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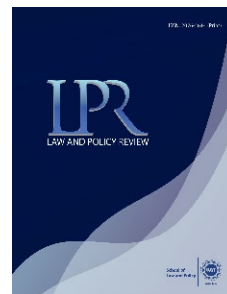
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Theory of Reverse Discrimination and its Operationalization in the Legal System of Pakistan

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Abstract

This research paper aims to exhaustively explore and elaborate the doctrine of reverse discrimination in the context of the legal system of Pakistan. It begins by examining the historical background of the concept through the contours of American jurisprudence that defined it whilst also exploring the dimensions of various English traditions of ethical philosophy that served as the conceptual cornerstone of the theory of reverse discrimination. This paper deploys comparative and doctrinal research methodologies to critically examine the implication of reverse discrimination in the legal strata of Pakistan. Following such definitional examination, it proceeds to analyze the position of this concept in the former and current constitutional frameworks of Pakistan. It argues that reverse discrimination is a viable solution to curb structural discrimination and inequality existing in the society, with reference to judgments tendered by the Supreme Court of Pakistan. Furthermore, this paper assesses penal statutes namely the Juvenile Justice System Act 2018 and Protection against Harassment of Women at the Workplace Act 2010 enacted pursuant to the goal of operationalizing the theory of reverse discrimination in the legal framework of Pakistan and in doing so shall examine the policy and statutory praxis of the doctrine in Pakistan. Lastly, it discusses the implications and consequences of deployment of reverse discrimination doctrine and affirmative action-based policy.

Keywords: affirmative action, public policy, reverse discrimination, quota system

Introduction

In its simplest form, discrimination refers to the unequal and inequitable treatment of individuals as a consequence of singling out individuals for less favorable treatment because of certain traits, such as their race, age, gender, or religion (Moreau, [2010](#)). Discrimination can take many forms,

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including exclusion, prejudice, and bias, and can have a significant impact on marginalised communities. One legal principle that serves as a bastion against such destructive practices is the right of equality and equal treatment of subjects before the law (Rakshita, [2020](#)). Recognized as an integral part of any legal system, the concept of equal treatment is also ingrained as an essential component of Dicey's interpretation rule of law that holds all men to be equal in the eyes of law (Chowdhury & Ghosh, [2011](#)). However, in spite of the universal application and acceptance of this basic doctrine, in certain circumstances the danger of discrimination and consequent marginalisation demand affirmative action by the law to intervene in order to neutralize the prospects of discrimination (Rakshita, [2020](#)).

This approach is rooted in the theory of reverse discrimination that is an exception to the general rule of equal treatment and entails adequate measures to be taken in the favor of minority class (Temirbekov, [2021](#)). While there is no concrete universally accepted definition of this concept, as it has evolved mainly through judicial precedents, it can be described 'as a species of compensatory justice that requires the compensation of an entire class or classes of persons by society as a whole (Blackstone, [1975](#)).

The concept of intervening action to prevent discrimination is not a contemporary development, rather this concept was revitalized at the advent of the 20th century when it received formal recognition by Western legal and philosophical schools of thought. Explored firstly by English philosophers, the theory received widespread attention and consideration in the midst of political movements centered on political values enshrining liberty, equality and an end to marginalisation of minority groups (Wexler & Irvine, [2006](#)). These developments were accompanied by the emerging public awareness of the importance of human rights and the necessity of intervening action by state structures to root out societal biases and ensure the provision of the same degree of rights to all members of the society (Kumm, [2010](#)).

The theory of utilitarianism as envisaged by Jeremy Bentham entailed a utility-oriented approach to legislation and extrapolated the theory of reverse discrimination as a continuation of this legislative approach (Kumm, [2010](#)). In the parameters of utility-based laws, the theory of reverse discrimination was viewed as an effective method of promoting inclusiveness of minorities within the greater society to reinforce social integrity and hence promote the greater good, which was a central theme in

Bentham's political discourse. In essence Bentham's utilitarianism demanded that when the general equality-based law regime fails to provide for the citizens and subjects in minority, then a utility-based law regime of reverse discrimination has to be applied for curing this defect. (Ferraro, [2010](#)).

This philosophical concept was soon adopted by the American judiciary as it was seen as an effective remedy against the extensive discrimination rooted in American culture. In the case of *Sweatt v. Painter* ([1945](#)), the American Supreme Court formally introduced the theory of reverse discrimination into American jurisprudence as a bastion for safeguarding the rights of the colored community. In this case, a black man named Sweatt was rejected admission to the University of Texas Law School due to the strict segregation laws of the state that prevented blacks from gaining admission to institutions of higher learning. The Supreme Court ruled the laws to be a blatant violation of the appellants rights as the Fourteenth Constitutional Amendment grants equal protection and enjoyment of laws to all citizens.

