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Rabia Pasha | Current LLM student

Rabia's LLM studies earned her a promotion at telecom Ufone, where she works as in-house counsel. The flex options have also allowed her to continue teaching part-time at the School of International Law.

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Editor's Note

Thank you for picking up a copy of the Spectrum of International Law to read – you received it because you are either loosely or intensely associated with Law or you are involved in social and ethical debates. We decided to begin the magazine for similar reasons; we are associated with Law and feel that debates on socially relevant ethical concerns are important.

I grew up with those wonderful ideologies where young people expound that Laws restrict freedoms and the less regulation, the better. Now I am inclined to believe that regulations serve a purpose and that purpose may not be the most popular but it protects something or someone – and in a responsible society that something or someone needs protection and it is just and right to provide that protection.

Not everyone finds regulations and laws a positive thing, however, and we hope to encourage the space for discussion. Our authors have in some cases written highly informed pieces about topics that they specialize in and in others opinions on subjects that matter to them. With matter as diverse as rights of States over their natural resources to diplomatic immunity, and labour policy to honour killing, there is, we hope, something for everybody.

In many articles that we have chosen to print in the first issue, we hear of the presence of good laws and inadequate implementation. In others, we see authors tracing changes in policies and laws, some for the better, others not so much. With an inadvertent clustering of articles around issues of gender, media and medical laws, we have some technical legal articles and many others on professional ethics.

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Syeda Shehrbano Kazim Editor



CONSTITUTION IN CONTEXT

Shaleem Samar Yaqoob

The writer is a graduate of the University of London's LLB (hons) International Programme and is a practicing lawyer and law teacher based in Islamabad

Woe unto us who seek to derive our dignity from an instrument with a troublesome past and a fickle future. Yet, even more lamentable is our fate when the chimerical nature of that very instrument fails to take account of our tattered social structure. The Constitution of Pakistan-though Supreme-seems a little out of place in our 'Land of the Pure'. Perhaps just enough to seem like a badly plagiarized copy of Sir Thomas More's Utopia, being dismally used here to govern those who occasionally give the Devil some cause to be envious. It would be singularly uncivil, not to mention futile, to reflect on the many factors that render our Constitution little better (if not worse) than its predecessors. However, Article 14¹ for all its benign majesty should not be left without comment.

Article 14(1) allows (subject to law) for the inviolability of the dignity of man and the privacy of one's home. Article 14(2) simply states that 'no person shall be subjected to torture for the purpose of extracting evidence'. It is postulated that both these provisions-save perhaps the sanctity accorded to the privacy of one's home-induce mockery of their elevated status which comes with the label 'constitutional'. Such mockery is owed to the inapplicability of these provisions to our society but more so to our hypocrisy for having a firm grasp of the obvious but refusing to appreciate the pickle it lands us in-the incompatibility of law and society. For when this disparity reaches its zenith, civil war is swift to follow.

The impracticality of Article 14 fully registers itself when one considers how the courts have interpreted it and this rendition is then placed in the context of our history and social practices. On principle, the provision appears glorious as it purports to achieve that which was gotten with much pain in the West, without the said element of pain and therein lies the problem. It is therefore asserted that in this respect at least there is no shortcut to appear 'Western'. It should be noted however, that the courts have attempted to give Article 14 a more Eastern and-for lack of a better word-more personal stroke by interpreting it as stemming from Islamic principles2. No contention is offered as to this assertion; rather it is suggested that such a finding works towards reducing the law/society gap discussed herein. However, the risk lies in assuming that a religious shade will cause the principle to be universally accepted and respected and consequently extricate us from our age-old practices. In Re: Suo Motu Constitutional Petition (1994)3, the Supreme Court was unequivocal on its stance that Article 14 is a fundamental right and as such it is an unqualified guarantee'-being subject to no other law. To be fair; it was here that the purview of Article 14 was really tested. In deciding that public hanging offended the dignity of a man-even a convicted felon-the Court said: 'According to Article 14(1) of the Constitution of Pakistan (1973) the dignity and self-respect of every man has become inviolable and this guarantee is not subject to law but is an unqualified guarantee. Accordingly, in all circumstances, the dignity of every man is inviolable and executing in public, even the worst criminal, appears to violate the dignity of man and constitutes, therefore, a violation of the fundamental right contained in Article 14.' More recently in Kaniz Fatima v Farooq Tariq (2002)4 the court reiterated the fundamental and unqualified nature of Article 14, adding that anything that 'affects the honour and respect of any person in public life' is a violation of the provision. These two precedents offer a touchstone against which the relevance and application of Article 14 may be gauged in practice. It will therefore be accurate to state that the provision lays down a fundamental right that is 'unqualified', unrestricted and unfettered⁵. Sadly, it may also be accurate to say that such flawless dignity lasts within the confines of a courtroom only. Out in the real world our 'Land of the Pure' is divided along the lines of gender, race, culture, religion, sects and so is our dignity. More pathetically however, in real terms 'dignity' is in direct proportion to wealth and status here. It is therefore common practice to be 'dignified' based on how much money one makes or the car one drives or-perhaps even more importantly-the people one knows. This is rather aptly captured by the oft used expression: 'do you know who I am'?

It is baffling to see that as Pakistanis, we are fully aware of this ground reality from the day we become conscious of our individual and family social status; and yet we fail to admit that this is our undoing. The amount of 'dignity' a Pakistani citizen carries becomes quickly evident in a feudal setting in rural areas; it manifests itself occasionally in urban settings, when one heads out to shop and reads: 'rights of admission reserved'-a rather improved version of the old 'dogs and Indians not allowed'. God forbid your child has to study with the son of a plumber; and may God restore your 'dignity' if you are caught in the middle of an official motorcade escorting even the pettiest of officials-so much for dignity.

Truly, we do not derive any dignity from our Constitution or



any legal instrument; we are born with it-or not! In any case, it would appear any dignity is swiftly lost if one spends some time in a police station. Last year alone, our police went overboard on their usual torturing methods with 1441 unfortunate-and later not so dignified people. What would perhaps have been more interesting would be a record of the number of people they found too dignified to interrogate or prosecute-no thanks to Article 14. How is our dignity an 'unqualified guarantee' in a country where honour killings occur in the name of 'dignity', where a Minister and a Governor get shot dead in the name of religion and where our inability to render justice has been disgracefully exposed in cases like that of Dr. Shazia Khalid?

It is argued that this is a legal dilemma as much as a social one. The apex Court found itself confronted with similar questions in the case of Niaz and Others v Abdul Sattar and Others (2006). It is opined that the quality of the judgment in this case lies in the honesty with respect to our social practices that the court demonstrated here. While attempting to square abuse of process with Article 14 and the dignity of man, the Court said: 'For, one has to bear in mind the ground realities of life existing in the country, it should appear plainly that proceedings before the police afford a stronger ground for an action for malicious prosecution than proceedings in a Court of law, for it is an unfortunate fact that, as things are, human dignity suffers or is likely to suffer more at the hands of the police than in a Court of law'. The extract from the judgment immediately reveals that any inconsistencies to Article 14 are judicially regarded as 'abuse of process'. This is the natural consequence of having a constitutional provision that does not mirror social practices. It is asserted that we are perhaps looking at this legal/social problem from the wrong end. While it can be proclaimed in a single breath that all men are equal and their dignity paramount, it is not and has never been believed to be so in this part of the world. In the subcontinent our civics are still under the figurative hangover of the caste-system and lord/serf relationship we have been accustomed to. Realistically speaking, we were simply nudged into democracy after the British left-the concept being largely alien to the common people as well as local rulers. On the other hand, generations of conservative beliefs and practices still ran deep at the time we drafted our first Constitution and still do today.

The question to ask then, is if there is an 'abuse of process' or

if the process is an abuse of firmly rooted social customs? Former British Colony or not, unlike them our Constitution did not evolve from conventions and social practices! It has been over sixty years and we are still having trouble tailoring our customs and practices to match with our Constitutional provisions. These were questions that required serious consideration when Article 14 and other Chapter I provisions were drafted. Consequently we Pakistanis are collectively left in the wake of our-seemingly perpetual-query, 'now what'? Going back is virtually impossible and would, in any case, be at the cost of alienating ourselves from most of the modern world. Unfortunately with the help of other extrinsic factors such as corruption and inefficiency, it appears we seem to be headed back rather than forward. Yet, the only avenue open to us is to move on and live up to the ideals we have, however Inadvertently, set up for ourselves. It is suggested that the conundrum here is not very different from racial prejudices once openly prevalent in the US and if it were not for the bold decision of the US Supreme Court in Brown v Board of Education (1954) things might have remained the same there for some time. The challenge then comes in enforcing and upholding such decisions within a society. It is submitted that in our way forward our inability to do this-if anything-would prove our undoing. In order to uphold what is right (Article 14 in this case); the first step is to admit our inequities (as our Supreme Court bravely did in Niaz v Abdul Sattar) and then to remove them. Then we must enforce the decision to remove them; our opposition being the strongly established culture of reserving all 'dignity' for the rich, powerful and influentialas illustrated in the foregoing.

This is what it will cost us in our way forward and this is the price we must unflinchingly pay: to do away with our deeply ingrained belief that the poor and weak must remain poor and weak. In the words of US Supreme Court Justice Stephen Breyer "It takes time! No one knows! It's a question of building habits in people, in a country that doesn't have it and maintaining habits which isn't always so easy either in countries that are lucky enough that they do....and that takes time and that's a challenge!'. Yet for all that, we must realize that we are currently stuck in a pseudo modern/liberal society and while on paper we might appear to have all the constituents of a forward looking liberal State we are not one in reality. The latter must be accomplished in real terms or the damage would be beyond the power of the courts or legislature to reverse.

¹ Chapter 1 (Fundamental Rights), The Constitution of the Islamic Republic of Pakistan, 1973

See: Bashir Ahmad v Maqsood Ahmad [2010 PCrLJ 1824] and Shariq Saeed v Mansoor Ali Khan [2010 YLR 1647]

^{3 [1994} SCMR 1028]

⁴ [PLD 2002 KAR 20]

⁵ Although note the qualified exception of 'telephone tapping' in the interest of National Security as discussed in Benazir Bhutto v

President of Pakistan [PLD 1998 SC 388]



DIPLOMATIC IMMUNITY: DIFFERENT RULES FOR DIFFERENT STATES

By Zainab Effendi

The writer is an Advocate of the High Court with an LLM from the University of Warwick

Early in the new year, Pakistan faces yet another tragedy. Lahore has become a constant victim of terrorism. However, the event that occurred on 27th January, 2011 is very different from the frequent events of suicide bombings and attacks. This event centers around a US citizen, employee of the US Consulate, who fired gun shots on two motorcyclists that resulted in their deaths. According to the US citizen, this was all done in the name of self-defense. In addition to this, an innocent pedestrian lost his life when another car from the US Consulate was coming to the staffer's rescue.

There is a great deal of animosity and anti-American sentiment evident in Pakistan that can be traced back to the fact that United States of America has always had a biased approach towards Pakistan. It appears the United States has treated Pakistan as an inferior country rather than reciprocating equal respect and comity between two nations.

Let us first analyze the American laws and Pakistani laws, before examining the Vienna Convention 1961, and comprehend why the American citizen felt the need to resort to self-defense and therefore shooting at the motorcyclists. The US laws have provided its citizens with much leverage to carry bear arms for their self-defense. In an article by Eugene Volokh, it is stated that, "Forty-four state constitutions, dating from 1776 to 1998, secure a right to keep and bear arms; 40 of these clearly secure an individual right to keep and bear arms in self-defense,3 though they may also secure a right to keep and bear arms for other purposes." In a number of reported judgments from various states, judges have ruled that by permitting citizens to carry/hold/bear arms the Constitution of the US (and respectively states) allows the citizens to apply physical force or bodily harm under the garb of self-defense. Although it is stated that use of force may only be reasonable, in case it is unreasonable then there is mens rea (intention to commit a wrong) and the accused is liable to punishment. However, there have been a plethora of cases where excessive or unreasonable physical force has led to acquittals.3 Perhaps this is why the US citizen felt it necessary to plead self-defense as he was aware that would not receive immunity from murdering two men.

Pakistani law follows the lines of British Law that is, while acting in self-defense the use of force must be reasonable and proportionate to the crime, in case a person causes death of

another by excessive use of force, he is to be tried under section 100 read with 304-A of the Penal Code 1860.⁵ From the facts of the case, the foreigner had either negligently or deliberately caused the deaths of two people. In any case, he had a right to be tried by due process of law in Pakistani courts and await his fate.

Subsequently, the interesting aspect of the situation was borne by United States requesting return of their citizen under the garb of diplomatic immunity guaranteed in the Vienna Convention on Diplomatic Relations 1961. Pakistan and the United States are parties to the Vienna Convention 1961 and Vienna Convention on Consular Relations 1963. After perusal of both the Conventions, I have learnt that staff of the sending country has privileges and enjoy immunity.⁵ However, it is imperative to mention here that immunity is not an absolute right. Immunity is granted to diplomats to carry on their duties without any fear. This privilege is not granted as a license to abuse the laws of the land. Notably the highest level of immunity (against civil lawsuits and criminal prosecution) is granted to the highest post. Though for lower level of posts such as Raymond Davis's, they are only immune to the extent of their acts done/committed as part of their duties. Their immunity is by no means stretched to exempt them from criminal prosecution.7 Clearly committing murder was not a part of Mr. Davis's official duty supplemented by fellow colleague who committed murder via hit-and-run accident.

Instead of waiving any kind of immunity (if Davis had any) so that he could be tried in the courts to ensure the two families were treated justly, the United States pleaded for Davis's return! One wonders, if the scenario was the other way around and Pakistani member of administrative and technical staff diplomat had committed murder in the States, would the United States conveniently allow the Pakistani to be returned home? In January 1997, the Deputy Ambassador of the Republic of Georgia to the United States, Gueorgui Makharadze, caused an accident that resulted in injuring four people and death of a minor. The United States ensured that the Republic of Georgia waived immunity and the American courts tried and convicted the Deputy Ambassador of manslaughter. He was sentenced to prison in the United States. It would be wise to construe where the United States convicted a deputy ambassador (second highest in rank) for



an accident,⁸ it is highly improbable that the Pakistani diplomat would have been returned home safely after committing two murders in the name of 'self-defense'.

Therefore, the United States should have reconsidered its stance on requesting Raymond Davis's return without him being tried in the court of law in Pakistan. The American citizen who committed murder in broad daylight before a mob of people is not above the law in Pakistan. What Raymond Davis's incident had done was deprive two families of their young and healthy sons. These families deserved justice in the name of humanity and righteousness.

The icing of course was when Senator John Kerry made a special visit to Pakistan in guise to ensure Davis's freedom was work-in-progress. By blatantly disrespecting Pakistan and its courts, Senator Kerry exemplified what arrogance truly meant. The respectable Senator went on to reminding Pakistan, in a brief press conference, about the need to look at the bigger picture of Pakistan-America relationship. The loss of lives of two young men supplemented by one of the deceased men's wife committing suicide in hope of justice for her late husband; clearly these lives are not significant enough to jeopardize the so-called long term relationship Pakistan-America is building towards. However, interestingly enough, Raymond Davis's life is worth jeopardizing this ostensible relationship to the extent that Secretary of State, Hillary Clinton pressurized former Foreign Minister, Shah Mehmood Qureshi to proclaim Davis's diplomatic immunity. When this tactic failed, it felt the need to send Senator Kerry to ensure positive outcome in favor of America. Furthermore, the United States warned Pakistan of discontinued bilateral relations until Davis's matter is resolved. One wonders why Davis's life is superior to three Pakistani innocent lives.

As the story of Davis has unraveled interesting facts surfaced. Davis was said to have been spying on Pakistan's cruise missile, Babur, and had several other photos of "sensitive areas" and appears to have "crossed the red line." Why was Davis spying on Pakistan's sensitive locations if the United States is an ally of Pakistan? Clearly, the United States is playing a double game only to safeguard its own interests and fortunately for Pakistan its spy has recently been caught red-

handed. This episode unveils the United States true colors and intentions for its so-called "most favored non-NATO ally." Consequently, the law applying to Davis is not Vienna Convention on Diplomatic Relations 1961; it is Vienna Convention on Consular Relations 1963 as he was a staff member of the Consulate. According to Vienna Convention 1963, article 41, he only has immunity in civil matters and it does not in any way extent to a "grave crime." And even if the United States boldly wishes to rely on the Vienna Convention on Diplomatic Relations 1961, article 37 specifies that immunity of the staff is confined to duties carried out in the "course of job." Was murdering two men in broad daylight with steady hands and impressive precision in acquiring the targets an act of self-defense or course of duty?

Moreover, the United States is emphasizing Pakistan being a signatory to Vienna Convention 1961 (which is not applicable to Davis's case) to safeguard its own interests whereas the United States is a classic example of disregarding the convention at its own will. In 2004, an American serving in the embassy killed a popular musician by accident in Romania. The United States ensured he returned to his hometown and in a court-martial he was acquitted of manslaughter. The United States intended to apply the same strategy in Pakistan, however, it needed to acknowledge the worth of lives lost in Pakistan and for once accept its responsibility to ensure those families who lost their loved ones receive justice, and not take Davis back to the States only so he could be acquitted.

Pakistan's Afia Siddique has been convicted and sentenced to life imprisonment in the United States on grounds of attempted murder of Americans. Her family has been pleading the United States government to permit her return to Pakistan. However, Pakistan has submitted to the United States due to the bigger picture and long term relationship between Pakistan-America. Raymond Davis in fact killed two men in a crowded place in Lahore and the United States decided to send its Senator to ensure that Pakistan succumbs to the so-called superior United States of America. One wonders how many generations it is going to take Pakistan to finally let go off this subservient approach towards the United States?

 $^{^1.} http://www.npr.org/2011/01/27/133270092/u-s-consulate-staffer-involved-in-pakistan-shooting and the staffer-involved-in-pakistan-shooting and the staffer-in-pakistan-shooting and t$

².http://www.trolp.org/main_pgs/issues/v11n2/Volokh.pdf

³.http://supreme.justia.com/us/177/529/case.html

A.Qadir Bakhsh v The Crown, PLD 1953 LHR 158

Vienna Convention on Diplomatic Relations 1961 http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf; See also Vienna Convention on Consular

^{6.} Relations 1963 http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf

[.]Diplomatic Immunity http://law.jrank.org/pages/6137/Diplomatic-Immunity.html

Georgian diplomat convicted in fatal crash goes home http://web.archive.org/web/20070305052953/http://archives.cnn.com/2000/US/06/30/georgia.diplomat

http://www.terminalx.org/2011/02/was-raymond-davis-spying-on-pakistans.html#ixzz1DgL5IT4n

¹⁰Vienna Convention on Diplomatic Relations 1961



DOCTORS, SAINTS NO MORE!

Rabia Pasha

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Surgeon, talking to his patient who woke up after an operation, "I'm afraid we're going to have to operate on you again. Because, you see, I forgot my rubber gloves inside you."

Patient, bandaged from head to toe, "What if I choose to live with them? Please no more cuts!"

Surgeon," Sure you can! Only, I need them for my next surgery, they're my lucky gloves."

I don't know if the right word is appalling or tragic, that our health care is actually synonymous to this extract from jokes.net but it is a notion enough to question. What a wonderful world is what Louis Armstrong had us thinking it was, where everyone is friendly, neighbourly and above all, human. But then somewhere along the harsh lines of life and growing out of your protective cocoons, you begin to see the big bad wolf almost everywhere. Having worked for two years now, I'm guite well acquainted with the maliciousness with which people tend to achieve their materialistic goals. However being a doctor's offspring and holding the idealistic image of the profession's nobility so carefully painted by my father having devoted his life to the Government hospital he worked at, I was shocked by the scams and blatant carelessness that hospitals and doctors have displayed in recent times. Of course malpractice is not a new concept, its age old especially in the rural areas, and so you might think that my findings are very naive if I am even a tad bit surprised at the statistics. But that is not the point I'm making. I was alarmed by the statistics of the so called urban "private" hospitals that apparently have all the facilities and dough they need, but almost deliberately scam the public at large. The incidents would probably not have been reported but our media has gained momentum with its public trial of all miscreants. My purpose of even meddling into this is credited to a recent week that I spent attending to my sister in a widely acclaimed private hospital.

