution of labour ministry in the light of the historical 18th Amendment. He has, indeed,

¹²³ Mahmood Abdul Ghani, "Islamic Provisions in Labour Laws", available at: <http://www.brecorder.com/articles-a-letters/single/626/0:/1263129:islamic-provision-in-labour-laws/>, date = 2011-12-21 (last accessed: 26 July, 2016).

¹²⁴ *Iddat* (waiting period) period, as per Islamic Law, is staying at deceased husband's home for the period of four months and ten days.

¹²⁵ Babar Sattar, "18th Constitutional Amendment and Devolution of Labour Ministry", Briefing Paper no.40 (June 2011), strengthening democracy and democratic institutions in Pakistan, Pakistan Institute of Legislative Development and Transparency (PILDAT) Lahore, ISBN. 978-969-558-210-7.

made it clear that though the CLL had abolished, still the Federal government has the stance to play its role in the labour-related laws due to the existence of some of the Constitutional provisions of general nature.¹²⁶

The author has exceptionally described the essence of the 18th Amendment and tried to clarify some of the confusions related to the future labour legislation and enforcement while he has pointed out some of the loopholes to which the drafters of the amendment shall have given due weightage.

The author, though, has not taken any of the labour-related legislative piece to be examined in accordance with the current situation of the working class, while nothing has been discussed regarding the Islamic nature of the relevant provisions which is the real cause of the today's workers' miseries. It has also not been taken into consideration that whether there was any advantage of the said Amendment for the working class when this subject was devolved.

Having read the above literature, it was found that there is much room left on various aspects and issues of Pakistani Labour Laws to be discussed in the light of Islamic Law in order to achieve the intended goal of the employment laws; protection and wellbeing of working class. These issues include; narrow scope of these laws as it covers not more than twenty two per cent

¹²⁶ Arts.11,17,18,25 and 37(c-e) of the Constitution are still required to be enforced jointly by the Federation as well as the Provinces.

out of the total number of Pakistan's labour force is 61 million.¹²⁷ Likewise, the agriculture sector which absorbs the largest percentage of labour force by employing 42.2 per cent, is out of the ambit of these laws.¹²⁸

The vague and complicated enforcement mechanism, exploitative classification of workers, illogical fixation of minimum wages, complicated methods for settlement of disputes, unhygienic environment in chemical factories, non- payment or delayed payment of due wages, energy crises and lack of awareness among the workers etc. have worst impact on the workers' interests in various industrial and commercial establishments.

The employment laws will remain in complete fiasco unless and until they are revised and made *Shari'ah*-compliant, hereupon it can proudly be said that the relationship of employer-employee is not based on the master-servant concept but that is truly based on cooperation, mutual respect, dedication towards work and a virtual contribution to the welfare of the society.

Therefore, a dire need is felt that the current employer-employee relationship Pakistani jurisprudence shall be analyzed under the title "RELATIONSHIP OF EMPLOYER AND EMPLOYEE IN PAKISTANI INDUSTRIAL LAWS: A SHARĪ'AH APPRAISAL".

¹²⁷ Labour Force Survey 2014-15, issue. 33rd, government of Pakistan Statistics Division, Pakistan Bureau of Statistics, www.pbs.gov.pk (last accessed: 20 January, 2017).

¹²⁸ Over view of the Economy (of Pakistan), 2015-16, Ministry of Finance, available at: http://www.finance.gov.pk/survey_1516.html (last accessed: 21 January, 2017).

1.8. RESEARCH QUESTIONS

This research work is mainly focused on Shari'ah appraisal of the employer-employee relationship under industrial laws in Pakistan that will find out answers to the following questions:

1. What are the sources of Pakistan's current EER jurisprudence?
2. After the devolution of 'labour' as a legislative subject, do the federal and the provincial governments have taken reformative steps to heal industrial employees' long-awaited grievances?
3. Have the FSC and the Council of Islamic Ideology play their due role to Islamize the EER related enactments?
4. Is it possible to interpret the EER in the light of the primary and secondary sources of Islamic law?

1.9. RESEARCH OBJECTIVES

This research is aimed;

- a) To analyze Pakistan's industrial jurisprudence pertaining to EER in the light of the Constitutional provisions and the ILO Conventions.
- b) To scrutinize various aspects of the EER as far as the Federal Shari'at Court's approach is concerned.
- c) To search out nature of Islamic view point on EER legal aspects.
- d) To find out un-Islamic elements and lacunas in the existing industrial jurisprudence, if any, and forward suggestions for future reforms.
- e) To enquire whether provisions of Islamic criminal law could be extended to workers in case of death and injuries.

1.10. RESEARCH METHODOLOGY

The research is primarily based on doctrinal and qualitative research methodology. In this regard, the following methods have been utilized:

- a. Historical method was adopted while discussing EER in the early period of Islam till the *Fuqahā's* period. Likewise, Pakistani laws on the subject were discussed historically till the devolution by virtue of the 18th Constitutional Amendment.
- b. Descriptive method was exercised to describe the relevant data sources in both Islamic as well as Western and Pakistani laws.
- c. Analytical method was applied while analyzing important provisions of employment laws.
- d. Comparative method was taken up while comparing various provisions of Islamic law with that of Pakistani constitution, ILO's Conventions and various Pakistani courts' judgments including the FSC.
- e. Critical method was used while discussing ambiguities and lacunas that exist in the current employer-employee relations regime.

Likewise, various data sources were searched and considered:

1. For Islamic point of view, both primary sources (Qur'ān, Sunnah, Ijmā and Qiyās) and secondary sources (Istehsān and Al-'Urf) were duly considered. Moreover, opinions of classical as well as modern scholars were given room.
2. For data on EER Pakistani regime, the constitution, the principal statutes; the ICEO, 1968 and IRA, 2012, judgments of the SCoP and provincial HCs along with FSC and NIRC were taken into consideration. Likewise, the ILO's Conventions and employment relations related Arabic and English books along with articles were given due room.

1.11. SCHEME OF THE STUDY

This research work is mainly focused on the analysis of primary enactments pertaining to industrial relations jurisprudence in Pakistan that regulate EER along with its impact on contracting parties. Likewise, *Sharī'ah* perspective of the EER has also been explained in the light of the classical and modern jurisprudence.

The study comprises six chapters:

Chapter one has been focused on a brief account of the EER regime in Pakistan along with its derivate sources. Likewise, basic concepts related to Islamic view of employment contract has also been given due room. Moreover, limitations, significance and literature review of the study along with research questions, objectives and methodology have been taken into consideration.

Chapter two has highlighted historical perspective and birth of industrial EER legislation in Pakistan that has been derived from pre-independence colonial period kept on various reformative phases. Constitutional development in respect of industrial relations along with ILO supervisory role has been given due space. The developmental stages have been divided further to five progressing periods from 1949 until the devolution of labour as a provincial subject by virtue of 18th Constitutional amendment that abolished CLL in 2010.

Chapter three contains Islamic view of EER where evidence has been given from primary and secondary derivative sources of *Sharī'ah* along with the opinions of *Fuqahā* and Islamic scholars. Likewise, classification of workers and rights and obligations of both employer and employee along with workers' liability have been discussed. Legal as well as ethical basis of EER and state's role in regulating market affairs along with *Sharī'ah* approach of resolving unprecedented issues have also been given room.

Chapter four describes the current EER's regime in the light of 18th Amendment that resulted mishaps in the existing IRs system and created a legal vacuum and complete fiasco. The validity of the IRA, 2012 and stances of the Supreme Court, four provincial High Courts and the NIRC have been given due room. It also contains discussion regarding the legal status of the labour laws, labour judiciary, enforcement mechanism and other related issues which were subject of confusion after the 18th Amendment was incorporated to the Constitution of the Islamic Republic of Pakistan. The two primary industrial relations enactments have been analyzed in a bit detail along with the loopholes that exist in the provisions of these legislative pieces.

Chapter five focuses on the *Sharī'ah* appraisal of EER jurisprudence where Pakistani Constitution, the two principal statutes and the ILO Conventions have been analyzed along with the FSC's approach on the subject. Likewise,

certain new provisions have been recommended to be incorporated to the current EER laws.

In the last chapter, conclusions have been drawn and suggestions have been forwarded for future researchers to undertake and discover more about in the field of industrial relations. The suggestions include solution to the lacunas and loopholes that exist in the current Pakistani EER regime in order to make it more Sharī'ah-compliant as well as employer-employee friendly.

CHAPTER TWO

HISTORICAL PERSPECTIVE OF THE EMPLOYER-EMPLOYEE RELATIONSHIP IN PAKISTANI REGIME

2.1. INTRODUCTION

In the beginning of industrialization EER were governed by the doctrine of *Laissez-Faire* as the states around the globe used to observe the industrial life without interference. With the passage of time, the states realized harsh ground realities that compelled the Britain and United States were the first states that had introduced the milestone industrial legislation in the subsequent 17th and 18th centuries.

Pakistan, soon after independence, inherited a minimal proportion of the total Indian industry of about nine per cent mostly located in urban areas with fewer industrial workers of about 0.63 per cent, in a population of seventy five millions. The pre-partitioned EER legislation of British era was adopted by Pakistan. Until 1955, there prevailed status quo until the first ever labour policy was announced in 1955 by the than government. Subsequently, other Labour Policies were announced in 1959, 1969, 1972, 2002 and 2010 till the labour was devolved by virtue of the 18th Constitutional Amendment in 2010.

Initially, EER was regulated under the Industrial and Commercial Employment (Standing Orders) Ordinance, 1968 and the Industrial Relations Ordinance (IRO), 1969. The IRO, 1969 were repealed twice in 2002 and 2008

accordingly. Being a member of the ILO, Pakistan has ratified thirty four core Conventions that cover almost all areas of labour legislation including freedom of association of workers and collective bargaining. Pakistan's labour laws are considered progressive as a result of the various governments' compliance to the ILO's Conventions that has not just given new dimensions to the already existing EER laws but it has provided a guideline for the new laws. The 18th Constitutional Amendment is considered of pivotal importance as it devolved 'labour' to the provinces.

2.2.BIRTH OF EMPLOYER-EMPLOYEE RELATIONSHIP REGIME; GLOBAL RECOGNITION

In the context of peaceful working environment, employer-employee relationship (EER) or labour relations refer to the dealings between employer and employees or their representatives and the procedure through which terms and conditions of employment are negotiated, adjusted and enforced in an industrial establishment.¹²⁹ EER also signifies the relationship of management with workers in a work place and the manner they both interact with each other while resolving their conflicts.¹³⁰

With the commencement of industrialization, the states' role was passive in a way that they were observing industrial activities silently. The economic

¹²⁹ Azucena, Cesario Alvero Jr. (2007), The Labour Code with Comments and Cases, vol. 2, Quezan City, Rex Printing Company, Inc, 1.

¹³⁰ Mindset Learn (2013, May 28), Industrial relations, Retrieved from Youtube: <https://www.youtube.com/watch?v=j4yDknRMrGo> , (last accessed: 20 July, 2019).

activities including EER were guided by the principal of *Laissez-Faire*.¹³¹ The states realized severity of the situation and their due role when the harsh ground realities divided the society into capitalists and workers.¹³² Britain is considered the first to have initiated the milestone legislation by recognizing the concept of combined efforts by the workers to protect their rights in the 18th Century through Combination Act 1780.¹³³

The law could not heal workers' grievances, resultantly, the workers protested against the law but they did not succeed and faced even more bitter laws like the Gagging Act of 1817. Relief was started with the introduction of various Acts such as the Employer's Liability Act, 1880.¹³⁴ However the unions got their real strength in 1913 after the implementation of Trade Union Act which gave the unions the right to have its subscriptions into a

¹³¹ *Laissez-faire* is a French term that literally means "leave alone" or "let you do"). It is an economic theory that got its roots from the 18th century. It favored free-market economy and opposed government rule in business affairs. According to the supporters of the theory the less the government is involved in the economy, the better off business will be—and as a result, the society as a whole. The theory became famous in the mid-1700s to the extent that it was considered one of the first articulated economic theories. It originated with a group that flourished in France from 1756 to 1778; led by a physician. They tried to apply scientific principles and methodology to the study of wealth. These economists argued that a free market and free economic competition were extremely important to the health of a free society. The government should only intervene in the economy to preserve property, life, and individual freedom; otherwise, the natural, unchanging laws that govern market forces and economic processes, what later British economist Adam Smith called the "invisible hand" should be allowed to prevail. Available at: <https://www.investopedia.com/terms/l/laissezfaire.asp>, (last accessed: 22 August, 2019).

¹³² 'Labour Legislation in India- A Historical Analysis of its Utility in the Context of Present-Day Needs', 17-18. Available at: https://shodhganga.inflibnet.ac.in/bitstream/10603/89669/7/07_chapter-ii.pdf, (last accessed: 19 July, 2019).

¹³³ Muhammad Shaukat Malik, A. B. Basit and Ahmad Kamal Qazi, Unions and Management: A Case Study of Pakistan Telecommunication Corporation, Pakistan Journal of Social Sciences (PJSS) Vol. 31, No. 1 (June 2011), 185-199.

¹³⁴ Ibid, 186.

political and a social fund. The trend of unionism in Britain afterwards expanded to USA.¹³⁵

In order to settle industrial disputes amicably, the pioneer legislation was introduced by the United Kingdom through the Conciliation Act 1896 and the subsequent Industrial Courts Act 1919 that provided for conciliation, adjudication and arbitration. The IR legislation in the UK derived from judge made law at least up to mid-1965.¹³⁶ Likewise, the Commonwealth Conciliation and Arbitration Act 1904 is considered milestone legislation in the field of IRs.¹³⁷

Trade unions movement reached to its peak in the US, trade unions during the nineteenth century when the first ever national union; the National Labor Union was founded in 1866. It was joined by various categories of workers from different walks of life.¹³⁸ In 1926, the railroad employees' right of collective bargaining was recognized when the Railway Labour Act 1926 was implemented. Subsequently, Industrial Recovery Act of 1933 has finally recognized the right to bargain through workers representatives.¹³⁹

It was very late in 20th Century when trade unions' right to raise an industrial dispute for bargaining was recognized in the US through National Labour

¹³⁵ Ibid.

¹³⁶ Mahmood Abdul Ghani, Industrial Relations in Pakistan at a Crossroad, Pakistan Law House, 151-152.

¹³⁷ Ibid, 152.

¹³⁸ Muhammad Shaukat Malik, A.B. Basit and Ahmad Kamal Qazi, "Unions and Management: A Case Study of Pakistan Telecommunication Corporation Limited (PTCL)", Pakistan Journal of Social Sciences (PJSS), vol. 31, No. 1 (June 2011), 185-199.

¹³⁹ Ibid, 186.

Relations Act 1935. By virtue of the Act workers were allowed to join any union of their choice without employer's intervention and the employers were compelled to bargain with workers representatives. Moreover, the concept of unfair labour practices remained on the part of employer only ¹⁴⁰ that annoyed employers at large. Consequently, the situation led to a defining legislation in the form of Labour Management Relations Act 1947 which commonly known as Taft Hartley Act.¹⁴¹

Due to oppressing laws and policies of the British Crown towards the Indo-Pak labor, after it took control over the sub-continent, law and order situation witnessed its worst form. It is the reason that Indian political leaders, along with their political struggle, were supporting workers' cause. Muhammad Ali Jinnah was also a prominent labour leader who was elected president of the All India Postal Staff Union in 1925 that had as many as 70000 (seventy thousand) membership at that time.¹⁴²

2.3. STAKE HOLDERS IN EMPLOYER-EMPLOYEE RELATIONS

In the industrial era EER have been institutionalized that means that employers and employees are bound together by a network of formally agreed rules through the contract of employment that define their respective

¹⁴⁰ Mahmood Abdul Ghani, Industrial Relations in Pakistan at a Crossroad, Pakistan Law House, 152.

¹⁴¹ Ibid, 152-153.

¹⁴² Syed, J. (2008). An Islāmic perspective of industrial relations: the case of Pakistan. Journal of Management, Spirituality and Religion, 5(4), 417-440.

rights and obligations.¹⁴³ The EER are typically termed as a tripartite relationship between employers, employees and the state though the main parties in this relationship are employers and employees as the state's role just regulatory one.¹⁴⁴ Undoubtedly, the state itself is an employer in the capacity of non-profit organization that is why its role has been differentiated from the private employers whose interest is actively involved in the work place activities.¹⁴⁵

Being the caretaker of the interest and wellbeing of the society, the state, shapes EER through its agencies, employers through associations and employees through unions¹⁴⁶ in order to preserve their respective interests. This concept will get negated in case where there exist no representative unions and the relationship between employer and employee is in the individual capacities.¹⁴⁷ The government as a regulating authority plays its pivotal role by framing laws and policies and promoting a conducive work environment.

¹⁴³ David Farnham, *Employee Relations in Context*, 27.

¹⁴⁴ Sonia Bendix, *Industrial Relations in South Africa*, Ed.4th, Creda Communications, Eliot Avenue, Eppindust II, Cape Town, 10.

¹⁴⁵ *Ibid*, 11.

¹⁴⁶ Abel K. Ubeku, *industrial relations in developing countries, the case of Nigeria*, 58. Available at: https://link.springer.com/chapter/10.1007%2F978-1-349-17265-8_3, (last accessed: 26 Jan, 2020).

¹⁴⁷ Sonia Bendix, *Industrial Relations in South Africa*, ed.4th, Creda Communications, Eliot Avenue, Eppindust II, Cape Town, 11.

2.4. DEVELOPMENT OF EER LEGISLATION IN PAKISTAN

Pakistan has inherited most of its laws from the Britain including industrial employment relationship laws that were based on master-servant system. Pakistan practiced and continued this system till 1955, resultantly, only fifty-two industrial disputes were referred for arbitration from 1947 to 1955.¹⁴⁸ No doubt, the ILO,¹⁴⁹ around the globe through its Conventions, has greatly influenced industrial relations in work place.

Soon after independence, Pakistan has become one of the members of the ILO in 1947 and a signatory to its several Conventions on important industrial laws that promote terms and conditions of employment contract, the decent work initiative and other relevant labour standards¹⁵⁰ set up by the ILO.

While considering the real force behind the reforms in industrial laws in the country, before and after independence, it seems appropriate that the role played by the ILO in this regard shall be given room. It seems pivotal, for clear understanding, that the pre-18th Constitutional Amendment era of industrial legislation has to be divided into two phases; pre-independence phase and post-independence phase.

¹⁴⁸ Muhammad Ali Raza, Aspects of Public Labour Policy in Pakistan vol.5, issue.2, BJIR an International Journal of Employment Relations, 198-210. Available at: <https://doi.org/10.1111/j.1467-8543.1967.tb00508.x>, (last accessed: 5 July, 2019).

¹⁴⁹ ILO was founded in 1919 soon after World War-I in order to promote an environment in the world where peace could prevail on the basis of social justice. In 1946, it became the first specialized agency of the United Nations. Available at: <https://www.ilo.org/global/about-the-ilo/lang-en/index.htm>. (last accessed: 19th July, 2019).

¹⁵⁰ "Labour Standards" refers to the minimum terms and conditions of employment which employees are legally entitled to and employers must comply with, Azucena, Cesario Alvero Jr. (2007). The Labour Code with Comments and Cases, vol. 2, Quezon City: Rex Printing Company, Inc, 1.

2.5. PRE-INDEPENDENCE PHASE

The British established its presence in the Sub-continent for commercial purposes by laying foundation of the East India Company in the seventeenth Century, though, the industrial revolution took place in the Indian Sub-continent, lately than Europe, when the British Government initiated industrialization process with construction of Cotton Mill at Calcutta in 1813 and construction of railway lines in 1853.¹⁵¹ Soon after the British Crown invaded the Indo-Pak in 1857 it had banned all Indian textile competitors that paved way to workers' strikes. Subsequently, the Crown had implemented two significant legislations namely; the Employment and Workmen Dispute Act, 1860 and the Indian Factories Act, 1881.¹⁵² In the third decade of twentieth century, the newly established ILO had greatly influenced on the labour legislation globally¹⁵³ and particularly in the Indian sub-continent.¹⁵⁴ The legislation of this period includes; the Factories Act 1922, the Mines Act 1922 and the Workmen's Compensation Act 1923 that was

¹⁵¹ Yu Shu Hong –Malik Zia-ud-Din, "Analyzing the Labour Issues in Pakistan: A Historical Background of Labour Laws and Labour Unions", Labour Law Issues, vol. 3, no. 2, 2017.

¹⁵² The Factories Act was introduced with the primary objective of promoting workers' interest as well as protecting them from exploitation in the hands of greedy employers. Although the Act was primarily enacted by the British Government in order to protect the vested interests of its employers as Indian textile goods offered a tough competition to British textiles in the export market and hence in order to make Indian labour costlier the Factories Act was first introduced in 1881. The Act introduced various reforms in the Indian Sub-continent such as: stipulation of eight hours of work, the abolition of child labour, and the restriction of women in night employment along with the introduction of overtime wages for work beyond eight hours. See. Nijara Deka, Legislative Brief (July, 2017) Rajiv Gandhi Institute for Contemporary Studies (RGICS) Jawahar Bhawan, New Delhi-110001, 6.

¹⁵³ Yu Shu Hong –Malik Zia-ud-Din, "Analyzing the Labour Issues in Pakistan: A Historical Background of Labour Laws and Labour Unions", Labour Law Issues, vol. 3, no. 2, 2017.

¹⁵⁴ Menon, V.K.R. (1956) "The Influence of International Labour Conventions on Indian Labour Legislation", 73 International Labour Review, 555.

factory-style regulation which dealt with rest period, working hours, female and child protection and health and safety of the workers in a certain factory.¹⁵⁵ The Trade Unions Act 1926¹⁵⁶ and the Trade Disputes Act 1929¹⁵⁷ were important enactments that provided a more modern approach of industrial relations and ancillary matters. However, industrial life could not go smoothly, consequently, the Royal Commission on Labour in India was established in July 1929 that handed over its report in 1931. Resultantly, 24 legislative pieces were introduced from 1932 to 1937 to heal grievances of industrial workers.¹⁵⁸ In order to maintain peace in the United India, after the British Government got engaged in the World War-II, several industrial laws were implemented such as; the Essential Services Maintenance Ordinance 1941, the Industrial Employment Act 1946¹⁵⁹ and Industrial Disputes Act 1947.¹⁶⁰

¹⁵⁵ Richard Mitchel-Petra Mahy-Peter G. Gahan, "The Evolution of Labour Law in India: An Overview and Commentary on Regulatory Objectives and Development", *Asian Journal of Law and Society*, 1. 2014, Cambridge University Press and KoGuan Law School, Shanghai Jiao Tong University, 416.

¹⁵⁶ The Trade Unions Act 1926 for the first time provided for voluntary registration of trade unions that ultimately gave the registered trade unions a legal status. The registered trade unions were extended with some protections against civil and criminal liabilities in the case of industrial disputes. The provisions of the Act were limitedly scoped in certain circumstances as in case of the unregistered trade unions were excluded from the protection that was extended by the Act. Moreover, the Act failed to provide any support to collective bargaining system because the employers were not bound to bargain with unions in case of an industrial dispute even in the case of registered trade unions the process of collective bargaining was dependent on the disposal of the employers.

¹⁵⁷ The Trade Disputes Act 1929 imposed various restrictions on the workers' right to strike. The Act made it obligatory that an industrial dispute in first instance shall be referred to a conciliation board. However, the decision of this reference was left to the disposal of the parties.

¹⁵⁸ Richard Mitchel-Petra Mahy-Peter G. Gahan, "The Evolution of Labour Law in India: An Overview and Commentary on Regulatory Objectives and Development", *Asian Journal of Law and Society*, 1. 2014, Cambridge University Press and KoGuan Law School, Shanghai Jiao Tong University, 417.

¹⁵⁹ The Industrial Employment Act described the process of recruitment, termination, punitive action and conditions for work and welfare of the employees.

2.5.1. NATURE OF LEGISLATION IN THIS PERIOD

The British Government, being the principal stake holder as far as economic activities were concerned, soon after it established its rule in the Indian sub-continent in 1857, was compelled to regularize industrial sector by introducing various legislations. The law of employer-employee relations in 17th, 18th, 19th and 20th centuries, in England and commonwealth countries, was the type of master and servant laws.¹⁶¹ In case of hiring, the economic rule of supply and demand prevailed, due to excess of labour force; employers were free to hire on their own terms and to dismiss accordingly.¹⁶² The Employment and Workmen Dispute Act 1860 was the primary law in this regard but it had just provided for minor punishment in case an employer was found guilty of breach of employment contract while there were no provisions for workers' protection while the Indian Factories Act

¹⁶⁰ This Act was introduced in order to provide permanent solution to disputes under specific rules and regulations given in the relevant law. The Act in its applicability was limited in its application because it was applied only selectively to certain kinds of business establishment, and, in respect of some provisions, only to businesses of a certain size as determined by the number of employees. See Richard Mitchel-Petra Mahy-Peter G. Gahan, "The Evolution of Labour Law in India: An Overview and Commentary on Regulatory Objectives and Development", Asian Journal of Law and Society, 1. 2014, Cambridge University Press and KoGuan Law School, Shanghai Jiao Tong University, 420.

¹⁶¹ The Law of Master and Servant was a complex legislation in England and her colonies that related to case law that determined terms and conditions of individual contracts for hundreds of years. This system favored masters and contained penalties for servants only in case of breach of contract such as imprisonment. See Douglas Hay and Paul Craven Labour / Le Travail, "Master and Servant in England and the Empire: A Comparative Study", Canadian Committee on Labour History and Athabasca University Press, vol. 31 (Spring, 1993), 175-184.

¹⁶² Ahluwalia S.P.S.P, Legislative Framework: Need for Rlook, the Indian Journal of Industrial Relations, vol. 28, No.1, April 1990, 381-382.

1881 provided legal framework for working hours for a child of seven to twelve years to work for not more than nine hours a day.¹⁶³

In the first quarter of the 20th Century other laws, with little modifications, were introduced such as; the Factories Act 1922, the Mines Act 1922 and the Workmen's Compensation Act 1923 that was work place related legislation which dealt with rest period, working hours, female and child protection and health and safety of the workers in a work place.

2.6. POST-INDEPENDENCE PHASE

Pakistan inherited more than seventy enactments¹⁶⁴ (Act and Ordinances) and enacted almost ninety rules and regulations under these laws¹⁶⁵ in order to make industrial peace prevail in work place. Pakistan got minimal proportion of the Indian industry; only 9 per cent of the total industrial establishments, mostly located in urban areas with fewer industrial workers.¹⁶⁶ In a population of 75 million, almost 0.63 per cent of work force was engaged in industries.¹⁶⁷

¹⁶³ Yu Shu Hong –Malik Zia-ud-Din, “Analyzing the Labour Issues in Pakistan: A Historical Background of Labour Laws and Labour Unions”, Labour Law Issues, vol. 3, no. 2, 2017.

¹⁶⁴ Sabur Ghayur, “Freedom of Association and Right to Organize and Bargain Collectively: Current Situation and Recommendations for Labour Law Reforms in Pakistan”, International Trade Union Confederation –Asia Pacific (ITUC-AP), Cross Country Study on Labour Law Reforms, Feb-2010, Islamabad, 4.

¹⁶⁵ Furqan Mohamed, “Protecting Pakistani Labourers Post-Eighteenth Amendment: Recognizing Rights after the Devolution of Power”, Loyola University Chicago International Law Review, vol. 9, Issue.2 Spring/summer 2012, 266.

¹⁶⁶ Yu Shu Hong –Malik Zia-ud-Din, “Analyzing the Labour Issues in Pakistan: A Historical Background of Labour Laws and Labour Unions”, Labour Law Issues, vol. 3, no. 2, 2017.

¹⁶⁷ Ibid.

In this tough state of affairs, to lay down foundation of comprehensive legal framework for industrial life, strongly based on progressive legislation, Pakistan, inherited various industrial laws from the British India, among others; the Trade Union Act 1926,¹⁶⁸ Industrial Employment Standing Orders Act 1946,¹⁶⁹ Industrial Dispute Act 1947¹⁷⁰ and Factories Act 1934.¹⁷¹ These industrial relations-related laws, like most of other adopted laws had followed hereditary structure left by the British Crown. These laws provided a strong foundation for future industrial laws and making policies in this regard.¹⁷² Under these laws trade union activities were recognized legally for workers representation in all sectors except armed force and police.¹⁷³

2.6.1. CONSTITUTIONAL FRAMEWORK OF EER LEGISLATION

Labour provisions had been incorporated in all Pakistani Constitutions. In the Constitutions of 1956, 1962 and 1973, before 18th Constitutional Amendment 2010, labour legislation was a part of the CLL.¹⁷⁴

¹⁶⁸ Indian Trade Union Act of 1926 gave rights to the workers for formation and registration of trade unions and guaranteed unions' representation in a certain work place.

¹⁶⁹ The Industrial Employment Act described the process of recruitment, termination, punitive action and conditions for work and welfare of the employees.

¹⁷⁰ Industrial Dispute Act 1947 was promulgated for the permanent solution of disputes under specific rules and regulations.

¹⁷¹ Gillette Barker, RIAA, Labour Law in Pakistan, available at: <https://www.riabarkergillette.com/usa/wp-content/uploads/Labour-law-in-Pakistan.pdf>, (last accessed: 19 July, 2019).

¹⁷² Ahmad Iftikhar, "Labour and Employment Law: A Profile on Pakistan", 2, available at: https://wageindicator.org/documents/Labour_and_Employment_Law-A_Profile_on_Pakistan.pdf (last accessed 18th July, 2019).

¹⁷³ Ibid, 2.

¹⁷⁴ Yu Shu Hong –Malik Zia-ud-Din, "Analyzing the Labour Issues in Pakistan: A Historical Background of Labour Laws and Labour Unions", Labour Law Issues, vol. 3, no. 2, 2017.

The Constitution of Pakistan is comprised of various provisions that promote social and economic well-being of citizens along with equality before law and justice. Fundamental rights, such as security of livelihood, prohibition of bonded labour, eradication of slavery and the right of association have been incorporated in the constitution. The state has the basic responsibility not to make or implement any law that is inconsistent with the fundamental rights. Thus, the constitution affirms the convinced progress of labour legislation, which is conducive to change and to benefit the working class.¹⁷⁵

The current Constitution's Articles 141 and 142 confer power on the National and Provincial Assemblies to formulate any law on the matters incorporated in the Concurrent List. The provisions of legislation with regard to labour as provided in the Constitution of 1973 were reasonably similar to the provisions drafted in the erstwhile Constitutions of 1956 and 1962 of Pakistan. Rights and privileges provided to the working class have been given in the Part-I and Part-II.¹⁷⁶

After the devolution of labour, the CLL was abolished and the labour legislation became provincial subject. Despite the devolution by virtue of the 18th Amendment, there exist other provisions that relate to the fundamental rights of every citizen of Pakistan generally and with labourers particularly. The most relevant provision of the Constitution of Pakistan 1973 for working

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

class in order to safeguard their rights is Article 17 (1) that provides for freedom of association in the following words:

*“Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality”.*¹⁷⁷

The Constitution does not grant the right to form unions unconditionally that favours the state to create hurdles in exercising this Constitutional right with freedom.

2.6.2. DEVELOPMENT OF INDUSTRIAL LAWS IN PAKISTAN

Industrial relations legislation in Pakistan had been derived from the British master-servant notion based laws, most of them inherited by Pakistan soon after independence. Though it has gone through various developmental stages in military and civilian administrations depending upon the evolutionary factors such as; social, economic and political as well as global factors that affected legislation in that specific period.

EER jurisprudence in Pakistan can be traced to enactments of industrial laws specially the Industrial and Commercial Employment (Standing Orders) Ordinance, 1968 and the IRO, 1969.¹⁷⁸ Moreover, the legal framework that provided for development of industrial life at work place along with

¹⁷⁷ Art. 17 (1), the Constitution of the Islāmic Republic of Pakistan, 1973 as modified up to the 28th February, 2012, National Assembly of Pakistan, available at: http://www.na.gov.pk/uploads/documents/1333523681_951.pdf, (last accessed: 12th July 2019).

¹⁷⁸ Mahmood Abdul Ghani, Industrial Relations in Pakistan at a Crossroad, Pakistan Law House, 154.

ancillary reforms need to be discussed briefly from industrial relations perspective in five periods.

2.7. FIRST PERIOD: INDUSTRIAL LAW REFORMS 1949-68

Labour, in the early years of independence, was not government's priority due to minimal proportion of Indian industry Pakistan got in her share with less labour force.¹⁷⁹ However, with growth of industrialization trade unions were getting strength that paved way for industrial reforms.¹⁸⁰ The government arranged a tripartite Labour Conference in 1949 to show government interest in labour-related issues. The then prime minister of Pakistan Liaqat Ali Khan addressed the Conference and stated government's view in these words:

*"We must create conditions which are favorable to labour. My government will take all necessary steps to see labour gets his due share in all enterprises...labour must remember that interest and welfare of Pakistan comes first before any individual or class of individuals and he must not do anything which in any way weakens Pakistan. If Pakistan endures and prospers the problems that labour has can be solved"*¹⁸¹

Labour legislation prior to 1958 was focused on welfare of individual workers rather than tackling workers problems in unionized form which was one of the reasons that led to the introduction of new legislation in 1959.¹⁸²

¹⁷⁹ Yu Shu Hong -Malik Zia-ud-Din, "Analyzing the Labour Issues in Pakistan: A Historical Background of Labour Laws and Labour Unions", Labour Law Issues, vol.3, no. 2, 2017.

¹⁸⁰ Khalil, Zakaullah Khan, "A Profile of Trade Unionism and Industrial Relations in Pakistan", International Labour Organization (ILO), 35.

¹⁸¹ Government of Pakistan, Ministry of Law and Labour, First Pakistan Labour Conference, Proceedings, Karachi, 1949, 9-10.

¹⁸² The Government of Pakistan, due to the large scale of strikes, was compelled to announce a comprehensive Labour Policy in 1959 guided by the ILO's Conventions and Recommendations ratified by Pakistan.

2.7.1. LABOUR POLICIES OF 1955 AND 1959

Though Pakistan had no well-defined labour policy until after eight years of independence, however, the first ever attempt the government had made was establishment of a Tripartite Labour Conference in 1949 that approved a pre-partition five years action plan¹⁸³ with little modifications. This five years plan was termed, by some experts, as the first labour policy for the period 1949-1954.¹⁸⁴

Lack of just and sufficient legal framework for settlement of industrial disputes, industrial workers were on streets, resultantly, unrest and instability of industrial environment and strikes were order of the day. The government realized the gravity of the situation and introduced the first ever Labour Policy, after eight years of partition, on 15 August 1955.¹⁸⁵ The policy was announced officially by a union leader.¹⁸⁶

Since the newly born country had a poor industrial base, the objectives of the policy were to promote and encourage collective bargaining along with

¹⁸³ In 1946 a labour conference unanimously approved a five-year program of action that laid down legislative and administrative measures in order to improve working environment and living standards of the industrial labour. Under the proposed program, the Federal and Provincial Governments were supposed to take concrete steps such as amendments to the Workmen's Compensation Act, 1923; Factories Act, 1934, and the Mines Act, 1923 along with new legislation on minimum wages, social security, plantations, shops, commercial establishments, transport services, streamlining machinery of inspection, conciliation and adjudication, provisions of medical and housing services, establishing such institutions as employment exchanges and the labour bureau, and the workmen's state insurance.

¹⁸⁴ Khalil, Zakaullah Khan, "A Profile of Trade Unionism and Industrial Relations in Pakistan", International Labour Organization (ILO), 35-36.

¹⁸⁵ Christopher Candland, "Labour Democratization and Development in India and Pakistan", Routledge 270 Madison Ave New York, NY 10016.

¹⁸⁶ Abdul Malik, a union leader from East Pakistan, had been made Minister for Labour who had drafted and presented the labour policy.

raising living standards of industrial workers. Healthy EER was viewed as a prerequisite for industrial harmony and increased productivity.¹⁸⁷

The very first Labour Policy had recommended the some crucial changes to be undertaken in the then existing industrial relations legal framework. In order to settle industrial disputes through amicable means strategies such as joint consultation, mediation, conciliation and arbitration were introduced.¹⁸⁸

It was proposed to incorporate amendments to the colonial era's Trade Union Act 1926 and the Industrial Disputes Act, 1947. Establishment of an effective industrial inspection system was considered a must in order to keep an eye on health and safety conditions inside industrial establishments so that to ensure stabilized wages in work place.¹⁸⁹

A strict law was introduced by the then Military government when The Industrial Dispute Act of 1947 was replaced with the Industrial Dispute Ordinance, 1959 and crucial changes were added to control the prevailing industrial unrest. Employers were authorized to fire workers and even their unions' representatives in case they go on strike. For resolution of industrial

¹⁸⁷ Ghayur, Sabur, 2009, "Evolution of the Industrial System in Pakistan", available at: <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1079&context=intl> (last accessed: 26 June, 2019), 11.

¹⁸⁸ Mahmood Abdul Ghani, Industrial Relations in Pakistan at a Crossroad, Pakistan Law House, 231.

¹⁸⁹ Ghayur, Sabur, 2009, "Evolution of the Industrial System in Pakistan", available at: <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1079&context=intl> (last accessed: 26 June, 2019), 11.

dispute no forum of adjudication was available, however, it was discretion of an employer could refer a dispute for settlement if he wished so.¹⁹⁰

In the light of the ILO's Conventions and recommendations ratified by Pakistan, the second labour policy was announced in 1959 with the following salient features:

- i. To legislate for labour in the light of the ILO's labour standards.¹⁹¹
- ii. To promote industrial peace, healthy unionism has to be promoted.
- iii. To increase productivity, there is a dire need of sound and healthy EER.
- iv. Constitutional amicable means are to be used in order to settle industrial disputes such as; joint consultation, conciliation, voluntary arbitration, mediation and adjudication.
- v. Workers' needs are to be given due weightage such as safety and health, education, housing and fair wages.
- vi. Important statistics regarding workers has to be collected for research purposes.
- vii. In the fields of labour and employment scientific and technical assistance will highly be appreciated.¹⁹²

¹⁹⁰ Khalil, Zakaullah Khan, "A Profile of Trade Unionism and Industrial Relations in Pakistan", International Labour Organization (ILO), 37.