In another similar case, *Defunis v. Odegaard* ([1974](#)), a Jew named Defunis was denied admission to the Washington Law School despite having perfect grades and meeting the eligibility criteria. However, there was no evidence to prove that this was a case of racial bias as to trigger the vires of equal protection clause under Fourteenth Amendment to the United States Constitution. A jurisprudential debate evolved after this case over the circumstances that merited the application of equal treatment and those which did not merit any such intervention in order to balance the operation of equal protection clauses and the general principle of equality. Therefore, it is required to strike a fine balance between the principle of equality and the utility of reverse discrimination. For instance, in Pakistan juvenile offenders should not be treated on equal footing as an adult offender and therefore, through application of reverse discrimination under Article 25(3) of the Constitution, Juvenile Justice System Act 2018, provides separate punishments for such offences which are exclusively applicable on juveniles only.

These jurisprudential developments invited the attention of renowned American jurists such as Ronal Dworkin. Dworkin ([1977](#)) deemed the application of reverse discrimination theory as an effective remedy for ensuring the equal treatment of all sections of society that were previously

deprived of such rights despite the presence of equal treatment clauses. Dworkin's approach was grounded in and highly influenced by Bentham's utilitarian philosophy of legislation that advocated for laws that could promote maximum happiness for the maximum number of people. Dworkin believed that reverse discrimination theory could empower the minorities and other communities that were in weaker positions in comparison to the general majority within well-established social systems. This paper shall explore the application of reverse discrimination and affirmative action in various legal systems, along with the evolution of these concepts and their incorporation in the legal system of Pakistan.

Literature Review

Moreau (2010) discusses that the concept of reverse discrimination is to achieve distributive justice and to empower the underprivileged groups in the society. For instance, certain actions of the majority might hurt the sentiments of the minority groups or might hamper their participation and equal treatment in the system. This defect can be rectified by prohibiting certain actions or policies which are disadvantageous to those minority groups through the effective implementation of reverse discrimination or through the application of affirmative-action based policies. Lastly, Moreau (2010) has reiterated that the purpose of all laws is to ensure that equal treatment is given to every section of the society irrespective of their caste, gender, race, creed, or disability and to promote their participation in all domains of public life such as health, education, housing and employment etc.

Reviglio (2015) emphasizes that affirmative action policies are required to enhance the conditions of impoverished groups in society by providing them with increased opportunities. Affirmative action policies are used in societies where structural inequalities exist among different classes of people, leading to discrimination against certain sections of the society. Although, in a democratic society, implementation of policies exclusively benefiting a minority group is not positively received. It then becomes a prime example of reverse discrimination in favor of the minorities as against the majority. However, in view of Reviglio (2015) affirmative action is an effective tool to curb the existing discrimination against the minorities and providing them with policy-based opportunities for fostering equal treatment and an inclusive approach.

Saleh (2017) suggests the government should reassess its current policy regarding induction of civil servants since the quality of civil service depends on merit-based induction and proper training. The quotas should be redefined in order to create a balance between the merit-based and quota-based induction. The provincial-quota based system is causing more harm than good and should be replaced by another quota-based system based on other classifying factors. Lastly, Saleh (2017) stresses that quota-based induction should not in any manner overpower the merit-based induction and the rule of meritocracy, otherwise it will severely affect the working and performance of civil services of Pakistan.

Research Methodology and Operational Framework

This paper attempts to investigate the impact of reverse discrimination in the legal system of Pakistan. To address this research question comprehensively, and to deliver a detailed examination over the subject-matter, the doctrinal as well as comparative method of research has been employed (Pattaro, 2006). The doctrinal method includes the interpretation of judicial precedents, statutory instruments and other sources of law available. Furthermore, the comparative method involves comparative analysis of relevant literature and data concerning the subject matter. Therefore, the legal enactments of various states and the judicial precedents of different courts will be relied upon to substantiate any claims made in response to the research query.

Modern Day Application of Theory of Reverse Discrimination Through Affirmative Action

Affirmative action, also known as positive discrimination, is a derivative and operative form of theory of reverse discrimination. It is important to note that every case of positive discrimination is not a case of reverse discrimination. Persons in whose favor affirmative action has been made are said to be positively discriminated, while the majority against whom such preferential treatment is provided, is subject to reverse discrimination. While the concept of reverse discrimination is rooted in legal jurisprudence, affirmative action is classified as a policy initiative falling in the domain of executive and legislative authority (Galchus, 1981). Affirmative action has been formally defined from an implementational perspective as a set of specific and result-oriented procedures which are applied in good-faith for the benefit of a particular community or persons,

with the aim of achieving equal employment opportunities. However, an acceptable affirmative action programme must include analysis of the areas where the marginalised community is facing unequal, biased and prejudiced treatment and is deficient in the enjoyment of rights given to minority groups. Therefore, the aim of affirmative action is to achieve prompt and full utilization of minorities and women engagement in the social strata, to eliminate all sorts of biases and discrimination against them, at all levels and in all segments of its work force where deficiencies exist (Crosby et al., [2006](#)). Introduced primarily in United States of America, the term affirmative action was popularized after the enactment of Title VII of the Civil Rights Act of 1964 that aimed to provide equal employment opportunities to women, blacks and all other minority communities which were historically subjected to unequal treatment. Section 703(a) and 703(d) of Title VII made the act of discrimination against the blacks or other minorities an actionable offence with the result that if an employer discriminates amongst his employees, he could be charged under Section 703 (a) and 703(d) of Title VII (Desai, [2022](#)).

