ESTOPPEL – DO THE COMMON LAW AND *SHARĪ'AH* HAVE THE SAME APPROACH? (A COMPARATIVE JURISPRUDENTIAL APPROACH)

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Estoppel, being a legal concept, both in *Sharī'ah* and Conventional law, is studied in minute detail in these legal regimes. The present work is, therefore, an attempt to probe into profound details of estoppel in Islamic and Conventional law at theoretical and operational levels. The work of classical and contemporary jurists, in both legal systems, is looked into for the investigation of the issue under discussion. However, in case of *Sharī'ah*, the scholastic work of classical *fuqahā* (Jurists of Islamic Law) is preferred more comparatively to that of contemporary scholars for the former being more reliable. The concept of estoppel is explicated here at three levels philosophical, strategic and operational. Findings prove that estoppel in *Sharī'ah* has more depth, as all the three levels than conventional law. Being a social science subject, qualitative research method is used where the secondary data has been critically analyzed thorough content analysis technique.

Keywords: Estoppel, *Sharī'ah*, Law, Court, Procedure, *Qur'ān*, Judgement, Jurists.

Introduction

Humans have developed for themselves a set of standards or rules to live and regulate their lives peacefully. The man with highest degree

of conduct and etiquette is, therefore, considered a better and law-abiding citizen. However, a person having a dual face, two-fold tongue and double standard is seen as uncivil and ill-mannered. In this regard, the Holy *Qur'ān* says "And when they meet those who have believed they say: we believe. And when they are alone with their devils, they say: surely we are with you; we were but mocking"[1]. Unlike the person mentioned above, another one who is straightforward in his dealings and steadfast with what he says and states, has a distinguished character and, therefore, symbolized as epitome for human beings by the Holy *Qur'ān* in these words; "And thou (standest) on an exalted standard of character "[2]. This verse manifestly gives status to good manners, more specifically in statements.

Taking the above standard in consideration, the basis of every law is grounded on people's mindset and reason. Sir Salmond further confirms this principle by stating: "The idea that in reality law consists of rules in accordance with reason, and nature has formed the basis of a variety of natural law theories ranging from classical times to the present day"[3].

The requisition of reason is prevention of statements which in itself are not consistent. It is to say, making someone believes on an assertion in some regard, and then after the same statement offers a different statement, is the actual interpretation of double standard. In other words, the concept of estoppel entirely relies on the above interpretation. Black's Law Dictionary offers the same definition of estoppel by stating; "The Court of Law stops a Litigant who already has given a view expressed or implied, likewise has given reason to believe, in favour of such statement and, subsequently, attempts to prove the negative of said assertion."[4] The *Qānūn-i-Shahādat* , as a primary law on evidence in Pakistan, has the same approach towards the concept of estoppel.[5]

Being a major concept of the legal spectrum, the estoppel is practiced (in terms of its prohibition) almost in all countries, including developing and under developing countries. The possible reason for this practice, throughout the world, is that estoppel beats the ends of Justice and wastes precious time of justice dispensers. Such essence of estoppel, mentioned herein above, as a vital part of conventional, as well as, Islamic law.

With basis of estoppel discussed in the previous lines, there is, however, a need to probe into the real mechanism of estoppel, structured in law, particularly, in *Sharī'ah*. Through detailed

examination of the concept, this paper, therefore, has to answer some questions i.e. Does the concept of estoppel is recognized by *Sharī'ah*, if yes, then to what extent? The same questions are supposed to be probed in conventional law too.

Sharī'ah, being a well-integrated legal mechanism, presents the concept of estoppel with minute details. There are many verses of the Holy *Qur'ān* which describe the concept by one way or another. For instance; "Behold, as for those who come to believe, and then deny the truth, and again come to believe, and again deny the truth, and thereafter grow stubborn in their denial of the truth - God will not forgive them, nor will He guide them in any way."[6] Some commentators, while interpreting this verse, opine that the Jews are addressed herein; notwithstanding, others say it means an apostate.[7] Without going into such interpretations, the verse clearly indicates that *Allāh* does not like a person who recasts his articulation over and over. Keeping in view the significance of such concept, awarded to it by the Holy *Qur'ān*, the renowned classical and contemporary Muslim Jurists[8] namely Imām Abū Bakar Muhammad ibn Abī Sahal Sarakhsī, Imām 'Ālāud-Din Abī Bakr bin Sa'ūd al-Kāsānī,' Thamān bin 'Āli bin Mahjan al-Bārī Fakhr-ud-Din al Zil'ī, Imām 'Alāud-Din Abī Hasan Alī bin Khalīl al-Tarāblasī, Imām Shams-ul-Haq Afghāni and etc. have discussed it, with minute details, in their works.

In the view of some common law scholars, the concept of estoppel does not have a single origin; owing to the fact that its various kinds have emerged at different times. While having the same approach Elizabeth Cooke states "A number of branches or categories of estoppel, with different origins and inconsistent rules, have been developed over the years to meet changing human and commercial needs.[9] Some scholars see the birth of estoppel as an outcome of "Equitable Doctrine".[10] All these fact, by one way or another, clarify that estoppel does not have a settled origin. In addition, it shows that the concept of estoppel has emerged in the 20th century as the doctrine of equity also has its origin in the same period. Conventional law, on the other hand, explicates the concept of estoppel in a maxim; "*allegans contraria non est audiendus"*, meaning thereby; "a person alleging contradictory facts should not be heard"[11]. Another relevant legal maxim to the concept is "*proesumptio juris et de jure"*[12], which means thereby; "the presumption of fact is not taken against every party rather than the one with whom litigation is in process". The set of rules under estoppel can be traced from another

maxim too; "*Interest reipublicae ut sit finis litium*" and "*Non potest adduci exceptio ejus rei cujus petitur dissolutio*".[13] Estoppel is one of the most powerful and flexible instruments to be found in any legal system.[14] The illustration of its being powerful is that the court never takes a right into consideration, which is, either waived off expressly, or impliedly by a party to such suit.

The present work focuses, predominantly, on the concept of estoppel from *Sharī'ah* perspective. The endeavours, made in this paper, may be beneficial to Islamic states in general and Pakistan in particular. Although, it may not have much applicability on practical side of law, albeit, being supported by heavenly law, the rule of evidence might breathe a new life and some new areas may be discovered too, regarding the concept of estoppel, for the learners and experts of law. Most people in Pakistan still believe that law in the country is not purely based on *Sharī'ah*, even though sizeable part of law is not in clash with it. The doubts in people's minds develop from the fact that the country has for so many decades remained under the British rulers – the pioneers and founders of English Law. The concept of estoppel is not an exception to this doubt. The present work is, indeed, a humble attempt to address these doubts. In addition, the work may also clarify that how the significant concept was introduced by classical Muslim Jurists several centuries before the conventional law. In other words, a comparative approach has been adopted in the present academic endeavour. The findings can possibly be used by the courts, legislative bodies, administrative units (while exercising their judicial powers) and etc. Moreover, it can also be utilized in *Jirgahs*[*], *Punchāyat*[**] and other local system dispensing speedy justices.

Methodology

The methodology of this work, as a whole relies on qualitative research, which is commonly and rather frequently used in social sciences' research endeavours. Being a typical type of qualitative research, content analysis method is adopted for the investigation of the issue. Considerable

[*]*Jirgah* is a terminology of Social Sciences, defined by the scholar according to their own style. However, a comprehensive definition is offered by Ali Wardak. In his view *Jirgah* is a Pashtu word that means gathering of few or large number of people for the decision of an issue and also sometime means consultation…see for further details…Wardak, Ali. "*Jirga-A traditional mechanism of conflict resolution in Afghanistan*.", (Institute of Afghan Study Center, 2003).

[**]The word '*Punchāyat'* is used for the term '*jirgah*' in some parts of the country (Pakistan), particularly, in Punjab.

care has been taken, prior to the use of said technique, for the authenticity of all cited secondary sources. The available secondary data on the subject of estoppel, both in *Sharī'ah* and conventional law, has been critically analyzed. Moreover, the logic has been used to derive some points, predominantly, those not found in the secondary data. For the purpose to keep reliability of findings and results, the endeavour has been made to make reference to the primary sources of law, such as, statues, enactments or jurisprudence and etc. The same approach has been adopted in case of *Sharī'ah*; where the basic sources, such as, *Qur'ān, Sunnah*, works of the classical and contemporary Muslim jurists have been referred to exhaustively. However, the work of classical Muslim jurists is preferred over that of contemporary Muslim jurists; owing to the fact that the previous is more reliable in terms of authenticity. In addition, the online sources like libraries (both online and classical), reputed magazines, journals (both printed and online), relevant websites, individual books, *Shāmilah* and etc. are used as sources of secondary data. In fact, after every citation, the logical arguments have been offered in order to strengthen the stance taken over an issue. As the present work discusses the concept of estoppel, both in *Sharī'ah* and conventional law, therefore, due care has been taken, to the last possible extent, to remain unbiased and neutral, particularly, at the time of offering arguments from both sides.