¹⁹¹ Ghayur, Sabur, 2009, "Evolution of the Industrial Relations System in Pakistan", available at: <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1079&context=intl> (last accessed: 26 June, 2019), 11.

¹⁹² Khalil, Zakaullah Khan, "A Profile of Trade Unionism and Industrial Relations in Pakistan", International Labour Organization (ILO), 37-39.

viii. Public and private sector industries to take joint responsibility for labour social welfare.¹⁹³

The proposed reforms in the Industrial relations could not bear fruit as the government had failed to implement the policy in letter and spirit, however, some important legislation had passed notably the West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968 and the Companies' Profits (Workers' Participation) Act, 1968.¹⁹⁴

It is worth mentioning that labour legislation before 1958 aimed welfare of individual workers rather than unions as their representatives. There was no proper legal forum to control victimization of workers and unions representatives.¹⁹⁵

2.7.2. INDUSTRIAL AND COMMERCIAL EMPLOYMENT (STANDING ORDERS) ORDINANCE, 1968

Industrial Employment (Standing Orders) Act 1946,¹⁹⁶ which required employers to provide their employees with clear terms and conditions of employment according to the items set down in a Schedule to the Act and certified by the relevant authority.¹⁹⁷ It was extended to the whole of Pakistan

¹⁹³ Mahmood Abdul Ghani, *Industrial Relations in Pakistan at a Crossroad*, Pakistan Law House, 231.

¹⁹⁴ Khalil, Zakaullah Khan, "A Profile of Trade Unionism and Industrial Relations in Pakistan", 39.

¹⁹⁵ Walter Galenson, *Labour in Developing Economics*, Institute of Industrial Relations University of California, Berkeley and Los Angeles 1963, University of California Press, 61.

¹⁹⁶ The Ordinance aimed to amend and consolidate the law relating to industrial employment in (West) Pakistan.

¹⁹⁷ Richard Mitchel-Petra Mahy-Peter G. Gahan, "The Evolution of Labour Law in India: An Overview and Commentary on Regulatory Objectives and Development", *Asian Journal of Law and Society*, 1. 2014, Cambridge University Press and KoGuan Law School, Shanghai Jiao Tong University, 419.

including the Tribal Areas.¹⁹⁸ The Ordinance was amended and implemented by the Federal Government in 1960. Prior to this Act, employers were required to frame their own standing orders which are to be followed while in the events of hiring and firing. The Act was extended to specified industrial and commercial establishments and certain classes of workers¹⁹⁹ as mentioned in the Act.²⁰⁰ It was extended as an obligatory law to all contractors by the fifth labour policy in 1972.²⁰¹

The scheme of this Ordinance is very different from the Act of 1946, as instead of rules and sections, a schedule of standing orders has been attached.²⁰²

2.8. SECOND PERIOD: INDUSTRIAL LAW REFORMS 1969-77

The new military government, after taking over the power, felt the grievances of the vulnerable labour segment and took historical steps in this regard. The pivotal role played by labour class got recognition from the new government by taking various issues related to labour force and to industrial life.

Employer-employee relations needed to be regularized in a way to ensure

¹⁹⁸ The Tribal Areas, after amendment to the Art.246 and abolition of Art.247, no more exist after its merger with the Province of Khyber Pakhtunkhwa by virtue of 25th Constitutional Amendment, 2018.

¹⁹⁹ Standing Order. 1 with Sec. 2 (g) divided industrial workers into six categories i.e., (i) Permanent (ii) probationers (iii) badlis (iv) temporary (v) apprentices and (iv) contract workers.

²⁰⁰ Sec. 1 sub. Sec. (4) lays down that the Ordinance applies to every industrial and commercial establishment where twenty or more workers are employed on any day during the preceding twelve months.

²⁰¹ Khalil, Zakaullah Khan, "A Profile of Trade Unionism and Industrial Relations in Pakistan", International Labour Organization (ILO), 41.

²⁰² Sec.2 (f) of the Ordinance explains important employment matters such as: (i) classification of workmen (ii) publication of working hours, holidays, payment of wages (iii) termination of service along with an experience certificate.

and promote healthy and peaceful industrial environment on one hand and to guarantee quality and quantity of productivity. They are going to be discussed in coming lines.

2.8.1. INDUSTRIAL RELATIONS ORDINANCE 1969 ²⁰³

The debut of the very first law that dealt with employer-employee relations in Pakistani industries was, perhaps, the Industrial Disputes Act of 1947, one of the pre-partition inherited Acts. The Act, to a limited extent, recognized workers' rights other than those conferred to them by the terms and conditions of employment contract. This Act provided legal forum till the Industrial Disputes Ordinance 1959 repealed it. The ordinance was further repealed and was passed with name of the Industrial Relation Ordinance in 1969.

The Ordinance to great extent regularized employer-employee relations in order to guarantee industrial peace and tranquility for the purpose of achieving great productivity. It was under this Ordinance that unionism was recognized for the first time as a right for both employer and employee. Consequently, the right of strike and lock out got restored in the event of failure of bilateral negotiations for settlement of industrial dispute.²⁰⁴

Maximum protection to trade union leaders was ensured in case of

²⁰³ The Ordinance was aimed to amend, consolidate and rationalize the law relating to formation of trade unions, regulation and improvement of relations between employers and workmen and avoidance and settlement of any differences or disputes arising between them.

²⁰⁴ Furqan Mohamed, "Protecting Pakistani Labourers Post-Eighteenth Amendment: Recognizing Rights after the Devolution of Power", Loyola University Chicago International Law Review, vol. 9, Issue.2 Spring/summer 2012, 274.

bargaining process. Labour appellate courts were established to try appeals against the decisions of industrial courts. The previously inserted problematic clause of “*public interest*”²⁰⁵ was also omitted.²⁰⁶

3.8.2. LABOUR POLICIES OF 1969 AND 1972

The interim government²⁰⁷ arranged a tripartite labour conference in May 1969 where it admitted failures of the past governments to heal grievances of the labour force. Subsequently, the fourth industrial relations policy was announced on 05 July, 1969. The government stance was mentioned in these words: “The Government was aware that the previous labour policies had failed because adequate machinery for their implementation had not existed. Every step would therefore be taken to ensure that this Policy was supported by the necessary machinery for its implementation”.²⁰⁸

The objective of the policy was to create an environment in which both the employers and the workers could work together to achieve greater productivity. It further attempted to allow the free exercise of freedom of association for all workers and to encourage the growth of trade unions. Specific measures concerning trade unions, conciliation and arbitration,

²⁰⁵ In the previously revised Industrial Disputes Act (IDA) 1968, the Federal and Provincial governments were authorized to prohibit strikes in any industry by declaring that strike against public interest and against the national interest. By introduction of the IRO 1969 this clause was omitted.

²⁰⁶ Yu Shu Hong –Malik Zia-ud-Din, “Analyzing the Labour Issues in Pakistan: A Historical Background of Labour Laws and Labour Unions”, Labour Law Issues, vol. 3, no. 2, 2017.

²⁰⁷ After Ayub Khan resigned from the government, Yahya Khan stepped into power in 1969 as a Martial Law Administrator of the government till the first ever elections of 1971.

²⁰⁸ Khalil, Zakaullah Khan, “A Profile of Trade Unionism and Industrial Relations in Pakistan”, 39.

settlement of disputes, industrial relations, collective bargaining in the public sector, minimum wages, workers' welfare fund, workers' housing, occupational health and safety, and similar matters were stressed in the implementation steps.

The 1969 Labour Policy included some lofty principles. It aimed at overcoming past obstacles. The labour policy's progressive targets for realizing a "fair share in the economic gains of the country" and "equitable distribution" were never realized.²⁰⁹

This Labour Policy, like the previous one, failed because of inadequate enforcement. A negative, but perhaps intended result of this policy was an explosion in the number of registered trade unions which grew from 1,500 in 1969 to 8,600 seven years later. Membership in the labour movement, however, did not expand at the same rate and the workers became increasingly fragmented and powerless. The important achievements of this regime were the promulgation of the Industrial Relations Ordinance, 1969 on 23 November, 1969 and the provision of Rupees. 100 million for workers' housing schemes.²¹⁰

As soon the than prime minister²¹¹ of Pakistan stepped into power in December 1971 who won the majority in the very first elections with a pro-

²⁰⁹ Ibid, 40.

²¹⁰ Ibid, 39-40.

²¹¹ Zulfikar Ali Bhutto assumed power as a civilian Martial Law administrator as his party; the Pakistan Peoples' Party, had got majority in election in the West Pakistan.

labour manifesto, he announced the fifth industrial relations policy on 10 February 1972.

The policy introduced specifically introduced a system where workers participation was recognized in the management of industry. One of the features of the policy was appointment of auditors through collective bargaining. The auditors were to be paid by employers to audit their company accounts in certain cases.²¹² It was proposed that shop stewards as representative of workers shall be appointed in each factory. In the event of appeal to the Labour Court, the court was bound to come up with decisions in twenty days for individual cases. A forum was established with name of Works Council to deal with all matters that can go before the Labour Courts for appeal. Either workers or employers permitted to take matters to the Labour Court for adjudication. In case no resolution of industrial dispute could be reached three days strike notice was required to be considered sufficient. An employer was required in the event of retrenchment and termination order to state reasons in writing accordingly.²¹³

Another important step was taken when two important enactments; the Payment of Wages Act 1936 and the West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance 1968 were made

²¹² Ghayur, Sabur, 2009, "Evolution of the Industrial Relations System in Pakistan", available at: <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1079&context=intl>, (last accessed: June 26 2019), 13.

²¹³ Yu Shu Hong, Malik Zia-ud-Din, "Analyzing the Labour Issues in Pakistan: A Historical Background of Labour Laws and Labour Unions", Labour Law Issues, vol.3, no. 2, 2017.

applicable to all contractors. Under the policy it was suggested that free education up to matriculation will be provided to one child per-worker by the employer. Moreover, introduction of old age pension for workers was introduced. It was held that safety measures and workmen's compensation against death and injury laws shall be revised. Likewise, a quasi-judicial body was appointed to promote genuine trade unionism to help in formation of unions and federations. Wages were to be linked with prices but no immediate increase shall be expected in cash wages.²¹⁴

2.9. THIRD PERIOD: INDUSTRIAL LAW REFORMS 1999-2007

Since 1972 no concrete step had been taken to rationalize the existing industrial relations legislation in accordance with new socio-economic conditions of the country. To achieve this goal the military regime took various steps in this regard and subsequently drafted a new Labour Policy and repealed the existing IRO, 1969.

2.9.1. LABOUR POLICY, 2002²¹⁵

The labour policy of 2002 is considered to have reflected and greatly influenced by the rights-based framework of the Constitution of Pakistan and International Labour Standards as drafted by the ILO Conventions ratified by Pakistan. The government was committed to resolve and end work place

²¹⁴ Khalil, Zakauallah Khan, "A Profile of Trade Unionism and Industrial Relations in Pakistan", International Labour Organization (ILO), 40-41.

²¹⁵ It was the fourth labour policy since creation of Pakistan that was announced in Musharraf regime.

discrimination based on gender and promote gender balance in all fields in line with our constitutional obligations as well as under international instruments.

The salient features of the policy are as follows;

- i. Facilitation of women participation in the job market through improvement in the work environment.
- ii. Development of a code of conduct for gender justice at the work place.
- iii. Implementation of the ILO Convention on Equal Remuneration for Work of Equal Value for Men and Women Workers, which Pakistan ratified in October 2001.²¹⁶
- iv. Recognition, importance and role of human resource development in the context of skill development of workers.
- v. Promotion of public-private sector cooperation through employer-led skill development councils in all the provinces.
- vi. Decentralization of the Workers Welfare Fund and introduction of Self-Assessment Scheme in Employees Old Age Benefit Institution (EOBI) and Social Security Institutions.
- vii. The process of consolidation, simplification and rationalization of labour laws into six categories.²¹⁷

²¹⁶ Khalil, Zakaullah Khan, "A Profile of Trade Unionism and Industrial Relations in Pakistan", 42.

²¹⁷ Ibid, these six heads are: (i) Industrial relations (ii) Employment conditions (iii) Wages (iv) Human resource development (v) Occupational safety and health and (vi) Labour welfare.

2.9.2. REPEAL OF THE INDUSTRIAL RELATIONS ORDINANCE, 1969

The primary legislation that keeps peace and tranquility and breathes life into the healthy employer-employee relations is the IRO, 1969 which was modified and promulgated in October, 2002. The primary structures of the IRO, 1969 and the IRO, 2002 are matching while some important modifications were introduced by the later.²¹⁸

The scheme of employees' participation in management was made simplified instead of a complicated one in the previous law.²¹⁹ The National Industrial Relations Commission (NIRC) was restructured and its role to promote healthy trade unionism was strengthened. The Labour Appellate Tribunal was abolished as appeals were to be referred to the High Courts in case of appeal against labour court decision.²²⁰

The most problematic clause no (52) termed as the "public interest" clause under the former IRO 1969 that provided protection to certain classes of workers was quashed away. Volume of penalties for wrongs were relaxed²²¹ such as exclusion of the imprisonment clause for employers who was found guilty of misconduct. Physical punishments were reduced to fines. An employer was not legally bound to reinstate the wrongfully terminated

²¹⁸ Zaheer Baig, Employer-Employee Relationship in Pakistan, available at: <file:///C:/Users/HP/Downloads/25-53-1-SM.pdf>, (last accessed: 26 August, 2019).

²¹⁹ Sec.24, IRO, 2002.

²²⁰ Ibid, Sec. 48.

²²¹ Kamal A. Munir, Natalya Naqvi and Adaner Usmani, The Abject Condition of Labour in Pakistan, ILWCH, 87, Spring 2015, 178.

workers. This new clause encouraged the employers to sack the workers with limited consequences. It was proposed that it is compulsory for a CBA to affiliate itself with nationwide federations that are already registered with the NIRC.²²² This affiliation with nationwide federations must be made within two months of award of status of CBA.²²³

2.10. FIFTH PERIOD: INDUSTRIAL LAW REFORMS 2007-10

In order to give a sigh of relief to the vulnerable working class, the government took two important steps to bring reforms to the existing labour laws; repeal of the IRO, 2002 with IRO, 2008 and drafting a new Labour Policy of 2010. Both reforms have been discussed in the coming lines.

2.10.1. IMPLEMENTATION OF THE IRA, 2008

IRA, 2008 was promulgated by repealing the IRO 2002. It was a sunset law by virtue of Section 87 (3).²²⁴ The Act was criticized for being against the interests of the working class as under the IRA, 2008 an estimated 80 percent of the workforce did not receive the protections of the Industrial laws.²²⁵ However, the Act brought reforms to some of the core issues that were created by the previous IRO, 2002. Some of the salient features of this Act have been hereby discussed briefly:

²²² Sec. 3 (d), IRO, 2002.

²²³ Yu Shu Hong –Malik Zia-ud-Din, “Analyzing the Labour Issues in Pakistan: A Historical Background of Labour Laws and Labour Unions”, Labour Law Issues, vol. 3, no. 2, 2017.

²²⁴ Sec. 87(3) of the IRA, 2008 lays down that his Act shall, unless repealed earlier, stand repealed on 30th April, 2010.

²²⁵ Kamal A. Munir, Natalya Naqvi and Adaner Usmani, The Abject Condition of Labour in Pakistan, journal of International Labour and Working-class History (ILWCH), 87, spring, 2015, 178.

- i. Re-establishment of Labour Appellate Courts that provided the aggrieved party to an industrial dispute to go for a speedy disposal of case.
- ii. The Labour Court was now to be presided over by a District Judge or Additional District Judge.
- iii. The discretion of the Labour Court for awarding compensation in lieu of reinstatement in service of a worker has been taken away.
- iv. The abolishment of the 'Public Interest' clause incorporated in the IRO, 2002 has been omitted.
- v. Appeal against the order/ decision of the Labour Court would, now, lie before the Labour Appellate Tribunal instead of the High Court.
- vi. Punishment of imprisonment for defaulters quashed away instead imposition of fine system was restored.
- vii. The provisions for affiliation of a CBA with a national level workers' federation was now made an act of voluntary nature.²²⁶

2.10.2. LABOUR POLICY 2010

The government showed its commitment to create an environment for the application of universal principles of equality and social justice as well as the constitutional and international rights of workers. The rights and commitment based approach to labour issues is being followed also in

²²⁶ Sec. 3(d) of the previous IRO, 2002 required all industry-wise Collective Bargaining Agents (CBAs) to get themselves registered with a national level federation soon after their registration with the newly established National Industrial Relations Commission (NIRC).

accordance with the Constitutional provisions of the Islamic Republic of Pakistan. In order to fulfill the obligations under the Constitution as well as under the international covenants with regard to wellbeing and socio-economic protection of the workers, the announcement of the new policy of the Government has become inevitable.²²⁷

Important objectives of this Labour Policy were as under:

- i. Protection and promotion of Workers' right to form unions.
- ii. Equitable adjustment of rights between workers and employers.
- iii. Ensuring job security and expeditious settlement of workers grievances.
- iv. Promotion of healthy Industrial relations environment for enhancing the labour productivity.
- v. Fresh job opportunities and facilities for proper recruitment to be ensured to the job seekers.
- vi. Social security and social insurance schemes to be further strengthened.²²⁸
- vii. Just and humane conditions of work and elimination of forced labour.²²⁹

In order to have better understanding of the bulk of labour laws it was felt for the first time by the drafters of the Labour Policy 2010 that these laws need to be classified and rationalized comprehensively into five broad

²²⁷ Government of Pakistan Labour Policy 2010, available at: <http://www.eobi.gov.pk/announcement/labour+poilcy+2010.pdf>, (last accessed: 25 August, 2019).

²²⁸ Mahmood Abdul Ghani, Industrial Relations in Pakistan at a Crossroad, Pakistan Law House, 231.

²²⁹ Government of Pakistan Labour Policy 2010, 3, available at: <http://www.eobi.gov.pk/announcement/labour+poilcy+2010.pdf>, (last accessed: 25 August, 2019).

categories. It was proposed that these laws will be classified to five broad heads such as: industrial relations, employment and service conditions, occupational safety and health, human resources development and labour welfare and social security.²³⁰

2.11. THE ILO ROLE IN DEVELOPMENT OF IRS LEGISLATION IN PAKISTAN

The ILO, as the first specialized United Nations Agency, has greatly influenced EER around the globe. The birth of the ILO had ensured governments' intervention in a more dynamic form with several member-nations mutually enacted labour laws including industrial relations legislation.²³¹ These ILO Conventions are internationally recognized as labour standards and guidelines for labour legislation. Pakistan is also a signatory to number of ILO Conventions²³² that are taken into consideration, theoretically if not practically, while enacting labour laws and policies.

Two of the core ILO Conventions related to IRs to which Pakistan is a signatory, therefore, have to be taken into consideration in the following lines.

²³⁰ Mahmood Abdul Ghani, Industrial Relations in Pakistan at a Crossroad, Pakistan Law House, 225.

²³¹ *ibid*, 151.

²³² Pakistan has ratified most of the ILO's Conventions which include seven of the eight fundamental conventions encompassing freedom of association, the abolition of forced labour, equality at work, the elimination of child labour, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Anti-Slavery Convention of the UN. Government of Pakistan Labour Policy 2010, 11, available at: <http://www.eobi.gov.pk/announcement/labour+poilcy+2010.pdf>, (last accessed: 25 August, 2019).

2.11.1. The ILO Conventions 87 and 98

The laws on Industrial Relations Acts (at Federal and Provincial levels) that have been so far enacted are deemed unable to produce the desired results in terms of compliance to the ILO Convention no.87 (freedom of association) along with the Convention no.98 (Collective Bargaining), both ratified by Pakistan. Some of the issues have also been pointed out by the ILO's Committee of Experts on the Application of Conventions and Recommendations. Consequently, the trade unions' activities are not getting due appreciation in Pakistani society that left the workers in the status quo; in the oppressive and abject state.²³³

Despite this abject state of affairs no serious thought has been given to the serious issues of the working class that need restructuring of trade unions to make the EER system workable in the light of the ILO's core Conventions no.87 and 98. Coverage under Industrial Relations Laws is denied to agriculture workers in three provinces (Punjab, Khyber Pakhtunkhwa and Gilgit Baltistan) and the state of Azad Jammu and Kashmir. The Federal Government in Islamabad Capital Territory being mostly urban may also think of extending its IRA to agriculture workers in its peripheral areas.²³⁴

²³³ Khalil, Zakaullah Khan, "A Profile of Trade Unionism and Industrial Relations in Pakistan", International Labour Organization (ILO), 46.

²³⁴ Ibid, 47.

2.12. CONCLUSION

The pre-partition era's EER laws were inherited by Pakistan provisionally, though, it could not see any substantial change until the ICEO of 1968 and the IRO 1969 were enforced. Pakistan's industrial relations regime has been considered progressive as various factors have got involved in its development that compelled the ruling class to implement industrial laws along with labour policies. In order to incorporate reforms to the current industrial relations system in accordance with changing socio-economic conditions of the country, the IRO, 1969 got repealed twice in 2002 and 2008 accordingly. The IRO, 2008 was a sunset law as its life time was till 30th April, 2010. Surprisingly, the historical 18th Amendment was passed on 26th April, 2010 that abolished the CLL and devolved Labour legislation to the provinces. There prevailed a legal chaos with expiration of the IRO, 2008 until the provinces enacted their own IRAs. Before devolution, various labour policies were announced and reforms have been introduced to the then existing industrial relations regime but in vain. The main cause of failure was the government's lack of interest and ignorance of the working class in respect of their rights. As a part of the world community Pakistan has ratified the core Conventions of the ILO and incorporated them to the EER laws but still the tranquility to the industrial environment could not be guaranteed.

CHAPTER THREE

ISLAMIC VIEW OF EMPLOYER-EMPLOYEE RELATIONSHIP

3.1. INTRODUCTION

The employer-employee relationship (EER) legislation in *Sharī'ah* has been derived from the primary and secondary sources of Islamic law. In case of unprecedented issues the doctrines of *Siyāsah Shar'iyah*, *Maslaha Mursala*, *'Urf* and *Sadd add-dhar'āi* and *Sharī'ah* maxims along with general principles of *Al-Adl* and *Al-Ihsān* are used as legislative tools for drafting new laws.

The EER comes into existence with conclusion of the employment contract (*Ijārah Al-Ashkhās*) where services of an employee (*Ajeer*) are hired for certain period of time against known wages. The contract of *Ijārah* (in all its forms) is a binding contract that cannot be revoked unilaterally. Terms and conditions of the contract of employment shall be known to both the contracting parties. The parties are required to fulfill their contractual promises accordingly.

It has been observed that EER's regime in *Sharī'ah* is, mostly, ethical rather than legal one as a general rule Islam favours free-market economy where state's role is that of a supervisor. However, in certain exceptional circumstances, the state can interfere in market affairs. Likewise, the rule of *Taseer* (fixation of prices of certain commodities) can also be extended to the fixation of minimum wages for workers.

3.2. IMPORTANCE OF EMPLOYER-EMPLOYEE RELATIONSHIP IN SHARĪ'AH

A healthy employer-employee relationship is the key to success for a peaceful work place.²³⁵ As an investor employer is always keen to go for much and much profit and employee also wants to lead decent living along with respect. In fact, both of them are thinking positively in case their goal is aimed at dedicating themselves to the industry in best possible way. The today's product-based living shows much more dependence on machines as well as on the working class as behind every product there are workers, an important and integral part of production.²³⁶

By realizing workers' contribution towards the society, *Sharī'ah* stresses upon worker-friendly environment based on both legal as well as ethical grounds. Governments, around the globe, are introducing reforms to their existing labour laws in accordance with the socio-economic situation of their respective countries by following the ILO's Conventions to uphold working class's living standard.²³⁷ Peaceful and productive environment in work place is, thus, the primary goal of labour legislation, which is achievable only when EER is based on cooperation, mutual respect and human treatment and the

²³⁵ Subramanian, Kalpathy (2017), Employer Employee Relationship and Impact on Organization Structure and Strategy, International Journal of Innovative Trends in Engineering (IJITE), 27.43, 2017, 42.

²³⁶ Afzal-ur-Rahman, Economic Doctrines of Islam, 18.

²³⁷ Since 1919, the ILO has adopted more than 180 Conventions and 190 Recommendations covering almost all aspects of workers' employment laws, "Briefing Paper No.40 (June 2011), strengthening democracy and democratic institutions in Pakistan", Pakistan Institute of Legislative Development and Transparency (PILDAT) Lahore, ISBN. 978-969-558-210-7,12.

workers are not regarded as a commodity²³⁸ but partners and contributors towards the finality of the products.

Keeping in view the importance of employer-employee's relationship, *Shari'ah* emphasizes on making both employer and employee as a strong unit. Therefore, it has based this relationship on vary solid basis of humanity, brotherhood, sympathy, cooperation, equity, willingness and the prevailing customs.²³⁹

3.3. ISLAMIC STATE'S ROLE FOR REGULATING MARKET AFFAIRS

Being the care taker and custodian of its subjects, it is among the priorities of an Islamic State ²⁴⁰ to ensure preservation of objectives of *Shari'ah* (*Maqāsid Al-Shari'ah*) ²⁴¹ in a Muslim society. By virtue of these objectives rights and wellbeing of the subjects are protected in individual as well as collective capacities in order to uphold Islamic system and culture.²⁴² The logic behind the state's role is protection of public interest under the shadow of '*Al-'adal* and *Al-maslaha* (justice and public interest).²⁴³

In ordinary circumstances, it is not preferable for state to intervene in market affairs though under certain exceptional circumstances the state is bound to

²³⁸ Walter E. Oberrer and others, *Labour law Collective Bargaining in a Free Society*, West Publishing Co. St. Paul, MINN., 1986, Ed. 3rd, 3.

²³⁹ Al-Zuhaili, Wahba, *Al-Fiqh Al-Islāmi Wa Adillatuhu*, Dār-ul-Fikr, Beirut, vol. 4, 70.

²⁴⁰ Saheeh Al-Bukhāri, Ch. Al-Murāja' Al-Riayyah fi bayt Al-Zawjiyah, Hadith no. 4826.

²⁴¹ Objectives of *Shari'ah* are ascertained through *Masāleh* (plural of *Maslaha*) which include: Necessities, comforts and luxuries. Necessities are further extended to protection of religion, life, intellect, family and wealth. (Al-Zuhaili, Wahba "*Al-Fiqh-al-Islāmi Wa Adillatuhu*, Dār-ul-Fikr, vol.9, 412) .

²⁴² Ibid, 413.

²⁴³ Fathi-i-uduraini , *Al-Haq wa Madā Sultān Al-Dawlah fi Taqyeedihi*, 110.

play its supervisory role by administering market for the preservation of greater cause; the society's interest.²⁴⁴

In fact drafting law and rules themselves are not considered goal of a legal system but there are always objectives behind the rules that mostly serve that respective purpose such as preservation of public interest.²⁴⁵ Freedom to individuals in economic activities has been granted with the condition that it shall not be violative of the fundamental rights and interests of other fellow society men. In case the public interest was in danger in situations like monopoly, fraud, ambiguity in transactions and gambling. In case the state realized that there seem no signs of improvement as far as the behavior of the stake holders in the affairs of market is concerned, it shall step down so that harm shall not be inflicted to the public interest.²⁴⁶

To regulate market affairs generally and the major dispute-arising issue of fixation of fair wages particularly, the state may establish an authority to determine fair wages for employees keeping in view protection of the interests of both employer and employee pertaining to their respective life style and welfare.²⁴⁷ The state by virtue of its supervisory role over market affairs, is authorized to resort for reformatory approach otherwise it may intervene in the personal matters of the subjects. It may restrict their freedom

²⁴⁴ Ibid.

²⁴⁵ Ibid, 214.

²⁴⁶ Hussain Shahātah, *Ilāj Mushkila Al-Khalal baina Al-ujoor wa Al-As'ār fi Al-Manhaj Al-Iqtisād Al-Islāmi*, available at: <http://www.darelmashora.com>, (last accessed: 05 April, 2018).

²⁴⁷ Abu Zuhrah, *Kitāb Al-Takāful*, 56.

and rights as well as to declare something unlawful which is otherwise lawful, one of such cases is prevention from hoarding and forceful fixation of prices of commodities without the consent of the hoarder.²⁴⁸

3.3.1. OPINIONS OF *FUQAHĀ*

Scrutiny of the Islamic literature reveals that fixation of wages had not taken place throughout the Islamic history because wages in an Islamic economy were to be fixed²⁴⁹ based on the terms of employment contract. Moreover, customary principles pertaining to multiple professions would be taken into account along with other Islamic principles of contract such as refraining from uncertainty in specification of the amount of wages in the contract of *Ijārah Al-āmāl* (contract for hiring of services) and knowledge of worker regarding his wages.²⁵⁰

Ibn-e-Taimiya, among the Islamic scholars, holds the view that interference of State is appreciated in regulating market affairs in certain exceptional circumstances to prevent monopoly and other injustices. He defines monopolist while saying: “The monopolist is a person who buys food items of daily usage on the intention to hoard them so that they could be sold when there is raise in the price of the commodities. He is, thus, considered guilty of

²⁴⁸ Fathi-i-uduraini , Al-Haq wa Madā Sultān Al-Dawlah fi Taqyeedihi, 113.

²⁴⁹ Tausif Azad, Appraisal of the Status on Research on Labur Economics in the Islāmic Framework, 209.

²⁵⁰ Hussain Shahātah, Ilāj Mushkila Al-Khalal baina Al-ujoor wa Al-As’ār fi Al-Manhaj Al-Iqtisād Al-Islāmi, available at: <http://www.darelmashora.com/Default.aspx?DepartmentID=10>, (last visited 8 July, 2018).

committing injustice to the consumers. The ruler of the state in this case is entitled not just to prevent the culprits from hoarding but to compel them on selling the same to the needy.²⁵¹

3.4. EMPLOYER-EMPLOYEE RELATIONSHIP (EER) IN EARLIER ISLAMIC PERIOD

Market practices that existed in the Prophet's reign and were not in contradiction with *Shari'ah*, stood validated as people were in dire need to them in satisfying day-to-day life essentials. In relation to the EER, the contract of *Ijārah Al-Ashkhās* was among these practices which was not just legalized but its validity was explained further by the Prophet (SAW) and the companions.

The best example, perhaps, in regard to the terms of employment contract has been found in the Holy Qur'ān that was concluded between the two prophets, Musā and Sho'aib (AS). The following terms and conditions have been found to have been agreed upon by the contracting parties:

- a. Offer of Sho'aib (AS) on the proposal of his daughter for hiring services of Musā (AS).
- b. Prompt response by Musā (AS) in form of acceptance.
- c. Specification of the subject matter of the contract of employment i.e. taking care of sheep.

²⁵¹ Ibid, 2-3.

- d. Remuneration and duration of the assigned task have been clearly decided,
- e. Upholding of the promises by the parties in the light of the employment contract that has been mentioned in the subsequent ayah that says: “when Moses had satisfied the agreed upon term (of employment) ...”²⁵²

3.4.1. EER IN THE PERIOD OF PROPHET (SAW) AND THE COMPANIONS

EER emerges out from the contract of employment (*Ijārah Al-Ashkhās*) which was validated unanimously by the Prophet (SAW) and the Companions, by their conduct, as they themselves practiced it. The Hanafi renowned Scholar Imām Sarakhsi, while declaring the lawfulness of the contract of *Ijārah* (in its multiple forms) in the Prophet (SAW) and the Companions era writes: “The contract and dealings practiced before Islam are valid practices for us also in the absence of any text disapproving them. Muhammad (SAW) was sent as a Prophet and he saw the people practicing *Ijārah* and approved that practice”.²⁵³

The contract of *Ijārah Al-Ashkhās* is a significant part of Islamic Law of transactions that has been derived from the primary and secondary sources of *Shari’ah*. The best example in this respect has been mentioned in the Holy Qur’ān in the story of *Musā* (AS) when the prophet *Sho’aib* (AS) wished to

²⁵² Ibid, 10.

²⁵³ Al-Sarakhsi, Al-Mabsūt, Dār-ul-M’arifah, Beirut, vol. 15, 74.

hire his services in turn to marrying one of his daughters. They agreed upon in these words:

"... أَنْ تَأْجُرَنِي ثَمَانِي حَجَّجَ فَإِنْ أَتَمَمْتَ عَشْرًا فَمِنْ عِنْدِكَ..."

"...on condition that you serve me for eight years; but if you complete ten years..."²⁵⁴

While in case of hiring nursing services for infants and describing their reward for feeding thereto Qur'an says:

"فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أَجُورَهُنَّ"

"And if they nurse your infant, give them their payment".²⁵⁵

There are various traditions of the prophet (SAW) that validate *Ijārah*. A tradition of the prophet (SAW) says:

"أَعْطُوا الْأَجِيرَ أَجْرَهُ، قَبْلَ أَنْ يَجِفَّ عَرَقُهُ"

"Make payment of a wage earner before his sweat dries up".²⁵⁶

In other place, Abu Hurairah (RA) narrates that the prophet (SAW) once said:

"مَا بَعَثَ اللَّهُ نَبِيًّا إِلَّا رَعَى الْغَنَمَ، فَقَالَ أَصْحَابُهُ: وَأَنْتَ؟ فَقَالَ: نَعَمْ، كُنْتُ أَرْعَاهَا عَلَى قَرَائِطٍ لِأَهْلِ مَكَّةَ"

"Every prophet used to gaze sheep, the companions asked: and you? He replied: I too used to gaze for Makkans on wages".²⁵⁷

Abū Saeed (RA) reported that the Holy Prophet (SAW) has said:

"إِذَا اسْتَأْجَرْتَ أَجِيرًا فَأَعْلِمْهُ أَجْرَهُ"

"When you hire a worker let him know his due wages".²⁵⁸

²⁵⁴ Al-Qur'an. 28:27-28.

²⁵⁵ Ibid. 65: 6.

²⁵⁶ Abū Abdullah Muhammad ibn Yazid Al-Quzwaini, Sunan Ibn-i- Mājah , Dār-ul-Ihyā Al-Kutub Al-Arabiyyah, Egypt, ch. Ajrul Ajrā, Hadith No. 2443, Al-Bāni in his book " Saheeh-ul-Jāmi Al-Sagheer wa Ziy'adātuahu" mentioned this Hadith No.1055, declared it as "Hasan".

²⁵⁷ Al-Bukhāri, Muhammad ibn Ismā'il, Saheeh Al-Bukhāri, Ch. Al-'Ijārah, Hadith no. 2262.

3.4.2. *FUQAHĀ* AND EER

The *Fuqahā* are agreed upon the legality of *Ijārah* (leasing / hiring) contract is an exceptional case in Islamic law. As per the general rules of contract in *Sharī'ah* when subject matter does not exist at the time of conclusion of a contract, it could not be contracted upon. In case of the contract of *Ijārah*, it is permissible and valid to conclude this type of contract despite its being sale of goods and benefits, which do not exist at the time of the contract.

The rule of *Qiyās* (analogy) also invalidates *Ijārah* contract though *Istihsān* (Juristic Preference) legalizes it as an exceptional case on the authority of the traditions of the prophet (SAW) and the *Ijmā* (consensus of the companions of the Prophet (SAW)).

The *Fuqahā* hold different opinions in respect of nature of *Ijārah Al-Ashkhās*:

- a. According to the majority of Islamic scholars (*Jamhoor*)²⁵⁹ the employment contract is actually concluded to attain services or work of an employee and not his person.²⁶⁰
- b. Some of the Shāfi'yyah are arguing that at the time of contract, services of the employed worker cannot be obtained; therefore, his person is actually employed and hired.²⁶¹

²⁵⁸ Al-N'asāi, Sunan , Hadīth no.3857, Al-Matbuāt Al-Islāmiyyah, Halb ,Syria, Ed. 2nd (1986), vol. 7, 31, Imām Al-Bāni declared this Hadith as "Dhaif Mawqoof".

²⁵⁹ Al-Hanafiyyah, Al-Mālikiyyah, Al-Hanābilah and most of the Shafi'yyah.

²⁶⁰ Ibn Qudāmah, Abu Muhammad Mawfiq Al-deen (d.620A.H), Al-Mughni, vol. 2, 333. Durar Al-Hukkām, vol.1, 381.

c. Ibn Taimiyah is of the view that this type of contract is actually made for some commodity which has to be created in future like milk of wet nurse.²⁶²

As far as the issue of EER is concerned, it has been discussed in *Fiqh* manuscripts under the topic of *Ijārah Al-Ashkhās* where an employee is hired either as a personal employee²⁶³ or common employee. A personal employee, at a time, renders services to one person under the contract of *Ijārah* for a fixed period on fixed wages while a common wage earner works for more than one person²⁶⁴ at a time on pre-determined wages like tailor, laundryman and blacksmith.

The parties to the employment contract (*Al-Āqidān*) must legally be sound mind and shall have reached to the age of puberty²⁶⁵ while the subject matter must be legal ²⁶⁶ and there shall exist no *Gharar* (ambiguity/ uncertainty). The contract must be finalized by offer from one party and acceptance from the other.²⁶⁷

²⁶¹ Al-Quzwaini, ‘Abdul Kareem (d.623 A.H), Fath-ul-Azeez bi Sharh Al-wajeez, Dār-ul-Fikr, vol. 12, 181.

²⁶² Ibn Taimiyyah, Taqi Uddin (d.728 A.H), Majmu Al-Fatāwah, Majma’ Al-Malik Fahad, Al-Madīna, Saudi ‘Arabia, vol.20, 551.

²⁶³ Al-Murghināni, Ali Ibn Abi Bakkar, Al-Hidāyah fi Sharh Bidāyah Al-Mubtadī, ch. Dhaman Al-Ajeer, Dār ul Ihyā Al-Turāth Al-Arabi, Beirut, vol. 3, 242.

²⁶⁴ Al-Bābarti, Al-Ināyah Sharh Al-Hidāyah, Dārul Fikr, vol. 9, 120.

²⁶⁵ Al-Samarqandī, Muhammad Ibn Ahmad Abū Bakkar Alāuddīn (d.540 A.H), Tuhfa’tul Fuqahā, Dār-ul-Kutub Al-Ilmiyyah, Beirut, Ed. 2nd (1986), vol. 4, 176-177

²⁶⁶ Ibid, 193.

