

# THE SHARIAH APPRAISAL OF CONSUMER PROTECTION LAWS IN PAKISTAN

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BY

**ABDUL QAYUM KHAN**

Reg.No.217-FSL/LLMCL/F09

UNDER THE SUPERVISION OF

**ATAULLAH KHAN MAHMOOD**

Assistant Professor, Faculty of Shariah and Law, IIUI

**DEPARTMENT OF LAW  
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### **FINAL APPROVAL**

It is certified that we have read the dissertation written by Abdul Qayum Khan, Registration No. 217-FSL/LLMCL/F09, titled "A Shariah Appraisal of Consumer Protection Laws in Pakistan" submitted to the Faculty of Shariah and Law. We have evaluated the dissertation and found it up to the requirements provided by International Islamic University, Islamabad for the award of LLM Corporate Law Degree.

### **VIVA-VOCE EXAMINATION COMMITTEE**

**1. Supervisor:**

Mr. Ataullah Khan Mahmood

Assistant Professor, Department of Law,

International Islamic University, Islamabad.

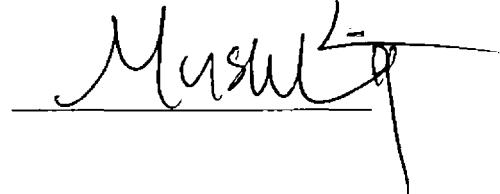


**2. Internal Examiner:**

Mr. Muhammad Mushtaq Ahmad

Assistant Professor, Department of Law,

International Islamic University, Islamabad.



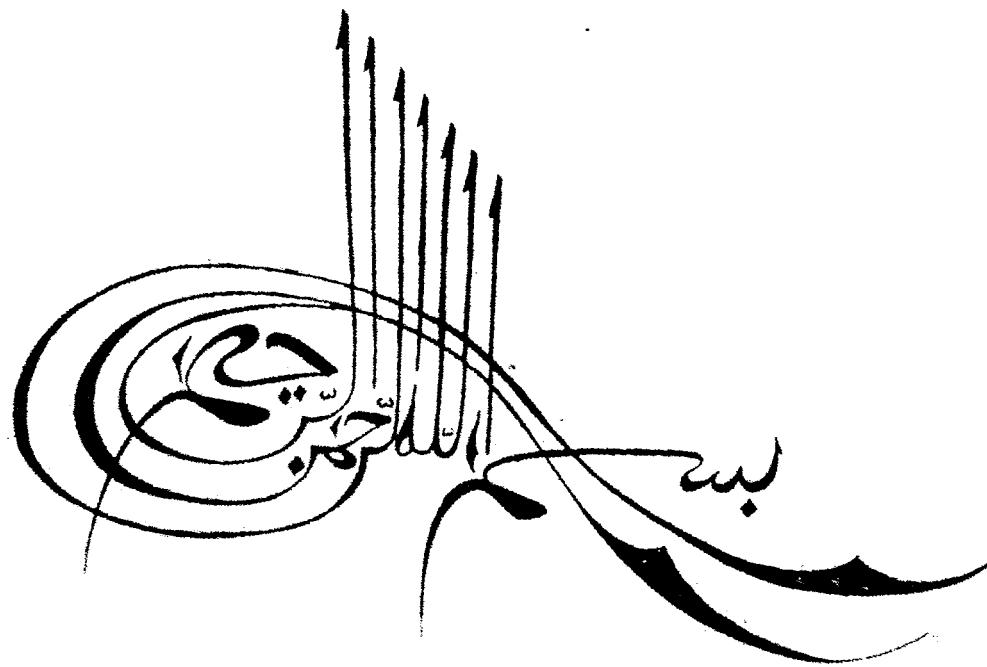
**3. External Examiner:**

Dr. Muhammad Motia-ur Rahman

Advisor,

Federal Shariat Court, (FSC) Pakistan



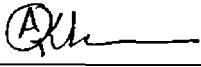


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## DECLARATION

I, Abdul Qayum Khan, hereby declare that this thesis is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this thesis has been duly acknowledged.

**Student: Abdul Qayum Khan**

Signature: 

Date: 25/06/2012

**Supervisor: Assistant Professor. Ataullah Khan Mahmood**

Signature: 

Date: 25/06/2012

## **DEDICATIONS**

**This thesis is dedicated to:**

**My Parents,**

**My Teachers,**

**My Siblings,**

**&**

**My Friends**

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## ACRONYMS

ACCC	Australian Competition and Consumer Commission Authority
ACL	The Australian Consumer Protection Laws
AFCO	Australian Federation of Consumers Organizations
BCPA	Balochistan Consumer Protection Act 2003
CRCP	Consumer Rights Commission of Pakistan
CCRF	Consumer Complaint and Redress Forum
COPRA	The consumer protection Act
CERS	Consumer Education and Research Society
DTI	the Department of Trade and Industry
EU	European Union
ICPA	Islamabad Consumer Protection Act 1995
LACORS	The Local Authorities Coordinators of Regulatory Services
NWFPCPA	North West Frontier Province Consumer Protection Act 1997
NCC	National Consumer Council
OFT	Office of Fair Trading

PCPA	Punjab Consumer Protection Act 2005
PIL	Public Interest Litigations
PSQCA	Pakistan Standards and Quality Control Authority
SCC	Small Claims Courts

## ACKNOWLEDGEMENT

The purpose of this thesis besides the fulfillment of partial requirements of degree of LLM (Corporate Law) from International Islamic University, Islamabad is also to make an effort to explore the consumer protection regime in Pakistan, especially from Shariah point of view, and to submit some humble suggestions for bringing it into conformity with the injunctions of Shariah.

I hope, this effort will help not only students of law but also it is our constitutional obligations to search out and repeal any provisions which are repugnant to the injunctions of Shariah, from the prevailing laws in Pakistan.

I am extremely indebted to my teacher and supervisor Mr. Ataullah Khan Mahmood for his continuous guidance in writing this thesis. I highly appreciate his acumen and intellect in this regard. I owe my gratitude to Dr. Aziz-ur-Rehman and Mr. Akbar Khan for their guidance in preparing my thesis proposal.

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Abdul Qayum Khan

## ABSTRACT

Like developed and developing countries Pakistan has also promulgated consumer protection law. The Shariah appraisal of this law reveals that some of their provisions are inconsistent with the injunctions of Shariah. The definition of consumer is limited to the buyers who buy goods for self-consumption and the one who purchases goods for re-sale or commercial purpose is excluded from the definition of consumer. The classical jurists of Shariah used the terminology of buyer for all kinds of buyers as Shariah protects all classes of buyers from any deceptive and fraudulent business practices. Secondly, the definition of product is inconsistent with the injunctions of Shariah as animals, fruits, milk and things obtained from them are excluded from the definition of product which is repugnant to Shariah. Shariah protects buyers of all sorts of product and goods subject to the concept of *halal* and *haram* in Shariah. The exclusion of animals, fruits, milk and things obtained from them make no sense because mostly fraud is committed in these goods. There are explicit Ahadith of the Prophet (peace be on him) which proscribe uncertain and fraudulent acts in the sale of fruit, animal and milk.

Thirdly, the provisions which exclude manufacturer from liability owing to the want of his scientific and technological knowledge are repugnant to Shariah. To exclude manufacturer from liability is like eating others wealth by unfair and illegal means which Shariah has proscribed in explicit terms. Shariah does not permit getting rich at the peril of another by unfair or illegal means. Finally, immunity from trial granted to the functionaries of consumer protection councils and courts is inconsistent with Shariah. As a matter of fact, in Shariah there is no concept of legal immunity as all human beings are the servants of Allah and equal, thus, none is above the law.

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## **INTRODUCTION**

Shariah (Islamic Law) means the injunctions of Quran and Sunnah which includes the work of classical jurists. Shariah is so designed that the rights of each individual is protected in the broader interest of the society. Shariah injunctions are not confined to the concept of Hudood and Qisas but they encompass the Holy Quran, Sunnah and the classical manuscripts of Muslim jurists, regarding rights, duties and protection of seller and buyer.

The developing countries, including Pakistan, are promulgating laws related to the protection of consumers and are following the already established norms of consumer legislation in developed countries. Recently Pakistan has promulgated various laws for the protection of consumer rights. In 1995 The Islamabad Consumer Protection Act, (I.C.P.A) 1995 was promulgated for the first time in Pakistan. Then The North West Frontier Province Consumer Protection Act (N.W.F.P.C.P.A), 1997, The Balochistan Consumer Protection Act (B.C.P.A), 2003 and The Punjab Consumer Protection Act (P.C.P.A), 2005 were promulgated respectively.

Pakistan is an Islamic Country; therefore there is an immense need to analyze the prevailing consumer protection laws from the perspective of Islamic Law. Hence, I am avid to do my LLM thesis research in this area and to find out legal answers to the following issues:

- a) Whether the existing consumer protection legislation in Pakistan is in conformity with Islamic Law or not?

- b) Whether Islamic Law and Western Law have any similarities in consumer protection?
- c) It is important to examine whether the principles of Islamic Law protect consumer as it is provided by positive law or it has a different scheme of policy.
- d) In the light of the principles of Islamic Law we shall see whether the existing consumer protection laws are in conformity with Islamic Law, if not, to what extent.
- e) It is equally important to search out that what are the provisions which are not in conformity with Islamic Law and how can they be brought into conformity with Shariah in the present scenario.
- f) If the existing legislation is not in conformity with Islamic Law then what is the alternative mechanism provided by Islamic Law in which not only consumers but all users, individuals and society at large is protected.
- g) How can an environment be created in which rights of the consumers will be highly protected in Islamic Law?

If the Shariah appraisal of the existing consumer protection Laws reveal that some of the provisions are repugnant to Shariah; then how it can be brought into conformity with Shariah and how a regime can be created in Pakistan in which the protection of consumers can be ensured in accordance with Shariah.

## **IMPORTANCE OF THE RESEARCH**

In the present capitalist economy consumer protection is regulated through consumer protection Laws in both developed and developing countries. Likewise, Pakistan has promulgated consumer protection Law in the shape of Acts which are based on western concept of consumer protection. Pakistan is an Islamic country and by virtue of its

constitution it is mandatory that no law shall be promulgated which is repugnant to the injunctions of Shariah.

Therefore, it is important to make a Shariah appraisal of the existing consumer protection Laws. This research will reveal to us that whether any provision is repugnant to Shariah or not.

The importance of this topic is so profound that we need to search out consumer protection Laws in Shariah and to incorporate them in the present consumer protection Laws of Pakistan or to suggest for the promulgation of new consumer protection laws which are purely Islamic.

**Objectives of the Research:** The research is aimed to;

- a. analyze the contemporary special consumer protection legislation in Pakistan from the perspective of Islamic law;
- b. point out the loopholes, if any, that are contrary to the consumer protection from the perspective of Islamic Law;
- c. search out an alternative consumer protection mechanism from the perspective of Islamic Law in which not only the consumer of the present definition but all the consumers, users and market at large shall be protected;
- d. Check the legitimacy of existing consumer legislation in the eyes of Islamic Law.

## **LITERATURE REVIEW**

I have reviewed a variety of literature on the subject and found that no author has done a Shariah appraisal of the existing consumer protection Laws of Pakistan. In the Faculty of Shariah and Law, (FSL) International Islamic University, Islamabad, (IIUI), Muhammad

Akbar Khan, student of FSL at IIUI, in his thesis, titled "*Consumer Protection in Islamic Law: An analytical study*", has expounded about general concept of consumer protection in Islamic Law, but he did not write about a Shariah appraisal of the existing consumer protection Laws in Pakistan which is the area of my research. His research has nothing to do with the existing consumer Laws in Pakistan from the perspective of Islamic. His research work will be quite useful and helpful for me in my research.

Miss. Ammara Waheed, student of FSL at IIUI in her thesis, "*Consumer protection Laws in Pakistan*", has focused on some key consumer issues in the context of privatization and deregulation of major institutions of Pakistan. She has analyzed the major legislation on consumer issues in Pakistan with regard to privatization and deregulation of major institutions and their impacts on consumer rights. Her dissertation has nothing to do with Shariah appraisal of existing consumer Laws in Pakistan which is the area of my research. Another student worked on "*Seller's responsibility in documentary credits from Islamic perspective: a comparative study*". It is focused on the seller's responsibility in documentary credits from Islamic perspective which has nothing to do with my area of research.

In the light of the above literature review, it is evident that no student has done a Shariah appraisal of consumer protection Laws at FSL, in particular and in Pakistan, in general. Therefore, I have the privilege to do my research on "The Shariah Appraisal of Consumer Protection laws in Pakistan."

## **RESEARCH METHODOLOGY**

A methodology may be defined in a research work so I have adopted the following methodology for my research:

- 1) An analytical method is natural to my research as I need, first, to analyze and examine the contemporary consumer protection legislation in Pakistan from the perspective of Islamic Law and to point out the existing provisions which are not in conformity with Islamic Law, and to provide a regime where consumers are protected as provided by Islamic Law.
- 2) It is a traditional, armchair and library research and I will resort to text books, statutes and articles on the subject.
- 3) The principles of English jurisprudence will be applicable to interpret provisions of the existing consumer protection legislation in Pakistan.
- 4) On the other hand, the principles of Islamic jurisprudence will be applicable to interpret the contemporary consumer protection legislation in Pakistan.
- 5) I will consult the original sources of Islamic Law for analyzing the existing consumer protection legislation in Pakistan from the perspective of Islamic Law.

## **CONCLUSION**

To sum up, this thesis is primarily focused on Shariah appraisal of prevailing four consumer protection Acts in Pakistan and on its perusal for making them Shariah compliant. The United Nations Organization (UNO) guidelines for consumer protection of 1985 persuaded most of the developing countries to promulgate consumer protection laws. Pakistan followed suit, when for the first time in 1995 the I.C.P.A 1995 was promulgated. Then the N.W.F.P.C.P.A 1997, the B.C.P.A 2003 and the P.C.P.A 2005 were promulgated respectively.

The first chapter of this thesis encompasses the basic concepts of consumer Laws, the concept of conditions, express warranties and implied warranties in a contract of sale and purchase. Second chapter is about the evolution of consumer legislation in Pakistan and summary of the four consumer Acts is given. Chapter three of the thesis is about the concept of consumer protection in Shariah, consumer rights in Shariah, business guidelines in Shariah, *caveat emptor* in Shariah and lastly the concept of *Khiyarat* (options) in Shariah. Chapter four is about Shariah appraisal of the prevailing four consumer protection Acts. There are a few provisions which seem to be not in conformity with the injunctions of Shariah. In the last chapter some recommendations, a "Shariah Model" consumer protection and conclusion are spelled out.

## CHAPTER ONE

# EVOLUTION OF CONSUMER PROTECTION LEGISLATION AND ITS BASIC CONCEPTS

### 1.1. INTRODUCTION

Consumer protection laws in the contemporary profit based market economy, is essentially based on the maximization of profit of seller and manufacturer. Consumer protection Laws have been promulgated in the developed and developing countries including Pakistan in order to raise the confidence level of consumer in the buying and consuming goods and services. As consumer protection Laws revolve around the term consumer so consumer's definition has a vital role in this regard.

In addition to this, the doctrine of caveat emptor, the concept of conditions, express and implied warranties in a contract of goods will be analysed in this chapter. The breach of conditions of a contract gives the buyer rights of repudiation of the contract whereas the breach of warranties give the buyer right of claiming damages. Warranties are of two kinds: express and implied. Consumer protection laws are, in fact, the codification of implied warranties of contract by the legislature in a statute of consumer protection.

### 1.2. DEFINITION OF CONSUMER

The entire consumer protection Law is working for the protection of consumer and consumer is granted greater protection by this Law. Consumer's definition is specifically provided for in this Law as he is its subject matter. Therefore, it is vital to know about the definition of consumer in the context of consumer protection legislation. The legislature has given its definition in the promulgated laws for the protection of consumer.

Literally consumer is a person who consumes something.

According to consumer protection Acts, consumer means;

"A person or entity who:- (i) Buys or obtains on lease any product for a consideration and includes any user of such product but does not include a person who obtains any product for resale or for any commercial purpose; or (ii) hires any services for a consideration and includes any beneficiary of such services; Explanation:- For the purpose of sub-clause (i) commercial purpose" does not include use by a consumer of products bought and used by him only for the purpose of his livelihood as a self-employed person."<sup>1</sup>

Hence, the above statutory definition of consumer excludes all those persons who buy any goods or services for some commercial or resale purposes. It is explicitly mentioned that a person who buys something for self-employment to make profit for his livelihood is excluded from the definition of consumer. It is a vague provision that what is the extent of self-employment and what will be the standard and yardstick to weigh that whether somebody's profit from self-employment exceeds his livelihood expenditure or not. If it exceeds then what will be his legal status under this law. Meaning there by, whether he will be considered a consumer or he will be put in the net of doing business for commercial purpose.

It is a vague definition and, therefore, needs more explanation and we need to see it in the light of precedents and case law. As far as my research is concerned, I could find no elaboration of consumer definition in any case law in Pakistan with special reference to self-employed person and the extent of his profit and earnings.

Whether retailers in villages and cities come under the consumer definition or not? What is the extent of their profit to remain in the net of self-employed persons? What is the yardstick for weighing earnings for livelihood? All these questions are still unanswered

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<sup>1</sup> Sec. 2 (c) (I & ii) P.C.P.A 2005, Sec. 2 (c) N.W.F.P.C.P.A 1997, Sec. 3 I.C.P.A 1995 and Sec.2 (c) B.C.P.A 2003

and we need elaboration of consumer definition. Since consumer definition is vague and problematic this law will remain redundant and in its garb retailers and sellers will get benefits at the cost of consumer.

A legal dictionary defines consumer in the following words that Consumer is a person who buys goods or services for personal, family, or household use, with no intention of resale; a natural person who uses products for personal rather than business purposes.<sup>2</sup>

This definition infers that consumer is a person who obtains any goods or service for consumption either for his personal or family but it shall not be for commercial purpose because commercial contracts are out of the ambit of consumer protection.

The statutory definition and dictionary definition are almost the same. The reason is that consumer definition, as enshrined in our Pakistani consumer protection laws is the replica of Western Consumer Laws and consumer is not defined in any manner peculiar to Shariah or our Pakistani environs.

It is a point of substance to know meaning of service and commercial purpose under this law. It was held that any administrative step prior to the start of actual service was not a service under the Act; as the purchase of a product for commercial purpose is excluded from the definition of consumer.<sup>3</sup> Then what would be the remedy for a defective car bought by any legal entity for the daily use of its directors and employees. Whether it is a commercial purpose or not?

It is a question of fact which shall be elaborated before the authorities concerned in each case and they will elaborate that what the Acts include and what they exclude in the definition of consumer. As consumer protection cases are contested before the courts

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<sup>2</sup> Bryan A. Garner, *Black's Law Dictionary*, (New York:West Publishing Co,2004), eight edi,335

<sup>3</sup> PLD-2010-Lahore-95 Chief Executive FESCO, Faisalabad Vs. Nayab Hussain

of law but in fits or starts, therefore, with the passage of time the definition of consumer will be elaborated in the light of precedents and case law in Pakistan.

### **1.3. THE DOCTRINE OF CAVEAT EMPTOR AND CONSUMER PROTECTION**

In a contract of sale and purchase there are always two parties. Both the parties have mutual corresponding rights and duties. In common law system the doctrine of *caveat emptor*<sup>4</sup> (means the buyer shall be aware) obliges the buyer to be vigilant and aware of all the features of the contracting subject matter. On the other hand, Shariah has no room for this doctrine and puts more responsibility on the seller to disclose all the features in the subject matter of the contract as he is the one who knows all the good and bad qualities of it. And deliberate concealment of fact in the contract of sale and purchase is considered fraud and Shariah proscribes the commission of fraud in business transactions. Let us elaborate the concept of caveat emptor.