Literature in *Sharī'ah*

The classical literature of *Sharī'ah* shows that *fuqahā* have worked academically on the concept similar to that of estoppel by one way or the other. The concepts of *Wa'd* and *Ibrā* are the typical examples in this connection. Such work is three-fold; for instance, some have gone into minute details of the concept, others have discussed the matter superficially and yet another group has just shed a brief light on its variant features. Logically, the more an issue is elucidated the more it becomes broader. The same rule can be applied to the concept of estoppel in *Sharī'ah* and, resultantly, we find a wide range of discussion on the concept in Islamic legal history.[15]

Since, estoppel is an important legal concept; therefore, the classical Muslim jurists have paid a great attention to it in their work. The endeavours of Imām Al-Rāzī[16], Imām al-Baghdādī[17], Imām al-Karābīsī[18], Imām Āfandī[19], Imām al-Zarqā[20], Imām Sarakhsī[21], Imām al-kāsānī[22],

Imām al-'ainī[23] and etc. can be cited as few of them. Imām Sarakhsī and Imām Āfandī, comparatively to the above jurists, have dedicated a substantive portion of their scholarly work to similar concepts like that of estoppel and other related issues therein.

The work of classical Muslim jurists on the concept of estoppel is so comprehensive in nature that it leaves no room for more details. Every sentence of their work, therefore, seems to be a quotation on estoppel. Most of the aspects, related to estoppel by one way or another, are brought under the umbrella of theoretical frame work, such as, transformation of statement from trust to ownership or agency[24]; inconsistent depositions and etc. In the view of some scholar, the concept of estoppel is discussed by the classical Muslim jurists at scattered places of their work and not as a separate discussion.[25] Imām Sarakhsī's, for instance, elucidates the concept of estoppel, thoroughly, in *Moḍārabah*, and *Hibāh* (gift).[26] Imām al-Karābīsī's, an eminent Shāfi'ī jurist, approach is not different, as both of them have expounded the concept (of estoppel) with its practical utility. However, the point of distinction between them is that Imām al-karābīsī's based his discussion on facet of deposition of evidence and variation in statement only. The former is one aspect of estoppel while the latter is very much wider in range and, thus, indeed, fulfils virtually all aspects of estoppel[27]. Imām al-Rāzī, an eminent Muslim jurist, has roped it (estoppel) with ethical boundaries, by calling the one who alters the statement astrayed from Right path[28] Imām al-Baghdādī states that such an account cannot be termed as robust statement.[29] Imām al-'Āinī, a Hanafī jurist, asserts that a judge should never decide on inconsistent statement, owing to the fact that when a witness retracts again and again from his testimonial, his statement starts lacking consistency and judgement on such witness is barred by *Sharī'ah* ".[30] Mohammad Amīn alias ibni 'Ābidīn[31] has the same view; by quoting the same conditions in number of chapters in his book *Qurratu 'Ainil Akhyār*.[32] The learned Imām Kāsanī states about the matter in probe, "… and this (estoppel) is inconsistency, their (those who change their statements continuously) suit of loss and response will not be heard or entertained, as *Munāqid* statement will have no legal effect…".[33]

Literature in Law

As mentioned earlier, that estoppel is age-old concept and most probably has emerged with the commencement of courts. It is believed

that sir Coke, an eminent jurist of the conventional law, has discussed the concept of estoppel generically in his scholarly work.[34] Sir Pollock, on the other hand, elucidates a typical type of estoppel in his work i.e. estoppel by conduct. He adds that the stance taken which cannot be altered is termed Estoppel in Pais,[35] Lauterpacht has, almost, the same opinion[36] Tiffany[37], an eminent scholar of conventional law, has discussed the subject of investigation by adopting anomalous approach. He differentiates estoppel and dedication[38] by offering an example, like, dedicating estate for public at large and bringing it into personal use, is not an estoppel, rather entirely a distinct concept.[39] In his book, he makes an effort to cover the entire concept of estoppel by incorporating the whole chapter to it therein, inaugurating with a general discussion to a handful detail at the end. Nonetheless, the discussion is limited to property and its entitlement.[40] The issue of estoppel is elucidated, appropriately, by Herbert with number of examples. He goes on saying, for instance, that a person gives false statement to make someone to do something and he does, subsequently, the former will not be permitted by the court to change what he has already said at any legal forum.[41] The concept of estoppel is wonderfully extended to the international community and international law by Kaijun Pan in his scholarly work and has, thereby, clarified much confusion.[42] However, the present research is very much focused on the concept of estoppel in domestic law; thus, Kaijun Pan's work can be critically analyzed in some other studies. The work of Lauterpacht, like that of Kaijun Pan, explains the concept in international law's perspective. In his view, much importance is given to the concept of estoppel in international law. Typically, the case between British and Venezuela, can be cited as examples of such importance.[43] While searching estoppel in the legal regimes of Roman Law, International Law, Latin law, Local Law, Civil Law and etc; the pearls (of estoppel) are seen in the scattered form. However, it is, predominantly, used in civil law. The concept of estoppel is also minutely elaborated by Hersch Lauterpacht. In his view, a person cannot object to force of punishment, when he, himself initiate the force by committing or omitting the offense - this phenomenon is known as dialogical estoppel.[44] However, this research is not comprehensive in nature as it does not accommodate the concept of estoppel as a whole; rather it discusses a very minor part of it. Orit Gan, like other scholars in the field of law, offers a very informative research endeavour on the concept of promissory estoppel which means; whether a promise[45] is legally binding or not?[46]

Theoretical Approach to the Concept of Estoppel (A Comparative Approach in *Sharī'ah* and Law)

As said in the earlier lines that the concept of estoppel does not have an undisputed origin; as it has many kinds and each kind has become a part of legal spectrum at different time. The statement of Elizabeth Cooke, a renowned scholar of the conventional law, can be cited, herein, as evidence, "A number of branches or categories of estoppel, with different origins and inconsistent rules, have been developed over the years to meet changing human and commercial needs".[47] Some other scholars describes estoppel's origin in the 20th century as, in their view, it is the outcome of "Equitable Doctrine".[48] Due to richness in terms of types, the concept of estoppel, naturally, does not have a specified and unanimous definition. Because of his reason, the common law jurists define it a generic way, a way that covers comprehensively all its species. Following the same, the Black Law Dictionary define it as "A bar or impediment raised by the law, which precludes a man from alleging or from denying a certain fact or state of facts, in consequence of his previous allegation or denial or conduct or admission, or in consequence of a final adjudication of the matter in a court of law"[49]

The *Holy Qur'ān* conveys a clear discouragement to speakers of inconsistent statements in many *Āyāt* (verses). For instance, it says, "And when they meet believers, they say, we believe, and when they meet (alone) with their *Shayāṭīn* (evil company) they say, actually we are with you, we were just mocking."[50]

The meaning of above āyah (singular of *Āyāt*) is very clear, leaving no space of any *bayān* (interpretation). It decries those who instead of giving one precise and straightforward statement give two inverse narrations which in all aspects nullify each other. This double standard, according to *Sharī'ah*, degrades a person in both worlds i.e. here and hereafter. Here, in this world, it leaves him with a bad reputation and he is added to the category of unreliable and irresponsible individuals in Islamic law. The two inconsistent statements, obviously, corrupt an individual and, as a consequence, society at large. On other hand, if the concept of estoppel is closely studied then it reveals the same situation where two different expressions are put forward by a person in order to obtain any illegitimate gains. Almost the same meaning can be derived from various verses of the Holy *Qur'ān*, discouraging inconsistent statements. The fore analysis, therefore, shows that a substantial

resemblance exists both in the disciplines of Conventional Law and *Sharī'ah* on concept of estoppel.[51]

The concept of estoppel can be derived from another term *Munāfiq* (the hypocrite), frequently used in the *Qur'ān* and *Hadīth*, which thereby means; a person who never sticks to one position in his assertion rather changes his statements from time to time. This concept is profoundly relevant to estoppel by any stretch of explanation. Mohammad al-Amîn al-Shāfi'ī, the renown *Mufassir* (commentator on *Qur'ān*), makes it further clear by saying; *Munāfiq* does the same when he (*Munāfiq*) admits among Muslims that he has embraced *Islām* while with non-believers he denies the same assertion by claiming that he is a *Kāfir* (non-believer).[52] *Qur'ān*, as a primary source of Islamic law, devotes a separate chapter on it. The first few verses can be cited for further elucidation of the point under discussion

