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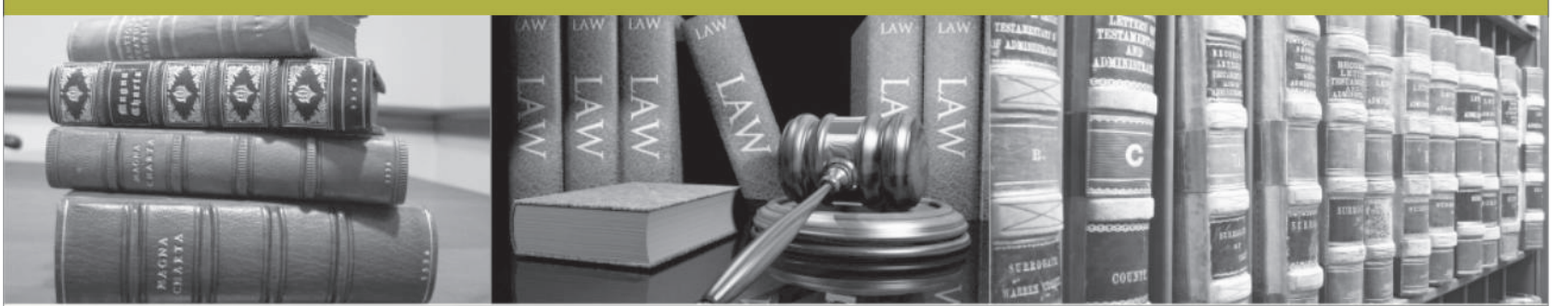

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Editor's Note

Greetings again!

As SIL commences its third academic year, we are also pleased to produce the fourth issue of the Spectrum of International Law. Inside, you will find a range of articles on a wide variety of topics which have been written by present and previous students, lecturers, professionals, as well as an interview which has been conducted by the editorial team.

On behalf of the editorial team, I would like to thank all authors for their co-operation, time, and contribution in making this issue possible and worthy of taking to print. We hope you enjoy reading the contents as much as we have enjoyed compiling it for you.

We would like to remind you that this magazine (and older issues) are available online and can be downloaded through our website : **http://sil.edu.pk/promos.html**. We always welcome and look forward to your feedback, as well as articles and advertisements; so please do write to us, and for us at publications@sil.edu.pk

Thank you,

Syeda Shehrbano Kazim

Constitution of Pakistan: What We Must Know

By Faryal Mazhar

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In the last decade, the term 'constitution' has been very popular amongst the media, which has made the people of Pakistan, irrespective of age or background, more educated and aware of this term, more so, aware of their fundamental rights, than they have ever been. Ranging from the so-called affluent drawing room discussions to the not-so-educated discussions between the drivers, hawkers and maids, we all try and sound intellectually smart by placing some reference from what we comprehend of it. Unfortunately, most of it is misunderstood, in the light of constitutional supremacy and rule of law, only due to lack of knowledge. In the legal fraternity, this word is not just a word; this book is not just any ordinary book, it's the sacred gospel of law. Whilst amongst us live some great institutions of constitutional law, for most of us students of law, our basics are still quite fragile, while some of us, particularly from the new generation, do not even know what it entails. The Constitution of Pakistan provides for a parliamentary system of government with the President of Pakistan as head of state and an elected Prime Minister as head of government. Pakistan has a bicameral legislature that consists of the Senate (upper house) and the National Assembly (lower house). Together with the President, the Senate and National Assembly make up a body called the Majlis-e-Shoora or the Parliament.

How it all began.

Pakistan became independent from British India in 1947, following its partition. The first document that served as a constitution for Pakistan was the Government of India Act, 1935. The first Pakistani Constituent Assembly was elected in 1947 and after nine years adopted the first indigenous constitution, the short-lived Constitution of 1956. In October 1958, President Iskander Mirza staged a coup d'état and abrogated the constitution. Shortly afterwards, General Ayub Khan deposed Iskandar and declared himself president. In 1960, Ayub Khan appointed a commission to draft a new constitution, thus the new Constitution of 1962 was decreed. On 25 March 1969, the second martial law was imposed; President Ayub Khan abrogated the 1962 constitution and handed over power to the Commander-in-Chief, General Agha Mohammad Yahya Khan. General Yahya's regime made no attempt to frame a constitution as all expectations were focused on a new constituent assembly which would be set up by holding a free and fair election. In order to hold the proposed elections, President Yahya Khan promulgated a Legal Framework Order on 30 March 1970 that also spelled out the fundamental principles of the proposed constitution and the structure and composition of the national and provincial assemblies.

However, the election results of 1970 truly reflected an ugly political reality: the division of the Pakistani electorate along regional lines and political polarization of the country between the two wings, East and West Pakistan. In political terms, therefore, Pakistan as a nation stood divided as a result of the very first general elections within twenty three years of its existence. Two major regional leaders, Mr. Mujib-ur-Rehman for East Pakistan and Mr. Zulfiqar Ali Bhutto for West Pakistan along with the ruling military government under President Yahya Khan held negotiations in the early months of 1971 but these tripartite negotiations for an agreed federal or even a confederal constitution were a complete and total failure. Widespread disturbances followed in East Pakistan to an extent that the civil disobedience movement developed into a war of national liberation backed by the Indian Army. As a result, Pakistani forces had to surrender to the Indian Army, and almost over 93,000 military personnel were taken as prisoners of war on 16 December 1971. This ended an important era of the largest Muslim state, Pakistan. A new and smaller Pakistan emerged on 16 December, 1971. Consequently, General Yahya Khan, being unable to control the situation, retired and Bhutto was sworn in on 20 December 1971 as President and as the first civilian Chief Martial Law Administrator.

After gaining power, Bhutto met the leaders of the

parliamentary parties and after intensive discussions an agreement known as the 'Constitutional Accord' was formulated. The National Assembly of Pakistan appointed a committee, of twenty five members, on 17 April 1972, to prepare a draft of the permanent Constitution of Pakistan. Mr. Mahmud Ali Kasuri was the elected chairman of the Committee. On 20 October 1972, the draft bill for the Constitution of Pakistan was signed by leaders of all parliamentary groups in the National Assembly. A bill to provide a constitution for the Islamic Republic of Pakistan was introduced in the Assembly on 2 February 1973. The Assembly passed the bill nearly unanimously on 19 April 1973 and endorsed by the acting President Zulfikar Ali Bhutto on 12 April 1973. The Constitution came into effect from 14 August 1973. On the same day, Bhutto took over as the Prime Minister and Chaudhary Fazal-e-Elahi as the President of Pakistan.
What it Entails.

The Constitution of 1973 broadly consists of the Preamble, XII Parts having two hundred and eighty Articles, Annex & Schedules and twenty amendments till date.

The PREAMBLE, briefly explained, states that the State shall exercise its powers and authority through the chosen representatives of the people; that the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed; Muslims are to live their lives in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah; protection to minorities, guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, freedom of thought, expression, belief, faith, worship and association, subject to law and public morality, independence of the judiciary shall be fully secured; integrity of the territories of the Federation, its independence and all its rights, including its sovereign rights on land, sea and air, shall be safeguarded, etc.

The main body of the Constitution consists of XII Parts; each Part consists of different Chapters, subsequently followed by Articles:

PART I – INTRODUCTION; deals mostly with the substantive provisions such as Pakistan being the Islamic Republic of Pakistan with its provinces; Islam being the State religion; the Objective Resolution; Elimination of Exploitation; Right of individuals to be dealt with in accordance with Law; Loyalty to the State and obedience to the Constitution and Law; High Treason.

PART II – FUNDAMENTAL RIGHTS & PRINCIPLES OF POLICY; Chapter I deals with Articles such as freedom of speech, right to information, right to education, protection of property rights, equality of citizens, etc. Chapter II deals with Articles relating to the Principles of Policy such as the Islamic way of life, full participation of women in national life, protection of family, protection of minorities, etc.

PART III – FEDERATION OF PAKISTAN; Chapter I deals with the President, the election, term of office, removal or impeachment, etc. Chapter II deals with Articles relating to the Majlis-e-Shoora (Parliament), such as the Parliament consists of the President and the Two Houses (National Assembly and the Senate) with 332 seats in total in the National Assembly and a total of a 114 seats in the Senate. Other Articles, inter-alia, relate to the qualification and disqualification for membership of the Parliament; General Procedure; Legislative Procedure, etc. Chapter II deals with Federal Government with articles relating to the Federal Government; Cabinet; Federal Ministers, Prime Minister, Attorney General of Pakistan, etc.

PART IV – PROVINCES; Chapter I deals with Governors; Chapter II with Provincial Assemblies, Financial Procedures, Ordinances; Chapter III with Provincial Governments.

PART V – RELATIONS BETWEEN FEDERATION & PROVINCES; Chapter I deals with Distribution of Legislative Powers; Chapter II with the Administrative relations between the Federation & Provinces; Chapter III with articles relating to the Council of Common Interests, rules, procedures; National Economic Council; Electricity; Priority of requirement of National Gas, Broadcasting and Telecasting, etc.

PART VI – FINANCE, PROPERTY, CONTRACTS AND SUITS; Chapter I deals with Finance which includes the Distribution of Revenue between the Federation and the Provinces, miscellaneous financial provisions; Chapter II deals with Borrowing and Audit, and; Chapter III deals with Property, Contracts, Liabilities and Suits.

PART VII – THE JUDICATURE; Chapter I deals with The Courts, in general Chapter II deals with The Supreme Court of Pakistan, which inter-alia, includes articles relating to the appointment of judges, ad-hoc judges, jurisdiction of Supreme Court (Original, Appellate, Advisory), Review of Judgments, rules of procedure, etc.; Chapter III deals with The High Courts; Chapter III-A deals with The Federal Shariat Court, and; Chapter IV deals with the General Provisions relating to the Judicature, such as, amongst others, Contempt of Court, Remuneration of Judges, Supreme Judicial Council, Administrative Courts and Tribunals, etc.

PART VIII – ELECTIONS; Chapter I deals with the Chief Election Commissioner and the Election Commission; Chapter II deals with the Electoral laws and the Conduct of Elections.

PART IX – ISLAMIC PROVISIONS; These articles include provisions relating to the Holy Quran and Sunnah, Composition of the Islamic Council, Reference by Majlis-e-Shoora, etc. to Islamic Council, Functions of Islamic Council, rules of procedure.

PART X – EMERGENCY PROVISIONS; These include the Proclamation of Emergency on account of war, internal disturbances, etc., Power to suspend Fundamental Rights, etc. during emergency period, Power to issue proclamation in case of failure of Constitutional machinery in a Province, Proclamation in case of financial emergency, Revocation of Proclamation, Majlis-e-Shoora may make laws of indemnity, etc.

PART XI – AMENDMENT OF CONSTITUTION.

PART XII – MISCELLANEOUS; Consists of seven (7) chapters, mainly, Services; Armed Forces; Tribal Areas; General, such as Protection to President, Governor, Minister, etc., legal proceedings, salaries, allowances etc. of the President and so on; Interpretation; Title, Commencement and Repeal; Transitional.

The Schedules are, in total, seven (7) out of which two have been omitted. These Schedules deal mostly with the election of the President, Oaths of Office, Legislative Lists and Remuneration and terms and conditions of Judges. The Annex consists of all the entries added to the Constitution through various amendments The Constitution of 1973 has been amended twenty (20) times till date. The bitter fact remains that within five years of the formulation of the Constitution, it had been amended seven times by the Bhutto regime. These amendments are briefly explained as follows:

The 1st Amendment eliminates and removes references of East Pakistan after the recognition of Bangladesh along with amending thirteen other articles, inter-alia, imposing curbs on political parties, barring them from indulging in political activities against the national interests besides making it mandatory on them to declare their source of income.

The 2nd Amendment declared the religious status of Ahmadis as a minority and as non-Muslims.

The 3rd Amendment extends the period of preventive detention of those who are accused committing serious cases of treason and espionage against the state of Pakistan.

The 4th Amendment protects the rights of minorities in the country and also protects the rights of accused until proven guilty, under any preventive detention.

The 5th Amendment provided to establish a High Court for provinces of Balochistan and Sindh. It also imposed import and sales tax on consumer products, restricted the eligibility of the Governor and the Chief Minister where they are not permanent residents, set a maximum age limit of the Chief justice as well as maximum term of serving its office. Amongst the amended articles, ten pertained towards the judiciary, impairing the independence of its working.

The 6th Amendment provides for the Chief Justice to retire at the age of sixty five and the High Court Judge to retire at the age of sixty two.

The 7th Amendment: enables the Prime Minister to obtain

a vote of confidence by the elected members of the Parliament and impaired the independence of the judiciary further by restraining it from touching upon issues relating to the armed forces.

The 8th Amendment had been enforced by General (R) Zia-ul-Haq, where the authority of the President was strengthened and was permitted additional powers to dismiss the elected government of the Prime Minister – under Article 58(2)(b) to dissolve the National Assembly.

The 9th Amendment made amendments to Articles 2 and 227 which provides for Islam to be the state religion and all laws to be in conformity with the injunctions of Islam.
The 10th Amendment made changes to Article 54 (Summoning of the Parliament) and Article 61 (Other provisions relating to the Senate).

The 11th Amendment made amendments to Article 51 (National Assembly)

The 12th Amendment made changes to Article 212(b) (Establishment of Special Courts for trial of heinous crimes)

The 13th Amendment was made by the then government of Prime Minister Nawaz Sharif, who stripped the President of his power to dissolve the National Assembly.

The 14th Amendment subjected members of the Parliament to very strict party discipline. Party leaders received unlimited powers to dismiss any of their legislators from the Parliament if they spoke or voted against the Party; also prevented the Prime Minister from being dismissed by a no-confidence vote.

The 15th Amendment provides for the Objective Resolution to form part of the Constitution and declared Quran and Sunnah as the supreme law of Pakistan.

The 16th Amendment made changes to Article 27 (Safeguard against discrimination in services)

The 17th Amendment were changes made by General (R) Musharraf, where the Legal Framework Order (LFO) was incorporated into the Constitution and permitted the President to hold an office of Chief of Army Staff. The President was deemed to be elected if he won the vote of no-confidence in the Electoral College and had the authority to dissolve the National Assembly, subject to approval of the Supreme Court. Article dealing with the National Security Council was annulled.

The 18th Amendment inter-alia, repealed the 17th amendment. The Legal Framework Order was declared null and void. It removed the power of the President to dissolve the Parliament unilaterally, renamed North West Frontier Province to Khyber Pakhtunkhwa. As per the 18th Amendment, all powers were to vest with the Prime Minister, Courts could no longer endorse suspension of the Constitution, a Judicial Commission was to be set up to appoint judges and the President no longer would be able to declare emergency rule in any of the provinces, unilaterally, along with the concurrent lists being abolished and more autonomy vested in the provinces.