²⁶⁷ Alā ‘Uddin ‘Abu Bakkar ibn Mas’ud ibn Ahmad Al-Kāsāni, (d.587 A.H), Badā’i’ Al-Sanā’i’ fi Tarteeb Al-Shar’āi Dār-ul-Kutub Al Ilmiyyah, vol.5, 136.

3.5. SHARĪ'AH STANCE ON THE RIGHTS AND OBLIGATIONS OF EMPLOYER AND EMPLOYEE

Employer-employee contractual relationship requires the parties to fulfill their respective promises agreed upon in the event of concluding a contract of employment. There are certain elements to be kept in mind by the contracting parties while determining their rights and obligations.

3.5.1. DUTIES OF EMPLOYER

An employer is required to create a healthy working environment where employer and employee work as a team as far as their respective tasks are concerned. The employer for being having upper hand shall satisfy certain obligations.

a. Fair Humane Treatment

An employee being an important part of the economic activities needs to be considered and treated accordingly. He deserves to be dealt with in respectful and dignified manner and shall not be compelled to do something that is beyond his physical or mental capacity that has bad impact on his physical or mental health.²⁶⁸ One of the Hadīth says: "Every one of you is a guardian and responsible for what is in his custody."²⁶⁹

b. Payment of just and reasonable wages:

A worker is entitled to payment of fair wages in case he has accomplished his services in accordance with the terms of the employment contract. Moreover,

²⁶⁸ Afzal-ur-Rahman, *Economic Doctrine of Islam*, Ch.15, 242.

²⁶⁹ Al-Bukhāri, Muhammad ibn Ismaeel, *Saheeh Al-Bukhāri*, ch. Al-Jumua', Hadith no.583, Dar-ul-Fikr, Beirut.

he is also entitled to the customary social wellbeing schemes that provide extra payments in shape of allowances.²⁷⁰ *Sharī'ah* emphasizes on payment of due remuneration within reasonable time in a just way that he should be paid before his sweat dries out, i.e. immediately.²⁷¹

As per the Islamic view point, wages of a worker shall be paid irrespective of the employment status of the worker. In either capacity of an *Ajeer-e-Khās* or *Ajeer-e-Mushtarak*, he is entitled to the wages as per the terms of contract of employment (*Ijārah Al-Ashkhās*). Fixation and determining wages in return of work of an employee is considered one of the major terms of employment contract that has to be agreed upon by the contracting parties with free consent. Likewise, wages must be pre-determined otherwise the contracted is deemed invalid (*Bātil*) where payment of due wages is not obligatory except in case where property of an orphan is involved.²⁷²

c. Payment of Prompt wages

When a workman has performed his assigned work as per the terms of employment contract he is entitled to fair wages that shall be determined keeping in view the efforts he has made.²⁷³ In a tradition the prophet has reported Allah (SWA); "I will be against three persons on the day of

²⁷⁰ Hamza Al-Jamī' Al-Damohi, 'Awāmil al-'Int'āj fi al-Iqtisād al-Islāmi, 217.

²⁷¹ Toseef Azid, Appraisal of the Status on Research on Labour Economics in the Islamic Framework, 214.

²⁷² Art. 459, M'ajall'ah Al-Ahkām Al-'Adliyy'ah, Kārkhāna Tijārat Kutub, Ar'ām Bāgh, Karachi.

²⁷³ Ibrahim Dasooqi 'Abdah, Al-Iqtisād Al-Islāmi, 89.

Resurrection... (one of them is) who employs a laborer and gets the full work done by him but does not pay him his wages."²⁷⁴

3.5.2. DUTIES OF AN EMPLOYEE

An employee is required to furnish his duties satisfactorily, for which he must be equipped with skills that will enable him to undertake his work in best possible way.

a. Knowledge and professional skills

An employee is needed to be aware and informed of his work-related knowledge and skills through which he becomes capable of undertaking his duties in the light of Islamic injunctions. It is also of pivotal nature to be updated of the customary trade and business practices so that not to deceive others and not to be deceived. It has been reported that once Umar ibn Al-Khattāb (RA) while monitoring market found a trader who did not have the required knowledge of the trade. He said: "لَا يَبِيعُ فِي سُوقِنَا إِلَّا مَنْ قَدْ تَعَفَّفَ فِي الدِّينِ", "A trader should not sell in our market if he has no knowledge, (of how shall he conduct business) ".²⁷⁵

Sharī'ah emphasize that it is of pivotal importance that a worker shall be equipped with professional skills and experience which are required for performance of his respective duty. There is a Hadith that refers to this point

²⁷⁴ Al-Bukhāri, Muhammad ibn Ismaeel, Saheeh Al-Bukhāri, vol. 3, Hadith no. 430.

²⁷⁵ Al-Tirmidhi, Muhammad ibn Esā (d.279 A.H), Sunan Al-Tirmidhi, Dār-ul-Gharb Al-Isālami, Hadith no. 487.

by saying: "Good earnings of a worker are those which were earned when (he) was advised".²⁷⁶

b. Excellence in performance

Performance of duty in a disciplined and perfect way is appreciated by *Shari'ah* as it is a prerequisite for earning through legal means.²⁷⁷ Perfection in undertaking duty makes man noble and respectable as a tradition of the Prophet (SAW) says: "Allah is pleased with those who try to do their work in a perfect way."²⁷⁸ It has been considered an integral part of duty to show commitment while performing one's duty by using manual and mental capabilities. Likewise, an employee who excels in his devotion to Allah and renders what is due to him regarding duty, sincerity and obedience, there is double reward for him.²⁷⁹

c. Rendering working capacity as a trust

It is an Islamic obligation that a worker shall consider his working capacity as an *Amānah* (trust) which has to be rendered to employer by virtue of the employment contract. A tradition of the Prophet (SAW) motivates on this point that says: "You should give *Amānah* to whom it is due and do not

²⁷⁶ Yousuf Kamāl Muhammad, *Fiqh Al-iqtisād Al-Asawāq, Al-Nashāt Al-khās, Dār Al-Nashr Lil- Jāmi'ah- Egypt*, 135.

²⁷⁷ Saeed Abu Al-Futooh Muhammad Basyoni, *Al-Hurriyyah Al-Iqtisādiyyah fi Al-Islām Wa Atharuhā fi Al tanmiyah, Dār-ul-Wafā' Al-Mansoorah*.

²⁷⁸ Yousuf Kamāl Muhammad, *Fiqh Al-iqtisād Al-Asawāq, Al-Nashāt Al-khās, Dār AL-Nashr Lil- Jami'ah- Egypt*, 134.

²⁷⁹ Shukri Ahmad, *the Concept of Islamic Work Ethic: An Analysis of Some Salient Points in the Prophetic Tradition*, 123.

betray the one who betrayed you".²⁸⁰ As far as *Amānah* in respect of working capacity is concerned it means that a worker is required to perform his duty without cheating, dishonesty and deceit as it is in contravention to the basic spirit of *Sharī'ah*. A tradition clearly forbidden from this sort of bad attitude as it impacts the healthy working environment which says: "مَنْ غَشَّنَا فَلَيْسَ مِنَّا" "He who cheated us is not from us (the Muslim community)."²⁸¹

3.6. ETHICAL GROUNDS OF EMPLOYER-EMPLOYEE RELATIONSHIP IN *SHARĪ'AH*

The EER in *Sharī'ah* has been considered to be based on legal as well as ethical grounds. It lays down some distinct principles that promote healthy environment in a work place while keeping protection of interests of both the contractual parties. These general Islamic principles have been termed as Islamic Work Ethics (IWEs) which have been described below:

3.6.1. Justice and Equality

Work place disputes mostly take place due to unjust and unfair dealing of employers with employees in order to make them feel being inferior. However, *Sharī'ah* considers both the contracting parties as contributors towards economic prosperity and their relationship is viewed from unique perspective. It has been established on the strong foundations of justice and fairness in order to protect employees from exploitation in the hands of greedy employers. It stresses that all the employees shall be dealt with fairly

²⁸⁰ Muhammad Ibn Ismail Al-Sanāni, *Subul Al-Salām Sharh Buloogh Al- Marām min Adillah Al-Ahkām*, Maktabah Al-Ma'ārif, vol. 3, 68.

²⁸¹ Muslim ibn Hajjāj Al-Nishāburi, *Saheeh Al-Muslim*, Hadith no. (101) 164.

irrespective of their religion, race, colour and origin. The Islamic teachings guide Muslims to be fair and just even if it is against themselves, their parents or when dealing with their rivals. A verse lays down these words:

"يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ لِلَّهِ شُهَدَاءَ بِالْقِسْطِ وَلَا يَجْرِمَنَّكُمْ شَنَاَنُ قَوْمٍ عَلَىٰ أَلَّا تَعْدِلُوا اعْدِلُوا هُوَ أَقْرَبُ لِلتَّقْوَىٰ وَاتَّقُوا اللَّهَ
إِنَّ اللَّهَ خَبِيرٌ بِمَا تَعْمَلُونَ"

"O you, who believe! Be upright to Allah, witnessing with justice; and let not the hatred of a certain people prevent you from acting justly. Adhere to justice, for that is nearer to piety; and fear Allah. Allah is informed of what you do".²⁸²

Likewise, another Ayah emphasizes on observing justice by whatever means possible as it says:

"يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَىٰ أَنْفُسِكُمْ أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ إِنْ يَكُنْ غَنِيًّا أَوْ فَقِيرًا فَاللَّهُ أُولَىٰ بِهِمَا
فَلَا تَتَّبِعُوا الْهَوَىٰ أَنْ تَعْدِلُوا وَإِنْ تَلَوْا أَوْ تُعْرَضُوا فَإِنَّ اللَّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا"

"O you, who believe! Stand out firmly for justice, as witness to Allah, even as against yourselves or your parents or your kin and whether it be against rich or poor, for Allah protects both".²⁸³

There are various traditions of the prophet (SAW) that describe the status of injustice in the sight of Allah and stress on implementing justice even if it is against one's self, children or relatives. In a tradition Ibn Umar (RA) while referring to the consequences of injustice narrates that the Prophet (SAW) one said: "إِنَّ الظُّلْمَ ظُلُمَاتٌ يَوْمَ الْقِيَامَةِ", *"Injustice is darkness in the hereafter"*.²⁸⁴ On another occasion some of the companions requested the prophet (SAW) not to

²⁸² Al-Qur'ān.5: 8.

²⁸³ Ibid: 4:135.

²⁸⁴ Muslim ibn Hajjāj Al-Nishābori, Saheeh Al-Muslim Ch. prohibition of cruelty, Hadith no. 2579.

implement punishment on a woman who was convicted for committing theft.

When the Prophet (SAW) heard the proposal, he became angry and said:

"لَوْ أَنَّ فَاطِمَةَ بِنْتَ مُحَمَّدٍ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، سَرَقَتْ لَقَطَعْتُ يَدَهَا"

"If my daughter Fātimah had been guilty (of theft), I would have cut her hand off".²⁸⁵

2.6.2. Humane conduct

A prosperous Muslim society cannot be expected without good manners among the society fellow men. It is a unique characteristic that makes a man beloved not just in the sight of Allah but it is also a way of winning the hearts of others. A verse says:

"إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاكُمْ"

"The best among you in the sight of Allah is the best of you in conduct".²⁸⁶

Another verse stresses on good way of conversation and says:

"...وَقُولُوا لِلنَّاسِ حُسْنًا..."

"...Speak good words to people..."²⁸⁷

Indeed, good behavior can change a foe into friend.²⁸⁸ It is a natural tendency of humans that they like those who are polite and well-mannered. Good behavior has an overriding effect on all other good qualities of a man. Therefore, it is a must for both employer and employee to be equipped with good manners so that to bridge the gulf of differences between the

²⁸⁵ Al-Bukhāri, Muhammad Ibn Ismaeel, Saheeh al-Bukhāri, (Ed. 1st (1422 A.H.) Dār Tooq al-Naj'āt), Hadith no.6788.

²⁸⁶ Al-Qur'ān.49:13.

²⁸⁷ Ibid: 2: 83.

²⁸⁸ Hoque and others, Leadership traits from Islāmic perspectives. Bangladesh Journal of Islamic Thought, 87-108.

contracting parties in order to create and maintain peaceful environment in the work place. *Sharī'ah* motivates employers to set a good example for the employed by considering them brother and friends which will make them nobles in the sight of Allah (SWA) as the prophet says:

”الْخَلْقُ كُلُّهُمْ عِيَالُ اللَّهِ، فَأَحَبُّ الْخَلْقِ إِلَى اللَّهِ أَنْفَعُهُمْ لِعِيَالِهِ“

*“All creations are the family of Allah and who well behave with the family of Allah is most likeable to Allah”.*²⁸⁹

2.6.3. Mutual cooperation

Sharī'ah considers all Muslims as an integral human body that when an organ is in need of other organs they promptly attend to it. In a famous tradition relationship of Muslims with each other has been described in these words:

”مَثَلُ الْمُؤْمِنِينَ فِي تَوَادِّهِمْ، وَتَرَاحُمِهِمْ، وَتَعَاطُفِهِمْ مَثَلُ الْجَسَدِ إِذَا اشْتَكَى مِنْهُ عُضْوٌ تَدَاعَى لَهُ سَائِرُ الْجَسَدِ بِالسَّهَرِ وَالْحُمَّى“

*“The example of the believers’ love, affection, and mercy for one another is like that of the body: when one of its organs ails, the rest of the body responds and watches over it by contracting fever”.*²⁹⁰

For the purpose of achieving final productivity, employer and employee are considered as a one unit in order to achieve the greater goals of the work place. In order to co-operate others means to benefit others in a friendly-manner which is a great task in the sight of Allah, as the prophet (SAW) says:

²⁸⁹ Sulaiman ibn Ahmad Al-Tibrāni, Al-Mujam Al-Kabeer, Maktabah in Taimiyah, Cairo, vol.10, Hadith no. 10033, 86.

²⁹⁰ Muslim ibn Hajjāj Al-Nishāburi, Saheeh Al-Muslim Hadith no. 2586.

"الْمُؤْمِنُ يَأْلَفُ وَيُؤْلَفُ، وَلَا خَيْرَ فِيمَنْ لَا يَأْلَفُ، وَلَا يُؤْلَفُ، وَخَيْرُ النَّاسِ أَنْفَعُهُمْ لِلنَّاسِ"

*"The believer is friendly and befriended, for there is no goodness in one who is neither friendly, nor befriended. The best of people are those who are most beneficial to people"*²⁹¹

In another tradition the Prophet (SAW) indicates that being sympathetic and merciful to people is a prerequisite of Allah's (SWA) mercy:

"مَنْ لَا يَرْحَمُ النَّاسَ، لَا يَرْحَمُهُ اللَّهُ عَزَّ وَجَلَّ"

*"Allah is not merciful to those who are not merciful to the people".*²⁹²

2.6.4. Consultation

It is a unique characteristic of Islamic society that all affairs of individuals as well as of the state are required to be conducted through mutual consultation. For this reason, *Shari'ah* assigns great value and respect to the opinions of those who are capable of giving sound and timing advice. *Shari'ah* refers to this significant view point and commands those in authority in these golden words: "...وَشَاوِرْهُمْ فِي الْأَمْرِ فَإِذَا عَزَمْتَ فَتَوَكَّلْ عَلَى اللَّهِ" *"...And consult them in the conduct of affairs. And when you make a decision, put your trust in Allah..."*²⁹³

Likewise, another Ayah enumerates attributes of the believers and says:

"وَالَّذِينَ اسْتَجَابُوا لِرَبِّهِمْ وَأَقَامُوا الصَّلَاةَ وَأَمْرُهُمْ شُورَى بَيْنَهُمْ وَمِمَّا رَزَقْنَاهُمْ يُنفِقُونَ"

²⁹¹ Al-Mu'jam al-Aws'at, 5787, Hadith status according to Muhammad Nāsir-ud-Deen Albāni: Hasan.

²⁹² Muslim ibn Hajjāj Al-Nishāburi, Saheeh Al-Muslim Hadith no. 2319.

²⁹³ Al-Qur'an: 3:159.

“And those who answer the call of their Lord and establish prayer, and who conduct their affairs by consultation and spend out of what We have provided them”.²⁹⁴

Being the role model, the Prophet (SAW) has set an example for the *Umm’ah* by regularly consulting his companions on all crucial matters before taking any important decision. On the occasion of the Battle ‘*Uhud*’ the prophet’s opinion was to stay inside *Madīna* in order to defend it but majority of the Muslims had contrary opinion which was accepted by the prophet (SAW).²⁹⁵

No doubt that the consultative decision making culture, if adopted by employers, will not merely improve the quality of decision making but it will also develop a strong bond of relationship between employer and his employees that will make employees feel themselves as a part of business of the employer and consequently his profit and loss as their own. Moreover, mutual consultation and workers participation in industrial affairs and decision-making process quashes selfishness as well as greediness from the work place.²⁹⁶

2.6.5. Fear of Allah (*Taqwā*) and Self-Accountability

Fear of Allah is the only cultural characteristic of Muslim society that works as a soul for the body without which a Muslim’s belief in Allah is deemed

²⁹⁴ Ibid: 42:38.

²⁹⁵ Al- Ghazālī, Muhammad, *Fiqh Al-Seerah*, Ed. 1st, Dār-ul-Qalam, Damascus), vol. 1, 256.

²⁹⁶ Nizam-ul-Haq, *Islamic Management and Business*, Ed. 1st, IIUC Studies, Dec-2011, Chittagong, Bangladesh: Noksha Publications, vol. 8, 46.

incomplete. Fear of Allah is the only motivational force that encourages a Muslim for self-accountability before death.²⁹⁷ *Taqwā* makes a person the noblest among all other creatures in the sight of Allah as Qur'ān says:

“...إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاكُمْ”,

*“Verily, the most honorable person to Allah among you is he who fears Him most”.*²⁹⁸

The life of the companions of the prophet (SAW) is full of situations where they have set an example for the Muslim community by adopting the attribution of *Taqwā*. The first Muslim ruler (*khalīfa*), Abu Bakkar (RA) in his speech addressed Muslims while saying; “I have been appointed as a ruler over you although I am not the best among you. I have never sought this position nor has there ever been a desire in my heart to have this in preference to anyone else...If I do right, you must help and obey me; if I go astray, set me aright...Obey me so long as I obey Allah and His Messenger. If I disobey them, then you have no obligation to follow me”.²⁹⁹

A problem-free work place can only be ensured when both the contractual parties whole heartedly promote a peacefully co-operative and work-friendly industrial environment based on *Taqwā* and accountability before the creator.

²⁹⁷ Ibid.

²⁹⁸ Al-Qur'ān: 49:13.

²⁹⁹ Al-Tabari, Muhammad ibn Jareer, *Tareekh-ur-Rusul wa Al- Mulook*, Ed. 2nd, Dār Al-Turāth, Beirut, ch.3, 210.

2.6.6. Merit-Based Distinction

According to Islamic teachings, all human beings as per their dignity and honor have been considered equally important. In the same way all workers need to be treated on equal footing. The Qur'ānic commandments have no parallel in this regard as it lays down unique criterion that says:

"يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاهُمْ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ"

"O Mankind! We have created you from a male and a female, and made you into nations and tribes, that you may know one another. Verily, the most honorable of you in the Sight of Allah is (the believer) who has Taqwā (piety and righteousness). Verily, Allah is all-knowing, all aware".³⁰⁰

In order to create humanitarian and worker-friendly environment on the basis of dignity and respect for all, is significant not just for their mutual relationship but as well as for the work place peace and tranquility where production process is undertaken. *Shari'ah* discourages all those forms of discrimination among the workers that either cause differences between employee and management or employee and employee. Once the Prophet (SAW) while indicating reason of priority over others in the eyes of Allah he said:

"يَا أَيُّهَا النَّاسُ! إِنَّ رَبَّكُمْ وَاحِدٌ وَإِنْ أَبَاكُمْ وَاحِدٌ، أَلَا لَا فَضْلَ لِعَرَبِيٍّ عَلَىٰ عَجَمِيٍّ وَلَا أَعْجَمِيٍّ عَلَىٰ عَرَبِيٍّ وَلَا أَحْمَرَ عَلَىٰ أَسْوَدٍ وَلَا"

أَسْوَدٌ عَلَىٰ أَحْمَرَ إِلَّا بِالتَّقْوَىٰ"

"O Mankind! Indeed, your lord is one and your father is one. Verily, an 'Arab has no superiority over a non-'Arab nor a non-Arab has any superiority over an 'Arab; also

³⁰⁰ Al-Qur'ān: 49:13.

a white has no superiority over black nor does a black have any superiority over white except by piety".³⁰¹

2.6.7. Mutual trust

A healthy employer-employee relationship is based on creating a trustworthy environment where they avoid from misconceptions against each other unless there is solid evidence.³⁰² In order to avoid suspicions about others Qur'ān says:

"يَا أَيُّهَا الَّذِينَ آمَنُوا إِن جَاءَكُمْ بَنِي فَاسِقٍ فَتَبَيَّنُوا أَن تُصِيبُوا قَوْمًا بِجَهَالَةٍ فَتُصْحِرُوا عَلَى مَا فَعَلْتُمْ نَادِمِينَ"

"O You who believe! If a wicked person comes to you with any news, ascertain the truth, lest you harm people unwittingly and afterwards become full of repentance for what you have done".³⁰³

In another ayah Allah (SWA) indicates the consequences of mistrust by saying:

"يَا أَيُّهَا الَّذِينَ آمَنُوا اجْتَنِبُوا كَثِيرًا مِّنَ الظَّنِّ إِنَّ بَعْضَ الظَّنِّ إِثْمٌ وَلَا تَجَسَّسُوا وَلَا يَغْتَبَ بَعْضُكُم بَعْضًا أَيُحِبُّ أَحَدُكُمْ أَن يَأْكُلَ لَحْمَ

أَخِيهِ مَيْتًا فَكَرِهْتُمُوهُ وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ تَوَّابٌ رَّحِيمٌ"

"O you who believe! Avoid much suspicion, in deeds some suspicions are sins. And spy not neither backbite one another. Would one of you like to eat the flesh of his dead brother? You would hate it (so hate backbiting). And fear Allah, verily, Allah is the One Who accepts repentance, Most Merciful".³⁰⁴

A working society that has been established on the basis of mutual trust can be termed as a 'progressive and prosperous Islamic society' that is promoted by *Sharī'ah* rules. The prophet (SAW), while highlighting the mischief of

³⁰¹ Al-Albāni, Abu Abdul Rahman Muhammad Nasir-ud-Deen Al-Albani, Salsilah Al-Ahādith Al-Saheehah, Ed. 1st, Maktabah Al-Ma'arif li Al-Nashr wa Al-Tawzee, Al-Riyadh, Hadith no: 2700.

³⁰² Sharfuddin, Ibn Umar, Muhamed (1987). Toward an Islamic administrative theory, The American Journal of Social Sciences, vol.4, 239.

³⁰³ Al-Qur'ān: 49:6.

³⁰⁴ Ibid: 49: 12.

mistrust and backbiting and their impact on a Muslim society, once asked the Companions and said: "Do you know what backbiting is?" They replied, "Allah and His Messenger know best". He then said, "It is to say something about your brother that he would dislike". Someone asked him, "But what if what I say is true?" The Messenger of Allah said, "If what you say about him is true, you are backbiting him, but if it is not true then you have slandered him".³⁰⁵

3.7. CLASSIFICATION OF EMPLOYEES AND THEIR LIABILITY IN *SHARĪ'AH*

The *Fuqahā* have classified employees into two broad categories of *Ajeer-e-Khās* and *Ajeer-e-Mushtarak* (personal employee and common employee),³⁰⁶ keeping in view nature of work and capacity they are working in for an employer as under:

3.7.1. *AJEER-E-KHĀS* (personal employee)

Personal employee has been defined as a person who renders his services for a specified period of time to a certain employer³⁰⁷ or he is the person who offers himself to a person to get benefit out of him.³⁰⁸ In other words he is a

³⁰⁵ Muslim ibn Hajjāj Al-Nishābori, Saheeh Al-Muslim Ch. prohibition of backbiting, Hadith no. 2589.

³⁰⁶ 'Alā 'Uddin 'Abu Bakkar ibn Mas'ud ibn Ahmad Al-Kāsāni, (d.587 A.H), *Badā'i' Al-Sanā'i' fi Tarteeb Al-Shar'āi Dār-ul-Kutub Al Ilmiyyah* ', Ed. 2nd (1986), vol. 4, 210.

³⁰⁷ Al-Sarakhsi, Muhammad Ibn Ahmad (d.483 A.H), *Al-Mabsūt*, Dār Al-M'ārif, Beirut, vol.15, 80. Mansoor ibn Yunus Al-Hanbali (d.1051 A.H) *Kashāf Al-Qannā' 'an Matan Al-'Iqnā'*, Ch. 'Al-'Ajeer, vol. 4, 32.

³⁰⁸ Ibn Qudāmah, Abu Muhammad Mawfiq Al-Deen, *Al-Mughnī*, vol. 5, 341.

workman who works for an individual ³⁰⁹ that entitles him for due wages within that particular time period.³¹⁰

When a valid contract gets concluded between an employer and *Ajeer-e-Khās*, other employment contract will be considered *Fāsīd* (vitiating³¹¹/ susceptible to invalidation³¹²) because the employee in this case has agreed upon rendering his services for the employer for specified time period. Hence, the employee is not allowed to conclude another contract at the same time or get another employee instead of himself but only with the consent of the employer. ³¹³

In case, an employee refuses to perform his duty upon which he had already agreed through a valid contract, who will be held responsible for undertaking the task? If the refusal of the employee was without any valid excuse then he will be forced for doing the said task otherwise he will not be forced to do the same or get someone else for the work if he had a valid reason for non-compliance. The reason is that the employee was required personally for his specific services and it is deemed that no one else can

³⁰⁹ 'Alā 'Uddin 'Abu Bakkar ibn Mas'ud ibn Ahmad Al-Kāsāni, (d.587 A.H), *Badā'i' Al-Sanā'i' fi Tarteeb Al-Shar'āi Dār-ul-Kutub Al-Ilmiyyah*, vol. 4, 174.

³¹⁰ Al-Murghināni, 'Ali ibn 'Abu Bakkar, *Al-Hidāyah fi Sharh Bidāyah Al-Mubtadi*, Dār 'Ihyā Al-Turāth Al-'Arabi, vol. 3, 230.

³¹¹ The term *Fāsīd* has been translated by a famous Shariah scholar, Imran Ahsan Khan Nyazee as "vitiating" in his book 'Islamic Legal Maxims', 153.

³¹² The translation for the term *Fāsīd* was recommended by one of my foreign evaluators.

³¹³ 'Alā 'Uddin 'Abu Bakkar ibn Mas'ud ibn Ahmad Al-Kāsāni, (d.587 A.H), *Badā'i' Al-Sanā'i' fi Tarteeb Al-Shar'āi Dār-ul-Kutub Al-'ilmiyyah*, vol. 4, 228 / Al-Murghināni, 'Ali ibn 'Abu Bakkar, *Al-Hidāyah fi Sharh al Bidāyah-ul-Mubtadi*, Dār 'Ihyā Al-Turāth Al-'Arabi, vol. 2, 245.

replace him. However, in such circumstances the employer has option to invalidate the agreement with the employee.³¹⁴

3.7.2. *AJEER-E-MUSHTARAK* (common employee)

A worker is called to have been employed by an employer when he renders services to the general public such as tailor and laundry man etc. His services are open and available to anyone who offers him his wages in exchange of services³¹⁵ like a mason who builds for anyone who hires him.³¹⁶

Unlike *Ajeer-e-Khās*, it is legally allowed as per *Sharī'ah* rules that *Ajeer-e-Mushtarak* may conclude multiple contracts at a time in order to sell out his services except in the following cases:

- a. When the nature of work is such that the employer has put a condition that employee himself will be bound to do a specific work in a specified time period.
- b. In case of personal employee, the employee is not allowed to get his own work done through others.
- c. The simultaneous contracts are also considered valid in case the first contract of *Ijārah* has not come to an end because the second contract is

³¹⁴ Al-Sarakhsi, Muhammad Ibn Ahmad (d.483 A.H), *Al-Mabsūt Dār Al-M'ārif*, Beirut, vol. 15, 79./ Zain Al-Deen Ibn Ibrahim ibn Nujaym Almasri (d. 970 A.H), *Shrah Kanz Al-Daqa'iq*, Bahr Al-Rā'iq, Dār-ul-Kitāb Al-Islāmi, Ed. 8th, vol.6, 8.

³¹⁵ Al-Murghināni, 'Ali ibn 'Abi Bakkar Al-Hidāyah fi Sharh Bidāyah Al-Mubtadi, Dār 'Ihyā Al-Turāth Al-'Arabi, vol.3, 244.

³¹⁶ Mansur ibn Yunus Al-Hanbali (d.1051 A.H) *Kashāf Al-Qannā' 'an Matan Al-'Iqnā'*, vol.4,26.

dependent on the first one. So, when the first contract has come to an end the second contract could not stand.³¹⁷

3.7.3. LIABILITY OF AN EMPLOYEE

Shari'ah stance in respect of undertaking liability for a legal wrong is under the topic of '*Al-Dhamān*' which literally means to take responsibility for something wrong that has been committed. Its legal meaning is to compensate the same thing if its alternative is found in kinds (*Al-Mithlī*) or its substitute of equal value or price is found (*Al-qīmī*).³¹⁸

3.7.3.1. LIABILITY OF *AJEER-E-KHĀS* AND *AJEER-E-MUSHTARAK*

As a general rule, in initial days of Islamic period commodities in the custody of both types of employees were considered as a trust (*Amānah*). Both categories of employees were not liable in case any damage or loss was caused to the commodities in their hands except in case of negligence.³¹⁹ With the passage of time and due to frequent loss of people's wealth, the *Fuqahā* while keeping in view preservation of public interest, have derived some strict rules in this regard. Therefore, it was viewed that liability of common employee and personal employee shall be viewed on different footings as it varies from case to case and depends on the nature of employment.

³¹⁷ Al-Murghināni, 'Ali ibn 'Abu Bakkar Al-Hidāyah fi Sharh Bidāyah-ul-Mubtadi, Dār 'Ihyā Al-Turāth Al-'Arabi, vol.3, 234.

³¹⁸ M'ajall'ah Al-Ahkām Al-'Adliyy'ah, Kārkhāna Tijārat Kutub, Arām Bāgh, Karachi, art. 416.

³¹⁹ Al-Zuhaili Wahba, Al-Fiqh-al-Islāmi Wa Adillatuhu, Dār-ul-Fikr Damascus, Ed. 9th (2012), 146.

3.7.3.1.1. OPINIONS OF FUQAHĀ IN RESPECT OF EMPLOYEES' LIABILITY

Fuqahā are unanimous that personal employee is not liable for loss or damage while goods are in his custody because his hand is considered as that of a trustee's (*Yad-ul-Amānah*).³²⁰

According to the four schools of thought, '*Ajeer-e-Mushtarak* (common employee) is liable for the loss or damage that has been caused to the goods or commodities in case he was found guilty of negligence. As for as the extent of liability is concerned in case the wrong has occurred without the consent and fault of *Ajeer-e-Mushtarak* there are two contrary opinions:

- a. The view point of Imām Abu Hanifa, Zufar, Hasan ibn Ziyād, Imām Al-Shāfi and Imām Ahmad (in one of their opinions) is that *Ajeer-e-Mushtarak* is not liable like *Ajeer-e-Khās* except in case of negligence. They derive their opinion on the basis of analogical conclusion from a Qur'ānic Rule that states that liability takes place in the event when there is an attack on someone's person, property or rights. As the following Qur'ānic verse is a witness to that: "فَلَا عُدْوَانَ إِلَّا عَلَى الظَّالِمِينَ", "...let there be no hostility except against the oppressors".³²¹

As a matter of fact in the mentioned case the independent contractor is not an oppressor rather he is a worker who shall be held responsible for loss or damage to the goods in his custody.

³²⁰ Ibid.

³²¹ Al-Qur'ān: 2: 193.

- b. In the above case, the independent contractor has not oppressed anyone's property but he took it in his custody for his own benefit and for the benefit of the owner of the commodity. So, in this case he is like a partner in the contract of partnership (*Al-Mudhārabāh*) and his custody is deemed to be that of a trustee (*Yad-ul-'Amānah*).³²²

The opinion of Imām Abu Yousuf and Imām Muhammad (both are called collectively as Sahib'ain), Imām Mālik, Al- Shāfi and Imām Ahmad (RA)(in one of their opinions) suggest that *Ajeer-e-Mushtarak* is liable for every sort of damage or loss to the commodity in his custody whether that was caused with consent or without consent.

The ruling has been given by the *Fuqahā* on the ground of public interest so that the trustees and tradesman shall take greater care in safeguarding people's properties.³²³ The Sahib'ain (Imām Abu Yousuf and Imām Muhammad) have drawn an exception to this rule, that in case of common natural calamities etc. he shall not be held liable.

The above mentioned opinion of *Fuqahā* has been supported by the Qur'ānic rule that says: "فَمَنْ اعْتَدَىٰ عَلَيْكُمْ فَاعْتَدُوا عَلَيْهِ بِمِثْلِ مَا اعْتَدَىٰ عَلَيْكُمْ", "Whoever commits aggression

³²² Al-Sarakhsi, Muhammad Ibn Ahmad (d.483 A.H), *Al-Mabsūt Dār Al-M'ārif*, Beirut, vol.11, 103/ 'Alā 'Uddin 'Abu Bakkar ibn Mas'ud ibn Ahmad Al-Kāsāni, (d.587 A.H), *Badā'i' Al-Sanā'i' fi Tarteeb Al-Shar'āi*, Dār-ul-Kutub Al-'ilmiyyah, vol.4, 211.

³²³ Alā 'Uddin 'Abu Bakkar ibn Mas'ud ibn Ahmad Al-Kāsāni, (d.587 A.H), *Badā'i' Al-Sanā'i' fi Tarteeb Al-Shar'āi*, vol. 4, 210, *Majma' Al-Dhamān*, 27 Ibn Qudāmah, Abu Muhammad Mawfiq Al-deen, *Al-Mughni*, vol. 5, 487.

*against you, react against him in the same measure as he has committed against you”.*³²⁴

Moreover, they quote a tradition of the prophet (SAW) in this regard which says; “(it is duty of) A hand to return whatever it has taken”.³²⁵ Likewise, their opinion is also supported by an act of ‘*Ali Ibn Abi Talib* (RA) who used to fine independent contractors such as: painter and jeweler in case of damage or loss. He has been quoted to have said: “people can only be brought to the right way through this (type of strict rule). That is why Imām Shāfi (RA) used to issue verdicts based on this opinion so that people’s wealth shall be safeguarded.”³²⁶

3.8. GROUNDS FOR EMPLOYEES’ LIABILITY

Fuqahā have mentioned certain grounds on the basis of which the status of an Ajeer (employee) converts from that of trustee to violator of trust. As a result he becomes liable for loss or damage in respect of goods in his custody under the following circumstances.³²⁷

³²⁴ Al-Qur’ān: 2: 194.

³²⁵ Ahmad Ibn Hambal, Sunan-e-Ahmad, Al-Tibrāni, Ibn Abi Shaybah, Al-Hākim declared it “Hadith Hasan”.

³²⁶ Ibn Rushd, ‘Abul waleed Muhammad (d.595 A.H), Bidāyah Al-Mujtahid wa Nihāyah Al-Muqtasid, Dar-ul-Hadith, Egypt, vol.2, 230. Ibn Juzay, ‘Abul Qasim (d.741 A.H), Al-Qawaneen Al-Fiqhiyyah, 278.

³²⁷ Al-Sarakhsi, Muhammad Ibn Ahmad (d.483 A.H), Al-Mabsūt Dar Al-M’arif, Beirut, vol.15, 104./ ‘Alā ‘Uddin ‘Abi Bakkar ibn Mas’ood ibn Ahmad Al-Kasāni, (d.587 A.H), Badā’i’ Al-Sanā’i’ fi Tarteeb Al-Shar’āi, Dar-ul-Kutub Al-‘ilmiyyah, Ed. 2nd (1986), vol.4, 211.

a. Negligence in respect of goods

As soon an employee has taken goods in his custody, he is bound to take care of them in a prudent way, failure of which makes him liable for if any loss or damage was inflicted to the goods.

b. Intentional misuse of goods

In case an employee has used the goods in his custody in improper manner i.e. washing of clothes in case of a laundry man that has been spoiled in a way that they no longer remained useable.

c. Violation of contractual conditions³²⁸

In case an employee has accomplished the assigned task in a manner which was in contradiction to the terms and conditions of employment contract agreed upon between the employer and employee, he will not just be responsible for the wrong but he will also be deprived of his wages as *Fuqahā* say that '*Aj'ar* (reward) and *Dhmān* (fine) cannot go together ('*Al-'Ajr wa Al-Dhmān lā Yajtamiān*)'.³²⁹

3.8.1. EXCEPTIONS TO THE RULES OF EMPLOYEES' LIABILITY

According to the Islamic law rules in respect of employed persons' liability there has been found certain professionals whose nature of service is such that they are universally presumed to have been working in good faith.

³²⁸ Alā 'Uddin 'Abu Bakkar ibn Mas'ud ibn Ahmad Al-Kāsāni, (d.587 A.H), *Badā'i' Al-Sanā'i' fi Tarteeb Al-Shar'āi*, Dār-ul-Kutub Al-'ilmiyyah, Ed. 2nd (1986), vol.4, 213.

³²⁹ Al-Sarakhsi, Muhammad Ibn Ahmad (d.483 A.H), *Al-Mabsūt Dār Al-M'ārif*, Beirut, vol.15, 147.

Medical professionals including surgeons in ordinary course of performance of their duties, are not held liable for consequences arising out of their work with the condition that they carefully have applied customary precautions with proper care and due diligence.³³⁰

Certain conditions shall be satisfied in order to escape criminal liability; firstly, wide-spread recognition in the respective field of expertise and secondly, no evidence shall prove that the professionals have acted upon negligently. As in case of executing sentence of cutting off hand of a convicted thief, the executor will not be held liable for the consequences of the injury as he has done what was permissible and the same rules are applied to the case of circumcision by a surgeon.³³¹

One of the inevitable reasons for being them not liable is that nature of their work is such that they cannot predict and consequently escape from such an unpredictable situation where a normal injury aggravates to such an extent that it causes death³³² which is beyond the control of human beings.³³³

³³⁰ Al-Baghdadi, Abu Muhammad Ghanim ibn Muhammad (d.1030 A.H), *Majm'a Dhamant, Dār-ul-Kitāb Al-Islami*, vol.1, 47.