> "When the hypocrites come to you, [O Muhammad], they say, "We testify that you are the Messenger of Allah." And Allah knows that you are His Messenger, and Allah testifies that the hypocrites are liars. They have taken their oaths as a cover, so they averted [people] from the way of Allah. Indeed, it was evil that they were doing. That is because they believed, and then they disbelieved; so their hearts were sealed over, and they do not understand."[53]

An ample resemblance, therefore, can be found between the concept of *Munāfiq* and estoppel as both are, without any doubt, carrying the inconsistent statement.[54]

The basic philosophy behind deploring such inconsistent statements, as mentioned above, is to root-out falsehood from Muslim society. For the same reason, *Qur'ān* discourages liars in different verses, such as; "They only invent falsehood who do not believe in the verses of Allah, and it is those who are the liars".[55] There are many other verses which condemn the liar by one way or another.[56] By having a closer look, *Hadīth* complies within all facets with *Qur'ānic* verses, declaring the signs of *Munāfiq* (singular of *Munāfiqūn)*; the foremost is, he lies when he speaks; secondly, he never fulfills the promises he makes; and lastly, if he is trusted he proves to be dishonest.[57] The lies are further devalued in all authentic books of *Hadīth*.[58]

Conventional law, on the other hand, has entirely a different philosophy behind the concept of estoppel. A reflective study of the same

law, according to some jurists, reveals that the stoppage of two uneven statements is not because it tends an individual or society to falsehood, rather, it maximizes the time span of court, making the procedure prolonged and tiresome. However, Henry Morrison Herman, has a different approach in this regard by stating:

> "The reasons why estoppels are allowed, seem to be: First, no man ought to be allowed to allege anything but the truth for his defense, and what he has once alleged is presumed to be true, and therefore he ought not to be permitted to contradict it. …"[59]

Some of the contemporary jurists compare retraction from *wa'd* with estoppel. As per the principles of Islamic Law, an individual has to fulfill his promise and should not retract from the same. In this regard the Holy Qur'ān states, "And fulfill the commitment, for the commitment will be inquired into on the Day of Judgment".[60] Another verse gives the same importance to the fulfillment of promise.[61] However, according to Hanafī School a promise cannot be enforced through the court of law. In view of the Mālikī School, a promise can be enforced through the court of law, primarily, when it is made in a commercial transaction[62]. At this very point, retraction from promise can be considered as an estoppel. In addition, the "Promissory Estoppel" can be the relevant concept here.

The concept of *Ibrā* (exonerate) can also be cited as an example of estoppel in Islamic law. In the view of scholars it is a unilateral waiver of right by a party to the contract which is granted out of his benevolence at his sole discretion.[63] Being a unilateral promise, one may easily retract from it after making it. The classical Muslim jurists have difference of opinion over this retraction; meaning thereby that some of them consider it actionable in the court of law while the others not. A closer look, herein, confirms that this issue is related with the concept of promise in Islamic law – by one way or another.

The works of Classical *fuqahā* frequently describe two familiar concepts in their scholarly works i.e. *Rujū' 'ani-Shahādah* and *Rujū' 'anil-Iqrār.* Both these concepts are very much similar to the concept of estoppel, owing to the fact that these two are used in procedural laws of both legal spectrums. In case of *Rujū'* '*ani-Shahādah,* for instance, a witness either retracts from his evidence or declares it to be a 'perjury'.[64] In both circumstances, a person, like estoppel, gives a firm statement in the court of law in the shape of evidence and, later-on, says inconsistent

to what he has deposed previously. For example, a party litigating on estate, money or any other property, calls upon a witness for deposition in favour of him and, he does; afterwards, he gets induced by adverse-party, in the same case, with any corrupt inducement. He, therefore, changes, immediately, his previous statement or simply retracts. Resultantly, the person having a genuine ownership or having an appropriate legal right either loses his grip over the law-suit or simply loses it. The second statement, indeed, makes the first testimony worthless. The scope of *Rujū'* is, however, much wider and pervades in all sorts of judicial matters. As a matter of fact, if an individual is not stopped from making inconsistent statements, the courts would not be in a position to protect legal rights of people.

In case of *Rujū' 'anil-Iqrār*, a person after admission or confession before the court of competent jurisdiction denies the same afterword.[65] This approach is also similar to that of estoppel; as the confessor retracts from his previous statement. This denial, after confession, hence, is not appreciated for the same reasons mentioned above in the case of estoppel and *Rujū' 'ani-Shahādah*.[66]

With the previous discussion in mind, it can be easily concluded that both, conventional law and *Sharī'ah***,** have the same philosophy regarding the concept of estoppel. Additionally, the expeditious dispensing of justice is speciality of courts, established under the umbrella of both legal systems. This purpose, certainly, without the concept of estoppel would remain unfulfilled. Moreover, people at large, as a result, may be impacted negatively, as, delay in justice gives sense of deprivation to the litigants and to the society at large. It is clear, thus, that Islamic law and conventional law incorporate estoppel for two major aims i.e. shaving out the falsehood from the society; and making sure the instant justice for the aggrieved party.[67]

Rules of Estoppel in *Sharī'ah* and Law:

Generally, *Sharī'ah* offers a comprehensive theoretical framework on numerous legal concepts, having great importance for the uplift of human beings. However, some contemporary legal concepts, principally, those not discussed by the classical *fuqahā*, can be dealt with through generic principles of *Sharī'ah*. The case of estoppel is different in this regard as its some aspects can be found in the work of classical *fuqahā* while other aspects are entirely new. Having such a peculiar nature,

some of its rules, though indirect, can be found in the classical text of *fiqh*. These rules can be mentioned hereinafter:

Legally speaking, it is crucial for all kinds of judicial matters to be in the jurisdiction of the court trying the case. Territorial jurisdiction, from among these, is the oldest and essential jurisdictions in *Sharī'ah,* found during the reign of Hazrat 'Umar (R.A.)[68]. On the same line, it is imperative in *Sharī'ah* for estoppel that it should be before the court of competent jurisdiction[69] Conventional law, on the other hand, prescribes, too, the same rule in this regard.[70] *Wakīl Bil-Mukhāṣamah* (the advocate), being in fiduciary character[71] and an agent, who represents client before the court, ought to have the prior *Riḍa* (free consent) of his plaintiff in any form i.e. express declaration or implied action.[72] In estoppel such consent is a pre-requisite for party giving inconsistent statements. Additionally, aforementioned representation, in the court of law, should be delegated instead of mere promise or intention.[73] Owing to this fact the word *Tafwīḍ* has been, painstakingly, used to indicate the preceding endowment of authority in estoppel.[74] The same requirement is mentioned for estoppel inthe *Qānūn-i-Shahadat Order, 1984*.[75]

As a natural requirement, the statements put forward in the court, having competency in terms of jurisdiction, are supposed to be *Mutanāqiḍān*[76] (inconsistent to each other). It is inevitable that both narrations should demand nullification, by default, of each other in all aspects; as one being negative and other being positive; or the first being true and the second one being false. For instance, one statement claims a thing white and other claims it black. Since, there can be no consolidation between *Mutanāqiḍān*, therefore, that case falls under estoppel. *Mausū'tul Fiqhiyyah al-Kuwaitiyyah* adds that second narration is unacceptable for it has the probability of falsehood and, hence, the court has to rely on first statement. Furthermore, according to Islamic and conventional law, as a person is estopped from inconsistent narratives, concerning him, in the same way, he is estopped from such statement in regard to other people. For example, a person admits that specific *Sil'a* (commodity) belongs to someone than after he alters it by saying they have agency agreement instead of transferring the ownership.[77] An exception to this rule is discussed by *Mausū'atul Fiqhiyyah al Kuwaitiyyah* by stating that the second uneven statement in financial matters is acceptable if it is followed by oath.[78]

According to *Sharī'ah,* estoppel can be applied to both *Shāhid* (witness) and *Mudda'ī* (plaintiff). The witness, for instance, after giving

evidence retracts afterwards, so if it is before the execution, the deposition becomes worthless and if it is post execution, witness is liable to compensate accordingly. Plaintiff, on the other hand, faces the same legal consequences. For example, a person claims something to be his property and, later on, he says it belong to another, his suit is to be terminated.[79] Both conventional law and *Sharī'ah* have the same approach in this connection.