Caveat emptor, the basic concept is that the buyer buys at his/her own risk and therefore should examine and test a product himself/herself for obvious defects and imperfections. Caveat emptor still applies even if the purchase is "as is" or when a defect is obvious upon reasonable inspection before purchase. Since implied warranties (assumed quality of goods) and consumer protection laws have come upon the legal landscape, the seller is held to a higher standard of disclosure than "buyer beware" and has responsibility for defects which could not be noted by casual inspection. This rule, from the very beginning of common law contracts, is not designed to shield sellers who engage in fraud or bad faith dealing by making false or misleading representations about

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<sup>4</sup>B. Saunders, "Words and Phrases" (London: Butterworth and Co. Ltd), 231

the quality or condition of a particular product. It merely summarizes the concept that a purchaser must examine, judge, and test a product himself.<sup>5</sup>

The modern trend in consumer protection laws, however, has minimized the importance of this rule. Although the buyer is still required to make a reasonable inspection of goods upon purchase, and more liabilities are inflicted on the sellers. That is why, at present, the doctrine of *caveat venditor* (let the seller be aware) has become more relevant.

Thus, it is evident from the above that in the present advanced marketing the doctrine of *caveat emptor* is less prevalent and the doctrine of *caveat venditor* (seller be aware) consumer protection have become more prevalent.

#### **1.4. Product liability**

When a buyer purchases anything he has certain expectations as to the quality and safe use of the goods. It is because of the seller's statement, conditions or express or implied warranties in the contract made at the time of contract. Product liability is a legal concept of law of contract. It means that the delivered goods are not in conformity with the express or implied warranties of the contract or they cause injury to persons or property.<sup>6</sup> Hence, the buyer and consumer are protected from all kinds of defective, harmful and inferior goods and services through express and implied warranties. Though the writer does not mention services, yet it impliedly includes services. Consumer protection legislation is basically focused on implied warranties of contract. As far as conditions and

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<sup>5</sup>Theodore Deden "Consumer Protection versus Caveat emptor" (September 30, 2010), <http://thededencompany.com/2010/09/30/consumer-protection-versus-caveat-emptor/> (last visited on March 25 2012)

<sup>6</sup> Harold f. Lusk, Charles M. Hewitt, John D. Donnel and A. James Barnes, *Business Law Principles and cases*, (USA: Richard D. Irwin, INC, 1978), 768

express warranties are concerned they dealt with under the Sale of Goods Act, 1930. Thus, it is indispensable to know about the legal status of conditions and warranties in a contract of sale.

### **1.5. Conditions and Warranties**

Conditions and warranties are the two primary elements on which the contract of sale and purchase is based. They govern contracts and business transactions during performance and non-performance of a contract. Conditions and warranties are the stipulations which play a vital role in the event of non-performance of a contract of sale and in the infliction of damages.

The breach of conditions or warranties has different effects on contract, especially in the accruing of damages in the event of non-performance of the contract.

The Sale of Goods Act, 1930 in its sections 11-17 provides for conditions and warranties and their impacts on the parties in the event of non-performance of the contract. Section 12 (2) of the said Act provides for conditions<sup>7</sup>. Condition is a stipulation related to the essence of the contract. The breach of any conditions gives right to the other party to repudiate the contract whereas warranty is a stipulation not essential to the purpose and essence of the contract but collateral to it. The violation of warranty does not give right to the other party to repudiate the contract or reject the goods but the remedy is by way of claiming damages.<sup>8</sup>

It is immaterial whether the term condition or warranty is stated in the agreement or not; as it depends on the formation and construction of each contract. Warranties are of two kinds. They are as follows.

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<sup>7</sup> Sec.12 (2) of The Sale of Goods Act, 1930

<sup>8</sup> Sec. 12 (3) ibid

## **Express and implied Warranties**

Warranties are stipulations not essential but collateral to the contract. Express warranties are contractual warranties and implied warranties come into operation by law.

### **Express warranties**

Warranties in its broadest sense mean the assumption of responsibility by the seller for the quality, character, or suitability of goods sold. The seller may assume such responsibility by express agreement, in such a case a warranty is created by contract and the rights and liabilities are contractual in nature. Such a warranty is called an express warranty. The breach of express warranties does not give the buyer right of rescinding the contract but he can claim damages as compensation.

### **Implied Warranty**

It means that goods shall be suitable for the purpose intended by buyer. It comes into operation by law. Meaning thereby, there is no need of its mentioning in the contract.<sup>9</sup>

The existing consumer legislation, in fact, embodies warranties in itself.

Thus, the seller has to adhere to implied warranties in the contract of sale of goods and services. The intended purpose of the buyer or consumer from the conclusion of contract shall be satisfied. Law has given it the name of warranties and the violation of warranties gives the buyer the right of claiming damages and not the right of repudiating the contract.

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<sup>9</sup> M.A.Mannan, *The Sale of goods and Partnership Acts* (Lahore: Law publishing company, 1979) edi 5<sup>th</sup>, 770

## 1.6. CONCLUSION

The term consumer is the primary terminology on which the entire consumer protection law is based. The definition of consumer in the consumer law is vague as the term self-employment and earning for livelihood are not clear as yet. But with the passage of time, case law of our courts will elaborate it. The doctrine of *caveat emptor* in contracts tempted sellers to concealment of defects. It was proved to be detrimental to consumers. But now, in consumer area, the doctrine of *caveat vedor* has replaced the doctrine of *caveat emptor* as the modern capitalist economy has put more responsibility on seller by implementing consumer protection Laws. The reason was that the concept of *caveat emptor* led to fraudulent business activities which were detrimental to consumers.

Therefore, implied warranties are incorporated in the shape of consumer protection laws so as to ensure protection to consumers in the present well-aware market on part of seller and manufacturer. The breach of conditions in the contract gives right of repudiation to the opposite party but the breach of warranties gives the right of claiming damages by way of compensation. Implied warranties have been embodied in special Law, namely, consumer protection laws, so now remedies for the breach of warranties have become statutory remedies and special courts of law are established by the consumer protection Acts for early disposal of consumer issues.

## CHAPTER TWO

### CONSUMER PROTECTION LAWS IN PAKISTAN

#### 2.1. INTRODUCTION

Consumer protection is a new area of law in which legislation has been done in the developed and developing countries including Pakistan. The genesis of consumer protection lies in the rule of Muslim rulers of the sub-continent. The Britishers during their rule promulgated some legislation in this regard but it was of a general nature and until 1995 there was no consumer protection laws in Pakistan. For the first time, in 1995 the Islamabad Consumer Protection Act (ICPA) 1995 was promulgated. NWFPCPA, BCPA and PCPA were promulgated in 1997, 2003 and 2005, respectively. In this chapter, each consumer protection Act and its the major provisions will be elaborated.

Reasons for the promulgation of consumer protection laws in Pakistan were two fold: First, global reasons; and second, domestic reasons. The impact of promulgation of consumer protection laws on the rights of consumer in Pakistan will be analysed. As a matter of fact, the efficacy of consumer protection laws in Pakistan still requires a profound struggle both from the state and people of Pakistan to ensure its implementation.

## 2.2. HISTORICAL PERSPECTIVE OF CONSUMER PROTECTION LAWS IN PAKISTAN

As consumer protection in the common law system is a new area of legislation which got impetus in the last quarter of the twentieth century. Consumer protection in Pakistan evolved bit by bit like many other countries of the World. Pakistan inherited consumer legislation from the pre-independence period, especially laws developed in the era of *Ala ua-Din Khilji*. He introduced consumer laws to regulate price measurement and established separate shopping centers at Delhi for food items. Sultan appointed market controllers and started spying to keep the government well informed on price and weight violation. Shopping centers were registered with the Ministry of Commerce and thus every merchant was registered with the government.<sup>10</sup>

The Britishers during their rule in the sub-continent introduced laws for regulating market but the objective was to promote British interest rather than the welfare of general public. The Pakistan Penal Code 1860 and the Sale of Goods Act 1930 were some of the enactments in that era for regulating and controlling trade and the law and order situation and were less focused on consumer protection.<sup>11</sup> The above enactments prevailed in Pakistan till the promulgation of consumer protection laws in 1995 and no special legislation was done in this sphere.

Pakistan promulgated its first consumer law in 1995 for the protection and promotion of consumer rights and interests on the provincial level rather than federal level. Islamabad Consumer Protection Act (ICPA) 1995 promulgated by the Federal

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<sup>10</sup> Ammara Waheed, *Consumer Protection in Pakistan* (unpublished thesis submitted to FSL, IIUI, 2007).

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<sup>11</sup> ibid

Government is efficient in many respects but its scope and ambit is limited to the Islamabad Capital Territory (ICT), while each province is supposed to have its own special consumer protection laws in this regard. Islamabad CPA 1995 was followed by North West Frontier Province (NWFP) CPA 1997.<sup>12</sup> In 2003, Balochistan Consumer Protection Act 2003 was promulgated. In 2004, the Governor of Sindh promulgated Sindh Consumer Protection Ordinance 2004 which lapsed due to no ratification by the Sindh Assembly. In 2007, it was again promulgated by the Governor but lapsed as it was not presented before the Sindh assembly for ratification. At present, Sindh has no special consumer protection laws.

In 2005, Punjab Consumer Protection Act 2005 was promulgated which became operational in March 2007.<sup>13</sup> It is a more comprehensive and detailed Act than other three Acts as it has given detailed provisions about defective products in its sections 5, 6, 7, 8 and 9. The existing four Acts will be elaborated later in this chapter one by one.

### **2.3. The PROMULGATION OF CONSUMER PROTECTION LAWS IN PAKISTAN**

After knowing about the existing consumer protection legislation in Pakistan, now we shall comprehend that whether they are sufficient and viable legislations or they have some inherent lacunas in their implementation and redressal mechanism. The legal arena does not appear promising for consumer as consumer laws are largely absent and where they exist, no effective implementation and enforcement mechanisms are available. The consumers are being exploited for they are largely unaware of their rights as well as

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<sup>12</sup> ibid

<sup>13</sup> Babar Bhatti, "Consumer Protection in Pakistan: A fad or Beneficial step for Consumers" (April 9 2008), <http://telecompk.net/2008/04/09/consumer-protection-punjab-pakistan/> (last visited on March 27 2012)

ignorant about the possible legal remedies available. The situation is rather worse as there exists maximum lethargy on part of public and consumer movement in Pakistan.<sup>14</sup> Given the state of Pakistan's society and economy, consumer rights would appear to be too utopian to be actually translated into reality.<sup>15</sup>

It is observed that the existing consumer protection laws are not exhaustive in the context of "consumer" definition; as "public services" are excluded by them which is a vast area of service. It would appear that the public sector, which is a major service provider in Pakistan is intended to be excluded from the operation of present consumer laws. It is suggested that the definition of a consumer should be extended to goods and services that are provided by the state or public sector. Such goods and services are paid for in the form of direct and indirect taxation. In our view taxes, duties, fees, etc., constitute consideration.<sup>16</sup> Besides, the enforcement mechanism are not efficient and expeditious in terms of providing speedy redress; and the penalties against the offenders are inadequate. As a matter of fact, these laws do not have the potential to provide for an efficacious and inexpensive judicial process for complaint redress.<sup>17</sup>

Keeping in view the existing inefficacious and inadequate consumer protection regime in Pakistan, Consumer Rights Commission of Pakistan (CRCP) took an initiative and held meetings with experts in the field, for envisaging an effective and consumer-friendly, consumer protection regime in Pakistan. As a result it drafted a "Model Consumer Protection Act 2000" and presented it, for its enactment, to Federal Law

<sup>14</sup> Muhammad Sarwar Khan and Abrar Hafeez, *Consumer Law in Pakistan* (Islamabad: Consumer Rights Commission of Pakistan(CRCP) + Liberal Forum of Pakistan, 1999),i

<sup>15</sup> Zubeida Mustafa, "Do Consumers have Rights in Pakistan?" (March 30 2005), <http://www.zubeidamustafa.com/do-consumers-have-rights-in-pakistan> (last visited on March 25 2012)

<sup>16</sup> Muhammad Sarwar Khan and Abrar Hafeez, *Consumer Law in Pakistan* (Islamabad: Consumer Rights Commission of Pakistan(CRCP) + Liberal Forum of Pakistan, 1999),14

<sup>17</sup> Ammara Wáheed, *Consumer Protection in Pakistan* (unpublished thesis submitted to FSL, IIUI,2007),8

Minister, Chief Justice of Pakistan, Provincial Governors and Pakistan law commission in 2000. Still there seems lethargy from the government side regarding this draft as no amelioration is made the area of consumer protection laws.

Three consumer rights bodies, two in Islamabad: "The Network for Consumer Protection", and the "Consumer Rights Commission of Pakistan" and one in Karachi: "Consumer Protection Council of the Helpline Trust" have been working in the field for the past several years. What they have achieved appears to be like a drop in the ocean.<sup>18</sup> Hence, there is more work needed to be done in the area of consumer protection.

In the following lines we will elaborate substantive provisions of the existing four consumer protection Acts. They are elaborated chronologically in the following lines.

### **2.3.1. THE PROMULGATION OF ISLAMABAD CONSUMER PROTECTION ACT 1995**

Islamabad Consumer Protection Act (ICPA) was promulgated in 1995 to provide for the protection and promotion of consumer rights and interests at Capital city of Pakistan. It has twelve sections. The substantive provisions of the Act will be summarized in the following lines.

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<sup>18</sup> Zubeida Mustafa, "Do Consumers have Rights in Pakistan?" (March 30 2005) Available at <http://www.zubeidamustafa.com/do-consumers-have-rights-in-pakistan> (last visited on March 25 2012)

## **Definition section**

Consumer is any person who acquires any products or services for a consideration and the ultimate user or beneficiary of these products or services. The one who acquires them for resale or commercial purpose is out of the ambit of consumer definition.<sup>19</sup>

The Act has exhaustively defined “unfair trade practice” as it says that hoarding, black marketing, adulteration, selling of expire drugs, food items and commodities unfit for human consumption, or charging for goods and services more than the fixed market price, false, misleading and bait advertisements, or falsely giving any warranty or guarantee of the specification, performance, ingredients, efficacy or length of the goods or services are included in unfair trade practices.<sup>20</sup>

## **Consumer Council**

For the purpose of implementation of the Act, it has provided for consumer protection council which has a dozen members from various Federal departments including traders and civil society members. The council shall hold its meetings as and when the chairman thinks fit but not more than two months shall lapse between the two meetings. Quorum of the council is fixed at four members. The council shall protect and promote consumer

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<sup>19</sup> S. 2 (3) “consumer means any person who-(i) buys goods for a consideration which has been paid or partly paid and partly promised to be paid or under any system of deferred payment or hire purchase and includes any user of such goods but does not include a person who obtains such goods for re-sale or for any commercial purpose; or (ii) hires any goods or services for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any beneficiary of such services”.

<sup>20</sup> S.2 (6) “unfair trade practice means a trade practice which, for the purpose of sale, use or supply of any goods or for provision of any service or for their promotion, adopts one or more of the following practices, causes loss or injury through hoarding, black marketing, adulteration, selling of expired drugs, food items and commodities unfit for human consumption, or charging for the goods and services in excess of the price fixed by an authority authorized to do so under any law...”

rights and interests and shall promote consumer education. It is also mandated with formulating policies for consumer protection from dishonest trade and market practices.<sup>21</sup>

### **Consumer Courts**

Consumer courts (The Authority i.e Session Judge or Special Magistrate) are mandated to decide consumer issues and all departments of capital city are directed to assist consumer court as and when so required<sup>22</sup>. The Act has prohibited false and misleading advertisements and if any person is aggrieved by such advertisements he shall be compensated by the seller in this regards.<sup>23</sup>

A complaint may be filed before consumer court which shall dispose it of according to the given procedure. It can also proceed ex party, if the defendant does not appear before the court. If any right of consumer is infringed as provided under section No. 5 of the Act, the violator shall be imprisoned for two years or fined forty thousand rupees or both. The violator of section 7 shall be imprisoned for two years or fined thirty thousand rupees or both. In addition to this, the court can take other actions against the violator as it deems fit in circumstances of each case.<sup>24</sup>

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<sup>21</sup> Ss 3-5

<sup>22</sup> S.6. "Authority: - (1) The Authority shall receive complaints of the consumers and those made on behalf of the council for investigation and determination thereof. (2) The police, Capital Development Authority and other agencies of the Federal Government and Islamabad Capital Territory Administration shall act in aid of the Authority for performance of its functions under this Act."

<sup>23</sup> S.7. "Prohibition of false advertisement, etc (1) Notwithstanding anything contained in any other law for the time being in force, no company, firm or person shall advertise in any manner not authorized by law for the sale or hiring of goods or services or any property movable or immovable, or solicit deposits for repayment at higher rates of profits or interest and thereby causes loss to any consumer, whether financial or otherwise. (2) Notwithstanding any punishment provided for making misrepresentation, false or misleading advertisement in any other law for the time being in force, the company, firm or a person making such advertisement shall be liable to pay such compensation as the Authority may direct for causing loss to the person affected by such advertisement"

<sup>24</sup> S.9. Penalties. (1) "Where any right of consumer required to be protected under section 5 of the Act is in any way infringed, the person responsible for such infringement shall be punished with imprisonment which may extend to two years, or with fine which may extend to forty thousands rupees, or with both. (2) Whoever makes advertisement through print or electronic media or by chalking on walls or in any other manner in contravention of section 7, he shall be punished with imprisonment which may extend to two years, or with fine which may extend to thirty thousands rupees, or with both. (3) The Authority may.

Legal immunity is granted to the council, the Authority and its members in respect of any act done under the provision of this Act.<sup>25</sup>

### **2.3.2. The North West Frontier Province Consumer Protection Act 1997**

The North West Frontier Province Consumer Protection Act (N.W.F.P.C.P.A) 1997 for the protection and promulgation of consumer rights and interests.

#### **Definition section**

Consumer is any person who acquires any products or services for a consideration and the ultimate user or beneficiary of these products or services. The one who acquires them for resale or commercial purpose is out of the ambit of consumer definition.<sup>26</sup> A person who makes, manufactures, assembles, puts his own trade mark on goods or owns any goods is manufacturer under the Act.<sup>27</sup> Services include all kinds of services, such as financing, banking, transporting, accountancy, entertainment, education and so on. But

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where it deems appropriate, order for payment of compensation to the consumer to the extent the consumer has suffered any damage or loss through any unfair trade practice. (4) The Authority may, where it deems necessary for protection of the rights of other consumers, order for confiscation of any goods or material or direct for their destruction."

<sup>25</sup> S.11. Immunity of the Council, etc. – “No suit, prosecution and other legal proceedings shall lie against the Council, its members, the Authority and other officers and authorities acting under the directions of the Council or, as the case may be, the Authority in respect of anything done under the provisions of this Act or any rules or orders made thereunder.”

<sup>26</sup> S.2 (c) “Consumer means any person who: -(i) buys goods for a consideration which has been paid or to promised or partly paid and partly promised to be paid or under any system of deferred payment including hire purchase and leasing and includes any user of such goods but does not include a person who obtains such goods for re-sale or for any commercial purpose; or (ii) hires any goods or services for a consideration which has been paid or promised or partly paid and partly promised to be paid or under any system of deferred payment including hire purchase and leasing and includes any beneficiary of such services.”