³³¹ Ibn Qudāmah, Abu Muhammad Mawfiq Al-deen, *Al-Mughni*, (d.620A.H), *Maktabah Al-Qahira*, vol.5, 398.

³³² Ibn Al-Hummam, Kamal-ud-Din Muhammad Ibn Abdul Wahid (d.861 A.H), *Fath-ul-Qadir*, *Dar-ul-Fikr*, vol.9, 127-128.

³³³ Al-Sarakhsi, Muhammad Ibn Ahmad (d.483 A.H), *Al-Mabsūt Dār Al-M'ārif*, Beirut, vol. 15, 105.

3.9. OPINIONS OF *FUQAHĀ* ON *TASEER* (FIXATION OF PRICES OF COMMODITIES)

Taseer is a *Shari'ah*, in normal circumstances, favours fixed wages agreed upon by the parties to an employment contract, though, *Fuqahā* have discussed both minimum and maximum levels of wages to be determined by state if it feels that without interference economic activities could not be undertaken peacefully. The *Taseer* doctrine of fixation of prices of commodities may be extended on the basis of *Qiyās* (analogy) to the case of wages as both are meant to protect interest of the stake holders.³³⁴

According to Imām Ibn-e-Taimiya is of the view that in case services of professional and skilled workers are needed but they refuse to render services, they shall be compelled by the state on customary wages (*'iwadh Al-mislī*) in a way that shall not be paid less or more than that.³³⁵ This view is also supported by Imām Ibn Al-Qayyim that when people are in need of certain professionals such as farmer or mason, so, they may be compelled by the concerned authorities to serve on the market wages.³³⁶

According to Imām Abu Hanifa, Taseer is not allowed but when there is no other way to improve market affairs and the matter of hike in prices due to

³³⁴ Ammarah, Khalid Muhammad, Al-hadd Al-And'a li Al-martabāt fi Al-Fiqh Al-Islāmi, available at: https://jfslt.journals.ekb.eg/article_10808_9e3927b6bb54cfb905cdcd98e99ae4b.pdf, (last accessed 10 August, 2020).

³³⁵ Majmū Al-fatāwa, vol. 28, 83.

³³⁶ Ibn Al-Qayyim Al-Jawziyyah, Abu Abdullah Muhammad ibn Abi Bakkar (189. A.H), Al-Turuq Al-hukmiyyah, Dar-ul-Ilm Al-faw'aid, Makkah, 247.

hoarding reached before *Qādhī* (judge), he shall order sale of the commodities on customary price.³³⁷ On the basis of analogical approach, as a hoarder may be compelled to sell out without his consent, in the same way an employer may be restricted to pay wages not below the minimum level.

Taseer literally connotes determining and fixation of prices³³⁸ of commodities while in its contextual meaning it is “price fixation of (certain) commodities for public interest by the ruler or his assignee that bounds all to comply with while buying and selling”.³³⁹ *Fuqahā* differ over the issue of *Taseer* as they forward their respective views on the subject along with the evidence from sources of *Sharī’ah*.

3.9.1. TYPES OF *TASEER* AND VIEW POINTS OF *FUQAHĀ*

Initially there have been found two categories of price fixation of commodities (*Taseer*):

a. Selling out of commodity on higher or lower price than its market price:

According to *Al-Mālikiyyah*, the seller of a commodity shall be prevented in the case he sells it on higher price but he may be allowed to sell on lower price than that of the market rate. However, *Al-Jumhoor* (majority of the scholars) from *Al-Shāf’iyyah*, *Al-Mālikiyyah* and *Al-Hanābilah* are of the view that in the latter case he shall also be prevented. They support their view

³³⁷ *Al-Ahkām Al-Sultaniyyah*, 81 / *Al-turuq Al-hukmiyyah*, 289-290.

³³⁸ *Al-lisān Al-Arab*, *Al-Mujam Al-Waseet* and *Al-Misbah Al-Munir*, root word ‘*sarr’a yo-sarr’io Taseeran’*.

³³⁹ Muhammad Al-Shawk’āni (1759–1839), “*Nail-ul-Awtār*”, *Al-Maktba Al-Usmaniyyah Al-Masriyyah*, vol. 5, 220.

point based on an occasion when once Umar (RA) was monitoring the market and found a companion (Hātib ibn Balt'ā) who was selling business goods on lower price. He was prevented by Umar (RA) in his words "whether you sell on usual market price otherwise leave our market".

b. Fixation of price of certain commodity by the ruler or his assignee:

The *Fuqahā* hold three opinions in this case:

1. *Al-Jumhoor's* view is that it is prohibited in *Sharī'ah* to fix prices of commodities and let no room for bargaining. They derive their view from a tradition of the Prophet when once prices have gone higher and people while complaining asked the Prophet to fix prices of the commodities.

The Prophet replied:

"إِنَّ اللَّهَ هُوَ الْمُسَعِّرُ الْقَابِضُ الْبَاسِطُ الرَّازِقُ، وَإِنِّي لَأَرْجُو أَنَّ أَلْقَى اللَّهَ وَلَيْسَ أَحَدٌ مِنْكُمْ يُطَالِبُنِي بِمَظْلَمَةٍ فِي دَمٍ وَلَا مَالٍ"

"Indeed Allah is the Musa'ir (price-fixation authority)...the Razzāq (Provider). And I am hopeful that I meet Allah (SWA) and none asks me for an injustice (that I have committed)".³⁴⁰

2. Imām Abu Hanifa is of the opinion that *Taseer* is not allowed in normal circumstances except where it is in the interest of the community and when it is felt appropriate after consultation with experts such as; in case

³⁴⁰ The tradition of the Prophet was reported by Malik ibn Anas (RA) and narrated by Abu Dawood in Sunan Abi-Dawood, Book.Ijārah, Ch.Al-Taseer, Hadith no. 3451.

a commodity was hoarded and the culprits were brought to the notice of the *Qādhi* (judge), he shall fix prices for the commodity.³⁴¹

3. Saeed ibn Al-Musayib allows *Taseer* to be used as a market regulating tool but the ruler shall not bind the seller to sell on the price that has been fixed if it is against the interest of the seller. In nut shell, interests of both buyer and seller shall be taken into consideration while fixation of prices is done.³⁴²

While going thoroughly over the books of classical *Fuqahā* as well as the contemporary scholars, it seems appropriate that whether to fix prices of commodities as well as the wages etc. or to leave it to the market forces to decide the matter depends on the prevailing '*Urf*' (generally acceptable norm) of that particular society. The reason is that '*Urf*' has been considered one of the sources of Shari'ah.³⁴³

3.9.2. APPLICATION OF THE DOCTRINE OF TASEER TO THE CASE OF FIXATION OF MINIMUM WAGES

The issue of Taseer have been discussed by the classical *Fuqahā* in respect of eatable goods of daily usage where certain aspects of the doctrine were taken into account. They have differences of opinions as per the legality and

³⁴¹ Al-Maraghi Ahmad Mustafa, "Al-Hisba fi Al-Islām", Al-Jazīrah li-al-nashri wa Al-tawzī, 23.

³⁴² Ibid, 24.

³⁴³ "Al-ādah Muhakkamah".

implementation are concerned,³⁴⁴ though, the changing socio-economic conditions and ground realities have compelled the experts to resort for the view that supports fixation of prices. As per our discussion, views of the Fuqahā are to be mentioned in respect whether the concept of *Taseer* could be extended to the modern time minimum wages legislation.

3.10. SALIENT FEATURES OF EMPLOYMENT CONTRACT

For the purpose of hiring a worker it is highly recommended by *Sharī'ah* that employment contract shall be concluded based on clearly mentioned terms and conditions of employment. It is also appreciated that all contracts shall be reduced into black and white.³⁴⁵ It has been emphasized in the Holy Qur'ān:

"...وَلَا تَسْأَمُوا أَنْ تَكْتُبُوهُ صَغِيرًا أَوْ كَبِيرًا إِلَى أَجَلِهِ ذَلِكُمْ أَقْسَطُ عِنْدَ اللَّهِ وَأَقْوَمُ لِلشَّهَادَةِ وَأَدْنَىٰ أَلَّا تَرْتَابُوا..."

*"...You should not become weary to write it (your contracts) whether it is small or big, for its fixed term that is more just with Allah, more solid as evidence, and more convenient to remove doubts among yourselves..."*³⁴⁶

³⁴⁴ Among the four schools of thoughts, Al-Hanafiyyah and Al-Malikiyyah, support *Taseer* on the grounds of Shariah maxims such as: i. La dharar wa la dharir ii. Al-dharar youzal and iii. Yotahammal al-dharar al-khās li tahammul al-dharar al-ām while Al-Shafiyyah and Al-Hanābilah support their view with a famous tradition of the prophet (SAW) when he was asked to fix prices but he refused to do so. For further details see. Al-zuhailī, Wahba "Al-Fiqh-al-Islāmi Wa Adillatuhū, Dār-ul-Fikr, vol. 4, 2695-2697.

³⁴⁵ Muḥammad Sharīf Chaudhry, Fundamentals of Islāmic Economic System, Ch.8, http://www.muslimtents.com/shaafi/b16/b16_13.htm , (last accessed on: 26 June, 2018).

³⁴⁶ Al- Qur'ān: 2:282, (The Noble Qur'ān, by the King Fahad Complex for the printing of the Holy Qur'ān).

In order to clearly understand Islamic concept of employment contract some of the salient features of the contract have been described as under:

3.10.1. OPINIONS OF *FUQAHĀ* IN RESPECT OF VALIDITY OF *IJĀRAH* CONTRACT

There exist various opinions of classical *Fuqahā* in regard to validity of *Ijārah* contract:

- a. According to the *Hanafi* School, *Ijārah* is a contract on selling benefits for a known consideration.³⁴⁷
- b. The *Shāfi* School views that *Ijārah* is a contract on known and permissible benefits in exchange of a known return.³⁴⁸
- c. According to the *Mālikī* School *Ijārah* is transfer of lawful benefits for a fixed price for a specified period.³⁴⁹
- d. The *Hanābilah* are of the view that *Ijārah* resembles a sale contract whereby price and use (of things or services) are exchanged.³⁵⁰

The contract of *Ijārah* also includes letting things moveable or immovable for hire as well as rendering services such as custody of property and professional services.³⁵¹ It also meant for employing a person to work on payment of wages for accomplishing a specific work. The one who engages another person to work is called employer *Ājir* (أجير) and the one who receives

³⁴⁷ Zail'ai, Tabyeen al- Haq'a'iq, vol. 5, 105.

³⁴⁸ Khateeb Al-Shirbini, Shams-ud-din (d. 977 A.H), Mughni al-muht'aj 'ila m'āni' Al-Alfāz Al-minhāj, vol.2, 332.

³⁴⁹ Ibn Rushd, 'Abul waleed Muhammad (d.595 A.H), Bid'ayah Al-Mujtahid wa Nih'ayah Al-Muqtasid, Dar-ul-Hadith, Egypt, vol.2, 219-220.

³⁵⁰ Ibn Qudāmah, Abu Muhammad Mawfiq Al-deen, Al-Mughni,(d.620A.H), Al-Sharh Al-Kabeer, Dar-ul-Kit'ab Al 'Arabi, vol.4, 2.

³⁵¹ Al-Samarqandī Abu Bakkar Alāuddīn (d.540 A.H), Tuhfa'tul Fuqahā, Dār-ul-Kutub Al-Ilmiyyah, Beirut, Lebanon, Ed.2nd, vol.2, 347.

wages is called an employee, a wage earner and *Ajeer* (أجير). The amount of compensation paid for the work done or services rendered is called '*ujrah* (أجرة) and wages.

3.10.2. FULFILLMENT OF CONTRACTUAL PROMISES

In regard to the agreed upon terms of employment contract between the contracting parties, the Qur'ānic teachings make it obligatory that both employer and employee must keep and fulfill their respective contractual promises.³⁵² In contrary the one who violates will face wrath and punishment of Allah (SWA)³⁵³ for the reason that *Ijārah* is a binding and irrevocable contract which cannot be revoked unilaterally.

In the Contract of hiring services, the work required to be performed, should specifically be mentioned such as the carriage of goods, or building house etc. Moreover, performance or work should be permissible in accordance with Islamic injunctions. Thus, it is not permitted to hire a magician to teach magic, or a singer for the purpose of singing. Similarly, it is not permissible to hire the services of a person to kill another person or torture him, because they are acts of sin and disobedience, hence prohibited in the *Sharī'ah*.

Under *Sharī'ah* rules of employment contract, it is an integral part of the contract that the time period for the assigned task shall be specified otherwise

³⁵² Al-Qur'ān. 5:1.

³⁵³ Ibid; 17: 34.

it may lead the contract to be termed as *Fāsid*³⁵⁴ (vitiated / susceptible to invalidation). It is, therefore, obligatory duty of the employer that *Ajeer-e-Khās* shall be paid fair wages as per the terms of employment agreed upon by the contracting parties (whether he is engaged in work or otherwise)³⁵⁵ for the reason that in that specific time period the worker is neither allowed and nor able to work for other employer.

3.10.3. REST TIME BEING AN INTEGRAL PART OF WORK

As per the *Sharī'ah* teachings allocating time for rest and holidays during work is considered an integral part of work to which workers are entitled in order to accomplish rights of both the creator and the created. A tradition of the Prophet (SAW) says: "...فَإِنَّ جَسَدَكَ عَلَيْكَ حَقًّا، وَإِنَّ لِعَيْنِكَ عَلَيْكَ حَقًّا، وَإِنَّ لِرُؤُوسِكَ عَلَيْكَ حَقًّا..." "Indeed, you owe rights towards your body, your eye and your wife/husband..."³⁵⁶ It has been reported that once the companion *Ali Ibn Abi Talib* (RA) suggested that a Muslim is required to get his time divided into three broad categories; worship, earning livelihood and entertainment.³⁵⁷ Allocating rest time, therefore, is not considered something separate from work. As a matter of fact, even an active and strong man cannot undertake continuously for a long period of time. A worker as a social being, along with

³⁵⁴ Ali Al-Khateef, *Ahk'am Al-Mu'amil'at Al-Shar'iyah*, Dar-ul-Fikr Al-'Arabi, Egypt, Ed. 3rd, 437.

³⁵⁵ Al-Zuhaili, Wahba, *Al-Fiqh-al-Islami Wa Adillatuhu*, vol. 4, 563.

³⁵⁶ Abu Al-Futooh Muhammad Basyuni, *Al-Hurriyah Al-Iqtis'adiyyah fi Al-Isl'am and its Effect in Economic Growth*, Dar-ul-Waf'a' Al-Mansorah, 384.

³⁵⁷ Al-Samarqandi Abu Bakkar Alāuddīn (d.540 A.H), *Tuhfa'tul Fuqahā*, Dār-ul-Kutub Al-Ilmiyyah, Beirut, Lebanon, Ed. 2nd (1986), vol. 4, 210.

earning livelihood, needs to play his due role as a father, son and husband for which he needs spare time.³⁵⁸

3.10.4. HIRING SERVICES FOR RELIGIOUS OBLIGATIONS

As a general rule services of another person could not be hired for religious duties and obligations. It is, therefore, not allowed for a person to pray or perform *Hajj* (pilgrimage) because they are mandatory duties of an individual, so the worker is not entitled to wages if he is hired for any of them. In regard to charging for teaching the Holy Qur'ān and other principles of faith; the agreed upon ruling of the earlier *Hanafi* School was that no one is allowed to charge any fee for teachings these subjects because it is considered to be a form of worship. However, the jurists of subsequent ages, when they keenly observed that the people were reluctant to teach the Holy Qur'ān, gave a fatwa in favour of charging fee for teaching the Holy Qur'ān. They considered it necessary in order to encourage the teachings of Islam.³⁵⁹

The Contract of *Ijārah* is an irrevocable contract as it may not be terminated unilaterally. Therefore, it should not comprise any condition according to which the wages might be paid from the article manufactured. Thus, it is permissible to say that this contract shall be effective from some specified future date. It is also permissible to specify some future time period such as

³⁵⁸ Abu Al-Futooh Muhammad Basyuni , Al-Hurriyah Al-Iqtis'adiyyah fi Al-Isl'am and its Effect in Economic Growth, 384.

³⁵⁹ Zail'ai, Fakhr-ud-Deen, Usm'an ibn Ali, Tabyeen al- Haq'a'iq, Sharh Kanz Al-Daq'aiq, Al-Matb'a Al-Kubr'a, vol. 5, 124.

that this contract shall be effective from January 1, 2021 or some other specified date.

3.10.5. SUBJECT MATTER OF *IJĀRAH AL-ASHKHĀS* (EMPLOYMENT CONTRACT)

In order to understand that what qualifies to be the subject matter of employment contract the following points shall be considered by the parties:

- a. The assigned task shall not be an act of obligatory worship which requires individual performance, like fasting in *Ramadhān*, *Hajj* and five times prayers that are personal duty of every Muslim to be performed in individual capacity.³⁶⁰
- b. The unanimous opinion of the *Fuqahā* is that wages shall be from the wealth that is permissible (*Halāl*) in *Shari'ah*.³⁶¹
- c. Specification of wages shall clearly be mentioned through word, in writing or by gestures.³⁶²

3.10.6. TERMINATION OF EMPLOYMENT CONTRACT

As a general rule, *Ijārah* is an irrevocable contract that cannot be invalidated unilaterally. However, there are certain unavoidable cases, as per the opinions of *Fuqahā* where the contract of *Ijārah Al-Ashkhās* automatically stands terminated in the following cases:

³⁶⁰ Ibid, 191.

³⁶¹ Ibid, 193.

³⁶² Ibid.

a. Death of one of the contracting parties

All four schools of thoughts are unanimous on termination of *Ijārah Al-Ashkhās* in case one of the parties dies without whom the contract entirely comes to an end, such as in case of death of wet nurse for breast feeding of a baby.³⁶³ However, they (*Fuqahā*) have different opinions in case of death of employer whereby the contract can be continued provided the employee could continue his duty as per the agreed upon terms of the employment contract. In the mentioned situation the contract will stand validated according to Jamhoor (majority of the scholars) contrary to *Ahnāf*.³⁶⁴ The opinion of *Ahnāf* is different from that of Jamhoor in case of *Ijārah Al-Ashyā / Al-ā'yān*; Jamhoor say that the contract is capable to be inherited by successors of the deceased employer³⁶⁵ but Hanafiyyah invalidates the contract.³⁶⁶

b. Consent of the contracting parties

Ijārah Al-Ashkhās is a binding and enforceable contract which cannot be terminated by one of the parties unilaterally though they may mutually agree upon termination of the contract.³⁶⁷

³⁶³ Ibn Rushd, Abul waleed Muhammad (d.595 A.H), *Bidaya Al-Mujtahid wa Nihayat Al-Muqtasid*, Darul Hadith, Egypt, vol.2, 277. Al-Qaw'aneen Al-fiqhiyyah, 278. / Ibn Qudāmah, Abu Muhammad Mawfiq Al-deen (d.620A.H), *Al-Mughni*, vol.5, 456. Al-Muhazzab, vol. 1, 406 / Al-sharh Al-kabeer, Dar deer, vol. 4, 30.

³⁶⁴ Ibn A'abideen, Muhammad Ameen ibn Umar, *Radd Al-Muht'ar Al'a Al-Dur Al-Mukht'ar* (H'ashiyah Ibn A'abideen), D'ar-ul-Fikr, Beirut, vol.6, 79/ *Bidaya Al-mujtahid*, vol.2, 173.

³⁶⁵ Mughni Al-muht'aj, vol. 2, 356. Bid'aya Al-mujtahid, vol. 2, 328/ Ibn Qudāmah, Abu Muhammad Mawfiq Al-deen, *Al-Mughni*, vol. 5, 428.

³⁶⁶ Al-Samarqandī Abu Bakkar Alāuddīn (d.540 A.H), *Tuhfa'tul Fuqahā*, Dār-ul-Kutub Al-Ilmiyyah, Beirut, Lebanon, Ed. 2, vol. 4, 222/ *Radd Al-Muht'ar*, vol. 5, 57 / Tabeen Al-Haq'aiq, vol. 5, 114.

³⁶⁷ Al-Zuhaili, Wahba, *Al-Fiqh-al-Isl'ami Wa Adillatuhu*, Dar-ul-Fikr, vol. 5, 3862.

c. Destruction of subject matter of contract

In case, the subject matter of the contract gets destroyed the contract automatically comes to an end except in case where the employer was able to replace an alternative subject matter, the contract will not be considered null and void and the employee will also be responsible to perform his part of the contract. This type of situation could take place in case of hiring a person for shifting goods from one place to another.³⁶⁸

d. Expiration of time period of the contract

Fuqahā are unanimous on the point that when the time specified for undertaking a certain task but the employee was unable to do so and the time has lapsed, the contract stands terminated.³⁶⁹

3.10.7. DEDUCTION FROM EMPLOYEES' WAGES

Islamic concept of deduction from wages depends upon the capacity of an employee whether he is *Ajeer-e-Khās* or *Ajeer-e-Mushtarak* (personal employee and common employee) and status of the commodity in their hands. As for as destruction or damage to the commodities in the hands of a personal employee is concerned, the *Fuqahā* unanimously agree the he is not liable to compensate for the wrong that has taken place except in case where his wrong intention or negligence has been found, because his custody is

³⁶⁸ Tabyeen Al-Haq'a'iq, vol. 5, 144 / Al-bad'ai', vol. 4, 196 / Takmila Fath Al-Qadeer, vol. 7, 220/ Bid'aya Al-mujtahid, vol. 2, 228/ Al-Qaw'aneen Al-fiqhiyyah, 277.

³⁶⁹ Al-Bad'ai', vol. 4, 196/ Gh'ayah Al-Muntah'aj, vol. 2, 218.

considered that of a trustee as it is in case of *Mudhārabāh* contract.³⁷⁰ The case of common employee has been dealt with by the *Fuqahā* on different footing where they hold multiple opinions on the basis of their respective approach.

3.10.7.1. OPINIONS OF *FUQAHĀ* IN RESPECT OF DEDUCTION FROM WAGES

The commodity in custody of common employee as well as personal employee had been considered as a trust (*Amānah*), however, with passage of time this practice was abused by common employees. Therefore, *Fuqahā* have adopted a strict approach in order to preserve public interest. Al-Shāf'iyyah³⁷¹ and Al-Hanābilah³⁷² hold the opinion that when the employee has undertaken his work in the presence of the employer or the commodity was ready to be delivered but it got destroyed or damaged, the employee is entitled to full wages. According to Al-Hanafīyyah, the commodity shall be considered whether it was in the custody of employer or employee at the time of destruction or damage³⁷³ then the issues related to payment, non-payment or deduction from wages may easily be resolved.

In case destruction or damage was inflicted in the custody of employee, the effect of his services may either apparently be realized on the commodity as in case of tailor and launder or its completion may not have relationship with it as in case of carrier and sailor. In the former case, if the damage occurred

³⁷⁰ Al-Zuhaili, Wahba "Al-Fiqh-al-Isl'ami Wa Adillatuhu, vol. 5, 3847.

³⁷¹ Al-Muhzab, vol. 1, 409.

³⁷² Al-Mughnī, vol. 5, 487.

³⁷³ Al-Samarqandī Abu Bakkar Alāuddīn (d.540 A.H), Tuhfa'tul Fuqahā, vol.4, 204.

before delivery of the commodity and in later case before completion of the work, wages of employee will be subjected to deduction accordingly.³⁷⁴

There may be a situation where the destruction or damage could be inflicted while employer holds possession of the commodity as in case of constructing a building or digging a well. The employee is entitled to full wages after completion of the work but in case he leaves the task incomplete, mostly, he is entitled to the reward to the extent of undertaken work.³⁷⁵

3.10.8. PAYMENT OF WAGES IN INSTALLMENTS

In contract of *Ijārah*, wages or rent are not payable just by conclusion of the contract except in a situation where a condition was incorporated for prompt payment or payment was made without such a condition or otherwise after the task was carried out.³⁷⁶ As far as payment on installments is concerned, the Fuqahā hold various views keeping in view nature of work for which an employee is hired. First opinion of Imām Abu Hanifa was that payment becomes due after completion of the period of *Ijārah* as in case of *Ijārah Al-Ashkhās* for taking a pilgrim (*H'aji*) to Makkah and then returning him back to his home town, though later on he has changed his stance and said that payment becomes due on daily basis. According to Imām Abu Yousuf and

³⁷⁴ Al-Zuhaili, Wahba "Al-Fiqh-al-Isl'ami Wa Adillatuhu, vol. 5, 3857.

³⁷⁵ Ibid, 3857-3858.

³⁷⁶ Al-Murghin'ani, 'Ali ibn 'Abi-Bakkar Al-Hid'ayah fi Sharh Bid'ayah-ul-Mubtadi, Dar 'Ihy'a Al-Tur'ath Al-'Arabi, Lebanon, vol.3, 231.

Imām Muhammad payment becomes due according to the stages of the assigned task.³⁷⁷

The logic behind the first view of Imām Abu Hanifa was that taking benefit being a subject-matter of the contract, from the beginning till the end, is considered one and same thing, here, the wages could not be divided and consequently be paid as in case of tailor when he sew a part of the cloth he would be entitled to wages because his incomplete services cannot benefit the employer.

The later opinion was adopted by Imām Abu Hanifa for there are certain tasks the benefits of which are divisible such as in case of travelling from place to place where wages becomes due for every specific step.³⁷⁸

3.10.9. WAGES AS AN ALTERNATIVE OF WORK

Wages is payment of remuneration to a worker in return for the work or services he has made by virtue of an employment contract. As per the Shari'ah view point regarding wages is concerned, there has been found no uniform definition, though some of the contemporary scholars have attempted to define it as an agreed upon payment in cash or kind to a worker

³⁷⁷ Al-Samarqandī Abu Bakkar Alāuddīn (d.540 A.H), Tuhfa'tul Fuqahā, Dār-ul-Kutub Al-Ilmiyyah, Beirut, Lebanon, vol.4, 201.

³⁷⁸ Ibid, 401-402.

by his employer as a result of his contribution towards the production that may last for specified time period of an hour, day, week, month or year”³⁷⁹.

In compliance with terms of the contract of *Ijārah Al-Ashkhās* (contract of employment), the responsibility of employer is to pay the agreed upon wages to the worker for he has rendered his services in accordance with the contract. Shari’ah on the other hand emphasizes and motivates workers to make the best efforts and hard work in order to perform the assigned tasks as every man will get for what he strives as the Holy Qurān says

", وَأَنْ لِّسَ لِلْإِنْسَانِ إِلَّا مَا سَعَى"

“for a man is nothing but for what he strives”.³⁸⁰

By accomplishing an assigned task a worker is entitled to due and agreed upon wages in accordance with his efforts and nature of work.³⁸¹ That is the reason Islam has stressed upon payment of due wages as earlier as possible.

In *Hadith-e-Qudsī*³⁸² Allah (SWA) says:

"ثَلَاثَةٌ أَنَا خَصْمُهُمْ يَوْمَ الْقِيَامَةِ: رَجُلٌ أَعْطَى بِي ثُمَّ غَدَرَ، وَرَجُلٌ بَاعَ حُرًّا فَأَكَلَ ثَمَنَهُ، وَرَجُلٌ اسْتَأْجَرَ أَجِيرًا فَاسْتَوْفَى مِنْهُ وَلَمْ يُعْطِ أَجْرَهُ"

“I will be against three persons on the day of Resurrection... (one of them is) who employs a laborer and gets the full work done by him but does not pay him his wages”.³⁸³

³⁷⁹ Hamza Al-J’ami’ Al-Damohi, ‘Aw’amil al-’Int’aj fi al-Iqtis’ad al-Isl’ami, 217.

³⁸⁰ Al-Qur’an: 53: 39.

³⁸¹ Ibrahim Dasoqi ‘Ab’adha, Al-Iqtis’ad Al-Isl’ami, 89.

³⁸² *Hadith-e-Qudsī* is a type of Hadith where the prophet (SAW) narrates that Allah (SWA) says so and so. This type of Ah’adith are very few as compare to the rest of the traditions of the Prophet (SAW).

³⁸³ Al-Bukh’ari, Muhammad ibn Ismail, Saheeh Al-Bukh’ari, vol. 3, Hadith no. 2227.

3.10.10. FIXATION OF MINIMUM AND MAXIMUM RATES OF WAGES IN *SHARĪ'AH*

Sharī'ah favours fixed wages agreed upon by the parties to an employment contract, though, *Fuqahā* have discussed both minimum and maximum levels of wages to be determined by state if it feels that without interference economic activities could not be undertaken peacefully. While comparing the conventional rules of wages fixation on the basis of supply and demand with that of Islamic view, it has been discovered that Sharī'ah has not relied on a specific system but left the matter to be determined by the customary employment practices.³⁸⁴ The wages, in ordinary circumstances are to be determined on ethical basis for a worker being a human shall be given preference over other elements in a way that he, along with his family, shall not be deprived of basic necessities of respectable and decent living.³⁸⁵

3.11. EMPLOYMENT ASPECTS OF *SALAM, ISTISNĀ, AL-'ABD AL-MA'Zoon BI-AL-TIJĀRAH AND WAKĀLAH*

There are certain Islamic contracts, discussed by the classical *Fuqahā* in *Fiqh* books in such a manner that they are applied, in some cases, to the employment contracts. A contractual relationship made under these contracts is hereby discussed briefly where priority has to be given to the guiding principles provided in the leading Hanafi *Fiqh* book of *Muhammad ibn Al-Hasan Al-shaybāni* titled as '*Al-'asal*'.

³⁸⁴ Saeed Abu Al-Futooh Muhammad Basyoni, *Al-Hurriyyah Al-Iqtis'adiyyah fi Al-Isl'am Wa Atharuh'a fi Al tanmiyah*, Dar-ul-Waf'a Al-Mansora, 380.

³⁸⁵ Hamza Al-J'ami' Damohi, '*Aw'amil al-'Int'aj fi al-Iqtis'ad al-Isl'ami*', 218.

3.11.1. *Salam and Istisnā*

As a general rule, a commodity could not be contracted upon which does not exist at the time of transaction, though, there exist two exceptional cases of *Salam* and *Istisnā*,³⁸⁶ where this rule is not applicable due to the *Shari'ah*'s different texts that support such type of sale contracts.³⁸⁷

Salam is a sale contract whereby seller promises to ensure supply of specific goods to the buyer in future for an exchange of prompt price.³⁸⁸ It may be concluded for all commodities that could be counted or weighed.³⁸⁹ *Istisnā*, on the other hand, is a contract whereby parties agree in a way that buyer of specific goods orders a manufacturer to make certain commodity out of his skills and material for a specified wages.³⁹⁰

3.11.2. *Wakālah*

Shari'ah permits contract of *Wakālah* ³⁹¹ where a prudent man, capable of being hired, is appointed as an agent (*Wakeel*) for undertaking various tasks on behalf of others, including legal proceedings. According to Imām Abu Hanifa, Imām Abu Yousuf and Imām Muhammad, in case of litigation, an agent's authority is limited to the extent to which has was hired and his

³⁸⁶ Usmani, Mu ʔammad Taqi, An Introduction to Islamic Finance, 128.

³⁸⁷ Al-Sarakhsi, Muhammad Ibn A ʔmad (d.483 A.H), Al-Mabsūt, Dar Al-M'arif, Beirut, vol.12, 124.

³⁸⁸ Ibid.

³⁸⁹ Al-shayb'ani, Abu Abdullah Muhammad ibn Al-Hasan (d.189 A.H), Al-'asal, Dar ibn Hazam, Beirut, vol. 2,371.

³⁹⁰ Usmāni, Muhammad Taqi, An Introduction to Islamic Finance, 135-136.

³⁹¹ Al-Zuhaili, Wahba "Al-Fiqh-al-Isl'ami Wa Adillatuhu, Dar-ul-Fikr, Damascus, vol. 5, 4059.

actions beyond that limit would be considered null and void.³⁹² Likewise, the agent is entitled to the agreed upon wages to furnish process of *Salam* for which the agent can even confiscate the commodity till he receives his wages.³⁹³

Wakālah contract may be general or specific. The *Fuqahā* have unanimously agreed upon on the validity of specific *Wakālah* while they differ over *Wakālah* that has been concluded for disposing of the whole property of the principal (owner of the property). According to *Mālikiyyah* and *Hanafiyyah* general *Wakālah* is valid while *Shāf'iyyah* and *Hanābilah* invalidate it for there exists uncertainty and doubts in this respective type of *Wakālah*.³⁹⁴

3.11.3. *Al-'abd al-ma'zoon bi-al-tijārah* (Permission of Slave for Trade)

A slave (servant) could be assigned with authority to undertake business on behalf of his master. According to Imām Abu Hanifa, Imām Abu Yousuf and Imām Muhammad, when a master tells his slave “ I have permitted you for business”, it means that he has allowed him to dispose of all the commodities related to business, like a free man, including hiring of workers and cultivating the earth. The master, in this respective case, does not need to

³⁹² Al-shayb'ani, Abu Abdullah Muhammad ibn Al-Hasan (d.189 A.H), *Al-'asal*, Dar ibn Hazam, Beirut, vol. 11, 209.

³⁹³ *Ibid*, vol. 2, 422.

³⁹⁴ Al-Zuhaili, Wahba, *Al-Fiqh-al-Isl'ami Wa Adillatuhu*, Dar-ul-Fikr, Damascus, vol. 5, 4059.

bear witnesses on what has been concluded between him and his slave because it is not right of the slave.³⁹⁵

In case a slave was found by his master while dealing in business articles though he ignored it, the conduct of the master would be considered to have permitted the slave for the business. In fact, when the master receives monthly profit from the slave on the investment that has been engaged in the business, it is an evidence that he has allowed the slave for conducting business activities.³⁹⁶

3.12. SHARĪ'AH STANCE ON RESOLVING UNPRECEDENTED ISSUES

Keeping in view the very nature of Islamic law, the Fuqahā have extracted various doctrines from the primary sources of Sharīah in the light of principles of Islamic law to derive solution of the emerging issues. The doctrines of *Siyāsah Shar'iyah* and *Maslaha Mursala* and their application to the EER in Pakistan is hereby discussed briefly.

3.12.1. DOCTRINES OF SIYĀSAH SHAR'İYAH AND MASLAHA MURSALA

Siyāsah Sh'ariyyah is the administration of justice by the state beyond the explicit law of *Shariah*³⁹⁷ which denotes that it is the search for derivation of new rules from the *Shariah*-recognized principles. An interest which is not supported by an individual text, but is upheld by the texts considered

³⁹⁵ Al-shayb'ani, Abu Abdullah Muhammad ibn Al-Hasan (d.189 A.H), *Al-'asal*, Dar ibn Hazam, Beirut, vol.8, 496.

³⁹⁶ *Ibid*, 497.

³⁹⁷ Imran Ahsan Khan Nyazee, *Theories of Islamic Law*, 328.

collectively is called *Maslaha Mursal'a*.³⁹⁸ It is a means by which public interest has been preserved in respect of a particular issue about which there has been found no precedent in Shariah neither in favour nor in contradiction. Most of the *Fuqahā* support *Maslaha Mursala* and prove their stance on the basis of examples from the Companions period where they have written Quran in a single version and suspended *Hadd* (punishment fixed by Qur'an) of theft.³⁹⁹

3.12.2. THE RULE OF AL-'URF (Commonly Acceptable Norm)

Al-'Urf is a usage with which people get familiar in their day-to-day life in such a satisfied way that subsequently it becomes a part of their life. Acceptance of the custom by people means majority of them and not all of them.⁴⁰⁰

Most *Fuqahā*, of various schools of thoughts, consider and recognize *Al-'Urf* as one of the base from which new laws could be derived. The *Fuqahā* have a great deal of principles under the shadow of the maxim: **الثابت بالعرف كالثابت بالنص** "recognized by custom is (as) recognized by text"⁴⁰¹ On the basis of recognition an *'Urf* as lawful or unlawful, it has been divided to recognized Custom (**العرف الصحيح**) is that which is neither recognized nor invalidated by *Shari'ah* the text such as exchange of gifts after engagement

³⁹⁸ Ibid.

³⁹⁹ Abdul Wahhab Al-Khallaf, *Al-Siyasah Al-Shariyyah fi Al-Shuoon Al-Dastooriyyah wa Al-Kharijiyyah wa Al-Maliyyah*, Dar-ul-Qalam, vol.1, 21.

⁴⁰⁰ Al-Zuhailil, Wahba "Al-Fiqh al-Islāmi Wa Adillatuhu, Dar-ul Fikr, Damascus, vol.7, 5164.

⁴⁰¹ Al-Mawsoo'a Al-Fiqhiyyah Al-Kuwaitiyyah, Ministry of *Awq'af*, Kuwait, vol. 16, 261.

while irregular custom (العرف الفاسد) which against the text like dealing in *Riba* transactions in most of the world's countries.⁴⁰²

3.12.3. SADD ADD-DHAR'ĀI (BLOCKING MEANS THAT LEAD TO A SIN)

The spirit of *Shari'ah* requires that interest of man must be protected at every cast, hence, in certain circumstances a permitted (Mub'āh) means could be declared unlawful when it leads to *Harām* (unlawful act)⁴⁰³ or it is prevention of lawful means to an unlawful end.⁴⁰⁴ It is very important principle of Islamic law which authorizes the ruler to take cognizance of those permitted means which are, sometimes, used by the guilty-minded to satisfy their individual interest irrespective of the expected harm to the society at large because there is no direct text in *Shari'ah* declaring it unlawful. The ruler in such a situation, is authorized to declare something illegal on the basis of this maxim to prevent expected harm for instance ban on the cultivation of opium which basically permitted but it presumed that will do great harm than its usefulness.