Imām Zaila'ī, a renowned classical Muslim jurist of the Hanfi school, describes another feature of estoppel. If the retraction, according to him, in *iqrār* (confession) is found before the judgement, the *qāḍī* (judge) shall not decide the matter relying on such confession. If the situation, however, is vice-versa i.e. the retraction after judgement, such *Rujū'* does not affect the process of adjudication as it has come after the judicial proceeding.[80] However, in *Ḥudūd* cases there is an exception to this rule where retraction is accepted by the court of law, following the leading maxim of *Sharī'ah*, "تتـــدرأ الحـــدود بالشـــبهات", meaning thereby, "*Ḥudūd* are dismissed by suspicions". Subsequently, the accused does not get the punishment fixed by such laws, rather a mere punishment is pronounced by of *Qāḍi.* The conventional law, on the other hand, is silent about such situation. Notwithstanding, some material can be traced from witness resiling from his deposition, or inconsistency of statements caused in plaint.

Implementation of Estoppel in Courts (An Approach from *Sharī'ah* and Law)

Estoppel is widely exercised in various courts of diverse nature. The general guideline of *Nifādh* (implementation), related to the concept, has been laid both in law *Sharī'ah* i.e. the litigants/witness are not allowed to present two inconsistent statements in the court of law. Both legal systems strongly believe that permission for uneven narratives, may have grave repercussion on judicial system. The litigants/witness, for instance, may keep changing their statements continuously in order to get the desired outcome in litigation, hitting the integrity of court by adding confusion to the suit and, as a consequent, the litigation may not come to an end within the appropriate time. Herbert Broom, a renowned scholar of law, has the same opinion.[81]

Contrary to conventional law, the application of estoppel is not restricted to *Mudda'ī* (Plaintiff or Prosecution) in *Sharī'ah,* more or

less, it pervades in *Da'wah* (plaint), *Daf'* (defence), *Iqrār* (admissions, confessions), facts and evidences etc. So, the scope of estoppel is wider in *Sharī'ah* than conventional law and this fact, indeed, put the previous legal system in a superiority zone. Some of *fuqahā* are, even, of the view that court may not take the plaint of a plaintiff, claiming big amount from a person whose *Iflās* (bankruptcy) has been established by the court as it has the factor of estoppel. Likewise, the same rule is to be applied to a litigant, witness or admitter – including confessor – speaking against the facts which he has stated before *Qāḍi.*[82] It can be deduced from both disciplines that a person confessing something, predominantly, contrary to the corroborative evidence, shall not be taken into account, rather the court may rejuvenate the inquiry as per his admission.

Both conventional law and *Sharī'ah* require that a *Da'wah* (plaint) must be very much clear in all facets. The *Maḥkamah* (court) shall not hear a case, or a law-suit which comprises statements having *Tanāquḍ* (inconsistency) in them, owing to the fact that it revokes the principle of estoppel. The conventional law has the same approach in this regard.[83] A person claiming for example, ownership of some property, through a plaint, for which he previously has applied in another plaint to buy or rent, in this case his second claim will not be entertained because of the rule of estoppel. Likewise, if a *Kafīl* (guarantor) says that he owes this amount because of *Kafālah*, later on the changes it, by saying the principle has either paid the debt or creditor has remitted it as an *Ibrā*. After finding such contradiction, the court has to set aside the second statement by retaining the first one as not *Kidhb* (false). Estoppel can also be applied to a person who admits something for someone- legally he cannot claim, later on, the same thing for himself.[84] In the view of al-Zaila'i, retraction from evidence or admission, after the judgement has been delivered, may not make any difference to first statement, although, the second statement shall be estopped due to its inconstancy.[85] However, an odd statement, subsequent to the first, given before the court, cannot be termed useless. The court, hence, may look into the matter if *Tathbīq* (consolidation) between such statements is possible. In this regard, Imām Karābīsī states;

> "… when one claims something for himself, then he alters his statement, saying that it is belonging to someone else, there is possibility of consolidation between two statements without unevenness, actually, he is authorized to change the ownership to

other person, he was truthful and change of entitle is to be taken into consideration."[86]

The above statement confirms that a *qāḍī* is not supposed to apply the rule of estoppel in each and every case rather he has to see the peculiar nature, accommodated by a suit. By the same token, when a *Wakīl*, a lawyer, tells the court that he has cause of action, soon after, he contends that his client has that cause of action, it can be said that latter statement is, actually, explication to the former and, thus, rule of estoppel cannot be applied here. This legal approach is envisaged only by *Sharī'ah* and the conventional law, on the other hand, is entirely silent about it. However, it is pertinent to mention that Islamic law allows litigants/witnesses' statements to be acceded to only if amalgamation is as cited above. On the contrary, there are some cases where *Sharī'ah* does not allow a *qāḍī* to opt for consolidation. For instance, a person states that a *'ayn* (commodity) is in the ownership of another person and, subsequently, he goes to change his statement by calling it his own property here at this point the concept of consolidation cannot be invoked as his first statement is tantamount to *Iqrār*.[87] In conventional law, however, his second statement has to be prevailed. The previous lines show that the concept of estoppel is not supposed to be applied to any two inconsistent statements rather the judge has to decide its application according to the nature of the suit which varies from case to case.

The application of estoppel has entirely a different mechanism and structure in *Ḥudūd* laws. Here the application of estoppel requires extra care from the judge, before and after execution. Generally, at both these levels, the *Rujū'* from *Shahādah* and *Iqrār* is acceptable. Unlike the cases, mentioned earlier, here the second statement has to be preferred legally, owing to the fact that *Ḥudūd* punishments are very hard in nature and, therefore, should be avoided to the last possible extent as per established principles of *Sharī'ah*.[88] Principally, it should fall under the territory of estoppel but here the statement given subsequently has value and affects the judgment in entirety.[89] Conventional law, contrary to this, does not differentiate the rule of estoppel in capital and normal punishments and, therefore, apply the concept in a general mode.

New Findings

As a matter of fact, it is presumed, in the contemporary legal environment, that conventional law is the sole source that brings out the

concept of estoppel. This presumption gets further strengthened when *Qānūn-i-Shahādat Order, 1984*, dedicates three major articles to it.[90] Moreover, some jurists of the conventional law have devoted their exhaustive work to the elaboration of various aspects of the concept. However, a close scrutiny reveals that the concept of estoppel, in such legal system, is used in procedural law rather substantive law.

Sharī'ah, on the other hand, indeed, offers a great deal of discussion over the matter of estoppel, making its application wider. Here, the concept (of estoppel) is applied both in substantive, as well as, in procedural law. Both headings can be further divided into subheadings. The following lines may clarify this fact further with minute details.

Estoppel, like in conventional law, has quite similar implications in Islamic procedural law. *Sharī'ah* brings the concept of estoppel; when one opts for a statement, believes on a specific narration; then contradicts the same through a subsequent statement.[91] For instance, a person files a plaint on a house, owned and possessed by someone, claiming that he has bought it from X and subsequently change his narration by claiming that the same is gifted to him. In this case, his second statement should not be accepted as there is clear *Tanāquḍ* between his two statements. In other words, the rule of estoppel has to be applied.[92]

The concept of estoppel can be found in two familiar concepts of Islamic procedural law i.e. *Rujū' 'anish-Shahādah* and *Rujū' 'anil Iqrār*. For instance, one admits of someone else right then he denies his admission, estoppel may be invoked, as, it has become the right of other party and, legally, he cannot tamper with other's right.[93] *Majallah* offers many other examples in this regard.[94] The passage shows that the rule of estoppel can be actively applied in both these concepts by the court of law adhering to the due care and other principles of Islamic law.

In Criminal law, more specifically in *Ḥudūd a* punishment fixed by *Shāri'* (Law Giver)) himself – if any sort of inconsistency is found in the statement of accused /witnesses, it shall fall into the precincts of doubts and, obviously, "الحـــدود تســـقط بالشـــبهات", thereby means: *'Ḥudūd* gets terminated by doubts'. This legal maxim is generic in nature and all seven kinds of *Ḥudūd* can be covered thereunder.[95] For instance, in case of *Ḥadd-i-Qadhf*[96], a person whose parent is attacked with abusive word, saying he is son of a prostitute, he, firstly, accepts that he is; but later on, he goes to court of law for the denial of the same. The rule of estoppel is not applicable here and, thus, his second narrative has no worth in the court.[97]

Similar to above, the estoppel is equally applicable to family affairs. For example, a person gives *Ṭalāq* (divorce), afterwards he says that he was joking, or, he does *Nikāḥ*, soon after, he makes a statement that he was joking the court, in this case, will apply the rule of estoppel. According to Imām Ibn-e-Nujaim, the second statement, here, has no worth and, hence, first *Ṭalāq* or *Nikāḥ* may be considered as true affirmation. Additionally, he cites a *Ḥadīth* for further confirmation of his stance which is; "ثَـلَاث جِـدُّهنّ جِـدّ وَهَـزلهنّ جـدّ، النّكـاح وَالطّـلاق وَالرّجعَـة" means thereby, "three things are there whose earnestness is earnestness and whose jocularity is earnestness, *Nikāḥ, Ṭalāq* and *Rujū'*. Thus, estoppel, according to *Sharī'ah*, can be applied by the court owing to the fact that family law is, principally, concerned with family matters which are very sensitive in nature. Every word, therefore, said in this regard should be taken care of.[98] This example shows amply that estoppel, according to Islamic law, is extended to substantive law too. The conventional law, on the other hand, actually circumscribes the premises of estoppel to Evidence.[99]

Limitations

The current study is very limited in terms of its scope as it, mainly, deals with the concept of estoppel, prevailing in conventional law and *Sharī'ah.* However, the concept is discussed more in the latter legal system compared to the previous one. Moreover, the concept of estoppel, though, exists in other legal systems of the world i.e. French Law, Roman Law, etc. Nevertheless, the present work does not accommodate such other legal systems' discussion regarding the concept of estoppel. Moreover, in case of *Sharī'ah*, the work of classical *fuqahā* is cited more compared to the work of contemporary Muslim jurists. This approach is intentionally adopted to keep reliability of sources.