The 19th Amendment was to establish the Islamabad High Court and made amendments to Article 175(A) (Appointment of the Judges to the Supreme Court, High Court and the Federal Shariat Court) and amendments to Article 182 (Appointment of Ad-hoc Judges).

The 20th Amendment amends provisions related to the formation and working of the Election Commission to help conduct free and fair elections.

Comparison with the Indian Constitution.

India and Pakistan started with same constitutional heritage where the Government of India Act, 1935 served as the first constitution of both countries, but after independence, they embarked on remarkably different directions of political and constitutional development. Indian experience represents constitutional continuity and stability since the introduction of its Constitution in January 1950. Pakistan, on the other hand, has gone through many ups and downs. It has experienced four constitutions and the present Constitution has also gone through various changes, altering the very nature of it.

The Constitutions of India and Pakistan can be broadly compared in five areas: provincial autonomy, president's relations with the cabinet, supremacy of the Parliament, civil- military relations and constitutional amendments. These areas show that the Indian political system has been established on the basis of democratic parliamentary norms. President's office is strictly 'constitutional' and real executive powers are vested in the council of ministers headed by the prime minister. Whatever problems that arose were settled within the

framework of the constitution. The civil-military relations have developed in a way that ensures civilian primacy over military establishment and Parliament's authority in bringing amendments to the constitution is an established rule.

Pakistan's constitutional history, on the other hand, shows constitutional breakdown and inconsistencies. Under the Constitution of 1973, a parliamentary form of government was envisaged but different amendments introduced in the constitution changed its substance and spirit, tilting the balance in favour of the president. Provincial autonomy is becoming a serious issue, partly due to centralizing trends introduced by the Constitution but mainly because of frequent disruptions of democratic and participatory processes and institutions. Military establishment has expanded its influence in the society and is major determinant of national policies. The dictatorial trends are dominant regarding the constitutional amendments. Formal constitutional procedures were ignored by military regimes while introducing amendments. Even civilian leaders were not averse to introduce changes in the Constitution to accommodate their vested political interests.

Thus, after sixty six years of independence, the unfortunate reasons behind the stark difference between the stability of both countries still continue to haunt us at the back of our minds.

What we have Learnt.

Constitution is a body of rules or precedents governing the affairs of state. It establishes the structure and purpose of an organization and rights of citizens. Pakistan has been struggling to address its socio-economic problems but has remained unsuccessful in the past due to the changes imposed by the military intervention, which has deformed the constitution and derailed the democratic set-up. The sacrifices and the unprecedented commitment shown by the Lawyers' Movement for the rule of law in Pakistan deserve the most credit. For the betterment of this country, we must keep this democratic system working and attempt to find the solution to our problems within the framework of the Constitution, without having to amend it further for any civilian-political or military vested interests, else we will be giving birth to more debates such as the one we experienced during the pre-election period of 2013 on Article 63.

We have a lot to learn from our past mistakes, however, let us start with the basics which as being a citizen of our country we must know and being lawyers poses a greater burden on us to read and understand and try and educate as many as we can to appreciate the importance and the role played by constitutional supremacy and the rule of law in a state.

Long Live Pakistan!

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The European Union: Creating a Unique European Identity Amongst its Citizens.

By Nyma Khan

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The European continent had historically been split by long running conflicts that pitted neighboring countries against each other and by 1945, much of Europe had been devastated by the two World Wars. Amid the rubble and ruins, politicians and the public - exhausted by years of violence - shared the belief that such conflict should never be allowed to happen again. This resolve culminated in the creation of a political and legal system which is unique in comparison to all others. Although it has traits that bear resemblance to the political systems of federal states as well as intergovernmental organizations, it remains one of a kind, a *sui generis*.

Recently however the European Union's continuing economic woes have caused some to wonder whether it would be more beneficial to abandon efforts focused on preserving unity especially in the face of the Euro-zone crisis and the broader financial crisis's currently being borne by various member states. The answer to this question can be found in the fact that while the initial focus of the European Commission was grounded in fostering economic unity as opposed to trying to discern and follow a shared ideology, over the years there has been greater political assimilation and the development of the recognition of a uniquely European identity amongst the peoples of Europe. While it can be argued that this natural unity has always existed, it is argued that this is in large part due to the manner in which free movement rights have been interpreted and implemented within the European Union.

The four fundamental freedoms of European Union law (free movement of goods, capital, services, and people) were all enacted to ensure the emergence and continuance of the common or internal market. The fundamental right to free movement of workers and self-employed persons was and is still considered to be essential in ensuring the mobility of a well-trained work force within this economic union. However, blurring the lines between the rights available to economically active and non –economically active persons residing in different member states has had a huge impact developing the notion of a European citizen. It was as late as the 1990's that the Union began to consider weaning away from its old formalistic approach in only allowing free movement rights for economically active persons. The union institutions began to pass several directives that gave limited right of residence to non-economically active persons. Directive (Dir), 93/96 related to students while Dir 90/365 and Dir 90/364 concerned retired individuals and non-economically active persons with their own resources, respectively. However, people relying on these directives had to show that they had sufficient means to support themselves and has full insurance cover so as not to be a burden on the social and tax welfare system the host member.

The Maastricht Treaty (TEU) 1992 was the result of the desire of many member states to extend the competencies of the community beyond those that were strictly economic in nature. Art 20 TFEU (Ex 18(1)) first introduced the legal concept of citizenship into EU law. It stated that "*Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and the measure adopted to give them effect*." This was hailed as a culmination of the rhetoric of a "People's Europe"[1] and an important milestone in developing a closer political union. Simultaneously, however, many doubted whether the move would bring any significant changes in practice and argued that the concept was merely symbolic in nature.

Directive 2004/38, which has now consolidated all the old directives, covers both economically active and non-economically active workers. It states that all EU citizens

have an unfettered right of residence for three months. After that time rights of residence are only granted to workers and to those individuals, while non-economically active, have sufficient resources not to be a burden on the host state.

The limitations have been included so as not to burden a host member state's social security, health and education systems. It was envisaged that benefit tourism[2] could undermine the objectives of the EC. Indeed herein lies the central contradiction which runs through EC law on free movement of persons: on the one hand it is a 'fundamental freedom' but, on the other hand, Member States have a legitimate interest in avoiding unlimited demands on their social welfare systems.

While the initial reaction of the Court of Justice seemed narrow in scope. This is illustrated by the case of *Skanavi*[3] which seemed to treat the rights of free movement of EU citizens as being secondary to more specific Treaty rights. However the Court has never been one to shy away from interpreting Treaty provisions in a 'teleological' manner in order to give effect to what they feel is 'the spirit of the Treaty'. In this way it seems that historically the Court, has always had a more developed euro centric consciousness; perhaps more so than any other union institution. In times where political and economic integration faced periods of stagnation, (especially during the 1970's and 1980's) the Court of Justice has consistently stepped in to carry the union forward in bold and surprising ways. This dynamism has been especially evident in the way they interpret the four fundamental freedoms underpinning the internal market. In keeping with this tradition, the Court has interpreted rights available under citizenship articles broadly and the restrictions narrowly. Member States are not to unilaterally impose restrictions on free movement and any purported restrictions have to be imposed in a proportional manner.

One of the many questions raised by critics was whether the only change brought about by the citizenship articles was that existing categories of individuals who had movement and residence rights had simply been given a new name.

In the case of *Baumbast*[4] it was held that the Art 21(1) did confer a directly applicable right on EU citizens to reside in a host member state, regardless of whether they were employed or self employed. Secondly, the Court also stressed that the conditions and limitations set by the state and by EU secondary legislation are to be read in light of the fundamental rights of movement and residence established by the Treaty and adjusted where they have been disproportionately restricted. The Court in *Commission v Belgium*[5], similarly condemned Belgium's excessively restrictive interpretation of how the 'sufficient resources' conditions could be satisfied, as well as the disproportionate penalty (automatic deportation) imposed by Belgian law for failure to produce the relevant documents needed to obtain a residence permit within the prescribed time.

The citizenship articles also brought about a substantial change with regards to the previous stance of invoking free movement rights in what seemed to be a purely internal dilemma. The Court of Justice had repeatedly held that EU rights of movement and residence couldn't be invoked in a wholly internal situation. However after the provisions on EU citizenship was introduced, attempts were made to challenge this approach. In *Uecker and Jacquet v Land Nordrhein*[6] the Court ruled that citizenship did not extend the scope of the Treaty to situations which otherwise had no link to EU law.

However in light of certain factual situations such as those in *Schempp*[7] and *Garcia Avello,* which previously may have been decided differently before the advent of citizenship but now due to Art 20 TFEU have a sufficient connection with EU law. The most important result of the citizenship articles seems to be the apparent creation of substantive rights for EU nationals who previously did not fall within the economically active or economically self-

sufficient category. It seems that after the advent of EU citizenship such individuals may be now entitled to equal treatment with nationals of the host member state beyond the initial 3 month period envisaged by Dir 2004/38.

We saw that both the 1990 directives (now replaced by Dir 2004/38) imposed conditions on freedom of movement and residence of EU nationals who were neither workers nor self-employed. First, such persons had to have sufficient resources to avoid becoming a burden on the social assistance scheme of the state, and second, they had to have comprehensive sickness insurance However, the Court in reading the citizenship articles in conjunction with Art 18 TFEU which protects against discrimination, has held that these provisions have substantially expanded the circumstances in which an EU national may be entitled to specific social benefits.

In the decisive case of *Martinez Sala*[8] the Court of Justice held that an EU national lawfully resident in another member state, falls within the provision of EU citizenship and can rely on art 18 TFEU which prohibits discrimination within the scope of the article. Some have contended that the court was willing to 'explode the linkages'[9] which had previously been required in order for the principle of non discrimination to apply as it was no longer deemed essential for there to be any kind of economic activity as a worker or service provider, nor was it necessary to show preparation for future economic activity.

In *Trojani*[10], the Court tackled the issue of the limiting conditions within the article. The Court restated the importance of the "sufficient resources" provisions and proclaimed that while EU citizens cannot derive a right of residence from Art 21 TFEU if they lack sufficient resources, they are entitled as long as they are lawfully resident (on some other basis) within a member state to have access to social assistance on the same conditions as nationals under Art 18 and 21 TFEU. Should a member state decide to deny an EU citizen access to social benefits under such circumstances, they must move to revoke that person's residence on the position that they lack sufficient resources. The final protection offered by the Court to the EU citizen in such a situation is that recourse to the social assistance system cannot automatically lead to revocation of residence permission or deportation. The member states are under a duty to apply the limiting condition in a proportionate manner. Furthermore, they must try and make proper enquiries into the adequacy of the EU citizen's resources, in order to gleam whether or not such a person shall prove to be a burden on the member states purse.

We see that *Sala* and *Trojani* were both cases that essentially concerned the circumstances of persons whose status in the host state is precarious since they did not seem to satisfy the sufficient resources and sickness insurance requirements. Interestingly enough, the court relying on their famed use of teleological method in interpreting Treaty Articles and secondary legislation held in both cases that, by virtue of the fact that both individuals were in principle entitled to equal access to those social benefits that were available to nationals purely on the basis of their nationality or residence. The introduction of EU citizenship has also been used to extend the circumstances under which EU nationals pursuing educational courses in different member states are entitled to claim certain social advantages. Traditionally, the Court was hesitant to allow students from claiming social benefits as to put them on an equal footing with local students. Taking into account the financial ramifications for the member state if they were required to treat all students of EU nationality were to be given exactly the same rights as national students, in conditions of access to vocational training, the Court of Justice in *Gravier*[11] once again demonstrated their dynamism by interpreting vocational training expansively so that any form of education that prepared for a profession, trade, or employment was included, even if it included 'an element of general education'.

However, understanding that the economic implications

and perhaps wanting to avoid the inevitable complaints from the governments of different member states the court restricted the application of the *Gravier* principle by stating in cases of *Lair*[12] and *Brown* that only grants intended to cover charges relating to access to vocational training were covered by the prohibition on discrimination, whereas maintenance an training grant provided by the State to pursue university study was not covered. In *Rudy Grzelyck*[13], a French national studying in Belgium applied for payment of minimum allowance in his last year of study. This was initially granted but was subsequently withdrawn after the Belgian minister decided that *Grzelyck* was not entitled as he was not a Belgian national. Looking at previous case law we see that the applicant's assertion that he was entitled under Art 18 TFEU to apply for state social assistance may have seemed unlikely to succeed. However the influence of EU citizenship on the outcome of the case was crucial. Here the Court made its novel move, boldly declaring that although it had previously ruled that assistance for students fell outside the scope of the Treaty, the combination of a new EC treaty title on education and the new provisions on EU citizenship had introduced the relevant changes. Despite the fact that the rights in Art 21TFEU are subject to limitations and conditions, there was no provision expressly precluding students from entitlement to social benefits.

In *Bidar*[14] the Court of Justice was once again confronted with the question whether maintenance assistance despite the limiting conditions fell within the scope of the discrimination under Art 18 TFEU. Following the line of the previous case relied on the introduction of EU citizenship to depart from its earlier conclusions in *Brown* and *Lair*. The Court went on to emphasize that its ruling was given support by the recently adopted provisions of Directive 2004/38 which provides for equal treatment within the scope of the Treaty for all EU citizens residing in the territory of another members state, and which states that should the member state wish, restrict eligibility for maintenance grants for students to those who have residence.

Nonetheless, the Court of Justice ultimately in *Bidar* accepted that maintenance grants could only go to those students who had demonstrated a certain degree of integration into the society of the state. This did not mean however that there now needed to be a requirement to show a link with the state's employment market. Such a condition would be deemed inappropriate. And that the UK government requiring that the student must be "settled" was also declared to be exceptionally restrictive and unwarranted.

Therefore *Grzelczyk*, *The Queen (Dany Bidar*), all have used a different path from *Gravier* and *Blaizo* and have employed the advantages intrinsic to the concept of EU citizenship to their benefit. It now seems that "...Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy within the scope of the Treaty the same treatment in law irrespective of their nationality..." (as stated by the ECJ in Heikki Antero Pusa).