3.13. CONCLUSION

The EER in *Sharīah* takes place with the conclusion of contract of *Ijārah Al-Ashkhās* where the parties agree upon certain terms and conditions. This relationship is dealt with and based on legal as well as ethical basis. As per the Islamic law literature, there has been found no codified law that

⁴⁰² Ibn 'Abideen, *Majmu'a Ras'ail*, vol.2, 114/ Al-Sh'atibi, *Al-Muwafaq'at*, vol.2, 283.

⁴⁰³ Hussain Hamid Hass'an, *Fiqhul Maslaha wa Tatbeeqatohi Al-Mu'asirah*, 33

⁴⁰⁴ Imran Ahsan Khan Nyazee, *Theories of Islamic Law*, 327

regulated employment relationship. However, basic principles related to competency of the parties, subject matter of the contract, specification of the agreed upon task and fixation of wages have been discussed in the Fiqh books under the topic of *Ijārah Al-Ashkhās* (employment contract). Employment contract is a binding and irrevocable that cannot be invalidated unilaterally. The contracting parties shall be capable of concluding a valid contract keeping in view all other requirements so that their due rights and duties shall be well established.

The EER, as per *Sharī'ah's* approach, is not that of a master and servant but they are deemed partners who contribute their respective shares towards accomplishing a constructive activity. An employer is required to feel self-accountability in dealing his subordinates as per assigning them a task and payment of due wages. Maximum or minimum level of wages are to be determined and fixed while keeping in view the existing market rates that must fulfill life's basic necessities in those particular surroundings.

In normal circumstances, *Sharī'ah* encourages free-market activities but in certain exceptional situations, state is authorized to regulate market affairs in order to protect public interest and play its due role as the custodian of the rights of oppressed. The case of prevention from hoarding has been applied to the fixation of minimum wages, on the basis of analogy as the logic behind both is same; protection of public interest.

CHAPTER FOUR

THE CURRENT EMPLOYER-EMPLOYEE RELATIONSHIP REGIME IN PAKISTAN

4.1. INTRODUCTION

Pakistan is the sixth populous country with population of almost twenty one hundred million and labour force of sixty five million⁴⁰⁵ of which 72.6 per cent is engaged in informal economy⁴⁰⁶ while the remaining 27.4 per cent is working in the formal economy.⁴⁰⁷ The statistics on labour are collected officially by the Pakistan Bureau of Statistics through population census that is normally conducted after a decade while the labour force surveys is another authentic source in this regard. The statistics are collected by male staff and the respondents are also male family members, thus, the real statistics could never be revealed.⁴⁰⁸

The EER legislation has been derived from the Constitution of Pakistan, 1973. Articles 17 (1) and 25 (1) lay down basis for representation of employers and workers is concerned along with enactments backed by the ILO Conventions

⁴⁰⁵ Labour Force Survey 2017-18, 34th Issue, Pakistan Bureau of Statistics, Ministry of Statistics, Government of Pakistan, 25.

⁴⁰⁶ The term “informal economy” has been defined by the ILO in its program “Transition from the Informal to Formal Economy Recommendation, 2015 (No. 204)” in these words: “All economic activities by workers and economic units that are – in law or in practice – not covered or sufficiently covered by formal arrangements” are called informal economic activities that excludes illicit and illegal activities.

⁴⁰⁷ Khalil, Zakaullah Khan, “A Profile of Trade Unionism and Industrial Relations in Pakistan”, International Labour Organization (ILO, 2018), 5.

⁴⁰⁸ M.Afzal and Zafar Moeen, Is Female Labour Force Participation Really Low and Declining in Pakistan? A Look at Alternative Data Source, Pakistan Institute of Development Economics Islamabad, vol. 26, No. 4, Papers and Proceedings Fourth Annual General Meeting of the Pakistan Society of Development Economists (PSDE) Islamabad, August 1-3, 1987, Part. 2 (Winter.1987), 699-709.

and judicial decisions. Primarily, there are two major pieces of legislation in Pakistan that regulate employment and relations between employer and employee; the IRAs and Standing Orders, 1968.

Like other countries Pakistan trade unions is going through three crucial stages of suppression, limited acceptance and tolerance, and finally general acceptance and recognition. In today's world worker unions are not at the same stage of development everywhere, in industrially developed countries they are at third stage while in Pakistan they are still passing through the second stage; limited acceptance and tolerance."⁴⁰⁹

By virtue of the 18th Constitutional Amendment⁴¹⁰ the CLL got abolished and labour devolved to the Provinces. The IRA, 2008 was the existing law at the time of Amendment that embodied a sunset clause that created mishaps regarding the future of EER regime. Later, the four Provinces have enacted the relevant law while the Federal IRA, 2012 was promulgated to regulate employer-employee relations in industrial establishments whether trans-provincial or in the Islamabad Capital Territory (ICT).

The validity of the IRA was challenged in all High Courts (HCs) and Islamabad High Court (IHC) as well as in the Supreme Court of Pakistan (SCoP). All the Courts declared the Act as valid law as the Federal Government was not standing on equal footing as the Provinces were as per

⁴⁰⁹ Rahim, Pervez, "Trade Unions", available at: <https://www.dawn.com/news/1378969>, (last accessed: 3 August, 2019).

⁴¹⁰ The 18th Constitutional Amendment was passed in May, 2010 that repealed many provisions of the constitution.

the abolition of CLL was concerned. After the devolution, EER laws could not attract due attention of the governments as the existing laws were adopted by the Provinces with nominal modifications. The limited scope, a century-old master-servant base, class based division of the society, a bulk of complex IRs laws have led to mistrust and disappointment of the back bone of the economy on the existing labour regime.

4.2.CONSTITUTIONAL FRAMEWORK AND EER

Being supreme law of the land and the primary derivative source of laws, certain rights have been incorporated to the current Constitution of 1973 that guarantee freedoms in various prospects of individual as well as collective life of the citizens. Right of association and collective bargaining has been provided for as a fundamental right to employer and worker to get resolved their disputes settled under the provisions of the Constitution.⁴¹¹ However, the rights provided under the Constitution does not include any guaranteed right of collective bargaining or the right to strike. In short, there has been found no fundamental right to strike in Pakistan under any of the clauses of the Constitution.⁴¹²

Among the fundamental rights provided under the Constitution, article 25 (1) lays down for equal protection and treatment of all the citizens before the law

⁴¹¹Under Article 17 (1) of the Constitution, all the citizens are free to form unions and associations of choice to protect their rights except where that is prejudice to national interest.

⁴¹² Mahmood Abdul Ghani, Labour and industrial jurisprudence-I, available at:<https://fp.brecorder.com/2008/05/20080517739841/>, (last accessed: 12September 2019).

which denotes that no discrimination shall be made between the subjects on the basis of their sex, occupation and social status. Likewise, article 37 (e)⁴¹³ protects workers by recognizing humane working conditions for them as well as prohibits employment of child and women to be employed for the work that is unsuitable for them. Moreover, employer-employee's equitable adjustment of rights has been provided under Article. 38⁴¹⁴ for the objective peaceful relations between them could be achieved.

4.3. THE POST-18TH AMENDMENT ERA AND DEVELOPMENT OF EER

'Labour' as a legislative subject, remained a Federal subject under the CLL prior to its abolition through the 18th Constitutional Amendment.⁴¹⁵ Subsequently, labour as a legislative matter has been devolved and become provincial subject.⁴¹⁶ The EER related two primary laws; IRA, 2008 and Industrial and Commercial (Standing Orders) Acts, 1968 as per its status, reformation, implementation and other ancillary matters are concern, is going to be discussed while highlighting the distinctive features pertaining to the laws of four provinces and the Federal. For the purpose of core

⁴¹³ The Constitution's Art. 37 (e) provided for reasonable humane working condition especially for children and women along with maternity benefits.

⁴¹⁴ Art. 38 (a), while describing the State's responsibilities, lays down: "The State shall secure the well-being of the people, irrespective of sex, caste, creed or race by raising their standard of living, by preventing concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees and landlords and tenants".

⁴¹⁵ Prior to the incorporation of the Amendment labour was part of the CLL under items no. 26 and 27.

⁴¹⁶ Syed Imran Ali Shah v. Govt. of Pakistan, etc, LHC, W.P.No. 579, 2012.

discussion, the Federal laws have to be preferred while provincial laws along with Courts' decisions will be given due place.

4.3.1. IRA, 2008 AS A SUNSET LAW AND LEGAL VACUUM AFTER DEVOLUTION

Abolition of the CLL through the 18th Constitutional Amendment of 2010 devolved various legislative subjects to the provinces including labour.⁴¹⁷ The Amendment was passed a few days prior to the expiry dated of the than existing IRA, 2008.⁴¹⁸ The IRA, 2008 by giving it lifetime was a sunset law that has created mishaps for trial courts and tribunals as far as the industrial disputes were concerned by giving it lifetime. Though the government had specified time for the devolution process⁴¹⁹ but nothing has been done in respect of the IRA, 2008's 'sunset clause' due to which the law automatically got expired after 30th April, 2010.⁴²⁰ Indeed, two of the fundamental rights of workers provided for by the Constitution and law got suspended; the right to freedom of association⁴²¹ and right to fair trial.⁴²² The word "to form" in Article 17 (1) of the

⁴¹⁷ Ch. Basharat Ali vs Federation of Pakistan, etc, LHC, W.P.No.24691, 2011, 5.

⁴¹⁸ Sec. 87 (3), IRA, 2008 provided for its lifetime up till 30 April, 2010.

⁴¹⁹ Art. 270-AA (8) lays down: "on the omission of the Concurrent Legislative List, the process of the devolution of the matters mentioned in the said list to the Provinces shall be completed by the 30th June 2011".

⁴²⁰ Mahmood Abdul Ghani, Industrial Relations in Pakistan at a Crossroad, Pakistan Law House, 49.

⁴²¹ Art.17 (1) of the Constitution of Pakistan, 1973 guarantees "Freedom of Association" in these words: "Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.

⁴²² Art. 10-A of the Constitution guarantees "Right to Fair Trial" and due process of law when there are criminal or civil charge against him.

Constitution means and include not only the right to start trade union but even to continue it. The Article is imperative in nature, so if there is no legislation in operation that can give effect to it, then the constitutional right of freedom of association will become at stake and, hence, meaningless.⁴²³ The legal imbroglio has remained for some days that consequently resulted in the following legal issues related to industries in the country:

- i. Absence of registrar of trade unions in the Federal as well as in the four Provinces in order to register new trade unions and arrange elections for determining of CBA from among the registered trade unions.
- ii. No Labour Courts was in place to try industrial disputes' cases and enforce workers' respective rights given to them under the Constitution and other laws.
- iii. No forum to adjudicate and determine industrial dispute or to redress grievances of unfair labour practices and no Labour Appellate forum for appeals proceedings.⁴²⁴

The Federal Government, in this unprecedented situation, was expected that it would issue some clarification regarding the uncertain situation that was created by the sunset clause of the IRA, 2008 regarding procedure or it might have adopted an "Expiring Law Continuance Act (ELCA)" on the style of

⁴²³ Mahmood Abdul Ghani, *Industrial Relations in Pakistan at a Crossroad*, Pakistan Law House, 51.

⁴²⁴ *Ibid*, 50-51.

Western countries.⁴²⁵ A former Law Minister and one of the members of the committee which drafted the 18th Amendment, S.M. Zafar, has suggested the government, as he writes in his book,⁴²⁶ to adopt such an ELCA but that was ignored.

4.3.2. IRA, 2008; VALIDITY IN THE LIGHT OF CASE LAW

The legal status of the IRA, 2008 was challenged in various trial forums, where the crucial questions were that whether the Act is a sunset law or it has to exist till the process of devolution gets completed. All provincial High Courts (HCs) as well as the Supreme Court of Pakistan (SCoP) and the National Industrial Relation Commission (NIRC) tried various petitions by exercising their trial and appellate jurisdictions. The views of the honorable courts are hereby discussed in respect of the validity of the IRA 2008.

4.3.2.1. STANCE OF THE FOUR PROVINCIAL HIGH COURTS

After this legal chaos prevailed for a few days, the Punjab Labour Appellate Tribunal (PLAT) came forward to interpret the sunset clause⁴²⁷ of the IRA, 2008, relaying on the Art. 270-AA Clause (6)⁴²⁸ to be read with Clause (8)⁴²⁹ of

⁴²⁵ Ibid, 49.

⁴²⁶ S.M. Zafar's suggestion in his book named "Cannon of Construction", (Ed. 2nd, 170) lays down : " ...therefore, the Law Reforms Commission in Pakistan would be well advised to consider this issue and provide for similar Expiring Laws Continuance Act which would help to avoid a lot of confusion and litigation".

⁴²⁷ Sec.87 (3) of the IRA, 2008 that provided for life time of the Act.

⁴²⁸ Art. 270-AA (6) provides that all laws that were under the ambit of the CLL shall remain in force until altered, repealed or amended by the competent authority.

⁴²⁹ Clause (8) of Art.270-AA lays down that devolution process has to be completed till 30 June, 2011.

the Constitution that all laws under the CLL have to be considered enforced till the devolution process gets completed up to 30th June, 2011. The same view was adopted in a petition⁴³⁰ before the Lahore High Court (LHC) that disposed of the petition on the ground that the IRA, 2008 shall be considered in force till the devolution process gets completed. In another petition⁴³¹ of the LHC Rawalpindi Bench the IRA, 2008 was held to be validly operational till 30th June, 2010 by virtue of Article 270-AA. The above view of the PLAT was declared null and void by the SCoP in another petition⁴³² where the petition was filed for the purpose to extend life of the IRA, 2008 up to 30th June, 2011. The court in its judgment held:

“...the IRA, 2008 ceased to continue in force w.e.f. 30th April, 2010...”

Interestingly, the Islamabad High Court (IHC) in a petition⁴³³ also declared that the IRA, 2008 that is was a repealed law through its section 87 (3). The matter was also confronted by the Divisional Bench of the Sindh High Court (SHC) in a constitutional petition⁴³⁴ where the court interpreted the sunset clause of the IRA, 2008 in the following words:

⁴³⁰ LHC. Writ Petition no. 10746/2010.

⁴³¹ ICA, 200/2008.

⁴³² Constitutional Petition. 24/2011, (Air League of PIAC of Employees through President Muhammad Usman Khan VS Federation of Pakistan M/O Labour and Manpower Division, Islamabad etc), 26.

⁴³³ Writ Petition. No. 4917/2010, (Tufail Ahmad vs Zaka Ullah Khalil).

⁴³⁴ Industrial Relations Advisors Association VS Federation of Pakistan (Const. Petition No. D-1437/2010).

*"...the Industrial Relations Act, 2008 stand repealed on April 30th 2010 by force of its Section 87 (3), and w.e.f. that date (previous) Industrial Relations Ordinance, 1969 came back to operation".*⁴³⁵

In the light of the respective approaches of the PLAT, the LHC, the IHC and the SHC while interpreting of the sunset clause of the IRA, 2008 it seems that by not adopting uniform way of interpretation legal system of Pakistan lacks the ability to tackle such a situation of legal chaos.

4.3.2.2. STANCE OF THE SUPREME COURT OF PAKISTAN (SCoP)

The SCoP examined the validity of the IRA, 2008 in various petitions in order to determine whether it was a sunset law or still it was to be considered operational. To determine the validity of the Act it was held by the SCoP⁴³⁶ that it was a sunset law in the light of its own provisions that ceased to exist after the expiry of that fixed life period on 30TH April, 2010.⁴³⁷ The apex court in another Constitutional petition⁴³⁸ held that though Art. 270-AA⁴³⁹ provided protection to all permanently existing laws enacted on the

⁴³⁵ Mahmood Abdul Ghani, Industrial Relations in Pakistan at a Crossroad, Pakistan Law House, 58.

⁴³⁶ 2011 SCMR 1254 (Air League of PIAC of Employees through President VS Federation of Pakistan M/O Labour and Manpower Division, Islamabad and others).

⁴³⁷ Sec. 87 (3), IRA, 2008 provided for lifetime of the Act up till 30.4.2010.

⁴³⁸ Const. Petition no.24/2011 (of the Supreme Court of Pakistan), 8.

⁴³⁹ Art. 270-AA (6) of the Constitution lays down fate of the laws that were drafted under the CLL in these words: "Notwithstanding omission of the Concurrent Legislative List by the Constitution (Eighteenth Amendment) Act, 2010, all laws with respect to any of the matters enumerated in the said List (including Ordinances, Orders, rules, bye-laws, regulations and notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having extra-territorial operation, immediately before the commencement of the Constitution (Eighteenth Amendment) Act, 2010, shall continue to remain in force until altered, repealed or amended by the competent authority".

subject of labour⁴⁴⁰ when the 18th Amendment took place but as far as the effect of Section 87 (3) of the IRA, 2008 is concerned it killed the said law.

4.4.CURRENT EER LEGISLATION IN THE FEDERAL AND PROVINCES

After the legal chaos prevailed for a few months, the four Provinces and later on the Federal government have repealed the previous IRA, 2008 by introducing their own legislation. The Punjab Industrial Relations Ordinance (PIRO) was passed on 13th June, 2010 which was repealed by the Punjab Industrial Relations Act (PIRA), 2010 on 9th December, 2010. The Sindh Industrial Relations (Revival and Amendment) Act (SIRA) was promulgated on 5th July, 2010 whereby the IRA, 2008 was revived w.e.f. 1st May, 2010 as if it had never been repealed. The Khyber Pakhtunkhwa Industrial Relations Ordinance (KPIRO) was passed on 14th July, 2010 that was consequently repealed by the provincial Assembly while declaring it as an Act. In the same way the Baluchistan Industrial Relations Ordinance (BIRO) was issued on 22th July, 2010 that was later on repealed by the Baluchistan Industrial Relations Act (BIRA), 2010 on 15th October, 2010.⁴⁴¹ In the Federal IRO, 2011 was promulgated that was then repealed by the IRA, 2012 which is currently in force and operational since 14th March 2012.

⁴⁴⁰ Here 'the subject' means labour welfare legislation that was mentioned in the CLL under items: 26 and 27 before its abolition through the 18th Amendment, 2010.

⁴⁴¹ The Constitution Petition no. 24/2011 (of the Supreme Court of Pakistan), 3-4.

4.4.1. INDUSTRIAL RELATIONS ACT (IRA), 2012

The IRA, 2012 was consolidated in order to regulate industrial relations in those industrial and commercial establishments which undertake business activities in the Federal Capital, Islamabad as well as the trans-provincial establishments are under the ambit of the Act. The reason that it has to be discussed here is not just that it is the Federal legislation but because it is the most questioned IRA so far challenged in the upper courts of Pakistan for various reasons. A brief account of the legal debate is hereby discussed that had taken place in various petitions before the courts.

4.4.1.1. CHALLENGES TO THE IRA, 2012

The IRA, 2012 repealed the earlier IRA, 2008 while incorporating minor modifications. The Act was promulgated to regulate employer-employee relations as well as to settle industrial disputes and to tackle other labour issues related to working class in the industries located in the Capital Territory along with those industries that function in more than one province. Though the Act was passed long time after the 18th Amendment, has created various legal issues regarding the labour as a provincial subject. The most debatable issues have arisen from the Preamble of the Act that is why it is produced here as it lays down its extent and objectives as under:

“An Act to consolidate and rationalize the law relating to formation of trade unions, and improvement of relations between employers and workmen in the Islamabad Capital Territory and in trans-provincial establishments and industry;

Whereas, the Constitution of the Islamic Republic of Pakistan recognizes the freedom of association as a fundamental right of the citizens;

And whereas the Islamic Republic of Pakistan has ratified ILO Convention No.87 on Freedom of Association and Convention No.98 on Right to Organize and Collective Bargaining;

And whereas it is expedient to consolidate and rationalize the law in Islamabad Capital Territory and at trans-provincial level, relating to formation of trade unions and federations or trade unions, determining the collective bargaining agents, regulation of relations between employers and workers, the avoidance and settlement of any differences or disputes arising between them or matters connected therewith and ancillary thereto".⁴⁴²

The major challenges before the Act were; its validity in respect to the provinces, the role of NIRC⁴⁴³ to try cases and its application to the trans-provincial establishments and industries and other ancillary matters as per its provisions that have paved way to a bulk of litigations. Various petitions resulted in the judgments of the apex courts which are to be discussed in a bit detail.

4.4.1.2 STANCE OF THE PROVINCIAL HIGH COURTS AS TO VALIDITY OF THE IRA, 2012

A brief account of the petitions has to be given in the coming lines where validity of the IRA, 2012 was challenged before the four provincial HCs.

4.4.1.3 ISLAMABAD HIGH COURT'S STANCE

The validity of the IRO, 2011 (that was repealed by the IRA, 2012 afterwards), as per its application to the trans-provincial establishments and industries,

⁴⁴² Preamble of the IRA (Federal legislation), 2012.

⁴⁴³ The National Industrial Relations Commission was established under the IRA, 2008.

was challenged in a petition before the IHC. The respective Court declared it *intra vires* based on the Entries No. 3, 32 and 59 of the Part-I in the FLL.⁴⁴⁴

In another petition ⁴⁴⁵ filed in the IHC by the aggrieved employees of the SME⁴⁴⁶ Bank against their illegal termination as they have worked for the bank from a long period of 2 to 13 years. The bank contested the case and submitted that grievance note shall be served on the bank under the IRA, 2002 (the prevailing law at that time) but the IHC maintained that IRA, 2012 is a valid law for the said purpose.

4.4.1.4 LAHORE HIGH COURT'S STANCE

The LHC in a writ petition⁴⁴⁷ the validity of the IRO, 2011 (that was repealed by the IRA, 2012 afterwards) was challenged on the stand that after the 18th Amendment the President of Pakistan had no authority to promulgate an enactment in labour affairs as that has already become a provincial subject. The LHC relying on the Entries No. 3, 32 and 59 of the Part-I of the FLL, the Ordinance was declared as *intra vires* enactment.

4.4.1.5 SINDH HIGH COURT'S STANCE

The Sindh Labour Appellate Tribunal remitted a grievance petition, filed by the employees of a bank, to the NIRC constituted under the IRA, 2012 which

⁴⁴⁴ The Federal Legislative List that describes the legislative ambit of the Federal Government under the Constitution of Pakistan, 1973.

⁴⁴⁵ Writ Petition no. 4626/2014.

⁴⁴⁶ SME Bank Limited (the Bank) is a commercial bank engaged in the business of banking with the primary objective to support and develop Small and Medium Enterprise (SME) sector in Pakistan by providing necessary financial assistance and business support. Available at: <http://www.sbp.org.pk/stats/Balance/2013/SME%20Bank.pdf>, (last accessed: 9 September, 2019).

⁴⁴⁷ Writ Petitions no. 24691-24695 of 2011, (2012 PLC 219).

was challenged by the bank before the SHC. The bank's stance was that the petition shall have been tried by under the SIRA, 2013 as the matter did not lie under the IRA, 2012. The SHC held that the proper trial forum in the mentioned case⁴⁴⁸ is the NIRC as the bank is a trans-provincial institution.

4.4.1.6 PHC'S STANCE

A grievance petition was filed with the Labour Court, Haripur that was sent to the NIRC Peshawar Bench where it decided the case. An appeal petition⁴⁴⁹ was filed in the PHC challenging the legal status of NIRC Peshawar Bench to try case related to the aggrieved employees of Meezan Bank. It was held by the PHC that the NIRC had valid jurisdiction under the IRA, 2012 to the extent of trans-provincial industries including those banks which have branches in the radius of more than one provinces.

4.4.1.7. BALUCHISTAN HIGH COURT'S STANCE

The Baluchistan High Court (BHC) in a petition⁴⁵⁰ that challenged the constitutionality of the IRA, 2012, held that the Act was properly enacted by the Parliament and thus it cannot be categorized as being unconstitutional. It is clear from the above four HCs decisions that they all are agreed upon one point that the IRA, 2012 is a valid piece of legislation passed by the Parliament in order to regulate employer-employee relations in trans-

⁴⁴⁸ Constitutional Appeal no. 606/2015, against order of High Court of Sindh dated 18-03-2015 passed in Constitutional Petition no. 4154-D/ 2013.

⁴⁴⁹ Writ Petition no. 634-P/ 2015 (2016 PLC 279).

⁴⁵⁰ Constitution Petition no.226/2012 (2014 PLC 315).

provincial industries as well as the industries ICT. It was also held that the Act is has no contradiction with the IRs of the provinces that have been passed after the devolution of labour through the 18th Amendment.

4.5. THE FEDERAL AND PROVINCIAL GOVERNMENTS' ROLE AND OBLIGATION TOWARDS THE INTERNATIONAL COMMUNITY

As per the preamble of the IRA 2012 the Federal government has mentioned its obligation towards the International Community by recognizing its due role to be played in the light of the ILO Conventions no. 87⁴⁵¹ and 98.⁴⁵² As far as the stance provincial IRAs is concerned regarding the obligation to the ILO Conventions, there has been mentioned nothing to how and under which capacity the provinces shall comply with the ILO rules that are contained in the two core labour-related Conventions and what would be the consequences in case of non-compliance.

As a result of the abolition of the CLL by means of the 18th Amendment, the devolution has a significant effect on effective governance of the labour market in the country. The reason behind this chaos was the classification and change in roles and responsibilities of the Federal as well as the provincial governments as there were several legislative subjects that were

⁴⁵¹ The Convention lays down about the 'Right of Freedom of Association'.

⁴⁵² The Convention emphasizes on 'Right to Organize and Collective Bargaining'.

previously in the domain of the Federal Government and now they have been devolved to the provinces .⁴⁵³

The legislative authority that was exercised previously by the Federal Government under the CLL is now in the purview of the Provincial departments of labours (DOLs). As far as the responsibility of reporting to the ILO is concerned, it is now one of the functions of Ministry of Overseas Pakistanis and Human Resource Development. The said Ministry reports Pakistan's progress to the ILO in respect of incorporating and implementation of the ILO's core Conventions and labour standards which have been ratified by Pakistan prior to the 18th Constitutional Amendment.⁴⁵⁴

Additionally, the NIRC Islamabad, on the basis of the IRA, 2012 is authorized to consolidate formation of trans-provincial trade unions in order to get EER improved in the trans-provincial establishments and industries.⁴⁵⁵

The provincial governments in the post-devolution period have been overburdened in respect of addressing a wide range of complex issues, including the enactment of laws that complies both with the Constitution, the international commitments as well as the ILO's Labour Standards. After devolution, all provinces have enacted their own Industrial Relations Acts for preservation and promotion of workers' unions in their respective

⁴⁵³ Khalil, Zakauallah Khan, "A Profile of Trade Unionism and Industrial Relations in Pakistan", International Labour Organization (ILO, 2018), 45.

⁴⁵⁴ Ibid, 45-46.

⁴⁵⁵ Ibid, 46.

geographical jurisdiction. At the Federal level, the IRA 2012 has been implemented for coverage to industries which undertake their business in more than one province (trans-provincial industrial establishments).⁴⁵⁶

4.6. ANALYSIS OF THE PRINCIPAL LAWS ON EER

The traditional concept of EER has been derived from the colonial period's notion of master-servant legislation. The primary document that creates contractual relationship between the parties is contract of employment where terms and conditions have been given due consideration. It is required that terms of employment shall clearly be understood by the parties to avoid work place disputes in future. In countries like Pakistan the terms and conditions of contract of employment usually are not described in explicit words that, ultimately, lead to industrial disputes.⁴⁵⁷ Keeping in view the poor, unhealthy and vulnerable condition of working class some industrial relations regulatory enactments have been implemented in order to maintain peace and tranquility in the industrial environment to the extent that issues shall be resolved amicably.

Legal framework of the EER laws previously contained various statutes, however, currently two of these statutes have been considered enough to cover most of the employment relationship such as terms of the contract of

⁴⁵⁶ Ibid.

⁴⁵⁷ Zahir Baig, Employer-Employee Relationship in Pakistan, journal on Market Forces (July 2005), vol.1, No. 2.

employment and trial forum that could officially resolve industrial disputes between the parties engaged in industries. In order to understand EER regime in Pakistan in respect of contract of employment, workers and employers representation in industrial affairs, there have been found two governing laws that regulate industrial relations.⁴⁵⁸

4.6.1. INDUSTRIAL AND COMMERCIAL EMPLOYMENT (STANDING ORDERS)

ORDINANCE, 1968

To provide an official and standard guideline to employers for determining terms and conditions of employment contract, the Industrial and Commercial Employment (Standing Orders) Act was introduced for the first time in 1946,⁴⁵⁹ which required employers to get the determined terms of employment certified by the relevant authority.⁴⁶⁰ Prior to the Act, there existed no law that regulated terms of employment as the employers were on liberty to frame their own standing orders which were to be followed while in the events of hiring and firing, that resulted in unfair treatment with workers.

⁴⁵⁸ Ibid.

⁴⁵⁹ The Ordinance aimed to amend and consolidate the law relating to industrial employment in (West) Pakistan.

⁴⁶⁰ Richard Mitchel-Petra Mahy-Peter G.Gahan, “ The Evolution of Labour Law in India: An Overview and Commentary on Regulatory Objectives and Development”, Asian Journal of Law and Society, 1. 2014, Cambridge University Press and KoGuan Law School, Shanghai Jiao Tong University, 419.

After independence, the Industrial and Commercial Employment (Standing Orders) Ordinance (ICEO) was promulgated by Pakistan in 1968⁴⁶¹ to regulate employer-employee contractual relationship. The Ordinance was made applicable to specified industrial and commercial establishments and certain classes of workers⁴⁶² as per the provisions of the Act.⁴⁶³ It was promulgated as a binding law to all contractors and employers by the fifth labour policy in 1972.⁴⁶⁴

4.6.1.1 STRUCTURE AND BRIEF SKETCH OF THE ICEO

The ordinance has been divided into two parts, the first part contains sections⁴⁶⁵ while the second part comprises of standing orders.⁴⁶⁶ The sections contain important definitions and other ancillary matters regarding the Orders such as its enforcement, means of modification, Government's supervision through inspection and penalties and procedure.

The Standing Orders lay down rules in regard to certain classes of workers and the procedure of their recruitment and the available job protection including payment of wages. Moreover, rules regarding the authority of

⁴⁶¹ The ICEO is a repealed form of the previous law that was promulgated in 1960.

⁴⁶² Standing Order. 1 with Sec. 2 (g) divided industrial workers into six categories i.e., (i) Permanent (ii) probationers (iii) badlis (iv) temporary (v) apprentices and (iv) contract workers.

⁴⁶³ Sub. Sec. (4) of sec.1 lays down that the Ordinance applies to every industrial and commercial establishment where twenty or more workers are employed on any day during the preceding twelve months.

⁴⁶⁴ Khalil, Zakaullah Khan, "A Profile of Trade Unionism and Industrial Relations in Pakistan", International Labour Organization (ILO), 41.

⁴⁶⁵ There are ten sections in this part of the Ordinance.

⁴⁶⁶ The Standing Orders are twenty in number.

employer to stoppage of work, closure of industry and termination of employment of workers have been described in the prescribed form. Likewise, the manner of reemployment of retrenched worker has been provided under the law⁴⁶⁷ along with special provisions for construction workers in this regard.⁴⁶⁸ In case of any misconduct by a worker he will face Penal provisions as described by the Ordinance.

Under the Standing Orders, workmen have been classified into six classes: permanent, probationers, badlis, temporary, apprentices and contract workers.⁴⁶⁹ In case of appointment of any class of worker the employment contract shall be in writing containing important terms and conditions of his service, at the time of hiring, promotion and transfer.⁴⁷⁰ The employer is also required that he shall maintain a notice board on which all the important documents shall be placed including the wage rates paid to different categories of workers.⁴⁷¹

In short, every employer is required to make sure proper and strict observance of the rules given under the law irrespective of whether the workers in that particular industrial establishment were being hired by a contractor or by the employer himself.⁴⁷²

⁴⁶⁷ Standing Ord. 14, ICEO, 1968.

⁴⁶⁸ Ibid, 14 (a).

⁴⁶⁹ Ibid, 1.

⁴⁷⁰ Ibid, 2-A.

⁴⁷¹ Ibid, 5.

⁴⁷² Ibid, 20.

4.6.1.2. ADOPTION OF ALTERNATIVE SCHEME

As per the law terms and conditions of employment may be set up and agreed upon by employer and worker on the condition that this modification of the Standing Orders shall not diminish or take away any of the rights and benefits given to workers under this law. The modification of employment conditions can only take place by means of collective agreement between the employer and worker or their representatives and not otherwise.⁴⁷³

In case an employer modifies the standing orders by other way than prescribed under the provisions of this ordinance he shall be liable to have committed a punishable offence⁴⁷⁴ for he has violated the proper procedure of modifying employment conditions. In case the employer was found guilty of committing the same offence twice he shall be awarded double punishment in the prescribed manner.⁴⁷⁵

4.6.1.3. FLEXIBLE NATURE OF THE ORDINANCE

As per the provisions of the ordinance it is not mandatory that terms and conditions given by the law shall be followed in all circumstances where an employment contract has to take place between employer and employee. Protection has also been given to the prevailing customs and usages on the condition that they provide for more favourable employment conditions to

⁴⁷³ Ibid, sec. 4, ICEO, 1968.

⁴⁷⁴ Ibid, sec.7 (1).

⁴⁷⁵ Ibid, sub sec. (4).

workers than those prescribed by this law and that they shall not be in contravention of the provisions of the law.⁴⁷⁶

4.6.1.4 TERMINATION OF EMPLOYMENT

A workman may be terminated either on account of misconduct or any other legal ground. As per the law, the following acts and omissions are to be treated as misconduct:

- i. Disobedience of the reasonable orders of superior.
- ii. Theft, fraud, dishonesty, taking or giving bribe and willful damage or loss of the goods or property of employer.
- iii. Habitual absence, late attendance or breach of any law of the industrial establishment.
- iv. Incite others to illegal strike or go-slow.⁴⁷⁷

4.6.1.5 TERMINATION OF VARIOUS CLASSES OF WORKERS

As per the provisions of the Ordinance workers have been classified into six categories⁴⁷⁸ in order to determine their legal status as per the law. The most protected workmen among the six classes are the permanent workers for whom proper procedure has been given under the ICEO. The remaining five categories of workmen may get terminated by will of the employer without any prior notice or ground of misconduct that make them subjected to termination.

⁴⁷⁶ Ibid, Sec. 9.

⁴⁷⁷ Ibid, standing ord. 12 (a).

⁴⁷⁸ Ibid, sec.1 (a).

An employer is required to serve a notice prior to termination of employment of a permanent workman by one month time period. The workman shall not be terminated except by following proper procedure given under the Standing Order.15 of the Ordinance even if he is guilty of misconduct.⁴⁷⁹

4.6.1.6 RETRENCHMENT OF EMPLOYMENT

In case an establishment was going through financial crises where it can no longer continue to accommodate all the workmen, it may go for retrenchment process for which the law provides proper approach of 'last come, first go'.⁴⁸⁰ An aggrieved workman whose employment is terminated may use internal mechanisms for dispute resolution through shop stewards and CBA, however if he is not satisfied with their orders he may appeal to the labour court in the manner provided by the IRA, 2012.⁴⁸¹ In that case, labor court is authorized to go into all the facts of the case and determine whether the termination was valid and bona fide or not.

The Ordinance further provides that whether a worker has resigned or was terminated, he is entitled to gratuity and other financial benefits to be paid to him in accordance with law.

⁴⁷⁹ Ibid, Standing Ord.12 (5).

⁴⁸⁰ Ibid, 14 (1).

⁴⁸¹ Sec. 58, IRA, 2012.

4.7. THE IRA, 2012 IN VIEW OF THE 18TH AMENDMENT

After the devolution of 'labour' as a legislative subject, by virtue of the 18th Amendment in 2010, the CLL was abolished, as a result, both Federal and Provincial governments have passed their own IRs legislations. The whole scheme of the IRA, 2012 (Federal legislation) contains ninety-one sections and two Schedules that is going to be discussed here. Reference may be given to the relevant provisions of previous enactments as well as the Provincial IRAs may be given due room.

4.7.1. VALIDITY OF THE IRA, 2012

Soon after the IRO, 2011 (that was repealed by the IRA, 2012 with the same scheme) was promulgated by the Federal Government and extended to the trans-provincial industries as well as to the industries in the ICT, various petitions were filed in all Provincial HCs around the country challenging the validity of the Act and its contradiction with the provincial IRAs.⁴⁸²

All the HCs including the Islamabad High Court, in multiple petitions before them, held that the IRA, 2012 is a valid piece of legislation passed by the Parliament in order to regulate employer-employee relations in the industries of ICT as well as the trans-provincial industries. It was also held that the Act

⁴⁸² Writ Petitions no. 24691-24695 of 2011, (2012 PLC 219)/ W.P.No.4626/2014, C.A.No. 606/2015, against order of High Court of Sindh dated 18-03-2015 passed in CP No. 4154-D/ 2013 and W.P.No. 634-P/ 2015 (2016 PLC 279) and C.P.No.226/2012 (2014 PLC 315).

is has no contradiction with the IRs of the provinces that have been passed after the devolution of labour through the 18th Constitutional Amendment.

4.7.2. EXCLUSION OF EMPLOYEES OF VARIOUS DEPARTMENTS/ SECTORS

Primarily, the provisions of the IRA, 2012 are applicable to all industrial establishments either they carry on business in the ICT or in more than one province.⁴⁸³ However, the Act denies⁴⁸⁴ the constitutional right of freedom of association and bargaining to certain categories of employees including police, Armed Forces of Pakistan and Persons employed in the administration of the State. Likewise, security staff of the Pakistan International Airlines Corporation (PIAC), employees of Pakistan Security Printing Corporation (PSPC) and those Institutions which treat or take care of sick, infirm, destitute or mentally unfit persons are out of the ambit of the IRA, 2012.

It may be understood that denying the Constitutional right of freedom of association provided under Article 17 (1) of the Constitution to those related to the administration of the State but as far as the Security Staff of PIAC, employees of PSPC and other establishment for care and treatment of sick, infirm and mentally ill persons are concerned, it is violation of the said Article. Moreover, members of security and fire staff engaged in production,

⁴⁸³ Sec.1 (3) of the IRA, 2012.