Conclusion

Estoppel is one of the most important concepts, prevailing in the procedural law of common law, as well as, available in *Sharī'ah* with slight difference in term of structure and mechanism. The concept, of course, stops those who are playing with Judicature, giving inconsistent statements there in and, thus, wasting precious time of the courts. While doing so, they delay the dispensation of justice; which is a form of

injustice itself. Primarily, estoppel is a rule, exhaustively used in the conventional procedural law and, thus, it is considered (by some conventional law's expert) the sole source of estoppel. This assumption is correct if looked from the legal historical background of the term. However, this assumption may possibly be incorrect as *Sharī'ah*, from the very beginning, discusses the concepts similar to that of estoppel in various legal matters though indirectly. *Qur'ān* and *Ḥadīth*, for instance, offer clear instructions where the believers are strictly guided to avoid inconsistent statements – a phenomenon similar to that of estoppel though indirectly Moreover, the *Rujū' 'anil-Iqrār* and *Rujū' 'anish-Shahādah*, for instance, are the legal matters which are closely related to the concept of estoppel by one way or another. Both these concepts are minutely discussed by the classical Muslim *fuqahā* in their tremendous research endeavours. However, the concept of estoppel, in Islamic law, is not restricted to these two concepts rather it accommodates number of issue. Some of the modern-day Muslim jurists, for instance, compare retraction from *wa'd* with estoppel. According to the Holy *Qur'ān*, a believer has to fulfill his promise and should not retract from the same by any means. The Muslim jurists, however, have difference of opinion whether a promise can be enforced through the court of law or not. As per the legal stand of the Hanafī School, a promise cannot be enforced through the court of law by any stretch of explanation. The Mālikī School, contrary to this, opines that a promise can be enforced through the court of law, first and foremost, when it is made in a commercial transaction. Retraction from promise, at this very point, can be considered a similar concept to that of estoppel in common law. In addition, the 'Promissory Estoppel', prevailing in conventional law, can be the relevant concept here. The concept of *Ibrā* (exonerate), on the other hand, can also be cited as an example of estoppel in Islamic law. As per the principles of Islamic commercial law, an individual can waive his right unilaterally. Being a unilateral promise, he can easily retract from it after making it. The classical Muslim jurists have difference of opinion over this retraction; meaning thereby that some of them consider it actionable in the court of law while the others not.

On the same way, similar concepts, like that of estoppel, can be found in *Fiqh-ul-Mu'āmalāt al Māliyah* (Islamic commercial law) as previously discussed. For instance, a person files a plaint on a house, owned and possessed by someone, claiming that he has bought it from A and, subsequently, changes his narration by claiming that the same is

gifted to him. In this case, his second statement should not be accepted as there is clear *Tanāquḍ* between his two statements. This example, and likely many others, show that the concept similar to that of estoppel, in Islamic law, is not only used in the law of evidence rather it is used in many other legal issues which arise at procedural level. Conventional law, contrary to this, utilizes the concept, solely, in matters related to evidence and a witness. At this level, *Sharī'ah* accommodates rules (similar to that of estoppel) in a very wide way compared to conventional law. In addition, after a closer look one finds that conventional law has evolved the concept of estoppel for procedural law only; leaving no space for its application in the substantive law. *Sharī'ah*, on the other hand, uses the concept of estoppel both in substantive and procedural law. For instance, a person gives *Ṭalāq* (divorces), afterwards he says that he was joking, or, he does *Nikāḥ*, soon after, he makes a statement that he has joked the court, in this case, will apply the rule similar to that of estoppel. Imām Ibn-e-Nujaim, a renowned Muslim jurist, has the same opinion regarding the issue. Here, in this case, the nature of the case is substantive rather procedural. At this particular point, the difference between *Sharī'ah* and conventional law (in terms of estoppel) arises. Moreover, conventional law introduces the concept of estoppel to save time of the court and it has no concern with the moral character of litigants/witnesses. *Sharī'ah*, contrary to this, has multi-dimensional objectives from the concept (of estoppel) i.e. building of moral character, saving time of the court, immediate decision of the court, removing confusion from the judge's mind and etc. This fact, indeed, paves a way for the superiority of *Sharī'ah*, particularly, on conventional law and, generally, on other prevailing legal systems.

Notes and References

1. The Qur'ān, II:14 (The Original text of Holy Qur'ān flows as:
"وإذا لقوا الذين امنوا قالوا امنا وإذا خلوا إلى شطينهم قالوا إنا معكم إنما نحن مستهزءون"
2. The Qur'ān, LXVIII:04.
3. P.J Fitzgerald, *Salmond on Jurisprudence,* Manzûr Law Book House, 1966, p. 15.
4. Bryan A. Garner, *Black's Law Dictionary*, West Publishing Company U.S, 1990, p. 667
5. *Qanun-e-Shahadat Ordinance, 1984,* Article 114.

6. 'Grow stubborn in denial of truth' means: "They Increase in denial of truth", sticking to second statement, terminating the first which was just and true".
7. The Qur'ān, IV:137…The Verse of Holy Qur'ān flows as:
"إن الـذين امنـوا ثـم كفـروا ثـم امنـوا ثـم كفـروا ثـم ازدادوا كفـرا لـم يكـن الله ليغفـــــرلهم ولا ليهـــــديهم ســـــبيلا"
8. Mohammad Sanāullāh 'thamanī (Explanatory translation: Syed 'bdul Al-Daim Jalālī)*, Tafsīr-e-Mazhari,* Karachi, Shakīl Press, 1999, p. 202.
9. Imām Sarakhsī*; Al-Mabsût* and Usûl-e- *Sarakhs*;, Imām Kāsānī; *Badai'-ul-Ṣanai'*; Imām Zīlī; *Tabyīn-ul-Haqaiq*; Imām farāblasī; *Mu'īnul-Hukkām* and etc.
10. Elizabeth. Cooke The modern law of estoppel. Oxford, Oxford University Press, 2000.
11. Mumtaz, Mohsin. "Promissory Estoppel: Origin, Development and Applicability Against Governmental Actions." (2016), p. 1.
12. Herbert Broom, *Selection of Legal Maxims,* (Philadelphia, T. & J. W. Johnson & Co., 1874), pp. 168-169.
13. *Ibid.*
14. George Frederick Wharton, *Legal Maxims with Observations and Cases*, (New York, Baker Voohris & Co., Law Publishers, 1878).
15. Frederick Pollock, *The Expansion of the Common Law, (London, Chancery Lane Law publishers,* 1904), p. 108.
16. The classical *fuqahā* have discussed the concept of estoppel in their work with minute details. These jurists include Imām al-Shawkānī, Imām al-Kāsānc , Ibn Qudāmah al-Maqdisī , Abû al-Walīd Muhammad ibn Ahmad ibn Rushd, Imām Muhammad ibn Ahmad ibn Abī Sahal al Sarkhasī, Ibn Âbidīn and etc.
17. Imām Fākhr-ud-dîn Al-Rāzī, *Mafātīh*-ul-ghayb Tafsīr-ul-Kabīr*,* (Beirut, Dār Ihyā-ul-Turāth, 1999), 3rd Edition, vol. XXVI, p. 289.
18. See for example the work of … Imām abul wafā Alī bin aqīl bin Muhammad bin aqīl al-baghdādī al-Zafrī, *al-Wādih fî Usûlil-Fiqh,* (Beirut, Muassisatur-risālah Lil-tabā' a wal-Nashr wal-Tûzī, 1999), 1st Edition, vol. I, p. 166.
19. Imām Asad bin Muhammad bin al-Hussain al-Nīsābûrī al-karābīsī, *Al-Furûq,* (Kuwait, Wizārayul-Auwqāf wal-Shuûn al-Islāmiyya, 1981) 1st edition. vol. II, pp. 158-159.
20. See … 'li haider khwāja Amīn āfandī, *Durar-ul-Hukkām Sharh Majallatul Ahkām,* Beirut, Dār 'alamil Kutub, 2003, vol. IV. p. 7.
21. Al- Shaikh Ahmad bin Shaikh Mohammad al-Zarqā, *Sharhul Qawāid al-Fiqhiyya,* Damascus, Dārul qalam, 1989, 2nd Edition. p. 192
22. Imām Abû Bakar Muhammad ibn Abī Sahal Sarakhsī, *Al-Mabsût,* Beirut, Dārul-Ma'rifa, 1993, vol. XVI, p. 172.
23. Imām 'Alāud-dīn abû bakkar bin Mas'ûd al Kāsānî*, Badai'-ul-Ṣanai',* Beirut, Dārul kutub al-ilmiyya, 1986, 2nd Edition, vol. VI, p. 211.
24. Imām abû Muhammad Mahmûd bin ahmad bin Mûsâ bin Ahmad bin Hussain al-ghītābī al-'ainī, *al-banāya sharhul-hidāya*, Beirut, Dārul kutub al-ilmiyya, 2000, 1st Edition, vol. IX, p. 200
25. For example: A deposes before court that a property was subject to trust, next up he changes that it was not a trust rather ownership or agency agreement.
26. 'Ali Haider Khwāja Amīn Afandī, *Durar-ul-Hukkām Sharh Majallatul Ahkām,* vol. IV, p. 7.