The Constitutional Placement of Theory of Reverse Discrimination in Pakistan

Pakistan is one of the few countries in the world that has incorporated the doctrine of reverse discrimination in its constitutional framework. While the concept of equality was enshrined in all constitutional frameworks adopted in Pakistan by successive regimes, the theory of reverse discrimination was only formally made part of the framework of constitutionally guaranteed fundamental rights in 1973. The concept of equality is a general rule and it was adopted in all constitutions of Pakistan. However, the concept of reverse discrimination is an exception to this general rule, and was adopted under Article 25 sub clause (3) of the 1973 Constitution of the Islamic Republic of Pakistan.

The theory of reverse discrimination was not explicitly articulated in the 1956 Constitution, yet its manifestations were discernible. It can be asserted that the developmental phase of doctrines safeguarding human rights and the protection of minority classes commenced with the 1956 Constitution of the Islamic Republic of Pakistan. Articles 27 to 30 establish the fundamental principles concerning equal protection and treatment for all categories of individuals. However, a crucial aspect to consider is that the framers of this constitution opted for a policy-based framework to address

issues related to the enforcement of minority rights, in contrast to the enabling legislation-based framework observed under Article 25(3) and 26(2) of the 1973 Constitution of the Islamic Republic of Pakistan.

The 1962 Constitution emerged as a product of a dictatorial regime and political upheaval, leading to a lack of positive expectations from its provisions. The notion of reverse discrimination experienced a pronounced decline, and even the affirmative measures present in the 1956 Constitution were retracted. The fundamental rights of the general populace were constrained, not to mention the curtailment of minority rights. The doctrine of reverse discrimination was firmly entrenched in the Constitution 1973. Article 25 sub clause (1) provides for the general rule of equality of citizens which states *“all citizens are equal before law and are entitled to equal protection of law. There shall be no discrimination on the basis of sex”*. Sub clause (3) of Article 25 states that *“Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.”* As per this clause, the state is empowered to make special laws for the protection of women and children. The concept of reverse discrimination enshrined under Article 25(3) is in direct contrast with the equality principle under Article 25(1). Therefore, sub clause (3) acts as an exception to the general rule of equal treatment before the law. Various statutes have been enacted pursuant to the operationalization of the theory of reverse discrimination which include, the Juvenile Justice System Act 2018 and the Protection against Harassment of Women at the Workplace (Amendment) Act, 2022.

In the case of *Mst. Attiyya Bibi Khan (Mst. Attiyya Bibi Khan others v. Federation of Pakistan, 2001)*, Justice Rana Bhagwan Das emphasized the constitutional provisions of Article 25, which guarantee equality and equal legal protection for all citizens and explicitly prohibiting sex-based discrimination. These provisions also permit the State to enact specific measures to safeguard the rights concerning children as well as women. Furthermore, Article 22 explicitly prohibits prejudice in educational institutions that receive public funding based on specific criteria. However, it also empowers public authorities to establish measures for the progress of socially or academically disadvantaged groups. Justice Das emphasized that Articles 22 as well as 25 provide for the implementation of specific measures to support women, children, and other economically or academically disadvantaged groups. This demonstrates the constitutional

dedication to rectifying past imbalances and fostering fairness and social equality.

Article 27(2) of the Constitution is another instance where reverse discrimination has been permitted. It states that “nothing in clause 1 shall prevent any Provincial Government, or any local or other authority in a Province, from prescribing, in relation to any post or class of service under the Government or authority, conditions as to residence in the province, for a period not exceeding three years, prior to appointment under that Government or Authority.” In the case of *Naseem Firdous v. Punjab Small Industries Corporation* (1995), the Supreme Court held that the second proviso to Article 27 of the Constitution of Pakistan established an exception to the general principle of equality, stipulating that certain specified positions or services, in the interest of the State, may be reserved for members of either sex. This exception is permissible if the nature of the duties and functions associated with such posts or services makes it impractical for members of the opposite sex to adequately perform them. The court highlighted that this provision establishes a deviation from the constitutional requirement that enforces the norm of treating similar cases in a similar manner. Put simply, it acknowledges that in some cases, the characteristics of certain positions may require gender-based differentiations in order to guarantee the efficient and appropriate execution of responsibilities. This legal interpretation permits a subtle and sophisticated approach to equality, considering the practical necessities of specific roles while maintaining the overarching constitutional ideal of treating like circumstances in a similar manner.