The framers of the Maastricht Treaty when drafting the citizenship provisions had kept in mind the importance of strengthening the link between the citizen and greater Europe. It seems that the rights of EU citizens lie in middle of two opposite models. The first places emphasis on preserving market integration and the second concentrates the idea of social citizenship. There has much been criticism directed at the formalization of the concept of citizenship. On one end of the spectrum it can be argued that such a concept was merely emblematic of the rhetoric of a unified Europe and how too wide an interpretation of citizenship would be detrimental to the interests of host member states. Regardless, fears that too wide an interpretation of rights would lead to excessive burden on member states and encourage "benefit tourism" seem to have been mitigated. The requirement for a genuine link that must be present with the host Member Staten before lawful residence triggers equal treatment seems to be a fair and effective way to accommodate the concerns of some Member States.

However, as with all fundamental freedoms the

Court of Justice's progressive interpretation of the rights related to citizenship has helped begin and develop the qualitative shift from focusing on facilitating free movement based solely on economic factors, to "creating a community of individuals"[15] thereby ensuring that the demarcation between economically active or inactive, while relevant, is no longer as important when nationals of the European Union try to avail right of free movement.

[1]Towards a Citizens Europe, Bull. EC, Supp. 7-1975
[2] Craig, P & de Burce, B "EU Law, Text, Cases, and Materials' (2008)
[3] Case C-193/94 Skanavi and Chyssanthakopoulos (1996) ECR I-929
[4] Case C-413/99 Baumbast and R v. Secretary of State for the Home Department (2002) ECR I-7091
[5] Case C-408/03 Commission v Belgium (2006) ECR I-2647
[6] Case C-64/96 and 65/96 Uecker and Jacquet v. Land Nordrhein Westfalen (1997) ECR I- 3171
[7] Case C-403/03 Schempp v. Finanzamt Munchen (2005) ECR I-6421
[8] Case C-85/96 Maria Martinez Sala v. Fraistaat Bayern (1998) ECR I-2691
[9] S.O Leary, "Putting Flesh on the Bones of EU citizenship" (1999)
[10] Case C-456/02 Trojani v. CPAS
[11] Case C-293/83 Gravier v. City of Leige (1985) ECR 593
[12] Case 39/86 Lair (1988) ECR 3161
[13] Case C-184/99 Rudy Grezlczyk v. CPAS
[14] Case C-209/03 Bidar v. London Borough of Ealing (2005) ECR I-2119
[15] Steiner, J & Woods, "EU Law" (2009)

BIBLOGRAPHY

TREATIES:

Treaty of the Functioning of the European Union (amending the Maastricht Treaty 1992 (TEU) Treaty of Rome 1957)

SECONDARY SOURCES

'Towards a Citizens Europe, Bull. EC, Supp. 7-1975
Craig, P & de Burce, B "EU Law, Text, Cases, and Materials' (4th edn OUP, Oxford 2008)
Emiliana Baldoni, "The Free Movement of Persons in the European Union: A Legal-historical Overview" (2003)
Robin C.A. White Free movement, equal treatment, and citizenship of the Union. (2005) I.C.L.Q. 2005 ,885-905
Steiner, J & Woods, "EU Law" (10th edn OUP, Oxford 2009)

Umbrella Clauses in International Arbitration

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***"A Subject and a Sovereign are clean different things."*[1] Charles I, speech on the scaffold, 30 January 1649**

This statement by Charles I clearly denotes that the Sovereign is separate from its subjects, and that their responsibilities differ greatly in nature. It appears that the two are on opposite sides of a coin. Though, the current circumstances' regarding the progressing trend of foreign investments around the globe changes this statement to an extent that the Sovereign may be held liable to the subjects of other Sovereigns. The foreign investors require protection for their resources in another state. In order to achieve this objective, the international law has witnessed emergence of the "umbrella clauses" in treaties. These clauses have bore an endless debate between the arbitral tribunals.

The origin of the concept of 'Umbrella Clauses', also known as the "*pacta sunt servanda,*"[2] can be traced back to its application in the case wherein 1959 a bilateral investment treaty (henceforth, BIT) was signed between Pakistan and West Germany. The clause stated, *"Either party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other party."*[3] The words of this provision indicated that the countries intended for any dispute arising in relation to investment to elevate into a treaty based claim. It is interesting to note that initially umbrella clauses were not as prevalent, however, with the passage of time their usage has magnified.

The factor contributing to the proliferation of umbrella clauses, abreast claims relating to unfair treatment and expropriation on part of the Host State, particularly in investment disputes, is the increase in the BITs which in turn triggered the velocity of the International Center for the Settlement of Investment Disputes (henceforth, ICSID) Convention. The ICSID Convention would only come into play where the contract is between a national of one Contracting State and another Contracting State or its agency. The fundamental role of the ICSID Convention was to *"promote foreign investment by establishing a neutral forum for resolving investment disputes between States and nationals of other States".* The umbrella clauses are presently portrayed as an integral part of the ICSID Convention. The essential reason for this intertwined relationship is the need for umbrella clauses, stated in the BITs, to protect the investors of the Contracting States, whilst the role of the ICSID Convention is to enable such foreign investors to invest in other States without hesitation of confronting biases, inequitable, and unfair treatment of national laws of the Host State. Keeping in mind that the under-developed countries need foreign investments to compete in the financial global market and the investors from the developed countries need to expand and diversify their business internationally, the use of the umbrella clauses has bridged the gap that investors have long awaited. However, the question is, to what extent will the investors be satisfied with the protection provided under an 'umbrella'? And where do the arbitral tribunals draw a line that would demarcate the interests of the Host State from that of the investors?

There is a plethora of case law on this topic but two

are landmark authorities namely, *SGS V Pakistan*[4] and *SGS V Philippines*[5] regarding the application and scope of umbrella clauses in light of the relevant issue.

Roller Coaster Approaches by the ICSID Tribunals:

- **Narrow Approach**
  - ***Societe Generale de Surveillance S.A. (Henceforth SGS) v Islamic Republic of Pakistan***

Briefly the facts are that a Swiss Company, SGS, had entered into an agreement with Pakistan, whereby the SGS had an obligation to provide "pre-shipment inspection" services to goods that were to be exported from certain countries to Pakistan (PSI Agreement). This agreement contained a dispute resolution clause that stated that in the case of a dispute arising out of the agreement; it will be resolved in accordance of the Arbitration Act of Pakistan. The PSI Agreement was, in fact, terminated by Pakistan and it filed a claim against the SGS. The SGS, on the other hand, initiated proceedings in the ICSID Tribunal claiming that the series of events provoked the application of article 11 of the BIT signed between Switzerland and Pakistan in 1995. The article stated,

"Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."

As a host state, Pakistan, objected to the jurisdiction of the ICSID tribunal arguing that the breach fell short of coming under the umbrella of the treaty as it was merely contractual.

The tribunal held that the contractual breach could not elevate into breach of the treaty provisions and thereby, rejected its own jurisdiction. As per the interpretation of article 11, the tribunal applied the maxim of *in dubio mitius* ("in the case of doubt for the restrictive view") without taking into account the modes of interpretation stated in the Article 31 of the Vienna Convention on the Law of Treaties, which avoids the maxim considered in this case. As per article 31(1), *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".*

In light of the aforementioned, the tribunal adopted a conservative approach regarding the scope of umbrella clauses as it would have had far-reaching consequences. Firstly, it elaborated the 'far-reaching' impact by highlighting the fact that not only minor contractual commitments but also non-contractual obligations would come under the umbrella. Secondly, if such an open-textual approach was adopted, there would be floodgates of lawsuits. The third submission was that the umbrella clause was situated at the end of the treaty provisions; thereby it could not be viewed as "first-order" standard obligation. Finally, the tribunal held that the host state was being unduly burdened to honour its obligations, whereas the investor could manifestly take advantage of such provisions.

For a short period of time, it was thought that *SGS v Pakistan* was the final and absolute judgment regarding the scope of the umbrella clauses. However, after the decision in the *Philippines* case, the views reflecting on the scope of umbrella clauses were far from absolute.

- **Broad Approach**
  - ***Societe Generale de Surveillance S.A. (Henceforth SGS) v Republic of the Philippines***

This case came before the ICSID tribunal after 6 months of the former case. It concerned the Republic of Philippines and the same Swiss Company, SGS, as the former case. The two parties

had mutually concluded the CISS Agreement in relation to provision of services. A dispute arose between the parties, when the SGS alleged that the Philippine Customs' had failed to pay the invoices' price that triggered the SGS to initiate proceedings before the ICSID tribunal as per Article X(2) of the BIT (1997) entered into between Switzerland and Philippines. The Article X(2) stated, *"Each Contracting Party shall observe any obligation it had assumed with regard to specific investments in its territory by investors of the other Contracting Party."*

The issue before the tribunal was whether or not it had jurisdiction over the matter as the CISS Agreement contained an exclusive jurisdiction clause. It held that the umbrella clause elevated the non-payment of due amount under the provisions of the CISS Agreement in accordance with its national laws into a breach of the treaty provisions thereby the tribunal had jurisdiction over the case.

It is interesting to note that although, the tribunal held that the contractual claims would fall within the scope of the umbrella clauses; the SGS was nevertheless required to honor the exclusive jurisdiction clause. The rationale behind this was that the investor will not be permitted to "cherry pick" the obligations that may qualify under public law and private law.

Prima facie, this decision seems to be ideal with regard to the elevation of contractual breach into breach of BIT, however, from a microscopic perspective, it has further caused confusion. This decision negates the inference that the tribunal proceedings could run parallel to the court proceedings regarding the facts of the case and simultaneously it contradicts the scope of the umbrella clause when the tribunal stated that the exclusive jurisdiction clause will take precedence over it. This is because, if the contractual breach is being elevated into claim based on international law, then the BIT should take precedence over the contractual breach. Nonetheless, it is essential to point out that, the *Philippines* case has signified the essence of the umbrella clauses by highlighting the fact that it has the capacity of encompassing a mere contractual breach under its guarded haven.

In Hakeem Sariki's[6] view, the path chosen in the *Pakistan* case, that the parties' are under an obligation to use clear and unambiguous words when formulating an agreement in order to elevate a contractual claim into a treaty claim, is more favorable than the *Philippines* case of adopting an open-textual approach as the issue of the ICSID jurisdiction over claims that are not related to investment does not sit comfortably with the Convention.[7]

On the other hand, James CrawfordEIGHT holds the view that the two prominent authorities that lead different paths are in fact destined for the same boulevard. He draws attention to the similarities found in both *SGS* cases and suggests that rather than debating over the issue of umbrella clause, the tribunals should work towards an agreement towards an "acceptable spectrum of views." The most relevant point made in the respective article was that the *"investor has neither international legal personality nor treaty-making capacity, and it does not acquire either merely by accepting an offer to arbitrate made in a treaty. If the agreement to arbitrate was a treaty, the resulting award would not be enforceable under the New York Convention of 1958, which has no application to international law arbitrations, e.g. between States or other international legal persons."*

Analyzing the views of prominent scholastic thought,

it appears the 'correct approach' is to literally regard the clause as an 'all-encompassing umbrella' for contractual disputes. However, in my opinion, the analysis by James Crawford is enlightening as it would be desirable to apply Crawford's analysis as a preliminary ground for the tribunals in deciding the jurisdiction over the alleged contractual breaches that the investors claim are covered by umbrella clauses in the BIT. Undesirably though, the tribunals' have applied a number of different methods that barely coincide with each other.

Other Explanations for Umbrella Clause

The essence of the umbrella clause lies in the fact that the investor is protected against discriminatory treatment. The reason why I believe there is a need for coherence and predictability in determining the scope of the Umbrella Clause as otherwise the arbitrators will continue debating on this topic, whilst the investors suffer from unsettled predicament. This in turn may discourage the investors to invest in a country where the law enforcement is weak but, investment is ideal with regard to profits as the labor and capital is skilled, accessible and inexpensive. Hence, in such a scenario, if there is a breach of a contract then it would be advisable for the investor to initiate proceedings before the ICSID tribunal pursuant to umbrella clause. It should be borne in mind that the investor is in a vulnerable position when he/she decides to invest in a foreign state; therefore, the host state ought to do everything to ensure the security of the foreign investor's resources and capital. In light of this, it may be relevant to say that the true meaning of the umbrella clause is to encourage investment as it acts as a defense mechanism and incentive for investors.

Conclusion:

In my perspective, the arbitral tribunal, after analyzing the clause thoroughly, would be in a position to infer whether or not the contracting parties truly intended for contractual obligations to be elevated into treaty obligations. In one way, it is inevitable for any Contracting State to desire the most of a BIT for its own State, however, the question arises would that Contracting State be willing to subject itself to be accountable for failing to honor a minor or basic contractual obligation and be answerable to the respective tribunal as if it was a breach of treaty obligation? It is quite unlikely and prejudicial against the host state as such commitments become overbearing.

In my opinion, there must be a balance struck between the interests of the state and protecting the interests of the investors. Keeping in mind Crawford's suggestion, one reasonable way to achieve this objective is that the parties, at the time of formulating the terms and conditions of the contract, can mutually agree that if a 'serious' breach occurs then the parties will be entitled to rely on the umbrella clause in the BIT, whereas in case of a 'minor' breach, the parties shall rely on the forum of choice. It is no doubt that the parties will try to argue that the umbrella clause encompasses all breaches; however, as stated above, this is a reasonable way of striking a balance. Though the question of differentiating a serious breach from a minor breach will be left for the tribunal to deliberate and interpret.

[1] Charles I, speech on the scaffold, 30th January, 1649 "King Charls his Speech made upon the Scaffold at Whitehall-Gate immediately before his Execution, on Tuesday the 30 of Jan 1648.

[2] Thomas Walde, 'The umbrella or (sanctity of contract/ punta sunt servanda) clauses in investment arbitration: A Comment on Original Intentions and Recent Cases' Volume I, Issue 04-October, 2004, **http://www.transnational- dispute-management.com/samples/freearticles/tv1-4-article_2.htm**

[3] Ethan G. Shenkman and D. Jason File, WilmerHale "Recent Developments in Investment Treaty Jurisprudence: Arbitrating Contract Claims under Umbrella Clauses"; Rudolf Dolzer and Christoph Schreuer, "Principles of International Investment Law", Pg 154

[4] Decision on Jurisdiction, 6 August 2003, ICSID Case No. ARB/01/13 http://icsid.worldbank.org/ICSID/FrontServlet

[5] Decision on Jurisdiction, 29 January 2004 ICSID Case No. ARB/02/6 http://icsid.worldbank.org/ICSID/FrontServlet

[6] Hakeem Seriki, 2007, "Umbrella Clauses and investment treaty arbitration: all encompassing or a respite for sovereign states and state entities?" *Journal of Business Law 2007*

[7] Award on Jurisdiction, ICSID Case No. ARB/03/11 http://icsid.worldbank.org/ICSID/FrontServlet; http://ita.law.uvic.ca/documents/JoyMining_Egypt.pdf

[8] James Crawford, 29 November, 2007 "Treaty and Contract in Investment Arbitration", The 22nd Freshfields Lecture on International Arbitration in London

Revisiting the Social Contract: Tracing the Basis for the National Minimum Standard of Protection for Host States

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This paper aims to explore the concept of State Duty to Protect as envisaged in the works of two notable scholars, Jean-Jacques Rousseau and John Locke, to assert the basis for advocating a National Minimum Standard of Protection in international investment law for Host States, based on which they can assert their regulatory freedom and secure a level playing field in true sense of the term amongst foreign and domestic investors alike.