27. Imām Abû Bakar Muhammad ibn Abi Sahal Sarakhsī, *Al-Mabsût,* vol. XVI, p. 172
28. Imām As'ad bin Muhammad bin al-Hussain al-Nīsābûrī al-karābīsī, *Al-Furûq,* 1st Edition, vol. II, pp. 158-159.
29. Imām Fākhr-ud-dîn Al-Rāzī, *Mafātīh-ul-ghayb Tafsīr-ul-Kabīr,* (Beirut, Dār Ihyā-ul-Turāth, 1999), 3rd Edition, vol. XXVI, p. 289.
30. Imām abul wafā Alī bin 'Aqīl bin Muhammad bin 'Aqīl al-Baghdādī al Zafrī, *al-Wādih fī Usûlil-Fiqh,* (Beirut, Muassisatur-risālah Lil-tabā'a wal-Nashr wal-Tûzī, 1999),1st Edition, vol. I, p. 166.
31. The original text flows as:
"(والقاضي لا يقضي بكلام متناقض): لأن الشاهد لما أكذب نفسه بالرجوع تناقض كلامه، والقضاء بالكلام المتناقض لا يجوز" see for further details… Imām abû Muhammad Mahmûd bin ahmad bin Mûsā bin Ahmad bin Hussain al-ghītābī al-ainī, *al-banāya sharhul-hidāya*, (Beirut, Dārul kutub al-ilmiyya, 1st Edition, vol. IX, p. 200.
32. He was son of renowned jurist Ibni-'Abidīn Shāmī. He wrote the *Takmila* (the completion) of *Rad-dul Muhtār,* his father's writing.
33. See for example: Bābul Makhārij, Kitāb ud Dawa, Kitāb ul Iqrār, Kitāb ul Sulh etc. … Imām Mohammad Amin bin 'Umar bin 'Abdul 'Aziz 'Abidin al-Hussaini, *Qurratu 'Ainil Akhyār Li Takmila Raddil 'Alā Durrul Mukhtār,* (Riaz, Dār 'Alamul Kutub, 2003) Special Edition.
34. The original text flows as:
"دَعْوَى الضَّيَاعِ وَالرَّدِّ؛ لِأَنَّ الْمُنَاقِضَ لَا قَوْلَ لَهُ؛ وَلِأَنَّهُ لَمَّا ادَّعَى دَعْوَتَيْنِ وَأَكْذَبَ نَفْسَهُ فِي كُلِّ وَاحِدَةٍ مِنْهُمَا فَقَدْ ذَهَبَتْ أَمَانَتُهُ، فَلَا يُقْبَلُ قَوْلُهُ"….see for further details Imām 'Alāud-dīn abû bakkar bin Mas'ûd al-Kāsānī*, Badai'-ul-'Sanai',* 1986), 2nd Edition, vol. VI, p. 211.
35. Edward coke/Thomas coventry Esq., *A commentary upon Littleton,* (London, Littlewood and Co., old Bailey, 1830), p. 352 …https://ia801405.us.archive.org/5/items/areadableeditio00cokegoog/areadableeditio00cokegoog.pdf (accessed on 08/02/2018).
36. An estoppel which does not come out of Record. A halt is put on a party by one's own conduct from getting the enforcement of right, operating to the detriment of another who justifiably relied on that conduct. . . .Fredrick Pollock, *The expansion of the common law,* p. 108.
37. Hersch Lauterpacht, *Private Law Analogies in International Law*, PhD LL.D Dissertation, University of London, 1926, p. 206.
38. Herbert Thorndike Tiffany was born in 1598. He was a known clergyman with influence to King Charles-I and his successor. The work, he did, presumed to be of worth in early 19th century.
39. Dedication is a concept like *Waqf* in which either real or a legal person brings out a property from his ownership and dedicates the same for the public interest.
40. Herbert Thorndike Tiffany, *The Law of real property and other interests in land,* (Chicago, Callaghan and company, 1920), vol. II, pp. 1880-1881.
41. *Ibid*, pp. 2117-2141.
42. Herbert Broom, *Selection of Legal Maxims,* p. 298.
43. See for further study… Kaijun PAN, A Re-Examination of Estoppel in International Jurisprudence, *Chinese journal of international law,* vol. XVI, issue. 4.

44. Hersch Lauterpacht, *Private law analogies in international law,* PhD/LL.D dissertation, University of London, 1926, p. 36… http://etheses.lse.ac.uk/664/ (accessed on: 11-2-2018).
45. Stephan Kinsella, Punishment and proportionality; the estoppel approach, *Journal of Libertarian studies,* vol. XII, Issue.1, 1996, p. 73.
46. Here the term 'promise' means 'social promise' and not 'legal promise'.
47. See for further details… Orit Gan, The Justice element of Promissory estoppel, *St. John's law review,* 2015*,* vol. LXXXIX, issue. 1.
48. Elizabeth. Cooke The modern law of estoppel. Oxford: Oxford University Press, 2000.
49. Mumtaz, Mohsin. "Promissory Estoppel: Origin, Development and Applicability Against Governmental Actions." (2016), p. 1.
50. The Law Dictionary, *Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. https://thelawdictionary.org/estoppel/*(acceseed 26th June, 2019).
51. *Qur'ān, vol.* II:14. The Original verse flows as:

"وإذا لقوا الذين امنوا قالوا امنا وإذا خلوا إلى شطينهم قالوا إنا معكم إنما نحن مستهزءون"

52. Herbert Broom, *Selection of Legal Maxims,* p. 187
53. The original text flows as:

وذلك أنه تركهم على ما هم عليه من التظهر بالإسلام في الدنيا، فعصم بهأ ، ... موالهم ودماءهم، وأخر عقوبتهم إلى الدار الآخرة، فجازاهم على خداعهم بالدرك الأسفل؛ أي: إن المنافقين يخادعون رسول الله، فيظهرون له الإيمان ليدفعوا عنهم أحكام الإسلام الدنيوية من قتلهم، ويبطنون الكفر،.... وسمي المنافق منافقًا أخذًا من نافقاء اليربوع، وهو جحره، فإنه يجعل له بابين يدخل من أحدهما، ويخرج من الآخر، فكذلك المنافق يدخل مع المؤمنين بقوله: أنا مؤمن، ويدخل مع الكفار بقوله: أنا كافر، Mohammad al-Amin bin Abdullah al-Armī al-'ilwī al-Hirarī al-Shafi'I, *Tafsīr Hadāiq-ur-Rûh wa-Raihān Fī Rawābi 'lūm-ul- Qur'ān,* (Beirut, Dār Tūq-un-Nijāt, 2001), 1st Edition, vol. VI, p. 424.