<sup>27</sup> S.2 (j) “Manufacturer includes a person who: - (i) makes or manufactures any goods or parts thereof; or (ii) does not make or manufacture any goods but assembles parts thereof made or manufactured by others and claims the end product to be goods manufactured by himself; or (iii) puts or causes to be put his own mark on any goods made or manufactured by any other manufacturer and claims such goods to be goods made or manufactured by himself; *Explanation :-* A branch office of a manufacturer shall not be deemed to be different manufacturer even though an assembly operation, distribution and sale of goods is carried out at such branch office.

services provided free of charges and the contract of personal services are excluded.<sup>28</sup>

Unfair trade practices means a trade practice that is done with the aim of sale or supply of goods or services by way of hoarding, black marketing, adulteration, selling of expire drugs, food items and commodities unfit for human or animal consumption, or charging for goods and services more than the fixed market price, false, misleading and bait advertisements.<sup>29</sup>

### **Obligations of Manufacturer**

Seller or manufacturer has to display in his shop the retail or wholesale price of every goods available for sale at his shop and mark or publish on every packet or container the retail price, standard and ingredients. He has to provide receipt to the consumer stating date of transaction, description of goods sold, nature of sale, price and quality of product and name and address of the seller.<sup>30</sup> Like ICPA this Act also has explicitly proscribed false, misleading and bait advertisements.<sup>31</sup>

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<sup>28</sup> S.2 (n) "Services includes services of any description which are made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, manufacturing, processing, accountancy, supply of electrical, mechanical or any other form of energy, boarding or lodging, entertainment, medicine, education, construction work, amusement, catering, security, or purveying news or other information and similar other services, but does not include the rendering of any service free of charge or under the contract of personal services."

<sup>29</sup> S.2 (o) " Unfair trade practice means a trade practice which a person for the purpose of sale, use or supply of any goods or provision of any service or for their promotion, adopts one or more of the following practices, causes loss or injury through hoarding, black-marketing, adulteration, selling of expired drugs, food items and commodities unfit for human consumption, or charging for the goods and services in excess of the price fixed by an authority authorized to do so under any law for the time being in force or in furtherance of such sale, use or supply makes any statement, whether orally or in writing or by chalking on walls or through sign-boards or neon-sings or by distributing pamphlets or by publication in any manner including electronic media..."

<sup>30</sup> Ss 4, 5 & 6

<sup>31</sup> S.7. "Prohibition of false advertisement, etc. (1) Notwithstanding any thing contained in any other law for the time being in force, no company, firm or person shall advertise in any manner not authorized by law for the sale or hiring of goods or services or any property, movable or immovable, or solicit deposits for repayment at higher rates of profit or interest and thereby causes loss to any consumer, whether financial or otherwise. (2) Notwithstanding any punishment provided for making misrepresentation, false or misleading advertisement in any other law for the time being in force, the company, firm or a person or

### **Consumer Protection Council**

For enforcement mechanism Consumer Protection Council shall be established at the provincial and district level. The Act has provided for the constitution, functions and procedure of the council.<sup>32</sup>

### **Consumer Courts**

The Act has provided for the establishment of consumer courts and has also provided for the disposal mechanism of consumer claims.<sup>33</sup>

Unlike ICPA, this Act has enshrined agency rules where principal is liable and responsible for the act and omission of his agent.<sup>34</sup>

Legal immunity is granted to the council, court and its members in respect of any act done under the provision of this Act.<sup>35</sup>

### **2.3.3. The promulgation of Balochistan Consumer Protection Act, 2003**

Balochistan Consumer Protection Act (BCPA) was promulgated in 2003 for the protection and promotion of consumer rights and interests.

#### **Definition section**

Consumer definition<sup>36</sup> is similar to the consumer definition of ICPA and KPK.CPA. Manufacturer's definition is like other Acts as it says that manufacturer is a person who

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undertaking making such advertisement shall be liable to pay such compensation as the Authority may direct for causing loss to the person affected by such advertisement.”

<sup>32</sup> See sections 8-11

<sup>33</sup> See sections 11A-19

<sup>34</sup> S.20. “Principal, liable for offence of agent and servant. - Where any offence under this act is committed by an agent or servant of any manufacturer or trader, such offence shall be deemed to have been committed by such manufacturer or trader unless he proves that such offence was committed without his knowledge.

<sup>35</sup> See s. Immunity. - No suit, prosecution or other legal proceedings shall lie against the Council or any member thereof or any functionary under this Act or acting under the direction of the Council or Government for anything which is in good faith done or intended to be done under this Act.”

makes, manufactures, assembles, puts his own trade mark on goods or owns any goods.<sup>37</sup>

Services of all kinds are included in the definition of services.<sup>38</sup> Under this Act "Unfair trade practice"<sup>39</sup> has the same definition as provided in other Acts.

### **Obligation of manufacturers**

Like other Acts this Act too has put some obligations on manufacturer which are not different than the provisions of other Acts.<sup>40</sup>

All kinds of false or misleading advertisements are prohibited under this section.<sup>41</sup>

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<sup>36</sup> S.2 (c) "Consumer means any person who:- (i) buys goods for a consideration which has been paid or promised or partly paid and partly promised' to be-paid or under any system of deferred payment including hire. Purchase and leasing and includes any user of such goods but does not include a person who obtains such good4 for resale or for any commercial purpose; or (ii) hires any goods or services for a consideration which has been paid or promised or partly paid and partly promised to be paid or under any system of deferred payment including hire purchase and leasing and includes any beneficiary of such services."

<sup>37</sup> S. 2 (K) "Manufacturer includes a person who-(i) makes or manufactures any goods or parts thereof; or (ii) does not make or manufacture any good but assembles parts thereof made or manufactured by other and claims the end product to be goods manufactured by himself; or (iii) puts or causes to be put his own mark on any goods made or manufactured by any other manufacturer and claims such goods to be goods made or manufactured by himself. Explanation: A branch office of a manufacturer shall not be deemed to be a different manufacturer even though an assembly operation; distributions and sale goods are carried out at such branch office."

<sup>38</sup> S.2 (n) "Services include services of any description which are made available to potential users and includes the provision of facilities in connection with banking, Financing, Insurance, Transport, Manufacturing, Processing, Accountancy, Supply of electrical, Mechanical or any other form of energy, boarding or lodging, entertainment, medicine, education, construction work, amusement; catering, security or surveying news or other information, and similar other services, but does not include the rendering of any service free of charge or under the contract of personal services."

<sup>39</sup> S.2 (o) "Unfair trade practice means a trade practice which a person for the purpose of sale, use or supply of any goods or provision of any service or for their promotion, adopts one or more of the following practices, causes loss or injury through hoarding, black\*marketing, adulteration, selling of expired drugs, food items and commodities unfit for human or animals consumption, or charging for the goods and services in excess of the prices fixed by an authority authorized to do so under any law for the time being in force or in furtherance of such sale use or supply makes any statement, whether orally or in writing or by chalking on walls or through sign boards or neon sign or by distributing pamphlets or by publication in any manner, including electronic, media, by; (i) falsely representing that the goods or as the case may be services are of a particular standard, quality, quantity, grade, composition, model style or mode; (ii) falsely representing any rebuilt, secondhand, renovated..."

<sup>40</sup> S.4. "Obligation of manufacturers---(1) Every manufacturer shall publish or mark on every packet or container the maximum retail price, the nature, standard or type and other specifications of the goods, therein, the weigh, size or volume and date of manufacture and expiry where appropriate, as the case may be having regard to the commercial practice in relation to those goods, the name and address of the manufacturer or in the case of packer or importer, the trade thereof: Provided that if any goods are not sold in packed form or in container, it shall be sufficient for the purpose of this subsection if the required information is exhibited conspicuously..."

## **Consumer Protection Council**

The Act has provided for the establishment, functions and procedures of consumer council.<sup>42</sup>

## **Consumer Court**

Government is empowered by the Act to establish consumer courts at district level and appoint judges<sup>43</sup> in this regard or transfer such power to judicial Magistrates. The Act has also detailed the disposal procedure of consumer claims.<sup>43</sup>

Like NWFP CPA 1997, the principles of agency are enshrined in this Act.<sup>44</sup>

Like other consumer Acts, legal immunity is ensured to the functionaries working under the provision of this Act.<sup>45</sup>

### **2.3.4. The promulgation of Punjab consumer protection Act, 2005**

The Punjab Consumer Protection Act (PCPA) was promulgated in 2005 for consumer protection. It has 39 sections.

#### **Definition sections**

Consumer is a person or entity<sup>46</sup> who acquires any products or services for a consideration and the ultimate user or beneficiary of these products or services. The one who acquires them for resale or commercial purpose is out of the ambit of consumer

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<sup>41</sup> S.7. "Prohibition of false advertisement, etc.---(1) Notwithstanding anything contained in any other law for the time being in force, no company, firm or person shall advertise in any; manner not authorized by law for the sale or hiring of goods or services or any property..."

<sup>42</sup> See sections. 8-11

<sup>43</sup> See sections.12-20

<sup>44</sup> S.21. "Principal, liable for offence of agent and servants: Where any offence under this Act, is committed by an agent..."

<sup>45</sup> S.23. "Immunity:-No suit, prosecution or other legal proceedings shall lie against the Council or any member thereof or- any functionary..."

<sup>46</sup> Only PCPA 2005 has provided for "legal entity" as a consumer and no other Act encompasses it.

definition. It is noteworthy, that resale or commercial purpose does not include self-employment.<sup>47</sup>

The definition of product<sup>48</sup> is similar to the definition of "goods" as defined in the "Sale of goods Act" 1930.<sup>49</sup> The term "reasonably anticipated alteration or modification" is a very important terminology as in most of the cases it needs interpretation and elaboration. It means any change or alteration in the subject which occurs in the course of its usual or general use. But any unreasonable alteration or maintenance or removal of an adequate warning by the consumer is excluded from this meaning and consumer will have no claim for compensation.<sup>50</sup> In addition to this, the term "reasonably anticipated use" means a use or handling of the subject that is expected from the usual user in normal condition.<sup>51</sup>

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<sup>47</sup> S. 2 (c) "consumer means a person or entity who: (i) buys or obtains on lease any product for a consideration and includes any user of such product but does not include a person who obtains any product for resale or for any commercial purpose; or (ii) hires any services for a consideration and includes any beneficiary of such services. Explanation:- For the purpose of sub-clause (i), "commercial purpose" does not include use by a consumer of products bought and used by him only for the purpose of his livelihood as a self-employed person".

<sup>48</sup> S.2 (j) "product has the same meaning as assigned to the word "goods" in the Sale of Goods Act, 1930, and includes products which have been subsequently incorporated into another product or an immovable but does not include animals or plants or natural fruits and other raw products, in their natural state, that are derived from animals or plants."

<sup>49</sup> According to section 7 of the Sale of goods Act 1930 "goods" means "every kind of movable property other than actionable claims and money; and includes (electricity, water, gas) [inserted by the Sale of Goods (Amendment) Ordinance 1962, S. 2 with effect from June 7<sup>th</sup> 1962], stock, shares, growing crops, grass and things attached to or forming part of the land which are agreed upon to be severed before sale or under the contract of sale".

<sup>50</sup> S.2 (l) "reasonably anticipated alteration or modification", means a change in a product that a product manufacturer should reasonably expect to be made by an ordinary person in the same or similar circumstances and a change arising from ordinary wear or tear, but does not include: (i) changes to or in a product because the product does not receive reasonable care and maintenance; or (ii) alteration, modification or removal of an otherwise adequate warning; or (iii) the failure of the seller to provide an adequate warning to the consumer where the same had been provided by the manufacturer and he could do no more".

<sup>51</sup> S. 2 (m) "reasonably anticipated use", means a use or handling of a product that the product manufacturer should reasonably expect of an ordinary person in the same or similar circumstances".

## **Liability for defective products**

The Act has put liability on manufacturer if the goods are defective in its construction or composition<sup>52</sup>, or in its design<sup>53</sup> or due to inadequate warning<sup>54</sup> or defective because of non-conformity to express warranty.<sup>55</sup>

The provisions of this section extends some protection to the manufacturer if any defect occurs as a result of want of his scientific or technological knowledge, that causes damage or loss to consumer.<sup>56</sup> The doctrine of caveat emptor is given space in this

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<sup>52</sup> S.5. "Defective in construction or composition: A product shall be defective in construction or composition if, at the time the product was manufactured, a material deviation was made from the manufacturers' own specifications, whether known to the consumer or not".

<sup>53</sup> S.6. "Defective in design: (1) A product shall be defective in design if, at the time the product left its manufacturer's control: (a) there existed an alternative design for the product that was capable of preventing the damage to a consumer; and (b) the likelihood and gravity of damage outweighed the burden on the manufacturer of adopting such alternative design and any adverse effect of such alternative design on the utility of the product. (2) When the manufacturer has used reasonable care to provide adequate warning to the users or handlers of the product, it shall be considered in evaluating the likelihood of damage arising from the design of a product".

<sup>54</sup> S.7. "Defective because of inadequate warning: (1) A product shall be defective if an adequate warning about the product that it possessed a characteristic that could cause damage, has not been provided at the time the product left its manufacturer's control or the manufacturer has failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product: Provided that a manufacturer shall not be required to provide an adequate warning about his product when: (a) the ordinary user or handler of the product could know, with the ordinary knowledge common to the community, that the product has dangerous characteristics which could cause damage; or (b) the user or handler of the product already knows or should be reasonably expected to know that the product has characteristics which were dangerous and could cause damage. (2) A manufacturer of a product who, after the product has left his control, acquires knowledge about the dangerous characteristics of the product that could cause damage, or who would have acquired such knowledge had he acted as a reasonably prudent manufacturer, shall be liable for damage caused by his subsequent failure to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product".

<sup>55</sup> S.8. "Defective because of non-conformity to express warranty: A product shall be defective when it does not conform to an express warranty made at any time by the manufacturer about the product if the express warranty has induced the claimant to use the product and the claimant's damage was proximately caused because the express warranty was untrue".

<sup>56</sup> S.9. "Proof of manufacturer's knowledge.— (1) Notwithstanding anything contained in section 6, a manufacturer of a product shall not be liable for damage proximately caused by a characteristic of product's design if the manufacturer proves that at the time the product left his control: (a) he did not know and, in the light of the then existing and reasonably available scientific and technological knowledge, could not have known the design characteristic that caused the damage or the danger of such characteristic;

section. It needs to be considered and consumer shall be protected in such cases. Giving such concession to manufacturers leads to further legal loopholes and lacunas, which will make consumer protection a myth.

Manufacturer is under duty to disclose all material facts of the product<sup>57</sup> and he can not exempt himself from all future accruing liabilities.<sup>58</sup>

### **Liability for defective and faulty services**

Under these provisions service provider is obliged to provide services according to the given standard or else he will make good loss of consumer.<sup>59</sup>

### **Unfair Practices**

This section prohibits, as provided by other Acts, any false, deceptive or misleading representation made by the seller regarding any product with respect to its quality, standard, history, time duration approval, endorsement by someone, affiliation or place of

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or (b) he did not know and, in the light of the then existing and reasonably available scientific and technological knowledge, could not have known of the alternative design identified by the consumer under section 6 (1); or (c) the alternative design identified by the consumer under section 6 (1) was not feasible in the light of the then existing and reasonably available scientific and technological knowledge or then existing economic practicality. (2) Notwithstanding anything contained in section 7(1) or 7(2), a manufacturer of a product shall not be liable for damage if the manufacturer proves that, at the time the product left his control, he did not know and, in the light of the then existing and reasonably available scientific and technological knowledge, could not have known of the characteristic that caused the damage or the danger of such characteristic.”

<sup>57</sup> S.11. “Duty of disclosure.(1) Where the nature of the product is such that the disclosure of its component parts, ingredients, quality, or date of manufacture and expiry is material to the decision of the consumer to enter into a contract for sale, the manufacturer shall disclose the same. (2) Notwithstanding anything contained in sub-section (1), the Government may, by general or special order, require such disclosure in any particular case”.

<sup>58</sup> S.12. “Prohibition on exclusions from liability: The liability of a person by virtue of this part to a consumer who has suffered damage shall not be limited or excluded by the terms of any contract or by any notice.”

<sup>59</sup> S.13. “Liability for faulty or defective services. A provider of services shall be liable to a consumer for damages proximately caused by the provision of services that have caused damage.”

origin of goods.<sup>60</sup> Like other Acts this Act too has prohibited bait advertisement under section 22 of the Act.<sup>61</sup>

## **Powers of the Authority**

The authority (D.C.O) is empowered by the Act to dispose of consumer claims if filed before it.<sup>62</sup> It is a parallel quasi-judicial authority for consumer grievances. The Act has also provided for the establishment of consumer council.<sup>63</sup> Like other consumer Acts, it

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<sup>60</sup> S.21. "False, deceptive or misleading representation: No person shall make a false, deceptive or misleading representation that (a) the products are of a particular kind, standard, quality, grade, quantity, composition, style or model; (b) the products have particular history or particular previous use; (c) the services are of a particular kind, standard or quality; (d) the services are provided by a person having a requisite skill or qualification or experience; (e) the products were manufactured, produced, processed or reconditioned at a particular time; (f) the products or services have any sponsorship, approval, endorsement, performance, characteristics, accessories, uses or benefits; (g) the products are new or reconditioned or have been in use for a particular period of time only; (h) the seller or producer of products or provider of services has any sponsorship, approval, endorsement or affiliation; (i) the products or services are necessary for somebody's well being; (j) concerns the existence, exclusion or effect of any condition, guarantee, right or remedy; and (k) concerns the place of origin of products".

<sup>61</sup> Bait advertisement means a deceptive advertisement which is meant to cheat or defraud consumer

<sup>62</sup> S.23. "Powers of Authority: (1) Any person may file a complaint for violation of the provisions of sections 11, 16, 18 and 19 before the Authority who, on being satisfied that such is the case, fine the violator that may extend to fifty thousand rupees and which may be recovered as arrears of land revenue. (2) The Authority may file a claim for declaring a product defective under sections 4, 5, 6, 7 or 8 or a service as faulty or defective under section 13 without proof of any damage actually suffered by a consumer but likely to be suffered keeping in view the general standard of that service. (3) The Authority may file a claim before the Consumer Court for declaring any act on the part of any person as being in contravention to Part IV of this Act without proof of any damage actually suffered but likely to be suffered due to the said contravention. (4) The Authority on receipt of a complaint or a reference from the Consumer Protection Council or on his own motion, may hold an inquiry as to defects in products or services or practices which contravene any of the provisions of this Act. No prior notice shall be required to be given to a manufacturer or provider of services for the purposes of holding an inquiry. (5) The Authority, while holding an inquiry, may direct the police or any other officer or authority of the Government to gather such evidence as it deems necessary or to perform function in accordance with law which have an impact on the inquiry. (6) The Authority may delegate his powers under this Act through a notification to any officer of the Government with its prior approval. (7) Any person aggrieved by the order passed under sub-section (1) may file an appeal before the Government within thirty days of such order."

<sup>63</sup> S.24. "Consumer Protection Council: (1) The Government shall set up a Consumer Protection Council in the Province. (2) The Government may set up Consumer Protection Councils in one or more districts which shall report to the Provincial Consumer Protection Council. (3) The Consumer Protection Councils shall have such other functions as may be assigned to them."

has also provided for the establishment and procedure of consumer courts.<sup>64</sup> The rules of immunity are incorporated in this Act, too.<sup>65</sup>

At present, consumer councils and consumer courts are functional in eleven districts of Punjab including Lahore, Gujranwala, Sialkot, Gujrat, Rawalpindi, Sargodha, Faisalabad, Sahiwal, Multan, Dera Ghazi Khan and Bahawalpur; and the adjacent districts are covered by these courts and future plans include establishment of consumer courts in all the districts of the province.<sup>66</sup>

### **2.3.5. The promulgation of Sindh consumer protection Ordinance, 2004**

Since, Sindh province has no consumer law so it will be a futile exercise to analyze the already lapsed ordinance. It is pertinent to state about its history in the following lines. Sindh consumer protection law was promulgated in the form of ordinance in 2004 for the first time but subsequently lapsed as it was not presented for ratification to the Sindh Assembly. The last time it was signed by the Governor on 25th October, 2007, but once again lapsed because it was not presented to the provincial assembly and today, Sindh is the only province that does not have Consumer Protection Law.<sup>67</sup>

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<sup>64</sup> Ss 26-35

<sup>65</sup> S.37. "Immunity: No suit, prosecution or other legal proceedings shall lie against any functionary under this Act, acting under the direction of the Consumer Council or the Government for anything which is in good faith done or intended to be done under this Act".