My sister was admitted into the hospital with a suspected Deep Vein Thrombosis (DVT); the condition entails the development of a clot in the vein, most of the time in the calf muscle. It is likely to occur during pregnancy when you are suffering from hormonal imbalances or post operation if you're not too mobile. In her case, both situations were a match because she had a caesarian surgery. The hospital

where she delivered her baby conducted a Doppler test and announced that she indeed had DVT and should be wheeled into the emergency, but that they didn't have the required facility or the medical expertise to treat this post pregnancy related condition. Consequently we rushed her to another acclaimed private hospital in Islamabad close to midnight to find junior doctors out of a Grey's Anatomy episode, walking hurriedly through the corridors but in complete dismay. After a process of four hours and waiting for a verdict, they admitted my sister under the name of a consultant who was to come review her case the next morning. This doctor, however, never came nor called in the five days that we were at the hospital. Of course the bill drawn by the administration said otherwise. We were also billed for consultations that were never needed with her prognosis. Three days into her admittance, all medicines were stopped because upon conducting another Doppler test, they realized that she didn't have DVT and in fact needed more tests. It was hoped that an MRI test would give the required details, this was conducted at 1:00 am on the fifth day, therefore adding another night's bill. However, when the reports did finally come in, the vascular consultant said while the condition was highly interesting and the symptoms a matter of inquisition, he didn't quite know what diagnosis to give. Five days at a hospital for them to tell us they didn't know what it was and at a hospital whose name ironically symbolizes neat!

Prior to studying law I didn't quite understand the word negligence, to say the least I was absolutely ignorant about consumer rights. However, upon studying the case of Donoghue Vs Stevenson, I realized the importance of warranty cards on all electronic and other gadgetry bought from retailers. Whilst studying, I embarked on a few individual research projects with my friends, including one on medical negligence because the concept, to present date, is still very unfamiliar to Pakistan and with the media reporting about high profile cases in metropolitan cities, including the fairly recent Huma Wasim Akram and Imanae Malik cases, it's no surprise why that is. In Pakistan everyone gets away with almost anything, except blasphemy and rebellion. Doctors continue to conduct negligent surgeries, forge hospital bills, misdiagnose patients and still retain their medical practitioner's license.

Medical liability in England and Wales is covered under the



law of tort, specifically negligence. It is general practice in cases of clinical negligence that National Health Service Trusts and Health Authorities are the bodies that are sued, rather than individual clinicians. Under this practice, NHS Trusts and Health Authorities are vicariously liable for the negligent acts and omissions of their employees – including doctors, nurses, and clinicians.

"Clinical negligence" is defined as "a breach of duty of care by members of the health care professions employed by NHS bodies or by others consequent on decisions or judgments made by members of those professions acting in their professional capacity in the course of their employment, and which are admitted as negligent by the employer or are determined as such through the legal process. The burden of proof is on the person claiming negligence and it is necessary to establish that the failure by the doctor actually caused the injuries complained of.

In India, health care professionals or medical doctors must have reasonable skills, knowledge, and proper medical education and competence to carry on the practice of medicine. If they fail in the criteria as narrated then they will be liable for incompetence in one way or the other and may face:

- 1. Liability in respect of diagnosis;
- 2. Liability in relation to doctor's duty to warn the patient about the risks involved; and
- 3. Liability in relation to the treatment to be carried out.

The courts in India have generally followed the decisions and practices of the English law. However, the Supreme Court of India in its landmark judgment in Indian Medical Association v. V. P. Shanta laid down the law relating to professional negligence under Consumer Protection Act, 1986 and enunciated certain principles that medical practitioners, government hospitals, and private hospitals and nursing homes are also covered under the consumer law in the following categories:

- where services are rendered free of charge to everybody availing the said services;
- 2. where charges are required to be paid by everybody availing the services; and
- 3. where charges are required to be paid by persons availing services but certain categories of persons who cannot afford to pay are rendered service free of charges.

The services provided in the first category by doctors and hospitals would not be covered by the services under section 2(1)(0) of the Consumer Protection Act,1986. But the services

rendered by the second and third categories of doctors and hospitals would be covered within the ambit of the service defined in the above provision. Of course, no human is perfect and even the most renowned specialist could make a mistake in detecting or diagnosing the true nature of a disease. Therefore, a doctor can only be held liable for negligence if one can prove that he/she is guilty of a failure that no doctor with required skills would be guilty of, if acting with reasonable care. Likewise, an error of judgment would only constitute negligence if a reasonably competent professional with standard skills would not have made the same error.

Sections 80 and 88 of the Indian Penal Code contain defences for doctors accused of criminal liability. Under Section 80 (accident in doing a lawful act) nothing is an offence that is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. According to section 88, a person cannot be accused of an offence if he performs an act in good faith for the other's benefit, does not intend to cause harm even if there is a risk, and the patients has explicitly or implicitly given consent. Moreover, a private compliant of negligence against a doctor may not be entertained without prima facie evidence in the form of a credible opinion of another competent doctor supporting the charge. Still many activists and jurists in India, argue that the law isn't entirely codified and that a monumental reform is needed. What of the nonexistent law in Pakistan?

At least India is headed somewhere, if you attempt to conduct an online search for medical negligence in Pakistan, you will find countless articles but no concrete law, except of course the applicability of Consumer Act 1986.

The handful of cases decided by the high courts endorse the duty owed by a doctor to his patient. Justice Mushir Alam's judgment in the case of Mrs Rahat Ali v. Dr Saeeda Rehman states that, "a ... doctor is to take all due care, take necessary precaution, give proper attention while extending advice, treatment or when operating upon". He goes on to state, however, that "[in the case of doctors] general presumption is attracted that they have performed their duties to the best of their abilities and with due care and caution [unless] it is established through cogent evidence that [they]...failed to take necessary precaution, due care and attention or acted carelessly and negligently". The common man, having little resources almost never files a claim successfully. One recent suggestion is to seek redress through consumer courts, as is being practiced India. Located in smaller districts, here a person may appear before the tribunal without a lawyer. However, he would still need to establish that the injury or



death was a result of an act or omission of the doctor. It is unlikely that a layperson would be sufficiently knowledgeable or have access to necessary materials, to make the legal connection between the outcome, of which he complains, and the treatment he was given. In any event, redress through the courts is a remedy after the fact and offers little comfort to a person facing the prospect of losing a limb or his life. Therefore, more important than allowing greater access to courts and enhancing the penalties for negligence is to take steps to prevent negligence from occurring in the first place.

Perhaps this calls for reform of the Pakistan Medical & Dental Council Ordinance 1962 to ensure that the council is a lean, efficient and independent body run by medical practitioners for the benefit of the profession and the public and which is diligent in improving the standard of medical education, training and licensing throughout Pakistan. At the very least the power of the Council to restore the license of a medical practitioner once it has been revoked needs to be carefully reviewed to eliminate any potential of abuse.



THE IMF INTERNAL WORKINGS UNVEILED

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The IMF was designed to promote international monetary cooperation and foreign exchange stability to facilitate international trade, high levels of employment and real income, and the development of the productive resources of all its members. It was established at Bretton Woods at the end of the Second World War. The IMF exercises surveillance on its members' economies, gives them policy advice and assists those with balance of payments problems by short term lending plans. The effectiveness of the Fund, however, is under question. The Fund's governance structure is not considered to be fair, and providing uncompromising policy advice and short term financing, is dysfunctional to the Fund's purposes of ensuring financial and monetary stability.

Quotas to the Fund are namely the contribution made by members, and determine their capacity to participate in the Fund's decision making process and whether they are allowed to borrow from the Fund's resources. This 'quota' distribution is one of the key problems among members, because they are distributed according to an obscure method, which gives wealthier members the right to contribute more capital to the Fund, which in turn grants them more votes, which results in more capacity to control and condition the Fund's policy advice and ironically also more capacity to borrow from the Fund. Consequently, the advanced economies have more access to resources of the Fund, and are seen to 'run' the institution. Developing countries on the other hand have little influence and relatively low access to the funds resources. The Executive board of the Fund rarely votes, so the Fund is keen to say that its decisions are mostly taken by consensus. According to Ngaire Woods, the relationship between the Board of directors and the countries is vital, however, the most developed countries such as the US, Germany, France, etc. are all directly represented by their own executive directors, but all other economies are grouped into constituencies which are represented by just one executive director.

Even if quota was allocated exclusively according to relative wealth, this would be shortly outdated without a mechanism to revise and adjust quotas to change in relative weight in the global economy. The inefficacy of the Fund's quota system is compounded by the obscurity of the method used to calculate the quotas which uses five formulae that are impossible for a layman to understand. They are not reflective

of the relative economic importance of its members in the world economy. For example, Netherland's quote is 'ONLY' 36% smaller than China's; India's is smaller than Belgium's. Additionally, the original allocations of quotas were established to represent pre-determined political objectives, rather than to reflect relative weight in the global economy. Raymond Mikesell, an economist from the US treasury was instructed by Mr. White, the then secretary of the Treasury to prepare a formula that would give the US a quota twice as big as that of the UK, a bit more than twice that of the USSR, and even more than twice that of China. It goes against the Fund's purposes that the rich should have the right to integrate bigger quotas, and thus have a bigger say in the running of the institution and greater access to its funds. At the World Bank Annual Meetings in Singapore in 2006, the need for a reform was recognized, and the IMF's Board of Governors approved a resolution which initiated a reform plan which was designed to revamp the representation of members in accordance with the recent changes in the global economy, at the same time enhancing the participation and giving a voice to low-income countries. The IMF proposal initially granted voting right increases to four countries (China, Korea, Mexico and Turkey) that were clearly under-represented and called for an increase to basic votes and change in the way quotas are calculated. The object of this reform is to provide simplicity, transparency and representativeness in allocation of quotas.

These meetings on weightage voting have not gone the distance in increasing the legitimacy in the decision making process of the Fund. Other reforms must be made to change the balance of power at the IMF, as developed countries still maintain their grip on the decisions of the institutions. Additionally, the revision of the quota formula may actually prove to negatively impact the voting rights of many low and middle income countries. According to Peter Chowla's analysis titled 'Why the IMF quota reform is inadequate', the real shame is that this proposal has succeeded despite the reservations of more than fifty developing countries. Hector R. Torres, said that the most powerful reason behind this opposition is that it creates a very high risk that even if advanced economies were not to increase their current share in quotas and votes, the end result of the reform could allow for the increase of the quotas of a handful of successful emerging economies at the expense of middle income developing countries. As the increase in quotas for the most



dynamic emerging markets would come at the expense of the middle income developing countries, the advanced economies would have the voting power to prevent it, and the low income countries are protected by the Singapore Decision to protect their quota share. The middle income countries would thus, remain the borrowers of the Fund.

As said earlier, one of the aims of this quota reform held in Singapore in 2006 was to enhance the participation and voice of low income countries. However, it can be seen that with the ad hoc vote increases for four countries and a doubling of basic votes will decrease the voting weight of advanced economies to just about 56.8% of the total. African countries will see their vote share increase a paltry of 0.5% to a total of about 6.5%. In addition three African Executive Directors on the IMF board revealed their anger that in a draft resolution the basic vote increase would have to await two rounds of ad hoc quota increases and on amendment to the quota formula; in short, this may not be implemented for years. And even if the amendment does take place it would be a long process that would involve approval by national legislation and the US Congress is notoriously reticent to agree to IMF quota increases. More radical governance reforms have been proposed by an alliance of more than forty European civil society organizations (CSO's). They propagate a shift to a double majority voting system, whereby any decision would have to be supported by a majority of member countries and a majority of the voting weight. This system would ensure that rich countries could not force their decisions upon the underrepresented group of poor countries. This would be easier than devising a quota formula that would satisfy all the different countries interested in IMF reform. Additionally, an end to the convention of the IMF's top job being allocated to a European and full transparency, such as the publication of board meeting transcripts and votes, has been called for.

The report of the World Commission on the Social Dimension of Globalization to increase coherence between the Fund, World Bank, the ILO and the WTO and other relative UN bodies suggests that the Fund consults and works in collaboration with other institutions such as the International Labour Organization (ILO), as labour policies are crucial to avoid globalization and deepening social inequities among countries, and also within themselves. Conclusively, the reform process launched in Singapore in 2006 will neither recover the credibility of the Fund, nor improve efficiency. The result will be giving more votes to the very few successful emerging economics, who were already weaned off the Fund's financial support. This will be at the expense of the less successful developing countries who remain potential borrowers. Effectiveness will not be achieved in this way. Other reforms, such as the double majority system could be more successful in bringing an additional sense of ownership for its policies and effectiveness. Furthermore, it will make the Fund more accountable and responsive to citizens' concern, as its policy advice and conditionality has direct implication on their income and for that they need to start working with institutions such as the ILO.



THE ART OF POLITICS AND PROPAGANDA IN PAKISTANI CINEMA

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There is no doubt that film medium has an outstanding value for propaganda purposes. In Russia, Stalin used the arts as propaganda to win the people. Any artist who defied the propaganda or dared to voice independence faced dire consequences. Before Hitler's reign, German cinema was known for its technical brilliance and thematic explorations with filmmakers such as Fritz Lang, Ernst Lubitsch, Karl Freund, Hans Eisler and Max Ophuls to name a few. Joseph Goebbels, Hitler's minister for propaganda, realizing the power of the medium took a personal interest in seeing and approving films produced in the Third Reich.

One of the first tasks Goebbels assumed was to ban Jews from the German film industry followed by prohibiting any (objective) criticism of those films, this included newspaper editors to apply for licenses to practice (to be issued only after a racial and political investigation). Like Goebbels, Republican senator Joseph McCarthy in United States attacked the medium, which he found "the weakest, and most vulnerable." Liberal Hollywood scriptwriters, directors, actors, producers, poets and composers were interrogated by HUAC, the House Un-American Activities Committee. In his book "Naming Names", Victor S. Navasky describing the era stated, "The social costs of what came to be called McCarthyism have yet to be computed. By conferring its prestige on the red hunt, the State did more than bring misery to the lives of hundreds of thousands of Communists, former Communists, fellow travellers and unlucky liberals. It weakened American culture and it weakened itself."

During British rule in India, the boundaries were clear. The British suppressed political ideas for their own agenda but never restricted artistic expression. According to Indian film historian B. D. Garga, "So long as no cloud covered the sun that shone so brightly over the Empire, Indian culture did not bother them one way or the other. Confusion ensued with the changeover from white to brown bureaucracy. The censorship code, if anything, became more rigid, reactionary and rigorous. What did not suit the whimsy of a particular new 'nabob' was unceremoniously suppressed in the national need, or in pleas for the preservation of our moral and spiritual heritage." Despite the changes, Indian cinema to this day remains apolitical as in 1920, Mr. T. P. O'Connor, the (then) president of the British Board of Film Censors handed

down a code comprising of forty three "don'ts" which remains the same to date.

In the first three decades after the partition of 1947, Pakistan's film industry gathered its credibility and produced a number of blockbusters. However, in the due course of time military dictatorships and growing religious indoctrination and censorship in the name of religion have played a major role in the death of the industry.

In his recent analysis of the state of the Pakistani film industry "Lust and lure in the land of pure" social media analyst Riaz- ul Hassan, pointed out that after the creation of Pakistan, the Ministry of Industries under Sardar Abdur Rab Nishtar issued the following notification: "In principle Muslims should not get involved in film making. Being the work of lust and lure, it should be left to the infidels." It is no wonder that today Indian films are immensely popular with the Pakistani population and dominate the cinema theatres in the country. Any films containing themes aiming at social consciousness were also discouraged. In 1957, the film 'Wadah' by W. Z. Ahmed was banned by the Censor Board for promoting socialist ideology, although the film went on to win critical acclaim at the Moscow Film Festival.

On December 2, 1978 General Zia-ul Hag delivered a nationwide address on the first day of the Hijra of the Islamic calendar as a measure to establish an Islamic society in Pakistan. In the speech, he accused politicians of exploiting the name of Islam saying that "many a ruler did what they pleased in the name of Islam." In the same year, after assuming power and enforcing Nizam-e-Mustafa (Islamic System) with the establishment of the Shariah Benches, he reconstituted the court and declared stoning Islamic even though the Federal Shariah Bench declared it unIslamic. This was the start of increasing fundamentalism, obscurantism and retrogression in the society discriminating against women and minorities particularly. In the following year, 1979, a Motion Picture Ordinance was chartered which restricted the freedom of artistic expression. Zia's rule not only fueled sectarianism in the country but created contradictory sects within the cinema industry as well. The government forcibly closed down most of the cinemas in Lahore and cancelled all censor certificates of films issued



prior to the imposition of martial law. It also imposed new registration laws for film-makers requiring them to hold film degrees during a time when there were no formal training centres for film-making in the country. The film-makers who remained were Punjabi film directors producing cult classics of Maula Jatt and "gandasa" culture involving a hero, a local gangster and a strong willed, tough-talking heroine. In the same piece, Riaz ul Hassan points out, "While the urban middle classes found an escape in pirated copies of Indian and Hollywood movies available on video tapes, the masses had to make do with highly censored non-political action Hollywood movies such as Rambo. This strange atmosphere gave birth to a new type of Pakistani films, where violence and criminals were glamorized and brutality worshipped. The dictator's policy of curbing human rights, killings, tortures and violation was mirrored in the movies of this era too."

Although history has proved that cinema has been subjected to all kinds of moral, social, political, economic and religious pressures and prejudices, it is equally true that many filmmakers broke away from the influence of dictators and demagogues. In Eastern and Western Europe in the 1960s, filmmakers began to portray political realities incorporating social consciousness and socialist realism. Despite the obstacles of the censor board in India, artists like Satyajit Ray managed to break the mediocrity and clichés. In Italy the neorealists, in France the new wave filmmakers and in Britain the "angry young men" have challenged the dominating ideologies of the time. Pakistan should heed of these historical movements and films in which art grew out of psychological rather than ideological compulsions. Will we show the same courage and conviction or will we stick to conformity resting upon the power of self appointed custodians? The choice is ours to make.



PSNR REVISITED

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The concept of state sovereignty has been a discussion that has spread over centuries resulting in bloody conflict, cold wars, diplomatic relations and the drafting of various bilateral and multilateral treaties. The discussion has taken a further twist by the dynamics of the European Union's failed attempts in securing the European Union law's sovereignty via a proposed Constitution for the Union that was ultimately rejected, no doubt in part due to the resistance towards codifying the concept in the first place. However in light of the discussion of the concept of sovereignty of states it becomes essential to re visit one of the earliest limbs of the debate that started off by states claiming permanent sovereignty over their natural resources and wealth (PSNR). As regards Pakistan the concept is revisited by the recent Reko Dig case where the contract to a foreign company on the mining rights of gold and copper reserves in Baluchistan is being challenged. In fact according to Barrister Zafarullah Khan, counsel for one of the petitioners, the leasing of Reko Diq gold and copper mines to the foreign company was against state interest as Pakistan's wealth was being "looted." Such cases require a careful analysis of the doctrine of PSNR, its origins and the modern day application in the face of growing investment by Multinational Enterprises.