In the case of *Abdul Fareed v. N.E.D. University of Engineering and Technology* (2001), the Sindh High Court's Division Bench concluded that Article 37(c) should be construed in conjunction with Article 25, specifically regarding admissions to Professional Colleges. The court underscored that when interpreting Article 25 in conjunction with Articles 2A, 22, as well as 37(c) underlying the Constitution, the sole categorization considered rational is one that is consistent with the goals of the Constitution. These objectives include making higher education available based on merit and simultaneously accommodating the interests of socially or economically disadvantaged sections of the population. The court asserted that such a classification is essential for fostering genuine equality rather than nominal equality in the pursuit of the constitutional goals.

The existence of the doctrine of reverse discrimination under Article 25(3) was recently propounded once again by the Supreme Court of Pakistan in the case of *Khawar Kayani v. The State* (2022). In this case, the appellant being a juvenile accused was detained for more than six months pending the completion of his trial. The Court noted that the accused was not involved in causing the delay/incompletion of the trial and thus the trial court had failed to adhere to Section 6(5) of the Juvenile Justice System Act, 2018. The Supreme Court held that the Juvenile Justice System was a legal regime enacted for the protection of children and that article 25(3) empowered the state to make special provisions for the protection of children even if such protection discriminates against the adults (reverse discrimination). While emphasizing the importance of Article 35 that places a duty of state to protect rights of children, the Supreme Court also defined the doctrine of reverse discrimination as “a term for discrimination against members of a dominant or majority group, in favor of members of a minority or historically disadvantaged group, etc.” The Court concluded that the trial court had committed a patent error of law by failing to admit the benefit of Section 6(5) of the Juvenile Justice System Act, 2018. Following its former precedents, in the case of *Uzma Naveed Chaudhary & others v. Federation of Pakistan* (2019) the Supreme Court observed that as per the Amending Act of 2022 the definition of “harassment” had been diversified as to include “discrimination on the basis of gender, which may or may not be sexual in nature, but which may embody a discriminatory and prejudicial mindset or notion, resulting in discriminatory behavior on basis of gender against the complainant.”

In addition to ensuring the application of Article 25(3) in its true spirit, the Supreme Court was mindful of operationalizing the theory of reverse discrimination as enshrined in the constitution while balancing it against the parameters of intelligible differentia and reasonable classification. This has been a necessary judicial initiative because reasonable classification is a pertinent principle that is rooted in the language of Article 25. While Article 25(1) establishes the overarching idea of equal protection and equal treatment before the law, the doctrine of reasonable classification introduces the notion that subjects can be reasonably categorized into different classes, and within those classes, equal treatment can be ensured. In essence, it distinguishes between universal equal treatment and the admissibility of differentiated treatment based on rational classifications as was declared in

the case of Uzma Naveed Chaudhary (Uzma Naveed Chaudhary & others v. Federation of Pakistan, [2019](#)).

For example, the Income Tax Law regime employs reasonable classification for taxation purposes, and even classifications based on educational qualifications are considered reasonable. Judicial scrutiny, as exemplified in case of Ellahi Mills Ltd (Elahi Cotton Mills Ltd v. Federation of Pakistan, [1997](#)), has affirmed the constitutional legitimacy of reasonable classification under Article 25. The Supreme Court ruled that the principle of equal protection under the law does not require identical procedures for every citizen under every situation. Instead, it requires equivalent treatment for persons or groups who are in similar circumstances. The court has upheld the notion that a legitimate categorization must be based on an understandable differentia, which refers to a readily apparent contrast between individuals who are included in a particular class and those who are excluded. The differentia must additionally have a logical connection to the aims intended to be accomplished by such classification. The constitutional reading of Article 25 emphasises that even though equal protection is an essential principle, reasonable categorization is a valid and necessary method for addressing different circumstances and ensuring fair treatment of individuals or groups based on their specific characteristics or situations.

In the matter of I.A. Sherwani (I.A. Sherwani v. Government of Pakistan, [1991](#)), the Supreme Court elucidated numerous fundamental principles pertaining to the notion of equal protection under the law:

1. The principle of equal protection under the law does not require every individual to be treated identically in every situation. Instead, it suggests that those who are in like circumstances or positions should be treated in a similar manner.
2. Reasonable categorization is allowed, but it ought to be based on a rational classification or a logical premise.
3. Different laws can be validly enacted for different sexes, individuals in different age groups, people with different financial standings, and those accused of heinous crimes.
4. No universal standard can be applied to test the reasonableness of a classification, as what may be reasonable in one set of circumstances may be unreasonable in another.

5. A law applying to one person or class may be constitutionally valid if there is a sufficient basis or reason for it. However, a classification that is arbitrary and lacks a rational basis is not a valid classification under Article 25 of the Constitution.
6. Equal protection of the law means that all persons equally placed should be treated alike in both privileges conferred and liabilities imposed.
7. To be considered reasonable, a classification should be based on:
 - (a) An intelligible differentia that distinguishes persons or things grouped together from those left out.
 - (b) The differentia must have a rational nexus to the object sought to be achieved by such classification.