<sup>66</sup> Babar Bhatti, "Consumer protection in Pakistan: A fad or beneficial step for consumers" (April 9 2008) , <http://telecompk.net/2008/04/09/consumer-protection-punjab-pakistan/> (last visited March 27 2012)

<sup>67</sup> Hina Safda, "Sans-consumer protection law on consumer rights day", <http://www.chowrangi.com/sans-consumer-protection-law-on-consumer-rights-day.html> (last visited on March 26 2012 )

### **2.3.6. Conclusion**

To sum up, most of the provisions in these Acts are similar as they have the same legal effect. For instance, the definition of consumer, the definition of consumer is inconsistent in these Acts as PCPA 2005 includes legal entity as a consumer whereas others mention only persons as consumer. So they shall be brought into conformity for equal consumer protection in all the provinces. Under the definition of consumer the term resale, commercial purpose and self-employment are vague terminologies and create ambiguity. Therefore, they need elaboration and explanation in these Acts. Therefore, it needs further research whether or not we can draw such exclusions.

The definition of product excludes animals, fruits, milk and things obtained from them which seem inappropriate in the presence of massive fraudulent practices in these items. It is, therefore, recommended that these items shall be incorporated in the definition of products so as to assure maximum protection to consumers in Pakistan.

These Acts are inconsistent with respect to imposing fine and imprisonment, as different provinces have their distinct limit of fine and imprisonment, which may lead to the encouragement of fraudulent practices in those provinces where punishments are comparatively more lenient than other provinces. So this practical loophole may be addressed.

The establishment of consumer council shall be ensured in each district of each province on imperative basis. In addition to this, separate consumer courts may be established in each district. Under the existing Acts District and Session Judge is a judicial forum for consumer redressals but they are already overloaded which causes

lingering on consumer matters which leads to discouragement of consumers to file and pursue their complaints in courts against the culprits. It is a legal lacuna which encourages manufacturers and sellers to go ahead with their defective, deficient and hazardous foodstuffs, products and services. Therefore, separate Magistrate may be appointed in order to ensure speedy and cheap justice to consumers.

The provisions which protect manufacturer on the basis of want of his scientific or technological knowledge in the PCPA 2005 may be deleted and manufacturer shall be declared liable for the defects caused owing to his lack of knowledge. The reason is that in such cases, the question arises who will make good the damage or loss of consumer. Under these provisions, in the instant Acts, in such cases consumer has no remedy. Under the general scheme of law no body shall be left without compensation if his wealth is lost or vitiated; while in this case the damage and loss are compensated by none and the benefit of negligence and want of knowledge is given to the manufacturer.

Penal provisions which say that costs and lawyer's fee of the opposite part shall be paid by the party that denies pre-trial settlement and opts for judicial proceedings of the claim, shall be deleted. Though the legislature has inserted this section in good-faith, it is contrary to Shariah, common law concept and even natural law. Therefore, these penal provisions shall be deleted as they fail the very purpose of consumer legislation, because consumers will not prefer to come to court for their redressal as they would fear the application of these provisions against them in case they lack evidence to prove their claim and if it is decreed against them.

Provisions related to the immunity of functionaries working under these Acts shall be removed as they are repugnant to Shariah and are even against public interest.

## **2.4. Reasons for the enactment of consumer protection laws in Pakistan**

Certain factors and reasons persuaded the developed and developing countries of the World to protect the rights of consumers through special consumer protection legislation. It is indispensable to know about some of the major reasons, at global and domestic level, for the promulgation of consumer law. It is as follows.

### **2.4.1. Global reasons**

Several reasons and factors led to the promulgation of special consumer protection laws in the World. Some of the primary reasons are as follows.

1. Today in the open market economy product complexity is on the rise and consumers can not make a reasonable and safe decision while buying products or services whereas in the past market was not as complex and confusing as it is today.
2. The competitive market of the day has produced so many sellers and producers which put consumers at their peril as they are unable to make a prudent decision at the time of concluding products or service contract.
3. Consumers buy so much stuff than they used to be, because they are tempted and persuaded by higher incomes and media advertisements.
4. Due to the rise of science and technology all sorts of new materials are available which may not be entirely understood, and may have unforeseen effects on customers' health and income.<sup>68</sup>

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<sup>68</sup>Richard Bowett, "External environment –consumer protection", <http://news.bbc.co.uk/1/hi/world/americas/2151754.stm> (last visited on March 26 2012)

In view of the above reasons, some non-governmental organizations and civil societies constantly campaigned for the legislation of consumer protection laws, such as Consumer International (CI) of America, in the developed countries for protecting and promoting the interests of consumer. Likewise, in 1986 UNO announced its consumer protection guidelines of 1986. The developing countries followed suit; and countries like India<sup>69</sup> and Pakistan<sup>70</sup> promulgated consumer laws in this regard.

#### **2.4.2. Domestic e reasons**

Pakistan is a signatory to "The UNO Guidelines of Consumer Protection 1986". Hence it was obliged to promulgate special consumer protection legislation for protecting and promoting the rights and interests of consumer. In addition to this, the present day manufacturers, producers, retailers and sellers' high professional skills persuaded government to enact in this area for ensuring the protection and promotion of consumer rights and interests through consumer laws in Pakistan.

#### **2.5. Impacts of consumer protection laws on the rights and protection of consumers in Pakistan**

In Pakistan, the consumer is left at the mercy of shopkeepers and manufacturers. The markets are full of sub-standard, similar and counterfeit products and goods and Pakistani markets are flooded with semi expired food, beverages and medicines. Many products

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<sup>69</sup> Indian Consumer Protection Act 1986

<sup>70</sup> Islamabad Consumer Protection Act 1995

which are available in the market are not even registered with Pakistan Standards and Quality Control Authority (PSQCA).<sup>71</sup>

The civil societies play a significant role in the protection of rights of every citizen in a society. It builds pressure on the policy makers to realize the need for change and to collectively work towards empowering citizens. As consumer protection is a part of human rights agenda, it requires whole hearted effort from the civil society to bring changes in the attitude of the society as a whole and provide basis for conducive environment to protect consumer and to design consumer protection in the national policy framework.<sup>72</sup> As a matter of fact, in developing countries sellers and manufacturers are more organized and informed whereas consumers are less organized and informed.<sup>73</sup>

In the absence of adequate public sector hospitals and dispensaries, people turn either to private hospitals and spend their earnings on the treatment of their patient. Even when a serious case of negligence leading to the death of a patient is reported, there is no redress for the family.<sup>74</sup> In such a situation, there is not much scope for the consumers to assert their rights in Pakistan.

Consumer resistance, a strategy widely adopted in industrialized countries, may be difficult to implement in Pakistan. If a dying person needs a life saving drug he will

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<sup>71</sup>Hina Safda, "Sans-consumer protection law on consumer rights day" , <http://www.chowrangji.com/sans-consumer-protection-law-on-consumer-rights-day.html> (last visited on March 26 2012 )

<sup>72</sup>Babar Bhatti, "Consumer protection in Pakistan: A fad or beneficial step for consumers" (April 9 2008), <http://telecompk.net/2008/04/09/consumer-protection-punjab-pakistan/> (last visited on March 27 2012)

<sup>73</sup> ibid

<sup>74</sup>Zubeida Mustafa, "Do Consumers have Rights in Pakistan?" (March 30 2005), <http://www.zubeidamustafa.com/do-consumers-have-rights-in-pakistan> (last visited on March 25 2012)

buy whatever is made available to him and at whatever price he is asked to pay.<sup>75</sup> Similarly, when milk-sellers sell adulterated milk at a higher price than that fixed by the government, how many mothers can boycott their sales and deny their children the milk which is an essential part of their diet.<sup>76</sup>

In the modern open market economy, the seller is well organized and has professional skill, whereas consumer is usually unorganized and unaware of his rights.<sup>77</sup> Hence, we need consumer legislation and consumer protection laws and policy.

## 2.6. Conclusion

Consumer protection is a new area of legislation and developed and developing countries including Pakistan have promulgated laws in this regard. The genesis of consumer protection lies in the rule of Muslim rulers of the sub-continent. The Britishers during their rule promulgated some legislation in this regard but it was of a general nature and until 1995 there was no consumer protection laws in Pakistan. For the first time, in 1995 the Islamabad Consumer Protection Act (ICPA) 1995 was promulgated. NWFP CPA, BCPA and PCPA were promulgated in 1997, 2003 and 2005, respectively. Most of the provisions in these Acts are similar as they have the same legal effect.

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<sup>75</sup> As it happened in Lahore in January 2012 that more than hundred people died due to the use of defective drugs

<sup>76</sup> Zubeida Mustafa, "Do Consumers have Rights in Pakistan?" (March 30 2005).

<http://www.zubeidamustafa.com/do-consumers-have-rights-in-pakistan> (last visited on March 25 2012)

<sup>77</sup> Paraksha, "Objectives of consumer laws" (sent before 4 years).

<http://www.caclubindia.com/forum/consumer-protection-act-objectives-5423.asp> (last visited on April 2 2012)

For instance, the definition of consumer, it is inconsistent in these Acts as PCPA 2005 includes legal entity as a consumer whereas others mention only persons as consumer. So they shall be brought into conformity for equal consumer protection in all the provinces. Under the definition of consumer the term resale, commercial purpose and self-employment are vague terminologies and create ambiguity. Therefore, they need elaboration and explanation in these Acts.

The definition of product excludes animals, fruits, milk and things obtained from them which seem inappropriate in the presence of massive fraudulent practices in these items. It is, therefore, recommended that these items shall be incorporated in the definition of products so as to assure maximum protection to consumers in Pakistan.

These Acts are inconsistent with respect to imposing fine and imprisonment, as different provinces have their distinct limit of fine and imprisonment, which may lead to the encouragement of fraudulent practices in those provinces where punishments are comparatively more lenient than other provinces. So this practical loophole may be addressed.

The provisions which protect manufacturer on the basis of want of his scientific or technological knowledge in the PCPA 2005 may be deleted and manufacturer shall be declared liable for the defects caused owing to his lack of knowledge. The reason is that in such cases, the question arises who will make good the damage or loss of consumer. Under these provisions, in the instant Acts, in such cases consumer has no remedy. Under the general scheme of law no body shall be left without compensation if his wealth is lost

or vitiated; while in this case the damage and loss are compensated by none and the benefit of negligence and want of knowledge is extended to the manufacturer.

Penal provisions which say that costs and lawyer's fee of the opposite part shall be paid by the party that denies pre-trial settlement and opts for judicial proceedings of the claim, shall be deleted. Though the legislature has inserted this section in good-faith, it is contrary to Shariah, common law concept and even natural law. Therefore, these penal provisions shall be deleted as they fail the very purpose of consumer legislation, because consumers will not prefer to come to court for their redressal as they would fear the application of these provisions against them in case they lack evidence to prove their claim and if it is decreed against them.

There were two fold reasons for the promulgation of consumer protection laws in Pakistan: First, global reasons; and second, domestic reasons. The impact of promulgation of consumer protection laws on the rights of consumer in Pakistan is nominal and people are mostly unaware of the consumer protection laws in Pakistan. As a matter of fact, the efficacy of consumer protection laws in Pakistan still requires a profound struggle both from the state and people of Pakistan to ensure its implementation in letters and spirits.

## CHAPTER THREE

### CONSUMER PROTECTION AND ISLAMIC LAW

#### **3.1. INTRODUCTION**

Shariah is a religion which encompasses laws for all kinds of business transactions. Today they are as relevant as they were fifteen hundred years ago. Shariah has granted protection to consumer by several ways which will be analyzed in this chapter. In Shariah consumers and buyers have some rights which give them protection from fraud, adultery, misrepresentation and so on. These rights are explained in this chapter.

The concept of *caveat emptor* and its concept in Shariah is pertinent to the topic which will be discussed in this chapter. Price fixation by state authorities is discouraged by Shariah but at times due to malpractices in the market it allows the state machinery to intervene in the market as a regulator. It will be elaborated in this chapter. The term “*Ba’i*” is used for sale and purchase transactions. It means selling something and also buying something.

A valid contract of sale is final in terms of rights and obligations of the buyer and seller. Thus, as a matter of principles of Islamic Law buyer and seller are not bound to each other for any defects or faults. But for the purpose of ensuring protection to consumer Shariah has made some exceptions by introducing the concept of *al-Khiyarat*. There are five major kinds of *Khiyarat* which will be elaborated in this chapter. It is indispensable to note that these *khiyarat* are granted to buyers by way of exceptions and

not as a rule. Therefore, no analogy is to be made on these exceptions in business transactions.

### **3.2. The concept of consumer protection in Shariah**

Islamic law (*Shariah*) is a revealed religion to guide human beings in their religious and temporal affairs; and to make them achieve triumph in this world and hereafter. Islam is a complete code of life; encompassing in itself rituals and business transactions. Islam relates temporal life with hereafter and assures legal protection not only to consumer, seller, Muslim but to the entire society. Islam has envisaged golden rules and ethics for business transactions in the market which attracted the non-Muslim societies of Spain, Africa and sub-continent to Islam and it was adopted by them. Thus, the spread of Islam in the World was not due to the use of force but because of ethics and morality and business ethics in particular.

Shariah protects consumer in several ways:

#### **a) Consumer protection from himself**

Islam teaches a consumer to spend his earnings in a chain of sequence and within his purchasing power. In other words to purchase, first, necessities (zarureyat); secondly, wants (hajeyat), and; thirdly, luxuries (kamaleyat). Allah says in the Holy Quran "eat and drink: but waste not by excess, for Allah loveth not the wasters."<sup>78</sup>

Thus, Shariah has strictly ordered believers to restrain from extravagance and excessive expenditures while buying goods; and shall not buy goods beyond their purchasing power.

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<sup>78</sup> Quran 7:31

### **b) Consumer protection from the products and goods**

Shariah demands its followers to produce products and goods which shall not be hazardous to health. The concept of haram and halal has the same object in Shariah. Likewise, Shariah prohibits fraud (ghash) and deficiency in goods. The Prophet (peace be upon him) said that the one who commits fraud is not among us.<sup>79</sup>

Fraud may be either in the price or measurement of goods, or in any other form. If it is proved the buyer has the right to return defective goods to the seller.<sup>80</sup> Shariah does not permit the sale of defective goods. Therefore, the buyer is given the right of *Khyar al-Shart* (option of defect), though by way of exception, in which case the contract is voidable at the option of buyer or consumer. Hence, consumer is granted protection.

### **c) Consumer protection from manufacturers/sellers**

Shariah protects consumer from manufacturer and seller by proscribing fraud, misrepresentation, negligence, hoarding and usury in business transactions. Islam has proscribed fraud and usury because they lead to wasting of people's wealth and has prohibited hoarding because it leads to the rise of price and inflation. Allah says in the Holy Quran "O ye who believe!

"eat not up your property among yourselves in vanities: but let there be amongst you traffic and

trade by mutual goodwill: nor kill (or destroy) yourselves: for verily Allah hath been to you Most Merciful."<sup>81</sup> Obtaining money from someone by way of fraud or other such

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<sup>79</sup> al-Jama` al-Sahih, Sunnan Ibn Majah, Abi Abdullah Muhammad Ibn Yazeed , Kitab al-Tejarat, Bai`b al-Nahi Anel Ghesh, Tradition No. 2224

<sup>80</sup> Kasani, Bada` , (Beirut: Darul fikar,1997) vol 5, 529

<sup>81</sup> Quran 4:29

manners is considered eating from someone by unfair means. Thus, it is prohibited in Shariah.

#### **d) Consumer protection from ruler and state intervention**

Shariah emphasizes on doing business transactions with mutual consent of the parties. Once a companion of the Prophet (peace be upon him) came and "O Messenger of Allah! Prices have gone up, so fix them for us." Thereupon the Messenger of Allah said, "Allah is the One Who fixes prices, withholds, gives lavishly, and provides and I hope that when I meet Allah, none of you will have any claim on me for an injustice regarding blood or property."<sup>82</sup> So the Prophet (peace be upon him) explicitly denied fixing prices for them in the market so as to let people carry on trade according to their mutual consent. Hence, Shariah prefers rulers not fix prices arbitrarily but to let the parties determine the price of contracting goods. In addition to this, Islam has given the concept of options (al-Khiyarat), though not as principles but by way of exception, in sale transactions which ensure the rights of buyer and consumer. From the forgoing, we may conclude that Islam has proved that it is a complete code of life as it has left no area of human life unelaborated.

#### **3.3. Rights of consumer in Shariah**

Shariah has given rights and reciprocal duties to everybody. Likewise, it gives rights to consumer for assuring him protection from unfair market practices. Shariah gave this concept fifteen hundred years ago. It is very encouraging that Allah has promised reward for those who adhere to business and commercial ethics, not only in this World but also

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<sup>82</sup> al-Jama` al-Sahih, Tirmizi, Abi Issa Muhammad Ibn Issa (Beirut: Darul fikar, 1978) Kitab al-Buyua', Ba`b al-Ghesh fil-Buyua', tradition no. 1235

in the hereafter. In the following lines we will enumerate some primary rights of consumer as provided by Shariah.

**a) Right against fraud (*gash*)**

Shariah protects consumer from fraud either it is from the seller or is inbuilt in the goods. Soundness of the subject or product is an essential implied condition of the contract. Shariah does not permit any person to knowingly sell out any defective goods. Fraud may be either in the price or measurement of goods or in any other form so if it is proved the buyer has the right to return defective goods to the seller.<sup>83</sup> The buyer has the right to return the goods by discovering any defect in it subject to the condition that he was unaware at the time of purchasing. A tradition narrated from the Holy Prophet (peace be on him) says, "The one who commits fraud is not among us."<sup>84</sup> Thus, fraudulent business activities are shunned by the above tradition. It is, in fact, one of the ways of protecting consumer and buyer from fraudulent business practices.

**b) Right against price hike**

Shariah protects consumer from high prices in the market which is why the later Muslim jurists have strongly advocated the concept of price fixation or price control by the state authority.

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<sup>83</sup> Kasani, Bida', (Beirut: Darul fikar, 1997) vol 5, 529

<sup>84</sup> al-Jama' al-Sahih, Sunnan Ibn Majah, Abi Abdullah Muhammad Ibn Yazeed, Kitab al-Tejarat, Ba'b al-Nahi Anel Ghesh, Tradition No. 2224

### c) Right against speculation

It means that consumer is protected against speculation in the market as in the case of bay najash (Tanajush)<sup>85</sup> and tasriyah<sup>86</sup> contracts. A sale by way of Tanajush makes the contract voidable at the option of buyer. A sale of an animal by way of Tasriyah makes the contract voidable at the option of the buyer. The Prophet (peace be upon him) said, "Do not sell by way of tanajush."<sup>87</sup>

Thus, Shariah discourages such business practices which lead to malpractices in the market.

### d) Right against defective goods

It is the duty of seller to disclose all the existing defects in the product, goods or services of the servant or horse etc to the buyer. A defectless product/subject matter is a source of attraction and inclination of buyer towards it which he could not gain from it if it is defective.<sup>88</sup> Hence his consent in sale contract has been vitiated and his right of *Kheyare al-Ayb* establishes. As a matter of fact, mutual consent is an essential element in mutual contracts

#### 3.4. Islamic Law and the Doctrine of caveat emptor

The doctrine of caveat emptor means the seller is under no duty to disclose defects; the buyer must use his own eyes to discover them. The general rules are that each party to a

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<sup>85</sup> It means to offer high price by false bidding without any intention to sell or buy it

<sup>86</sup> It means not to milk an animal for some days in order to let it appear more milk producing at the time of sale

<sup>87</sup> Al-Jama` al-Sahih, al-Muslim, Abul Husain Muslim bin al-Hajjaj al-Nisapuri, Kitab al-Buya`, Ba`b Tahrem-un najash, tradition No.1515

<sup>88</sup> Kasani, Bida` (Beirut: Darul fikar, 1997) vol 5, 646

contract may observe silence even in regard to facts which he believes would be operative upon the mind of the other party.<sup>89</sup> From the above definition it may be inferred that a seller can sell out his defective goods by keeping silent while selling to the other party. It is a common law concept but Shariah does not have such a concept. Shariah inflicts maximum liability on the seller to disclose all the defects or deficiencies in the goods or services to the buyer. Likewise, the ethical system of Shariah does not permit the concept of *caveat emptor*. The reason is that it ultimately leads to the encouragement of fraud and other malpractices in market. Therefore, Islam does not recognize the common law doctrine of *caveat emptor*.