⁴⁸⁴ The IRA, 2012, sec.1 sub-sec.3 clauses (a,b,c and d) excludes certain departments and categories of employees that are out of the ambit of this Act.

transmission and distribution of natural or petroleum whether in public or private capacity are considered out of the scope of the industrial laws.⁴⁸⁵ The said exclusion of workers from the ambit of the IRA also leads to violation of Article 25 of the Constitution.⁴⁸⁶

4.7.3 IMPORTANT DEFINITIONS

Under section two of the IRA various industrial relations related legal terms have been defined that explain the relevant meanings as per the provisions of the Act are concerned. Some of these terms have been given as under:

- i. The term 'Award' means settlement of an industrial dispute by the Commission,⁴⁸⁷ Arbitrator⁴⁸⁸ and includes in interim award.⁴⁸⁹
- ii. The Collective Bargaining Agent' (CBA) ⁴⁹⁰means a registered trade union of workmen that represents industrial workers in matters of collective bargaining.⁴⁹¹
- iii. 'Employer' means a person or a body that employ employee workmen in an establishment under a contract of employment and includes an heir, successor or any person responsible for the management, supervision and control of an establishment or as prescribed under the provisions of this Act.⁴⁹²

⁴⁸⁵ Mahmood Abdul Ghani, Industrial Relations in Pakistan at a Crossroad, Pakistan Law House, 74-75.

⁴⁸⁶ Art.25 of the Constitution of the Islamic Republic of Pakistan, 1973 lays down that all citizens are equally entitled to the protection of law and no discrimination shall be made in this respect.

⁴⁸⁷ The NIRC has been re-constituted under Sec. 53 of the IRA, 2012.

⁴⁸⁸ Sec. 40 sub-sec.2 of the IRA, 2012 lays down that an arbitrator may be a person who is a member of a panel that has been maintained by the Commission or he may be a person upon whom both the parties are agreed to settle their industrial dispute.

⁴⁸⁹ Ibid. sec.2 clause (ii).

⁴⁹⁰ Workmen's agent and representative in an industrial establishment appointed under Sec.19, IRA, 2012.

⁴⁹¹ Clause (iv), sec. 2, IRA, 2012.

⁴⁹² Ibid, ix (a, b, c, d and e).

- iv. 'Industrial dispute' means any dispute or difference between employer and employer or between employer and workman or between workman and workman connected with the employment, non-employment, terms of employment, or the conditions work of any person.⁴⁹³
- v. The term 'industry' means any business, trade, manufacture, calling, employment or occupation for production of goods or services.⁴⁹⁴
- vi. 'Lock out' means closing of a work place or suspension of work by employer wholly or partly or refusal absolute or conditional by employer to continue to employ any number of workmen employed by him in order to compel workmen to accept his stance in relation to an industrial dispute. ⁴⁹⁵
- vii. The word 'settlement' means settlement arrived at in the course of conciliation proceedings and includes an agreement between the employer and his workmen arrived at otherwise than in the course of conciliation or as prescribed under the Act.⁴⁹⁶
- viii. The term 'strike' means stoppage of work by workmen or refusal under a common understanding of any number of workmen to continue to work or to accept employment.⁴⁹⁷
- ix. The term 'trade union' means any combination of workmen or employers formed primarily for the purpose of regulating relations between workmen and employers, workmen and workmen or employers and employers and includes a Federation of two or more Trade unions.⁴⁹⁸

⁴⁹³ Ibid, (xvi).

⁴⁹⁴ Ibid, (xvii).

⁴⁹⁵ Ibid, (xxi).

⁴⁹⁶ Ibid, (xxix).

⁴⁹⁷ Ibid, (xxx).

⁴⁹⁸ Ibid, (xxxi).

- x. 'Trans-provincial' means any establishment, group of establishments or industry that has branches in more than one province.⁴⁹⁹
- xi. Finally, the term 'workmen' or 'worker' has been defined to mean any person not falling within the definition of employer, including employment as Supervisor or as an apprentice, in an establishment or industry for hire or reward either directly or through a contractor whether the terms of employment are expressed or implied. It does not include a person employed mainly in managerial or administrative capacity.⁵⁰⁰

4.7.4. REGISTRATION OF TRADE UNIONS

By virtue of the Constitutional provisions and the ILO Conventions, workers and employers, without distinction, have got the right to organize themselves at national level as well as at international level by joining international trade associations of their own choice. Likewise, both the trade union and the employers association have right to draw up their own constitution and rules, to elect their representatives to organize their administration and activities and to formulate their program. Similarly, workers and employers' associations have been given the right to establish and join federations and confederation and any such organization.

The competent authority to register trade unions is the Registrar assisted by the Joint registrar who, along with this primary function, undertakes other

⁴⁹⁹ Ibid, (xxxii).

⁵⁰⁰ Ibid, (xxxiii).

ancillary duties notified⁵⁰¹ to them in this behalf. It is the registrar who will decide, in accordance with his powers and functions, that whether a trade union is eligible to be granted with certificate of registration or it is disqualified.

It is unfortunate that the registration process has been made so complicated by requiring trade unions to provide complete details in respect of its members and employer. The list then has to go through the employer's verification where he mostly uses delaying tactics including threats, harassment and dismissal from work in order to discourage unions' activities. Moreover, the informal private sector is used to another tactic in this regard; to convert non-management cadre to management positions because the law prohibits union activities for management.⁵⁰²

4.7.4.1. REQUIREMENTS OF APPLICATION FOR REGISTRATION

A trade union needs fulfillment of some legal formalities to get it registered with the registrar. An application signed by the President and Secretary of the trade union (TU) is needed to be forwarded ⁵⁰³in order to become a legal trade union.

⁵⁰¹ Sec.5, the IRA, 2012.

⁵⁰² Yu Shu Hong -Malik Zia-ud-Din, "Analyzing the Labour Issues in Pakistan: A Historical Background of Labour Laws and Labour Unions", Labour Law Issues, vol.3, no. 2, 2017.

⁵⁰³ IRA, 2012, sec.7.

The important documents needed to be attached with the application include a statement showing the name of the Trade union, address of its head office, date of formation of the union, title, name, address, age and occupation of officers of the trade union. There shall be submitted a statement of total paid membership, name of the establishment or group of establishments or industry as the case may be to which a trade union relates, along with statement of total number of workers employed therein. It is important to provide registrar with the name and address of trade union in the establishment, group of establishments or industry as the case may be and in the case of a federation of trade union, the name, address and registration number of the member union.⁵⁰⁴

Likewise, three copies of the constitution of the TU, together with a copy of the resolution by members of the trade union adopting such a constitution that is bearing the signatures of the chairman of the meeting.⁵⁰⁵ Moreover, a copy of the resolution by the members of the TU, authorizing the president and the Secretary to apply for its registration and in the case of a Federation of Trade union, copy of the resolution from each of the constituent unions seeking to become members of the union is to be attached along with the application for registration.⁵⁰⁶

⁵⁰⁴ Ibid, clause (a (i-vii)), sec. 7.

⁵⁰⁵ Ibid, clause. b.

⁵⁰⁶ Ibid, clauses (c-d).

4.8. TRADE UNIONS' ENTITLEMENT TO REGISTRATION

A TU shall not be entitled to become a registered TU if it fails to provide a comprehensively drafted constitution embodied with all the required information such as; name, address of the trade union, objectives for which the trade union has been formed, purpose for which the general fund of the union shall be applicable. Moreover, numbers of the executive shall not exceed the prescribed limit and shall include not less than seventy five percent from amongst the workmen actually engaged or employed in that respective work place in which activities of the TU will be undertaken.⁵⁰⁷

Every TU is legally required to provide the circumstances where its members could claim those benefits which are assured to them by virtue of its Constitution along with conditions where any fine may be imposed. There shall be proper arrangements by the TU for maintaining a list of its members and the manner in which the constitution could be made subjected to variation and amendment. Likewise, a TU is bound to convince the registrar on the arrangements through which safe custody of its funds and annual audit would be done. It shall provide in its application for registration the manner to facilitate inspection of the account's books by the authoritative officers. It is also necessary to convince the registrar regarding the procedure through which the TU may get dissolved along with the manner of election

⁵⁰⁷ Ibid, sec. 8, sub sec. 1 (a, b, c and d).

and re-election of officers by the General Body of the TU which are to be held at least once every year.⁵⁰⁸

Furthermore, a TU is required to ensure that all its members are workmen actually engaged or employed in the industry with which the trade union is connected and where there are two or more registered trade unions in the establishment, group of establishment or industry with which the trade union is connected, unless it has as its members not less than one fifth of the total numbers of workmen employed in such an establishment, group of establishments or industry as the case may be.⁵⁰⁹

4.9. POWERS, FUNCTIONS AND DUTIES OF REGISTRAR

The IRA, 2012 provide all cases where Registrar of Trade Unions shall exercise his due authority. He is required to register TUs and maintain the relevant record in this regard.⁵¹⁰ Likewise, he can lodge a complaint to the Commission for action against employer, worker or a TU that has been found to have violated provisions of the Act or their constitution.⁵¹¹

The Registrar shall also determine which of the TUs is entitled to be a certified CBA in a particular industry ⁵¹² and to inquire, inspect and

⁵⁰⁸ Ibid, sub. sec. 1 (a, b, c, d, e, f, g, h, I, j, k and l), sec. 8.

⁵⁰⁹ Ibid, sub. sec. 2 (a-b).

⁵¹⁰ Ibid. clause (a), sec. 5.

⁵¹¹ Ibid. clause (b).

⁵¹² Ibid. clause (c).

investigate accounts of registered TUs.⁵¹³ He is bound to issue a Certificate of Registration to TU within seven days after receiving its application for registration completed in all respects.⁵¹⁴ To register alteration and changes that have been made by a TU as to its constitution or officers and it may refuse to do so if the changes are in contravention of this Act or the provisions of the constitution of the TU.⁵¹⁵ The Registrar shall hold fresh elections if he is satisfied that due to change in officers of a TU there exists a dispute inside the TU's management.⁵¹⁶

4.9.1. APPEAL AGAINST DECISION OF THE REGISTRAR

In case of grievance due to the Registrar's order, decision or proceedings TU may appeal to the Commission within thirty days.⁵¹⁷ Likewise, if the registrar has rejected application of a TU to be declared as a registered TU or where application was accepted but certificate of registration have not been issued, the TU may appeal to the Commission for an action.⁵¹⁸

4.10. COLLECTIVE BARGAINING AGENT (CBA)

CBA is a registered trade union that has been elected through secret ballot from among the registered trade unions in an industrial establishment. It is an agent which represents workers in the establishment in the event of an

⁵¹³ Ibid. clause (d).

⁵¹⁴ Sec. 9 (1), the IRA, 2012.

⁵¹⁵ Ibid. sec.9 (3-4).

⁵¹⁶ Ibid. sec.9 (6).

⁵¹⁷ Ibid. sec.12.

⁵¹⁸ Ibid. sub Sec (2), sec. 9.

industrial dispute takes place. In case there exists only one trade union and its members are at least one-third of the total workers in an establishment, it is permissible under the provisions of the IRA, 2012 to make an application to the registrar to be declared as certified CBA.⁵¹⁹ Where there are more than one trade union in an establishment, the registrar has to hold within fifteen or thirty days (depending on the size of establishment) a secret ballot in order to determine one of the unions as the CBA for that particular establishment.⁵²⁰

In order to cast vote for determining a CBA, the workers' right to vote is not absolute. As per the provisions of the IRA the minimum period of employment shall not be less than three months. Every worker whose period of service is more than this period and he is member of a trade union which is contesting the elections is considered eligible to be listed by the registrar in the registered voters.⁵²¹

4.10.1. SECRET BALLOT AND DETERMINATION OF CBA

The Registrar under the provisions of the IRA, 2012 is required to fix date for the elections of CBA and inform all stake holders accordingly. Code of conduct shall be observed in the way that the ballot boxes shall be sealed and ballot papers received in the presence of the representatives of the contesting TUs.⁵²² After conclusion of the poll, one of the TUs, who got at least one third

⁵¹⁹ Ibid, sub sec (1), sec. 19.

⁵²⁰ Ibid, sub sec (2).

⁵²¹ Ibid, sub sec. 5.

⁵²² Ibid. clauses (a-b), sec. 19 (9).

of the votes, shall be certified as the CBA of that industry. In case none of the TUs has received the prescribed vote then a second ballot shall be held among the two TUs that got majority votes and the certified CBA will be the one who gets majority. In case both the TUs got equal votes a third ballot will be conducted so that anyone of them gets majority.⁵²³

4.10.2. FUNCTIONS OF CBA

A CBA, being workers' representative is required to play its due role in engaging collective bargaining with employer on any matter of employment, non-employment, terms of employment and working conditions in accordance with the provisions of this Act.⁵²⁴ It has the discretion to represent workers in any proceedings, to give notice of strike and nominate workers' representatives for Board of Trustees of welfare institutions and Provident Fund and Workers' Participation Fund in respect of an industrial establishment.⁵²⁵ Likewise, the CBA may request employer to deduct a prescribed amount from a worker who is not willing to contribute to the TU's funds.⁵²⁶

Moreover, a CBA is required to maintain a bank account with National Bank of Pakistan or any other saving bank recognized by the State Bank of

⁵²³ Ibid. clauses (c, d and e) to be read with the mentioned provisos.

⁵²⁴ Ibid, sub sec. (1), clause. (a), sec. 20.

⁵²⁵ Ibid, (d).

⁵²⁶ Ibid, sec. 22.

Pakistan to manage its funds transparently along with submission of all deductions that are made for the TU's funds.⁵²⁷

4.11. WORKERS' PARTICIPATION IN WORK PLACE AFFAIRS

Workers' scheme of participation in the affairs of establishment is one of the areas of EER that make employees feel themselves as an integral part of the industry. As per the provisions of the Act, there have been mentioned three types of forum; shop steward, works council and joint management board, where industrial workers may participate in the management of establishment.⁵²⁸

4.11.1. SHOP STEWARD

Along with the CBA, Shop Steward is a parallel system where individual grievances of workers have been presented for settlement in a prescribed manner.⁵²⁹ Shop Steward has to be set up in an industrial establishment where twenty five or more workers are employed. He has to be elected from among the workers really engaged in a particular establishment which he is going to represent through a secret ballot⁵³⁰ or nominated by CBA ⁵³¹ for holding office for one year time period.

⁵²⁷ Ibid, sub sec (3).

⁵²⁸ Ibid, sub sec (1), sec.23.

⁵²⁹ Ibid, sec.24, read with sec.33 of the IRA, 2012.

⁵³⁰ In case there exists no CBA, the employer shall make election's arrangements in the prescribed manner.

⁵³¹ Where a CBA has already been elected in an establishment the CBA is authorize to nominate shop steward from among the workers.

Shop Steward shall work as a link between employer and workers, as such; he is required to assist in promoting peaceful industrial environment in respect of arrangement for physical working conditions and production work and to help works in settlement of individual grievances related to the work place.⁵³²

In the like manner, he has to ensure workers' legal rights guaranteed or secured to them under the provisions of this act or other laws ⁵³³ and to take a matter for necessary action to the CBA or the NIRC of which a worker is aggrieved.⁵³⁴

4.11.2. WORKS COUNCIL (WC)

Works Council (WC) is a representative body that consists of the representatives of both employer and employee. It has been constituted in an industrial establishment where fifty or more workers are employed in a manner that representatives of workers shall not be less than the representatives of the employer. Members of the WC either be nominated⁵³⁵ or elected⁵³⁶ as per the provisions of the IRA, 2012.

⁵³² Sec.24, the IRA, 2012.

⁵³³ Ibid, sec.33(1).

⁵³⁴ Ibid, (4).

⁵³⁵ Nomination of the Works Council shall be made by a CBA if there are more than one registered trade unions in an industrial establishment.

⁵³⁶ The members of the Council, in case there is no CBA, shall be elected through a secret ballot in the prescribe manner.

4.11.2.1. FUNCTIONS OF THE WORKS COUNCIL

In order to achieve better labour-management relations, the WC have been set up so that it may exercise its due role in promoting means of securing and preserving good relations between employer and employed and to encourage an industrial environment based on mutual sympathy and understanding. In case of industrial dispute the WC can settle disputes through bilateral negotiations by using various amicable means of resolving industrial disputes. It shall also assist workers to strive for job satisfaction, security, conditions of health and safety and to promote and take steps for vocational training of workers along with educational facilities for their children.⁵³⁷

4.12. JOINT MANAGEMENT BOARD

There is a third forum under the scheme of IRA, 2012 where workers' participation in management⁵³⁸ has given recognition. The law requires every factory and establishment to constitute a Joint Management Board (JMB) where workers participation shall be up to thirty percent. Representatives of the employer shall be selected from the senior executive officers however workers representative shall be taken from the workers really engaged in the industrial establishment.

⁵³⁷ Sec.26 (a, b, c, d, e), IRA, 2012.

⁵³⁸ Sub sec. 7, clause (b), sec. 28 of the IRA lays down that "Management" means the employer.

The JMB shall take care of the affairs of the industry along with preservation of interests of both employer and workers in improvement of productivity, efficiency of workers, fixation of piece-rates and matters pertaining to transfer of workers. The JMB may also introduce new rules for remunerations for workers as well as uphold welfare of the workers employed through contractors. In case of necessity, the JMB may demand information from the industry's management that shall be provided by the employer in a prescribed manner.⁵³⁹

4.13. INDUSTRIAL INSPECTION SYSTEM

The primary law to the industrial inspection is the Factories Act, where the whole procedure has been provided in this regard.⁵⁴⁰ As per the provisions of the IRA, the scope of industrial inspection has been made very limited. One of its major duties is investigating workers' participation in the industrial establishment.⁵⁴¹

4.13.1 FUNCTIONS OF THE INDUSTRIAL INSPECTORS

The inspectors are appointed by the government as public servants⁵⁴² to undertake their respective functions in respect of workers such as to demand from employer any document related to workers' participation in the affairs of the work place and inquire it accordingly. They may also require any other

⁵³⁹ Sub sec (4), sec. 28, the IRA, 2012.

⁵⁴⁰ Chapter. II of the Factories Act 1934 provides for inspecting staff and other ancillary matters.

⁵⁴¹ Sec. 29, The IRA, 2012.

⁵⁴² Ibid, sub sec (2), Sec. 30.

relevant information from the management to which the employer is bound to provide within the prescribed manner and time and to submit report to the registrar in case any offence has been committed thereto.⁵⁴³

4.14. UNFAIR LABOUR PRACTICES (ULPs)

In order to protect and sustain industrial peace on concrete foundation, both employer and workers are required to abstain from certain acts that are in contradiction of the IRA which amount to ULPs. The jurisdiction of NIRC under Sec. 54 (e) and (i) comes into action only where there is allegation of unfair labour practice on the part of employer or employee as defined in Sections. 31 and 32 of IRA 2012.

As per the Act, the following acts and omissions are considered to be ULPs on the part of employer:

- i. Incorporating conditions to prevent a worker for his right to join a trade union or continue his membership thereto.
- ii. Employing or not employing a person on the ground that he is member or not member of a trade union.
- iii. Discriminating a person in regard to employment, promotion, conditions of work on the by virtue of being an officer or member of a trade union or vice versa.

⁵⁴³ Ibid, sub sec (1).

- iv. Inducing a person to refrain or cease to be a member of a trade union while offering some advantage to him or in his behalf to any other person.
- v. Attempting to use various illegal means to mentally torture or physically threaten an officer of the CBA to arrive at a certain settlement of a dispute except in case where a person was appointed or promoted to a managerial position.
- vi. Interfering in the ballot for election of CBA or to recruit workmen during the notice of strike in the prescribed manner under the law.
- vii. To close down industrial establishment in contravene of the Standing Orders Act or to instigate others to participate in illegal lockout.⁵⁴⁴
- viii. To settle a dispute with a trade union other than the CBA for that particular workplace which performs functions in accordance with law⁵⁴⁵ except when it is by mutual agreement as prescribed under the Act.⁵⁴⁶

On the other hand, there are certain acts and omissions that constitute ULPs on the part of workers,⁵⁴⁷ in case they are committed by a worker or trade union in the following manner:

- i. To influence a worker to join or to refrain from joining a trade union during working hours.

⁵⁴⁴ Ibid, sec.31.

⁵⁴⁵ Proviso sec.49 (1), IRA, 2012.

⁵⁴⁶ Ibid sub sec. (2), sec. 49.

⁵⁴⁷ Ibid, sec.32.

- ii. To threaten a person to become or cease to continue or to abstain from joining a trade union by any other means such offering advantage.
- iii. To compel employer to accept a demand by means of physical threat or mental torture.
- iv. To incite other to support an illegal strike or go-slow⁵⁴⁸ physically or monetarily.
- v. To interfere in the ballot for election of CBA in contravene of the provisions of the Act.⁵⁴⁹

4.15. MECHANISM FOR SETTLEMENT OF INDUSTRIAL DISPUTES

In order to discuss mechanism of industrial disputes' settlement, it is required to have an over view of the industrial dispute under the relevant law. Industrial dispute has been defined under the IRA, 2012 as follows;

“Industrial dispute means any dispute or difference between employer and employer or between employer and workman or between workman and workman connected with the employment, non-employment, terms of employment, or the conditions work of any person”.

The industrial dispute normally takes place in two capacities; at individual level or collectively. Individual grievance may be presented by a worker through himself, shop steward or CBA within the period of ninety days from the day when it takes place. In case the worker presented his dispute himself, the employer shall communicate his decision to the worker in writing within

⁵⁴⁸ As per the IRA, 2012, sub sec. (1, (e)), sec. 32 “go slow” means: “an organized, deliberate and purposeful slowing down of normal output...by a body of workmen acting in a concerted manner”.

⁵⁴⁹ Sub sec (2), sec. 32, the IRA, 2012.

fifteen days. If the dispute brought to the notice by shop steward or CBA the employer's decision shall come within seven days. No party shall be presented by a legal practitioner before the Commission or Arbitrator except with permission under the law.⁵⁵⁰

If employer fails to communicate his decision or the worker is dissatisfied with the decision, he may take the dispute within sixty days directly to the NIRC or it may be referred to the Commission through shop steward or CBA. The Commission shall communicate its award within seven days.

4.16. AMICABLE MEANS OF SETTLEMENT OF INDUSTRIAL DISPUTES

In case an employer or a CBA finds that an industrial dispute has taken place or is likely to arise, anyone of them may communicate its views in this respect in writing to the other party. After the communication, the other party, legally, has ten days to try and settle the dispute by bilateral negotiations in the Works Council,⁵⁵¹ the employer or the CBA may, within seven days, serve a notice of strike or lock-out⁵⁵² to the other party.⁵⁵³

4.16.1. CONCILIATION

Copies of the notice of strike or lock-out shall also be delivered to the Commission and Conciliator. The Conciliator shall arrange a meeting of the

⁵⁵⁰ Ibid. Sec.65 (2-3).

⁵⁵¹ A representative body that consists of the representatives of both employer and workers.

⁵⁵² A strike or lock-out may be declared after a period of fourteen days of the notice as mentioned under Sec. 41 of the IRA, 2012.

⁵⁵³ Sub.sec.3, sec. 35, the IRA, 2012.

parties to the dispute within fifteen days after the notice where he may try to reach to a settlement in peaceful manner. If it reached to a settlement, a copy of the decision along with memorandum shall be delivered to the Commission that bears signs of the parties.⁵⁵⁴

4.16.2. ARBITRATION

If the conciliation fails, the Conciliator tries to motivate the parties to refer their dispute to an arbitrator. If they agree, the parties make a join request in writing to the arbitrator they have agreed upon. The arbitrator gives his award within a period of thirty days or a period agreed upon by the parties. The award of the arbitrator is final and valid for a period not exceeding two years. A copy of the award is sent to the Federal Government, for publication in the official Gazette.⁵⁵⁵

4.16.3. AWARDS AND SETTLEMENTS

Where an industrial dispute was settled through conciliation, arbitration, Commission or arrived at between CBA and management, shall be binding on the parties including heirs and successors of the employer. In case of collective bargaining the award shall be of binding nature on all the workmen who were employed in the workplace on the date when the dispute took place. In case any question arises of interpretation of the

⁵⁵⁴ Ibid, sub. sec.4, Sec. 38.

⁵⁵⁵ Ibid, sub sec.4, sec. 40.

provisions of an award or settlement the decision of the Full Bench, after being heard the parties, shall be final and binding on the parties.⁵⁵⁶

4.17. STRIKES AND LOCK-OUTS; A MATTER OF RIGHT

In case dispute settlement proceedings fails before a conciliator and the parties does not agree to refer the dispute for settlement to an arbitrator, the workers are entitled to the to go on strike. A notice of strike shall be provided to the employer within fourteen days and in the same way, the employer has also got the right to declare a lock-out after the delay of notice of conciliation has expired.⁵⁵⁷

The government has the discretion to prevent a strike or lock-out in case it lasts for more than thirty days without any result. Likewise, the NIRC has the right to prohibit a strike or lock-out prior to the expiry of thirty days on the condition that it is competent to adjudicate and determine such type of industrial disputes. The prohibition order of the commission may be issued in writing when it is convinced that such a strike or lock-out is going to cause serious hardship to the community or it is prejudicial to the national interest.⁵⁵⁸

⁵⁵⁶ Ibid, sec.51 (1-2).

⁵⁵⁷ Ibid, sub sec. (1), sec. 42.

⁵⁵⁸ Ibid, sub sec (3).

4.17.1 ILLEGAL STRIKES AND LOCK-OUTS

In the daily life by hearing the term strike it has been taken negatively but as far as its status is concerned from the perspective of employer-employee relationship it has been considered a legal means for workers to achieve their respective rights. Strike or lockout is declared illegal⁵⁵⁹ if it is commenced without giving notice of conciliation to the other party of the dispute, or if it is commenced or continued in a manner other than that provided by the IRO 2002 or in contravention with this text.

In case of an illegal strike or lockout, an Officer from the Labour Department may make a report to the Labour Court, and require the employer or CBA or the registered trade union concerned, to appear before the Court. The Court may, within 10 days, order the strike or lockout to be stopped.⁵⁶⁰ In case of non-compliance of the order of the Court by the employer where the Court is satisfied that the pursuance of the lock-out is causing serious hardship to the community or is prejudicial to the national interest, it may order the attachment of the factory and the appointment of an official receiver, who will exercise the powers of management and may do all such acts as are necessary for conducting business. In case of non-compliance of the order of the Court by the workers, the Labour Court may pass orders of dismissal

⁵⁵⁹ As per the provisions of the IRA, 2012, a strike or lock-out is illegal if declared in the manner discussed under sec. 43 of the Act.

⁵⁶⁰ Sub sec (6), sec. 44, the IRA, 2012.

against the striking workers, or cancel the registration of the trade union that committed such illegality.

4.18. NATIONAL INDUSTRIAL RELATIONS COMMISSION (NIRC)

The NIRC plays important role in promoting industrial peace and tranquility. It was founded in 1972 by amending IRO 1969 where it was maintained by successive enactment the IRO 2002, which was repealed by IRA 2008. After the CLL was abolished through 18th Constitutional Amendment, it undertakes its functions under Section 53 of IRA 2012.⁵⁶¹

The NIRC regulates EER from various perspectives that include registration of trade unions⁵⁶² and trial of cases of ULPs on the part of employers and workers.⁵⁶³ Its functions also include trial and settlement of industrial disputes, registration of trans-provisional trade union as well as trade unions in ICT⁵⁶⁴ and determination of CBAs.⁵⁶⁵

The NIRC is headed by honorable retired and serving District and Sessions Judges of the SCoP, and its members are Federal Government Officers and the Registrar of the NIRC. As per the law members of the Commission shall not be less than ten including their chairmen who are to be appointed by Government in a prescribed manner. Two of the members are to be

⁵⁶¹ The NIRC's head office is located at ICT with its branches in the four provinces, available at: <http://www.nirc.gov.pk/abuutus>, (last accessed: 23September 2019).

⁵⁶² Sec. 54 (b). IRA, 2012.

⁵⁶³ Sec. 54 (e).

⁵⁶⁴ Sec. 54 (a).

⁵⁶⁵ Ibid, (c).

appointed as advisors; one to be representative of workers and another to represent employer.⁵⁶⁶

4.18.1. FUNCTIONS OF THE NIRC

The NIRC, as per the provisions of the IRA, is authorized to determine matters in connection to the industries that function in the ICT as well as the trans-provincial establishments in regard to registration of trade unions as well as to elect CBAs and CBUs.⁵⁶⁷ Likewise, the commission also determines and adjudicates industrial disputes along with trial of offences of unfair labour practices and to prohibit strikes and lockouts.⁵⁶⁸

By exercising its authority, the commission has got the authority to punish culprits in cases of disobedience to its awards or contempt of the court with simple imprisonment and fine ⁵⁶⁹ and to conduct inquiries in adjudicating a dispute and to enter an industry between the sunrise and sunset.⁵⁷⁰ Likewise, it may take suo motu action in respect of various matters while exercising its functions including grant of interim injunction and other ancillary matters.⁵⁷¹

⁵⁶⁶ Ibid, sub sec (5), sec. 53.

⁵⁶⁷ Ibid. sec.62.

⁵⁶⁸ Ibid.sec.61.

⁵⁶⁹ Sec.57 sub sec. 1 clause (a).

⁵⁷⁰ Ibid. (b).

⁵⁷¹ As described under Sec. 57 of the IRA, 2012 under the title: “Additional Powers of the NIRC”.

4.19. PENALTIES FOR UNFAIR LABOUR PRACTICES

Certain acts and omissions that have been considered harmful to the stability and tranquility of industrial environment if committed either by employer or worker or their representatives they are deemed to be offences under this Act. A brief table of the industrial offences has been drawn along with necessary details for easy understanding.

4.19.1 TABLE OF OFFENCES AND PROCEDURE UNDER CHAPTER-IX OF IRA, 2012

Labour court or magistrate of first class shall have the jurisdiction to try the following offences described in the prescribed manner under this Act:

S. No	Offender	Relevant Section/Sections of IRA, 2012	Nature of Offence	Prescribed Punishment
1	Employer	Sec.17	Transfer, promotion, dismissal of a workman of a trade union during pendency of application for registration of trade union. ⁵⁷²	Imprisonment which may extend to ninety days or fine of Rs. 30 thousand or both.
2	Employer	Se.31	Unfair Labour Practices (ULPs) on the part of employer	Imprisonment which may extend to 30 days or fine of Rs. 50 thousand or both.
3	Worker	Sec.32	ULPs on the part of worker	Imprisonment which may extend to 30 days or fine of Rs. 20 thousand or both.
4	Officer of trade union	Sec.32 sub-sec.1	ULPs on the part of worker	Disqualification to be an officer of TU plus Imprisonment which may extend to 30 days or fine of Rs. 20 thousand or both.

⁵⁷² Except with the permission of the Registrar.

5	Employer	Sec.47	Removal of fixed assets of industry during strike	Imprisonment which may extend to thirty days or fine of Rs. 70 thousand or both.
6	Employer or Worker	Sec.69	Failure to implement an award, decision or settlement	Imprisonment which may extend to 15 days or fine of Rs. 30 thousand
7	Employer or worker	Sec.70	False statement regarding an application or document	Imprisonment which may extend to Fifteen days or fine of Rs. Seventy five thousand
8	Employer	Sec.64	Change in terms of employment as well as termination and transfer of officer of trade union	Imprisonment which may extend to Fifteen days or fine of Rs. thirty thousand
9	Worker or officer of trade union	Sec.72	Embezzlement and misappropriation of trade union funds	Thirty days and fine equal to the misappropriated funds
10	Employer	Sec.73	Preventing inspector to function under Sec. 29	Fine of Rs. 75 thousand
11	Employer	Sec.74	Preventing workers participation in management under sections. 27-28	Imprisonment which may extend to Fifteen days or fine of Rs. One hundred thousand

4.20. RIGHTS AND LIABILITIES OF EMPLOYER AND EMPLOYEE

Under the IRA 2012, a scheme of rights and obligations⁵⁷³ has been provided for the first time by this Federal law⁵⁷⁴ that defines rights and duties of employers and employees based on their contractual relationship. It is strange that by going through these provisions of the Act it has been found

⁵⁷³ Schedule-II has been incorporated as an explanation to Sec.91 (the last Section of the IRA, 2012) that provided for rights and duties of employers and workers in industrial establishments.

⁵⁷⁴ The Four Provinces of Pakistan have not added such guidelines to their respective IRAs as they have adopted the provisions of the IRA, 2008 that exists no more after the 18th Amendment.

nowhere that in case of non-compliance what will be punishment of the offenders.

All the stake holders in the industrial relations including workers are required by the provisions of the law to respect employers' right to dispose of their property and other resources in a prudent manner as they think fit for promotion of business and production.⁵⁷⁵ On the other hand, the employer is bound to treat workers in accordance with the law to preserve their rights and interests in respect of wages, decent work and quality of life.⁵⁷⁶ The workers have been provided with the right to work in accordance with the terms of employment contract and receive due wage and benefits of welfare scheme along with freedom of association and collective bargaining.⁵⁷⁷

4.21. LOOPHOLES IN THE CURRENT EER REGIME

The two important IRs enactments that have been so far enacted by the Federal and the Provincial governments have been unable to produce fruitful results in terms of compliance of Arts.17⁵⁷⁸ , 18⁵⁷⁹ and 25 of the Constitution along with the ILO Conventions that have been ratified by Pakistan. The IRs Acts have not been made in full compliance with the Constitutional provisions as far as freedom of association is concerned. Theoretically, this right of freedom of association seems to have included other rights that

⁵⁷⁵ Schedule-II, employers' rights and duties, (a-b), IRA, 2012

⁵⁷⁶ Ibid, (c).

⁵⁷⁷ Ibid, workers' rights and duties, (a-b).

⁵⁷⁸ The Art guarantees freedom of presentation through forming unions and associations to settle their respective disputes by legal and amicable means.

⁵⁷⁹ Art. 18 of the Constitution provided for freedom of trade, business and profession.

emerge from this right such as right to strike for workers and lock-out in respect of employers. In practice this right is not absolute as it has been made restricted by the relevant laws while by regulating strikes, lock-outs and going to appeal in certain cases have apparently made the right of association to have been drawn narrowly scoped.

Likewise, Section 11 (A) of the Standing Orders Ordinance 1968, one of the primary enactments of IRs, violates Article Eighteen of the Constitution that promotes freedom of business while the mentioned section restricts this freedom. It puts restricts employers to close down their business in industrial establishment except with prior permission of the Labour Court.⁵⁸⁰ Likewise, various sectors have been excluded from the application of IRs laws including the Export Processing Zones as they are out of the ambit of these laws in respect of the right to form unions and hold strikes as per the provisions of the IRA.⁵⁸¹

As a matter of fact, a great portion of the work force is engaged in informal sector⁵⁸² that is out of the domain of the EER laws. Agriculture being the biggest employment sector practically remained excluded from the law on trade unions and collective bargaining, even the ILO's Conventions no. 87

⁵⁸⁰ Mahmood Abdul Ghani, Industrial Relations in Pakistan at a Crossroad, Pakistan Law House, 92-93.

⁵⁸¹ Khalil, Zakaullah Khan, "A Profile of Trade Unionism and Industrial Relations in Pakistan", International Labour Organization (ILO), 55.

and 98 ratified by Pakistan have not been given due weightage. The former Convention guarantees freedom of association while the latter ensures collective bargaining to the industrial workers in respect of work place issues.

The most relevant pieces of legislation pertaining to EER are IRAs (Federal and Provincial) and the Standing Orders, 1968 which have been found to be possessed by anomalies and ambiguities as far as definitions, application, process of employment and termination, working conditions, holidays, and mechanism of dispute resolution are concerned. Moreover, classification of workmen is also based on illogical phenomenon.

4.22. CONCLUSION

Soon after the historical 18th Constitutional Amendment was passed in May, 2010 that abolished the CLL and labour was devolved to the Provinces. The IRA, 2008, a Federal law, embodied a sunset clause that declared the law to be expired on 30th April, 2010. As the Amendment was operative from 1st May 2010, the Federal government was expected to adopt 'Expiring Laws Continuance Act' to keep the expiring law intact but nothing could be done in this respect. There was a legal fiasco that resulted in huge volume of petitions in all the HCs including the SCoP. It was held that the expiring law shall be viewed in the light of the General Clauses Act that lays down that a law of permanent nature will be considered operational till its substitute

takes the place. The mishap ended when all the Provinces and the Federal enacted their own IRAs that now regulate industrial environment as per the jurisdiction provided thereto. The Federal's IRA, 2012 by virtue of its provisions is applicable to the industries carrying on trans-provincial business or in the ICT. The validity of the IRA, 2012 was challenged in the HCs as well as in the SCoP; it was declared unanimously that it is a valid law as per its provisions.

Various Constitutional provisions provided cover for industrial affairs to be undertaken amicably while protecting interests of both employers and employees on equitable grounds. Articles 17, 18, 25 and 37 are the most relevant provisions that promote industrial harmony. Moreover, The IRAs, both Federal and Provincial, and the ICEO, 1968 are the major pieces of legislation that govern employer-employee relations along with the ILO Conventions that have been ratified by Pakistan with binding force. Trade unions and collective bargaining are yet to be tolerated to grow in the industrial environment.

As per workers' rights of resolution of industrial dispute and strike, there are contradictions in the provisions of the federal IRA and provincial IRAs that leads to further ambiguity and mishaps as both have been enacted the laws in the light of Constitutional provisions. Moreover, the Export Processing Zones' laws prohibit workers' rights related to unions and strikes in case of industrial dispute.

CHAPTER FIVE

SHARĪ'AH APPRAISAL OF PAKISTANI EMPLOYER-EMPLOYEE RELATIONS JURISPRUDENCE

5.1. INTRODUCTION

Islamization of existing Pakistani laws is a constitutional mandate that grants legislative authority to the legislature to bring the existing laws in conformity with the injunctions of *Sharī'ah*. The Islamization process has been assisted by the FSC and the Council of Islamic Ideology in their respective capacities. The former is legally a trial forum where a law or provisions of law could be challenged if they were found contradictory to the injunctions of Qur'ān and Sunnah while the latter forum is an advisory body to motivate and advise the legislature such recommendations that shall facilitate Islamic way of life individually as well as collectively. The FSC has also got the *suo moto* jurisdiction to take cognizance of a law which it deem fit for Islamization.