The idea of PSNR has also fueled the content of international investment law today which like many other areas of international law remains un-codified and is mostly determined through the decisions of ad hoc tribunals, bilateral investment treaties and at best by lending support to non binding documents produced by the United Nations General Assembly. The idea of a state being sovereign was recognized immediately after the ancient empires crumbled leading to the birth of nation states. However, in time the modern nation states faced another kind of imperialism at the hands of colonial powers. It was after the process of decolonization (mostly after the second world war) that the newly independent developing states emerged in a more assertive light claiming that their sovereignty extends to being able to control and dispose off their resources in a manner they see fit. The problem with accepting such an apparent justified assertion was the fact that the ex colonial masters had invested greatly in these countries in the form of capital and infrastructure and the international notions of "economic justice" would dictate that the investments belong to them and if expropriated or nationalized by the state, due compensation must be paid to these foreign investors.

The developing states reaction reflected staunch resistance and thereby international law witnessed one of the biggest debates between national treatment and the so called international minimum standard. The concept of national treatment asserted that a foreign investor should be given the same treatment as that accorded to the local investors of that state. More importantly in the event of a dispute the legal forum to adjudicate upon the issue would be the host state's national courts and no international tribunal. This concept was also echoed in the Calvo doctrine propounded by Carlos Calvo, an Argentinean jurist and the newly independent Latin American states seemed to regard the concept as sacred at the time!

In contrast the developed world advocated the existence of an international minimum standard ... a concept that accorded the highest level of protection to a foreign investor in line with "customary international law". The problem with the assertion was that the developing world alleged that this so called standard was a convenient invention of the West to tailor the rules of international trade according to their benefit whilst ignoring the needs and concerns of the developing states. This argument was carried to the United Nations General Assembly where the developing states took advantage of their numerical majority and advocated the importance of recognizing the concept of PSNR. The result was a political compromise of sorts with the world nations signing the PSNR Resolution in the 60's that recognized that each state had the right to dispose off and utilize its natural resources in a manner it saw fit and that cases of nationalization and expropriation were allowed provided that the expropriation/nationalization was done in furtherance of a public purpose and was non discriminatory and that most importantly the state would pay compensation to the injured investor. The document did go on to assert that in case of a dispute the parties would be free to go to an international court if they so agree and that all relevant international law would be applied thus in a way signaling that the world in general had agreed to the existence of the "international minimum standard."



There were bolder moves within the UN by the developing states such as the championing of the New International Economic Order (NIEO) and the subsequent signing of the NIEO document that basically spoke of the need to change the current system of international economic law to accommodate the needs of developing states thus creating a more just economic system. This was followed by the signing of the Charter of Economic Rights and Duties of States (CERDS) that went on to repeat the provisions of the PSNR resolution with one very important difference. It gave no reasons for a state to justify an expropriation unlike its predecessor which listed public purpose and it made no reference to following rules of international law. It is no surprise that United States refused to sign the document and in the noted case of Texaco v. Libya, the arbitrator refused to apply CERDS calling it a political document rather than one which has any legal significance.

One thing that must be remembered is that despite the fanciful and bold assertions of all these document, they lack any implementing power as they are all non binding. At best they might reflect the collective view or consensus of states on the issue but the area of investment law is one that is largely determined through bilateral treaties signed between two states and mostly the stronger state can include whatever it prefers through its "bargaining power" with the poorer state.

The next question that comes to mind is that how firm is the concept today in a world where foreign investment or the business of multinational enterprises (MNEs) is the way to go forward! A quick look around a local city would show how far we have come. Take the case of the city of Lahore ... McDonald's, Gloria Jeans, Cinnabon, KFC, Pizza Hut, NEXT, The Body Shop ... the list can go on for a few paragraphs. The concept of globalization never seemed so close to home as it does today with virtually every foreign commodity being within reach of the local consumer. These franchises operate as subsidiaries of the multinationals they represents and the question arises as to how far Pakistan can control the activities of such MNEs. Islamabad recently saw the closing down of McDonald's in F9 park as according to the Supreme Court, the allotment of the land was made in violation of the

relevant procedures. The optimist would see this as a triumph of the state while the cynic might ask whether it really made any difference as shortly afterwards after the "correct" procedure of tenders and bids was followed McDonald's was allowed to open again in the same area. Nonetheless, this could be regarded as an example of the state flexing its institutional muscle to regulate the activity of an MNE. Should this be encouraged? Are we scaring off any potential future investment that might be coming Pakistan's way? A quick look at a local newspaper would show how uncertain the current climate of the country is with the regular spate of terrorism, whispers of a faltering democracy and a general lack of confidence in the political and economic conditions of the country. Can we hold on to the concept of PSNR in a world where the staggering difference between the developed and less developed countries is becoming more apparent with each passing fiscal year?

The power of MNEs can be determined by a guick look at international case law where some high profile cases display how influential MNEs can conveniently ignore human rights/workers rights and environment laws (that have been created and espoused by the countries that have given birth to the multinationals in the first place) in poorer investment recipient countries. The case of Nike being accused of using child labor in its production houses in Vietnam is one example. The world-wide condemnation of these practices led Nike to lead a pro active campaign by advocating it would take the strongest action against any of its subsidiaries found to be employing child labor. Thus the PSNR concept has come a long way from its origins where states were simply claiming to have the right to nationalize property on their territory regardless of ownership in exchange for compensation to modern day economy where the majority of investment and business is conducted by multinational enterprises and it is getting harder for the investment seeking countries to regulate their activities much less claim PSNR. One can only wonder what would have happened in our Islamabad example of instead of shutting the building down until the proper procedure was followed, the government had decided to simply take over! Perhaps then we would have seen the debate of PSNR take a whole new dimension in the face of globalized politics!



TALAQ AND THE MUSLIM FAMILY LAW ORDINANCE, 1961 IN PAKISTAN: An Analysis

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The Muslim Family Law Ordinance, 1961 (hereafter MFLO) is the most significant but controversial reform law in Pakistan. Bangladesh has inherited the same law. The background of the MFLO is interesting. In 1955, Muhammad Ali Bogra, the then Prime Minister of Pakistan, married his secretary while still legally married to his first wife. The All Pakistan Women's Association (APWA) – an elitist women's organization – began an organized agitation throughout the country. On August 4, 1955 the government of Pakistan announced a seven member Commission on Marriage and Family Laws, consisting of Dr. Khalifa Shuja-ud-Din (President), Dr. Khalifa Abdul Hakim (Member Secretary), Maulana Ihtisham-ul-Haq, Mr. Enayet-ur-Rahman, Begum Shah Nawaz, Begum Anwar G. Ahmad and Begum Shamsunnahar Mahmood.2 After the death of the President of the Commission, Mian Abdur Rashid, former Chief Justice of Pakistan was appointed as President on October 27, 1955. The Commission was mandated to report on "the proper registration of marriages and divorces, the right to divorce exercisable by either partner through a court or by other judicial means, maintenance and the establishment of Special Court to deal expeditiously with cases affecting women's rights."3 The Commission published its report on June 20, 1956 and the dissenting note of Moulana Thanavi was published separately on August 30, 1956. The Commission brought severe criticism from the ulama.4 A detailed discussion of the Commission's Report is beyond the scope of this work.

The Commission recommended the enactment of laws providing that three divorces in one session amounts to one pronouncement and for a divorce to be effective, two further pronouncements in two subsequent *tuhrs* would be necessary. Moreover, the legislation should provide that no person shall be able to pronounce a divorce without obtaining an order to that effect from a Matrimonial and Family Court. Moulana Intisham-ul-Haq rejected outright the recommendations of the Commission. The Moulana opined, "To put a restriction on the exercise of this right by making it ineffective if *talaq* is not registered or not authorized by the Matrimonial and Family laws Court, not only amounts to tampering with the injunctions of the faith but also putting obstacles in the way of dissolution even when it becomes necessary and desirable."

Because of the intense hostility of the ulama to the

Commission's recommendations relating to divorce, the framers of the MFLO ignored the idea of court intervention in divorce. The provisions of section 7 of the MFLO relating to talaq are reproduced below:

- Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.
- Whoever contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or both.
- 3. Save as provided in sub-section (5), a talaq unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman.
- 4. Within thirty days of the receipt of notice under subsection (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about the reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.
- If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in sub-section (3) or the pregnancy, whichever be later, ends.
- 6. Nothing shall debar a wife whose marriage has been terminated by talaq effective under this section from marrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.

The most noticeable implications of section 7 are: Firstly, it refers the issue of divorce to an administrative body for reconciliation; Secondly, talaq is not effective for ninety days during which reconciliation shall be attempted between the parties. Unfortunately, the reconciliation effort does not precede the pronouncement of talaq, it follows it. Thirdly, although sub-section (1) mentions any form of talaq (talaq in any form whatsoever) which obviously include ahsan, hasan, as well as talaq al-bid'a. But as discussed above, under Islamic law the procedure for reconciliation is only possible if only one or two pronouncements are made. Fourthly, section 7 can be construed to have impliedly abolished talaq al-bid'a (triple talaq) because it allows remarriage between the



parties after the divorce without an intervening marriage or halala, unless this is the third such pronouncement under section 7. The MFLO is indeed a very vague law and the ulama brought in a scathing attack on it.10 The main criticisms of section 7 are: Firstly, under Islamic law a third divorce becomes effective as soon as it is pronounced but under section 7 a third divorce will be effective after ninety days are passed from the date of the receipt of the notice by the Chairman (and not from the date of pronouncement of talaq). Secondly, under Islamic law, iddat is counted from the time of the pronouncement but under section 7 it is counted from the time the notice is received by the Chairman. Problems arise when no notice is sent to the Chairman. Thirdly, under Islamic law, divorce of a couple who have not yet consummated their marriage becomes effective immediately and no iddat (waiting period) is required for the woman. But under the MFLO every divorce whether the marriage is consummated or not consummated will be effective until ninety days of the receipt of the notice by the Chairman.11 Fourthly, according to section 7, the iddat of a woman who is not pregnant is over ninety days but under Islamic law, her iddat is three monthly courses. Fifthly, under section 7 the iddat period of a pregnant woman is the end of pregnancy or ninety days, whichever is later. According to the Qur'an, it ends with the end of pregnancy which may be less than ninety days. Finally, under section 7 effectiveness of talaq is dependent on the notice of talaq to the Chairman and reconciliatory efforts by him. This has no basis in Islamic law.

An Analysis of Judicial Interpretations of Section 7 of the MFLO

The first question that had to be interpreted by the judiciary in Pakistan was the consequences of failure to give notice of talaq to the Chairman, i.e. what would be the effect if the husband failed to give any notice of talaq. In Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yusuf 12the Supreme Court held that where the husband did not give notice of talaq to the Chairman, he would be deemed to have revoked the talag. 13 This remark by S. A. Rahman, J. could only be considered as a dictum because failure to give notice of talaq was not an issue in that case. However, the Supreme Court as well as the High Court raised it to the status of a celebrated ratio in subsequent cases, such as, the State v Mst. Tauqir Fatima, Abdul Aziz v. Rezia Khatoon, Abdul Mannan v. Safrun Nessa, Mst. Ghulam Fatima v. Abdul Qayyum and Others, Muhammad Salahuddin Khan v. Muhammad Nazir Siddiqui, and Junaid Ali v. Abdul Qadir.19 The Gardezi case had thus become 'the Gardezi rule' failure to give notice of talaq amounts to revocation. There have been only two exceptions to the Gardezi rule reported in two cases but this is because of the peculiar circumstances of the two cases.20 Till the passing of the Protection of Women

Act, 2006, husbands who would not comply with sub-section (3) of section 7 to give notice of *talaq* would, in order to harass her, accuse her of zina (adultery) with her new husband. The Protection of Women Act, 2006 has put an end to this practice.²¹

In Mst. Kaneez Fatima v. Wali Muhammad²² the Supreme Court while discussing the Gardezi rule held that "failure to send notice of Talaq to the Chairman of the Union Council does not by itself lead to the conclusion that Talaq has been revoked. It may only be ineffective but not revoked. "23 This is the first time that the infamous Gardezi rule was overruled by the Supreme Court itself. Unfortunately, in Mst. Farah Naz v. Judge Family Court,24 the Supreme Court once again upheld the controversial Gardezi rule (without referring to the Gardezi case itself). The Supreme Court has not been very consistent regarding this issue. It is important to note that the Farah Naz case was decided by a Divisional Bench of the Supreme Court comprising of Rana Bhagwandas and Muhammad Nawaz Abbasi, JJ whereas Kaneez Fatima was decided by a larger Bench of five judges. The facts in both cases were somewhat similar. In Kaneez Fatima the husband and wife agreed to mutually dissolve their marriage with effect from 1-11-1977 and the wife received rupees 10,000 and five tolas (one tola is equal to 12 grams) of gold in lieu of the prompt dower of rupees 30,000 and 20 tolas of gold and a monthly maintenance of rupees 200. Both the parties agreed that they will have no further claim in future against each other. However, on 6-4-1978 the appellant filed a suit for recovery of the remaining amount of dower (i.e. rupees 20,000) and maintenance in Family Court pleading that the compromise was arrived at due to coercion and no notice of dissolution of marriage was given to the Chairman as provided by section 7 of the MFLO, 1961. It was held that "In case where with the consent of both the parties divorce is effected and confirmed in writing under their undisputed signatures, section 7 should not be strictly construed." The Court opined that "the notice can be sent at any time thereafter to comply with the provisions of section 7."25 The Court refused maintenance to the appellant. Commenting on the Gardezi rule the Court held, "So far the observations made in Syed Ali Nawaz Gardezi's case, it may be observed that failure to send notice of Talag to the Chairman of the Union Council does not by itself lead to the conclusion that Talag has been revoked. It may only be ineffective but not revoked." 26 In Farah Naz's case the appellant filed a suit for recovery of maintenance from the husband on 16-2-2002 but the husband claimed to have pronounced divorce on her on 13-12-1997 and therefore she was not entitled to the relief of maintenance. Her claim for past maintenance was rejected by the trial Court but accepted by the first the Appellate Court from 28-12-1996 to 14-4-98. Both Courts accepted the oral



talaq pronounced by the husband although the husband had not given any notice of talaq to the Chairman under 7. The High Court upheld the decision of the trial Court regarding maintenance. However, the Supreme Court disagreed and held that "[O]ral allegation of Talaq would neither be effective nor valid and binding on the appellant." The Court awarded the wife past maintenance as she claimed. In Farah Naz the Court neither made any reference to Ali Nawaz Gardezi case nor to Kaneez Fatima. Our conclusion is that in Kaneez Fatima the parties opted out of the procedure of section 7 whereas there was no mutual compromise to put an end to the marital tie and the husband alleged to have orally pronounced talaq but failed to prove it. Another point is that in Farah Naz, the respondent (husband) was trying to benefit from his own failure to give notice of talaq to the Chairman. Unfortunately, the Court did not raise this point in its discussion. The Farah Naz decision has apparently re-activated the Gardezi rule (i.e., failure to give notice of talaq to the Chairman amounts to revocation). In addition, Farah Naz (a Divisional Bench's decision) cannot overrule Kaneez Fatima (a five members Bench's unanimous decision) because a larger Bench of the Supreme Court binds a smaller Bench.28

In Allah Rakha v. The Federation of Pakistan²⁹ the Federal Shariat Court in Pakistan has declared sub-sections (3) and (5) of section 7 as repugnant to the injunctions of Islam.30 As we have seen above there are too many objections against section 7 from an Islamic law perspective and not just two.

See, Freeland Abbott, "Pakistan's New Marriage Law: A Reflection of Qur'anic Interpretation", Asian Survey, Vol. 1, No. 11, (Jan., 1962), pp. 26-32 at 26. Also see, Pakistan Times, Lahore, April 14, 1955.

[&]quot;Report of the Commission on Marriages and Family Laws", The Gazette of Pakistan, Extraordinary, Karachi, 20 June 1956, 1197. (Hereafter Report).

³ Ibid. 1197-8.

For example, see, Syed Abul A'la Maududi, "The Family Law of Islam" in Khurshid Ahmad (ed.), Studies in the Family Law of Islam (Karachi: 2nd edn. 1961), 21 and Amin Ahsan Islahi, "A Critique of the Modernist Approach to the Family Law of Islam", in Khurshid Ahmad (ed.), Studies in the Family Law of Islam (Karachi:

²nd edn. 1961), 194. For a detailed analysis of the Report, see, Alamgir Muhammad Sirajuddin, Shari'a Law and Society: Tradition and Change in South Asia, (Karachi: Oxford University Press, 2nd edn. 2001), pp. 35-75.

The Report, p. 1213.

⁷ Ibid., p. 1214.

⁶ Ibid. 1586-7.

⁹ This is according to the jamhur. Reconciliation is possible according to Ibn Taymiyya, Ibn al-Qiyyam, the ahl al-hadith and the Shi'a Imamiyya because they treat

three repudiations in one session to be one. Muslim Family Laws Ordinance as Commented by Ulama in the Light of [the] Quran [sic] and [the] Sunnah (Hyderabad: Maktaba-e-llmi, n.d.). The original pamphlet was in Urdu and was signed by 14 ulama mostly from Lahore; and Khurshid Ahmad, ed., Marriage Commission Report X-Rayed (Karachi: Chirag-i-Rah

Publications, 1959). Its second edition was titled as Studies in the Family Law of Islam. In practice the Arbitration Council locally known as 'Musalihati Council' (in some areas it is known as Musalihati Court) upon the receipt of the notice looks at the type of talaq pronounced by the husband. The Council does not act if three pronouncements are made by a husband and tells the parties to wait for 90 days for obtaining their divorce certificates.

PLD 1963 SC 51.

¹³ Ibid. at 74-75. (per Justice, S. A. Rahman).

¹⁴ PLD 1964 (W.P.) Kar 306.

^{15 21} DLR 1969, 733.

^{16 1970} SCMR 845.

¹⁷ PLD 1981 SC 460.

^{18 1984} SCMR 583.

^{19 1987} SCMR 518. See, Noor Khan v. Haq Nawaz PLD 1982 FSC 265 and Chuhar v. Ghulam Fatima PLD 1984 Lah 234.

For details, see, my, "Is Zina bil jabr a hadd, ta'zir, or Syasa Offence? A Re-Appraisal of the Protection of Women Act, 2006 in Pakistan", Yearbook of Islamic and Middle Eastern Law, Vol. 14 (2008-2009), pp. 95-115.

²² PLD 1993 SC 901.

²³ Ibid., at p. 916. (Per Saleem Akhtar, J for the five members Bench. Other members of the Bench were Shafiur Rahman, Abdul Qadeer Chaudhry, Saeeduzzaman Siddiqui and Wali Muhammad Khan, JJ).

PLD 2006, SC 457.

²⁵ See, PLD 1993 SC 901 at 917.

See, PLD 1993 SC 901 at 915-6.

²⁷ See, PLD 2006, SC 457 at 463 (per Rana Bhagwandas, J for the Divisional Bench).

²⁸ For details of this rule, see, Muhammad Munir, Precedent in Pakistani Law, forthcoming.

³⁰ Ibid., 62. The Pakistani Government has appealed against the decision of the Federal Shariat Court to the Shariat Appellate Bench of the Supreme Court where the case is pending till the writing of this article. Section 7 of the MFLO has been the subject of fierce debates in the academic circles as well as amongst the superior judiciary in Pakistan. It is pointed out by some authors that because of the procedure laid down in section 7, Pakistani law abolishes triple talaq or talaq al-bid'at. See Alamghir, Shari'a Law, 215 and Lucy Carroll, 'Talaq-e-Tafwid in the Classical Texts,' in Carroll and Kapoor, Talaq-e-Tafwid, 45.



THE CRICKETER, SANDWICHES AND ORANGES: THE PAST, TRULY, IS ANOTHER COUNTRY

Adnan Ahmed Sipra

The writer is a journalist with experience spanning twenty years career, including work for the United Nations' humanitarian news agency, the Integrated Regional Information Networks (IRIN).