In Shariah the right of *khiyar al-shart* gives protection to the buyer from any defective or faulty goods but if the buyer has not stipulated *khiyar al-shart* and he later finds the goods according to specifications but defective so he has no right of returning them to the seller.<sup>90</sup> Hence, though Shariah puts maximum responsibility on the seller to disclose any defects in the goods, it wants the buyer, too, to be vigilant while buying something.

### **3.5. Business ethics:**

Ethics are not laws as they have no legal sanctions but in Shariah the observance of ethics is part of faith and their observance assure success in the hereafter. Shariah encourages Muslims to comply with business ethics for '*barakah*' in the business and for reward in the hereafter. In other words businessmen are encouraged to comply with these ethics for the betterment and well-being of the general public.

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<sup>89</sup> John B. Saunders, "Words and Phrases" (London: Butterworth and Co. Ltd), 231

<sup>90</sup> Sarakhs, *al-Mabsut* (Beirut: Dar ul Marefah, 1985), vol 13, 38

In the following lines we will analyse the concept of business ethics in Shariah.

### **3.5.1. Business ethics in Islamic Law**

The jurists have derived, through ijтиhad and qiyas, various business ethics and general principles from Quran and Sunnah. Business Ethics is one of the branches of ethics which provide for principles within a commercial context; various ethical problems which may arise in businesses. They make specific judgments about what is right or wrong, or what ought to be done or what ought *not* to be done.

Business ethics is concerned with the study of what is good and bad, right and wrong, and just and unjust in commercial and business activities. Within an Islamic context, the term most closely related to ethics in the Qur'an is *khuluq*. They are divided into negative and positive orders. By negative we mean not to practice these acts and by positive is meant to practice and stick to these acts. First we shall discuss positive ethics and then negative ethics. They are as follows.

#### **Positive or encouraged ethical principles of business**

##### **a) Doing business early in the morning**

It is encouraged to start business early in the morning. The Prophet (peace be on him) has said, "O God! Give your blessings to my *Ummah* for their effort early in the morning."<sup>91</sup> Doing business early in the morning has some relation with consumer protection as there will be *barakah* in the sale and purchase transactions of the parties which will encourage them not to commit any fraud. In addition to this, early in the morning consumers will be

<sup>91</sup> al-Jama' al-Sahih, Tirmizi, Abi Issa Muhammad Ibn Issa (Beirut: Darul fikar, 1978) Kitab al-Buyu'a, Ba'b majah fil Takbeer bel-tejarah, tradition no. 1230

able to buy fresh and defectless product as it is evident that food stuff etc are available in a better quality early in the morning.

**b) Trade through Mutual Consent**

Mutual consent between the parties is one of the necessary conditions for the validity of commercial transactions. A sale transaction under coercion is not acceptable in Islam. Taking advantage of someone's poverty or plight and charging high price is also a form of exploitation and is, therefore, forbidden in Islam. Allah says in the Holy Quran "O ye who believe! eat not up your property among yourselves in vanities: but let there be amongst you traffic and trade by mutual goodwill: nor kill (or destroy) yourselves: for verily Allah hath been to you Most Merciful. "<sup>92</sup>

Mutual consent of the contracting parties is a condition precedent to the validity of a valid contract. If a contract is concluded by acquiring the consent of a party by coercion, fraud etc so it is considered *fasid* (voidable) at the option of the party whose consent is acquired without its consent. Hence, mutual free consent is one of the conditions of a valid contract. If a consumer concludes a contract with the seller which is not based on free consent of the consumer so he is protected and he has the right of repudiating the said contract.

**c) Truthfulness or trustworthiness in Business**

To be true and trustful are the cardinal and principal principles and ethics of Islamic business transactions. The Apostle of Allah is reported to have said:

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<sup>92</sup> Quran, 4:29, translated by Abdullah Yusuf Ali

“The truthful merchant will on the Day of Resurrection be with prophets, veracious souls, martyrs and pious people”.<sup>93</sup> Thus, Islam has emphasised on truth in business.

**d) Generosity in dealings and modesty in claiming debts**

It means that a business man shall be generous and easy in his commercial dealings. When one demands his debt shall do it in a modest manner. As indebtedness is likely to lead to unethical conduct so Muslim lenders are encouraged to show leniency to debtors. At the same time, debtors are urged to repay debts promptly. The Prophet (peace be on him) is reported to have said:

Shariah guides both lender and debtor to be lenient and generous in their dealings. It is to the lender to deal with leniency with consumer in case he is out of balance. Shariah emphasises on leniency in demanding debt and expediency in repaying loan because there is no concept of interest on debt in Shariah.

**e) Honouring and fulfilling Business Obligations**

Shariah emphasises on honouring and fulfilling obligations, promises and trusts. The Holy *Qur'an* emphasizes the moral obligation to fulfil one's contracts and undertakings. Allah says in the Holy Quran:

“O you who believe! Fulfil (all) obligations.”<sup>94</sup>

Fulfilling promises is part of faith in Islam. Here faith is related with business transactions. When the seller and manufacturer fulfill their promises and stick to their product specification the confidence level of consumers will increase. Adhering to

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<sup>93</sup> Al-Jama` al-Sahih, Ibn Majah, Kitab al-tejarat Ba`b al-hes a`lal makaseb, I tradition No. 2139

<sup>94</sup> Quran, 5:1

promises by the manufacturers is one of the ways of promoting interest and rights of consumer.

A tradition of the Prophet (peace be upon him) condemns promise-breaking as it is the hallmark of a hypocrite:

If he makes a promise, he breaks it, and if he makes a compact, he acts treacherously.<sup>95</sup>

In addition to these positive ethics, Islam encourages us to extend fair treatment to workers and to strive for halal (legitimate) earnings.

In a nutshell, these are some of the major positive ethics in Shariah for the purpose of ensuring protection to consumer rights and interests in the market. Now, we will analyze some negative or discouraged acts which are part of business ethics in Shariah.

### **Negative or discouraged acts in business transactions**

By negative or discouraged business ethics is meant that Shariah teaches us not to perform these acts during business transactions. The one who shuns them will be awarded not only in this World but also in the hereafter. They are as follows.

#### **a) Dealing in Prohibited (*Haram*) goods**

Dealing in unlawful (*haram*) goods or services is prohibited in Shariah. The sale of dead meat (unslaughtered), trading in pork, intoxicants, sale of idols and statutes are not proscribed and prohibited in Shariah. The Holy *Qur'an* says:

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<sup>95</sup> Al-Jama' al-Sahih, al-Al-Bukhari, Abu Abdullah Muhammad Ibn Ismael Al-Bukhary, Kitab: Eman billah, Ba'b: Ayatul Munafiq, tradition No.32

“Lawful unto you (for food) are all four-footed animals, with the exceptions named: but animals of the chase are forbidden while ye are in the Sacred Precincts or in pilgrim garb: for Allah doth command according to His Will and Plan.”<sup>96</sup>

In another place the Holy *Qur'an* says:

“O you who believe! Intoxicants and gambling [dedication of] stones and [divination by] arrows are an abomination of Satan's handiwork: eschew such (abomination), that you may prosper.”<sup>97</sup>

These are some of the prohibited items on which no contract can be concluded. A contract against these items is void ab initio. The purpose of prohibiting these items is the protection of mind and health of the consumer.

### b) Sale of *Al-Gharar* (Uncertainty or Speculation)

Uncertainty or gharar means the sale of goods or products that are not in existence; or the consequences or outcome of which is not yet known; or a sale involving risks or hazards where one does not know whether at all the commodity will later come into existence.

Such contracts are proscribed because they may give rise to disputes and disagreements between the parties concerned.

The Prophet (peace be upon him), therefore, prohibited such sales. Narrated Jabir bin Abdullah: “The Prophet (peace be on him) forbade the sale of (date) fruits till they were red or yellow and fit for eating.”<sup>98</sup> Likewise, the Prophet (peace be on him) prohibited the contracts of muhaqala, mukhadara, mulamasa, munabadah and muzabana.

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<sup>96</sup> Quran, 5:1

<sup>97</sup> Quran, 5:90

<sup>98</sup> Al-Jama` al-Sahih Al-Bukhari, Abu Abdullah Muhammad Ibn Ismael Al-Bukhary, Kitab: al-Buya` , Ba`b: Ba` semar qabla Budu Selaheha, tradition No.1037

Narrated Annas bin Malik: Allah's Messenger forbade muhaqala, mukhadara, mulamasa, munabada and muzabana.<sup>99</sup>

The Prophet (peace be on him) forbade from the sale in which there is the element of *gharar*.<sup>100</sup>

Hence, any sale transactions that involve deception or uncertainty is prohibited in Shariah. Here the protection of both seller and consumer is aimed at. One shall not get rich at the cost of other. Therefore, an uncertain and deception based sale and purchase transactions are proscribed in Shariah.

### c) Arbitrarily Fixing the Prices

Shariah promotes open market economic system, subject to the concept of haram and halal, which is why price fixation is not encouraged in Shariah by the state authorities except in the case of need and urgency. Narrated Abbas R.D: Allah's Messenger said, "Do not go to meet the caravans on the way (for buying their goods without letting them know the market price), a town dweller should not sell the goods of desert dweller on behalf of the latter."<sup>101</sup> From the above Hadith it is evident that it is the rights of everyone to know about the market price and it shall not be fixed arbitrarily.

Hence, price fixation is not encouraged. Seller and purchaser shall be left to their mutual consent to determine price between themselves. But it does not mean that state machinery can not determine price in all circumstances. In the event of urgency, need and monopoly of the sellers the state machinery can regulate price in the market under the doctrine of maslaha mursalah and istehsan of Islamic Jurisprudence.

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<sup>99</sup> Ibid, Ba'b: Ba'y al-Mukhzara, tradition No.1040

<sup>100</sup> Al-Jama' al-Sahih, al-Muslim, Abul Husain Muslim bin al-Hajjaj al-Nisapuri, Kitab: al-Buya', Ba'b: ba'yul gharar, tradition No.1516

<sup>101</sup> Al-Jama' al-Sahih Al-Bukhari, Abu Abdullah Muhammad ibn Ismael Al-Bukhary, Kitab: al-Buya, Ba'b: Ba'y hazer lebad, tradition No.1024

#### **d) Exploitation of Ignorant**

It is a common unethical business practices that expert and informed traders exploit the ignorance of new trader in the market because of his ignorance of market conditions. Shariah proscribes this practice and curses such traders. The Prophet (peace be on him) has strictly prohibited such practices. Narrated Abu Huriara: "Allah's Messenger forbade the selling of things by a town dweller on behalf of a desert dweller".<sup>102</sup>

#### **e) *Al-Najsh* (Trickery or treachery)**

*Al-Najsh* means an action or omission in which a person offers a high price for something, without intending to purchase it, but just to defraud and cheat another real buyer for increasing the price. Narrated Abu Huriara: "Allah's Messenger forbade the selling of things by a town dweller on behalf of a desert dweller, and similarly *Najash* was forbidden. And one should not urge somebody to return the goods to the seller so as to sell him his own goods."<sup>103</sup>

Therefore, Shariah proscribes sale which leads to deception, treachery, disputes and frauds.

#### **f) False Swearing**

False swearing while selling is disapproved of. It will cause the loss of the blessings of Allah. Narrated Abdullah bin Amr bin Al-Aa's: The Messenger of Allah said, "... you are My (Allah's) slave and My Messenger. I have named you al-mutawakkil. You are neither discourteous, harsh nor a noise-maker in the markets...".<sup>104</sup> From the above it is evident that noise-making is discouraged in the market places by Shariah. The reason is that noise-making though persuade consumer to buy goods which may be not of a standard or

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<sup>102</sup> Ibid, Ba'b: Ba'y alal Ba'y, tradition No.1020

<sup>103</sup> ibid

<sup>104</sup> Ibid, Kitab: al-Buya', Ba'b: Karaheyat-ul-sakhab fil-al-sooq, Tradition No.1013

demanded quality. Therefore, noise-making is discouraged. And Allah S.W said that His Messenger is not a noise-maker in the markets.

### g) Giving Short Measures

Shariah prohibits short or deceitful measurement as Quran says:

“And give full measure when you measure, and weigh with a just balance. That is good and better in the end.”<sup>105</sup> Likewise, the Prophet (peace be on him) said, “Measure your foodstuff and you will be blessed.”<sup>106</sup> Shariah has put great emphasis on weighing and measuring in sale transactions so as to avoid short measure and also to ensure transparency in the market with regard to measurements of foodstuff. Hence, strict measurement regulations shall be implemented by the state.

### 3.6. Price fixation/ price control in *Shariah* and consumer protection

#### What is meant by price fixation?

*Tas a'r* is a Shariah terminology used for the fixation of price in market by the state authorities. Price fixation means to fix price or cost of some goods or services by the state authorities. It is an interference of the state to pass an order to sell or purchase some goods against some specific consideration with no increase or decrease. State becomes a regulator. According to Imam Shawkani price fixation means “The order of ruler, his governor or any other state authority to fix the price of any products and restrain them from any decrease or increase in the price except some for some public good (maslaha).”<sup>107</sup>

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<sup>105</sup> Quran verse 17:35

<sup>106</sup> Al-Jama' al-Sahih Al-Bukhari, Abu Abdullah Muhammad Ibn Ismael Al-Bukhary, Kitab: al-Buya, Ba'b:ma yusta habu menal kail, tradition No.1015

<sup>107</sup> Shawkani, Nayl al-Awtar (Berut: Darul Kutub, 1980) vol.5,220

## **The status of price fixation/ price control in Shariah**

Shariah supports and promotes open market economy subject to the concept of haram and halal concept of commodities. Seller and buyer are encouraged to conclude their contracts according to their agreed upon terms and conditions. And ruler of the state is not permitted to fix prices in the market. But the jurists are not unanimous on this interpretation and they are divided into three groups. Each group has arguments for its point of view. They shall be enumerated in the following lines.

**First opinion:** The majority of Hanafi, Maliki, Shafia and Hanbali jurist oppose price fixation and do not allow state to interfere in market in no circumstances.<sup>108</sup>

**Arguments from Quran:** Qauran says “Do not eat each others wealth unlawfully, except with mutual agreed upon business transactions.”<sup>109</sup> So they argue that commercial and trade activities shall be allowed as agreed upon by the parties amongst themselves and state shall not interfere in price fixation. State intervention is considered eating wealth of each other by unfair means.

### **Arguments from Sunnah:**

When the prices increased in the era of the Prophet (peace be on him) people said: “O Messenger of Allah! Prices have gone up, so fix them for us. Thereupon the Messenger of Allah said: ‘Allah is the One Who fixes prices, withholds, gives lavishly, and provides and I hope that when I meet Allah, none of you will have any claim on me for an injustice regarding blood or property.’”<sup>110</sup> So the Prophet (peace be on him)

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<sup>108</sup>ibid

<sup>109</sup>Qura`n 4: 29

<sup>110</sup>al-Jama` al-Sahih, Tirmizi, Abi Issa Muhammad Ibn Issa (Beirut: fikar, 1978) Kitab al-Buyua` , Ba`b al-Ghesh fil-Buyua` , tradition no. 1235

explicitly denied to fix prices for them in the market. Therefore, it is not for the state to fix or control prices in the market, instead people shall bargain by mutual consent.

**Second Opinion:** According to *Al-Malikiah* and *Al-Hanafiah* price fixation by the state authority may be ordered for the purpose of removing any difficulty for the general public. It is in the event of hike of prices in market by the traders and sellers. Though Shariah does not permit price fixation in normal circumstances, when market is manipulated by some elements then regulatory and monetary framework shall be established by the state, particularly when they cause deliberate price hike, hoarding, excessive profits or any other fraudulent activities.

### Arguments

They argue that it is one of the *maslaha* (public good) for removing any troubles or difficulties for the community as in this way the arbitrary price hike may be regulated and controlled by the state authority (*Hasbah*).<sup>111</sup>

Secondly, that increase of price is part of injustice and cruelty (zulm) and the ruler is sanctioned to remove injustice and cruelty; and price control is one of the ways of removing injustice in the society.<sup>112</sup> Thirdly, price control by the state will regulate all fraudulent business malpractices in the market which is one of the purposes of Shariah.<sup>113</sup>

**Third Opinion:** According to some *Shafiah* jurists price control is permissible in the case of famine etc and not in normal circumstances.<sup>114</sup> For the purpose of not allowing price fixation they give the same arguments as advanced by the exponents of first

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<sup>111</sup>Hasbah, in Shariah, means administrative and regulatory department of the government for the administration of market. It is permitted under the doctrine of *Zarureyat* and *Maslaha Mursalah* of Shariah

<sup>112</sup> Muhammad bin Khwaja Sultan. *Tadkhul al-Dawla fel al-Majal al-Eqtisady* (JIUI, 1998), 162

<sup>113</sup> *ibid*

<sup>114</sup> Zuhely, *Alfiqh al-Islami wa adellatuhu* (Beirut: Darul Kutub, 2008) vol 4, 589

price fixation they give the same arguments as advanced by the exponents of first opinion; and for the purpose of allowing it they advance the arguments of exponents of second opinion.

In a nutshell, what opinion shall be adopted. The second opinion seems to be more relevant in the present day seller and manufacturer-dominant market. It is argued that in the era of the Prophet (peace be on him) price control was not recommended because of the fact that commodities were scarce and sellers used to bring them to market after great strive and the shortage of goods used not to be artificial but natural. But today it occurs owing to the malpractices of sellers. Therefore, Imam Ibn Timaiyah and Ibn Qayem maintain that it is the obligation of a state to have a price fixing and price control policy for the interest of general public. They argue that price hike is a trouble or difficulty (*mazarrah*) for the community so the ruler shall address and regulate it under the doctrine of *maslaha mursalah*.<sup>115</sup>

### 3.7. The concept of *al-Khiyarat* (options) and consumer protection

#### Introduction

Allah S.W has allowed *tejarah* (sale and purchase) as a means of acquiring goods. *Mall* (wealth) is made means for the benefits of human beings; and, thus, it has permitted some ways for obtaining goods so as to shun causing *fasad* in the World.<sup>116</sup> The right of *khiyar al-shart* of which other *khiyarat* are collateral is granted not as a matter of general

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<sup>115</sup> *ibid*

<sup>116</sup> Sarakhs, *al-Mabsut*, (Berut: Dar ul Marefah, 1985) vol, 12, 108

are introduced by Shariah to avoid uncertainty in contracts.<sup>118</sup> Thus, necessity shall be limited to the extent of necessity and shall not be taken as a general principles and no analogy can be drawn on it.

According to Kasani there is only one condition for the *luzoom* (implementation) of a contract: the emptiness of contract from four *khiyarat* (options) namely, option of determination, option of condition, option of defect and option of inspection. Contract does not become *lazem* (implemented) in the subsistence of any of these conditions.<sup>119</sup> Hence, the stipulation of conditions may be concluded by the buyer for three or any certain period of time which shall not be detrimental to the seller and buyer. *Khiyar al-shart* (option of condition), *khiyar al-tayin* (option of determination), *khiyar al-ruyah* (option of inspection), *khiyar al-Aa'b* (option of defect) and *khiyar al-tadles or taghrer* (option of fraud) are the major kinds of *khiyarat* (options). They will be analysed in the following lines.