Sharī'ah stance towards the EER is based on both legal and ethical grounds that demarcates rights and obligations of the contracting parties. Every term agreed upon by the parties has been considered valid until it validates a *Harām* (prohibited thing) or invalidates a *Halāl* (permissible thing). Employment matters, as per Islamic law, seem to have been flexible that can vary from place to place keeping in view the existing customary practices of that certain area.

5.2. ISLAMIZATION OF LAWS IN PAKISTAN

The FSC has been conferred with original jurisdiction to examine validity of any existing law or custom on the yardstick of injunctions of Islam. The jurisdiction may be exercised by the court on its own discretion or by filing a petition by any of the Federal or Provincial Governments or by a Pakistani citizen.⁵⁸³ The court has also been conferred with revision and appellate jurisdictions in criminal cases pertaining to enforcement of Hudood.⁵⁸⁴ In all cases other than Hudood, the Supreme Court of Pakistan (SCoP) has appellate jurisdiction against the decisions of the FSC,⁵⁸⁵ for which there has been constituted a Shari'at appellate Bench.⁵⁸⁶

The FSC, originally was created to try Shari'at petitions while exercising its original jurisdiction. As far as the Hudood cases are concerned, initially, it was not entitled to review its own judgments, though, after it gave judgment in a renowned *Rajam* (punishment of stoning to death) petition titled *Hazoor Bakhsh vs. State*⁵⁸⁷, it was bestowed with revision jurisdiction.⁵⁸⁸ In fact, the FSC tried the said case by exercise of its original jurisdiction where it declared that death by stoning was against the principles of Islam and that hundred lashes was the correct punishment for the offence of adultery.⁵⁸⁹

⁵⁸³ Art. 203D (1), The constitution of Islamic Republic of Pakistan, 1973.

⁵⁸⁴ Ibid. 203DD (1).

⁵⁸⁵ Ibid. 203F (1).

⁵⁸⁶ Ibid, art. 203-F (5).

⁵⁸⁷ PLD 1981 FSC 145.

⁵⁸⁸ Art. 203-DD, the Constitution of Pakistan, 1973.

⁵⁸⁹ PLD 1981 FSC 145.

Thus, the Hadd of *Rajam* was declared as *T'āzīr* punishment and not *Hadd*.

Later on, the court was conferred upon the power of Review of its decisions⁵⁹⁰.

Federation of Pakistan filed a Review Petition. The Court reviewed its previous judgment and held that sections 5 and 6 of the said Ordinance were not repugnant to the Injunctions of Islam.⁵⁹¹ The FSC has adopted an interesting approach while dealing with relationship between employer and employee. The petitioner⁵⁹² challenged the legal provision for confining the medical facility to one wife of the employee despite Islam does not prohibit having more than one wife in an apparently unambiguous Qur'ānic verse.⁵⁹³

The FSC, emphasizing on the contractual nature of relationship between employer and employee, held that the rule in question did not contradict any Islamic injunction. Strangely, this decision was subsequently overturned by the Shari'at Appellate Bench of the Supreme Court by allowing medical facility to more than wives of Muslim employees.⁵⁹⁴

⁵⁹⁰ Article 3 of the President's Order V of 1981 as the Constitution Amendment Order 1981, sub-Article (9) was added to Article 203-E of the Constitution of Republic of Pakistan, 1973.

⁵⁹¹ PLD 1983 FSC 255.

⁵⁹² PLD 1992 FSC 527 (Ch. Irshad Ahmad v Federation of Pakistan).

⁵⁹³ The Noble Qur'ān: 4:3. Translation by Muhammad Taqi-ud-Din Al-Hilali and Muhammad Muhsin Khan, King Fahad Complex for the Printing of the Holy Qurān, Madīna, K.S.A.

⁵⁹⁴ PLD 1993 SC 464 (Irshad Ahmad v Federation of Pakistan).

5.2.1. AN OVERVIEW OF THE FSC’S STANCE ON THE PRIMARY LAWS OF EER

In a petition⁵⁹⁵ before the FSC both Ordinances were examined thoroughly in the light of Qur’ānic *Āy’āt* (verses), Sunnah of the prophet (SAW), sayings and actions of the Companions and the opinions of the *Fuqahā*. Likewise, a well-known codified Ottoman Empire Islamic Code ‘*M’ajall’ah Al-Ahkām Al-Adliyy’ah*’ was quoted along with general Islamic principles related to approval of customary practices. It was declared by the court that the current prevailing Industrial laws in the country generally and the EER laws are based on the ILO’s Conventions that have been ratified by Pakistan. There has been found no repugnancy to the injunctions of Sharī’ah though there are various technical and political issues that the government should tackle accordingly.

One of the issues that was highlighted by the court, was that apparently an employer has upper hand over employees he may exploit them by committing ‘*Ikrāh*’ or compulsion. To cope with such type of situations the Constitution as well as the industrial relations’ legislation provide for formation of trade unions in order to protect workers from exploitation. Moreover, parties to an industrial dispute are encouraged to settle their differences amicably through conciliation and arbitration otherwise they may opt for NIRC or labour court as the case may be.

⁵⁹⁵ PLD 1985 Federal Sharī’at Court 305.

In short, the court apparently viewed EER on flexible grounds that is mostly considered in the light of customary practices and generally acceptable norm, 'Urf which is one of the laws' deriving source as per Islamic jurisprudence is concerned. Hence, it was held that in both the primary pieces of legislation there has been found no derogatory provision which could be termed to be repugnant to the injunctions of Qur'ān and Sunnah.

5.3. ROLE OF THE FEDERAL SHARĪ'AT COURT IN ISLAMIZATION OF LAWS

The FSC has been established ⁵⁹⁶ as the appropriate platform where by virtue of the Constitutional provisions, the existing laws in the country could be examined that whether there has been found any repugnancy to the injunctions of Islam as laid down in the Holy Qur'ān and Sunnah.⁵⁹⁷ As per the employer-employee relations related laws are concerned some of the provisions were challenged in the FSC.

5.3.1. PROCEDURE OF THE FEDERAL SHARĪ'AT COURT IN EXAMINING LAWS

Before the FSC's stance on the relevant laws is described, it is of pivotal importance to know what procedure is normally followed by the court while examining a provision of law that has been challenged before it on the ground that it is repugnant or derogatory to the injunctions of Sharī'ah. In a Sharī'ah petition⁵⁹⁸ the respective court clarified that the jurisdiction of the

⁵⁹⁶ Under art. 203-C of the Constitution, Federal Sharī'at Court was founded at Islamabad.

⁵⁹⁷ Art. 203-D, Powers, Jurisdiction and functions of FSC, the Constitution of Pakistan.

⁵⁹⁸ P L C (C.S.) 2009, 809 Shariat Petition No, 38/L of 1992 26/5/2009, Muhammad Rasheed Rashid VS Government of Pakistan, Ministry Of Finance, Islamabad.

FSC under Art. 203-D of the Constitution of the Country is to determine as to whether any enactment, rule or law is violative of any Injunctions of Islam as enunciated by the Holy Qur'ān and Sunnah and not to dilate upon its merits or demerits. In another petition the court⁵⁹⁹ held that while exercising its jurisdiction under the Constitution for examining a law or a provision, it resorts to the following procedure:

- a. To specify a particular law or provision of the law in order to examine it.
- b. To discover and specify direct injunctions of Sharī'ah that are laid down in the Holy Qur'ān and Sunnah and which can be attracted to the subject-matter of that particular law or its provision.
- c. In case the law is not derogative to the direct text but it is in repugnancy to the deductions and principles derived therefrom, to clarify and state the same authentically.
- d. To state the exact extent of repugnancy, if any, after due comparison has been made with sufficient details of the relevant Islamic injunctions.

5.3.2. THE FEDERAL SHARĪ'AT COURT'S RULINGS ON EER LAWS

Unlike other substantive and procedural laws, the laws related to employer-employee relations have rarely been challenged before FSC for various reasons, while on the contrary there has been found a tendency for filing such grievances to other courts and labour tribunals. One of the primary

⁵⁹⁹ P L D 1987 Supreme Court 304 , Pakistan And Other VS Public At Large And Other.

reasons was indicated by the FSC in a petition that employer-employee relationship is considered one of the flexible contractual relationships based on contract of employment where terms and conditions are agreed upon by the parties.⁶⁰⁰ In fact, industrial laws are procedural laws that mostly depend on the prevailing customary industrial environment.

A discussion has to be undertaken in the coming lines so as to know stance of FSC to the provisions that were challenged before it in multiple petitions.

5.3.3. FOCAL POINTS OF EMPLOYER-EMPLOYEE RELATIONSHIP

The FSC in a petition⁶⁰¹ has pointed out that, in Sharī'ah, the relationship between employer and employee is that of flexible contractual relationship though certain inevitable guarantees have been given to an employee. These guarantees include; immediate payment of agreed upon wages, strong adherence to the terms and conditions of the contract of employment and abstaining from his work hard to the extent that could be unbearable.

In another petition,⁶⁰² the court reminded the government to play its due rule in respect of EER and pay attention towards ground realities by introducing various developmental schemes in order to educate both employers and employees. And to bridge the gulf of misunderstandings by implementing a system based on the Islamic concept of *Mu'ākhāt* or brotherhood so that a

⁶⁰⁰ PLD 1983 Federal Shariat Court 17, M. Daryab Quraishi VS Chairman WAPDA.

⁶⁰¹ Ibid.

⁶⁰² PLD 1985 Federal Shari'at Court 305.

dignified and respectful industrial environment could be ensured. The system of accountability of employer and employee shall be set up on effective grounds for the speedy and timely justice is the key to balancing the EER.

5.3.4. OBSERVANCE OF RELIGIOUS PRACTICES

No doubt that in Pakistan Islam is not just constitutionally the State's religion but preservation of religion always remains the utmost priority in a Muslim's life. It is a constitutional duty of the state to enable a religion-friendly environment for Muslim in the country by incorporating Islamic injunctions in the existing laws. Keeping in view importance of religion, the FSC in a petition⁶⁰³ held that the government shall incorporate provisions in the existing laws regarding construction of mosques in the industries and let the workers perform their five times prayers on time.

5.3.5. FIXATION OF WAGES

Definition of wages⁶⁰⁴ under the Payment of Wages Act, 1936 was challenged before the FSC and plea was taken by the petitioner that the wages excludes accommodation, medical expenses and supply of water and light. Hence, the term in the said Act is repugnant to the injunctions of *Shari'ah*. The court after examining the provision held that in *Shari'ah* specification of wages and its knowledge to the parties is an essential part of the contract of employment.

⁶⁰³ PLD 1983 Federal Shariat Court, 18 (2).

⁶⁰⁴ Sec. 2(vi) of the Payment of Wages Act, 1936.

The court argued that the term 'wages' not necessarily be explained as it is sufficient that it has been agreed upon by the contracting parties that such and such will be the compensation in return for the services rendered.

The court further held that the principal force behind wages is customary practice of that particular society on the condition that if it is not in contradiction to Islamic law, then the 'custom is of force' (*Al-ādah Al-Muhakamah*) which has been considered a source of Islamic law.

The court quoted another maxim of Islamic jurisprudence regarding customary practices that says: "المعروف عرفاً، كالمشروط شرطاً", 'A thing known by common usage is like a stipulation which has been made'. The court has also mentioned definition of the term 'wages' from *M'ajall'ah Al-Ahkām Al-Adliyy'ah* (a codified law of Ottoman Empire) which says that '*Ujrah* (wages) means 'payment against benefits that have been achieved'.⁶⁰⁵

5.3.6. AWARDING OR TAKING WAGES IN ADVANCE (*PESHGĪ*)

The overall condition of the working class needs to be improved, however, the most vulnerable segment is that of brick kiln workers who are working under the bonded labour system. In order to eliminate the existing unfair practices, the Bonded Labour System (Abolition) Act was introduced in 1992.

⁶⁰⁵ Art. 404, *M'ajall'ah Al-Ahkām Al-Adliyy'ah*, Kārkhāna Tijārat Kutub, Ar'am Bāgh, Karachi.

Several petitions⁶⁰⁶ were filed before the FSC challenging some of the provisions of the Act to be repugnant to the injunctions of Sharī'ah. One of these provisions was the *Peshgī* (advance) system⁶⁰⁷ where the poor brick kiln workers are given wages in advance in order to reserve them for the unpaid work in future.

The court examined the provision in detail while quoting evidence from the Holy Qur'ān and Sunnah along with opinions of *Fuqahā* arguing that wages could not be awarded until the work gets completed. The court has quoted a tradition of the prophet "Allah (SWA) said I will be an opponent to three types of people on the Day of Resurrection: One who makes a covenant in My name, but proves treacherous; one who sells, a free person and eats his price; and one who employs a worker and takes full work from him but does not pay him for his labour." The Hadith was interpreted by *Ibn-e-Hajar Al-Asqalāni* in these words:

"By taking work from someone without payment of fair wages is equivalent to pressing a free man into slavery by producing goods from his labour because he has reaped the benefits

⁶⁰⁶ Shariat Petitions No, 36-L of 1992. (1) (Rana Saeed-uz-Zaman and others VS Government of Pakistan).

Ibid, No, 37-L of 1992.(2) (Niaz Ali and others VS Government of Pakistan).

Ibid, No, 58-1 of 1992.(3) (Ghulam Khan Bangash VS Federation of Pakistan).

Ibid, No, 6-L of 1993.(4) (Haji Muhammad Amin and others VS Secretary, Ministry of Law).

Ibid, No, 7-L of 1993.(5) (Mian M. Akram and others VS Secretary, Ministry of Law).

Ibid, No, 8-L of 1993.(6) (Syed Shabbir Hussain and others VS Government of Pakistan).

Ibid, No,9-L of 1993(7) (Gulfraz Ahmad and others VS Secretary, Ministry of Law, Government of Pakistan).

Ibid, No, 10-L of 1993. (8) (Haji Muhammad Aslam and others VS Secretary, Ministry of Law).

⁶⁰⁷ Sec. 2 (a), 'advance (Peshgī)' means an advance, whether in cash or in kind, or partly in cash or partly in kind, made by one person (hereinafter referred to as the creditor) to another person (hereinafter referred to as the debtor).

without offering compensation and because he has hired him as a labour but dealt him as a slave".⁶⁰⁸

Opinions of Hanafi *Fuqahā* were given place in the judgment by quoting *Al-Murghināni* who writes in his book⁶⁰⁹ that according to *Abu Hanifa* if a person hires another to make him a certain quantity of bricks the worker is entitled to his wages when he sets up the bricks while the two disciples (*Sahib'ain*) held that he is not entitled to wages until he collects the brick together and build them up because it is this which completes his work, since bricks are not secured from injury until they be so collected and built up.⁶¹⁰

The court concluded that payment of wages in advance (*Peshgī*) to a worker who has not rendered any services yet is repugnant to the injunctions of *Sharī'ah* as it leads to a modern shape of slavery and confinement of life of a free man.⁶¹¹

5.3.7. SHARĪ'AH STANCE ON PAID HOLIDAYS AND LEAVES

In a *Sharī'ah* petition,⁶¹² leave rules were challenged as the petitioner claimed leaves with pay as a matter of right. It was held by the court that the basic rule as per *Sharī'ah* is that there are no wages without rendering work or

⁶⁰⁸ The interpretation of ibn Hajar was quoted by the court in Shariat Petitions No, 36-L of 1992. (1) (Rana Saeed-uz-Zaman and others VS Government of Pakistan.

⁶⁰⁹ Ali ibn Abi Bakkar Al-Murghināni, *Al- Hidāyah fi Sharh Bidaya Al-Mubtadi*.

⁶¹⁰ Ibid, Ch. When do wages becomes due? 293.

⁶¹¹ Shariat Petitions No, 36-L of 1992. (1) (Rana Saeed-uz-Zaman and others VS Government of Pakistan.

⁶¹² PLC (C.S.) 2009, 809, Shariat Petition No. 38/L of 1992, 26/5/2009 (Muhammad Rasheed Rashid VS Government of Pakistan, Ministry Of Finance, Islamabad).

services.⁶¹³ The concept of holidays and leaves, whether casual or earned, has emerged through social evolution and there has been found no sanction by *Shari'ah*. There has been found no evidence that during the life span of the Prophet and the Companions any worker was ever granted paid holiday or leave. However, some of the later time scholars are of the opinion that taking rest is an integral part of work, therefore, a worker is entitled to wages during holidays.⁶¹⁴

It is noteworthy that though Friday is the holiest of the days of a week but even then, Islam does not favour a Muslim to sit idle and do nothing. It is the commandment of Allah (SWA) to the Muslims to go in search for livelihood soon after performing *Jumu'a* prayer.⁶¹⁵ There is no evidence from *Shari'ah* that declares paid holidays and leave as a matter of right instead it is customary issue based on the terms and conditions an employee agrees upon while signing contract of employment.

In short, by going through the judgments of FSC in respect of various industrial laws and especially the industrial relations and employment related legislative pieces, the court considers repugnancy in a case where it explicitly derogates injunctions of *Shari'ah*. In all other cases EER are deemed to have been based on customary rules. These are the main reasons that the

⁶¹³ Al-Shaybāni, Abu Abdullah Muhammad ibn Al-Hasan (d.189 A.H), *Al-Asl al-marooḥ bi Al- Mabsūt, Idārah Al-Qur'ān wa Al-Uloom Al-Islāmiyyah*, Karachi, vol.3, 40.

⁶¹⁴ *Al-Fatawa Al-Hindiyyah*, Dar-ul-Fikr, vol.3, 329.

⁶¹⁵ *Al-Qur'ān*: 62: 9-10.

court has declared a few provisions of the industrial laws to be repugnant to the injunctions of Islam as laid down in the Holy Qur'ān and Sunnah.

5.4. SHARĪ'AH APPRAISAL OF THE CONSTITUTIONAL PROVISIONS

Being supreme law of the land the Constitution of Pakistan, 1973 has been considered the primary source of EER laws. Various Constitutional provisions provide for basic guiding principles; the fundamental rights that shall be taken in consideration while undertaking the process of enacting any law. Likewise, Islam is constitutionally, the state religion,⁶¹⁶ therefore, it has been prescribed that all the existing laws shall be brought in conformity with the injunctions of *Sharī'ah* and no law in future shall be made which is repugnant to such injunctions.⁶¹⁷ Keeping in view the preamble of the Constitution, *Sharī'ah* appraisal of the EER related articles of the constitution have been taken up for due consideration.

5.4.1. FREEDOM OF UNIONISM

The Constitution recognizes and provides for fundamental right of association to all the citizens⁶¹⁸ though this right has been restricted by some conditions.⁶¹⁹ This right has not been extended to the Government servants⁶²⁰ irrespective of nature of the work they undertake which is discrimination

⁶¹⁶ Art. 2, the Constitution of Pakistan, 1973.

⁶¹⁷ Ibid, Art. 227.

⁶¹⁸ Ibid, art. 17 (1) lays down that citizens have the right to form association for protection of this rights in a particular environment.

⁶¹⁹ Ibid, (2) forming union or association shall not contravene integrity and interest of Pakistan.

⁶²⁰ Sec.1, sub sec. 3 (a), IRA, 2012.

and in contravene of the Constitutional provisions.⁶²¹ In the purview of fundamental constitutional rights of citizens, the Constitution lays down that the State shall ensure that no form of exploitation shall exist and that everyone be dealt with in accordance with his ability and work.

Shari'ah does not favour, from the day first, any discrimination as per the fundamental human rights are concerned. In order to eliminate discrimination in the man-made class-based society, the Qur'ānic principle has been described in these words:

"يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتَقَاكُمْ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ"

"O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted".⁶²²

The prophet once explained ground of preference according to Allah (SWA) by saying:

"يَا أَيُّهَا النَّاسُ! إِنْ رَبُّكُمْ وَاحِدٌ وَإِنْ أَبَاكُمْ وَاحِدٌ، أَلَا لَا فَضْلَ لِعَرَبِيٍّ عَلَىٰ عَجْمِي وَلَا عَجْمِي عَلَىٰ عَرَبِيٍّ وَلَا أَحْمَرَ عَلَىٰ أَسْوَدٍ وَلَا أَسْوَدٌ عَلَىٰ أَحْمَرَ إِلَّا بِالتَّقْوَىٰ"

"O people! Your Lord is one Lord, and you all share the same father. There is no preference for Arabs over non-Arabs, nor for non-Arabs over Arabs. Neither is their preference for white people over black people, nor

⁶²¹ Art. 3, the Constitution of Pakistan lays down the State's responsibility in the following words: "The State shall ensure the elimination of all forms of exploitation and the gradual fulfillment of the fundamental principle, from each according to his ability, to each according to his work".

⁶²² Al-Qur'ān.49:13.

*for black people over white people. Preference is only through righteousness”.*⁶²³

Hence, the restrictive nature of the right to form trade unions for protection of individual and collective interest of workers, has deprived most of the workers to exercise their constitutional right. In order to extend freedom of association to all workers and employees this provision of the constitution shall be extended to all workers throughout the country as per the rules and recommendations of the ILO.

5.4.2. FREEDOM OF PRACTICING RELIGION

As per the Constitutional provisions, it is state's responsibility to facilitate Muslims by introducing religious-friendly environment in order to observe religious practices.⁶²⁴ By going through the two primary enactments⁶²⁵ that regulate EER there has been found nothing regarding various religious practices such as performance of five times prayers,⁶²⁶ *Iddat* (waiting period) period,⁶²⁷ breast feeding intervals for babies, *Hijab* for women workers and leaves for taking care of old parents' and so on. Moreover, none of the Pakistani industrial law provides for separate working places. Moreover,

⁶²³ Al-Albāni, Abu Abdul Rahman Muhammad Nasir-ud-Deen Al-Albani, *Salsilah Al-Ahādeeth Al-Saheehah*, Ed. 1st, Maktabah al-ma'ārif li al-Nashr wa Al-Tawzee, Al-Riyadh, Hadith no: 2700.

⁶²⁴ Art.31, the Constitution of Pakistan, 1973.

⁶²⁵ These primary enactments that are related to EER contain: standing orders ordinance, 1968 and the IRA, 2012 along with IRAs of the four respective provinces.

⁶²⁶ Al-Qur'ān.2:43: "And establish prayer and give *Zak'āt* and bow with those who bow [in worship and obedience]". There are almost 700 places where performing prayers has been described in the Holy Qur'ān.

⁶²⁷ Ibid.2: 234: "And those who are taken in death among you and leave wives behind - they, [the wives, shall] wait four months and ten [days]". The āyah makes four months and ten days period as an obligatory stay at home for a woman whose husband dies.

there exists no provision in any of the laws that compel employers to construct prayer place or mosques so that five times prayers may be performed there.

It seems, impliedly, as there has been given no room to religion in the industrial laws. As a matter of fact, *Shari'ah* does not favour that people shall be converted to Islam with force⁶²⁸ rather it gives freedom to followers of all religions to practice their respective ways of worship. It is duty of a Muslim State to facilitate believers to observe *Deen* (religion) in their day to day life for religion is the first priority in the life of a Muslim after he becomes a true believer.⁶²⁹

Soon after the belief in the unity of Allah and acceptance of Muhammad (SAW), performing five times prayer is obligatory on every adult Muslim⁶³⁰ and avoiding it considered one of the major sins. Likewise, breast feeding mothers are bound to feed babies⁶³¹ in reasonable intervals and by not doing so it may have bad impacts on the infant. Likewise, as a religious duty, a woman is bound to observe *iddat* period after her husband gets expired.⁶³² Moreover,

⁶²⁸ Ibid. 2:256: the āyah says: "There shall be no compulsion in [acceptance of] the religion".

⁶²⁹ In the view of Fuqahā like Imam Al-Ghazālī, the first among the objectives of *Shari'ah* is preservation of "Deen" (religion).

⁶³⁰ Al-Qur'ān.2:43. The Āyah says: "And establish prayer and give Zakāt and bow with those who bow [in worship and obedience]".

⁶³¹ Ibid.2:233: the āyah says: "Mothers may breastfeed their children two complete years...".

⁶³² Ibid.2:234. The Āyah says: "And those who are taken in death among you and leave wives behind - they, [the wives, shall] wait four months and ten [days]".

old parents' taking care is an obligation soon after belief in the unity of Allah.⁶³³

5.4.3. EQUALITY OF CITIZENS BEFORE LAW

The Constitution deems all citizens to be dealt before law on equal footings⁶³⁴ and there shall be no discrimination in this respect. By going through the EER enactments, it seems that all workers in the country have not been considered equally such as domestic workers, informal workers as well agricultural workers. These workers are subjected to arbitrary treatment by employers and influential landlords and prevented from basic workers' rights such as terms of employment contract in black and white, working hours, minimum wages and reasonable rest time.

Shari'ah insists on dealing workers on the basis of brotherhood and sympathy. Like other contracts, employment contract shall be in black and white⁶³⁵ where each and every condition shall be explained to the worker including working hours, wages and other ancillary matters so that there shall arise no ground for dispute between employer and employee.

⁶³³ Ibid.17:23-24: These āyah say: "And your Lord has decreed that you not worship except Him, and to parents, good treatment. Whether one or both of them reach old age [while] with you, say not to them [so much as], "uff," and do not repel them but speak to them a noble word and lower to them the wing of humility out of mercy and say, "My Lord, have mercy upon them as they brought me up [when I was] small".

⁶³⁴ Arts. 4 and 25, the Constitution of Pakistan, 1973.

⁶³⁵ Al-Qur'ān. 2: 282. The āyah says: " O you who have believed, when you contract a debt for a specified term, write it down".

5.5. SHARĪ'AH APPRAISAL OF THE INDUSTRIAL AND COMMERCIAL EMPLOYMENT (STANDING ORDERS) ORDINANCE, 1968

No doubt that EER is a waste subject that covers mostly all aspects of the employer and workers related issues from hiring and employment till retirement and afterwards. Among these laws, two of the enactments are to be analyzed from *Sharī'ah* perspective.

The Industrial and Commercial Employment (Standing Orders) Ordinance (ICEO) 1968 was one of the founding laws that have been implemented to regulate terms and conditions of employment contract in respect of the workers to be employed in an industrial establishment whether skilled, unskilled or clerical work against a monetary reward. Moreover, the Ordinance covers the disciplinary process to be adopted by an employer in case a worker was found guilty of misconduct. There are various irregularities that make it difficult for the law to be implemented in word and spirit. For the purpose of *Sharī'ah* appraisal those provisions have been taken into consideration that have paved way to numerous litigations.

5.5.1. DEFINING THE TERM 'WORKMAN'

One of the disputable matters under this Ordinance is vague definition of the term 'workman'. It is interesting to note that it has not been defined homogeneously in Federal⁶³⁶ and the provincial enactments of Sindh⁶³⁷ and

⁶³⁶ The term "workman" has been defined under the Ordinance: "any person employed in any industrial or commercial establishment to do any skilled or unskilled, manual or electrical work for hire or reward".

Khyber Pakhtunkhwa. It because of this anomaly litigants opt to take their grievances to the competent forum which causes them heavy cost in both manual and mental capacities. In a petition⁶³⁸ before the NIRC ⁶³⁹ it was held that the petitioner performed his duty as a Medical Information Officer who was promoted twice as Field Officer and Senior Sales Promotion Officer, hence, he was on a managerial post. In such circumstances he does not come under the definition of 'workman'. As per the definition in the Sindh Industrial and Employment Standing orders Act 2016, if a worker was hired to perform his duty on a managerial post he shall not be considered an employer, meaning thereby, that he is deemed to be a workman.⁶⁴⁰

It is obvious that in the same country and law there exist no uniformity in these provisions that not just in contravention of the Constitution but as well as against the *Sharī'ah*. The constitution guarantees all citizens equality before law⁶⁴¹ and elimination of exploitation.⁶⁴² As per *Sharī'ah* principles, there shall be no ambiguity in terms of the contract of employment so that workers shall

⁶³⁷ The term "worker" means any person employed in any industrial establishment or commercial establishment or a mine to do any skilled or unskilled, manual or clerical work for hire or reward and includes permanent, probationer, badli, temporary, apprentices and contract workers, but does not include occupier and manager having the hiring and firing authority; provided that no worker shall be employed through an agency or contractor or sub-contractor or middleman or agent, to perform function relating to their contract of employment.

⁶³⁸ PLC (2016), 54 (NIRC) Muhammad Yaqoob vs Bayer Pakistan (Pvt) Ltd.

⁶³⁹ The National Industrial Relations Commission established under the IRA, 2012 to try cases of misconduct and individual grievances under the Act.

⁶⁴⁰ Pervez Rahim, Terms of Employment, available at: <https://www.thenews.com.pk/print/134190-Terms-of-employment>, (last accessed: 26 November, 2019).

⁶⁴¹ Art.25 (1), Constitution of Pakistan, 1973.

⁶⁴² Ibid, Art. 3.

know their legal status and the due reward they will get. A tradition of the prophet (SAW) supports this stance that says: “Whoever believes in Allah and the Day of Judgment, should not employ a worker, until he knows what he is going to receive”⁶⁴³

5.5.2. CLASSIFICATION OF WORKERS

Under the ICEO workers have been classified into six categories⁶⁴⁴ that determine their legal rights and status of employment. There is no harm if this division was kept for administrative purposes but it really creates job insecurity and feeling of being exploited. Moreover, this division of workers has created a safe passage for the guilty-minded employers as they hire on short term contracts so that they will keep on feeling temporarily employed. This strategy results in non-unionizing of workers as forming a trade union in an industry needs at least majority of twenty percent of permanent workers of that work place. In order to become a CBA a trade union is required to win majority of votes in the election.⁶⁴⁵

This classification of workers is based in contravention of the Constitution and Sharī'ah as both the systems are against all forms of exploitation. The constitutional provisions lay down that the state shall be committed to

⁶⁴³ Ahmad ibn al-Hussain al-Khurāsāni, *Al-Sunan Al-Kubrā Li Al-Bayhaqī*, vol. 6, Hadith no. 11652, 198.

⁶⁴⁴ Sec. 1 (a) of the Ordinance prescribes six categories of workers are: (i) permanent, (ii) probationers, (iii) badlis, (iv) temporary, (v) Apprentices and (vi) contract workers.

⁶⁴⁵ A separate election has been conducted by the NIRC so that a trade union shall be elected from among the contesting unions to be a CBA for the reorientation of workers in that particular industrial establishment.

eliminate all form of exploitation,⁶⁴⁶ including employees. As per the *Sharī'ah* stance is concerned, the Fuqahā have classified workers into two broad categories of *Ajeer-e-Khās* and *Ajeer-e-Mushtarak*⁶⁴⁷ (personal employee and common employee). The Fuqahā have made this division in order to determine two important issues; entitlement to wages and the status of commodity in their custody. Otherwise, there is nothing that makes any of the employees feel himself being exploited because that is against the spirit of *Sharī'ah*.

5.5.3. CLOSURE OF BUSINESS FORCEFULLY

As per the provisions of ICEO an employer is restricted to close industrial establishment or terminate more than fifty percent of the employees without the prior permission of the Labour Court.⁶⁴⁸ This provision is violative of the Constitution⁶⁴⁹ on one hand and against *Sharī'ah* on the other hand. *Sharī'ah* bases business matters to be based on the principle of freedom and willingness, the Holy Qur'ān thus says:

*"O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you".*⁶⁵⁰

⁶⁴⁶ Art.3, the Constitution of Pakistan, 1973.

⁶⁴⁷ Muhammad ibn Ahmad Shamsuddin Al-Sarakhsi, *Al-Mabsūt*, vol. 16, 10 / arts: 610-611, *M'ajall'ah Al-Ahkām Al-'Adliyy'ah*, vol. 1, 114.

⁶⁴⁸ Standing order. 11-A: Closure of establishment.

⁶⁴⁹ Art. 18: Freedom of trade, business or profession, the Constitution.

⁶⁵⁰ Al-Qur'ān: 4:29.

5.5.4. TERMINATION OF EMPLOYMENT

Most of the litigants complain that they have been terminated from their employment on the basis other than legal one. Termination is normally based on the rule 'last come first go'. In a case before Sindh Appellate Tribunal,⁶⁵¹ the employees claimed that they were terminated on the ground that their services were "no longer required" though they have been served the industry for four years. The tribunal, after considering the particular circumstances, restored their employment with back benefits.

Protection and security of employment in the light of the terms of employment contract can motivate workers to undertake their duties conveniently. Devoted workers shall not be deprived from employment on a trivial ground as it is not only unjust but it is against the Constitutional provisions as well as the Shari'ah rules. The Constitution protect employment of all those who possess the required qualifications for that specific nature of work.⁶⁵² Likewise, Shari'ah insists on keeping promises⁶⁵³ whether they are made in daily life activities or they are in the form of contract of employment in order to keep trust worthy environment prevailing in the society.

⁶⁵¹ 2016 PLC 300, Arshad Ali Khan vs Dalda Foods (Pvt) Ltd.

⁶⁵² Art. 18, the Constitution: Freedom of trade, business or profession.

⁶⁵³ Al-Qur'an: 5: 1.

5.5.5. RIGHT OF REEMPLOYMENT

Under the ICEO,⁶⁵⁴ a worker is entitled to reemployment in case where an employer has terminated workers in accordance with law. Various tactics have been used by employers to avoid this due process. In a case before Labour Appellate Tribunal Sindh,⁶⁵⁵ the appellants' stance was that they were not reemployed since they had to be given preference in this regard. The tribunal held that reemployment and previous service is not a matter of right and privilege which is against the provisions of the ICEO itself.⁶⁵⁶

Shari'ah deals with this issue under its general principles that support hiring of experienced and trust worthy employees to be given preference. In the story of the prophet *Musā* (AS), this point has been mentioned by one of the daughters of *Sho'aib* (AS) in these words: "Truly, the best of people for thee to employee is one who is competent and trust worthy".⁶⁵⁷ Likewise, the Prophet recognized that those who hire unqualified individuals do disservice to their community and faith. He stated, "He whoever hires a person and knows that there is another one who is more qualified than him, has betrayed Allah and His Prophet and the Muslims".⁶⁵⁸

⁶⁵⁴ Standing order. 14.

⁶⁵⁵ 2015 PLC 88, Muhammad Hassan vs Shah Murad Sugar Mills (pvt) Ltd.

⁶⁵⁶ Standing order. 14: Re-employment of retrenched workmen.

⁶⁵⁷ Al-Qur'an 28:26.

⁶⁵⁸ Abdul Khader Muhammad, A comparative study between Islāmic management and conventional management with special reference to HRM, Proceeding of the Social Sciences Research ICSSR 2014 (e-ISBN 978-967-11768-7-0). 9-10 June 2014, Kota Kinabalu, Sabah, Malaysia, 116.

5.6. SHARĪ'AH APPRAISAL OF THE INDUSTRIAL RELATIONS ACT, 2012 ⁶⁵⁹

Industrial Relations Act, 2012 ⁶⁶⁰ is the primary law that deals with employer-employee relations in the industrial environment. There are various provisions of this Act that if brought under the umbrella of Sharī'ah principles may become fruitful for the interest of both employer and employee. Some of these anomalies are to be analyzed from Sharī'ah perspective.

5.6.1. DIVERSITY IN THE SAME LEGAL FRAMEWORK OF IRS SYSTEM

After abolition of the CLL by virtue of the 18th Constitutional Amendment⁶⁶¹ subject of labour was devolved to the provinces. The two important enactments namely; the IRAs and the ICEO were redrafted by the Federal and the Provinces that caused problems to the already prevailing IRs system. No doubt the mindset behind the existing IRs system is based on the colonial period that had grown up in the hands of British Masters and that was not meant to heal grievances of the working class rather it was to make exploit them.

Instead of bringing improvement and uniformity in the IRs system, the Federal and the provinces have further widened the gap in these laws. An example in this respect is labour judiciary; in provinces industrial disputes

⁶⁵⁹ IRA, 2012 is a Federal law that is applicable to trans-provincial industries as well as to those working in the ICT.

⁶⁶⁰ All the four provinces have drafted their own IRA after the Concurrent Legislative List stood abolished after implementation of the 18th Amendment in 2010.

⁶⁶¹ The Amendment was passed in May, 2010 that was a step forward to the provincial autonomy. The amendment has changed almost half of the provisions of the Constitution.

are referred to the Labour Courts⁶⁶² whereas in Federal they are resolved by the NIRC.⁶⁶³

5.6.2. SCOPE AND EXTENT OF IRS' ENACTMENTS

It is an interesting fact that IRs laws are not applicable to almost ninety percent of the working force in Pakistan due to petty reasons. Though, the Constitutional provisions provide for elimination of exploitation,⁶⁶⁴ equality before law⁶⁶⁵ and establishing unions⁶⁶⁶ for protection of rights of the citizens. Moreover, certain classes of employees have been bared by the IRA, 2012⁶⁶⁷ to form any union as it is deemed against the integrity of the country that creates exploitative environment in these institutions.

Shari'ah insists on a uniform system of rights and duties and promote an industrial and working environment where mutual trust and brotherhood is order of the day. A tradition of the prophet says: "Your employees are your brothers upon whom Allah has given you authority, so if a Muslim has another person under his control, he should feed them with the like of what one eats and clothe them with the like of what one wears and you should not

⁶⁶² PIRA, 2010 and KIRA, sec. 13 (b).

⁶⁶³ IRA, 2012, sec.12.

⁶⁶⁴ Art.3, the Constitution of Pakistan, 1973.

⁶⁶⁵ Ibid, art. 4.

⁶⁶⁶ Ibid, art.17.

⁶⁶⁷ Sec. 1, sub sec. 3 (a-d), IRA, 2012.

over burden them with what they cannot bear and if you do so, help them in their jobs".⁶⁶⁸

5.6.3. VAGUE AND RESTRICTIVE DEFINITION OF THE TERM WORKER

One of the grounds of that leads to industrial dispute is that the term "worker" has not been defined exclusively that resulted in litigations and wastage of valuable time of courts, employers and workers. In fact, there is no harm in defining the term but the problem arises when workers and other industrial staff members or workers based on their division⁶⁶⁹ are treated differently as per their employment, retrenchment and termination etc.

As per Islamic principles every person is considered an *Ajeer* (worker) whether he undertakes work mentally or manually and obtaining of reward is to be achieved in this world or in the hereafter.⁶⁷⁰ The division of workers in Sharī'ah into *Ajeer Al-khās* and *Ajeer Al-Mushtar'ak* is just for the purpose of defining their nature of employment and the status of commodities in their hands though both type of workers are equal as per general principles of Sharī'ah are concerned.