54. The Qur'ān*,* vol. LXIII:1-3.
55. T.Leigh Anenson, "From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law" *Lewis and Clark Law Review,* vol. XI:3, p. 634.
56. The Qur'ān*,* vol. XVI:105 Original text flows as:

"إنما يفترى الكذب الذين لا يؤمنون بالت الله، وأولئك هم الكذبون"

57. The examples of other verses are…III:61, XCVI:15, LIX:11-12, V:41-42, II:10, IX:77, VI:93, XL:28, XXIX:3 and etc.
58. Ahmad bin Sho'aib abu- 'bdur-Rahman al-Nasāi, *Sunan Nasāi al Kubrā,* (Beirut, Dārul Kutub al-'ilmiyya, 1991), *Hadīth* no. 11752, Bāb: 'alāmatul Munāfiq, 1st Edition. "Follow the truthfulness, because it leads to virtues, which takes to the paradise. A man tells what truth is and remains steadfast on telling truth (despite any hardship) and finally his name is written with *Siddīq* (truthful person). Abstain from lies since it leads to *Fujûr* (wickedness) which takes to the fire. A man lies and constantly lies until his name is written with *Kadhdhāb* (liars)…Mohammad bin 'īsā Saura bin Mûsā bin Dahhāk al Tirmizi, *Al-Jāmi 'ul Kabīr Sunan al-Tirmizi,* (Beirut, *Dārul* gharb al-Islāmi, 1998), Hadīth no. 1971, Chapter. What has been related about Truthfulness and Falsehood)… The original text can be cited as:

عَلَيْكُمْ بِالصِّدْقِ فَإِنَّ الصِّدْقَ يَهْدِي إِلَى البِرِّ، وَإِنَّ البِرَّ يَهْدِي إِلَى الجَنَّةِ، وَمَا يَزَالُ الرَّجُلُ يَصْدُقُ وَيَتَحَرَّى الصِّدْقَ حَتَّى يُكْتَبَ عِنْدَ اللهِ صِدِّيقًا، وَإِيَّاكُمْ وَالكَذِبَ فَإِنَّ الكَذِبَ يَهْدِي إِلَى الفُجُورِ، وَإِنَّ الفُجُورَ يَهْدِي إِلَى النَّارِ، وَمَا يَزَالُ العَبْدُ يَكْذِبُ وَيَتَحَرَّى الكَذِبَ حَتَّى يُكْتَبَ عِنْدَ اللهِ كَذَّابًا"

59. Other *Hadīths* are *: Bukhārī* 110, 1973*; Muslim* 3, 5, 106, 532*; Tirmizi* 235,1971*; Abu-Đāwûd:* 4990.
60. Henry Morrison Herman, *Commentaries on the law of Estoppel and Res-Judicata*, (New York, Mills Building, 1886), 2nd Edition, p. 9.
61. The Qur'ān, vol. XVII:24
62. The Qur'ān, vol. XVI:92.
63. Siti Salwani Razali, *The Concept of WA'AD in Islamic Financial Contract*, http// www.kantakji.com/fiqh/Files/Finance/N418.pdf, (accessed 20th April, 2012).
64. M. F. Abdul Khir, "Ibra' and its application in Islamic finance." *Fatwa in Islamic Finance. Bloomberg-ISRA Monthly Publication* (2013), p. 2.
65. Sadr-ud-din Ali bin Ali al-Hanfi, *al-Tanbeeh 'alā Mushkilāt al Hidāyah,* (Saudi Arabia, Maktaba al-Rushd Nāshirûn, 2003), 1st Edition, vol. IV, p. 533.
66. Abdullah bin Ahmad bin Mohammad (Ibn-e-Qudama al-Maqdisi), *al Kāfī,* (Beirut, Dārul Kutub al-Ilmiyya, 1994), 1st Edition, vol. IV, p. 309.
67. Kira A. Davis, Judicial Estoppel and Inconsistent Positions of Law applied to Fact and Pure Law, *Cornell law Review,* 2003, vol. LXXXIX, Issue. 1, p. 209.
68. *Ibid.*
69. The territorial Jurisdiction for each court remained a center of focus throughout Islamic Judicial history, predominantly, in the days of second caliph Omar (R.A.). He separated the Judicature from Executive through a popular letter, during his Caliphate some 1385 years ago, addressed to Abû- Mûsa al-Asharī (RA)…See for further details Wahba al-Zuhailī, *Fiqhul Islamī wa Adillatuhû,* (Damascus, Dārul Fikr lil-Tabā'a wal-Tauzī wal-Nashr), 2nd Edition, vol. VI, pp.1-740.
70. The original text is as under:
"فَالَّذِي شَرَطَ كَوْنَهُمَا فِي مَجْلِسِهِ يَعُمُّ الْحَقِيقِيَّ وَالْحُكْمِيَّ فِي السَّابِقِ وَاللَّاحِقِ"…Ibn Abidin, Mohammad Amin bin-e-Umar bin Abdul Aziz Abidin, *Raddul Muhtār 'alā Durril Mukhtâr, (Beirut, Dārul Fikr, 1992),* 2nd Edition, vol. V, p. 198.
71. *Qanun-e-Shahadat Ordinanace, 1984,* Article 114. The word Suit and Proceeding has been used thereby which manifestly indicates the competence of Jurisdiction in both Civil and Criminal matters.
72. Fiduciary has not been defined in *Qanun-e-Shahadat Ordinanace, 1984.* The definition can be found in the Black's Law dictionary which is," A person or Institution who manages money or property for another with the ample responsibility of due care, having imposition of law. Trustee is the best illustration who has money with liability of it, if any breach or embezzlement is found on his behalf or behest."… Henry Campbell Black, *Black's Law Dictionary,* (St. Paul Minn., West Publishing Company, 1979), 5th Edition, p. 563.
73. The original text flows as:
وَعَلَى هَذَا (التَّوْكِيلُ) لُغَةً تَفْوِيضُ الْأَمْرِ إلَى الْغَيْرِ وَشَرْعًا (تَفْوِيضُ التَّصَرُّفِ) فِي أَمْرِهِ (إلَى غَيْرِهِ) وَإِقَامَتِهِ مُقَامَهُ, For further details please see …Muhamad bin faramarz bin 'ali alshahir bamala - aw manlaan 'aw almawlaa – khasru, *Durar*

alhukkām sharh gharar al-ahkām, (Halb, dār-ull-Ihyā alkutub al-'arabiah), vol. II, p. 282.

74. 'Ali Haydar khawajah Amin Afandi, *Durar alhukkām fī sharh Majalah al-ahkām,* (Beirut, Dārul-Jayl, 1991), 1st Edition, vol. III, p. 493. For example, in another book, Imām Shāfi'ī says that agency agreement cannot be conditioned on some future happening. For instance, "You are my agent to sell a slave for a condition when the end of the month approaches" Imām Abû Hanīfa and Ahmad believe such contract is all right...See for further details Mohammed bin Abdullah bin Abi Bakr al Hathithi, al-Sardafi al-Rimi, Jamal al-Din, *Alma'āni albadī 'ah fī ma'rifat ikhtilāf Ahl-e- al-shar'īah,* (Beirut, dār-ul kutub al-'ilmiah, 1999), 1st Edition, vol. II, p. 16.

75. The original text of *Mausû'atul Fiqhtul Kuwaitiyya* flows as under:
ًاَنْ يَكُونَ الأَمْرَانِ الْمُتَنَاقِضَانِ صَادِرَيْنِ عَنْ شَخْصٍ وَاحِدٍ ، وَهُوَ الْمُدَّعِي ، أَوْ عَنْ شَخْصَيْنِ . هُمَا فِي حُكْمِ الشَّخْصِ الْوَاحِدِ ، كَمَا هُوَ الْحَال فِي الْوَكِيل وَالْمُوَكِّل ، وَالْوَارِثِ وَالْمُوَرِّثِ فَلَوْ أَنَّ الْوَكِيل ادَّعَى عَيْنًا لِمُوَكِّلِهِ ، وَكَانَ هَذَا الْمُوَكِّل قَدْ سَبَقَ مِنْهُ إِقْرَارٌ بِأَنَّ تِلْكَ الْعَيْنَ لَيْسَتْ لَهُ ، وَإِنَّمَا هِيَ لِغَيْرِهِ ، لَمْ تُقْبَل دَعْوَى الْوَكِيل لِمُنَاقَضَتِهَا لإِقْرَارِ الْمُوَكِّل...

76. Nafeer A. Malik, *The Qanun-e-Shahadat Order, 1984,* (Lahore, Four star Publishers, 2015), p. 1021.

77. Ministry of Awqaaf and Islamic affairs (State of Kuwait), *Mausû'atul Fiqhiyyatul Kuwaitiyya,* (Kuwait, Dārul Salāsil, 1984-2006), 2nd Edition, vol. XIV, p. 43.

78. *Ibid*

79. According to the *Hanbali* school of thought, the second statement is not acceptable even with oath. (*Mausû'atul Fiqhtul Kuwaitiyya, Bab Mā yartafi'u Bihi al-Tanāqud,* vol. XX, p. 291.