While elaborating the role of reasonable classification in the case of Dr. Shahnawaz Wajid (Dr. Shahnawaz Wajid v. Federation of Pakistan, [2012](#)), the Supreme Court highlighted that the provisions outlined in Article 25 of the Constitution cannot be applied without considering the absence of restrictions regarding reasonable classification within Article 25. The court emphasized the well-established principle that the equality clause does not prohibit the enactment of different laws for individuals in different circumstances, as long as a rational standard is established to guide the discretion of the relevant authority in choosing the appropriate law. This also underscores the accepted judicial position that reasonable classification is permissible under the equality clause, provided there is a rational basis for differentiation. Therefore, reasonable classification is made to distinguish between classes of persons and identify which one of them is at a disadvantaged position so that affirmative action could be done in their favor and the majority could be reversely discriminated in the regard to minimize structural inequalities.

Statutory Praxis of Theory of Reverse Discrimination in Pakistan

The notion of reverse discrimination, along with the derivative concept of intelligible differentia, serves as the conceptual foundation for two legal enactments that seek to safeguard women and children. These initiatives, aimed at protecting the rights and possibilities of women, children, particularly transgender individuals, demonstrate a sophisticated approach to rectifying past inequalities while managing the intricacies of present-day societal requirements.

In 2000, Pakistan enacted the Juvenile Justice System Ordinance (JJSO) to safeguard the rights of young offenders, in accordance with the United Nations Convention on the Rights of the Child (UNCRC) that was ratified in 1990 (United Nations, [1989](#)). The protocols established through the Juvenile Justice System Ordinance (JJSO) were not effective in guaranteeing a fair criminal trial for minors due to a lack of awareness and inconsistent execution. The JJSO's effectiveness was diminished by inconsistencies in legislation, which led to the ongoing treatment of juveniles regarded as offenders instead of addressing their distinct needs and circumstances. Consequently, there have been demands for change (Taimur, [2016](#)). For instance, while the JJSO prohibited the corporal punishment of juveniles, it failed to override provisions of statutes such as the Punjab Borstal Act (1926) which allowed corporal punishment of male juveniles, since “the JJSO was as per Section 14 addition to and not in derogation of, any other law for the time in force”. Such inconsistencies directly contradicted the spirit of Article 25(3) of the constitution and failed to carry out its purpose according to the theory of reverse discrimination (Taimur, [2016](#)).

In 2018 the Juvenile Justice Systems Act (hereinafter referred to as “JJSA”) was passed by the Parliament to improve the juvenile justice framework in Pakistan. The JJSA creates a separate system of courts and other institutions specifically designed to address the needs of young offenders by considering several factual circumstances that do not merit legal consideration in normal criminal courts (Taimur, [2016](#)). These factual considerations include age, level of maturity, and capacity of rehabilitation and prospects of social reintegration. These factors qualify for legal consideration in juvenile courts to provide a fair and equitable process for young offenders while simultaneously promoting public safety and addressing the root causes of juvenile delinquency.

In terms of application, the provisions of JJSA apply on all children below the age of 18 years as per section 2(b). In comparison, section 83 of Pakistan Penal Code 1860 only provides legal immunity to children below the age of 14 years. By establishing a higher age for application than the age limit for criminal culpability specified in the Pakistan Penal Code 1860, the JJSA aims to provide a more comprehensive and protective framework for juvenile offender. While the provisions of PPC 1860 create blanket immunity for children below the age of 14, by the extending for application

to 18 years, the JJSA does not aim to alter the penal structure in its entirety but rather recognizes it the developmental stages of adolescents and acknowledges that individuals below 18 may still be in the process of emotional and cognitive maturation.

This approach reduces the likelihood of subjecting younger adolescents to harsh legal consequences that may not be commensurate with their level of responsibility. The JJSA prioritises the protection and rehabilitation of young offenders and its approach aligns with international standards by establishing a separate sentencing regime for juveniles through reasonable classification between a juvenile offender and an adult offender. Furthermore, it provides for the rehabilitation mechanism for the juvenile offenders by sending them to juvenile facilities instead of police prison/jail so that they could be prevented from turning into habitual offenders.

In order to ensure greater protection of juvenile offenders the JJSA enumerates additional rights that operate notwithstanding the existing fundamental rights guaranteed under article 10-A of the Constitution. These rights include the provision of free legal assistance by the state and information regarding all available legal rights by a legal practitioner who has a standing of at least 7 years in the Bar as per Section 3 of JJSA. The JJSA also envisions the creation of special juvenile courts under Section 4 which exercise exclusive jurisdiction over criminal cases in which the accused is a juvenile to ensure speedy disposal of such cases within 6 months.