### ***al-Khiyarat (options)***

There are five major kinds of *khiyarat*, as stated above, in Shariah for the protection of buyer but the major kind of *khiyar* is *khiyar al-shart*. They will be delineated in the following lines.

- a) *Khiyar al-Shart* (option of condition/stipulation)
- b) *Khiyar al-Tayin* (option of determination)
- c) *Khiyar al-Ruyah* (option of inspection)

<sup>118</sup>Sarakhsy, *al-Mabsut*, (Beirut: Dar ul Marefah, 1985), vol.25,187

<sup>119</sup>Kasani, *Bada'* (Beirut: Dar ul kutub, 1990) vol.5,136

- d) *Khiyar al-Ayb* (option of defect)
- e) *Khiyar al-Tadles or Taghrer* (option of fraud)<sup>120</sup>

Now, we shall explain these options one by one in detail. They are as follows.

**a) *Khiyar al-Shart*: (option of condition/stipulation)**

It is a kind of option, stipulated by buyer or seller to revoke the contract within a stipulated time period. For example, a consumer stipulates, “I purchase this goods from you but I shall have the right of returning it within three or such days”.

The validity of this option lies in the tradition of the Prophet (peace be on him) when he advised the companion Lehyan bin Munqed, who complained that he would defrauded when he had purchased any thing, to say “No cheating and I reserve the option for three days.” The purpose behind this option is to avoid uncertainty in contracts.<sup>121</sup>

**What is the maximum time period of option of condition?**

It is an important contention that for how many days the option of condition may be stipulated. There is an agreement among the jurists that it may be stipulated for three days as stated in the preceding tradition. But what about the time period which exceeds three days period. It is a point of contention among the jurists. The jurists are divided into three groups on this contention. Their views will be analysed in the following lines.

**Firs opinion:** According to Imam Abu Yusaf, Imam Muhammad and Hanbales the parties may extend the time period from three days without any restrictions.<sup>122</sup>

**Second opinion:** According to Imam Abu Hanifah and Imam Shafi three days are enough and no further time is permitted. The reasoning is that khyar is not a general rule

<sup>120</sup> Zuhely, *al-Fiqh al-Islami wa Adillatuhu* (Beirut:Dar ul fikar 2005)vol.4,250

<sup>121</sup> Sarakhsy, *al-Mabsut* (Beirut:Dar ul Marefah,1985) vol.25,187

<sup>122</sup> Kasani,*Bada* (Beirut:Dar ul kutub,1990)Vol.5,174

but given by way of an exception which was a necessity. Therefore, the necessity is acknowledged three days and an exception can not be extended beyond three days time period.<sup>123</sup>

**Third opinion:** Malikis say that the time period of khiyar varies from contract to contract or from sale to sale. It may be one day when a piece of cloth is bought or may be one or two months when a house is purchased.<sup>124</sup>

#### **Legal status of contract during option of condition**

The contract is not yet binding on the party in whose favour the option is stipulated. Right in the property is not yet transferred to the buyer and he has the right to revoke the contract within the stipulated time period or ratify it either expressly or impliedly.

#### **When does the option terminate?**

- a) By death of the party in whose favour option was operating

In case of his death the option lapses and contract becomes binding on his heirs. Because it is a personal right and can not pass to heirs. On the other hand, Malikis and Shafia are of the opinion that it can pass to his heirs and they can exercise this right within the stipulated time period.

- b) By destruction of the subject matter

When the products are destroyed in the hands of the buyer so the contract becomes binding.

- c) By the termination of time period

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<sup>123</sup> ibid

<sup>124</sup> Ibn Rushd, *Bidayat-ul-Mujtahid* (Beirut: Darul kutub, 1995) vol.2, 208

d) When the stipulated time period lapses the contract becomes binding as it is an implied acceptance by the buyer.<sup>125</sup>

**b) *Khiyar al-Tayin* (option of designation)**

It is the right of buyer to choose or determine within a stipulated time one out of some products which are offered to him. The rule demands that subject matter shall be ascertained at the time of contract. For instance, a person buying a generator out of three for fixed price, he gets an opportunity to examine it by a specialist and to select one of them. This option is imposed by the buyer and it renders a binding contract non-binding in favour of buyer.

*Hanafis* and *Malikis* permit this option as an exception through juristic preference (*Istihsan*) because it happens as a necessity as one may require to consult a specialist in this regard and the same time does not want to lose bargain; or the buyer may happen to be an agent of a person and he wants to show it to his principal.<sup>126</sup>

**The maximum period for ascertainment**

**First opinion:** According to *Hanafiah* it is part of *khiyar al-Shart* and is not a separate *khiyar*. Imam Abu Hanifah maintains that it too has a maximum three days option for the same reasoning as stated earlier.

**Second opinion:** Imam Abu Yosuf and Imam Muhammad maintain that time period for ascertainment is unlimited.

**Third opinion:** A group among *Hanafiah* maintains that it is a separate *khyar* and its time period is not fixed<sup>127</sup>.

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<sup>125</sup> Sarakhs, *al-Mabsut* (Beirut: Dar ul Marefah, 1985) vol. 26, 6

<sup>126</sup> Kasani, *Bada'* (Beirut: Dar ul kutub, 1990) Vol. 5, 158

<sup>127</sup> Ibid, 174

### **Essential elements of *khiyar al-tayin***

It is indispensable that (a) the number of unascertained subject matter shall not exceed three; (b) there shall be difference in value between the three items and price of each shall be known; (c) time period of ascertainment shall be known to the parties.<sup>128</sup>

### **When does the option terminate?**

The option of ascertainment terminates in the following ways:

- 1) By the exercise of option either expressly or impliedly
- 2) By destruction of one of the items
  - (i) if the goods are destroyed in the possession of buyer, so the destroyed goods is considered ascertained and buyer is liable for price;
  - (ii) if the goods is destroyed in possession of seller the buyer has the option to either contract against what has remained or rescind the contract.
- 3) By death of the one who had the option of ascertainment. The sale becomes binding for his heirs and the right of revocation lapses. The heirs shall determine one of the products.<sup>129</sup>

### **c) *Khiyar al-Ruyah* (option of examination)**

It is the right of buyer to examine goods for the purpose of either rejecting or accepting contract. Knowledge of subject matter of contract is an essential condition at the time of contract for the purpose\* of removing any kind of ambiguity or want of knowledge (*jahalah*).

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<sup>128</sup> Zaydan, *al-Madkhal al-Fiqh al-Islami* (Beirut, Dar ul kutub, 1998), 680

<sup>129</sup> Madkur, *al-Madkhal til al-Fiqh al-Islami* (Beirut: Dar ul kutub, 1995), 680

### **Opinions of jurists on *Khiyar al.Ruyah***

**First opinion:** Other jurists of the three schools of thoughts do not permit sale on the basis of this option. They argue on the basis of a tradition, "Do not sell what you do not have"<sup>130</sup> that no contract is allowed on the subject matter which is not in existence at the time of contract.

**Second opinion:** Hanafis permit contract on the basis of this khiyar. They argue that the tradition, "Do not sell what you do not have" applies to one who does not own goods and has no capacity to deliver. They also permit it on the basis of another tradition, "He who buys a thing which he has not seen has an option upon seeing it."<sup>131</sup>

### **Essential elements of Khyar al-Ruya**

There are two main essential elements in this regard.

- (i) That the buyer must not have seen the subject matter of contract.
- (ii) That the contract must relate to the property which is specified and not the one which is soled by description. Things specified are like houses, horses, land etc which posses their own individual and special features.

### **Status of contract during *Khiyar al-Ruyah***

The property in the goods passes to the buyer but it renders the contract non-binding on buyer, while it is binding on seller and he can not revoke such a contract.

### **When does the option terminate?**

The option of examination terminates in the following cases.

- 1) The option is terminated by the examination of the goods.

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<sup>130</sup>Shawkani, Ney ul Awtar (Beirut:Darul kutub, 1985), 164

<sup>131</sup> Madkur, al-Madkhali al-Fiqhi al-Islami (Beirut:Darul kutub, 1995), 686

- 2) The option lapses by destruction of the subject matter of contract.
- 3) When the buyer examines and then disposes of the property.
- 4) Death of buyer terminates option of examination and contract becomes binding for the heirs of the buyer.<sup>132</sup>

**e) *Khiyarn al-Ayb* (option of defect)**

It is consumer's right to cancel the contract if he discovers some defect which diminishes its value<sup>133</sup>. This right is imposed by the law and needs no prior stipulation. The buyer has the right to reject the subject matter of the contract if undeclared defects are declared later on. But here is an exception to the general rule that if the seller has already disclosed all the existing defects or deficiencies then the buyer has no option of cancelling contract as he acted at his own risk. It means that the seller can exempt himself from any defect if he has already disclosed it to the buyer, but it does not mean that he can exempt himself from any defect by a general notice displayed at his business place.

The validity of the option is based on the following two traditions.

- a) "He who defrauds another is not from amongst us."<sup>134</sup>
- b) "It is not permitted for seller to sell things which are defective unless he points out defects to the buyer."<sup>135</sup>

**Essential elements of *Khiyar al-Ayb***

- (i) The defect shall be of the nature which existed prior to the contract and not after.

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<sup>132</sup>ibid

<sup>133</sup> Kasani, Bida' (Beirut: Darul kutub, 1978) Vol.5,247

<sup>134</sup> al-Jama' al-Sahih, Sunnan Ibn Majah, Abi Abdullah Muhammad Ibn Yazeed, Kitab al-Tejarat, Ba'b al-Nahi Anel Ghesh, Tradition No. 2224

<sup>135</sup> Shawkani, Nayl ul Awtar (Beirut: Darul kutub, 1985),224

- (ii) The defect shall continue to exist from the time of delivery to the exercise of the option of defect.
- (iii) The defect may be apparent or hidden but it shall be of the nature which decreases its value or renders it out of anticipated use.
- (iv) The buyer shall have no knowledge of the defect at the time of contract or delivery.

#### **Legal impacts of *khayr al-Ayb* on contract**

The jurists are divided into three groups on the legal impacts of option of defect on contract.

**First opinion:** According to the majority opinion, contract under this option is revocable and the buyer has the right either to cancel or confirm the sale.

**Second opinion:** According to Maliki jurists there is a difference between major and minor defect; and suggest that if the defect is minor the buyer may confirm the sale and shall be compensated proportionately for the minor defect. If the defect is major he has the right either to cancel the contract or ratify it.

**Third opinion:** Hanbali jurists maintain that the buyer of an item with defect whether minor or major may confirm the contract but shall be paid proportionate compensation for defect or deficiency.<sup>136</sup>

#### **When does the option of defect terminate?**

It terminates in the following cases.

- a) When the subject matter is destroyed in the possession of buyer.
- b) When buyer or consumer accepts the subject matter with defect, deliberately.

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<sup>136</sup> Zyhal, al-fiqh al-Isla'mi' wa-Adillatuh (Beirut:Dar ul fikar, 1997) vol.4,3122

It is noteworthy, that unlike khiyar al-shart and khiyar al-ruyah the death of buyer does not terminate this option and it transfers to his heirs by way of inheritance.<sup>137</sup>

#### f) *Khiyar al-Tadles or Taghrer (option of fraud)*

The option of fraud means that whenever the buyer finds out some fraud in the product he has the right to either return the product or claim damages.

It may occur in the following three forms:

- (i) Fraud related to the acts or omission of seller, such as not milking animal for making it appear more productive to the buyer. According to Imam Abu Hanifa the buyer has no right to return the product but to claim damages and compensation.<sup>138</sup>
- (ii) Fraud related to seller's words, such as he claims that it is the only item and there is no similar in the market. Such acts are not permitted in Shariah. So in this situation the buyer/consumer has the right to return the product and claim compensation.<sup>139</sup>
- (iii) Fraud related to the concealment of facts, such as concealing defects in the subject matter. It is prohibited by Shariah and jurists are unanimous on its invalidity because it is an apparent fraud and Shariah has strictly proscribed fraudulent practices in businesses. So in this situation the buyer has right to return the subject matter and claim damages.<sup>140</sup>

To sum up, Shariah has very sophisticatedly protected the rights of buyer and consumer both in theory and practice through the tools of *al-Khiyarat* (options), though by way of

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<sup>137</sup> Kasani, Bida` (Beirut: Darul kutub, 1978) Vol.5,268

<sup>138</sup> Al-Darul Mukhtar wa Radul Muhtar (Beirut: Dar ul Kutub, 1995) vol.4,101

<sup>139</sup> ibid

<sup>140</sup> Ibn Aa`bide, Dar ul Muhtar, (Beirut: Darul fikar, 1985), vol.4,103

granting exceptions, as stated in the above lines. We shall note that classical jurists have mostly used the terminology of 'subject matter' for the items on which contracts are concluded generally. This terminology of subject matter is not confined to products or goods but it includes services too. Therefore, we can not say that classical jurists have not discussed services as a subject matter of contract, in fact, services are inbuilt in the word subject matter. These options have grave potential to assure protection to consumers if incorporated into our legal statutes. The application of these options in trade can be essential for Islamic and non-Islamic countries because they are excellent tools for the protection of both seller and consumers.

### **3.8. Conclusion**

Shariah is a religion which encompasses laws for all kinds of business transactions. Today they are as relevant as they were fifteen hundred years ago. Shariah has granted protection to consumer by several ways as stated in this chapter. Shariah protects consumer from fraud, adulterated food, uncertainty and deception as elaborated in the above lines. The concept of *caveat emptor* in Law visa-vise Shariah has been discussed. Price fixation by state authorities is discouraged by Shariah but at times due to malpractices in the market it allows the state machinery to intervene in the market as a regulator.

The conclusion of a valid contract of sale is final in terms of rights and obligations between the buyer and seller as they are not later bound to each other for any defects or faults as a matter of principles of Islamic Law. But for the purpose of ensuring protection to consumer Shariah has made some exceptions by introducing the concept of *al-*

*Khiyarat*. These are of five kinds as elaborated in this chapter. It is indispensable to note that these *khiyarat* are granted to buyers by way of exceptions and not as a rule. Hence, no analogy is to be made on these exceptions in business transactions.

## CHAPTER FOUR

### THE SHARIAH APPRAISAL OF CONSUMER PROTECTION

#### LEGISLATION IN PAKISTAN

##### INTRODUCTION

Shariah appraisal of consumer protection laws is the primary portion of this research work. The existing four consumer protection Acts namely; ICPA 1995, NWFPCPA 1997, BCPA 2003 and PCPA 2005 will be appraised from Shariah point of view. The method employed for Shariah appraisal is that the provisions of PCPA 2005 will be analysed and cross reference of relevant provisions from other three consumer protection Acts will be cited.

Shariah appraisal of these Acts will be done from the original sources of Islamic Law. It is noteworthy, that classical jurists of Shariah have not used the term *mustahlik* (consumer) as they have given a general terminology of buyer and seller. They have talked about consumer protection not under a specific chapter but under the chapter of Ba'a.

Shariah appraisal of consumer protection Acts is as under.

##### **The Shariah Appraisal of Consumer Protection Acts**

Shariah appraisal of PCPA 2005, ICPA 1995, KPKCPA 1997 and BCPA 2003 will be done in the following lines.

The term "Consumer" is defined in a similar manner in all the Acts<sup>141</sup>; as it means a person or entity<sup>142</sup> who:

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<sup>141</sup> Ss.2 (c) of KPK.CPA, PCPA, BCPA and section 2 (3) of ICPA, respectively

- buys a product for a consideration
- obtains something on lease
- any user of such products
- hires any services for a consideration
- any beneficiary of such services
- any person who buys and uses goods for his livelihood as a self-employed person.

It is noteworthy that a purchaser who purchases goods or services for the purpose of resale or commercial purpose is out of the ambit of consumer definition. So they are not protected under this Act except self-employed person.

For instance, a person who hires the services of any medical centre for diagnosis is a consumer and is protected under the Act as it was held by the Supreme Court in this case.<sup>143</sup> A person who uses goods with the approval of another person who bought such goods,<sup>144</sup> is included in the definition of a consumer. For a person to be protected under these Acts, it is essential that he comes under the definition of consumer otherwise he will have no remedy under consumer law. In this case the complainant who had applied for electric connection to Faisalabad Electric Supply Company (FESCO) was declared not a consumer and case was decided in the favour of FESCO<sup>145</sup>. For a person to be protected under the Act, it is essential that he comes under the definition of consumer otherwise his case will not fall under this law.

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<sup>142</sup> The term “entity” is incorporated only in PCPA whereas in other Acts only person is declared to be a consumer

<sup>143</sup> PLJ 2010 Lahore 355/ PLD 2010 Lah 214, Dr. Shamshad Syed, Chief Physician Lahore V. District Consumer Court, Lahore and others

<sup>144</sup> Laxmi Engineering Works Appellant v. P.S.G Industrial Institute Respondent, (1995-CPJ-2-1-SC; 1995-STPL-0-236-SC)

<sup>145</sup> PLJ 2010 Lah 108 and PLD 2010 Lah 95. Chief Executive Faisalabad V. Nayyab Hussain

To analyze it from Shariah point of view in the light of classical manuscripts of jurists, it is evident that they have discussed the protection and rights of buyer/consumer under sale contracts under different kinds of *al-Kheyarat* (options). So Shariah has given legal protection to all buyers and consumers whether they are mere consumers as provided in the Act, or buyers for re-sale or commercial purpose, without any distinction.

In addition to this, in the era of the Prophet (peace be on him), companions and classical jurists every buyer was a consumer because people mostly used to purchase things either for self- consumption or for self-employment; because economic activities and businesses were not as developed as it is today and was not in the form of corporations and legal business entities as it is today.

As the classical jurists have interpreted it from *Quran* and *Hadiths* that whosoever purchases any product is protected by Shariah. So Shariah has made no distinction between consumer and the one who purchases things for commercial purpose or re-sale. No where in the classical manuscripts the jurists have made any difference between buyers of self-consumption or self-employment or commercial purpose as they have used a general terminology of buyer and purchaser.<sup>146</sup>

The instant legislation is a special law for consumer protection and all kinds of buyers and purchasers can not be protected under the instant Act as there are many other Acts for their protection.<sup>147</sup> Under the doctrine of *Istehsan* and *maslahah mursala* of Islamic Jurisprudence an Islamic state has legacy to legislate laws for a specific segment of society in order to better manage and administer affairs of that segment but shall not be

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<sup>146</sup> Kasani, Bada' (Barut: Dar ul kutub, 1995), Vol. 5, 680

<sup>147</sup> such as Contract Act 1872, Drug Act 1976, The Sale of goods Act 1930, Pakistan Penal Code 1860, West Pakistan Pure Food Ordinance 1960, Pakistan Standards and Quality Control Authority Act 1996, Natural Gas Regulatory Ordinance 2000, Pakistan Hotels and Restaurant Act 1976, Pakistan telecommunication (Re-organization) Act 1996 and Wefaqi Mohtasib (Ombudsman) Order 1983.

repugnant to injunctions of *Quran* and *Sunnah*. So, in the light of the above, it can not be said that “consumer” definition, as given in these Acts, is repugnant to the canons of *Shariah*.

The distinction between commercial purpose and self-employment may be deleted for better protection and promotion of consumer rights, so as to make it more *Shariah* compliant.

*Shariah* gives protection to all consumers and encourages even free providers of goods to give not the neglected quality but the best, as *Quran* says, “You can not get virtue until you spend/give that which you like the most.”<sup>148</sup> It is evident that *Shariah* has made no such distinction between commercial purpose or self-employment and the rights provided for under *khiyarat* are extended to all kinds of buyers regardless of commercial purpose or self-employment. Therefore, it needs further research whether or not we can draw such exclusions regarding re-sale or commercial purpose.