Let me tell you a story. I fell in love with the game of cricket in the winter of 1982-83 when, like millions of Pakistanis, I was captivated by the exploits of an Imran Khan-led Pakistani side against the touring Indians. I was ten years old and my interest in following the national cricket team had been piqued by a special edition of that fabulous publication, The Cricketer, which had been gifted to me by an uncle. Edited by the late Gul Hameed Bhatti, The Cricketer, which was founded in 1972, had decided to celebrate only the second tour of Pakistan by an Indian team in the preceding twenty-odd years by bringing out a double-issue in which there were superbly crafted pen-sketches of all the players that were to participate in that six-Test series, along with brilliantly written articles on past matches between the two sides by eminent cricket correspondents from both sides of the border.

So, with the winter break on from school and once the cricket started, I would cycle to the Gaddafi Stadium with that double-issue in my satchel. Those were different times, of course: there were no security checks when the first Test started in Lahore and it would take me five minutes to get to the ground from our old, rambling house in the Old F.C.C. scheme. Tickets for the General Stand were very cheap: my pocket-money covered the cost of my daily entry and I would find a nice spot next to the television camera so that I could peek over the camera-man's shoulder and see the action as it played out. But that first Test was a high-scoring draw and my perennial love-affair with cricket was yet to begin in earnest, although even back then, I loved the experience of sitting in the winter sun on the concrete slabs and jumping up to celebrate when the elegant Zaheer Abbas reached his double-century and, later, when the great Sunil Gavaskar reached his half-century.

Like I said, those were different times and cricket tours would last a couple of months because a touring side would play first-class matches as practice games in between Tests. Thus, between the time that the Indians arrived at the end of November 1982 and when they left, vanquished 3-0 in the Test series, in early February 1983, all it had taken was one stunning spell of bowling by Imran Khan in the second Test at Karachi to make me and every other boy of my age fall completely in love with the game. Television coverage was very basic in those days: Pakistan Television covered the matches without any of the frills associated with today's high-tech, multiple-camera extravaganzas but I still remember the roar of the Karachi crowd as Imran scythed through a highly-experienced Indian batting line-up to set up an innings victory. For me and my mates at Aitchison College, his achievements in that series - 40 wickets and over 200 runs - were a source of pride because, we would tell each other (as we tried to emulate his run-up and copied his batting stance), he was an Aitchisonian and we would make the

longish trek to the Old Pavilion from Prep School to point him out to each other in the pavilion's verandah where photographs of the school's teams from decades past were displayed. But I still have to tell you a story. Eleven years on from thence, I had followed in my father's footsteps and started writing on cricket. So, at the age of 21, I found myself sitting in the press box at Old Trafford in Manchester: the only Pakistani journalist covering the Ashes series in 1993. I had a typewriter which belonged to my grandfather and was my most cherished possession but every single English and Australian journalist had lap-tops. On the first day of that first Test, after Shane Warne had bowled his ball of the century to Mike Gatting, and I started typing out my report before the day's play came to a close, one old journalist who sat next to me tapped me on the arm and asked if I could stop typing for a couple of minutes because he couldn't dictate his report over the phone due to the clatter of my typewriter's keys.

Back home in Pakistan once the series ended with the Australians victorious, I set about covering domestic first-class matches and international fixtures. However, the love for the game that had fixated me and my peers throughout our teenage years and bubbled over with Pakistan's World Cup win in 1992 was fast being replaced by disillusionment. Through reading the works of E. W. Swanton and John Arlott and Brian Johnston and through drinking in the fabulous newspaper prose of John Woodcock (whom I finally met in 1993); and through my education at an elite public school such as Aitchison College where sport plays an integral part in the shaping of a student's personality, the lesson that had been ingrained in my mind was the fact that cricket was the sport of gentlemen. Through being passionate fans of Imran Khan, my friends and I had marveled at his aristocratic demeanour on the field and reveled in the fact that, despite playing the game hard, he played it fairly as did the opposing teams of his time. Yet the match-fixing scandal that first broke in the mid-1990s involving Pakistani players made me realize that, for the cricketers of that generation, the pride of playing for their country appeared to have been overtaken by matters concerning personal preferences and monetary gain. Also, I found that, instead of focusing on the elegance of an on-drive or the intricacy of a leg-break, the mandate handed to cricket correspondents now required them to function as investigative reporters rather than merely cricket writers. So, despite the fact that I became a journalist at the age of 17 only to write on cricket – and which was something I thought I would happily do for the rest of my life - I decided, at the age of 23, that I wanted absolutely nothing to do with this sport on a professional level.

So the story I wanted to tell you is simply this: my love affair with cricket has not died away in the 15 years since I decided to return to



simply being a passionate cricket fan. Yes, the game has changed immensely in that time; yes, it has grown immensely as a spectacle and, yes, it harbours serious pretensions of becoming a truly global sport eventually. But with each passing year and each new madefor-television adventure, more money has come into the game and, with each new millionaire created by smash-bang epics in the T-20 format, more greed has crept into the minds of young cricketers who might, otherwise, have only wanted to play the game for the eventual honour of being able to represent their country. That is what people of my generation grew up believing to be the best singular honour because that is what was handed down to us through the books we read and the lore we heard about the great cricketers of the past who played their hearts out for their countries. Money was not even a consideration: it was just a simple matter of being the best at what you do and being able to pit your skills against worthy opponents.

However—and very ironically—the only good thing to have emerged in the past decade and a half is the evolution of the International Cricket Council (ICC) from being viewed simply as a regulatory body into one that can now truly be called a "governing" body. In the past, and before the great television spectacle carried the game into the

sporting stratosphere, it was viewed as being toothless and without a specific mandate to operate in if a member board decided to challenge its authority. But, in recent years, it has grown in stature and authority and, even, organizational ability. Sadly, the media circus that surrounds cricket now has more to criticize than critique on the way that the ICC functions but even the most cynical amongst us would be willing to admit that the latest match-fixing scandal to hit the game has been handled extremely well by cricket's world body. That it concerned Pakistani players again is just as sad a reflection on this country's cricketing authority's inability to foresee what was coming.

So my story ends on a purely cricketing note. While I still love the game and it remains my first love, no amount of cricket I watch now can fulfill me as much as that time when I was a boy who would cycle to the Gaddafi stadium with my double-issue of The Cricketer and my sandwiches and oranges and sit on a concrete slab to watch my heroes play a fabulous game, day in and day out. Or when I would persuade my father to come and join me simply so I could take his binoculars and watch the flick of Mohsin Khan's wrists as he played the ball to the onside or that tremendous leap that Imran used to take in his delivery stride. In my personal cricketing context, the past truly is another country.



INTERVIEW WITH A LEGAL ENTREPRENEUR – NIDA TAREEN AND THE SCHOOL OF INTERNATIONAL LAW

Staff Reporter

Where did you study?

I completed the LLB (Hons) distance learning programme from the University of London in 2004 and then proceeded to complete the LLM programme offered by the same university. So one answer is that I have University of London degrees — the LLB (Hons) and the LLM and the other is that I have studied in colleges in Lahore and Islamabad, and independently when adequate support was not available.

Why open a law school – after all there are already a few operating in Islamabad?

I have been loosely involved with a majority of the existing law colleges in Islamabad either as a student or as a visiting faculty member.

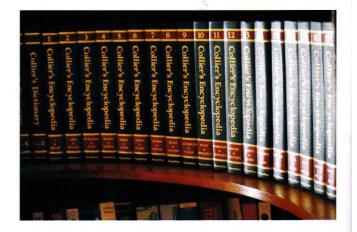
As a student, I always felt that my experience could have been enriched much further had an institution existed that put the students first! I have still not understood how we could be trained to be lawyers of an international degree programme and yet never learn the practical application of legal theory. For instance, our classes were spent studying the textbooks without ever deliberating upon the legal ramifications of what was being learnt. Unfortunately, it seems that students tend to fall into the rut of mere rote learning or note memorizing which accounts for their dismal appreciation and limited understanding of legal complexities once they enter into the legal profession.

I suppose the simplest answer to your question is that there is a gap that I think my team and I can fill.

What is School of International Law (SIL) doing or going to do differently?

Studying for any distance learning programme can be challenging. In order to excel, a student requires guidance and support from faculty that has the necessary experience and skill to teach both the subject matter and examination techniques. The School of International Law is equipped to do just that.

With all the basics in place – a spacious campus, the requisite infrastructure, sports facilities, a well-equipped library – SIL offers those ingredients that make it possible for students to



realize their potential, as individuals and as lawyers.

SIL has a policy of going beyond the classroom environment and textbook approach. We are passionate about providing our students with an enriching experience of what it is to be a lawyer in the making. Some of our extracurricular activities include training our students in advocacy and hosting regular mock trials within the campus. In addition all courses include regular law moots and legal research training.

Since no campus life is complete without recreation, SIL offers regular alumni get-togethers, field trips and sports matches. SIL has also arranged for the top performers of each year to be placed with reputable law firms as interns and research associates during their summer break. This placement allows the students to gain invaluable practical experience for their CVs while clarifying for them which areas of Law interest them.

At SIL, our aim is to ensure that our students are trained to be lawyers and not simply learn enough to pass an exam. We aim for the highest grades while at the same time ensuring that our students walk out as competent professionals in the legal world, whether they choose to practice law, teach law or enter the corporate sector.

Your college is the only one offering teaching support for the University of London LLM programme in Islamabad. How are you equipped to teach those subjects and why shouldn't a prospective student go to England for the course?

Going abroad, whether for a graduate degree or a post-



graduate one, requires a lot of different things to fall into place—the funds have to be there, you have to get the visa, you have to get admission into a university, you have to be able to leave the country for that many years, and so on. In Pakistan, we have family obligations that do not always allow us to leave. Our money converted into pounds sterling takes on nightmare proportions. And for young men, being a Pakistani Muslim does not guarantee visas. If a prospective student has all those factors in his favour and gets admission into a good LLM programme abroad, certainly that is an experience worth pursuing. If, however, he or she cannot go abroad then the University of London International Programmes are a superb option.

I have been teaching students for the LLM for the past two years so in my case I am equipped to teach the course because I have successfully taught them thus far.

Why Law?

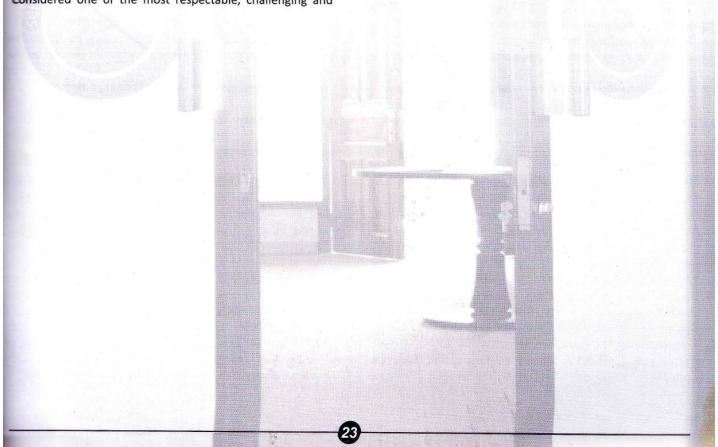
The study of law has increasingly gained popularity in the recent years in Pakistan as students are realizing the vast potential that the subject has to offer. Whether in the field of criminal practice or civil advocacy, corporate transactions or constitutional development, LAW has something for everyone!

Considered one of the most respectable, challenging and



lucrative fields today, lawyers in Pakistan have historically been in the forefront of shaping civil society and the character of the nation. It is no wonder that the founder of the nation started his career as an eminent barrister!

Law has a distinct advantage over other professional degrees in that it equips students with skills that prepare for the rigours of real life. Confidence, discipline and articulation are but some of the hallmarks of a lawyer's personality, learnt in the course of his or her academic training.





GENDER SENSITIZATION FOR CONFLICT MANAGEMENT AND RESOLUTION

Sehar Tariq

The writer works at the Jinnah Institute, a public policy think tank in Islamabad. She did her Bachelors Degree from Yale University and her Masters in Public Policy from Preston University.

"If women are half of every community, are they therefore not half of every solution?"

Noeleen Heyzer, ED of the UN Development Fund for Women

Impact of Recent Conflicts on Pakistani Women

As the world marks International Women's Day, thousands of Pakistani women across the nation, suffering due to ongoing conflicts in the region remain largely ignored by the world. Domestic violence, harassment and discrimination continue to form the pillars of the women's rights agenda for most activists and rights based organizations. Responding to the needs of women in conflict zones, their rehabilitation and their inclusion in peace negotiations or post conflict reconstruction are causes that have not received the attention they require.

More than 30,000 Pakistanis have been killed or injured in the War on Terror since 2001. According to ISPR sources, this includes over 21,000 civilian deaths and injuries. UN OCHA reports that over 2.5 million people have been displaced as a result of military operations being conducted in the northwest of Pakistan. The war has taken a heavy toll on life, livelihoods and infrastructure but gender disaggregated data is currently available. Therefore, quantifying the impact of the war on women remains difficult. As a result, discussion of how the war has affected women, remains absent from policy discourse. Women continue to suffer on the margins of society; not only victimized and targeted during conflict, but also excluded from post conflict reconstruction and peace building processes.

Women have suffered the indignity of rape, torture and captivity. Girls' schools have been primary targets for extremist organizations, and education for women and girls has come to a virtual halt in areas where the militancy still rages on. Working women have been targeted by extremists while threats to personal safety have left women deprived of livelihoods and increased their financial dependence on patriarchal and tribal structures. Whereas many women have suffered at the hands of the conflict, some have also actively aided and abetted insurgents. Therefore, despite being neglected by the state, women continue to be involved actively in conflicts, as victims and aggressors, but their potential as peacemakers and peacekeepers remain

untapped.

Hotbeds of militant activity in Pakistan coincide with highly patriarchal and exclusionary societies where women have been historically marginalized and excluded from public life and decision making processes. The rise of guerilla groups in these regions, the military's subsequent action against them and the State's longstanding failure to empower women has resulted in increased oppression of women, exclusion from society and further exacerbated the culture of violence towards women.

The State needs to play a more active role in sensitizing security forces operating in these areas to women's needs and working to put an end to the cycles of violence, oppression and exclusion. The State must also encourage women to act as agents of change in their communities. Women should be empowered to play a positive role in ending militancy and violence in their communities. Supporters and sponsors of the War on Terror, in the pursuit of their strategic goals in the region have also neglected the plight of women in the area.

International actors, operating in the region, have failed to consider the impact of the war on terror on women. In the construction of their military strategies they have failed to prioritize strategies that will mitigate the impact of the conflict on women and children. The structuring of aid programmes have also failed to build in substantial incentives for increasing female participation in conflict resolution, post-conflict reconstruction or rehabilitation.

SCR 1325 and Pakistan: An Unused Framework for Inclusion

On 31st October, 2000, the United Nations Security Council adopted Resolution 1325 on women, peace and security during its 4231st meeting. The Resolution deals with the special impact that war has on women and children and stresses the necessity to involve women in conflict prevention, peace building and post-conflict reconstruction. The Resolution calls for increasing the number of women working on all levels of decision-making and incorporating a gender sensitive perspective in conflict prevention, conflict resolution and post conflict reconstruction; and training of security and peacekeeping personnel in accordance with these priorities to ensure their implementation in the field.



Pakistan has a stated commitment to gender equality and women's empowerment through its ratification of CEDAW in 1996. The Government through the Ministry of Women Development is keen to support the development of an implementation plan on SCR 1325 and in general advance gender-sensitive approaches to peacekeeping. However, Pakistan is not recognized by its government as a "conflict country" or a country at war since the conflicts confronting Pakistan are of an internal nature. The government prefers to label the current situation a "crisis of law and order." Therefore, little progress has been made towards the actual implementation of 1325 in Pakistan and pressure from the international community to Progress remains limited to gender sensitization of peacekeepers being sent abroad on UN peacekeeping missions. There is currently no state-wide program or initiative in place for the sensitization of civil and military personnel deployed in conflict zones in the country. Some initiatives, led by local NGOs and funded by a variety of donors have been working on gender sensitizing police personnel but no such programme exists for military and paramilitary forces operating in the north western regions of Pakistan.

As a result, Pakistan's military forces are unprepared and untrained to deal with the needs of women in conflict zones. Given the severely patriarchal culture of the military and the northwestern borderlands of Pakistan, inclusion of women in negotiating peace deals is unheard of. Furthermore, even incorporating their perspective or needs into peace settlements is missing from the current operational ethos of the government and military. Women and girls are among those most affected by the violence and economic instability associated with conflict and post-conflict situations. Yet, when it comes to negotiating peace and facilitating the reconstruction of societies after war, women are grossly under represented.

The Way Forward

<u>Implementation of SCR 1325</u>: The government of Pakistan, despite not being a conflict state, must realize that SCR 1325 is a comprehensive framework for ensuring that women's needs are addressed and their voices are included in the process of post-conflict reconstruction. Therefore, various arms of the state involved in managing the law and order situation, should ensure that their operations are aligned with the international covenants enshrined in 1325.

Review of gender policies of law enforcement agencies: Policies outlining conduct of law enforcers towards women, particularly during crises and conflicts have in many cases not been formulated and in most cases not implemented. Lack of implementation of these policies needs to be investigated.

Policies, where lacking, must be crafted and implemented. Unimplemented policies should be reviewed by MoWD with the help of relevant expertise from civil society to ensure that they are in accordance with our international commitments to protecting and promoting women's rights. A report on the status of implementation of gender sensitive policies of law enforcement agencies should be commissioned and made public by MoWD.

Setup an inter-ministerial task force for an inter-agency effort to sensitize law enforcement agencies: MoWD should coordinate with all related organizations like NGOs, police department and the military to translate national and international commitments to women's rights and inclusion into performance on the ground. The task force should, review the status of policy implementation in each organization, recommend actions for improvement and monitor progress of agencies to ensure implementation. The report of the task force should be made public.

Develop accountability mechanisms for trying and punishing perpetrators of crimes against women: Law enforcement agencies have internal mechanisms for holding personnel accountable for violating official policy. These mechanisms, particularly in the military, are extremely non-transparent. Greater transparency around the trial and prosecution of perpetrators of crimes against women and children should be instituted in all law enforcement agencies. A mechanism for grievance redressal, that allows the public to file complaints against law enforcement agencies and follow up on progress, must be instituted.

Establish a platform for greater coordination and interaction between the NGOs and law enforcement agencies, particularly the military: While a number of civil society initiatives are in place to sensitize the police to issues of gender, no such large scale, civil society initiative exists for military personnel and this is largely due to the lack of access to military personnel and sustained interaction between members of the civil society and the military. Such interactions will facilitate greater understanding between he two groups of operational challenges and constraints and can provide a platform for devising solutions to Pakistan's unique situation that will allow not only the protection of women and children during conflicts but their inclusion in negotiating peace.

Knowledge-sharing between the Pakistani and Argentinean Ministries of Defense: Under the leadership of its Ministry of Defense, Argentina has taken steps to make law enforcement more inclusive, democratic and sensitive to the needs of women. The Ministry of Defense has drafted a progressive



and comprehensive gender policy and help set up a training institute dedicated to the sensitization of peacekeepers and law enforcement agents to gender issues. The Ministry of Defense in Pakistan should establish a platform for knowledge sharing with their Argentinean counterparts in order to formulate similar policies that ensure gender equity in deciding matters of national security.

Encourage greater participation of women in civil and military law enforcement agencies: Pakistan has already taken steps to actively recruit women into the police and armed forces. Such efforts should continue and all female groups should be deployed in areas experiencing law and order disturbances along with their male colleagues. Female troops will have greater access to the women in the area, thereby allowing law enforcement agencies to become aware of the needs of women. Deployment of women in areas experiencing conflict is not standard practice in Pakistan as it is believed that the

protection of female troops will become an additional burden on security forces. However, women battalions and groups have been deployed in various conflict zones across the world and the Pakistani military and law enforcement agencies must review their policies to allow women troops in the field.