The JJSA makes special provisions for determination of age of accused persons claiming to be juveniles and grants special powers to the officer in charge of police station and the investigation officer to conduct an inquiry on the basis of available documentary evidence regarding the alleged age of offender or by a medical examination by medical officer under Section 8. The JJSA also requires courts to record a finding in respect of the age before initiating proceedings under section 167 of Code of Criminal Procedure. By allowing such determination the JJSA ensures a careful and objective assessment of the accused person's age. This process helps prevent potential misclassification of individuals, safeguarding the rights of children and ensuring that they are treated in accordance with the appropriate legal framework for juveniles.

In addition to creating specialized courts and granting special rights to juveniles, the JJSA also introduces procedural innovations which include an alternate mode of criminal proceedings as well as an alternate mode of penalization for juvenile offenders. The JJSA prescribes the creation of Juvenile Justice Committees under Section 10, consisting of judicial magistrate with powers u/s 30 of the Code of Criminal Procedure, district Public Prosecutor, member of local Bar with minimum standing of 1 year and serving probation officer or social welfare (not below rank of BPS-17). The JJC is empowered to dispose of cases of juveniles within 1 month upon referral of police during investigation or the prosecution and the Court during the trial through a process termed as diversion. A diversion requires the consent of the juvenile, his guardian and the complainant of the case and depending upon the circumstances of each individual case may end with penalties including, restitution of movable property, reparation, formal apology, mandatory community service, fine/ costs, placement in Juvenile Rehabilitation Center or official reprimand under Section 9.

The introduction of the diversion process through the JJC is a key mechanism for upholding child rights. Diversion serves as an alternative to traditional court proceedings and punitive measures. This approach takes into account the unique circumstances of each case and prioritises the best interests of the juvenile. Swift resolution of cases by JJC rather than Juvenile Courts helps prevent unnecessary delays, reducing the potential negative impact on the juvenile's well-being and future prospects. The penalization scheme adopted in diversion is aligned with the principles of restorative justice, emphasizing the rehabilitation and reintegration of juvenile offenders into society rather than focusing solely on punitive measures.

The Protection against Harassment of Women at the Workplace Act was passed in 2010 pursuant to increasing reports and statistics regarding harassment of female employees during the course of their employment (Riaz, [2010](#)). As explained in its statement of objects and reasons, the Act was designed to operate on existing 'principles of equal opportunity for men and women and their right to earn a livelihood without fear of discrimination as stipulated in the Constitution' which clearly illustrates the importance of theory of reverse discrimination in forming a foundational basis of the Act as it strived to create a safe working environment for women without prejudice to the equality guaranteed under the Constitution. The Act

was also enacted to comply with the international obligations of Pakistan pursuant to ratification of Universal Declaration of Human Rights ('UDHR'), the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') and International Labor Organization ('ILO') Conventions 100 (ILO Convention for Equal Remuneration for Men and Women for Work) and 111 (The Discrimination (Employment and Occupation) Convention of 1958 (Riaz, [2010](#)).

Under the framework of international human rights law, the right to work is understood as a collection of individual rights, all of which integrate to promote conditions in which a person can freely and without coercion pursue their desired profession (Smith, [2013](#)). Therefore, the right to work not only contains freedom of choice of profession and right to remuneration but also encompasses the right to favorable and just conditions. Harassment involves any behavior, whether spoken or physical, that obstructs work or fosters an offensive work environment (Bano, [2020](#)). It comprises unethical acts of coercion or attention-seeking, not necessarily of a sexual nature that can manifest through various unwelcome behaviors such as stalking, gazing, jokes, intimidation, and exhibiting sexually demeaning attitudes. Such wide category of acts in a variety of situations evade any distinctive classification and penalization under a specific penal code and hence require a general overarching mechanism of regulation capable of operating within every organization. This legislative gap was filled by the Protection against Harassment of Women at the Workplace Act (hereinafter referred to as "PHWWA") through a number of provisions (Mushtaq, [2014](#)).

Firstly, the Act stipulates a non-exhaustive and broad definition of the term harassment that is capable of encapsulating any abhorrent or sexually perverse action which is offense to a working woman under Section 2(h) of PHWWA. The definition as provided under the Act includes any abuse of authority, creation of a hostile working environment and instances of retaliation. While the Act provides an explanation as to each of these terms, it does not specifically stipulate that such explanations are by any means exhaustive, rather the Act acknowledges the generality of actions that can be classified as harassment and refrains from providing a specific and limited definition. Secondly, the Act provides for the establishment of an Inquiry Committee in every organization under Section 3 consisting of a member of senior management, a representative of employees and a