The definition of product as provided by consumer legislation<sup>149</sup> has some repugnancy to *Shariah* with respect to its scope; as some items are excluded from its definition in the Act. The product definition is repugnant to the canons of *Shariah* as all items (save *haram* things) dealt with for business purposes are considered products/subject matter of contract in *Shariah*; and no distinction is made between animals, plants, natural fruits and other raw products in their natural form or that which are derived from animals or plants. The instant Act does not protect consumers or buyers of animals, natural fruit and other such raw products as these items are excluded from the definition

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<sup>148</sup> *Qura'an*, 3:92

<sup>149</sup> S. 2 (j) of PCPA says: “product” has the same meaning as assigned to the word “goods” in the Sale of Goods Act, 1930, and includes products which have been subsequently incorporated into another product or an immovable but does not include animals or plants or natural fruits and other raw products, in their natural state, that are derived from animals or plants;

of products. Therefore, it is inconsistent with Shariah because Shariah has made no such distinction in the subject matter of contract. There seems no rationale behind this exception in this section. Therefore, the sale of animals and natural fruit shall be included in the definition of products under this section.

It is a general observation that people are mostly deceived and defrauded in the bargaining of animals, fruits and other natural foodstuffs. So there is a need for equal protection of all kinds of consumers and buyers; as provided by *Shariah* under the concept of *al-Khiyarat*.

This section<sup>150</sup> provides for the liability of manufacturer if alteration or modification occurs as a result of usual use of the product. If changes occur due to the unanticipated use of the product then manufacturer is not liable for such defects. Likewise, in *Shariah* the hand of buyer/consumer is considered to be of *Amanah*<sup>151</sup>, trust, if there occurs any defect in product in his possession without his fault, seller shall be liable for that. If any defect is caused to the product by the consumer himself in his hand, with *ta'ady* (it means owing to carelessness or negligence or unanticipated use), so the purchaser is liable for that and not the seller or manufacturer. This section<sup>152</sup> seems quite consistent with *Shariah* law as under the option of defect it is stated that seller will not be liable for any defect which is caused by the act or omission of the buyer.

Under the provision of this section<sup>153</sup>, the manufacturer is entitled to expect reasonable and proper use of the product by the consumer. Damage caused by a product to a

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<sup>150</sup> S.2 (l) of PCPA

<sup>151</sup> It means that alteration or modification if occurs, in spite of reasonably anticipated use, so seller is liable for that, but if intentional and deliberate (*ta'ady*) alteration or modification occurs, which does not come under the terminology of reasonably anticipated alteration or modification, then seller is not liable for such a defect.

<sup>152</sup> S.2 (l) of PCPA,2005

<sup>153</sup> S.2 (m) of PCPA,2005

consumer which is safe when used by normal people, but which causes injury when used by an abnormally sensitive or allergic person, will not be compensated since no general duty of care has been broken.<sup>154</sup> For instance, perfume used by normal consumers may be causing allergy to some sensitive people, like me, so seller or manufacturer is not liable for such sensitive consumers.

*Imam kasany* says<sup>155</sup> that if he [consumer/buyer] destroyed foodstuff or clothes by any manner other than drinking, eating or wearing it, and he later on found any defect in that so, without any difference among jurists, he has no right of returning it to the seller. Because destroying it other than its anticipated use, is like its intentional destruction or modification.

### **Liability arising from defective products**

These sections put liability on manufacturer for defective products, goods and services.<sup>156</sup> *Barret* bought a new car from *Mossy Ford*. It caused a steering problem. On complaint, the seller could not fix the problem so Barret sued him for damages which were decreed in his favour.<sup>157</sup> Seller/manufacturer is liable for any defect in product; because sale transaction itself demands a complete product/subject matter without any defect, and without the rights of others, (*dhaman-u-dark*<sup>158</sup>), without any pre-condition in the sale contract as defect is rejected by *Aqd*.

According to *Shariah* manufacturer or seller is liable for defective products or services. It is stated that it is an implied condition in sale transactions that product/subject matter shall be without any apparent or hidden defect and according to buyer's demand.

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<sup>154</sup> *Ingham v. Emes* [1955] 2 QB 366, [1955] 2 All ER 740, CA.

<sup>155</sup> *Kasani, Bada'* (Beirut: Dar ul kutub, 1995), vol. 5, 681

<sup>156</sup> See sections 4 & 13 of PCPA, KPKCPA and BCPA, respectively

<sup>157</sup> *Ford Motor & Co V. Barret* (800 p. zd 367 (sup. ct. wash. 1990)

<sup>158</sup> It means product/goods shall be complete ownership of seller without any arrears or encumbrances.

Until the seller provides a complete [without any defect] product to the buyer, the sale will not be enforceable and seller will be liable for defect for the following two reasons;

- a) That the purpose of buyer is gaining benefits (intended by him) from the product which is unlikely in case of defective product.
- b) That he has paid a complete consideration [price] to the other party in order to obtain goods/subject matter which is complete, in all respects, and without any defect.<sup>159</sup>

According to *Imam kasany*, a defectless product is an implied condition in sale and he presumes this condition an explicit condition in the text of the sale contract. In addition to this, as far as buyer has paid complete consideration so it is his right to get complete and defectless product. So his right of *Kheyare Aib* has been established.

Secondly, that a defectless product/subject matter was a source of attraction and inclination of buyer towards it that he could not gained from it.<sup>160</sup> Hence his consent in sale contract has been vitiated and his right of *Kheyare al-Ayb* establishes. As a matter of fact, mutual consent is an essential element in mutual contracts;<sup>161</sup> and the same is provided by Pakistani contract Law<sup>162</sup> and consumers are protected particularly under the instant Act.

Manufacturer/seller is liable for all those defects or flaws which devalues product in market or decrease its market value. So all such flaws are considered defects in *Shariah* and gives buyer/consumer right of returning the product to seller.<sup>163</sup>

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<sup>159</sup> Zyhayli, *al-Fiqh al-Islami wa Adillatuhu* (Beirut:Dar ul fikar,2008) vol.9,643

<sup>160</sup> Kasani, *Bada'* (Beirut:Dar ul kutub,1995)vol.5,646

<sup>161</sup> Ibid 643

<sup>162</sup> Section 8<sup>th</sup> of The Contract Act 1872

<sup>163</sup> Kasani, *Bada'* (Beirut:Dar ul kutub,1995)vol.5,644

This section<sup>164</sup> says that ingredients and their use in the manufacturing or assembling of the product, the manufacturer is duty bound to stick to the specifications which he claims to be existing in the goods or his service providers in the case of services. Quantity as well as quality must conform to what has been stated about the product. Any negligence in this behalf shall bring liability under the law.<sup>165</sup>

From Shariah point of view, as stated by Imam *kasamy*, that if a seller says that it is pure *Reshma* (made of silk) piece of cloth but later the consumer finds out that it was not pure *Reshma* but was mixed with other kind of cloth; [hence, deviation from his own specifications and defective in composition] so the seller is liable for the defective composition of the same and consumer has the right of returning it to the seller because the cause of his inclination to the product is not in-existence.<sup>166</sup> Similarly, if consumer has hired a house/building which was made of a specific materials or bricks but later the consumer found that it was not constructed of the described materials. So the manufacturer/ lesser is liable for the same defect.<sup>167</sup> These rights of buyer are established by option of defect, description and option of stipulation.

It means that if manufacturer gives warranty of any product such as car, generator or machine but it is found defective during that duration so he has to compensate the consumer. Complainant purchased a washing machine which is found defective. Complainant claimed either replacement or refund of the price. Commission allowed refund of consideration with costs.<sup>168</sup>

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<sup>164</sup> Ss.5 of PCPA, other Acts do not have this provision

<sup>165</sup> Munir Ahmad Mughal, *Law of consumer protection* (Lahore: Muneeb Book House, 2011) edi 5<sup>th</sup>, 117

<sup>166</sup> Kasani, *Bada'* (Beirut: Dar ul kutub, 1995) vol.5, 331

<sup>167</sup> *ibid*

<sup>168</sup> *Alankar Cycle Market v. V R Srinivasan*, (1991) 1 CPJ 238 (Kant); *JP Singh v. Auto Tractor* (1991) 1 CPJ 34 (NC)

According to *Shariah* a product is defective, if not in conformity with the qualities or description described by the seller at the time of sale. The buyer's purpose of getting benefit from its purchase fails so the seller/manufacturer will be liable for it.<sup>169</sup> Thus the provisions of these sections<sup>170</sup> are not inconsistent with *Shariah* as they have protected consumer from all kinds of misleading, fraudulent and malpractices of the market.

These provisions<sup>171</sup> have given room to the doctrine of *caveat emptor* as it exonerates the seller from the responsibility of defects which occurs due to his want of knowledge, while, in such circumstances the consumer will have no remedy. A defect which occurs as a result of having knowledge of its existence is not a defect but fraud. In this way this section protects the professional negligence of the manufacturer as it is vague and, therefore, needs improvements for a better protection of consumer rights.

*Shariah* requires seller or manufacturer to be fully educated about what he manufactures or sells to others for a consideration and in case of any existing or future occurring defect manufacturer is liable. It is buyer or consumer's right to cancel the contract if he discovers some defect which diminishes its value. This right is imposed by the law and needs no prior stipulation.<sup>172</sup>

It is administrative prerogative of the state to inflict any reasonable damages and compensation as provided for in this section.<sup>173</sup> *Shariah* maintains that a similar product shall be granted in damages, subject to the availability of its kind; or the return of consideration, if kind of the product was not available.<sup>174</sup>

<sup>169</sup> Zyhayli, *al-Fiqh al-Islami wa Adillatuhu* (Beirut: Dar ul fikar, 2008) vol. 9, 361

<sup>170</sup> Ss. 6, 7 and 8 of PCPA; other Acts do not have these provisions

<sup>171</sup> Ss. 9 of PCPA, other Acts do not have this provision

<sup>172</sup> Kasani, *Bada'* (Beirut: Dar ul kutub, 1995) vol. 5, 247

<sup>173</sup> Ss. 10 & 15 of PCPA; other Acts do not have this provision

<sup>174</sup> Kasani, *Bada'* (Beirut: Dar ul kutub, 1995) vol. 5, 561

In case of defective goods/product the buyer/consumer has two options; either to return the product/subject matter to the seller/manufacture or to keep it with himself for complete consideration, and he cannot make the consideration lesser except with consent of the seller.<sup>175</sup>

Under this section<sup>176</sup> the seller is duty bound to disclose substantive and material facts of products and goods. Likewise, Shariah obliges seller in the following different kinds of sale contracts to disclose all characteristics of the subject of contract. Some of them are: *Bia Murabaha*<sup>177</sup> and *Tawleyah*<sup>178</sup>, they are called *Bia of Amanah*, trust. In *Murabaha* and *Tawleya* the seller is obliged to disclose the real price of product and the earning profit to the buyer otherwise the sale is declared voidable. As far as it is a kind of *bay* (contract) based on trust of the seller so he is considered to be a trustworthy person, without any argument and he swears, which is why he has to prevent himself from unfair practices,<sup>179</sup> as Allah says, 'Oh you trustworthy, do not intervene in your truths, while you know that.'<sup>180</sup> The Prophet (peace be on him) has also discouraged corrupt practices as stated in chapter three. The seller is duty bound to disclose the following things:

According to *Imam Zufar* and *Imam Shafi* the seller has to disclose to the buyer any defect caused to the product/subject matter as a result of natural disaster, if he wants to sell it by way of murabahah; but according to Hanafi school of thought he can sell it by way of murabahah against actual price without disclosing its cause of defect. According

<sup>175</sup> Zyhayli, *al-Fiqh al-Islami wa Adillatuhu* (Beirut:Dar ul fikar,2008) vol.9,360

<sup>176</sup> Ss.11 and 16 of PCPA, other Acts do not have this provision

<sup>177</sup> In this kind of contract the seller is duty bound to disclose the actual price of goods and amount of profit and shall describe its other related characteristics.

<sup>178</sup> It means re-sale of goods at stated original cost with no profit or loss to the seller.

<sup>179</sup> Kasani, *Bada`* (Beirut:Dar ul kutub,1995) vol.5, 523

<sup>180</sup> Qura`n, 9:25

to the *Ijma* of jurist, if defect was caused due to the act of seller/manufacturer himself or any stranger, so he has to disclose it otherwise he cannot sell it.<sup>181</sup>

Similarly, if any increase occurs in the product (after he had bought it), such as birth of offspring of animal, fruit in tree, milk increased and in case of female servant pecuniary compensation owing to rape, so he cannot sell it without mentioning these characteristics to the buyer; because any increase in product is considered part of it because he (the present seller) will return product along with its increase, if he finds any defect in it. Though this increase was not included in consideration paid already by this seller, yet it is part of the same product/subject matter and he cannot sell it without disclosing the increase to the buyer. If he sells it without mentioning the increase, so it is like selling part of the thing and keeping part of it. And it is prohibited in *Bia Murabaha*.<sup>182</sup>

Likewise, he has to disclose any arrears on the product/subject matter, if caused due to his or any stranger's act or omission.<sup>183</sup> From the above, we may infer that seller/manufacturer/distributer has to disclose arrears, fine etc to the buyer on products and services. Otherwise, it will be considered a defect and he will be liable for it.

Under this section<sup>184</sup> seller is not allowed to exclude himself from any liability, in general, by terms of any contract or notice. According to Shariah Muslims honor their conditions and stipulations. Shariah has the concept of exclusion from liability as Imam Kasany states that if seller says that he soled out this item on the condition that he will not be liable for any defects

<sup>181</sup> Kasani, Bada' (Beirut: Dar ul kutub, 1995) vol.5, 524

<sup>182</sup> Ibid

<sup>183</sup> Ibid

<sup>184</sup> Ss. 12 & 17 of PCPA; other Acts do not have this provision

or he mentions any specific defect or names that defect.<sup>185</sup> So by this exclusion the buyer means three situations;

- a) Defect existing at the time of sale transaction; or
- b) Defect of general nature, *Mutlaq*; or
- c) Future occurring defect.

Let us elaborate the above three situations in the following lines.

**a) Defect existing at the time of sale transaction.**

If he related this condition to the defect existing at the time of contract before taking possession by buyer so it is acceptable but if he relates it to a defect occurring before taking possession so then it is not approved by jurists unanimously. Even though if seller's condition was a general one or related to a specific defect.<sup>186</sup>

**b) Defect of general nature, *Mutlaq***

There are two opinions of jurists in this condition

**First opinion:** According to *Imam Abu Yousaf* it will include both defects, occurring before or after the contract.

Reason given by him: the exclusion clause directly and impliedly extends to pre and post occurring defects. It extends explicitly to these defects because the seller has extended his condition to generally occurring defects.

Whereas, it is impliedly extended to all defects because by such a defect the main purpose of seller is closing the door of returning it and it will not be closed unless his

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<sup>185</sup> Kasani, Bada' (Beirut: Dar ul kutub, 1995) vol.5,650

<sup>186</sup> ibid

condition is impliedly extended to the new occurring defect. That is why the later occurring defect will be impliedly included in it.<sup>187</sup>

**Second opinion:** According to *Imam Muhammad* and *Imam Zufar*, it will not include the newly occurring defect and for this reason the buyer will have the right of returning it.

Reason given by him: that his general words include only the existing defect and not the later occurring one because exclusion from defect means exclusion from the existing one and not the later occurring because the later occurring is like exclusion from non-existing thing or that has not yet become his right<sup>188</sup>, so exclusion from non-existing thing is not possible.

#### **c) Future occurring defect**

If the buyer excludes himself from any newly occurring future defect as he says that I exclude myself from any new defect which will occur after sale transaction, so according to *Hanafi fiqh* this condition does not extend to such defects and sale is invalid.

Reason: that it is an invalid condition on part of seller which prohibits buyer from returning the defective product.<sup>189</sup>

Thus the provision of this section incorporates the spirit of Shariah law and gives more protection to consumer in the present professional marketing, but this section needs to be expanded in accordance with Shariah provisions as stated in the above appraisal. Nothing can be concluded at this stage whether it is repugnant to Shariah or not because the provisions are vague and need elaboration; as it is provided by Shariah.

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<sup>187</sup>Ibid,650,651

<sup>188</sup>Ibid

<sup>189</sup>Ibid,651,652

## **Liability arising out of defective and faulty services**

Under this section<sup>190</sup> the service provider is liable to consumer for faulty services.

According to Shariah the relation between service provider is based on humanity, benevolence, tenderness, justice, willingness and custom.<sup>191</sup> Consideration/ wages/service charges paid to service provider against his services or any benefit obtained from service provider. Service provider is paid for the completion of his services but if he could not complete his services or agreed upon work, so the hirer of services has the right to get his work completed by him.<sup>192</sup> From the above, we infer that consumer of services is also protected by Shariah.

If services provider fails to complete his services, he has no right for complete consideration from consumer. In Shariah Contract of hiring services is called *Aqd Muawazah*, it demands ownership of consideration before completion of sale contract as the seller owns consideration by contract of sale<sup>193</sup>. So we can infer that contract of services demands full and adequate consideration from both parties, and if one fails, the aggrieved party has right to damages and compensation. These provisions are not repugnant to Shariah as Shariah too has similar provisions as stated above.

## **Obligations of manufacturer**

The provisions of these sections<sup>194</sup> direct seller to issue a receipt to consumer, consisting of all relevant details. Shariah emphasizes to reduce into writing all kinds of dealing so as to avoid future rifts and contentions.<sup>195</sup> *Imam al-Sarakhsī* writes in his manuscript<sup>196</sup> that

<sup>190</sup> Ss.13 of PCPA, other Acts do not have this provision

<sup>191</sup> Zyhayli, *al-Fiqh al-Islāmī wa Adillatuhu*, (Beirut:Dar ul fikar,2008) vol.4,70

<sup>192</sup> ibid,69

<sup>193</sup> Ibid,60

<sup>194</sup> Ss.19 of PCPA, 6 of KPK.CPA and 6 of BCPA, respectively

<sup>195</sup> Qura'n1:285

<sup>196</sup> Sarakhsī, *al-Mabsut* (Beirut:Dar ul Ma'refa) vol.30,168-169

according to *Imam Abu Yousaf* it is sufficient for the seller to write his own name along with his father's name whereas according to *Imam Abu Hanifah* and *Imam Muhammad* he shall write his own name, his father's and his grandfather or his own name and the name of his tribe.<sup>197</sup> As far as return and refund policy is concerned so Shariah has explicitly elaborated it under the concept of options as stated in chapter three. So this section<sup>198</sup> is not repugnant to Shariah.

### **Unfair practice**

The provisions of these sections<sup>199</sup> have prohibited: the making of false representation, the making of deceptive representation, the making of misleading representation. Hence, an exhaustive and inclusive provisions against unfair business practices. Misleading advertising(misrepresentation) means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and if by reason of its deceptive nature it is likely to affect their economic behavior or which, for those reasons, injures or is likely to injure a competitor.<sup>200</sup>

According to Shariah, deception or fraud in business is prohibited. Whenever the buyer finds out some defects in the product he has the right to either return the product or claim damages<sup>201</sup>. Deception may be in the price or measurement of goods or in any other form so if it is proved the buyer has the right to return defective goods to the seller.<sup>202</sup>

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<sup>197</sup> *ibid*

<sup>198</sup> Ss.20 of PCPA

<sup>199</sup> Ss.21 of PCPA, 2 (o) of KPK.CPA, 2 (6) of ICPA and 2 (o) of BCPA

<sup>200</sup> Brian W Harvey, Deborah L Parry, *The Law of Consumer Protection and fair trading* (London:Butterworths,1996) edi 5<sup>th</sup>. (Butterworths, London), 41

<sup>201</sup> Zuhayle, *al-Fiqh al-Islami wa adellatuhu* (Beirut:Dar ul fikar,2008) vol.4,3069-3071

<sup>202</sup> Kasani, *Bada'*(Beirut:Dar ul kutub,1995)vol.5,529

Similarly, Shariah prohibits any kind of deception, misrepresentation, falsity, exaggeration and fraud as the Prophet (peace be on him) says, "He who defrauds another is not from amongst us."<sup>203</sup>

Thus, the Prophet (peace be on him) has prohibited from all kinds of sale, under the option of fraud, which are concluded as a result of fraud (*Gesh*) or misrepresentation (*Gharar*).