Use the pre-deployment training of peacekeepers as a template for sensitizing all military personnel: MoWD and the military have developed a training for UN peacekeepers that is used to sensitize them to gender issues before being deployed abroad as part of a UN mission. This short training is only provided to troops going abroad. The scope of this training must be expanded to include all civil and military personnel. This training should also be instituted as a core part of the initial training and curriculum of security forces instead of being provided prior to a tour of duty overseas.



JURISDICTION OF US COURTS AND THE CONCEPT OF IMMUNITY

Pashmina Khan and Mekael Mehmud Ali

The writers are graduates of the University of London LLB (Hons) International Programme and are practicing lawyers based in Islamabad.

A US citizen wishes to file a civil suit against a foreign body for alleged acts of terrorism against his/her family. There is no evidence of said alleged acts of terrorism.

Can a US Court have jurisdiction over a foreign body based on International Law?

Under the traditional basis of asserting jurisdiction in International Law, a U.S Court does not have jurisdiction over a foreign body. Under International Law extra-territorial jurisdiction can be claimed on very narrow grounds and asserting jurisdiction on a sovereign State's functionary/entity performing exclusively a State function is in clear contravention of International Law.

However, in exceptional circumstances jurisdiction may be claimed on the basis of passive personality, i.e. a State has the right to assert jurisdiction over nationals of foreign States, on the principle that foreign nationals committed crimes against nationals of their State.

The passive personality principle was relied on in the case of United States v Yunis, in which the US Courts asserted jurisdiction over a Lebanese Citizen accused of hijacking a Jordanian civil aircraft in the Middle East. The rationale for asserting jurisdiction was the presence of American citizens on board the airliner. Interestingly enough, none of the American Citizens were actually hurt. Yet the Court could assume jurisdiction.

Therefore the assertion of extra territorial jurisdiction is possible. However, as a rule passive personality has been used against individuals by States based on cogent evidence and not States nor State actors. Furthermore, passive personality remains an extremely controversial method of asserting jurisdiction.

Certain elements of the Lockerbie Case require scrutiny.

1. All the cases in which jurisdiction has been asserted seem to have involved criminal liability and not civil liability. The Lockerbie Case is an exception to this rule and has been discussed and distinguished from the present situation further on in this opinion. 2. US Courts may have asserted jurisdiction in cases against individuals such as a drug dealer in Alvarez-Machain, as has Israel in the Eichmann (former Nazi) case. Nonetheless these forms of jurisdiction remain unacceptable to the world at large and are likely to endanger world peace.

In the Lockerbie Case, a Pan-Am flight was bombed and several sections of the plane fell over the town of Lockerbie in Scotland. 270 people were killed during the tragic incident.

In 1991, two Libyans were arrested because they were suspected of involvement in the bombing. Mr. Megrahi was a Libyan Intelligence Officer and the Head of Security for Libyan Arab Airlines. The second suspect, Mr. Fhimah, was an LAA station manager.

There was a dispute over jurisdiction in the case since Libya wanted to try the perpetrators in its own courts and the US, UK, and France asserted jurisdiction over the suspects. In the end, Libya surrendered to the weight of great international pressure in the form of multiple sanctions and agreed to a trial in the Netherlands which served as a neutral trial venue. On 31st January 2001, Mr. Megrahi was convicted of murder by a panel of three Scottish judges and sentenced to 27 years in prison but Mr. Fhimah was acquitted.

On 29th May 2002, Libya offered up to US\$2.7 billion to settle claims by the families of the 270 people killed in the Lockerbie incident, representing US\$10 million per family. The Libyan offer was that:

- 40% of the money would be released when United Nations sanctions, which were suspended in 1999, were cancelled;
- Another 40% when US trade sanctions were lifted; and
- The final 20% when the US State Department removed Libya from its list of states sponsoring terrorism.

Jim Kreindler, who orchestrated the settlement, said, "These are uncharted waters. It is the first time that any of the states designated as sponsors of terrorism have offered compensation to families of terror victims."

Thus, calling this payment a settlement (a traditional legal settlement) is a farce. The payment was clearly an attempt to escape trade sanctions from the US and UK. Mr. Kreindler's



involvement was simply that of a facilitator.

The Lockerbie scenario is entirely different from the issue at hand and is not applicable to our fictional foreign body for the following reasons:

- In the Lockerbie Case, there was clear evidence of direct involvement of the Libyan Government in the terrorist attack. In the present circumstances, there is no incriminating evidence.
- The settlement was made after a criminal inquiry was conducted and a trial had taken place, leading to Mr. Megrahi's conviction. Libya admitted responsibility in 2003 for the Pan-Am Flight in a letter to the President of the UNSC. The involvement of our fictional body is mere conjecture.
- In the Lockerbie case, a suspect apprehended and convicted was actually a member of the Libyan Intelligence Service. There is no evidence of the involvement of our fictional body in our case.
- 4. As stated above, the payment made by Libya is clearly not genuine compensation in the real sense of the word. Instead, it is a trade-off to escape sanctions. The State Department of the US has made it clear that they were not involved in the settlement. On 24 February 2004, Libyan Prime Minister Shukri Ghanem stated in a BBC Radio 4 interview that his country had paid the compensation as the "price for peace" and to secure the lifting of sanctions. When asked if Libya did not accept guilt, he said, "I agree with that." Therefore, using that settlement as an example of a successful civil claim is ludicrous.

Therefore, clearly Lockerbie is not the precedent to follow. We can argue that any national law which claims jurisdiction subverts international laws and principles is infringing upon the fundamental notion of sovereign equality of states.

Can the UNSC pass a resolution on the matter and can such a resolution have binding effect?

Chapter Seven of the UN Charter gives the UNSC the power to decide what measures are to be taken in situations involving "threats to the peace, breaches of the peace, or acts of aggression."

In such situations, the Council is not limited to recommendations but may take action, including the use of armed force "to maintain or restore international peace and security". This was the basis for UN armed action in Korea in 1950 during the Korean War and the use of coalition forces in Iraq and Kuwait in 1991. Decisions taken under Chapter Seven, such as economic sanctions, are legally binding on UN

members. During the Lockerbie incident, for example, the UNSC passed resolutions imposing international sanctions on Libva.

However, the chances of the UNSC passing such a Resolution for the matter at hand are close to none. The existence of mere suspicion and an unresolved inquiry is insufficient to bring about a resolution on the issue at hand, especially on a civil matter. Chapter 7 can only be utilized when there is a breach of the peace or at least a threat, and at present there is no evidence of our fictional body's involvement in the matter therefore the causal link is missing. Nonetheless, the USA has significant influence in UNSC and at present we cannot comment on the US government's involvement in the issue.

Possibly, a non-binding recommendation could be issued under Chapter Six of the UN Charter requiring settlement through peaceful methods, but again the likelihood of such a step is extremely remote.

What is the status of International Law regarding Sovereign Immunity?

The concept of jurisdiction and immunity are so closely intertwined that they are almost indistinguishable from each other. The doctrine of state immunity rests upon two fundamental legal principles.

- There is the principle of "par in parem non habet jurisdiction em", i.e. legal persons of equal standing cannot have their disputes settled in the courts of one of them. Since a sovereign cannot be sued in his own courts, the sovereign of another state is similarly exempt from the jurisdiction of the Courts of a foreign State.
- 2. There is also the principle of non-intervention in the internal affairs of other states.

In the past, this doctrine established absolute immunity. In recent years, the doctrine of absolute immunity has been replaced by one of restrictive immunity. In the British case of Trendtex Trading Corp v Central Bank of Nigeria, it was held that where activities of a commercial purpose were being conducted by a government body, immunity would be lost. A test was established, requiring a survey of an organisation's functions and the extent of government control. However, in the case of government bodies and officials, immunity continues to exist as long as they are operating within the scope of their government functions.

We should also consider the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004). This convention is not in force at this date and will not apply retrospectively, but its content can serve as an excellent



Sustration of the nature of International Law on the matter of immunity.

Article 5 of the Convention makes it clear that a State enjoys immunity, in respect of itself and its property, from the jurisdiction of the Courts of another State. The term 'State' includes agencies of the State in relation to the scope of the activities they are performing in the exercise of sovereign authority. Representatives of the State acting in such a capacity are also covered by this term.

A State shall give effect to State Immunity under Article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State. To that end, a State shall ensure that its courts determine on their own initiative, that the immunity of the other State is respected.

Furthermore, the appearance of a representative of a State before a court of another State as a witness shall not be interpreted as consent to the exercise of jurisdiction by the court. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be interpreted as consent to the exercise of jurisdiction by the court.

Every country has its own approach to the concept of State immunity. We will now look at the law of the United States on this matter.

What is the status of American Municipal Law in relation to Jurisdiction and Immunity?

The United States has also adopted the doctrine of restricted immunity. The relevant US legislation is the Foreign Sovereign Immunity Act 1976 (FSIA). The Act lays down the criteria for state immunity to operate in a case and also presents certain exceptions to the rules of sovereign immunity. These exceptions operate in the realm of tortious liability and commercial activity. For our purposes, however, the most important exception is that of terrorism. A summary of the relevant section has been provided below.

The terrorism exception states that a foreign state will not be immune from the jurisdiction of the US Courts in a civil claim where the foreign State is accused of injury or death caused by torture, extrajudicial killing, aircraft sabotage, hostage taking or of indirectly providing material supports to other bodies which carry out such acts. The section also makes the foreign state liable if an employee is involved in such acts while acting within the scope of his state functions. However, the foreign state has to be a 'State sponsor of terrorism' for this section to apply. Furthermore, the section provides for a private right of action for individuals who are US Citizens and are affected by

such acts.

The Kingdom of Saudi Arabia relied on the FSIA in 2008 in order to preclude a suit filed by families and victims of the September 11th attacks who alleged that the Saudi leaders had indirectly financed Al Qaeda.

In the case of In re Terrorist Attacks on September 11, 2001, 538 F.3d 71 (2d Cir. 2008), the Second Circuit Court of Appeals in Manhattan upheld a 2006 ruling by US District Judge Richard Casey dismissing a claim against Saudi Arabia, a Saudi charity, four princes and a Saudi banker alleging that all the parties provided material support to Al Qaeda before the September 11 attacks. The appeals court found that the defendants were protected under the FSIA. There are a number of statements made in this judgment that require closer scrutiny.

- The court stated in a clear and unequivocal manner that the terrorism exception to the immunity rule as contained in S.1605A did not apply because Saudi Arabia had not been designated 'a State sponsor of terrorism' by the US State Department. If the country from which our foreign body hails is not part of this glorious list, it is free from this section.
- 2. The plaintiffs had argued that the defendants had donated money to charities with the intent that the money be funneled to terrorist organizations. The US Court stated that "This argument fails because 'it goes to purpose, the very fact the Act renders irrelevant to the question of an activity's commercial character.' It does not matter that the defendants made (and oversaw) donations to charities with a specific intent as to where those donations would end up. The alleged conduct itself giving away money is not a commercial activity." Hence the act of donating did not come within the Commercial Activities Exception as contained in S. 1605 of the FSIA. Therefore, any monetary connection of our foreign body with any organization will be a moot point.
- 3. The US Court also placed great emphasis on the fact that the plaintiffs were not alleging direct involvement on the defendant's part, but were instead relying on a causal link. It was stated that "Even if the Four Princes were reckless in monitoring how their donations were spent, or could and did foresee that recipients of their donations would attack targets in the United States, that would be insufficient to ground the exercise of personal jurisdiction ... It maybe the case that acts of violence committed against residents of the United States were a foreseeable consequence of the princes' alleged indirect funding of al Qaeda, but forseeability is not the standard for recognizing personal jurisdiction. Rather, the plaintiffs must establish that the



Four Princes "expressly aimed" intentional tortious acts at residents of the United States." Hence, reliance on a tortious claim was also rejected. If a similar claim is raised against our foreign body, it must be rejected on the same basis since it has not been proven that the body has 'expressly aimed' intentional tortious acts at citizens of the United States.

An important point to consider here is whether an individual government official of a foreign state is protected by the FSIA. Case law on the matter is unfortunately inconsistent. In re Terrorist Attacks on September 11, 2001 the majority of Federal Courts of Appeals appear to have concluded that individuals are covered under S.1603(b) of the FSIA as "agents or instrumentalities" of foreign states and hence immune.

However, in June 2010, in the case of Yousuf v. Samantar, the US Supreme Court decided that the FSIA does not extend immunity to a government official acting on behalf of a State. The facts of this judgment are discussed below:

1. The respondents claimed that they had suffered persecution at the hands of the Somali government in

- the 1980's. They alleged that the petitioner had at the time, held high government positions in Somalia and exercised command and control over the military forces committing the abuses. Furthermore, in the Yousuf case there was evidence of the guilt of the petitioner.
- The Supreme Court held that the petitioner was not protected by the FSIA under S.1603 of the Act, which says that the term 'foreign State' includes agency or instrumentalities. An agency is defined as an organ of a foreign State. The Court held that an official acting on behalf of the State was not protected under the section.

Conclusion

In a world where lines between nations are falling into an ever-increasing grey area, and the concept of immunity is fast disappearing, it is impossible to give a concrete answer to any question. The status and the importance of a foreign body in the global network is often far more important than international legalese or the eternally encroaching laws of the United States of America. We live in a world where political capital is everything and legal consequences are nothing. In the end, it is politics and material advantages which will decide the matter and not the law.



MENTAL HEALTH

Mehreen Shahid

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Recently I had to look up mental health laws in Pakistan, as part of a course I teach to budding clinical psychologists, at the University of Management and Technology, Lahore. I came across a document titled, Mental Health Ordinance for Pakistan 2001. Thoroughly impressed by the mere presence of such a document I began perusing it for further information. It contained all of the usual glorified names and titles such as "psychiatrist", "community mental health", "social workers", "informed consent", "confidentiality" and so on. I felt proud of our law makers for having come up with such a powerful document. The document presents a rosy picture of educated and professional mental health professionals. Technologically advanced institutions for imparting mental health services; boards for overseeing the implementation of laws; trainings for advancing development among professionals ... but where is all this? Something is still missing!

Development of mental health services in Pakistan by Mubbashar and Saeed, published in the Eastern Mediterranean Health Journal, in the same year, a mental health overview presents a different picture.

Epidemiological studies carried out in Pakistan have shown that 10% – 66% of the general population suffers from mild to moderate psychiatric illnesses in addition to the 1% suffering from severe mental illnesses.

The prevalence of severe mental retardation in children between 3 years and 9 years of age has been estimated at 16—22 per 1000, and according to recent estimates, there are 4 million substance abusers in Pakistan. The most common substance of abuse is heroin (49.7%) and 71.5% of the abusers are under 35 years of age. There are about 232 facilities for drug detoxification all over the country. I am, personally, only aware of 10–15 functioning in reality.

This article further states the details of the programme for mental health development as sanctioned by the World Health Organization (WHO), an initiative taken back in 1986. It reveals plans for developing school mental health programs, collaborative activities with local faith healers. Of course, let us not forget the role of the non-governmental organizations INGO's), research and publication and legislation as already

mentioned above. Moreover, a visit to the website for Pakistan Association for Mental Health (PAMH), Karachi, I found that there are various trainings being held for teachers, general physicians and nurses. This association provides a slight glimmer of hope for those aspiring to be clinical psychologists in the near future. It is of particular emphasis here that the clinical psychologist population in Karachi is much more progressive and professionally active than the population in Lahore or Islamabad.

There are only a few institutes in Pakistan offering professional degrees in Clinical Psychology, 2 in Karachi, 3 in Lahore, 1 in Islamabad and 1 in Multan; Peshawar may also be in the running, but the output has been negligible. There are more psychiatrists than psychologists in government and private hospitals, the general public prefers someone who can give them a pill to pop, instead of someone who can help bring long term change.

The situation in reality, however, remains dismal. Before I begin dismembering the all too rosy picture, I would like to clarify to those who have created the Ordinance, the difference between a psychiatrist and a clinical psychologist. The term clinical psychologist is mentioned only once in all 36 pages of the document and that too in relation to an issue regarding which the clinical psychologist has no technical expertise - psychosurgery.

A psychiatrist is a medical doctor with post coursework training, commonly known as a "house job", in psychiatry imparted within the psychiatric ward of the affiliated hospital. Being a medical practitioner first, a psychiatrist is allowed to prescribe medicine, which they do a little too often. A clinical psychologist on the other hand, is a professional with a post graduate degree in clinical psychology, with intensive training in therapy. Although, he or she possesses basic psychopharmacological knowledge, prescribing medication is most certainly against the law in Pakistan. Having said that, in spite of the fact that a majority of our population seeks the easier way out, via medication, the importance of a clinical psychologist's expertise cannot be ignored.

Now for the ground realities of mental health and affiliated laws:



Section 9, Chapter III, of the Mental Health Ordinance, addresses four important issues: admission, assessment, treatment and holding of a patient. According to the ordinance the client can only be detained for up to 28 days for the purpose of assessment. The period of detention for treatment is up to 6 months and is renewable under further provisions. The period of emergency admission is limited to 72 hours from the time an application is made. The period of emergency detention is valid up till 24 hours from the time an application is made.

In the following sections of this chapter the rules of assessment, admission, detention and treatment revolve around the decisions made by the medical officer or psychiatrist. Nowhere is the role of the clinical psychologist mentioned! It is imperative to mention here that a clinical psychologist is better equipped to make decisions relating to psychological assessment, admission, treatment and detention. Contrary to popular belief, medication is NOT the only method of treating a psychological disorder, and psychologists DO have an equal if not higher capability of providing therapeutic services.

What is in practice is most certainly haphazard and disconnected as most decisions are made on the spot and there is no legal check on whether the ordinance is being implemented or not. Most government hospitals have their own rules regarding assessment, admission, treatment and retention of a patient. It is the discretion of the psychiatrist or psychologist if someone is allowed to stay or made to go. Anyone can bring in a patient, at times being paid to do so, assessment tools are not indigenized and most certainly anyone being assessed using biased tools will be qualified as dangerous and in dire need of psychological treatment. The stigma of a psychological illness is never removed, and the person always remains a recovering someone rather than a completely healthy part of the society.

The all important terms used in the Ordinance, of informed consent and confidentiality, are the two that are most frequently disregarded because we fail to capture their essence. Confidentiality, according to the ordinance, forbids the revelation of a client's identifiable characteristics. One look at the provisions in government and private hospitals tells us exactly how well that turns out. An internship is part of course work at all leading institutes offering professional degrees in clinical psychology. Interns are required to work at government hospitals under the supervision of appointed psychologists.

As far as the infrastructure of government hospitals goes there are hardly any separate rooms for senior clinical psychologists let alone for trainee clinical psychologists. Clinical psychologists at Sir Ganga Ram Hospital, Lahore, have been given offices, within one large room, using cardboard partitions. How confidentiality is maintained across paper thing walls is beyond comprehension! At the outdoor department of Jinnah Hospital, Lahore, 3 - 4 trainees share one large room and sit in all corners of the room to prevent distortion of boundaries. The only time that confidentiality can legally be broken is when there is harm to the client or to others in close proximity to him. Under the current infrastructure, it is actually harder to maintain confidentiality simply because someone will be involuntarily listening in on the conversation.

These arrangements fall short of all that is mentioned in the prestigious document that has proudly been put up for public scrutiny on the internet. Most hospitals hold case conferences for discussing, in front of a board, progress made in various cases. While doing this, the patient's consent should be sought, needless to say this is also neglected.