Introduction

That a State has a right to protect its citizens in 'foreign lands', under the doctrine of State Responsibility and the notion of Diplomatic Protection, is a well enshrined principle of international law, which has found expression not only in the writings of scholars on the subject but also in the plethora of international legal judgments and international human rights treaties.

For instance, the Permanent Court of International Justice (PCIJ) in the **Mavrommatis Palestine Concessions Case** held that, "it is an elementary principle of international law that a State is entitled to protect its subjects when injured by acts contrary to international law committed by another State, from when they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – the right to ensure, in the person of its subjects, respect for the rules of international law."[1]

In addition to that, almost all international and regional human rights treaties establish that the paramount duty to protect rights of citizens lies with the State.[2]

More interestingly, since the middle of eighteenth century scholars such as E. de Vattel have asserted the duty of a State to protect its citizens abroad by suggesting that, "anyone who mistreats a citizen directly offends the State. The sovereign of the State must avenge its injury, and if it can, force the aggressor to make full reparation or punish him since otherwise the citizen would simply not obtain the goal of civil association, namely, security."THREE In that, clearly these scholars have tended to rely on the notion of social contract as articulated the prominent works of Jean-Jacques Rousseau[3] and John Locke[5] who asserted that the main reason people form societies and subject themselves to a government is for 'preservation of their property and safety'. They thus, explored the origins of a civil human society and the basis upon which a State derives its legitimacy and the right to govern its subjects. However, it leaves me to wonder why in the development of international investment law, the notion of social contract has always mainly been employed "outwards" to articulate positions and principles such as that of Diplomatic Protection and State Responsibility to protect citizens abroad and never "inwards" to articulate positions and principles to protect citizens residing within a State's territory, who are 'injured' because of foreign interests.

The fact that this has been the case is even more worrisome given that, (a) the original theory of social contract was concerned with an inward focus on how a State was to treat its own subjects and what 'end' (i.e. preservation of its people) it had to meet in order to derive its legitimacy to govern and (b) the human rights treaties clearly encompass the State Duty to Protect people from acts of private persons and entities. For instance, the Human Rights Committee in its General Comment 31 elaborates upon the State Duty to Protect and confirms that under the International Covenant on Civil and Political Rights, "the positive obligations on State Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities."[6]

Indeed, as acceded, by the Special Representative of the Secretary-General of UN on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, "the State Duty to Protect against non-state abuses is part of the international human rights regime's very foundation, and that, the duty requires States to play a key role in regulating and adjudicating abuses by business enterprises or risk breaching their international obligations."[7]

This paper is therefore, an attempt to revisit the widely trumpeted State Duty to Protect in light of the social contract theories of the eighteenth century with an inward focus in order to articulate positions and principle in international investment law that allows a State to protect citizens within its territory if injured by foreign interests in that State.

The Social Contract

A social contract is in the nature of an overt or covert pact between individuals and the members of the society as a whole that unite to form a government for the purposes of self-preservation. In that, the members of the society as individuals give up on certain liberties in consideration for the greater safety that the combined forces of mankind in the form of a government will provide.

Rousseau asserted that, "The first and most important deduction from the principles we have so far laid down is that the general will alone can direct the State according to the object for which it was instituted i.e. the common good... it is solely on the basis of this common interest that every society should be governed."[8]

Rousseau's ideas were first explored by John Locke. Locke argued that the main reason people form societies and subject themselves to a government is for 'preservation of their property' and 'safety'. He said, "Men being, as has been said, by nature, all free, equal and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby anyone divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community, for their comfortable, safe and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it."[9]

The government formed thus serves the purpose of protecting the individuals, because "if man in the state of nature be so free as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to nobody...; and that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others, for all being kings as much as he, every man his equal, and the greater part, no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure ... The great and chief end therefore, of men's uniting into commonwealths, and putting themselves under government is the preservation of their property."[10]

Consequently, the social contract governs the creation of society, providing for the 'mutual protection of the people and their goods.' As members reap the benefits of society (i.e. self-preservation) and enjoy a greater degree of protection, they forgo certain freedoms and comply with the general will of the society, enforced via a formed government.[11]

However, Locke believed that, "the fiduciary relationship between the State and the citizen creates a wide array of powers for the government, but that those powers are subject to an obligation i.e. protection of the rights of individuals who had given the government the power to act."[12] He said that, "though men, when they enter into society, give up the equality, liberty and executive power they had in the state of nature, into the hands of the society to be so far disposed of by the legislative as the good of the society shall require; yet it being only with an intention in everyone the better to preserve himself, his liberty and property; the power of the society or legislative constituted by them, can never be supposed to extend farther than the common good; but is obliged to secure everyone's property... and whosoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws promulgated and known to the people and not by

extemporary decrees; by indifferent and upright judges who are to decide controversies by those laws, and to employ the force of the community at home, only in the execution of such laws; ... and secure the community from inroads and invasion, and all this to be directed to no other end but the peace, safety and public good of the people."[13]

Locke further clarified that the legislative power, "is a power that hath no other end but preservation, and therefore can never have the right to destroy, enslave or designedly to impoverish the subjects."[14] He explained the 'bounds of trust' that is put in the legislative by the society, in all forms of government that, "first, they (legislative) are to govern by promulgated established laws not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countrymen at plough. Second, these laws also ought to be designed for no other end ultimately, but the good of the people."[15]

A State's Duty to Protect is therefore, very much inherent in the notion of social compact, as is the duty of the citizen to abide by the laws promulgated by the sovereign for the common good. That is to say that, "the undertakings which bind us to the social body are obligatory only because they are mutual..."[16] In other words, the central feature of social contract is that, "by covenanting to obey the laws of the society, one is entitled to the 'preservation of his life, and property,' and that therefore, the function of preservation of life and property goes to the government... as it limits and regulates people's freedoms for the general good, and the scope of governmental duty of preservation is limited to these 'natural rights' of life, liberty and property, which are inalienable i.e. not forfeited at the formation of society... The individuals surrender to the State the authority to enforce their rights... and therefore, the individual's natural rights create a duty on the government to protect and enforce these rights."[17]

As asserted by Locke, "the community perpetually retains a supreme power of saving themselves from the attempts and designs of any body, even of their legislators, whenever they shall be so foolish, or so wicked, as to lay and carry on designs against the liberties and properties of the subject; for no man or society of men, having a power to deliver up their preservation, or consequently the means of it, to the absolute will and arbitrary dominion of another; whenever anyone shall go about to bring them into such a slavish condition, they will always have a right to preserve what they have not a power to part with; and to rid themselves of those who invade this fundamental, sacred and unalterable law of self-preservation, for which they entered into society."[18]

He concedes that, "whensoever, therefore, the legislative shall transgress this fundamental rule of society; and either by ambition, fear, folly or corruption, endeavor to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties and estates of the people; by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people who have a right to resume their original liberty, and by the establishment of a new legislative, provide for their own safety and security, which is the end for which they are in society."[19]

As a result, a strong proposition can be developed for finding a basis in social contract theories to argue and assert that every State has the first and foremost duty to preserve its people and protect its national interests for the common good and that therefore its basic regulatory freedom and powers to act should in no way be restricted and/or alienated.

In addition to that, we can conclude that a State has a duty, legally, as well as under the social contract, towards its people to protect their rights, such that it too, by failing to meet the 'general interest', can be a violator of this duty, just as much as a deviant citizen may be.

Moreover, recognizing how central the role of the State and its duty to protect is towards assurance of such rights[20] it is important to assert that international law should never act, or be used or developed in a way so as to disable the trumpeted ability of the State to protect its citizens. In that, at the bare minimum, the regulatory freedom of the State to fulfill its democratic mandate and its responsibility towards its citizens to offer them a safe, healthy environment with an assurance of all

fundamental rights including right to life and an adequate standard of living with dignity and equality, should never be hampered, particularly, by virtue of international investment law, as has traditionally been the case.[21] Instead, this ability and freedom of States should be preserved and secured through all international legal avenues, including international conventions, courts and arbitration tribunals.

The International Investment Law Dent on the State Duty to Protect

The law of foreign investment has mainly developed on an ad hoc and piecemeal basis in response to the changing political and economic situation of the world at any given time. In this regard it has resulted in catering to the needs of the capital exporting states, as a consequence of which, the rights and freedoms of the capital importing states have been compromised.

Indeed, the freedom of the States to regulate has been curbed to an extent that even though a well-established 'duty to protect' is said to exist, the States receiving the foreign investments are nonetheless hostage to and subjected to the lopsided tenets of international investment law and the many a rights it brings along with itself for foreign investors, including most importantly, the investor's right to bring a claim in international arbitral forums against the Host State. Needless to suggest the impacts that this trend has had on the people, policies and environment of the Host States whose public issues are open to debate and subject to the scrutiny of forums such as International Center for Settlements of Investment Disputes (ICSID).

For example, the government of Australia has recently announced that it will abandon the investor-state arbitration provision in its future BITs and free trade agreements (FTAs) having investment chapters. Here is an excerpt from the Australia's Trade Policy Statement:[22]

"The Gillard Government supports the principle of national treatment — that foreign and domestic businesses are treated equally under the law. However, the Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. Nor will the Government support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses. The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme. ... In the past, Australian Governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries."

The National Minimum Standard of Protection for Host States

As discussed in this Paper, the fact that a democratic State derives its legitimacy and supremacy from the very notion of the social contract under which the State has a duty to protect the rights of its people in exchange for the wide array of powers that the citizens forfeit in favor of the State, it is only then appropriate to assert that the proposed National Minimum Standard of Protection traces its roots to the inherent notion of the 'social contract' between the State and the citizens.

In addition to this, considering that the State's legal duty to protect is now recognized worldwide under all human rights instruments, treaties and conventions, there exists a strong basis in tracing the 'National Minimum Standard of Protection' within the international human rights regime as well.

Hence, the 'National Minimum Standard of Protection' is hereby being proposed for Host States, so that they have

a basis upon which to rely and assert their sovereignty, regulatory freedom as well as a basis upon which they can fulfill their democratic mandate vis-à-vis their people.

The idea is to capacitate the Host States in a way so that they are actually able to fulfill their trumpeted 'duty to protect' the rights of their citizens. Unless they are 'enabled' to do so legally, it is only unfair to impose such an obligation upon them and expect them to deliver when in fact, as things stand, they cannot. In addition to this, by advocating a national 'minimum' standard of protection as a general principle of international investment law, the idea is to achieve an effective and operative balance of interests between foreign investors and citizens at the bare minimum and basic level.

Elements of the Proposed Standard

The 'National Minimum Standard of Protection' traces its origin in the notion of the social contract between the State and the citizen and therefore, on that basis this standard of protection is to allow the Host States the ability and freedom to extend 'minimum protection' to the rights of their citizens.

The protection is sought from the excesses of the multinational corporations which have a profound impact on the local communities and domestic investors in the Host States. The idea is to capacitate the government to take the 'bare minimum measures' needed for the 'survival' of their citizens as persons or as legal entities. In this regard, it is important to ensure that government is allowed to (a) "take all basic measures to ensure, safeguard and protect the health, safety, and environment of the people; and (b) to take the bare minimum steps towards the economic sustenance of the small domestic industries owned and controlled by small local investors", so that they do not risk going 'out of business' in face of fierce 'lopsided' and hence unfair competition from foreign firms operating within the Host State. The idea is to protect the locals as well as the local industry so that the national productive capacities of the receiving States are not undermined and/or compromised.

By advocating bare 'minimum' protection and not more, the objective is to keep this notion balanced and equitable between foreign investors and local people. The idea is to protect only to the extent necessary to ensure a 'level playing field' in true sense of the term. If the protection exceeds the 'bare minimum' level, it may then be regarded as 'discriminatory' and the resulting consequences of a governmental action being discriminatory may then flow by all means. Whether the measure taken was up to the bare minimum level or not would, however, depend on a case-to-case basis.

The key word here is 'survival' and the regulations or measures adopted under the proposed standard of protection should seek to ensure only that - the survival of (a) the people (which includes their basic rights as to life, health, safety and clean environment) and (b) the local investors (which includes equality of competitive opportunities in real sense of the term) in the Host State.

Benefits of the Proposed Minimum Standard of Protection

In view of the fact that there are competing principles of international human rights and international investment law and recognizing that there is a conflict when the State Duty to Protect the rights of its citizens as envisaged under the international human rights regime is curbed by the principles of international investment law, there exists a need for the convergence of the competing principles of international law in order to avoid the conflict between the fields of international human rights and investment law.[23] Such a convergence can be achieved if the National Minimum Standard of Protection is admitted and embraced in international investment law as it would allow the States the regulatory freedom to protect the basic rights of its people and fulfill its democratic mandate.

Also, considering that the proposed National Minimum Standard of Protection calls for a basic minimum level of protection and not more, this standard would help achieve the necessary balance between the rights and interests of all parties concerned thereby democratizing

international investment laws that are currently, in majority of cases, lopsided.[24]

Reasons for advocating *Lex Generalis* as opposed to *Lex Specialis*

It is also important to understand why such a standard should be developed as a general principle of international (investment) law rather than negotiated independently and included as a clause of a BIT. For this it must be understood that BITs are *lex specialis* between the State Parties where the capital importing States are often not in the best bargaining position to secure their interests or that of their citizens.

On the other hand, if the Minimum Standard of Protection is consistently demanded multilaterally and or collectively, its evidence ultimately as 'Customary International Law' will become binding on all parties concerned without the need for it to be negotiated independently in a BIT where the bargaining position of the parties is not always equated.

For this reason, this paper proposes that capital importing States facing the impacts of the lopsided BITs and international investment law regime should, as a matter of policy, adopt and assert the 'National Minimum Standard of Protection' in all multilateral forums such as the United Nations so that eventually it is established as a rule of Customary International Law. Alternatively, should the UN General Assembly support this contention and if it believes in the need for convergence and balance of competing international law principles, it may even seek to adopt a Resolution to that effect, as they did so when they adopted the Resolution 1803 on the Permanent Sovereignty of States over their Natural Resources,[25] to pledge support for and to endorse the new 'National Minimum Standard of Protection' for Host States.