⁶⁶⁸ Al-Bukhāri, Muhammad ibn Ismaeel, Saheeh Al-Bukhāri, vol.3, Hadith no. 2545.

⁶⁶⁹ Sec. 1, Standing Orders Ordinance, 1968: 'classification of workmen'.

⁶⁷⁰ Al-Qur'ān. 99:7-8: these āyah say: "So whoever does an atom's weight of good will see it, And whoever does an atom's weight of evil will see it".

5.6.4. COLLECTIVE BARGAINING

The concept of workers representation through CBA was introduced for the first time in the Industrial Relations Ordinance, 1969. In order to become an elected CBA under the law, a trades union has to go through various stages. Sometimes, there arise petty issues between employer and employees or employees and other employees that could be resolved amicably by negotiations etc. CBA is there to play its due role in this respect that sometimes may, in case of disagreement, lead to take the issue to labour court or even to go on strike.⁶⁷¹

Shari'ah also supports that justice shall be done in case rights of any worker got violated. A tradition of the prophet highlights punishment of the wrong doer in this regard in these words:

*"I will be an opponent to three types of people on the Day of Resurrection: one who makes a covenant in My name but proves treacherous; one who sells a free person and eats his price; and one who employs a worker and takes full work from him but does not pay him for his labor".*⁶⁷²

5.6.5. WORKERS' PARTICIPATION IN MANAGEMENT

Under the provisions of IRA, 2012 workers have been recognized as an important factor of production by providing them opportunity to participate in the affairs of management through shop steward,⁶⁷³ works council⁶⁷⁴ and

⁶⁷¹ IRA, 2012, ch. vii (strikes and lock-outs).

⁶⁷² Al-Bukhāri, reported by Abu Hurairah (RA).

⁶⁷³ Sec.23, IRA, 2012.

⁶⁷⁴ Ibid, sec.25.

joint management board.⁶⁷⁵ Shari'ah insists on participation of all stake holders doing their work through *Shūra* (consultation). Qur'ānic verses and traditions of the prophet support this stance.

Indeed, various verses support *Shūra* among Muslim such as; "And their business is (conducted) through consultation among themselves".⁶⁷⁶ Another verse lays down the same subject as; "And those who have answered the call of their lord and establish prayer and who conduct their affairs by consultation and spend out what we bestow on them for sustenance."⁶⁷⁷

In another āyah Allah (SWA) explains the secret behind the prophet's popularity among the people by saying; "And by the Mercy of Allah, you dealt with them gently. And had you been severe and harsh-hearted, they would have broken away from about; so, pass over (their faults), and ask forgiveness for them; and consult them in the affairs. Then when you have taken a decision, put your trust in Allah, certainly, Allah loves those who put their trust (in Him)".⁶⁷⁸ Traditions of the prophet (SAW) also insist on the recognition of the concept of *Shūra*. In a famous tradition the prophet says: "My *Umm'ah* (Muslim Community) cannot agree on error".⁶⁷⁹ On the occasion of *Uhud* Battle the prophet acted upon the opinion of a companion

⁶⁷⁵ Ibid, sec.28.

⁶⁷⁶ Al-Qur'ān. 42: 38

⁶⁷⁷ Ibid. 42:38.

⁶⁷⁸ Ibid.3: 159.

⁶⁷⁹ Ibn Umar (RA): Al-Tirmidhi, Hadith no. 2167.

to select a strategically better fighting place. Moreover, the rightly-guided caliphs followed footsteps of the prophet in this respect.

5.6.6. DISPUTE SETTLEMENT ON THE BASIS OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

In order to maintain peaceful industrial environment in work place, the law has provided for amicable means of settlement of an industrial dispute. Either conciliation⁶⁸⁰ or arbitration⁶⁸¹ has been used as an alternative dispute resolution tool which, if applied in letter and spirit, is an effective way to remove distances between employer and employee.

Islamic law in respect of EER insists on removing differences between people through amicable means in all cases except where *Hudood* (fixed Islamic punishments) are involved.⁶⁸² In all other situation it has been encouraged that disputes shall be resolved through one of the amicable means.⁶⁸³

Shari'ah promotes a peaceful and trust worthy society where differences are settled through amicable practices so that peace and prosperity prevail. Allah (SWA) lays down importance of conciliation.

⁶⁸⁰ IRA, 2012, ss. 36-38.

⁶⁸¹ Ibid, sec.40.

⁶⁸² Kamal Halili Hassan, Employment Dispute Resolution Mechanism from the Islāmic Perspective, Arab Law Quarterly, Vol. 20, No. 2 (2006), 181-207.

⁶⁸³ Ibid, these ADR means include: sulh (negotiations/ mediation) and Tahkeem (arbitration), 182.

"لَا خَيْرَ فِي كَثِيرٍ مِنْ نَجْوَاهُمْ إِلَّا مَنْ أَمَرَ بِصَدَقَةٍ أَوْ مَعْرُوفٍ أَوْ إِصْلَاحٍ بَيْنَ النَّاسِ وَمَنْ يَفْعَلْ ذَلِكَ ابْتِغَاءَ مَرْضَاتِ اللَّهِ فَسَوْفَ نُؤْتِيهِ أَجْرًا عَظِيمًا"

"No good is there in much of their private conversation, except for those who enjoin charity or that which is right or conciliation between people".⁶⁸⁴

Another verse says:

"وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَأَبْعَثُوا حَكَمًا مِنْ أَهْلِهِ وَحَكَمًا مِنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا"

"And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them".⁶⁸⁵

In order to resolve disputes between Muslims another āyah says:

"وَإِنْ طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلَحُوا بَيْنَهُمَا ..."

"And if two factions among the believers should fight, then make settlement between the two".⁶⁸⁶

There are traditions of the prophet which support settlement of dispute through amicable means. A tradition says: "All types of compromises and conciliation among Muslims are permissible except those which make *Harām* (illegal) anything that is *Halāl* (legal), and *Halāl* as *Harām*".⁶⁸⁷ Once, people of Qubā (Madīna) fought each other to the extent that they threw stones on each

⁶⁸⁴ Al-Qur'ān.4:114.

⁶⁸⁵ Ibid.4:35.

⁶⁸⁶ Ibid. 49:9.

⁶⁸⁷ Abu Abdullah Muhammad ibn Zaid Al-Quzwaini, Sunan ibn Mājah, vol. 2, Hadith no. 2353, 788. Imām Albāni declared this Hadith as 'Saheeh'.

other. When the prophet came to know the incident he told the companion: "let us go to bring about them to reconciliation".⁶⁸⁸

5.6.7. FIXATION OF MINIMUM WAGES

The Federal and provincial governments normally fix and announce minimum wages for unskilled workers in the industries in official gazette on yearly basis.⁶⁸⁹ Indeed, these wages are not determined by any standard criteria such as daily and monthly necessities and comforts of workers and their families; meaning thereby; these wages are same for an unmarried worker and a worker with a half dozen of children and old parents.

Shari'ah insists that everyone shall be dealt with and paid in accordance with his qualification and experience. The Holy Qur'an stats this fact in these golden words: "And for all there are degrees [of reward and punishment] for what they have done, and [it is] so that He may fully compensate them for their deeds, and they will not be wronged".⁶⁹⁰ In another tradition the messenger of Allah had been reported to have said: "من استأجر أجيرا فليعلمه أجره", "Whoever employs someone to work for him; he must specify for him his wage in advance."⁶⁹¹

⁶⁸⁸ Al-Bukhāri, Muhammad ibn Ismaeel, Saheeh Al-Bukhāri, vol.3, Hadith no. 2693, 183.

⁶⁸⁹ In the year 2019-20 the minimum rate of wages for unskilled worker has been fixed by Rs: 17500 in ICT, K.P and Punjab.

⁶⁹⁰ Al-Qur'an.46: 19.

⁶⁹¹ Al-Marghināni, 'Ali Ibn 'Abi-Bakkar (511-593), Al-Hidāyah fi Sharh Bidāyah-ul-Mubtadi, Dār 'Ihyā Al-Turāth Al-'Arabi, Beirut, Lebanon, vol. 3, 230.

5.7. SHARĪ'AH APPRAISAL OF THE ILO CONVENTIONS

Pakistan had ratified two ILO Conventions⁶⁹² among the eight core Conventions⁶⁹³ that regulate EER related matters. These Conventions, *inter alia*, are deriving sources for the industrial relations in the country. These Conventions are hereby discussed from Shari'ah perspective.

5.7.1. CONVENTION NO. 87; FREEDOM OF ASSOCIATION

Pakistan is a signatory to the ILO Convention no. 87⁶⁹⁴ that puts legal obligation on the member states to comply with rules⁶⁹⁵ laid down under the provisions of the Convention. It guarantees employers as well as employees the right to organize⁶⁹⁶ and to form and join their representative unions and associations.⁶⁹⁷ The IRA, 2012 recognizes that freedom of association is a fundamental right in the light of the Constitution; therefore, compliance to

⁶⁹² Convention no. 87 and Convention no. 98 lay down guiding principles for the signatory states. The former provides for freedom of association and the latter for collective bargaining.

⁶⁹³ These core Conventions are: the Forced Labour Convention, 1930 (No. 29), the Abolition of Forced Labour Convention, 1957 (No. 105), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Equal Remuneration Convention, 1951 (No. 100), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Minimum Age Convention, 1973 (No. 138), and the Worst Forms of Child Labour Convention, 1999 (No. 182), available at : https://www.ilo.org/global/standards/WCMS_201895/lang--en/index.htm, (last accessed: 30 November, 2019).

⁶⁹⁴ This Convention became operational on 04 July, 1948 and was ratified by Pakistan on 14 Feb, 1951. Available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312232, (last accessed: 30 November, 2019).

⁶⁹⁵ Under Art. 1 of the Convention this compliance has been described in these words: "Each Member of the International Labour Organization for which this Convention is in force undertakes to give effect to the following provisions".

⁶⁹⁶ IRA, art. 3 (1).

⁶⁹⁷ Ibid, art. 5.

Convention no. 87 on freedom of association has specially been mentioned in the preface.⁶⁹⁸

Shari'ah, on the basis of its general principles, does not favour any effort that apparently divide society on the basis of their rights as it creates mistrust and hatred that further leads to misunderstanding in minds of both employer and worker. The prophet (SAW) says: "Mankind is the family of Allah and the most beloved of them before Him is the one who is the best to his family".⁶⁹⁹ Verses of the Holy Qur'an and traditions of the prophet emphasize on unity among society men as the āyah says: "And hold firmly to the rope of Allah all together and do not become divided. And remember the favor of Allah upon you - when you were enemies and He brought your hearts together and you became, by His favor, brothers. And you were on the edge of a pit of the Fire, and He saved you from it. Thus, does Allah make clear to you His verses that you may be guided".⁷⁰⁰

While describing importance of unity among Muslims Allah (SWA) says: "And brought together their hearts. If you had spent all that is in the earth, you could not have brought their hearts together; but Allah brought them together. Indeed, He is Exalted in Might and Wise".⁷⁰¹ Another Āyah says:

⁶⁹⁸ Interestingly, all the provincial IRAs have mentioned nothing obligation to international community in this respect.

⁶⁹⁹ Al-Musili, Abu Yāla, Musnad Abi Yāla, Dār-ul-M'amoon li Al-Tur'āth, Damascus, Hadith no. 3478, vol.6, 194.

⁷⁰⁰ Al-Qur'an. 3:103.

⁷⁰¹ Ibid.8:63.

“And the believers, men and women, are protecting friends of one another, they enjoin the right and forbid the wrong”.⁷⁰² Likewise another Āyah says: “The believers are naught else than brothers. Therefore, make peace between your brethren and observe your duty to Allah that hopefully ye may obtain mercy”.⁷⁰³

Traditions of the Prophet (SAW) have also focused on the unity of Muslims. A tradition says: “You will see the believers in their mutual kindness, love and sympathy just like one body. When a limb complains, the whole body responds to it with wakefulness and fever”.⁷⁰⁴ Another Hadith says: “You shall not enter Paradise until you believe; and you will not believe until you love one another. Shall I not guide you to a thing? Which when done, will make you love one another: Spread the greeting of Salām among you”.⁷⁰⁵

While prohibiting Muslims from suspicious activities against each other the Prophet (SAW) says: “Keep away from suspicion, for it is the most deceptive discourse. Do not attempt to probe, spy on, compete with, envy, or be hateful of one another, but be, O servants of Allah, brothers. The Muslim is the brother of his fellow Muslim: he does not oppress him, fail him, or scorn him. *Taqwā* (piety) is here [points to his heart]. It is wrong for a man to hold his

⁷⁰² Ibid.9:71.

⁷⁰³ Ibid.49:10.

⁷⁰⁴ Muslim ibn Hajjāj, Saheeh Muslim, vol.4, Hadith no. 2586.

⁷⁰⁵ Ibid, vol.1, 74.

Muslim brother in contempt. Everything pertaining to a Muslim is forbidden to another: his blood, his honor, and his wealth".⁷⁰⁶

The above verses and traditions in no form favour any organization of either employers or workers that is based on such grounds that lead to an environment based on hatred, mistrust and suspicion that ultimately impacts on the productivity of the industrial establishment. On the basis of the general Islamic principles that have been derived from the primary and secondary sources including custom (*Urf*), trade unions and employers associations may be replaced with bipartite organization in the work place that shall promote the IWEs in accordance with the injunctions of Holy Qur'ān and Sunnah.

5.7.2. CONVENTION NO. 98; RIGHT TO ORGANIZE AND COLLECTIVE BARGAINING

The Convention lays down various situations where protection shall be provided to both employers and workers by the signatory states that have ratified ⁷⁰⁷ the Convention. Employment of a worker has to be protected and in no case it shall be attached to joining or not joining a union. Any discriminatory stipulation in the contract of employment that prevents from involvement in union's activities shall be considered an anti-union act.

⁷⁰⁶ Ibid, vol. 4, 1986, Hadith no.2564.

⁷⁰⁷ Pakistan has ratified the Convention on 26th May, 1952.

Likewise, no worker shall be subjected to any discrimination just because he is member of a particular union.⁷⁰⁸

A forum shall be established to promote collective bargaining between employers and workers organizations for better working conditions⁷⁰⁹ and such other matters are subject of the Convention.

Shari'ah supports *sulh* (mediation) as a peace-guaranteeing tool for promoting a peaceful Muslims society. Collective bargaining in industrial environment is a form of negotiation that is undertaken by the representatives of employer on one hand and workers on the other hand. Voluntary collective bargaining is promoted in the light of general principles laid down by the Holy Qur'ān and Sunnah. A verse says: "The believers are but brothers, so make settlement between your brothers. And fear Allah that you may receive mercy".⁷¹⁰ Another āyah says: "And if two factions among the believers should fight, then make settlement between the two".⁷¹¹

There are occasions where the Prophet himself conducted *sulh* between Muslims. Once it came to the knowledge of Prophet that Muslims of Qubā (a place in Madīna) fought each other to the extent that they even threw stones on each other, the prophet said: "let us go to bring about them to

⁷⁰⁸ Art. 1, sub art. 2 (a-b). Convention No. 98; Right to Organize and Collective Bargaining.

⁷⁰⁹ Ibid, art.4.

⁷¹⁰ Al-Qur'ān.49:10.

⁷¹¹ Ibid. 49:9.

reconciliation".⁷¹² Another tradition lays down that *sulh* and compromise in all shapes are permissible except when it is in contradiction with Shari'ah. A tradition says: "All types of compromises and conciliation among Muslims are permissible except those which make *Harām* anything that is *Halāl*, and a *Halāl* as *Harām*".⁷¹³

5.8. INCORPORATION OF NEW PROVISIONS TO THE CURRENT EER REGIME

The current industrial regime in Pakistan, undoubtedly, has taken its roots from the pre-independence colonial period where industrial workers were dealt as servants i.e. a commodity. Though, the laws have gone through various developmental stages still there remain some important aspects that are yet to be incorporated in the current EER laws. An attempt has been made to discuss these issues from the perspective of Shari'ah.

5.8.1. BEHAVIOR OF EMPLOYER WITH EMPLOYEES

As per the Shari'ah perspective, employer is not free to treat his subordinates the way he wishes for he will be asked about his behavior as a tradition says: "Every one of you is a shepherd and is responsible for his flock..."⁷¹⁴ In the light of this tradition employer as well as employee are accountable for their actions before Allah. Under the doctrine of *Siyāsah Shar'iyah* an Islamic state

⁷¹² Al-Bukhāri, Muhammad ibn Ismaeel, Saheeh Al-Bukhāri, vol.3, Hadith no. 2693, 183.

⁷¹³ Abu Abdullah Muhammad ibn Zaid Al-Quzwaini, Sunan ibn Mājah, vol. 2, Hadith no. 2353, 788. Albāni declared this Hadith as 'Saheeh'.

⁷¹⁴ Al-Bukhāri, Muhammad ibn Ismaeel, Saheeh Al- Al-Bukhāri, Hadith no. 893, vol.2,5.

has the right to regulate work place related matters including determining rights and obligations of both the contractual parties.

5.8.2. *IDDAT* (WAITING PERIOD) LEAVES

The current industrial regime lacks to provide provisions for certain religious obligations such as observance of *Iddat* period by a woman whose husband passes away or get divorced. Shari'ah has specified this period to be of four months and ten days while staying at her husband home.⁷¹⁵

5.8.3. BREASTFEEDING INTERVALS

It has been found nowhere in the industrial laws that how many intervals a mother could take for breast feeding. As per the Islamic teachings a breastfeeding infant is entitled to be given milk by his mother till two years period.⁷¹⁶

5.8.4. INTERVALS FOR FIVE TIMES PRAYERS

It is essential that industrial establishment shall have allocated places for observing five times obligatory prayers. While keeping in view this significant issue the FSC, in a petition, recommended management in work place shall undertake proper arrangements for performing obligatory prayers.⁷¹⁷

⁷¹⁵ Al-Zuhaili, Wahba "Al-Fiqh al-Islāmi Wa Adillatuhu, Dār-ul Fikr, Damascus, vol. 9, 7198-7202.

⁷¹⁶ Al-Qur'ān. 2:233. The Āyah says: "Mothers may breastfeed their children two complete years..."

⁷¹⁷ PLD 1983 Federal Shari'at Court 18 (2).

5.8.5. RIGHT TO FILE WRIT PETITION

The fundamental rights laid down by the Constitution are interlinked and supportive of each other. The right of equality before law⁷¹⁸ and the right to fair trial⁷¹⁹ seem not to be fully supportive of the right to engage in a lawful profession.⁷²⁰ A petition before PHC (Mingora Branch)⁷²¹ was dismissed in *limine* on the ground that the court was out of the jurisdiction in employer-employee relationship for the reason that it was a factual issue which required recording evidence. As the court is not competent to deal with factual issues and record evidence while sitting in writ jurisdiction.

The extension of the right to file writ petition as a worker shall be extended to employees so that timely access to justice may be ensured in the light of Constitutional right of equality before law and right to fair trial.

5.9. CONCLUSION

Various EER laws and provisions have been challenged before the FSC, including the two principal laws; the ICEO 1968 and the IRO 1969. After examining the laws, the court was of the opinion that employment matters are mostly based on customary practices, therefore, nothing seems in the current EER regime repugnant to the injunctions of *Shari'ah*. Likewise, certain customary practices pertaining to the brick kiln workers that have been

⁷¹⁸ Art. 25 (1), the Constitution of Pakistan, 1973.

⁷¹⁹ Ibid, Art. 10 (A).

⁷²⁰ Ibid, Art. 18.

⁷²¹ W.P.No.556-M/2017, (Habib Ullah, the petitioner).

declared 'illegal' under the provisions of the Bonded Labour System (Abolition) Act of 1992 were challenged before the court. The court was of the view that customary practice of *Peshgī* (borrowing debt in advance for future employment) is repugnant to the injunctions of Islam, therefore, it has been declared 'illegal'.

By deeply scrutinizing the court's stance in respect of the two principal EER laws, it seems that it has ignored various discriminatory aspects of these laws such as scope, multiple definitions of workman, arbitrary classification of workers and nominal compensation in case of fatal accident that results in death or severe injuries. Some of the lacunas that violate fundamental human rights have also not been taken into account such as breast feeding intervals, iddat period holidays, allocation of place for obligatory prayers and parental leaves and so on.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1. INTRODUCTION

As per *Shari'ah* view point, EER takes place at the movement the contracting parties agree upon certain terms of employment under the contract of *Ijārah Al-Ashkhās*. An employee is undertaking his duties either in the capacity of *Ajeer-e-khās* or *Ajeer-e-mushtar'ak*.

Pakistan being a Muslim State is committed by virtue of Constitutional provisions to Islamize the existing laws in accordance with the Islamic injunctions as laid down by the Holy Qur'ān and Sunnah of the Prophet (SAW) so that there remains no law that is in contravention of *Shari'ah*. The FSC and its Supreme Court Appellate Bench have played due role in the process of Islamization. Various enactments have gone through the process, whereas, various provisions of the EER related laws are yet to be given due consideration. The current EER regime is a complicated system based on a hundred plus legislative pieces which have been adopted with the spirit of British colonial period. These laws have not been so far addressed the long-awaiting grievances of the under-privileged segment of the society; workers. It was expected that after devolution of the subject 'labour' the federal as well as the provincial governments will revise the existing EER regime by introducing reforms but the dream had never come true.

6.2. CONCLUSIONS

Scrutiny of the current EER legislation reveals that there prevailed individual hiring system since time immemorial. The concept of collective employment of workers has derived its roots from the Industrial Revolution in the 18th century in America, Australia and Europe. In the beginning, the states were observing industry-related matters under the doctrine of *Laissez-Faire* that ultimately resulted in division of society into industrialists and workers; haves and have not's. The first attempt to regulate industrial relations on national level was seen in Britain through Combination Act, 1780. Under the British masters, Indian industries have witnessed regulatory scheme with introduction of various enactments such as; Employment and Workmen Dispute Act 1860, Indian Factories Act 1881, the Industrial Employment Act 1946 and Industrial Disputes Act, 1947.

The issue of EER in *Shari'ah* has been derived from the primary and secondary sources of Islamic law on legal as well as ethical grounds. There has been found no separate code of EER, though, the subject has been covered in *Fiqh* books under the topic of *Ijārah Al-Ashkhās* where employees have been divided to *Ajeer-e-Khās* and *Ajeer-e-Mushtarak*. However, there has been found a codified Islamic law of Ottoman Empire; '*M'ajall'ah Al-Ahkām Al-Adliyy'ah*' where a chapter had been assigned to the subject of *Ijārah*.

In order to enter into an employment contract, it is obligatory that the contract shall be conducted between sound-minded and adults having free consent from both the parties and shall be reduced into black and white. If any of the requirement of a valid contract was not satisfied by the contracting parties the contract is considered *Fāsid* (vitiating / susceptible). The *ājir* (employer) is bound not to conceal anything from *Ajeer* (employee) in regard to the nature and duration of work, wages and other ancillary matters. Subject matter of the contract; hiring services of a worker, is required to be in accordance with injunctions of Shari'ah. Likewise, both the contracting parties are required to keep their respective promises by performing their respective part of the contract.

As a general rule, Shari'ah favors freedom of individual and the community by non-interference in the market as the state is considered to play its supervisory role unless and until it is convinced that the evil forces are taking roots in the market such as; greediness, obtaining wealth through unfair means, fraud, misrepresentation, coercion and artificial hike in prices. No doubt that all these cases promote unhealthy environment that require the State to intervene in the market under the doctrines of *Siyāsah Shar'iyah* and *Maslaha Mursala* in order to regulate market affairs and preserve public interest.

Shari'ah, in normal circumstances, favours to some extent the famous economic doctrine of *Laissez-Faire* though there certainly exist differences

between the two legal systems. It is unanimously agreed upon by the *Fuqahā* that the state can interfere in peoples' individual as well as collective affairs in order to protect and maintain a peaceful and progressive society where everyone shall live and enjoy his life fearlessly.

The EER laws in Pakistan have been derived mainly from the Constitution, statutes, case law, state policies, the ILO Conventions, prevailing customs and traditions. The Constitution being supreme law of the land protects working class in respect of their employment related matters through their representative unions. Likewise, employers' right of association has been recognized for the protection of their individual as well as collective interest. Primary issues of working class are mostly related to wages, decent work environment and social security.

The statutes further implement and interpret the Constitutional right "...to form association..." in the light of the ILO Conventions. It is because of the ILO Conventions that strikes and lock-outs have been categorized to legal and illegal that depends upon the nature and background of the strike and lock-out. A detailed legal frame work has been given for collective bargaining through amicable means of settlement of industrial dispute. Moreover, case law plays an important role in interpreting and explaining the law in the Constitution and the legislative enactments. The functions of courts and tribunals have been considered of great value as they resolve worker related issues in a convenient manner. One of such examples took

place when the 18th Amendment devolved labour to the provinces the Federal government has enacted IRA, 2012 which was made applicable to the industries of ICT as well as to the trans-provincial industries. The Federal government's jurisdiction was challenged in respect of the trans-provincial industries in the four provincial HCs and NIRC that had been decided in favour of the Federal government.

The ILO, through its Conventions, plays a leading role in framing labour legislation in the signatory states like Pakistan. It is interesting to know that the ILO Conventions does not recognize 'right to form association' to all workers and employees as it has declared this right in a restricted way. Certain institutions such as Army, Police and those who are directly involved in the administration of state affairs have been excluded from the ambit of this right. The logic from behind is the sensitiveness of these institutions and their role in maintaining foundation of the state.

The right to organize in a work place has been further expended with right to strike as a legal strategy to ensure employees' rights and prevent their exploitation in the hands of greedy employers. Legal strike on the part of employees and legal lock-out on the part of employers have been recognized legal industrial actions when proper procedure has been followed as prescribed by the IRAs. Strike is not just to stop the machinery but there are certain acts that may amount to an implied strike such as 'go slow' or

damage to the machinery and tools with bad intention to affect the production process.

Normally, the EER related matters are viewed from the perspective of customary practices. In this connection, there are certain customary practices which are violative to the basic spirit of employment relationship they have been nullified by various laws such as the bonded labour system was declared as 'illegal and un-Islamic' through The Bonded Labour System (Abolition) Act, 1992. The Act also nullified the well-known customary practice of taking advance (*Peshgī*) in where a person in need borrows money from another and promise to work for him when the creditor wants him so. In fact, the relationship between the parties is that of creditor and debtor and not that of employer and employee. Various provisions of the major EER laws were challenged before the FSC for being contrary to the injunctions of Islamic law but the petitioners were unable to support their claims with strong evidence for the derivative sources of *Sharī'ah*.

Pakistan, after independence, inherited two major EER enactments from the colonial United India; the Industrial and Commercial Employment (Standing Orders) Act, 1946 and Industrial Disputes Act 1947. The former was replaced with Industrial and Commercial Employment (Standing Orders) Ordinance, 1968 and the latter with Industrial Relations Ordinance, 1969. The Standing Orders regulate terms and conditions of employment contract between

employer and employee and provide a legal framework for determining various aspects of employees' working status inside a work place.

The IRO on the other hand regulates relationship between employer and worker in regard to collective bargaining in respect to an industrial dispute through representative unions and associations. There are various means for resolving industrial dispute between employer and employee amicably whether the dispute is of individual nature or it is in the collective capacity. In case an industrial dispute failed to be resolved amicably there are other platforms where an industrial dispute may be referred such as labour courts and NIRC. Likewise, a petition may be filed as an appeal in High Court of the respective province.

After the 18th Constitutional Amendment, by abolition of the CLL, 'labour' devolved to the provinces, the Federal and the four provinces have enacted their respective laws to regulate EER. In fact, nominal changes have been introduced to the existing industrial relations framework as no worker-friendly reforms could take place in order to improve the abject condition of the working force.

There was a point of time when a legal vacuum was created after devolution of labour; consequently, the IRA 2012 was challenged before the four Provincial HCs and the NIRC. The main issue under discussion was applicability of the EER laws to the trans-provincial industrial establishments; those industries which have branches in more than one

province. Almost all the petitioners took the plea that after the 18th Amendment; the Federal Government has no authority to legislate regarding provincial industries. All HCs along with the SCoP and NIRC concluded that since the Federal Government has an upper hand over the province it can still, to some extent, legislate on the subjects that were previously included in Concurrent Legislative List.

The current EER regime has primarily been covered under the Industrial and Commercial Employment (Standing Orders) Ordinance / Act and the IRAs Acts (repealed and amended by the federal and provinces after devolution). The Standing Orders mainly covers fundamental aspects of contractual employment relationship as per the terms and conditions of employment are concerned in the offer letter for appointment in certain industrial establishment. For the purpose of job security and social welfare benefits industrial workers have been divided to six categories so that they could get legal protection as per the relevant laws. There have been given certain standards and guidelines that must be kept in mind by the employer while hiring and firing. Modifications and changes could only be brought to the standing orders when employer and employee agreed with the condition that that the modifications shall not violate the spirit of the Ordinance. Changes have been considered legal in case they have been brought to provide workers with more favourable conditions. Most of the important issues such

as termination and its grounds, retrenchment and re-employment of industrial workers have been discussed under the ordinance.

The Industrial Relations Acts (Federal and Provincial) is the main legislation applicable to the EER in an industrial establishment that covers almost all the important areas of this contractual relationship. The Act has been drafted in the light of Article 17 (1) of the Constitution that entitles the workers and employers to 'freedom of association'. The second source of the employer-employee relations related laws is the ILO Conventions no 87; freedom of association and the Convention no 98; right to organize and collective bargaining.

The IRA, 2012 provides for a complete legal framework in respect of collective bargaining between employer and employee through their representative unions and associations for improvement and reforms to the employment conditions. In case of an industrial dispute trade union and employer's association play their respective roles to resolve an industrial dispute in an amicable manner so that it shall not go to lengthy process of litigation.

Various amicable means of industrial dispute have been given under the IRA such as conciliation and arbitration and legal strikes as per the rules provided by the law. There is concept of illegal strikes as well, in case the proper procedure of strike and lock out was not followed by the employees or employers. There are number of acts which are considered as ULPs whether

committed by employer or employee. Interestingly, for the first time the Federal IRA, 2012 has provided for rights and liabilities on the part of both employer and employee.

The existing IRAs on both Federal and provincial levels have been made applicable to various classes of workers who have been employed in specified industrial establishments, though all the provisions are yet to be implemented in word and spirit. Therefore, the desired result could not be achieved for the reason that these laws carry several defective provisions in respect of their applicability, scope along with defective procedure for industrial dispute resolution. Moreover, lack of the government's interest and awareness of the industrial workers regarding their rights and obligations has led to futility of the current industrial relations legislation. Another cause for ineffectiveness is that industrial laws have narrowly scoped that let little number of workers benefit by these laws.

There are other provisions in the current EER laws have some lacunas particularly those related to the scope and the definitions of various terms such as 'worker/ workman' and 'wages'. It is pertinent to mention that issues such as absence of fixation criterion of minimum wages, implementation mechanism and imposition of fines on culprits have also not been considered as per their importance is concerned. The EER laws are not extended to home-based workers, local businesses of permanent and seasonal nature along with those employed in auto-workshops. Moreover, workers engaged

in public transportation, super stores, shopping malls, self-employed and those working under specific type of employment contract (*Thekedārī*) are also out of the ambit of these laws. Likewise, skilled and unskilled workers who are working with private institutions like professionals and educated persons employed in private institutions such as schools, colleges, universities and Information Technology (IT) companies.

Some of the provisions of labour laws have been challenged before the FSC for the reason that they were deemed repugnant to the injunctions of Sharī'ah as laid down by the Holy Qur'ān and Sunnah of the prophet. The petitioners were not able to argue their stance in the light of Islamic injunctions that led to dismissal of the petitions. In some of the petitions the court realized that there exist some elements that are not in accordance with Sharī'ah and shall be replaced.

In nutshell, the EER jurisprudence in Pakistan has not gone through the process of Islamization as it deserved, hence, it has not been made *Sharī'ah*-compliant. Another reason is that employment relationship between employer and employee has normally been determined on customary practices that may differ from place to place and profession to profession depending upon the economic prosperity and level of awareness of the parties to the employment contract.

The primary objective of this Ph.D. thesis has remained to the deep analysis of Pakistan's industrial EER regime from the perspective of *Sharī'ah* in the light of primary and secondary sources of *Sharī'ah* along with the views of *Fuqahā*. It has been tried in this research work to present the issue from the perspective of *Sharī'ah* on legal as well as ethical basis under the general principles of Islamic law. However, it has been humbly suggested that the issue shall be left open-ended for future researchers so that it shall be proved that *Sharī'ah* is the complete and divine code of life and can face challenges of every place and time to come and has the capability to adjust anywhere and everywhere.

6.3. RECOMMENDATIONS

The current EER regime in Pakistan, as per its theoretical aspects are concerned, has been found not to be in contradiction with Islamic law, though, certain administrative and procedural flaws, lacunas and loopholes have made the EER system ineffective. Scrutiny of the EER system has persuaded me to forward some fruitful suggestions as to introduce reforms to the existing industrial relations framework in the light of Islamic injunctions in order to make it *Sharī'ah*-compliant.

1. The FSC and the Council of Islamic Ideology have got constitutional mandate to assist the government in the process of Islamization. The former shall play its role by interpreting EER laws in accordance with

general principles of Islamic law while the latter shall forward valuable suggestions to the government to review the current EER regime.

2. New provisions related to the basic rights of the workers shall be incorporated to the current EER regime, inter alia, leaves in *Iddat* (waiting period), breast feeding intervals for babies during working hours, separate work place for both genders and wearing *Hijab*. Reforms are needed in this respect so that the country's Islamic image shall truly be observed in the work place on one hand and the women worker shall feel themselves safe, honest and decently treated one. Moreover, building a place for observing five times prayers shall be made compulsory for employers inside industrial establishments. Likewise, right to writ petition shall be extended to employees.
3. As far as the federal and provincial governments' jurisdiction of the labour laws legislation is concerned after the 18th Amendment, there shall be clear demarcation of their respective authorities. A Labour Welfare Commission, consisting of experts, may be established in order to codify a harmonized and uniform industrial code in the ICT and the four provinces so that workers shall not feel themselves being exploited by the diversities in the existing legal framework in the same country.
4. EER needs to be viewed from the perspective of IWEs that contain brotherhood, mutual trust, sympathy and accountability before Allah (SWA) and not that of master and servant. Employees are to be motivated

for undertaking permissible work as a personal obligation (*fardh-e-āiyn*) and a means for earning livelihood.

5. As the primary source of EER legislation, the Constitution provides that there shall be no discrimination as per equality before law is concerned. To achieve this goal the current EER laws shall be extended to all workers whether employed in formal or informal sectors including home-based workers, agricultural workers, private educational institutions etc.
6. A comprehensive alternative dispute resolution system shall be introduced in industries where there exists no representative union of the employees. Members of the resolution Committee shall be appointed by the Commissioner so that they are neither be from employer and nor from employer side; that they shall not have vested interests in the industrial dispute.
7. Certain definitions in the current EER regime are needed to be reviewed such as 'worker' and 'workman' shall be assigned for a uniform identity of all employed persons irrespective of industrial establishment/ company/ factory and office they are working in. The *Sharī'ah* definition of the term; '*Ajeer*' may be adopted in this respect.
8. Industrial inspection system shall be reformed by reviving the existing system so that enforcement of the laws shall be ensured especially the provisions of the Bonded Labour (Abolition) System Act 1992 shall strictly be implemented so that the illegal customary practices of advance (*Peshgī*)

and consequently forced labour shall be eliminated from the roots. A monitoring unit, on the format of education and health departments, may improve the current industrial inspection system.

9. Certain classes of workers are out of the ambit of the current EER laws such as university graduates employed on visiting teaching basis by private schools, colleges and universities on very low and exploitative wages. They are not paid in accordance with minimum wage rates for the reason that they are out of the ambit of the industrial laws. Therefore, it is the responsibility of the provincial governments after the 18th Amendment to look into severity of the matter and extend EER laws to all skilled and unskilled workers and employees, irrespective of the work place they are engaged for certain physical or mental work.
10. Classification of industrial workers shall be based on *Shari'ah* rules as the current classification seems discriminatory for workers in the same work place. They all are entitled to humane working conditions, fair wages based on the principles of justice (*Al-Adal*) and equity (*Al-Ihsān*). Moreover, all workers are to be dealt with by their respective employers in accordance with the contemporary customs and usages as agreed upon by the employer and employee either in the terms and conditions of employment or which has been described by the relevant laws.
11. Misuse of authority in all shapes either by employer or employee shall be made part of the ULPs because the current system has narrowly been

drawn as it does not include any misuse of authority in respect of recruitment/hiring, promotion, termination and retrenchment. Likewise, violation of the commandments of Shari'ah by an employer or employee shall be included in the grounds that disqualify a person for being an officer of employer's association or workers' union.

12. The provisions of PPC shall be extended to the EER laws particularly in cases of intentional or unnatural deaths and injuries as it has recently been done in a special case of Ali Enterprises Baldia Town fire case by the Anti-Terrorism Court that claimed 264 lives. Likewise, the court ordered *Diyat* compensation to be paid to each of the victims' families.
13. A standard criteria shall be made for fixation of minimum rates of wages that shall enlist life's basic necessities of a worker and his family in line with the socio-economic conditions of the country along with the ILO's guidelines for decent living.
14. Enforcement mechanism of the prevailing MW policy does not bear any fruit for the abject working class for number of reasons. One of these reasons is lack of awareness among the workmen about their major rights such as entitlement to humane conditions of work, legal working hours, social protection and receipt of officially prescribed MW. The government shall make special arrangements to ensure that all workers are really taking benefit of the MW policy irrespective of their employment status.

Labour inspectors shall be well trained in order to undertake disposal of their duties in an effective and fruitful manner.

15. Pakistan has ratified two basic ILO's Conventions on workers' right to organize and collective bargaining. The Federal and provincial governments shall feel their respective responsibility and make a Trans-Provincial Council on Labour where experts on labour laws and religious scholars shall revise the current labour-related enactments along with the ILO Conventions in order to codify an Islamic Labour Code in the light of IWEs.

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