Common ward discussions are mostly centered on gossip regarding a certain patient and his/her caretakers. Some psychologists and psychiatrists think a little bit of humor does no one any harm. They do tend to forget that ridicule is not humor and that the people they're dealing with are already suffering from low self-esteem and a distorted self-image. This usually happens when doctors and psychologists suffer from burnout. An inability to handle their own emotions and turmoil mixed with the unending supply of social and emotional upheaval provided day in and day out by the clients. By international standards, every psychologist or psychiatrist, is required to seek supervision for himself. This supervision helps prevent burnout and keeps the professional objective.

Unfortunately such is not the case in Pakistan. Psychiatrists and psychologists, alike, are minting money. Conducting 15 to 30 min sessions instead of the standard hourly sessions and charging from Rs. 1000 to Rs. 12,000 per session, depending upon their repute, they soon suffer burnout. At hospitals, nurses, who are supposed to be responsible for dispensing prescription medicine, are careless enough to hand over the entire dose to the patient's illiterate care taker. Some times patients attempt suicide while they are admitted under "professional" care. If such an attempt were to be successful, it would cause major legal repercussions. What does the law indicate if a suicide attempt is successful while the patient is admitted to a hospital? The law looks upon this as professional negligence. In this case the psychiatrist in charge is responsible for everything that happens on the ward. A legal suit can be brought against the doctor if such a case were to



occur.

Speaking of legal suits, a trip to Edhi Centers or the Government Mental Health Institute, tells us exactly who has been a victim of the legal system. Many women have been forcefully admitted to the Punjab Institute of Mental Health on false basis. A large number abandoned there by their in laws because their husband wanted to marry a second time and they would not allow it. Others brought there because the initial purpose of marrying them, property, has been satisfied and they are proven insane and their property usurped. It is a legal limitation, on those diagnosed as mentally unwell, to hold a piece of property. Unlike the West, the concept of a trust is not acceptable, there are too many vultures eyeing the piece of property.

There is, undeniably, a close intertwining of psychology with law, even if in the past it has been for all the wrong reason; as those stated in the preceding paragraph. It is, however, time to move on, let bygones be bygones and instead improve the system beginning with our younger generation. There is a popular field of psychology, known as forensic psychology that works in close collaboration with the legal system. The main responsibilities of a forensic psychologist are to assess, diagnose and treat those convicted within the legal framework. They also provide assessment and legal testimony if required by a court of law in custody and property cases. Such a psychologist is trained to work with families, dealing either with individuals in separate sessions, or the entire family in group sessions.

These are the agreed upon and prescribed practices of a forensic psychologist, my perspective, is somewhat

progressive. I feel that lawyers and psychologists have similar tasks, their daily routine involves listening to people's woes and worries and trying to find a solution for them. How many times does a lawyer listen to a woman relating her heart rending story about how her husband beat her to a pulp so much so that she had to brave all and file a case against him? It is during the case preparation time, I feel, that there is a dire need for counseling. If our lawyers are aware of the need of this counseling they would readily refer them to a clinical psychologist or a counselor who is affiliated with their office. Children, who are torn to choose between either parent in a custody case, suffer the most and it is for their benefit that the lawyer's office must have an appointed counselor who can help create solace for the child.

Still, there is time until we become an interdisciplinary society, and collaborate with each other in a beneficial manner. Lawyers themselves can be taught certain psychological courses, inducing parapsychological skills in them, which will help impart counseling when needed in an emergency. A form of therapy, called Narrative Therapy, can be smoothly incorporated within the lawyer's education so that he can provide tertiary counseling while preparing the background for the case. Like psychologists, lawyers may also be in need of supervision, meeting with a counselor once a month to straighten out the creases in their own mind before fighting for other people's rights.

Rightful implementation of laws can help prevent a myriad of psychological problems. It is of personal interest to me that this liaison between law and psychology is born. This will most definitely facilitate in creating awareness and much needed advancement in the field of mental well being in Pakistan.



POSITIVE RAMIFICATIONS OF THE PROTECTION OF WOMEN ACT OF 2006

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In my opinion, the new law added to the statute books attempts to cure and address the shortcoming of the previous law governing sexual offences. Based upon the research shown below it is my belief that such a conclusion is justified. Such a determination however, is best to be seen by actual application of the law by the courts of the land, a determination which shall perhaps take some time. In 1979, owing to the political winds of the time, and to better appeal to the religious elements which had gathered significant positive public opinion, the then President of Pakistan Zia-ul-Haq saw it fit to grant the people of Pakistan a more Islamic manner to judge certain criminal offences and sanctions as laid down in the Shariah, and along with it introduce the standard and burden of proof leading to the offences. It is for this reason, among others, that the Hudood Ordinance and Qazf Ordinance were promulgated and adopted in the law of the Land. Hudood (or Hadd) offences are acts prohibited by God and carry with them mandatory punishments as laid down in the Quran. The punishment of such crimes is an extreme measure as the acts violate a particular right protected by Quranic scripture and is aimed to serve a measure of deterrence.

The controversial Hudood Ordinance on Zina of 1979 has been subject to many an academic debate, and has been under staunch attack by modernist elements of the State, in which on side of the coin tries unsuccessfully to amend its provisions, while religious elements declare some of its provisions to not be conjunction with Islamic injunctions. For purposes of understanding, Zina is adultery or consensual intercourse outside wedlock, and considered as a Hadd offence in classical Islamic Law. Rape on the other hand is not a specified Hadd offence, but has been argued by Jurists that it falls under the heading of a Syasa¹ offence (which means that it requires the administration of justice by the State beyond the explicit law of Islam).

Most notable of the criticisms of the law promulgated is the fact that the distinction between Zina bil Jabr (rape) and Zina (consensual intercourse) seems distorted. The only difference between the two is the element of consent to the act, as both are defined as "sexual intercourse without being validly married". Moreover, if the woman can not establish that the sexual act occurred against her consent, the act itself was deemed to be a crime against the society, and consequently

the complainant woman would become liable for the had offence of zina as the accusation made by her is deemed to be a confession of adultery in case the offence was not established by evidence. By this line of reasoning, women who have been victims of rape have been successfully convicted under the law for reporting crimes against themselves or their families. A good example of the application of this law can be seen in Safina Bibi v. The State.² In this case the complainant herself was convicted as committing zina, though she was later acquitted by the Federal Shariah Court. The law also ordains extra-martial pregnancy as proof of zina even though the element of force (Jabr) in the case of rape nullified criminal liability of the victim, though other jurists do differ on this point.³

It should be known that an accusation of zina (adultery) had to be substantiated by four male witnesses as per the Quran. This was introduced as a measure to protect women from false accusations of un-chastity or infidelity by men. If not substantiated, for want of witnesses or otherwise, the accuser of the crime had to be subscribed appropriate punishment for the false allegation (Qazf), the same was not historically extended to an accusation of rape. The problem with the promulgated law was, as stated earlier, the blurring of the difference between both the offences of rape and adultery. It is in this way, the same concept was extended to cases of rape, calling for a woman to substantiate her case by producing for the court four witnesses who can testify to seeing the act in question. And by the same logic, failing to establish a case for rape for want of witnesses or other reasons, led to punishments of a false accusation. In both cases, if the accusation is not established, the false accusation would be liable as a Ta'zir (punishment as determined by a judge, using certain arguments of policy).

In 1989, the Federal Shariah Court ruled that charges of Zina bil Jabr (rape) liable to a ta'zir (a crime whose punishment is determined with public interest and conditions of the time⁴) should not be designated zina (adultery or fornication, dependant on the case), for failure to convict could result in charges of qazf (charges of false accusations of unlawful sexual intercourse) against the complainant, and seemed to be a crime unknown in Shariah, until the Ordinance made it out to be one.⁵ The Court asked the regime at the time to consider removing these sections from the statute books,⁶ but



an appeal from the government of the time against it stopped such a move from translating into something material. In addition to the above, women have also been held for extended lengths of time where they have alleged rape, notwithstanding the fact that a majority of such charges have ended up in acquittals.⁷

The above were some of the problems relating to the Zina Ordinance 1979. In contrast, if we look at the rich Islamic jurisprudence on the matter, Islamic jurisprudence has always allowed adequate safeguards so that innocent people do not become subject to punishment under Islamic law on insufficient proof. As in the case of zina, the requirement of 4 sane adult male witnesses constitutes a protective measure making it relatively difficult to prove zina as a Hadd crime. It seems to be a matter of opinion that definitional areas regarding rape and adultery caused the law to be termed as draconian in application.

Caught between the mixed sentiments of two extremes from women activists groups and religious elements, the amendment act seems to tilt towards favoring women, a postulate which seemed to be on the agenda of the regime of President Musharraf back in 2006. Also passed in furtherance of this agenda are laws allowing women accused of non bailable offences to receive bail, except in cases of terrorism, financial corruption, or murder and such offences punishable by death or imprisonment for life or imprisonment for 10 years.

The Protection of Women Act 2006 brought with it three major changes to the law. Some of the offences from the Zina Ordinance and Qazf Ordinance and put them in the Pakistan Penal Code of 1893. The Act also reformulated the offences of fornication and false accusation of adultery and removed the definition of a valid marriage from the Zina Ordinance (which has significance as explained ahead). Finally the Act also sought to introduce new procedures for the prosecution of adultery, fornication and false accusations regarding adultery and fornication. Zina bil jabr was made a Ta'zir offence and inserted in the Penal code under sections 375 and 376. The consequence of this move is that for a woman to claim a case of rape against a man, she need not produce 4 witnesses to further her cause. Where such a charge is not established, the accused man is not entitled to the remedy provided in the idea of punishing a person making such a false accusation. So in cases of rape, the man has no counter claim of a qazf.

According to Martin Lau, the offence is worded in section 375 so as to cover cases of marital rape as well¹⁰ and in this way afford women protection under such circumstances. The offence has been returned to the same position it was in prior

to the promulgation of the ordinances in 1979, except for this inclusion of the fact that the crime does not require the lack of the element of consent in the case where the woman is under sixteen years of age. ¹¹

Section 7 of the PWA 2006 creates a new offence of "fornication" by inserting section 498B in the Pakistan Penal Code 1898. It is defined simply as consensual sex out of wedlock, perhaps to operate as a concession to religious element of the country. The punishment for such an offence under the PPC is up to 5 years imprisonment and a nominal fine and this should be contrasted with the punishment of the offence as stipulated under the Zina Ordinance which ordains 100 lashes or stripes in a public place. 12 False charges of fornication are protected by potential abuse by section 496C, saying that a person who brings false evidence of fornication would lead to punishment of up to 5 years imprisonment and a fine not exceeding Rs.10,000. Such a provision would result in a lesser number of false accusations of fornication, so Section 496C acts more as a deterrent for accusations of fornication, quite similar to the Hadd Offence of Qazf.

The offence of adultery remains part of the Zina Ordinance. This is accompanied by the offence of false accusations of adultery. However the act has made a needed change with regards to confessions of the offence. This is shown by section 2 of the Ordinance, calling for such a confession to be "explicitly regarding the commission of the offence of Zina (adultery)" not withstanding any judgement of any court to the contrary. This change is intended to remove the confusion of the offences of rape and zina. As said earlier, that failed actions of rape by a woman were converted into adultery charges on the basis that the woman has confessed to sexual intercourse when she has claimed rape! Under the new section 5A of the Ordinance, no complaint of rape shall at any stage be converted into a charge of adultery, and similarly no charge of fornication shall be converted into a charge of fornication at any stage of the proceedings.

Changes to the law brought about by the PWA 2006 include the omission of section 28 of the Qazf Ordinance of 1979, which gave overriding effect to its laws over all other in force at the time, which saw much anger from the religious right. To add to this injury clause (iii) of the Zina Ordinance is specifically omitted, giving the Provincial Government the discretion to reduce the punishment of any offender found guilty of Zina.

Potential short falls of the law have to be seen in light of the loopholes in the previous one In accordance with the Zina Ordinance abuse was seen at the hands of bitter husbands to punish their ex-wives for "defiance". The definition of what



amounted to a valid marriage under the Zina Ordinance has been repealed by the PWA,13 a change much desired. This is because from 1961 to 1993, if the Husband, in the situation of a pronouncement of talaq (divorce) had given no notice to the Chairman of the Union Council 14 judges considered that such a divorce (talaq) had been revoked by the husband, 15 but later the Supreme Court ruled in the Kaneez Fatima16 case in 1993 that such a failure of notice did not suggest an automatic revocation of the pronouncement of divorce. During the period lading from 1961 to the Kaneez case, many unsuspecting wives who had believed to have been divorced by their husbands would remarry, only to be subjected to charges of adultery, as the failure to give notice to the Union Council on part of the husband led to her previous marriage to be in effect. The change brought about by the PWA seems guite welcomed in this respect.

In another situation, if a woman married a man against the will of the parents, in what is popularly termed as a "Court Marriage "in Pakistan, the family would launch a police complaint against the husband accusing him of abducting their daughter in order to force her in to wedlock. This would prompt the police to take both into custody. During police detention the family would pressure the daughter in to testify against the husband to the effect. And if the family was successful in eliciting such false testimony, the husband would be liable to face up to 10 years imprisonment. It is conceded

that after the promulgation of the PWA 2006, the woman cannot be arrested if such a charge is levied by the family. But if the family is successful in convincing the woman to give such testimony, the husband in such a situation would still not be protected from proceedings under the Act. The drafters of the piece of legislation seem to be unaware of this pitfall.

The new Act has nonetheless been welcomed by women rights groups across the nation though could not be said to completely appeal to their disposition. This is mostly because they wished for the abolishment of the Hudood laws altogether. The religious right wished for a few of the provisions of the old law to be struck out because they were against the tenants of Islam, but for the substantive part to remain in force. Although the Ordinances were promulgated in the name of introducing the nation to a set of Islamic laws but was instead used as a tool of oppression by husbands to punish their wives and certain ill-defined concepts led an allegation of rape levied by a woman to be converted in to a confession of committing zina if the charge fails. The PWA has been challenged in the Federal Shariah Court in order to see if the petition follows the teachings of Islam. Such a determination may take many years with the possibility of an Appeal to the Shariat Appellate Bench of The Supreme Court, who shall have the final say in the matter. What is pertinent to see is how the lower courts in the land apply the new law.

¹Muhammad Munir, Is zina bil-Jabr a Hadd, Ta'zir or Sayasa Offence?, Yearbook of Islamic and Middle Eastern Law SOAS Volume 14, 2008-2009

²PLD 1985 FSC 120

³See Dawud ibn Hazm al-Zahiri, al-Muhallah, Dar al-Kutub al-Arabi, Beriut, 1988

Benmelhs, Taz'ir Crimes, at page 211

⁵As Per Section 10 of the old Zina Ordinance of 1979.

Begum Rashida Patel v. Federation of Pakistan, PLD, 1989, FSC 95

^{&#}x27;Hudood Ordinance 1979: An Interim Brief Report, Islamabad. Council of Islamic Ideology, 2006, as per Chapter 8.

Many of the promulgated Ordinances of the Musharaf regime have been made void by the verdict of the NRO case of 2009

The Code of Procedure (Second Ammendment) Ordinance, 2006, promulgated under Article 89(1) of the Constitution of Pakistan.

¹⁰ Martain Lau, "Pakistan", Page 453.

¹¹Section 375 (v) of the Pakistan Penal Code 1898

¹²Section 4 of the Zina Ordinance 1979.

¹²As per section 10(ii) of the PWA 2006, which has repealed Section 2 of the Zina Ordinance of 1979

¹⁴A requirement stipulated by Section 7 of the Muslim Family Law Ordinance of 1961

¹⁵ Syed Ali Nawaz Gardezi v. Muhammad Yusuf , PLD 1963

¹⁶ Kaneez Fatima v. Wali Muhammad, PLD 1993



TALAQ-E-TAFWEEZ – THE MUSLIM WOMAN'S RIGHT TO DIVORCE

Faryal Mazhar

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When we read about the discriminatory laws in our country, our mind almost automatically thinks about our women, especially in the rural areas, suffering at the hands of our illiterate systems and practices such as karo-kari, vani, watta satta, to name a few. No one talks about our so-called modern, educated women who also suffer, most of the time due to their own state of denial or lack of awareness, by their husbands or their in-laws when marital relations go bad. It is true that for a woman, the most important decision in her life is marriage and at that time, she lives through a make-believefantasy-world, not even remotely thinking that it takes no time for relationships to turn sour, which may expose the woman to repudiation, unilateral extra judicial divorce by the husband, legal insecurity and total absence of control over her matrimonial situation. Just like the man has the option of exercising his right of divorce, such a right also lies with the woman, provided that she is willing to ask for her right from her husband. It is important for women to know of the Islamic practice of delegation of the right of divorce or Talaq-e-Tafweez.

In Pakistan, such a right may be delegated to the wife at the time of signing of the nikahnama or the marriage contract, governed under sections 17 and 18 of the nikahnama. Unfortunately, most of these nikahnama(s) have such sections already crossed out by our self-proclaimed scholars, as according to them, these sections are against the injunctions of Islam. Such is not the case; the Quran may be quoted for many instances where talaq and its delegation, though indirectly, may be referred to. Keeping religion aside, the nikahnama is a contract executed between two individuals with due consideration given, thus, all its terms, conditions and its stipulations shall be valid and binding on both parties.

As per the applicable laws of our country, Talaq-e-Tafweez is delegating the right of divorce to the wife or to a third person either absolutely or conditionally or for a temporary period or permanently, as laid down in section 8 of the Muslim Family Law Ordinance 1961, however, the procedure provided in section 7 of the Muslim Family Law Ordinance, 1961 shall mutatis mutandis apply to such a divorce. Where such a right has been delegated, the wife does not have to sue to enforce the authority given to her rather, she would sue after she has been given effect to it to make the husband liable for dower or

to restrain him from seeking conjugal relations. Once the divorce is pronounced, it should be treated as a substitute for the pronouncement of divorce by the husband and it shall be effective after an expiry of 90 days unless the husband or wife exercising her right of Talaq-e-Tafweez revokes it. A misconception, which needs to be cleared, is that the wife, in exercising her right to divorce, does not have to return any consideration and/or benefit provided by the husband, as is the case when the wife seeks dissolution of marriage on the ground of khula.

However, problems arise where the right of divorce is not delegated to the wife and the woman has to approach the Court to bargain her way in getting her marriage dissolved. Section 8 of the Muslim Family Law Ordinance, 1961 provides for dissolution of marriage otherwise than by talaq – where the woman seeks dissolution of marriage on the ground of khula. Under Islamic law, the wife has been given the right to have the marital ties broken by a verdict of Court, if the Court reaches the conclusion that the following conditions are met: (i) apprehension of husband and wife that they cannot live together within the limits of Allah, (ii) It is the wife who has to sought separation from the husband, and (iii) It must be she who has to pay the consideration back to the husband.

There exits a school of thought that in the exercise of the right of khula by the wife, the right of granting khula is subject to the satisfaction of the judicial conscious of the Court reached upon the consideration of facts and circumstances of the parties. The wife must show reasons on account of which she claims khula. In the absence of compelling reasons for dissolution, the wife cannot come forward and say that the marriage is to be dissolved on the basis of khula just because the wife chooses to do so contrary to what the delegated right of divorce given to the wife has to offer.

A woman married under Muslim law shall only be entitled to obtain a decree for dissolution of marriage if she can prove any one or more of the following grounds; whereabouts of the husband are not known for a period of 4 years, husband has failed to provide maintenance, husband has contracted a second marriage, husband has been sentenced to imprisonment for a period of 7 years, husband has failed to fulfill his marital obligations for a period of 3 years, husband was impotent at the time of marriage, husband has been



insane or has been suffering from some virulent venereal disease, the woman has been given in marriage before attaining puberty provided that the marriage has not been consummated, husband accuses the wife of zina (lian), husband treats her with cruelty, etc.