Certain kinds of fraudulence or deception had commonly been practiced in the pre-Islamic period, such as *Bay al-Musarrat wa l-Muhaffalat* (sale by keeping animals unmilked for a longer time), and so on. Such transactions were prohibited by Islam. To emphasize the prohibition of such transactions, it was reported that a person came to the Prophet and said that he had always been betrayed in purchasing. The Prophet advised him to say, at the time of buying, "No cheating, and then you have the right of option for three (days) from your sale."<sup>204</sup> In light of the provisions of this section it seems that it has given a maximum protection to buyers. From Shariah point of view it has nothing repugnant to Shariah; as Shariah, too, emphasizes on the protection of consumers from all deceptive and misleading acts and omissions on part of the seller and manufacturer.

These sections<sup>205</sup> have proscribed bait advertisements. A bait advertisement is a deceptive advertisement whereby the consumer/buyer is cheated or defrauded by raising prices in the urban market. Bait advertisements are actually meant to commit fraud because fraud is "a knowing misrepresentation of the truth or concealment of a material fact to induce another to

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<sup>203</sup> al-Jama` al-Sahih, Sunnan Ibn Majah, Abi Abdullah Muhammad Ibn Yazeed , Kitab al-Tejarat, Ba`b al-Nahi Anel Ghesh, Tradition No. 2224

<sup>204</sup> Shawkani, Nayl al-Awtar (Beirut:Dar ul kutub,1995) vol.5,182

<sup>205</sup> Ss.22 of PCPA, 7 of KPK.CPA, 7 of ICPA and 7 of BCPA, respectively

act to his or her detriment.<sup>206</sup> So in the case of bait advertisements the seller/manufacturer tries to induce the consumer and make him or her to do an act or omission which benefits seller and it amounts to fraud.

In Islamic terminology it is named *Bay al-Najash* which is strictly proscribed by Shariah. Shariah prohibits all business practices which are meant to defraud or mislead consumers and buyers; as narrated by Abu Huriarah R.D that Allah's Messenger forbade *Najash*.<sup>207</sup>

Fraud in Islamic Law includes misrepresentation of Western Law, which is defined as a false statement of fact, made by one party before or at the time of the contract which induces the other party to enter into the contract. The act of fraud which gives innocent party right to revoke the contract, must fulfill following conditions:

- Misrepresentation of a material fact must occur,
- There must be an intent to deceive,
- The innocent party must rely on misrepresentation,
- The innocent party must suffer an injury.

In light of the above, all these fraudulent acts are found in bait advertisements. Thus, Shariah, too, has no place for bait advertisements and it is like cheating and cheating in business is discouraged in Islamic law as stated earlier in the tradition of *Lehyan bin Munqid*. Thus, these sections are in accordance with Shariah and nothing found repugnant to Shariah.

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<sup>206</sup> Bryan A. Garner, *Black's Law dictionary*, (USA:West Publishing Co. Ltd,2004) edi 8<sup>th</sup>,685  
<sup>207</sup> Al-Jama` al-Sahih Al-Bukhari. Abu Abdullah Muhammad Ibn Ismael Al-Bukhary, Kitab: al-Buya. Ba`b:Ba`y Aa` ba`y, tradition No.1020

Sub-section two of this section is of obligatory nature as it obliges the seller to honor his offer and provide goods or services for supply or sale. It is an adequate provision for the promotion and protection of consumer rights in Pakistan. Likewise, Shariah obliges us to honor *Ahd*, and fulfill every contract, "For every engagement will be enquired into (on the day of reckoning)." <sup>208</sup> and about *Aqd*, Allah says, "Oh you believe fulfill your contracts." <sup>209</sup> Hence, consistent with Shariah as it demands for the fulfilling of promise and covenant.

The first proviso of this section<sup>210</sup> is repugnant to the canons of Islamic Law as it is an inherent right of any party to either reject pre-trial settlement or opt for contesting his case on merit. Likewise, it is against the principles of fundamental rights, positive law and even our Pakistani constitution to penalize someone (by way of paying costs and lawyer fee of the opposite party) for the rejection of pre-trial settlement (compromise) in case he loses his case. It is a draconian provision and needs deletion. It is against the principles of natural law, too.

These sections<sup>211</sup> are of administrative nature (saving sections of immunity) as no substantial legal provisions exist therein; in Shariah state has the power to run the administration as it thinks fit, keeping in view the injunctions of Quran and Sunnah. For market regulatory system *Shariah* has given the concept of *Hasbah*. Consumer Councils established under these Acts seem to be on the pattern of *Hasbah* in *Shariah*. So nothing found repugnant to Shariah in these sections.

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<sup>208</sup> Qura'an, 17:34

<sup>209</sup> Qura'an: 5:1

<sup>210</sup> Ss.29 of PCPA, other Acts do not have this provision

<sup>211</sup> Ss.23-39 of PCPA, 8-23 of KPK.CPA, 8-25 of BCPA and 3-12 of ICPA, respectively

*Hasbah* is an administrative council or authority provided for by Shariah. *Hasabah* means an administrative authority which shall shun all kinds of unethical and illegal business activities in the market. The primary functions of *Hasbah* is to advance business ethics in the market and to regulate market so as to provide a fair play both to sellers and buyers for better protection and promotion of consumer rights and interests<sup>212</sup>. The Prophet (peace be on him) himself patrolled markets and ordered people not to indulge in malpractices. For instance, once he checked out some foodstuffs which were adulterated. He prevented such practices. It is reported that the Prophet (peace be on him) once checked some foodstuffs in the market which were adulterated so ordered the seller not to mix up good quality with bad quality goods.<sup>213</sup> There were even some female market inspectors in the early era of Islam, such as *Samra bnt Naheek Ansariah* and *al-Shafa* in the era of Umar R.D.<sup>214</sup>

Thus, *Shariah* emphasizes on market regulatory mechanism, especially with respect to unethical and malpractices in business places. Consumer councils, as provided for in these Acts, are consistent with the general scheme of *Shariah*.

In Islam, state is responsible for ensuring social and economic justice and it is one of the basic and cardinal responsibilities of Islamic state and its ruler. To ensure this purpose any reasonable mechanism may be adopted for enforcement of the law which may differ from society to society, from area to area and from era to era. As a matter of fact time changes, likewise, the way and mechanism of enforcement of law change.<sup>215</sup> So it is

<sup>212</sup> Dr.Abdul Maaz Fazal Abdul Razziq, *Al eqtesad al Islami, tarekhuhu, tatawaruhu, akhlaqeyatuhu*, (Egypt:Darul kutub al Mesreyah,2010),161

<sup>213</sup> al-Jama` al-Sahih, Tirmizi, Abi Issa Muhammad Ibn Issa (Darul fikar: Beirut, 1978) Kitab al-Buyua', Ba`al-Ghesh fil-Buyua', tradition No.1329

<sup>214</sup> Abdul Maaz Fazal Abdul Razziq, *al- eqtesad al- Islami, tarekhuhu, tatawaruhu, akhlaqeyatuhu*, (Egypt: Darul kutub al Mesreyah,2010),161

<sup>215</sup> Muhammad Farooq Al-nehad, *Abhas Fel Eqtisad al-Islami*,(Berit:Mu asesah al-resalah,1988),106

discretionary power of Islamic state to adopt enforcement mechanism according to the environment of society. Hence, nothing found repugnant to Shariah in these sections.

These sections<sup>216</sup> have granted immunity to the functionaries working under this Act. *Shariah* makes every body liable for his deeds whether they are in personal or official capacity. Therefore, it is repugnant to the general scheme of Shariah. It may be deleted for the purpose of avoiding any mischief on part of consumer councils and courts. In addition to this, it will protect and promote consumer rights and interests; and will ensure a strong and Shariah compliant consumer protection regime in Pakistan.

## **Conclusion**

Like developed and developing countries Pakistan has also promulgated consumer protection law. The Shariah appraisal of this law reveals that some of their provisions are inconsistent with the injunctions of Shariah. The definition of consumer is limited to the buyers who buy goods for self-consumption and the one who purchases goods for re-sale or commercial purpose is excluded from the definition of consumer. The classical jurists of Shariah used the terminology of buyer for all kinds of buyers as Shariah protects all classes of buyers from any deceptive and fraudulent business practices. Thus, the definition of consumer needs to be brought into consistency with the injunctions of Shariah.

Secondly, the definition of product is inconsistent with the injunctions of Shariah as animals, fruits, milk and things obtained from them are excluded from the definition of product which is repugnant to Shariah. Shariah protects buyers of all sorts of product and goods subject to the concept of *halal* and *haram* in Shariah. The exclusion of animals,

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<sup>216</sup> Ss.37 of PCPA, 21 of KPK.CPA, 11 of ICPA and 23 of BCPA

fruits, milk and things obtained from them make no sense because mostly fraud is committed in these goods. There are explicit Ahadith of the Prophet (peace be on him) which proscribe uncertain and fraudulent acts in the sale of fruit, animal and milk. Thus, the definition of product needs to be brought into consistency with the injunctions of Shariah.

Thirdly, the provisions which excludes manufacturer from liability owing to the want of his scientific and technological knowledge are repugnant to Shariah. To exclude manufacturer from liability is like eating others wealth by unfair and illegal means which Shariah has proscribed in explicit terms. Shariah does not permit getting rich at the peril of another by unfair or illegal means. These provisions exist in the PCPA 2005 which shall be deleted.

Finally, immunity from trial granted to the functionaries of consumer protection councils and courts is inconsistent with Shariah. As a matter of fact, in Shariah there is no concept of legal immunity as all human beings are the servants of Allah and equal, thus, none is above the law.

In a nutshell, the rest of the provisions of consumer protection law are nor repugnant to the canons of Shariah. The above some provisions are repugnant to Shariah; they shall be brought into conformity with the injunctions of Qura'n and Sunnah.

## CHAPTER FIVE

### RECOMMENDATIONS AND CONCLUSION

#### **5.1. INTRODUCTION**

Every work needs some amelioration in one or the other way. Likewise, consumer protection Act prevailing in Pakistan have some loopholes. To bridge these lacunas I will advance some recommendations in this chapter. The major recommendations are related to the definition of consumer, definition of product, removing the existing inconsistency from the Acts, the establishment of separate consumer courts, and the incorporation of al-khiyarat in the consumer protection Acts. And a “Shariah Model” of consumer protection is spelled out in this chapter. Of course, conclusion of the thesis is drawn in the end.

#### **5.2. Recommendations**

The scrutiny of consumer protection Acts prevailing in Pakistan persuaded me to advance some recommendations and suggestions which may make consumer protection laws Shariah compliant. In our society even basic and fundamental rights are neglected not only by state machinery but also by the general public. In theory consumer rights are not some thing alien but it has its history back in 600 A.D as we have studied in this thesis that the Prophet (peace be on him) has emphasized on the protection of buyer and consumer rights by forbidding fraudulent and malpractices and by enjoining observing market and business ethics. The concept of options (Khiyarat) provided by Shariah is a sufficient mechanism for consumer protection if enshrined in our consumer protection laws along with Islamic business ethics. Here are some recommendations on the subject.

1. The definition of consumer is inconsistent in these Acts as PCPA 2005 includes legal entity as a consumer whereas others mention only persons as consumer. So they shall be brought into conformity for equal consumer protection in all the provinces.
2. Under the definition of consumer the term resale, commercial purpose and self-employment are vague terminologies and create ambiguity. Therefore, they need elaboration and explanation in these Acts. It is evident that Shariah has made no such distinction between commercial purpose or self-employment but the rights provided for under *khiyarat* are extended to all kinds of buyers regardless of commercial purpose or self-employment. Therefore, it needs further research whether or not we can draw such exclusions.
3. Animals, fruits, milk and things obtained from them are excluded from the definition of product which seems inappropriate in the presence of massive fraudulent practices in these items. It is, therefore, recommended that these items shall be incorporated in the definition of products so as to assure maximum protection to consumers in Pakistan. These provisions shall be brought in conformity with the injunctions of Shariah.
4. These Acts are inconsistent with respect to imposing fine and imprisonment, as different provinces have their distinct limit of fine and imprisonment, which may lead to the encouragement of fraudulent practices in those provinces where punishments are comparatively more lenient than other provinces. So this practical loophole may be addressed.
5. The establishment of consumer council shall be ensured in each district of each province on imperative basis. In addition to this, separate consumer courts may be

established in each district. Under the existing Acts District and Session Judge is a judicial forum for consumer redressals but they are already overloaded which causes lingering on consumer matters which leads to discouragement of consumers to file and pursue their complaints in courts against the culprits. It is a legal lacuna which encourages manufacturers and sellers to go ahead with their defective, deficient and hazardous foodstuffs, products and services. Therefore, separate Magistrate may be appointed in order to ensure speedy and cheap justice to consumers.

6. The provisions which protect manufacturer on the basis of want of his scientific or technological knowledge may be deleted and he shall be declared liable for the defects caused owing to his lack of knowledge. The reason is that in such cases, the question arises who will make good the damage or loss of consumer. Under these provisions, in the instant Acts, in such cases consumer has no remedy. Under the general scheme of Shariah no body shall be left without compensation if his wealth is lost or vitiated; while in this case the damage and loss are compensated by none and the benefit of negligence and want of knowledge is given to the manufacturer.

In the present open market economy manufacturers are so astute that they may benefit by this legal loophole at the cost of consumers. Therefore, it may be deleted from the present Acts for the protection and promotion of consumer rights and interests, so it shall become Shariah compliant.

7. *Al-khiyarat* (options) of Shariah shall be incorporated in these Acts as they have sufficient potential to render protection to the rights of consumers in Pakistan.

8. Consumer legislation may incorporate some provisions for appointing consumer legal advisors in all big companies and corporations so they shall sanction each manufactured

product according to consumer legislations. It will assure protection to consumers protection from the very grass roots.

9. Penal provisions which say that costs and lawyer's fee of the opposite part shall be paid by the party that denies pre-trial settlement and opts for judicial proceedings of the claim, shall be deleted. Though the legislature has inserted this section in good-faith, it is contrary to Shariah, common law concept and even natural law. Therefore, these penal provisions shall be deleted as they fail the very purpose of consumer legislation, because consumers will not prefer to come to court for their redressal as they would fear the application of these provisions against them in case they lack evidence to prove their claim and if it is decreed against them.

10. The provisions of "the exclusion of liability" by manufacturer or seller need more elaboration in order to make these provisions Shariah compliant. Shariah has provisions for seller's exclusion of liability but in certain circumstances.

11. Provisions related to the immunity of functionaries working under these Acts shall be removed as they are repugnant to Shariah and are even against public interest. To sum up, these are some of the recommendations which may add some improvements to the existing consumer protection laws in Pakistan if incorporated and made part of this law.

### **5.3. A 'Shariah Model' of Consumer Protection**

To protect the rights and promote the interests of consumers under Shariah provisions, it is expedient to draw the following "Shariah Model".

## **Definitions**

1. The definition of consumer shall include all buyers of goods and services whether they purchase goods for consumption, self-employment, resale or commercial purpose. The reason for this generalization is that they all purchase items for a price so equal protection shall be granted to them irrespective of purchasing for commercial or household reasons.
2. The existing consumer protection laws do not protect the buyers and consumers of animals, plants, natural fruits and other raw products obtained from fruit or animal. The buyer and consumer of such goods and all other goods shall be protected under the consumer laws irrespective of any exceptions.

## **Liability arising from Defective Goods or Services**

Liabilities arising from defective goods or services are the substantive part of consumer protection in Shariah. Shariah contains provisions for the protection of consumer rights under the concept of *al-Khiyarat*, though in Shariah *al-khiyarat* are exceptions from the general rules of contract. These *khiyarat* may be incorporated in consumer protection Acts so as to extend protection to consumer through Shariah provisions. The codification of *khiyarat* as consumer protection legislation will be an efficient law for the protection of consumer's rights and interest.

In a nutshell, the definition of consumer shall encompass all kind of buyers and no exceptions shall be made in this regard. Secondly, the buyers and consumers of animals, plants, natural fruits and other raw products obtained from fruit or animal shall be protected and no exclusion is to be made. Thirdly, *al-khiyarat* shall be incorporated in the consumer protection legislation for better protection of consumer's rights and interest.

Finally, the implementation and awareness policy of consumer protection in Shariah shall be ensured.

#### **5.4. Conclusion**

The perusal of consumer protection laws in various western regimes reflects that they have enacted this law for the sake of regulating open market economy in order to protect and promote consumer's rights and interests. The 1960s was the dawn of its genesis in the Western countries. In 1985 the UNO adopted consumer protection guidelines, which persuaded developed and developing countries to follow suit.

Therefore, most of the developing countries legislated in this sphere and Pakistan too was in the queue. It was, for the first time, that in 1995 Islamabad Consumer Protection Act, 1995 was promulgated. Then K.P.K, Balochistan and Punjab promulgated similar Acts in 1997, 2003 and 2005, respectively. PCPA 2005 is the most comprehensive Act. The province of Sindh has no consumer protection Act; although it promulgated Consumer Protection Ordinances which lapsed time and again, due to no ratification by the Provincial Assembly.

At present, the situation of consumer protection is dismal in Pakistan. There is a little awareness in this regard both in the general public and also in sellers and retailers. Some three consumer non-governmental organizations (NGOs) work for consumer protection and awareness across the country but their activities are like a drop in the ocean. The existing consumer Acts are not implemented in letters and spirit. Even the statutory bodies as provided by the Acts are not found adequate and efficient for ensuring consumer protection.

Chapter three encompasses consumer rights in common law system and in Shariah. Business ethics are elaborated both in law and Shariah. The studies show that Shariah has given more protection to consumers by advancing the concept of business

ethics and al-Khiyarat (options). Shariah supports no state intervention in the market as it encourages traders to do trade by mutual agreements. But Shariah also gives the concept of *Hasbah* which shall play its role in some exceptional cases; in case of necessity or in the event of rampant fraud in the market by the traders which is, ultimately, detrimental to the general public.

*Hasbah* is a regulatory and accountability institution which shall fix prices in case of monopolies, shall root out fraudulent business practices and shall exercise regulatory supervision in the market. The underline reason is that the protection of society is the right of Allah and under Shariah state authorities can launch any legal action for the protection of society. So the institution of *Hasbah* in Shariah plays a pivotal role in regulating market and in eliminating unethical and fraudulent business activities from the market.

Shariah appraisal of consumer protection Acts is done in the fourth chapter. These Acts have some provisions which may be considered repugnant to Shariah. For instance, Like developed and developing countries Pakistan has also promulgated consumer protection law. The Shariah appraisal of this law reveals that some of their provisions are inconsistent with the injunctions of Shariah. The definition of consumer is limited to the buyers who buy goods for self-consumption and the one who purchases goods for re-sale or commercial purpose is excluded from the definition of consumer. The classical jurists of Shariah used the terminology of buyer for all kinds of buyers as Shariah protects all classes of buyers from any deceptive and fraudulent business practices. Thus, the definition of consumer needs to be brought into consistency with the injunctions of Shariah.

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In a nutshell, the rest of the provisions of consumer protection law are nor repugnant to the canons of Shariah. The above some provisions are repugnant to Shariah; they shall be brought into conformity with the injunctions of Qura'n and Sunnah.

In the last chapter some recommendations are advanced so as to bring the existing consumer protection law into conformity with the injunctions of Shariah.

This thesis is primarily focused on Shariah appraisal of the existing four consumer protection Acts which I have done to the extent of my access and efforts. This area shall be appraised more from Shariah point of view so we shall develop a complete and viable consumer protection code to prove that Shariah has its own consumer protection. In addition to this, Muslim countries shall strive to incorporate these provisions in the UNO Consumer Guidelines for a better consumer protection regime across the globe.

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