Conclusion

Globalization has had a profound effect on the way of life of people and much has been said about the way it has engulfed the world and changed the way in which it works.[26] Increased inter-dependence has brought increased risk of impacts for the world economy and environment and the trickle-down effect of the crash of the housing market, Wal-Mart, banks and other financial institutions has been felt by the common man the world over.

In addition to this, incidents of corporate abuses of human rights and debates on the notion of corporate social responsibility have been on a rise, to the extent that it has been expressly included as a director's duty under the new UK Companies Act 2006.[27]

The impact of the activities of MNCs have been so vast on both the human rights as well as on the environment of the world that the debate surrounding their accountability is on the rise in the agendas of all key players in the international arena, including the United Nations which has appointed a Special Representative on Business and Human Rights, John Ruggie on this very point. Although, Mr. Ruggie has opted for the softer and voluntary notion of 'responsibility to respect' as opposed to a more assertive 'duty to protect' in the case of multinational corporations, nonetheless, the idea that now seems to be gaining greater acceptance is the fact that companies now need to be more mindful of their activities and proceed with due diligence their operations for a greater social acceptability of their entities.

Therefore, given that the law of foreign investment has developed mainly in response to the changing political and economic situation of the world at any given time, it is once again time to reconsider and revisit the foreign investment law not in isolation, but within the context of the human rights and environmental laws, making the latter an overriding backdrop within which principles of foreign investment law develop. The proposed National Minimum Standard of Protection can prove to be instrumental in this regard as it has the potential for democratizing investment laws and ensuring minimum standards for Host States as result of which they will, (a) have a basis to fulfill their democratic mandate and the

basic covenant with their citizens from which they derive the very legitimacy of their supremacy and existence and (b) be capacitated to fulfill their 'duty to protect' that is so widely and blindly credited into their account.

[1] PCIJ Rep Series (1924) A No. 2, Para 21.
[2] See Preamble, Universal Declaration of Human Rights (UDHR) 1948, Article 2 and 5 of International Covenant on Civil and Political Rights (ICCPR) 1966, Article 2 of International Covenant on Economic Social and Cultural Rights (ICESCR) 1966, Article 2 and 7 of the Charter of Economic Rights and Duties of States (CERDS) 1974, Article 1 of The European Convention on Human Rights (ECHR) 1950, Articles 1, 21(5), 25 and 26 of The African Charter of Human and Peoples Rights 1986, Para 1 of The American Declaration of the Rights and Duties of Man 1948, Article 1 of The American Convention on Human Rights 1978.
[3] E de Vattel, *Le droit des gens ou les principes de la loi naturelle* (vol I, 1758) 309, as translated and cited in Z. Douglas, *The Hybrid Foundations of Investment Treaty Arbitration* (2003) 74 BYIL 151, 165.
[4] Jean-Jacques Rousseau, *The Social Contract and the Discourses*, translated by G.D.H. Cole (1913), revised edition, (1973).
[5] John Locke, *The Second Treatise of Government,* chapter VIII, Norton critical edition, (2005).
[6] HRC, General Comment 31, Para 8, as cited by Ruggie, A/HRC/4/035, 6.
[7] John Ruggie, A/HRC/4/035, 5 and 7.
[8] Rousseau, *supra note 4*, 199.
[9] Locke, *supra note 5,* 58.
[10] Locke, *supra note 5*, chapter IX, 71-72.
[11] Liliya Abramchayev, *A Social Contract Argument for the State's Duty to Protect from Private Violence*, St John's Journal of Legal Commentary Vol. 18:3 (2004) 849-851.
[12] Abramchayev, *supra note 11*, 852.
[13] Locke, *supra note 5*, chapter IX, 73.
[14] Locke, *supra note 5*, chapter XI, 76
[15] Locke, *supra note 5*, chapter XI, 80.
[16] Rousseau, *supra note 4*, 204.
[17] See A. John Simmons, *The Lockean Theory of Rights*, 72-73 (Princeton University Press 1992) (illustrating the point via example: children have a right to be cared for, that right creates a duty on the parents to provide such care) as quoted by Abramchayev, *supra note 11*, 853.
[18] Locke, *supra note 5*, chapter XIII, 83.
[19] Locke, *supra note 5*, chapter XIX, 114.
[20] See for example, the work of John Ruggie, Special Rapporteur, Secretary-General United Nations on issues of human rights and transnational corporations and other business enterprises (2005-2011), A/HRC/4/035, A/HRC/8/5, A/HRC/11/13, and A/HRC/17/31.
[21] See N. Mahmood, "Democratizing Investment Laws: Ensuring Minimum Standards for Host States", Journal of World Investment and Trade, Vol 14.1 (2013), 79-113, for an illuminating account of how and why the development of international investment law has been lopsided and the impact that this has on the local people and investors in the Host States.
[22] Australian Government Department of Foreign Affairs & Trade, Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity 14 (Apr. 2011), available at http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity .html.
[23] It is the author's contention that in any instance where the conflict may be irreconcilable, the preference be given to international human rights law instead of international investment law, given the public law nature of the international human rights regime.
[24] Majority of Foreign Investment Law principles that have been developed, including the Most Favored Nation Treatment, National Treatment, Fair and Equitable Treatment, International Minimum Standard of Protection, and Prompt, Adequate and Effective Compensation, coupled with the protection under Bilateral Investment Treaties (BITs) and through decisions of international arbitral forums like ICSID in cases such as Emilio Agustin Maffezini v Kingdom of Spain, ICSID Case No ARB/97/7 2000; (2003), and Metalclad Corporation v United Mexican States, ICSID Case No ARB (AF) /97/1 (2000), actually make the entire international investment law regime lopsided and makes it more beneficial to operate as a foreign investor in a given Host State rather than as a local investor. This in turn has led towards a trend of nationality shopping by locals so that they can get the benefits that a foreign investor does; for example, Bechtel Corporation shifted its registered office from Cayman Islands to Netherlands to sue government of Bolivia because Cayman Islands did not have a BIT with Bolivia whereas Netherlands did (Aguas del Tunari SA v Republic of Bolivia, ICSID Case No ARB/02/3 (2005)
[25] UNGA Resolution 1803 (XVII) on Permanent Sovereignty of States over their Natural Resources, 14 December 1962.
[26] See Thomas L Friedman, *The world is Flat: A Brief History of the 21st Century*', Farrar, Straus and Giroux, (2007).
[27] See Section 172, UK Companies Act (2006), *Duty to promote the success of the company,* which reads as follows:
"(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
(a) the likely consequences of any decision in the long term,
(b) the interests of the company's employees,
(c) the need to foster the company's business relationships with suppliers, customers and others,
(d) the impact of the company's operations on the community and the environment,
(e) the desirability of the company maintaining a reputation for high standards of business conduct and
(f) the need to act fairly as between members of the company.
(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

WTO Dispute Settlement, an overview of the Appellate Body rulings.

By Salma Saifullah Khan
The author holds an LLM from the University of London in Commercial and Corporate Law.

The World Trade Organization (WTO) dispute settlement is a distinctive system in international law. Its basis is found in the provisions of and practice that developed under Article XXII and XXIII of GATT 1947. The WTO dispute settlement is regulated by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), The Dispute Settlement Body (DSB) is the WTO authority which administers the rules and procedures under the DSU. It establishes panels, adopts panel and Appellate Body reports, maintains surveillance of implementations of rulings and authorizes suspension of concession. The WTO dispute settlement system is an integrated unlike the system that developed within GATT.

Under GATT 1947, there was no prospect of appeal, but the DSU established a new institution, the Appellate Body. It's a permanent institution that reviews appeals from panel reports. The Appellate Body is suppose to provide security and predictability to the multilateral trading system and it is suppose to clarify provisions of covered agreements in accordance with customary rules of interpretation of public international law. Furthermore, the Appellate Body is competent to review only issues of law covered in the panel report and the legal interpretation developed by the panel. P.Van den Bossche comments, the decisions of the Appellate Body, for example in EC-Bananas III and US-Shrimp have put an end to politically as well as economically complex and sensitive disputes between WTO members and this may be correct to some extent.

In *EC-Bananas II (1996)*[1], the Appellate Body upheld the Panel's finding that the EC measures were inconsistent with GATT Article II and XVI because they were discriminatory and clarified that the 'aim and effect' of a measure is irrelevant under GATS Article II and XVIII. It also held that the allocation of a tariff quota share to some members not having a substantial interest in supplying bananas but not to the others was inconsistent with Article XIII:1. It also ruled that private lawyers may appear on behalf of a government during an Appellate Body oral hearing (the Panel did not allow them). Another reason why the Appellate Body has reinforced the basic principles of the WTO system is that it found that the European Communities had committed to accord no less favorable treatment within the meaning of Article II and XVII to the range of principles and subordinate 'wholesale trade services', the Panel concluded that they were de facto granted less favorable treatment than the EC and ACP supplies in violation of Article II and XVIII. Similarly in the *US-Shrimp* [2], the issue was the interpretation of Article XX which states that a measure must not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same condition prevail. So in this case the Appellate Body found the elements of the measure relating to the protection of sea turtles as 'unjustifiable discrimination' because they found that the US had adopted a rigid and unbending standard for certification of the right to export shrimp to the US and did not take into account other policies and measures that an exporting country may have adopted. Secondly it held that the US had only concluded with a few countries, an agreement for the protection and conservation of sea turtles but had failed to provide all exporting countries with similar opportunities. It also for the first time allowed members to have the right to impose trade restrictions based on the process of production, not limited to the characteristics of a product.

From these two cases we see the Appellate Body's case law as highly authoritative and and one can see why it has come to be most important organ of WTO dispute settlement. There are however a few flaws and drawbacks in the Appellate Body which could undermine the whole purpose of the WTO i.e. trade liberalization. William Magnuson in the Harvard International Law Journal argues that one of the first criticisms of the Appellate body is that of narrow textual reading of treaty provisions which leads to decisions that interfere with the sensitive domestic decisions about the level of risk that a society is willing to accept. These issues cut to the very heart of concepts of sovereignty. Additionally, the opinion does not force the violating country to adopt trade liberalizing policies. Instead the losing party decides to maintain or increase trade restrictive policies, the very thing the WTO was created to prevent. In the *EC Sardines*[3] case for the first time the Appellate Body had held that a

technical regulation adopted by a member state was invalid because it was not in line with a new binding international standard and in turn gave more binding force to international standards. This was considered to be important development in international law. However, the way the Appellate Body concluded this has been criticized because it focused its opinion on self evident interpretation of treaty texts and dictionary definition. It looked at the meaning of technical regulation from the Technical Barriers to Trade (TBT) Agreement and then came up with guidelines which resembled the actual text itself. Hence, the Appellate Body's restatement does not provide any further guidance to member states about the actual meaning of the text.

Another line of criticism is that the Appellate Body decisions increasingly interfere with sensitive democratic processes in sovereign countries. In Japan Apples, the Appellate Body examined a health and safety measure implemented by a member state and struck it down on the basis that the scientific evidence was insufficient to support it. The Appellate Body did not even address what particular risk Japan had decided to accept. Instead it assessed for itself what kinds of measure were appropriate. For this reason they have constrained the ability of government to exercise their discretion in this sensitive area. In Brazil-Tyres, the Appellate Body's opinion indicated that the ban on importation of tyres was improper because it discriminated against some countries. In order to comply with the decision, Brazil could take two approaches. First it could remove the ban on importation, thereby treating countries equally or it could ban the importation of retreaded tyres (according to Brazil this ban was justified because it was necessary to protect citizens from threat of disease that these tyres could bread from all the countries. This shows that Appellate Body's decision allow states to increase rather than decrease barriers to trade. What the Appellate Body could do is give a more directive approach and restrict than to remove the offending measure. This is also in conformity of Article 19 of DSU which states that Appellate Body may suggest ways in which members could implement the recommendations.

Likewise, the Appellate Body's case law might be highly authoritative but there is no concept of binding precedent. So in cases like US-Shrimp where they have effectively put an end to politically and economically complex disputes might not be followed in another similar case that arises and this leads to uncertainty. A whole new structural reform might consume a lot of time and money but the WTO dispute settlement could bring about a little change that could lead to a big difference. It could start with following the binding precedent system and instead of recommendations, give rulings so that the member states actually do implement them and not resort to consultation again and go round and round in circles without remedying their inconsistent measures or violations of obligations. The WTO could also either codify international standards so that every member follows the same standard or just give preferential treatment to the least development countries. With these few changes the Appellate Body could indeed be the most important organ of WTO dispute settlement and could rightly be referred as the 'crown jewel' of WTO.

[1] The initial complainants received in this case that lead to the request for establishment of a panel alleged that the European Communities' regime for importation, sale and distribution of bananas is inconsistent with Articles I, II, III, X, XI and XIII of the GATT 1994 as well as provisions of the Import Licensing Agreement, the Agreement on Agriculture, the TRIMs Agreement and the GATS.

[2] In early 1997, India, Malaysia, Pakistan and Thailand brought a joint complaint against a ban imposed by the US on the importation of certain shrimp and shrimp products. The protection of sea turtles was at the heart of the ban. The US Endangered Species Act of 1973 listed as endangered or threatened the five species of sea turtles that occur in US waters, and prohibited their "take" within the US, in its territorial sea and the high seas. ("Take" means harassment, hunting, capture, killing or attempting to do any of these.) Under the act, the US required that US shrimp trawlers use "turtle excluder devices" (TEDs) in their nets when fishing in areas where there is a significant likelihood of encountering sea turtles. Section 609 of US Public Law 101–102, enacted in 1989, dealt with imports. It said, among other things, that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the US — unless the harvesting nation was certified to have a regulatory programme and an incidental take-rate comparable to that of the US, or that the particular fishing environment of the harvesting nation did not pose a threat to sea turtles.

[3] On 20 March 2001, Peru requested consultations with the EC concerning Regulation (EEC) 2136/89 which, according to Peru, prevents Peruvian exporters to continue to use the trade description "sardines" for their products. Peru submitted that, according to the relevant Codex Alimentarius standards (STAN 94-181 rev. 1995), the species "*sardinops sagax sagax*" are listed among those species which can be traded as "sardines". Peru, therefore, considered that the above Regulation constitutes an unjustifiable barrier to trade, and, hence, in breach of Articles 2 and 12 of the TBT Agreement and Article XI:1 of GATT 1994. In addition, Peru argues that the Regulation is inconsistent with the principle of non-discrimination, and, hence, in breach of Articles I and III of GATT 1994.