As a general rule, everything, which may be given in dower, may serve as compensation for khula. Islam concedes the right to the wife to seek dissolution of marriage on the ground of khula but it is only to be allowed in extreme circumstances. It is not absolute and there is no blanket right given to the wife for automatically denouncing marital bonds. This right is reasonably controlled and is dependent on the scrutiny of the Court competent to decide in the matter after properly satisfying itself about the existence or reasonable circumstances whereby separation is being claimed. It is for the judge to consider whether in the given circumstances, the grounds for dissolution have been proved or not, if the marriage is to be dissolved on the basis of khula. The judge may look into the evidence to decide if a case of khula can be made out. The Court has to see whether efforts of reconciliation have failed, whether the rift is so serious that there are no chances for the spouses to live together and if the wife is willing to return all the benefits that she has received from the husband.

It may be concluded from the above that by not having the delegated right of divorce, a wife has to rely on the grounds as mentioned above, return all the benefits/consideration back to the husband, go through a long cumbersome process, suffer the wrath of the opposing lawyers at the time of evidence after which, she must satisfy a judge that all the conditions have been met and her marriage deserves to be dissolved. The judge in his own capacity may be very competent but can never be able to comprehend on how an individual might be exhausted due to suffering emotionally and sometimes physically from a marital relationship.

Therefore, women need to know the significance of having the delegated right of divorce and to have a practical approach for being prepared for the worst, at the time of marriage, rather than looking at the short term joys of life or being afraid of bringing up this issue as it might raise eyebrows in the society around her. Her partner should understand that if he has the right to divorce so why not delegate this right to his wife, rather than making her pay consideration in return for her freedom from a miserable life along with bearing the brunt of exhausting and embarrassing proceedings in the Court of Law.



THE WORLD TRADE ORGANIZATION AND ITS DISPUTE SETTLEMENT BODY.

Sahar Sulaiman

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The World Trade Organization is the world's only organization that deals with global trade related matters. It aims to provide the smooth running of trade between its member states. It currently has 153 members, which represents 97% of the world's population. WTO deals with regulation of trade between participating countries; it provides a platform for negotiating and formalizing trade agreements, an it has a dispute resolution process that enforces the member countries to adhere to the WTO agreements, to which they are signatories.

WTO ascertains that trade flow predictably and fairly. It does this by administering all trade agreements, providing a platform for negotiation between signatories, settling trade disputes etc.

Decisions made within the WTO are usually by consensus. A majority vote is also possible but it has never been used in the WTO. The WTO's agreements are ratified in all members' parliaments. Top-level decisions are made at ministerial conferences that commence every 2 years.

Under this is the General Council (normally ambassadors and heads of delegation in Geneva, but sometimes officials sent from members' capitals), which meets several times a year in the WTO headquarters in Geneva. The General Council also meets as the Trade Policy Review Body and the Dispute Settlement Body.

At the next level, the Goods Council, Services Council and Intellectual Property (TRIPS) Council report to the General Council.

Numerous specialized committees, working groups and working parties deal with the individual agreements and other areas such as the environment, development, membership applications and regional trade agreements.

with so many signatories, it is easy to assume that there are numerous trade disputes, especially between developed and developing countries. Trade disputes are resolved under the Dispute Settlement Understanding. Countries bring their disputes to the organization when they believe their rights under the agreements are being infringed. Judgments by specially appointed independent experts are based on

interpretations of the agreements and individual countries' commitments.

Countries are encouraged to settle their differences through consultation at first. In case that fails, they follow a carefully mapped out, stage-by-stage procedure that includes the possibility of a ruling by a panel of experts, and the chance to appeal the ruling on legal grounds. Confidence in the system is borne out by the number of cases brought to the WTO i.e. around 300 cases in eight years.

The permanent seven-member Appellate Body is set up by the Dispute Settlement Body sets up a seven member Appellate Body. It represents a range of the WTO signatories. Its Members have a 4 yr term. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government.

A procedure for settling disputes existed under the old GATT, but it had no fixed timetables, cases were dragged for a very long time without any conclusion being reached. A better and more formatted process was introduced in the Uruguay Round. It introduced a set length of time that a case should take to be settled, with flexible deadlines set in various stages of the procedure. The agreement emphasizes that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling, it should not normally take more than about one year — 15 months if the case is appealed. The agreed time limits are flexible, and if the case is considered urgent (e.g. if perishable goods are involved), it is accelerated as much as possible.

The Uruguay round has made it impossible for the losing party to block the decision. Now, rulings are automatically adopted unless there is a consensus to reject a ruling — any country wanting to block a ruling has to persuade all other WTO members (including its adversary in the case) to share its view.

The Dispute Settlement Procedure is as follows:

60 days Consultation, mediation period

45 days Panel set up and panelists appointed

6 months Final Panel report to parties



3 weeks

Final panel report to WTO members

60 days

DSB adopts report (in case of no appeal)

Total = 1 year without appeal 60-90 days Appeals report

30 days

DSB adopts appeals report

Total = 1 year, 3 months with appeal

Once the case has been decided the party at fault has to correct its fault as soon as possible. Even when the case has been decided, there is more to do before sanctions (the conventional form of penalty) are imposed. The priority at this stage is for the losing "defendant" to bring its policy into line with the ruling or recommendations. The dispute settlement agreement stresses, that "prompt compliance with recommendations or rulings of the DSB [Dispute Settlement Body] is essential in order to ensure effective resolution of disputes to the benefit of all Members".

The losing party must follow the panel's recommendations. This intention should be stated after 30 days at the Dispute Settlement Body Meeting. If the party fails to act within this period, it has to enter into negotiations with the complaining country (or countries) in order to determine mutually-acceptable compensation — for instance, tariff reductions in areas of particular interest to the complaining side.

If after 20 days, no satisfactory compensation is agreed, the complaining side may ask the Dispute Settlement Body for permission to impose limited trade sanctions ("suspend concessions or obligations") against the other side. The Dispute Settlement Body must grant this authorization within 30 days of the expiry of the "reasonable period of time" unless there is a consensus against the request.

In principle, the sanctions should be imposed in the same sector as the dispute. If this is not practical or if it would not be effective, the sanctions can be imposed in a different sector of the same agreement. In turn, if this is not effective or practicable and if the circumstances are serious enough, the action can be taken under another agreement. The objective is to minimize the chances of actions spilling over into unrelated sectors while at the same time allowing the actions

to be effective.

Above discussed process shows that the Dispute Settlement Body provides a very flexible approach to the member countries in order for them to reach a settled agreement over their disputes. It monitors how adopted rulings are implemented. Any outstanding case remains on its agenda until the issue is resolved.

Pakistan became a signatory of the WTO on 1 January 1995. It has been part of 3 disputes as the complainant. These were the following:

- Against USA for import prohibition of certain shrimp and shrimp products (Compliance proceedings completed without finding of non-compliance on 21 November 2001)
- Against USA for transitional safeguard measure on combed cotton yarn from Pakistan (Implementation notified by respondent on 21 November 2001)
- Against Egypt for anti-dumping duties on matches from Pakistan. (Settled or terminated (withdrawn, mutually agreed solution) on 27 March 2006)

As respondent in the following:

- Patent protection for pharmaceutical and agricultural chemical products. The complainant in this case was USA (Settled or terminated (withdrawn, mutually agreed solution) on 28 February 1997)
- Export measures affecting hides and skins. The complainants were the EC countries. (In consultations on 7 November 1997)

As can be seen the DSB is the only legal body as far as the WTO is concerned. It is a committee assisting in the regulation of solving disputes and ascertains that there is a smooth trade flow, which is both predictable and fair, keeping in mind that this is the primary aim of the WTO as a whole. At the Doha Ministerial Conference in November 2001, member governments agreed to negotiate to improve and clarify the Dispute Settlement Understanding. These negotiations take place in special sessions of the Dispute Settlement Body (DSB).



WHOSE DISCRETION IS IT ANYWAY? RELEVANCE OF INTELLIGENCE REPORTS IN CIVIL SERVANTS' PROMOTIONS

By Syed Masroor Shah

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Over the last few years, the practice of the use of reports compiled by the intelligence agencies in respect of civil servants, for the purposes of their promotion or supersession, has become quite rampant. This practice is not only contrary to the law in force pertaining to the Civil Service, infringes upon the fundamental rights enshrined by the Constitution and negates the injunctions of Islamic jurisprudence but also repugnant to the much trumpeted doctrine of good governance. It is high time to ascertain the legal raison d'être for the use of and reliance upon intelligence agencies' reports by the government against the civil servants for the purposes of withholding their promotions.

Civil servants do not have a vested right of promotion to a higher grade rather the same is discretionary. This article shall explore exactly whose discretion is it anyway?

In order to analyze the issue in the right perspective, firstly let us ascertain the exact yardstick for promotions of civil servants set out in the law in force.

The Legal framework for promotions of civil servants rests upon the edifice of Civil Servants Act, 1973, Civil Servants Appeal Rules, 1977 and the promotion policy enunciated by the government from time to time, particulars whereof are set out in the Civil Establishment Code (Hereinafter referred to as the "ESTACODE").

All the posts in civil service are categorized either as: -

- a)Selection Posts
- b)Non Selection Posts

Positions in BPS - 18 and above fall in the ambit of "selection" posts, criteria for promotion whereto is "merit" or in other words, best of the best.

In order to ascertain the merit, indexes like length of service, performance at prescribed training courses and quantum of points calculated on the basis of Annual Confidential Reports are the lawfully used. For instance, in order to be promoted from BPS - 19 to 20, a civil servant would require at least 17 years of service, successful completion of Advanced Management Course, a minimum of 70 points on the threshold of quantum of Annual Confidential Reports ("ACR"),

high quality output of work and sound integrity.

Here, "integrity" is a term that has very wide connotations. It may imply anything ranging from financial to moral uprightness and therefore can sometimes become very subjective. The assessment of integrity, defined in Chambers Dictionary as honesty, truthfulness or reliability, cannot simply be left to the whims of the civil servants' superior officers. After all, Constitution guarantees the right of every citizen to have his honor and reputation intact and that if any action detrimental to his person is to be taken, the same should be done strictly in accordance with the law. Hence A very clear test to gauge the integrity of a civil servant is enunciated so as to prevent the possibility of arbitrariness and promote the adherence to the rules of justice and fair play A clear mechanism is worked out whereby marks scored by a civil servant under the head of "Integrity" and "Quality output of work" in the ACRs are separately added and set out in "Quantification Form" and placed before the relevant promoting authority along with other prescribed documents for the perusal and consideration of the same. A note of the any pending departmental inquiries and litigations pertaining to the civil servant is also annexed thereto. Since the points pertaining to the integrity and quality output of work are assigned by the officers directly supervising the civil servant and further verified by the countersigning officers, they enjoy higher sanctity and reverence and remain the most relevant and important factor in ascertaining the integrity of the civil servant.

Legally, constitutionally and ethically speaking, the points given by a civil servant ought to be the only criteria used for assessing a civil servant's integrity because firstly these are warded by none other than the civil servant's own direct bosses and hence free from any element of hearsay and secondly a civil servant has the opportunity to get them judicially reviewed if any mala fide are involved therein.

The use of Intelligence reports on the contrary finds no mention in the entire legal edifice pertaining to the promotion of civil servants. In case reported as 2004 PLC (C.S) 1520 the Court minced no words in terming "Integrity" a very crucial factor for the purposes of promotion, which has to be ascertained from the ACRs. More so, pursuant to ESTACODE, intelligence reports are not even supposed to be placed



before the promoting authority, hence making them totally extraneous and irrelevant to the legal benchmark used for gauging the quantum of integrity in a civil servant, for the purposes of his promotion. The Supreme Court of Pakistan, has time and again, reiterated in most unequivocal terms that the Central Selection Board should strictly adhere to the provisions of the ESTACODE for promotion of the civil servants. Any deviation there-from shall be a nullity in the eyes of the law.

As reiterated above, promotion is not a vested right of a civil servant rather it is discretionary. However it ought to be appreciated that by endowing discretion, law has not given a tacit license to the departmental promotion authorities to do what ever they like at their own whims and caprices. The aforesaid discretion is not an absolute one rather the same is circumscribed with the principles of natural justice and has to be exercised in accordance with the law and in light of the relevant service rules. As a matter of fact, in cases where discretion is exercised relying upon irrelevant factors, it is deemed that the discretion has not been exercised at all rather the same stands fettered.

Even otherwise, when a law requires a thing to be done in a particular manner, as in present case, in consonance with the ESTACODE, it has to be done in that manner or not at all.

Thus, as far as the strict legal position is concerned, a negative intelligence agency report, being an irrelevant and extraneous factor, cannot be used as a valid ground for denying promotion to a civil servant.

What to talk of a negative comment in an irrelevant source like intelligence report, even an adverse remark set out in the ACR, which is otherwise quite relevant and appropriate factor in determining the civil servant's fitness to hold a post in the higher grade, cannot be used against him for the purposes of his promotion if the same is not communicated and that too within the time span of 30 days. Keeping in mind the constitutional importance of the issues involved therein, the Courts in Pakistan have always adopted a very firm approach in respect thereof. In case reported as 2003 PLC (C.S) 1092 it was categorically stipulated that where adverse remarks recorded in the ACR were not conveyed to the civil servant within 30 days, they were of no legal effect whatsoever and could not be used against him for the purpose of withholding promotion. Similarly in case reported as 2003 PLC (C.S) 1046 the Court refused to uphold the super-session of a civil servant on the basis of an entry of Adverse Remark in his ACR, which was not consistent with his previous unblemished service record. The importance of confronting the adverse remark to the civil servant within the stipulated time period of 30 days can be visualized from the fact that the Court in case reported as 2000 PLC (C.S) 392 expunged the adverse remark from the ACR of a civil servant, even though his service record was not completely unblemished, for the sole reason that the same was not communicated within the time frame enunciated there-for.

Apart from the discussion on relevance or otherwise of intelligence reports, the practice of reliance thereupon can even be challenged on the touchstone of constitution wherein fundamental rights have been enshrined and guaranteed. Audi Alteram Partem is an established principle of natural justice connoting that no one should be condemned unheard. With the use of uncorroborated intelligence reports compiled at a civil servant's back, renders him guilty even without being put on trial, which is clearly an infringement of law and the Constitution, specially in the light of decision of the Supreme Court where it was recognized that even pendency of disciplinary proceedings should not act as an automatic bar to the promotion of civil servant as every one is innocent in the eyes of law until proven guilty. Even otherwise, jurisdictions around the world are replete with case law upholding the principle of Audi Alteram Partem.

Development of current case law by the Superior Courts:

In 2003, the Lahore High Court in a very famous case though not directly addressing the issue of intelligence reports, dilated upon the veracity of oral allegations pertaining to the doubtful integrity of a civil servant resulting in his supersession. It was held that the promotion of a civil servant could only be withheld on the basis of some tangible material and not on mere bald allegations made by a member of the CSB under whom the petitioner never had even served. This judgment no doubt upholds the rules of natural justice.

The first judgment that directly addressed the issue of reliance upon intelligence reports by the CSB has been rendered by the Rawalpindi Bench of the Lahore High Court. Though the judgment did not go a long way in completely curbing this menace from the civil service yet it could be termed as a small step in the right direction.

The said case hovered around a senior police officer having a completely unblemished service record with no inquiry ever conducted against him nor any adverse remark recorded for the purpose thereof, with 78 points scored over the quantification of ACRs (commonly known as blood count) who was denied promotion for the sole reason that intelligence agencies have reported negatively upon the integrity of the officer. Vide said judgment, the Honorable High Court though did not completely discard the use of



intelligence reports rather tied it up with the contents of the ACR. Thus, intelligence reports alone could not be made bases of super-cession rather "a strong corroboration is required with the ACR."

In my humble opinion and with utmost respect to the Honorable Court, intelligence reports could not even be used for the purposes of corroboration since the same would be contrary to the ordains of the ESTACODE and as per the dictates of the law, in that when a specific procedure is prescribed for a particular purpose, either the same has to be followed or the purpose is not achieved at all. It is also a negation of the ratio set out by the Honorable Supreme Court of Pakistan wherein it was held that integrity is to be ascertained from ACRs and that the provisions of the ESTACODE ought to be applied strictly. Simply put it, Courts cannot deviate from the express procedures laid down by the statutes and policies unless that policy or the statute itself has not been either taken off the statute book or declared ultra vires to the constitution by a court of competent jurisdiction.

Another argument in favor of using only the ACR as the fair mode of assessing integrity of an officer is that it falls within the ambit of judicial review whereas intelligence reports do not. An adverse remark vis-à-vis integrity of a civil servant is a very serious allegation over the character, honesty and dignity of a civil servant, which can badly prejudice his career progression. A large untapped reservoir of power cannot be given in the hands of superior officers, who may abuse this power merely to settle personal scores.

However with ACRs, there is always a room for rectification and the courts often readily exercise their jurisdiction to scrutinize the recording of adverse remarks that tend to deprive officers of their dignity, which under the Constitution is inviolable. In cases reported as 1998 PLC (C.S) 691, 1998 PLC (C.S) 1496 and 1998 PLC (C.S) 1499 where no instances of any corruption or other allegations were cited by the assessing officers, adverse remarks recorded in the ACRs were expunged by the Courts. Thus, even where an assessing officer errs or acts with mala- fide, the sword of judicial scrutiny dangling over it can get the grievances redressed. However with intelligence reports the same is not possible hence rendering them arbitrary, one sided and unilateral.

Promulgation of Promotion Policy by the Government

After the announcement of judgment in case reported as PLC 2006 (C.S) 619, the Courts across the courts across the

country stood replete with petitions by civil servants aggrieved by negative i-reports. Since the law was clearly laid down by the judiciary already, the Federal Government deemed it appropriate to revise its policy and abandoned the use of i-reports in the civil servants' promotions business.

A new Promotion policy was introduced in 2007 whereby promotions to the higher grades were to be made on the basis of performance evaluation reports (RERs), also known as ACRs; the grading of officers in the mandatory courses — National Institute of Public Administration (NIPA) and the staff college/the National Defence College (NDC) courses; and on evaluation of the CSB. The ACRs carry 70 per cent weightage, the mandatory courses 15 per cent and the CSB's discretion is 15 per cent.

With the promulgation of comprehensive policy for the civil servants, the ambiguities and legal lacunae in their promotion process stood cleared. However somewhat similar issue again cropped up in the appointment/confirmation of judges by the Parliamentary Committee in consonance with the Constitution of Pakistan as amended by the Constitution of Pakistan (Nineteenth Amendment) Act, 2010.

For paucity of space, I would not set out the facts leading to the filing of Constitution Petitions 10 & 18 of 2011 in the Supreme Court of Pakistan. However the ratio decidendi set out in the judgment rendered in the said petitions categorically stipulate that in the course of appointment and/or confirmation of judges of the superior courts, objective rather than subjective yardstick ought to be adopted. Our Constitution does not recognize individual opinions as to competence, antecedents or over all suitability of a nominee.

Conclusion: -

The crux of the above discussion is not to impress upon the idea that government cannot use the intelligence reports to its advantage, at all. There seems no harm in treating the reports as means to an end rather than an end in itself. Perhaps! They can safely be treated somewhat like police reports on the basis whereof enquiry or investigation may be carried out after proper service of show cause notice and with full participation of the civil servant concerned and at all times subject to the respect of his fundamental rights. However, ipso facto reliance thereupon and treatment of the same as a gospel truth is repugnant to the law and constitution.



LABOUR POLICY INNOVATIONS IN PAKISTAN

By Maria Khan

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Civilised nations strive to incorporate into their infrastructure seemingly, the best models of success that have been developed by experienced theorists, academics, jurists and economists. Paradoxically, many of these best concepts are sometimes in conflict, causing strife among affiliated stakeholders.