representative of females. Upon receiving a written complaint, the Inquiry Committee is bound to communicate the allegations to the accused, obtain a written defense and examine any evidence as necessary to determine the veracity of the allegations made as per Section 4. Under the Act, the designated proceedings carried out by the Inquiry Committee are to be kept confidential and any retaliatory action against the complainant or witnesses is strictly prohibited. After concluding its proceedings, the Inquiry Committee submits its findings to the competent authority of the organization together with recommendation as to penalties (Riaz, 2010). The Act differentiates between two categories of penalties; minor penalties that include censure, withholding of promotions, stoppage or compensation and major penalties that include reduction to lower post, compulsory retirement, removal, dismissal or fine. For the performance of its functions, the Inquiry Committee is vested with the powers of a civil court i.e., to summon and enforce attendance of a person and recording his evidence, to direct discovery and production of documents, to receive evidence on affidavits and to record evidence under Section 5. Any party aggrieved from the findings of the Inquiry Committee can have recourse to an appeal to a federal or provincial Ombudsman as the case may be. Thus, the provisions of the Act create an inclusive definition of the offence of harassment and also establish a special internal structure in organizations to speedily assess, identify and penalize such actions. It is important to note that the provisions of the Act are deemed to be 'in addition to and not in derogation of any other law for the time being in force' meaning thereby that their application do not automatically oust the application of any other penal statutes (Riaz, 2010).

The Act adopts a broad approach to address various forms of workplace misconduct and ensures that women's perspectives are considered in the investigative process. It aims to counteract any potential backlash that individuals, particularly women, might face for reporting incidents of harassment. By vesting the powers of courts on the Inquiry Committee, it enables the committee's to thoroughly investigate complaints, ensuring a fair and objective assessment of the allegations. The Act takes a proactive approach to address harassment against women in the workplace, recognizing the need for specific measures to counter historical disadvantages and aims to create a more inclusive and supportive work environment for women (Riaz, 2010).

By creating a parallel punitive system and establishing special protocols that operate outside the ambit of the general criminal justice system, the Juvenile Justice Act and The Protection against Harassment of Women at the Workplace Act embody a practical application of the theory of reverse discrimination. These Acts, and the structures they create, are designed to address the particular circumstance that merit legal consideration on a logical basis but which are ignored in the general criminal justice system. Such legislative initiatives operationalize the spirit of Article 25(3) of the Constitution (Riaz, [2010](#)).

Policy Praxis of Theory of Reverse Discrimination in Pakistan

Affirmative action stands as a pivotal component within the policy mechanisms of both developing and developed nations. In the context of Pakistan, the doctrine of affirmative action has been integrated into the regulation of affairs concerning underprivileged or disadvantaged classes, either through policy formulations or statutory enactments. An evident example of affirmative action involves the adoption of a system of quotas or allocation of reserved seats in different domains, such as education and health. The quota system aims to tackle categorizations related to gender, colour, ethnicity, place of residence, or faith (Reviglio, [2015](#)).

A quota system is a deliberate measure used by governmental and non-governmental bodies, such as organisations or colleges, to assign a predetermined proportion of seats or participation to marginalised and minority groups (Mushtaq, [2014](#)). This proactive action seeks to rectify past inequalities and foster inclusiveness by offering opportunities to individuals who have traditionally been marginalised. The main objective of enacting such measures is to eliminate deeply ingrained beliefs of inferiority that are experienced by those from marginalised and underprivileged segments of society. These programmes have a substantial role in reducing discrimination based on criteria such as race, faith, or gender (Mushtaq, [2014](#)). The quota system aims to promote diversity and equal opportunities by reserving a specific proportion of seats from underrepresented groups. This approach is implemented in numerous domains such as education and employment to ensure fairness and inclusivity. This strategy is based on the notion that having a diverse and fair community is beneficial for everyone since it brings different viewpoints and promotes an inclusive culture (Carlson, [2018](#)).

For example, let's analyse the situation of university admissions, which are usually regulated by open-merit standards and some have quota systems as well. The basis of quota system in the education sector is to promote inclusive education and due representation from every province. In the absence of affirmative action, pupils from areas with superior resources and motivations may have an unevenly greater likelihood of gaining admission to a public college or university. (Carlson, [2018](#)). This system reinforces preexisting disparities, impeding the educational and career advancement of those from historically marginalised backgrounds. Contrasting with the open-merit system, students hailing from minority communities, whether racial, religious, or ethnic, may encounter challenges in securing admission solely based on merit (Schiavo-Campo, [2001](#)). Such a circumstance could potentially infringe upon the fundamental right to education guaranteed under Article 25-A of the Constitution (Bibi, [2015](#)). To bridge this gap, the implementation of a quota system becomes imperative. In response, organizations adopt affirmative action by introducing positive discrimination in favor of minority candidates, providing an alternative avenue for their inclusion. Through affirmative action, it ensures that minority students are not only represented but also afforded a fair chance to pursue higher education (Krook, [2009](#)).

The quota system serves a dual purpose. Firstly, it addresses the issue of representation, ensuring that minority and disadvantaged segments of society are not overlooked or marginalised in educational institutions (Saleh, [2017](#)). Secondly, it prioritises the granting of fundamental rights to individuals who might otherwise be deprived if a strictly merit-based approach were the sole criterion, thereby promoting inclusivity in line with the broader goals of societal equality (Krook, [2009](#)).