[4] On 20 June 2005, the European Communities requested consultations with Brazil on the imposition of measures that adversely affect exports of retreaded tyres from the EC to the Brazilian market. The consultations led to no resolve and so the European Communities requested for establishment of a panel.

From Boom to Gloom: Economic Recession from the seedy underbelly of the Real Estate Market?

By Maria Hameed

The aurhor has an LLB Hons degree from the University of London and an MSc in Management from the University of Surrey. She is currently based in Dubai, UAE working in the banking sector.

The importance of regulatory infrastructure has become evident time and again through global fiascos. The recent mortgage market crisis and subsequent economic recession of 2008 is the most recent and eye-opening example of such a need. Striking unexpectedly, the worldwide economic crash destroyed years of progress.

Many analysts have laid the majority of, if not the entire, blame onto the mismanaged mortgage lending market. The downfall of the real estate and mortgage market has left most stakeholders skeptical and shaken.

Owning a house, creating a home, being able to provide a secure haven for your loved ones is what most people dream about and strive for their whole life. So how could such noble aspirations be the root cause of the one of the worst financial recessions to hit the world with such widespread repercussions? What really happened?

In the years before the economic crisis struck, the property market was growing exponentially. Being able to afford a home of their own was becoming possible for many people. Buyers were offered low interest rates, affordable repayment plans and ownership of properties. Real estate agencies mushroomed facilitating in supplying property options to eager buyers hoping to purchase homes and land. Naturally, lending institutions were more than happy to oblige. Monthly influx of interest combined with a tangible and high value collateral made home financing and mortgages a reliable and sought after facility.

The home financing product gained momentum in the rapidly developing market. Home prices skyrocketed, property values became inflated by over 100%. From an individual centered product, home financing soon became a choice facility for investors. Buying homes to let and for profit selling became common practice. Similar to stocks, property value was seen as a bankable asset. Trading of properties flourished. The property market boom was global. International investors and buyers started purchasing and trading in properties located all over the world especially in thriving real estate markets such as London, Dubai, New York, Hong Kong, et cetera.

The utopic environment reached a point where existing home owners felt they were losing out by staying idle and soon a trend of equity financing emerged as people became convinced that their home was essentially an untapped gold mine, an asset being wasted. Pre-owned homes became collateral for borrowing and instant cashing. The confidence level in the property market reached its peak to the extent that people invested in off plan properties with completion dates years away. Speculative investments resulted in people borrowing for apartments/houses/properties that did not exist, for instance there were buyers for apartments on the 15th floor in buildings whose foundations had yet to be laid. Risks paid off and success stories spread like wildfire. People became millionaires overnight and the common man aspired and dreamed, because property trading, unlike the stock market did not require technical knowledge of the finance industry, just gut instinct and favorable market conditions.

Before long, the property boom peaked and cracks started to appear in the perfect mortgage utopia. The blind faith investments and superficial confidence of the buyers gave rise to countless fraudulent deals. Millions were lost or embezzled under the guise of home financing.

Banks and lending institutions along with real estate brokers played on human nature and created an environment that successfully persuaded people to invest in property they wish could own, but were not really qualified to own. However, with low interest rates, satisfactory repayment trends and a healthy economy, risk considerations were relaxed by lenders and buyers with inappropriate profiles were approved to become home owners. As a result, loans were disbursed to buyers with bad credit histories who were high risks for default.
Similarly, buyers had been swept away by the magic of the

property market as well. People ended up taking loans to own houses they could barely afford to pay back. With hopes pinned on eventual pay out through rental income and equity finance options people ended up entering into unfavorable loan agreements. No one seemed to be thinking what would happen should things go awry.

However, as dramatically as the property boom had been created, the bubble burst equally unexpectedly. Consequently, mortgages were reset and many homeowners were unable to refinance their mortgages at lower rates, as there was no equity being created when housing prices fell. They were, therefore, forced to accept exorbitantly higher mortgages rates, which many could not afford. To make matters worse, the recession created redundancy and joblessness. With no source of income remaining, loans could not be paid off. Many homeowners were simply forced to default and foreclosures ensued. Almost literally, the real estate and mortgage market imploded within a matter of days. The fall out was nasty and tragic. Emotions ran high with most people having lost everything. From riches to rags became a bitter reality for many. Reeling from the shock, the affected stakeholders aggressively started to place blame to hold someone accountable for their misery.

Does the blame lie with the lending institutions and banks that allowed greed and profit making ambitions get the better of them? Or does the onus fall on the overzealous buyers who got in over their heads hoping to strike gold in the real estate market trading? The question has been pondered upon by analysts, economists and financial and even legal experts. Who really was to blame for this dismal situation, how did it get out of hand without warning and why was there no damage control mechanism in place?

Once again, the focus is on the lack of an effective infrastructure in place that could have prevented the situation from escalating to such a point. With all stakeholders having a free hand to manoeuver the market conditions in their favor, there was a glaring lack of regulations to address the conflict of interest of all concerned parties. Whereas, policies and regulations existed on the generic profile of borrowers and basic lending parameters, there was nothing to monitor or control the on-the-ground deals, incorporate employment trends or job stability and job loss contingency.

When the market crashed, banks pulled back, inflating interest rates steeply. The role of central banks has been severely criticized in mortgage market regulation. The central bank acted more like an ineffectual referee between opposing parties battering away at each other, making no coherent decisions or implementing guidelines to control the chaos. The real estate market crash, like its ascension was also on a global scale. The inconsistency of regulations, rules and practices in various countries complicated matters further. With borrowers belonging to a country with sympathetic rules, but having borrowed in a country with strict and inflexible conditions created complex and disruptive situations. Banks and collection agencies transformed into villains out for blood in the eyes of the general public.

Lack of legislation to streamline or control mortgage lending surfaced as a worrying factor. It became palpable that there was no contingency plan in place to control such facilities raising serious concern for the future and other similar facilities.

Overall, it was a mix of factors and participants that precipitated the market collapse and subsequent mess. Ultimately, though, human behavior and greed drove the demand, supply and the investor appetite for these types of loans. Hindsight is always 20/20, and it is now obvious that there was a lack of wisdom on the part of many.

Five years down the road, no one can safely say that the worst is over. The meltdown of the system brought out the worst in people. Still stinging from the burn, buyers are reluctant to indulge in borrowing whereas lenders are hesitant to risk lending for fear of further defaults. However, there is gradual and forced improvement in the property market but it is barely reminiscent of the dynamic property trends of days past.

Justice Ali Nawaz Chowhan

A Profile Interview conducted by the editorial team.

'*The Moving Finger writes; and, having writ, Moves on: nor all thy Piety nor Wit Shall lure it back to cancel half a Line, Nor all thy Tears wash out a Word of it*' - that is destiny says Justice Ali Nawaz Chowhan quoting Omar Khayyam in response to our question about how he achieved the versatility that defines his career to date. The editorial team of the Spectrum had the honor of spending an enlightening evening in the company of this learned gentleman, where he shared his thoughts on legal subject matters, enthralled us with his many interesting personal experiences and humbled us with his hospitality.

Justice Chowhan was elected International Judge of the United Nations (by the General Assembly) and worked at The Hague from 2006 to 2009 with diplomatic status under the Secretary General of the United Nations. Presently, he works as a consultant on Legal Affairs, Administrative Law and International Law. He is the Alternate Chairman of UNESCO Appeal (Judicial) Board, Paris, France. Furthermore, he is a visiting professor of International Law including Human Rights at local institutions. He is enlisted in the panel of scholars of Islamic Law and Jurisprudence drawn by the President in consultation with the Chief Justice under Article 203f(B) of the Constitution and is the President of the Punjab University Society of International Law and Human Rights. As our discussion reaches his opinion on the coexistence of parallel systems of state law and the Shariah, we find that Justice Chowhan is a proponent of the *unique court system*.

Our parallel system, he says was created through the amendment of Article 203 of the Constitution by a dictator who had the 'mens rea' to extend his rule and not actuated by pious intentions of bringing about peace and harmony in the society or even a just system. The amendment was portrayed as a semblance to the one established by the Khulfa-e-Rashideen but that could have never really been achieved. Presiding as a Sessions Judge at the time, Justice Chowhan recalls meeting with the gentleman who was sponsored to graft portions of Shariah into the local system. His name was Mr. Devaldi. He was a Syrian and an advisor to His Majesty, the King of Saudia Arabia. Justice Chowhan had the opportunity of interacting with him when he was staying in Islamabad and boldly voiced his concerns that there were problems which needed considerations prior to the grafting, but this effort bore no fruit.

Bringing in two systems did not work in Justice Chowhan's opinion. There is a recession in this society of moral values. We cannot get the standard of witnesses which the Shariah requires so we have to maintain secular laws. Hence, things have become complicated. With regard to the punishment of stoning to death, he purports that we still do not quite have a clear understanding; the case is still anchored at the Federal Shariat Court. There have been two judgments on “usury” but they lack any clear definition and explanation of the subject matter.

With the post colonial system, he says jurists were more comfortable to the extent of criminal law. People were well versed in the evidence law and we had some very great lawyers who could bring on record the truth. He himself tried about 200 murder trials on the basis of the old law but presently with the system at hand, there is a lack of coherence he feels. The confusion has increased because the development of law has been quite inconsistent.

He elaborated that the *corpus juris* of Anglo-Saxon law was already well established. If Shariah had been introduced in its entirely it would have been different and Justice Chowhan says he would have welcomed it but the grafting was done in part and in a half baked manner. Many people have opined, he says that it is bringing the tribal system here without there being the requisites, like the standard of witnesses for instance. There have been only a few cases where the *hadd* punishment for stealing has been pronounced. The law of evidence has been merely reshuffled. There is no proper input and only one or two sections have been modified. He looks forward to

the day when we shall adhere to a single legal system. Whilst concluding he refers to a recent judgment by the Lahore High Court where they declared to be more than capable of handling both matters of Shariah and local law Learning that he has also presided over blasphemy cases during his career, we ask him about his take on the blasphemy laws and where exactly does the flaw exist, in law or in implementation? "It's the misuse and exploitation," he retorts. He recalls two cases that he tried. The first, involved a student of a homeopathic college who reported that his teacher who was also a doctor, had committed blasphemy by talking about the body parts of the holy personage, the professor as it happens was teaching physiology and giving a lesson on anatomy.

An FIR was lodged against the professor and he was arrested. Upon trial, an Additional Sessions Judge in Islamabad pronounced a death sentence on the basis of a letter that was received by the Judge after the trial concluded wherein the teacher allegedly stated that he had done nothing wrong and that he would continue to say the blasphemous things that he did. The judge, annoyed by this statement said the man was deliberately being disrespectful. Ultimately the matter went to a Double Bench at the High Court, as is the norm for death sentences. At the High Court, the Judges differed on their respective verdicts. So the Chief Justice referred the matter to Justice Chowhan as a Referee Judge.

Whilst presiding over the Court, he recalls that several prominent Ulemas were also present. He was quite conscious of the fact and had to be very careful whilst listing evidence. He decided to examine the infamous letter that played such a pivotal role in the initial judgment; He learnt that the letter had not been exhibited on the case file. It had never been put to the accused. This letter as the Additional Sessions Judge had said came to him in his chambers. It was purported to have been written by the professor. Pursuant to S.342 of the Criminal Procedure Code any incriminating evidence must be put to the accused to give him the opportunity to give an explanation.

This was never done because the case was closed for judgment and the letter arrived during this while. In court, Justice Chowhan enquired from the prosecution lawyer, a very senior person, whether the letter had been exhibited and the lawyer said yes, it had but the court records said otherwise. Keeping in view the sensitivity of the matter Justice Chowhan asked for the matter to be returned to the Sessions judge to ask the accused if the letter was in fact his. When the matter went back to the Sessions Judge, the accused was confronted with the letter and the professor pleaded that he knew nothing about it, nor was it even in his handwriting. Not having any other evidence, the man was therefore, acquitted.

He tells us there was another case in Sargodha. There was an allegation against a man that he had put up posters against the holy personage. The man, however, kept denying the allegations. As it turned out, the prosecution lawyer was apparently an archenemy of the accused. Moreover, during review of the file, Justice Chowhan learnt that the investigating police officer had been taking the containing documents home and the content was not attested, so there was a possibility that anything could have been manually modified. Vis-à-vis evidence, there was no proof of the accused having put up the posters - no one had witnessed the act. On lack of such evidence therefore, he acquitted the accused.

So he stresses it's not the law, it's the misuse of the law due to which the accused always suffers. In the latter case therefore, Justice Chowhan had suggested a methodology to prevent this abuse. He advised that a person not less than the rank of the Superintendent of Police should investigate matters of blasphemy because he will understand the intricacies of Shariah but this is not being done. Moreover, he had also suggested that a Sessions Judge instead of an Additional Sessions Judge should review such cases.

The objective he says is to not be misled by emotion. The law need not be changed but it must be justly applied. Due to this misuse, it's mostly the minority community that has suffered in Pakistan and they are rightly upset. As equal citizens, having been guaranteed a due place by Quaid in his August 11, 1948 address they demand equal respect.

Further on he says, that the blasphemy cases should only be tried by the Federal Shariat Court because that, in his opinion, is the competent court for this subject matter. What is important is to have a foolproof procedure so that no one can dare make a false allegation. Today the terrorism pressure has also affected the judiciary. Many judges refuse to try the cases. When we ask him if he has been threatened at any occasion, he says he's been quite fortunate. He always based his judgments strictly on facts and evidence. Recalling one random incident, not relating to blasphemy cases though, he says he once noticed a group of men in tribal attire at a trial he was presiding who were unnecessarily intrusive and he told them to leave the courtroom. Having been offended they plotted a plan to intercept Justice Chowhan on his route back home from the Court, but the Intelligence got hold of their plans and duly warned the Justice.

With such a versatile career, we were curious to learn if the opportunities coincidentally came his way or was each experience something he deliberately endeavored to take and that's where Justice Chowhan quoted Omar Khayyam.

He tells us he used to participate in House of Commons style debates at Gordon College. Senior lawyers came as chief guests to these debates. He supposes those years did act as a prelude to what was to come. He subsequently went to law school and topped in the degree, which gave him further encouragement to pursue a career in law. However, he purports it was the first few years of his career that were most monumental. His father was an influential man and so he soon became legal advisor to Murree Brewery and one or two textile mills. In 1974, East Africa had sent away the Asians and the British. Mr. Bhutto called for an Islamic Summit Conference at Lahore.