Corporate organisations and their workforce and employees have long been a victim of such conundrums. The most efficient and cost effective models of economic growth infringe the rights of workers and employees. Profit maximisation achieved through lowest possible costs per unit is the basic objective of all commercial organisations. Historically, the rights of employees and workers have been on the back burner, leading to strikes, lockdowns, picket lines, and other such drastic forms of protest to bring about a change. Such issues have been addressed with the emergence of much needed labour laws and policies, governing the way companies and organisations manage their workers.

Since the creation of Pakistan in August 1947, the Government had published a Labour Policy five times, that is, in 1955, 1959, 1969, 1972 and 2002, prior to 2010. With each publication of a Labour Policy, the existing government tried to expand and develop the parameters of business conduct, protect the rights of employed workers, address the settlement of industrial disputes and provide for worker grievances in the light of International Standards.

The past decade has gone without a fresh Labour Policy being broadcast, however, the developments have been constant and ongoing. With such rapid growth within the corporate culture and the unavoidable process of globalization, a dire need has emerged to keep abreast with changing times. International covenants have set new milestones and objectives that need to be achieved by way of an updated Labour Policy, so as to ensure socio-economic protection of workers. In February 2009, the Pakistan Tripartite Labour Conference took place under the Chairmanship of the Prime Minister, resulting in recommendations and reforms that have become imperative to modern day business policies. The new Labour policy has been drafted whilst taking into account the impact of globalisation on the economic survival of a developing nation, the demand for decentralisation and

restructuring due to foreign investments and the need for initiatives to conduct trainings to increase the level of professional competence within the workforce.

The Labour Policy 2010, has been divided into four parts:

- 1. Legal Frame Work;
- 2. Advocacy, Rights of Workers and Employers;
- 3. Skill Development and Employment; and
- 4. Manpower Export.

Updated according to International Covenants as far as possible, like most International Labour policies, this simply provides an outline and skeletal structure, for Companies to fashion their own Business Policies and Human Resource Strategies around.

Labour Policies are considered to be the domain of the Human Resource Division. The changing nature of business conduct has created a need for dynamic functions to emerge in order to cater to the inadequacies of the previous management systems. Organisational Development and Strategic Planning drive business strategy nowadays. These departments help bridge the conflict between effective business models and adherence to minimum legal requirements of the country. Objective setting and goal identification of the Company is done keeping in mind the obligations of the company to it's workforce. Profit sharing, compensation policies, benefits, training initiatives, rewards systems, have now become essential to a business strategy.

In Pakistan, the gap between Public sector organisations, and privately owned organisations was wider than most international forums. Furthermore, the firms and organisations operating on a small scale or focused on social development seemed altogether exempt from complying with such obligations. Proactive governance has caused a shift in momentum. The catalyst perhaps may have been the introduction of the Protection Against Harassment of Women at the Work Place Act 2010, requiring implementation in public and private sector organisations alike. The Statute was responsible for causing most multinational companies to update and revisit their Code of Conduct and Business Policy. The effectiveness of the Act has yet to be seen, as it has seldom been invoked. On a positive note, however, the Statute has jumpstarted positive action. For instance, the



constitution of Disciplinary Committees has been revised, imposing mandatory presence of a female, especially when dealing with harassment claims.

Similarly, the contents of the Labour Policy are far from having immediate effect, but in order to stay on equal footing with international organisations on a global forum, Pakistani organisations and international organisations operating in Pakistan will have to update their policies to keep in line with what the world requires of them.

The Labour Policy 2010 calls for consolidation of all anomalous, overlapping and complex Labour laws into five core laws:

- 1. Relating to industrial relations;
- 2. Relating to employment and service conditions;
- Relating to occupational safety and health;
- 4. Relating to human resource development; and
- 5. Relating to labour welfare and social security.

Women empowerment and gender equality initiatives undertaken by the Ministry of Labour and Manpower in coalition with various international organisations through development projects have also been incorporated into the Policy emphasising the hiring of women, equal remuneration, benefits, equal opportunities, etc. in line with standards of the ILO Conventions.

Child labour and Contractual Labour issues have been addressed, whereas measures to eradicate Bonded Labour are proposed. Furthermore, Health and Safety hazards for workers of all economic sectors are to be identified, with corresponding recommendations and measures to be provided by a Tripartite Council on Health and Safety.

Tripartite Monitoring Committees will be set up at District, Provincial and Federal Levels to monitor implementation of Labour Laws particularly with reference to payment of wages, working environment and working time.

Worker benefits, Skill Development and Advocacy for rights of workers have been outlined in length providing organisations further reference to fashion their own policies around. Disabled persons and their right of employment has found coverage in the Policy as have the rules pertaining to the export of Manpower.

Labour Laws have not had a great impact on Human Resource and Employment Strategies in Pakistan, unlike, Laws on Monopolies and Competitive Practices. Perhaps the success of the latter can be attributed to the mechanism for monitoring such practices, like the Monopoly Control Authority (MCA), and more recently the Competition Commission of Pakistan (CCP). Any organisation is more likely to respond positively under threat of sanction.

Regulatory authorities or bodies are an integral support to the legislative function. The drafting of laws and conditions is futile if there is no mechanism to assert them.

Although it has been proposed in the Labour Policy 2010, that Committees for this purpose shall be set up, unless they act positively and make an example of infringing corporate policies, through sanction or heavy fine, the true intent of the new Labour Policy cannot be effectively realised. In order to stand out in this global rat race, the nation's legal framework and corporate strategies must complement each other. Accurate interpretation of the statutes and development of policies accordingly is the best means to achieve that.



HONOUR KILLING IN PAKISTAN

By Maliha Zia Lari

The writer is a High Court Advocate with an LLM in Human Rights from SOAS

There are many forms of violence against women in Pakistan. Honour Killing is not only one of the most heinous and horrific crimes that occurs across Pakistan but it is one the most controversial ones. While on one hand there is a great deal of sentiment that strongly rejects and is anti the crime of honour killings, but simultaneously, there are constantly incidents of honour killings. According to a report from national Non-Governmental Organisation (NGO), Aurat Foundation, from 2008 – 2010 there were 1,636 incidents of honour killings reported in Pakistan, that is over 1 case of honour killing a day. Worse still is the fact that it is constantly perpetuated and condoned by society, going so far as for a Pakistani Senator to announce in the Senate that honour killing was a customary practice. ¹

What is honour killing? A simplistic definition of 'honour' killing is given by Rabia Ali, ² "[W]hen a man takes the life of a woman and claims that he did it because she was guilty of immoral sexual conduct it is called an honour killing, not murder". ³ Another definition states, "Honor crimes are acts of violence, usually murder, committed by male family members against female family members, who are held to have brought dishonour upon the family". ⁴

Honour killing is a complicated issue. While they are largely linked with the Islamic faith, they in fact to do not take root from religion at all. They are actually the result of society's most traditional and tribal customs and at the most, of a misinterpretation of the Islamic concept of the inequality of the sexes i.e. the man being dominant over the woman. This has resulted in the concept that men 'own' women which has perpetuated in society to such an extent that it has become entrenched in the psyche of Pakistani society. The justifications for honour killings are based on two inter-linked concepts i.e. men's honour and the concept of men's ownership of women. It is important to understand both these concepts in order to appreciate the crime of honour killing.

The concept of 'honour' traces back to pre-Islamic Arabia. The pre-Islamic society was a strictly patriarchal tribal society. Although Islam dissolved the tribal system, the concept of 'honour', attached to female sexuality, remained due to the obsession with patrilineage. However, with the breakup of the tribal system, the focus of and the responsibility to protect

from breach of 'honour' fell upon the family; now the father, brother or son was responsible for the control of women's sexual behaviour. Due to this strong obsession with patrinlineage, the concept of 'honour' remains linked to women's sexuality.⁵

There is a link between familial respect and social prestige and a relation between the person's own feelings or self-worth and that of the peer group. The concept of 'honour' has a heavy influence on all of these. A man's honour is given to him at the behest of the society and therefore men and women must both follow the social definitions and boundaries of 'acceptable' behaviour in order to gain 'honour'. As difficult as it is to gain, it is as easy to lose and therefore it is vital to protect against the loss of honour. As discussed above, there is a vital link between men's honour and the control on women's sexuality. Therefore, if a man cannot control the sexual behaviour of his wife, daughters, sisters, cousins, albeit any female relatives, he will lose the respect of society. The result is an obsession to control women's movement and behaviour in order to ensure limited contact with other men so that they do not besmirch the respect of the family. This results in the development of men's bondage and their role in 'policing' women's sexuality. Khan discusses it in terms of a collective patriarchal male understanding to protect the womb of his wife and sisters and daughters to ensure paternity. He performs this task on the assumption that if he does not protect his women, they cannot be assured of getting 'clean' and 'pure' women for themselves. This practice is not a cultural or traditional phenomenon it has very much an economic basis and material motives.6

This obsession of controlling women's movement, mobility etc, has resulted in the fact that any act by a woman which is not considered "chaste" according to these standards, is considered a "dishonourable" act, thereby bringing shame to the family and making them lose their 'honour'. As a result any act which falls outside the accepted norms of behaviour is considered shameful, which can include leaving the house too often without permission, meeting or contacting or communicating with any outside men, choosing ones own life partner, getting a job, laughing too much, etc. Anything can be considered to harm the reputation of the family. The charge against the woman does not even need to be proved, a rumour can be considered enough to commit such a crime.



It is interesting to note that, if 'honour' is considered the sole property of men and women do not possess honour or suffer shame, how can they alone bring dishonour and shame? They can do so by challenging and rebelling against the dictated norms of family and community. It is a question of power and control of the person under the command of the murderer; the anger is caused by the defiance and rebellion of the person under his control.

This 'lost honour' can therefore, also be regained by returning the offensive act. As mentioned above, in honour bound societies, female chastity represents the family's 'symbolic capital'. To protect it, the offending woman must be killed rather than divorced or excommunicated, an act which in itself is considered shameful. Killing her removes the offensive act, redeems family honour and resurrects its prestige. The murder is therefore a means to an end and used instrumentally to 'restore honour' and 'remove shame'.⁸

Fatima Mernissi discussed the above mentioned relationship between sex and money. She states, "Honour and purity ... link the man's prestige in an almost fatal way to the sexual behaviour of the women under his charge, be they wives, sisters or unmarried relatives".

The Amnesty International Report: Pakistan: Violence Against Women in the Name of Honour, 1999, discusses the economic factors and advantages for men, relating to this commodification of women. Some of the examples of this 'economically viable' situation includes marriage of girls within the family to ensure property remains within the family, marriage of women to the Quran, payment of 'bride price' at the time of marriage, especially in tribal areas of Khyber Paktoonkhwa, Sindh and Balochistan—including in the form of another woman, and blood money i.e. the compensation negotiated to end a dispute which besides money may involve a woman to be given to an adversary.

Pakistan has been lagging behind in effectively dealing with

this problem under the law. While a law making honour killings illegal, Criminal Law (Amendment) Act 2004 was enacted, it has done little to stem to murders. A large part of this reason is the lack of interest and commitment shown by the society to even report the case, much less try to ensure the perpetrators are caught. They in fact are often in collusion to cover up the matter. There is also the matter of the social acceptance of the murder. With large amounts of the community accepting the murder as necessary, they will not be willing to assist in the capture and prosecution of the perpetrators. Further, the police is often reluctant and at other times unequipped or unable to handle such investigations. As members of the society and quite often the community which perpetuates such crimes, it is difficult for them to commit to investigating a crime which they believe to be justified, or on the other hand do not have the necessary skills and techniques to do so.

However, while the overall picture remains dismal, it is important to recognise the evolution and progress that has been made so far. The fact that honour killing is now a nationwide topic is a fundamental step forward. A few years ago, this issue could rarely be mentioned openly in public, much less with a large part of the society being somewhat knowledgeable about it. The media has been a critical player in this respect by continuing to report such cases and to bring to light and draw attention to these horrific crimes. The fact that a law was passed, despite not being fully and properly implemented, is also a major achievement. This means that there is a large segment of society and a large segment of our leaders who do recognise honour killings as a crime and recognise that it does need to be dealt with under the law. Other positive movements include the increasing number of police projects raising awareness about honour killings and under-going trainings on how to investigate such cases. Despite all the negatives, the positives should be a propelling point for all of us to continue to push for a no-tolerant society and work towards eliminating this evil from Pakistani society.

¹Anti-women' cabinet riles Pakistan activists, Saeed Shah, The Guardian, 12-11-2008

²The Dark Side of 'Honour', Rabia Ali, Shirkit Gah

¹bid

^{&#}x27;Honor Killing in Pakistan', filed on 11-06-2009, http://actdcmetro.wordpress.com/2009/06/11/honor-killing-in-pakistan/

⁵P. 45, 'Beyond Honour', Tahira S. Khan, Oxford University Press

⁶'Beyond Honour', Tahira S. Khan, Oxford University Press

⁷P 47, 'Beyond Honour', Tahira S. Khan, Oxford University Press

^{*}Are Knudsen, 'License to kill: Honour Killings in Pakistan', Chr. Michelsen Institute Development Studies and Human Rights, 2004

P. 45, 'Beyond Honour', Tahira S. Khan, Oxford University Press 2005



MEDIA LABELS THE CONCEPT OF BEAUTY

Palwashay Arbab

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"Wisdom is the abstract of the past, but beauty is the promise of the future."

Oliver Wendell Holmes

The aforementioned quote is in itself a perfect personification of the significance of beauty and its altering role in society and culture. As it is self-explanatory, it indicates to the commercial value of beauty in one's life and it being one's asset for survival in an ever-competitive world as compared to the role that intelligence and wisdom once played. All thanks to the world dominance of media in influencing thought process and global perceptions. The power of media and the arts in influencing the concept of beauty is beyond guestion. The movie industry perpetuates the Hollywood type/kind of beauties. Cosmetic industries would popularize models who look like stick, and the motto "thin is in". All around the world, women and men are bombarded by ever changing images of "beautiful women." In magazines, television shows, music videos, and all other forms of media, the ideal body type is transformed by the media and perpetuated by the consumer. The images have varied throughout the history of media, occasionally reaching physically damaging levels. Images have spanned from the voluptuous bodies in ancient and renaissance art to the stick thin, picture perfect "model beauty". These popular images of beautiful women specially, are a constant thread seen in art and are ever changing, leaving women forever trying to keep up at all costs.

Global media through all its forms amplifies the cultural concepts of beauty. Usually our concept of beauty revolves around values we treasure, like youth and health. Baby faces are considered beautiful because they look youthful. Similarly, long hair for women is also shown as a sign of youth, because short hair is seen and portrayed as a sign of old age via the media. It is not as simple as just the media. Moreover, before the advent of mass media, fat and pale used to be considered beautiful because it was a sign of wealth, having enough food to eat, and enough money not to have to slave away in the sun. Now tan is beautiful because it is a sign of wealth, being thin requires hard work and dedication. High foreheads were once prized because they were once a sign of intelligence. But as mentioned in the quote above, wisdom has ceased to become a symbol of beauty for many people.

Today, many women would prefer to be thin than healthy. The psychological impact of models like Kate Moss and Pamela Anderson is evident in the number of recorded eating disorders and plastic surgeries. In the United States alone, in 2004, approximately 7 million girls and women were reported to struggle with eating disorders. During 2003, Women had nearly 7.2 million cosmetic procedures (Mandy and Twiggy, 2003). And I am sure the numbers of such cases would have increased by quite a percentile in the years after. This is all a direct influence of media impact on the global concept of beauty, thus also on people's changing lifestyle choices.

To shed more light on the impact and media on consumer perceptions regarding beauty I carried out a survey in which the respondents were a group of individuals ranging of all ages (between 18 and 65) and both genders. They were mostly regular consumers of local and international media. According to the survey that I carried out regarding the topic, the majority of the respondents agreed to the vital role media has played in changing the global and personal perceptions of beauty. Despite getting a wide diversity of answers for particular questions, 63% of the survey subjects agreed that the masses consider a toned and slim body to be the epitome of beauty today. And 88% of respondents unanimously agreed on fairness being the ultimate definition of beauty in our culture in Pakistan. The choices of the majority of the subjects for the questions about their favorite celebrities and beauty icons also proved this further, as they are after all a part of the same culture. They all chose fair skinned actresses and models, particularly in the female category, such as 33 % chose Mahnoor Baloch, the remaining 67% chose Kareena, Katrina or Megan Fox. This was a complete contradiction to their choice of ideal partners which the majority subjects answered to be good by nature and presentable by looks.

For 55% of respondents' beauty was defined as attractiveness and something that appeals instantly to one, while 45% believed that beauty was skin deep and was confined to simplicity and intelligence. The answers to the questions regarding the first celebrity crush to the latest celebrity crush proved the fact that most subjects earlier in their life chose those icons that were simple looking but were fair having beautiful features such as Leonardo, Mahnoor Baloch, Hrithik Roshan, Elizabeth Hurley, Aishwarya etc. Whereas, their latest choices of celebrity crushes were those who had perfect

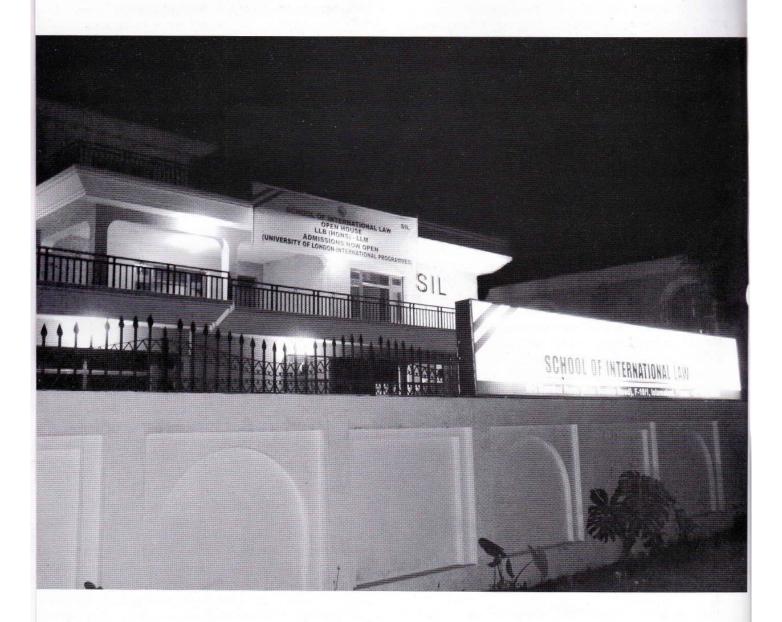


bodies, tanned skins and glamorous personalities. These included sportsmen, actors, models, musicians and even politicians. This shows that not only has the media glamorized the fashion and beauty industry more but has also glamorized the image of all those people in the lime light with constantly keeping an eye on their eyes and their lives.

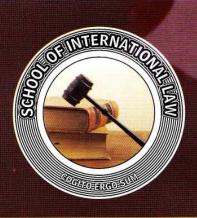
70% of the survey respondents believed that the most prominent thing that has changed in the world fashion and beauty industry since the dominance of media has been the concept of showing more skin and the commercial formula of sex sells taking over the industry. Thus emerging with new concepts of beauty where just facial beauty is not enough. It has glamorized over all.

When being questioned about what would be the one thing the respondents would want to change about their appearance, 63% answered it to be their body size and skin. This is another verifying factor identifying the significant impact on the changing global concepts of beauty by studying our own local media consumers. The question regarding the difference between genders received diversity in answers from the subjects. This proved more to be a personal perception; however 51% respondents agreed that the media shows the male gender to be mostly superior to that of the female counterparts through media via various stereotypical images, such as the male predominantly plays the superhero while the female is shown as the quintessential damsel in distress.





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