80. Mohammad bin Ibrahim bin Abdullah al-toujiri, *Mausû'atul Fiqhtul Islamiyya,* (Riyadh, Baitul Afkār al-Duwaliyya, 2009), 1st Edition, vol. V, p. 246.

81. The original text goes as:
"... (فَإِنْرَجَعَاقَبْلَحُكْمٍلَمْيَقْضِبِهَا)؛لأَنَّكَلَامَهُمَامُتَنَاقِضٌ ..." …see for further details Usman bin Ali bin Mahjan Fakhr'ud-Din al-Zail'ī, *Tabyīn ul Haqāiq Sharh Kanzul Daqāiq,* (Cairo, Al-Matb'a al-kubrā al-amīriyya, 1895), 1st Edition, vol. IV, p. 243

82. Herbert Broom, *Selection of Legal Maxims,* p. 343.

83. Mohammad Amīn bin *'*Amar 'Abdul 'Azīz 'Âbidīn al-Dimashqi, *Raddul-Muhtār 'Alā Durrul Mukhtār,* (Beirut,dār-ul fikar, 2nd Edition 1992), vol. V. p. 544.

84. Henry Morrison Herman, Commentaries on the law of Estoppel and Res-Judicata, New York, Mills Building, 1886, 2nd Edition, pp. 13-14.

85. Ministry of Awqaaf and Islamic affairs (State of Kuwait), *Mausû'atul Fiqhiyyatul Kuwaitiyya,* (Kuwait, Dârul Salāsil, 1984-2006), 2nd Edition, vol. XIV, p. 43.

86. Usman bin Ali bin Mahjan Fakhr'ud-Din al-Zail'ī, *Tabyīn ul Haqāiq Sharh Kanzul Daqāiq,* (Cairo, Al-Matba'a al-kubrā al-amīriyya, 1895), 1st Edition, vol. IV, p. 243.

87. The original text flows as:
...والفرق بينهما أنه إذا ادعى أولا لنفسه ثم ادعى أنه لغيره وكله بالخصوص فيه أمكن الجمع بين الدعويين من غير تناقض لأنه يقدر على نقل ملك نفسه إلى غيره فصدق فيه وجعل في حقه كأنه نقل إليه، وليس كذلك إذا ادعى أولا لغيره لأنه أقر

بـــأن الملـــك لـــه ولا يقـــدر علـــى أن ينقـــل ملكـــه إلـــى نفســـه فـــإذا لـــم يـــدع انتقالـــه مـــن جهتـــه إليـــه ولـــم يقـــدر علـــى نقلـــه إليـــه صـــار بـــإقراره الأول مكـــذبا لـــه شـــرعا فـــي دعـــوى "...الثـــاني فـــلا يصـــدق. As'ad bin Mohammad bin Hossain al-Nisaburi al-Karabisi, *Al-Furûq,* (Kuwait, Ministry of Awqaaf and Islamic affairs, 1982), 1st Edition, vol. II, p. 172.

88. See for further details of the issue As'ad bin Mohammad bin al Hussain al-Nisābûri al Karābisi, *Al-Fûrûq,* (Kuwait, Wizāratul Auwqāf wal- Shu'oûnul Islāmiyyah, 1st 1981), vol. II, p. 171.
89. The Original text of Hadīth-cum- Islamic Legal maxim is as under: "الحـــدود تســـقط بالشـــبهات"... Abdur-Rahman bin Saleh al-Abdul-Latif, *Al-Qawā'ed wal-Đawābiþ al-Fiqhiyya al-Mutdammina Lil-Taisir,* (Saudi Arabia, 'imadatatul-Bahsul'ilmi bil-Jāmi'ah Islāmiyya, 2003), 1st Edition, vol. II, p. 672.
90. Usman bin Ali bin Mahjan Fakhr'ud-Din al-Zailī, *Tabyīn ul Haqāiq Sharh Kanzul Daqāiq,* (Cairo, Al-Matba'a al-kubrā al-amīriyya, 1895), 1st Edition, vol. IV, p. 243.
91. Article 114: When one person has, by his declaration, act or omission, intentionally caused or permitted another persons to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. Article 115 deals with estoppel of immovable property whereas the following article discusses the matter relating Movable Property. See: Article 114, 115 and 116 *Qanoon-e-Shahadat Order, 1984.*
92. Henry Morrison Herman, Commentaries on the law of Estoppel and Res-Judicata, 2nd Edition, p. 6.
93. The original text flows as: رجـل فـي يديـه دار جـاء رجـل وادعـى أنهـا داره اشـتراها مـن فـلان، وجـاء بشـاهدين شـهدا أن فلانـاً ذلـك وهبهـا وقبضـها منـه وهـو يملكهـا، فالقاضـي لا يقبـل هـذه الشـهادة، لأنهـا خالفـت الـدعوى صـورة ومعـنى ... Burhan-ud-din bin Mahmood bin Ahmad bin Abdul-Aziz bin Umar, *Al-Muhīþ-ul-Burhāni,* (Beirut, Dārul-Kutub al-'ilmiyyah, 2004), 1st Edition, vol. VIII, p. 493,
94. Original text is: ومـــن أقـــر بحـــق لآدمـــي، أو حـــق لله تعـــالى، لا تســـقطه الشـــبهة، كالزكـــاة، والكفـــارة، ثـــم رجـــع عـــن إقـــراره لـــم يقبـــل رجوعـــه؛ لأنـــه حـــق ثبـــت لغـــيرهَ... See for further details… Abdullah bin Ahmad bin Mohammad bin Qudama al-Hanbali, *Al-Kāfi,* (Beirut, Dārul-Kutub al-'ilmiyyah, 1994), 1st Edition, vol. IV, p. 309.
95. Original text can be cited as: لَـوْ أَقَـرَّ أَحَـدٌ بِمَجْهُـولٍ ثُـمَّ بَعْـدَ إقْـرَارِهِ بَيَّـنَ وَفَسَّـرَ ذَلِـكَ الْمَجْهُـولَ بِشَـيْءٍ لَا قِيمَـةَ لَـهُ فَيَكُـونُ ذَلِـكَ بِمَعْنَـى الـرُّجُوعِ عَـنْ الْإِقْـرَارِ، وَلَا يُقْبَـلُ ذَلِـكَ التَّفْسِـيرُ، وَيُجْبَـرُ عَلَـى التَّفْسِـيرِ بِشَـيْءٍ ذِي قِيمَـةٍ... See for further details…Ali Haider Khwaja Amin Afandi, *Durar-ul-Hukkām fi sharh Majallatil Ahkām,* 1st Edition, vol. IV, p. 120.
96. Abdur-Rahman bin Saleh al-Abdul-Latif, *Al-Qawā'ed wal-Đawābiþ al-Fiqhiyya al-Mut'ammina Lil-Taisir,* (Saudi Arabia, 'imadatatul-Bahsul 'ilmi bil-Jāmi'ah Islāmiyya, 2003), 1st Edition, vol. II, p. 672.
97. *Qadhf* means a person blames and attacks another with intolerable offensive words which harms him in his reputation, for example, A calls B "son of prostitute", now B has a cause of action to make him take back his words or

prove that he really is so. In case, he could not satisfy the court, there shall be *Hadd-e-Qadhf* on him.

98. Mohammad bin Ahmad bin abi-Sahl al-Sarakhsi, *al-Mabsûþ,* Beirut, Dārul Ma'rifa, 1993, vol. IV, p. 124.

99. Original text flows as:
وَلَـمْ يَشْـتَرِطْ أَنْ يَكُـونَ جَـادًّا فَيَقَـعُ طَـلَاقُ الْهَـازِلِ بِـهِ، وَاللَّاعِـبِ لِلْحَـدِيثِ الْمَعْـرُوفِ «ثَـلَاثٌ جِـدُّهُنَّ جِـدٌّ وَهَـزْلُهُنَّ جِـدٌّ النِّكَـاحُ، وَالطَّـلَاقُ، وَالْعَتَـاقُ»... It has been said in original text that for *Ţalāq* it is not important that a person is really willing to do so, rather, a person gives *Ţalāq* and he is not serious still it occurs. Thus it can be deduced that a person gives *Ţalāq* than after he states that he was mocking. His second statement is nothing but useless… Zain-ud-Din bin Ibrahim bin Mohammad alias Ibn Nujaim, *Al Baḥr-ur-Rāiq,* (Dārul Kutub al-Islami, no date available), 2nd Edition, vol. III, p. 263.

100. John Cartwright, Protecting Legitimate Expectations and Estoppel in English Law, *Report to XVIIth International Congress of Comparative Law,* July 2006, P. IV.