Justice Chowhan was invited to the conference (representing the Rawalpindi Bar). It was at this occasion that the Amin of Uganda was also present and requested Mr. Bhutto to send a delegation of lawyers for capacity building and to assist them on matters. So the Chief Justice came from East Africa and there was an in-house interview in the major cities. He had hardly spent a few years working but Justice Chowhan also went for the interview. He was required to write an essay which he easily did; having attended the conference and having a background of the matter greatly aided the task. He was selected along with three other lawyers from Pakistan. It was a wonderful opportunity he says. The Chief Justice of East Africa became very fond of him and gave him a better house than the rest. The Chief Justice wished for him to stay there for a long time but his wife got very depressed there with the prevalent conditions and so they moved back.

In Pakistan, there were many eminent judges who came to know Justice Chowhan and learnt that he was selected so they offered him the position of a Sessions Judge and he took it. A few years later, he became a High Court Judge. He requested the Chief Justice of the High Court at the time to allow him to try company law and corporate matters; he had already had several years of experience trying criminal matters. The Chief Justice of the High Court insisted that he continue to preside over the criminal cases alongside the new matters he took on. So in the mornings Justice Chowhan would try criminal cases and in the afternoons he would preside over Banking and Company law matters. All these years, the respect that he has received from his peers has always encouraged him.

In 2005, because of his trial experience and versatility of expertise, the government nominated him for the position of an International Judge at the United Nations. Nominations are sent to the Security Council which then sends them forward to the Assembly. In order to secure the position, one requires more than half the votes. At the General Assembly session, he recalls waiting for the results to be announced and Mr. Kofi Anan read out his name but Justice Chowhan missed hearing it. It was only after he began to receive congratulations from all around him that he realized he had been elected.

You can see how he's made it to the ranks he has. It's the numerous qualities he holds, exuded in conversation. Most of all it's the humility with which he receives everyone. We hardly realize the passing time and have to deliberately call it a day when he reminds us that the magazine might not be able to accommodate other articles if we kept talking the way we were.

Sir Creek and the Indo- Pakistan maritime boundary

By Sarah Kazmi
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From the days of discoveries made by Christopher Columbus, States across the globe have tried to appropriate and control the sea which once was open to all and owned by no one. It was the juridical debate of *open sea v the closedsea* in the 15th and 16th century from which modern international law took its rise. Back then States wanted to have sovereignty of the sea to have dominion over trade but over the next few centuries as the world evolved so did the use of the sea, to naval warfare, fishing, extraction of hydrocarbons, minerals and tourism.

The development of the international law led to the creation of different maritime zones to cater to the different uses of the sea and has allowed the Coastal states to make claims over different maritime zones of the oceans.

Maritime zones

Apart from internal waters, States can now claim territorial sea of up to 12 nautical miles from their baseline where they have complete sovereignty over the water, seabed ,subsoil and air space above. An additional 12 nautical miles gives States rights toprevent and punish infringement ofits customs, fiscal, immigration, or sanitary laws and regulations. This maritime area is called the Contiguous zone. Another maritime zone is the Continental shelf which gives the coastal State exclusive sovereignty over the continental shelf of 200 nautical miles up to 350 nautical miles whereby the State has ownership over the natural resources like oil and gas reserves that lie beneath the Continental Shelf. Lastly you have a fishing zone or what is known as Exclusive Economic Zone with distance of 200 nautical miles in which the States have rights to explore conserve and manage living and non- living resources in the water, seabed and subsoil.

The rights of coastal states in these maritime zones are defined and explained in the United Nations Convention on the Law of the Sea (UNCLOS) 1982 which came into force in 1994. Therefore States that are a party to the Convention have made claims of these maritime areas in accordance to the laws governed by the Convention. This creeping jurisdiction of the States towards the open sea is what allows the State to benefit from the sea.

Delimitation of maritime boundaries

In the 20th century as more and more states started to make new maritime claims, some of these claims overlapped with those of the neighbouring states that are adjacent or opposite to each other. These overlapping maritime claims meant that there was a need for boundary delimitation of these maritime zones which would divide the area in cases where states have overlapping claims. The process of boundary delimitation implies that the maritime zones would be divided in a manner which results in rights of states being restricted.

The drawing of maritime boundaries is a task mainly for bordering states which usually is done through mutual understanding and bilateral agreements. Currently there are about 400 potential maritime boundaries throughout the world of which only about 200 have been negotiated through agreements. There have been many delimitation of maritime boundary disputes between States some of which have been resolved by third party intervention and some that still exist.

Sir Creek Dispute

Like Siachen and Kashmir, the Dispute of Sir Creek between Pakistan and India is quite well known in the country. What is not widely known is the link between the dispute and Pakistan's maritime boundary, Exclusive Economic Zone (EEZ) and Continental Shelf (CS).

A part of Pakistan's coastline is adjacent to that of the India's Gujrat coast and the significance of Sir Creek is that it lies between the boundary of India and Pakistan. Sir Creek is a 96 km strip of area between Pakistan and India in the Rann of Kutch marshlands. Situated south east of Karachi, the Creek divides the Kutch region of the Indian

state of Gujarat with Sindh province of Pakistan. The far ends starts from Border Pillar (BP) 1175 and other end opens up into the Arabian Sea.

A dispute of Sir Creek is on the issue of drawing a dividing line between the two countries. This dispute can be traced back to the pre independence period around 1908. The dispute was resolved in 1914 then revived again in 1960s after armed clashes in 1965. India claims that the boundary lies in the middle of the Creek and Pakistan asserts that the line lies on the Creek's eastern bank and therefore the entire Creek belongs to Pakistan.

The boundary delimitation of the Sir Creek impacts the maritime boundary delimitations of both states, impacting the determination of the Territorial Sea, the Exclusive Economic Zone (EEZ), and the Continental Shelf (CS).

Importance of Sir Creek

Although Sir Creek has limited military value, it is still of great importance due to its fishing resources. Sir Creek is considered to be one of the largest fishing grounds in Asia Furthermore the area around the Gulf of Kutch and Sir Creek and the mouth of Indus Delta is the richest in fish and it is where a large number of fisherfolk of both countries earn their livelihood from. The creek also has immense energy potential which means potential economic benefits for the two countries as the marshlands are estimated to be rich in hydrocarbons.

The demarcation of the creek's boundary becomes significant when the line is extended seawards to divide the Arabian sea boundary between Indian and Pakistan. The line then directly affects the division of sea resources including, hydrocarbons, minerals, fish and other marine life between the two countries.

The United Nations Convention on the Law of the Sea (UNCLOS) was adopted in 1982 and came into force on November 16, 1994. Pakistan ratified the convention on Feb 26, 1997. After the treaty came into force for Pakistan, additional rights were given to Pakistan over sea resources of up to 200 nautical miles in the water column and up to 350 nautical miles in the land beneath the water column. Since the ratification, the issue of Sir Creek has become more contentious.

What makes Sir Creek so important is its direct impact on the delineation of the maritime boundary which in turn dictates the size of the Exclusive Economic Zone (EEZ) and the Continental Shelf (CS) which each country can claim. For this reason it is pertinent that a solution be reached between the two countries. Depending on which country accedes to the other's stand, the stake here is more than 2000 sq km of maritime area. Neither of the countries wants to back down from their official stance but without the maritime boundary demarcation between them neither country can exploit the resources in its Exclusive Economic Zone (EEZ) upto 200 nautical miles or its Continental Shelf (CS)upto 350 nautical miles.

India and Pakistan have had several rounds of talks over the resolution of the Sir Creek dispute but have been unsuccessful as no resolution has been reached till date. If both countries want to make use of the advantages of UNCLOS 1982, to gain economic benefits, especially the energy potential of the area, they need to agree on international maritime boundary for its maritime zones and this can only be achieved by resolving the Sir Creek issue.For decades the Kashmir issue has overshadowed all matters between the two countries and Pakistan and India need to resolve the Sir Creek dispute without linking it to the issue of Kashmir.

Legal Challenges of the Telecommunications Era

By Zainab Najam

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A couple of decades ago, telecommunications was an emerging phenomenon that people were getting accustomed to, but today it has become an essential part of our lives. Also, the proliferation of this technology is not restricted to developed countries; its usage has quickly spread to all parts of the globe. Generally, technological advancements are expected to remain restricted to developed countries; however, telecommunications technology unexpectedly has not had such limitations. Pakistan is a typical example where development indices are not very impressive, yet we have a highly competitive, liberal and diverse telecom market. The telecom applications are quickly transforming from fixed line phones to mobile phone technologies, cable internet to wireless internet systems (wifi) and cable to satellite television systems.

These trends indicate widespread coverage and utilization of telecommunication applications. In Pakistan, a significant percentage of the population, both in urban and rural areas is using some form of telecom applications. In this emerging scenario of information revolution, the important question is to assess the social and legal dimensions arising from this information revolution. I will argue that both development and assimilation of this technology has been so rapid that countries and societies have not been able to assess the negative aspects of this revolution. Hence the development of the legal framework to regulate its use and implementation mechanisms are lagging behind.

In recent years, we all read about a variety of crimes which in one way or another, are related to or facilitated by information technology applications and such incidents have made me deliberate the negativities of telecom technology. Including many other crimes executed with the help of technology, cyber crimes have become an extremely common practice, the foremost reason that comes to my mind is the comfort of indulging in a significant crime without having to physically commit it. In the course of our daily routine while checking emails we come across many that seem to be sent from a reliable source however, in reality they are part of Phishing attacks. Usually people lacking awareness of such internet scams provide important personal information to such dishonest spoofers, thus providing them with an opportunity to withdraw from the victim's funds or perform dishonest transactions for monetary gain. Further also incidents of cyber stalking where technology is used as a medium of harassment have become increasingly common and such crimes have no age limitation. Today children aged 10 and above are also appearing to use such negative tactics to counter peer pressure and school bullying incidents. Other crimes including but not limited to, theft of information contained in electronic form, password cracking and financial crimes by hacking of ATM card pins and bank accounts are also targeted to happen on a daily basis.

Cyber crimes have brought a new challenge to the law enforcement community. Utilization of technology and benefitting from it seems to be easy but combating the crimes associated to such technologies and getting successful convictions still remains an uphill task for the present law regimes around the globe. An individual armed with nothing but access to technology can target any victim in the world, but law enforcement is confined to state borders and the sovereignty of nations has to be respected. Thus in countries where there is no law to counter cyber crimes cause the criminals to go unpunished. Furthermore, collection of evidence and its admission in a court of law for successful prosecution in cyber crimes is a very technical job, which requires huge funds and expertise. It can be therefore imagined what will be the ratio of successful cases for police and law enforcement agencies and particularly in Pakistan. Pakistan not having any existing legal framework to address cyber crimes passed its first Electronic Transaction Ordinance in year 2002 with the objective to

provide for the accreditation of certification of service providers and also to facilitate communications and transactions in electronic form. This ordinance aimed to target crimes relating issuance of false certificates and crimes that are targeted to damage information systems. Further in 2004, Electronic Crime Act came into existence keeping 2002 Ordinance as basis, which targeted a wider scope of cyber crimes including but not limited to, cyber stalking, cyber terrorism, electronic fraud and spoofing. In year 2008 Prevention of Electronic Ordinance came into existence, wherein it stated that it shall apply to all persons irrespective of his nationality or citizenship, its shall also apply to persons committing an offence inside or outside Pakistan, having detrimental effect on, but not limited to, Pakistan's security or its nationals or causing harm to national harmony or causing damage to electronic system located in Pakistan or used by any electronic system in Pakistan. This Ordinance also gave exclusive powers to Federal Investigation Agency of Pakistan to investigate and charge cases against cyber crimes. These developments in law also caused the law enforcement community to bring certain changes in the evidentiary mechanism in the litigation process. The law relating to evidence was amended wherein all information and documents generated, received or recorded by electronic system would be admissible in the court of law.

However, it is extremely essential to focus on enforcement of these enacted cyber laws by the governmental authorities. The enforcement of cyber laws has been a challenge for law enforcement authorities on a global level. However, in Pakistan it is a greater challenge due to lack of awareness not only amongst the citizens of Pakistan but also lack of awareness amongst the local police and other enforcement authorities. On a grass root level there is absolutely no awareness of cyber technology or the technology that is used to commit such crimes. Federal Investigation Agency having the mandate of countering and investigating cyber crimes incorporated National Response Center for Cyber crimes with the vision of combating all types of electronic crimes against information resources of Pakistan. However, the effort and the vision of the government sounds convincing but in reality to combat cyber crimes this seems insufficient. Further awareness and cooperation between the nationals and implementing authorities should be focused upon greatly. Government should organize specialized forums regarding the cyber laws and general crimes related to technology and such other activities that could promote technical literacy and education amongst the law enforcement agencies, government departments, judiciary and other private organizations.

Developing nations like Pakistan must learn from the experiences of developed nations to prepare against the inevitable cyber crimes. However since it is not possible to eliminate cyber crime in its entirety, it is surely possible to check and control it. Any legislation in place cannot be successful without a flawless enforcement mechanism. It is also essential to bear in mind that the legislation in place should not be so stringent that it retards the growth of telecommunications industry and in turn prove to be counterproductive.

Framework of Legal system in UAE

By Sana Nauman
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The United Arab Emirates was formed on 2nd December 1971 by the passing of the Union Declaration by six states namely, Abu Dhabi, Dubai, Sharjah, Ajman, Fujairah an Umm Al Quwain. Ras Al Khaimah joined the Federation in 1972. In 1994, Abu Dhabi was made the permanent capital of the UAE and in May 1996, Dubai agreed to a permanent constitution, one that would unify the armed forces of the UAE.
The UAE Constitution permits each emirate to have its own legislative body and judicial authority. All emirates other than Dubai and Ras Al Khaimah have brought their judicial systems into the UAE Federal Judicial Authority. Dubai and RAs Al Khaimah have retained their own judicial systems which are not part of the UAE Federal Judicial Authority. Local and Federal courts apply UAE federal laws which are enacted by the UAE Federal Legislative Authority as well as laws and regulations enacted by the rulers of the individual emirates.

Although the legal procedures and the laws applicable to courts in the individual emirates are all fairly similar, there are differences, particularly where a special law has been enacted and applied in a particular emirate. In the event of a conflict between the federal and local laws, the federal law will supersede the local law of the emirate.

The UAE is a civil law country and follows a civil system with the primary source of law being a statutory code. The UAE legal system has largely been influenced by the Egyptian legal system which has its source in French and Roman law. The legal system has been influenced by Islamic law codified in the Shari'a and embodied in the UAE Civil and Commercial law. Judges in the UAE Federal and local courts apply the provisions of the specific laws, established usage or customs as well as Islamic Sharia'a.
There is no system of case reporting and a judge is under no obligation to take previous decisions of court into consideration in an action before him. Such decisions are considered persuasive and when repeated by the Supreme Court established principles laid down which serve as guidelines rather than a precedent.