In the same manner, the seats in parliament have quota for women, religious and ethnic minorities. Article 51(4) of the Constitution provides reserved seats for women in National Assembly. Furthermore, as per Section 18 of the Election Act 2017, there shall be reserved seats for women and as per Section 104 of the Election Act 2017, a political party shall ensure at least five percent representation of women candidates. This ensures that women have adequate representation in the legislative organ of the state through quota system which otherwise might have not been possible (Krook, [2009](#)).

The quota system also helps the minority class to get employment in top services of the state and be a part of state's machinery (Saleh, [2017](#)). For appointments to the positions of civil servants of grade 17 or above, there are reserved categories provided on the basis of gender, race, ethnicity, religion etc. The induction to these positions is made through two channels (Schiavo-Campo, [2001](#)). One is through the channel of open-merit system in which anyone can apply and selection will be based on merit and competence. The other stream is of quota / reserved class system where appointments are made on the basis of class differences and priority is given to members from minority / underprivileged class (Carlson, [2018](#)).

Despite the advantages and benefits, the quota system has intended to provide, yet the implementation of quota system in Pakistan has rendered certain drawbacks. One of the reasons is the controversial and ambiguous nature of policies adopted in this regard, for instance, the quota of 20% has been allotted to military personnel for their induction the bureaucracy. The principle of meritocracy and competency is disturbed and severely compromised when appointments are made on the basis of quota (Krook, [2009](#)). Another instance prevalent is quota seats for representation of minorities and underprivileged classes in the bureaucratic structure of Pakistan. The positions which require sheer competency and expertise over the area get compromised when someone from the quota share gets appointed instead of someone based on merit and competence. This harms and retards the efficiency of the bureaucratic machinery of Pakistan (Carlson, [2018](#)). Therefore, it is advised that quota system should be reassessed and implemented only when there is dire need, not to an extent as to overshadow or undermine the rule of meritocracy in all departments and sectors.

Conclusion

In conclusion, the theory of reverse discrimination operates as a necessary exception to the concept of equality before law which underlays the entire legal superstructure in a society. The theory has been developed conceptually through philosophical discourse and contemporary constitutional jurisprudence. In the context of Pakistan, the theory has found expression in Article 25(3) of the Constitution and has been applied through statutory legislation and policy measures. In terms of application by the superior judiciary, the Supreme Court has portrayed a consistent inclination in applying the theory of reverse discrimination with its natural balancing

doctrine i.e., the doctrine of reasonable classification and intelligible differentia to ensure that the reverse discrimination does not completely upset the structure of legal rights. In instances such as *Khawar Kayani v. The State*, *Uzma Naveed Chaudhary & others v. Federation of Pakistan*, and *I.A. Sherwani v. Government of Pakistan*, the Court emphasized the importance of reasonable classification under Article 25 of the Constitution. The Court has consistently held that equal protection of the law does not demand identical treatment for every citizen but rather necessitates that individual in similar situations be treated alike. The notion of intelligible differentia mandates that any differentiation must be founded on a lucid and comprehensible distinction between individuals encompassed within a specific category and those that are excluded. The differentia must possess a logical connection to the aims intended to be accomplished by such categorization. The Court has elucidated that a reasonable categorization is acceptable, permitting the enactment of distinct statutes for varying conditions.

The concept of reverse discrimination, based on the derivative principle of intelligible differentia, is implemented in Pakistan through legislative measures and policy procedures. Two such instances where the Juvenile Justice Systems Act (JJSA) as well as the Protection against Harassment of Women at the Workplace Act. The JJSA, founded in 2018, implements a specialized structure for adolescent wrongdoers, recognizing their distinct requirements and situations, and giving priority to rehabilitation rather than punishing actions. This legislation introduces the idea of reverse discrimination through raising the age restriction for eligibility to 18 years, which corresponds to the developmental phases of teenagers. In a similar way, the Protection against Harassment Act, which was put into effect in 2010, deals with inappropriate behavior in the workplace by providing a comprehensive definition of harassment and setting up an internal framework inside organizations to promptly evaluate, recognize, and punish such behaviors. Both Acts demonstrate a proactive and complex strategy to address reverse discrimination, aiming to mitigate historical disadvantages and establish more welcoming and beneficial environments for marginalised groups. Furthermore, affirmative action laws, such as the implementation of quotas in education and employment, effectively put into practice the idea by offering opportunities to groups who are underrepresented and disadvantaged. This, in turn, fosters inclusivity and diversity in other aspects of life. Nevertheless, the actual execution of the

system of quotas has encountered obstacles, such as apprehensions regarding the potential compromise of meritocracy and competence in appointments.

Conflict of Interest

The authors of the manuscript have no financial or non-financial conflict of interest in the subject matter or materials discussed in this manuscript.

Data Availability Statement

Data availability is not applicable as no new data was created.

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