The Courts (federal and local courts) are divided into civil courts, criminal courts and the Sharia'a courts. The civil courts hear civil and commercial matters including private suits and company and insurance matters. The Sharia'a courts are responsible for civil matters for Muslims and no non-Muslim can appear before these courts. The Sharia'a courts deal with cases of family law such as divorce, inheritance and succession, alimony and custody of children. The criminal courts deal with all criminal matters referred by the Police to the Prosecutor's office for investigation and prosecution. Some crimes such as assault and adultery maybe transferred to the Sharia'a courts in some emirates, even in such cases the UAE Federal Criminal Code will be applied and for procedure UAE Law of Criminal Procedure will always apply to a case, whether heard by criminal or Sharia'a court.

There are no oral hearings in the court and all arguments, submissions and comments are made by way of written submissions. However, in some cases on the request of either party or if the court considers it appropriate witnesses may be called or an oral hearing may take place before the court. The courts conduct themselves in the Arabic language and the law requires not only legal advocates who are properly licensed to appear before the courts, but also requires that they are conversant in Arabic. A claimant may represent himself personally in litigating a case before the Court of First Instance and Court of Appeal, as the engagement of an advocate is not required is not required except in the superior courts, Dubai Court of Cassation and the Abu Dhabi Supreme Court as these are courts before which appeal can be bought only on points of law.

The Rights of Illegitimate Children in Islamic Law

By Neshmiya A. Khan
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An illegitimate child, (referred to in Islamic law as *walad zina*) is one who is born out of the illicit intimate relationship between a man and women not lawfully wed. Such an act in Islamic law is referred to as *zina* which is a crime *per se*; a crime which, if one is found guilty, is subject to harsh punishment, as the Quran makes explicitly clear:

> *"The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment." (Qur'an, Surat an-Nur, 24:2)*[1]

However, to hope for the followers of Islam to abstain completely from such illicit acts is to seek Utopia. Taking human nature and free will into account, even Islamic societies are not free from such illicit unions, and at times such illicit unions may result in the conception of a child. In order to protect the child and allow it an able care giver, both Shia and Sunni schools of thought (the Malaki school of thought being an exception) do not consider pregnancy (circumstantial evidence) as evidence for the crime of *zina.* How such a child is perceived and what rights it is guaranteed highlights the sharp divide between the two prominent schools of thought in Islamic law in relation to this subject.

The attitude the Shia School of thought takes in relation to a *walad zina*, to call it "harsh" would be an understatement. This is evidenced by the fact that **Muḥammad ibn 'Alī al-Bāqir** (Fifth Imam[2] to the Twelver Shia and Forth Imam to the Ismaili Shia) quoted as saying that a *walad zina* is the joint product of zina and the devil, adding that there was nothing good in the *walad zina:* neither his skin, nor in his hair, flesh, blood, or any other part of him. To further add insult to injury he stated that even the dog and the pig, normally considered impure animals were carried on board Noah's Ark, but not the *walad zina*. Per Shia tradition (and in some Sunni traditions as well) it is also believed that Prophet Muhammad (P.B.U.H) himself had declared that the *walad zina* would not enter Paradise.[3]

As if the above is not enough to highlight the abhorrence the Shia Imams feel in relation to the very existence of the *walad zina*, the *walad zina* also play a prominent, almost the protagonist, role in certain Islamic eschatological, or dooms day, traditions. One of these is that the turbulent period before the arrival of Imam Mehdi[4] will be marked by the plethora of *walad zina,* Hazrat Ali (A.S) has been quoted as saying that the companions of the DajjalFIVE will consist mostly of the Jews and *walad zina.*

Under the Shia School of thought, as quite aptly illustrated in the above paragraphs, the *walad zina* is not even considered as being part of Islamic Society, but, to put it crudely, as an impure creature deserving hatred and repulsion. Thus one would conclude that the *walad zina's* legal position cannot be any better.

Since the *walad zina* is considered as being beneath every other legitimate Muslim, he does not even have the right to partake in the privileges and responsibilities ordinarily bestowed upon a Muslim child which include the right to be maintained i.e. to be fed, clothed and the obligation of the father to educate his child. From this one may induce that the child then has thus no right seek financial aid or help from either the mother or father. Hence, under Islamic law he or she is left completely cut off. His right of maintenance can thus only be safe guarded through various legal stratagems or state aid.

Under both Islamic schools of thought, a legitimately born Muslim child is entitled to inherit from both his mother as well his father. In relation to the right of the *walad zina* to inherit from his natural parents, different sects have differing opinions.

However, there is a consensus among all Shia sects that the *walad zina* cannot inherit from the father and neither can the father inherit from the child. Whether the child

can inherit from the mother is dealt with differently in various Shia sects. According to the Zaydis and the Fatimid Isma'ili Shias the *walad zina* is entitled to inherit from his natural mother and she from him[6]. The view of the Imami scholars stands in marked contrast to this and they believe that the child cannot inherit even from his natural mother and neither can she from him. Hence the child has no such property he may call his own, only what he has earned and bought is what he may call his own. However, it would be wrong to assume that this position is unanimously adopted by all Imami jurists. On a side note, the restrictions imposed on the rights of the *walad zina* in relation to inheritance do not extend to his offspring or to his/her spouse: they may inherit from his and he/she from them. If the *walad zina* dies leaving behind no next-of-kin then the inheritance belongs to the Imam.[7]

Finally, some Imami jurits and scholars hold the view that the *walad zina* has closer ties to his natural mother than to his natural father. This view is illustrated by the ruling that when a *walad zina* commits murder, the blood money (if the family of the victim prefer this method of retribution to death) is to be paid by the mother or her relatives.[8]

If one is to compare the stance of the Sunni schools of thought with the Shia schools of thought in relation to the rights of the *walad zina,* one will note that the position of both schools stand at opposite ends. The Sunni school of thought bases its conclusions in relation to illegitimate children by referring to the following Quranic verse which holds:

"Each man shall reap the fruits of his own deeds: no soul shall bear another's burden" [Surah Al-Annam 6:164].[9]

What one can clearly draw from this is that no man, women or child is responsible for the intentional and willful wrong doing of another: each man, women and child is responsible for their own sins. Hence under Sunni Islamic law, a *walad zina*, although conceived of a sinful act, is as pure as any legitimately born child. They are hence treated as part of Muslim communities. They enjoy the same rights and are expected to fulfill the same obligations as others and there is no discrimination on the basis of their illegitimacy.[10]

The legal rights of the *walad zina* are thus, one could say, the same as any legitimately born Muslim, although certain exceptions do exist.

In relation to maintenance, the mother is meant to maintain and support the child. In relation to the father, one may refer to the oft quoted Hadith (a saying or an act or tacit approval or criticism ascribed either validly or invalidly to the Prophet Muhammad [P.B.U.H]) narrated by Sayyiduna Abu Huraya (Companion of the Prophet Muhammad [P.B.U.H]) Prophet Muhammad [P.B.U.H] that:

'The child will be attributed to the husband and the adulterer will receive the stone." (Sahih Muslim, No.1458)

This has been described as meaning to state that the right of paternity of the *walad zina* will be bestowed upon whomsoever the mother wishes to marry. Thus the paternity of the *walad zina* will not vest with the adulterer but with his or her mother's chosen husband. If the mother is unmarried, the child will only be attributed to her.

Take note that the Hadith states that the adulterer will "receive the stone", this has been interpreted to also mean "deprivation", meaning that the *walad zina's* natural father will not have the right to paternity. This seems like a fair punishment, in the sense that it denies him custody as well the fact that he will not be able to give the child his name so as to use the child to continue his legacy. However this deprivation of paternity may also act as a double edged sword, meaning that this may give the natural father an excuse not to maintain his child or provide him with any such financial support and in turn nor can the child claim any such financial support. And even if the child wishes to prove that the natural father is indeed his natural father, he may be not be able to so without fulfilling the evidential prerequisites of zina, because he is thus charging his father of zina.

In relation to the right of the *walad zina* to inherit, the Sunni School of thought recognizes the mutual rights of inheritance between the *walad zina* and its mother.[11] Similarly it also recognizes the mutual rights of

inheritance and between the *walad zina* and his or her maternal relatives. However, the Sunni School does not recognize any such right of the *walad zina* to claim or inherit from the property of his natural father nor from the legal husband of his natural mother, and vice versa. It has been said that Islamic law "imposes no burden" upon the natural father of a *walad zina*.

However this "burden" is clearly imposed upon the mother, which begs the question: does this mean to imply that the woman involved in the illicit act is more guilty then the man, the punishment of which is to bear the full responsibility of any child born out of this relationship? Why is the only "punishment" upon the man the deprivation of his right to a lineage? Why is the *walad zina* not able to claim to any sort of financial support from the father? The answers to the above questions are not something which are often considered given the criminal nature of *zina.* No woman, no matter how much she cares for the well-being of the child, would ever confess to the crime of *zina* (confession, which must be made 4 times, by the wrongdoer is also taken as evidence for the crime of *zina*) as in conservative Muslim societies, the reprehension and ***ostracization*** by society is usually a worse punishment then the one set by Islamic law. Hence, staying silent is, unfortunately, considered the better option.

Thus if one is to compare the two schools of thought one can easily conclude that the Sunni school of thought is much more lenient toward the *walad zina*.

This area of law has not seen much reform. This can be evidenced by the fact that several Islamic countries do not have any legislation regarding the rights and duties of the *walad zina*. If such a case were to arise the courts would simply apply classical Islamic law as would suit the beliefs of the petitioners - Saudi Arabia, Pakistan, Tunisia and Jordan are such examples. Iran, on the other hand, follows and codifies the Classical Shia Imami Law via Article 1167 of the Civil Law[12] which states: "A child born out of wedlock cannot be attributed to the adulterer or male violator."

Acceding to Iranian law, the parent's of the *walad zina* is referred to as "natural" parents as opposed to "legal" parents as natural parents do not have a legal right to raise their children. Hence, per Iranian law, they can lose custody of the child to "legal" (or adoptive) guardians. This also means that the child cannot inherit wealth or property from their parents and their parents do not have any financial responsibility towards them. Also this causes their civic rights such as citizenship and child support to be compromised. These children are hence deprived from their full civil, legal, and human rights simply because of the illicit act their parents engaged in.

Certain non-Islamic countries, however, ensure that a *walad zina*, regardless of their religious beliefs, is protected and cared for. In the Republic of India, cases are decided according to the petitioners religious beliefs and even though it is recognized that the father is not bound to maintain the *walad zina* in neither Sunni nor Shia Islam, Section 125(1) (b) and (c) of the Criminal Procedure Code 1973[13] imposes upon the natural father of the *walad zina* a legal duty to maintain him. He is under a legal duty to do so even if the mother refuses to surrender the custody of the child to the father. This point was reaffirmed in the case of *Sukha v Ninni* AIR, 1966 where it was held:

"An agreement to maintain an illegitimate child, for which the Mohammedan Law as such makes no provision, will in my opinion not have the effect of defeating the provisions of any law. As a matter of fact, maintenance of illegitimate children has been statutorily recognized under Section 125 of the Criminal Procedure Code of 1973 in our country and it is in consonance with this wholesome policy that the offsprings born under such circumstances are to be provided for and should not be left to the misfortunes of vagrancy and its attendant social consequences."

The United Republic of Tanzania takes the same stance as India as illustrated by The Affiliation Ordinance 1949 as amended by the Affiliation Ordinance (Amendment) Act of 1964 whose main objective was to provide for the maintenance of illegitimate children.[14]

This is clearly a step in the right direction as it ensures that

the father is also made responsible for the maintenance and financial security of a child he also had a hand in bringing into this world. The responsibility should be shared equally as it should. Although the possibility of seeing any such reform in Islamic law would be highly unlikely considering the fact the law itself from divine or semi-divine sources i.e. The Quran, Hadith, and the saying of the Imams, as any such deviation would be seen as being unlawful in the eyes of God. However Islamic states should do more to erase the social stigma attached to being a *walad zina* and should find some way to ensure that such children are provided with all the financial support they require to live as any legitimate child can.

[1] The Holy Quran

[2] I**māmah** is the Shia doctrine of religious, spiritual and political leadership of the Ummah. The Shia believe that the Imams are the true Caliphs or rightful successors of Prophet Mu"ammad (P.B.U.H),the line starting with Hazrat Ali (A.S), who was Prophet Muhammad (P.B.U.H)'s cousin as well as his son-in-law. They further believed that Imams are possessed of divine knowledge and authority and are part of the Ahl al-Bayt, (the direct descendants of Prophet Muhammad). This Imamas have the role of providing commentary and interpretation of the Quran and their word is usually considered as law.

[3] This tradition is considered too current in both Sunni and Imami (Shia) texts and some Sunni hadith scholars regard this tradition as forged (mawdu'), both because of its alleged faulty isnad and because of its contents. For similar reasons, these scholars also reject as forged the tradition according to which the *walad zina* will be resurrected on the Day of Judgment in the form of monkeys and swine.

[4] In Islamic eschatology, Imam **Mahdi** is the prophesied redeemer of Islam who will rule for seven, nine or nineteen years (according to various interpretations) before the Day of Judgment and, alongside Jesus Christ, will rid the world of wrongdoing, injustice and tyranny

[5] D**ajjal** (Arabic for "the false messiah"), is an evil figure in Islamic eschatology. He is to appear pretending to be the Messiah at a time in the future, before Judgment Day, directly comparable to the figures of the Antichrist in Christian eschatology and Armilus in Jewish eschatology.

[6] This is also the view taken up by Sunni Scholars.

[7] Etan Kohlberg Bulletin of the School of Oriental and African Studies, University of London Vol. 48, No. 2 (1985), pp. 237-266 Published by: Cambridge University Press

[8] Ibid

[9] The Holy Quran

[10] http://www.dailytimes.com.pk/default.asp?page=story_23-6-2002_pg3_3 16th April 2012

[11] http://www.lawisgreek.com/muslim-law-an-illegitimate-childs-right-to-inherit- 16th April 2012

[12] http://www.gozaar.org/english/articles-en/Legal-Rights-of-Children-in-Iran.html 16th April 2012

[13] http://www.legalservicesindia.com/articles/cmrights.htm 16th April 2012

[14] http://www.mcdgc.go.tz/data/Illegit_child.pdf 16th April 2012 Mniwas, Eugennee, Maintenance of 'Illegitimate Children' in Tanzania: A Right or Rhetoric? A review of the Affiliation Ordinance Chapter 278

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