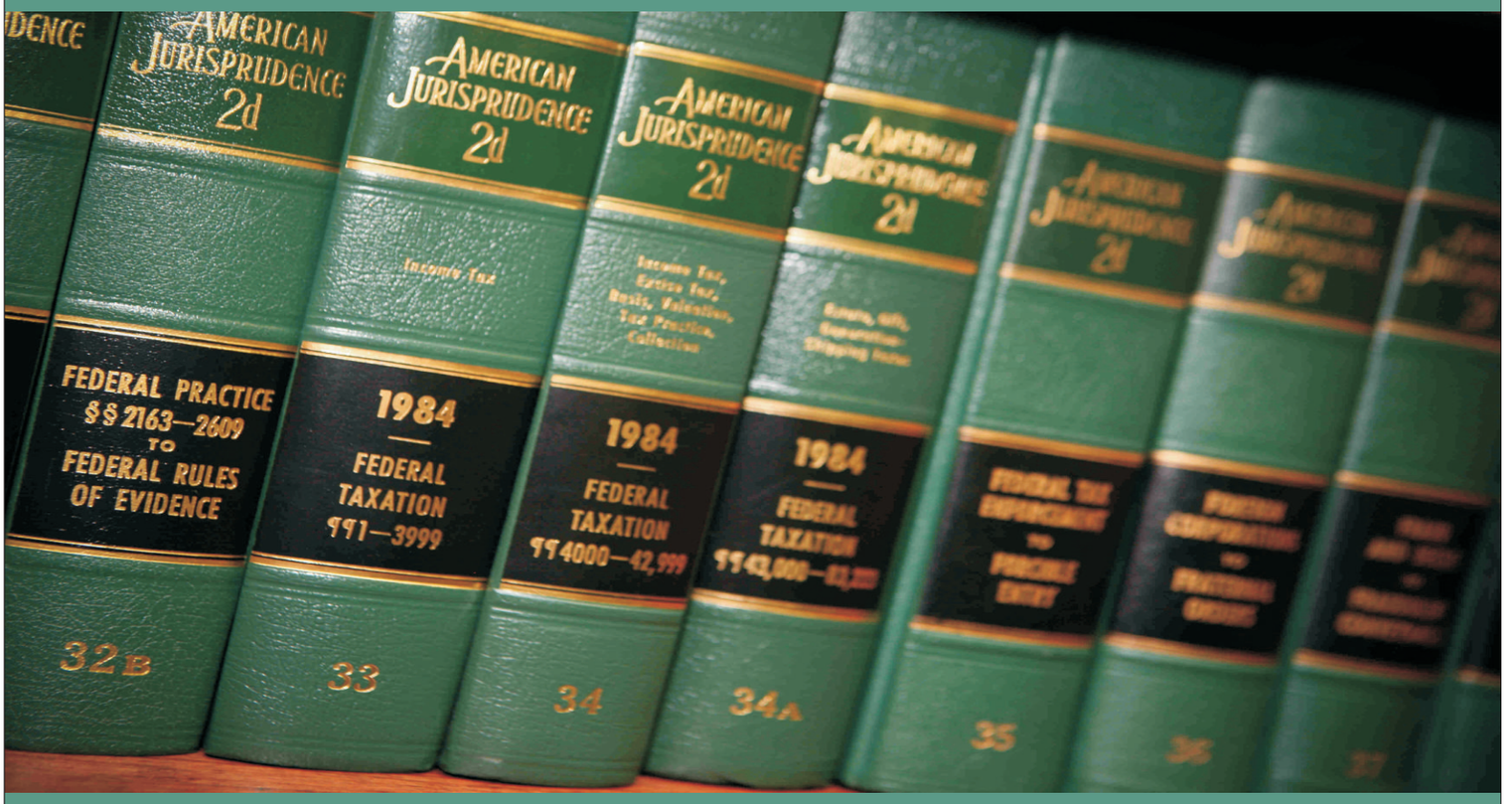

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Editor's Note

The articles and thoughts expressed in this issue of Spectrum may seem dense and hard to follow, and I would admit that for those who have nothing to do with law, the content of this issue might seem to fly over one's head. But it is with small endeavors such as these that the mind starts thinking in new directions.

Will this be the start of a change, or a foretelling of times to come? It would be foolish of me to make that claim. But if an inkling of an idea lingers on as you put down this issue, then the ball starts rolling and that is what we hoped to achieve. The intricacies of international law will never let it be simplified to a basic problem but what can be put in the motion is the intent to do so. This issue is not being put out in the hope of achieving some lofty aim but as a small step in the right direction.

As it is the second issue of the Spectrum of International Law, I will take this opportunity to thank our contributors and the editorial team. The students who wrote for this issue and the ones who edited the articles put in a lot of time and effort and we greatly appreciate their efforts. Also worthy of special mention are the sponsors who gave ads to make this publication possible.

We always welcome feedback along with articles and advertisements, so please do write to us, and write for us, at publications@sil.edu.pk

Syeda Shehrbano Kazim
Editor

Editorial Team:

Acts of State

A re-examination of the international framework regarding the Acts of State as a defense to legal actions

Khyzar Hussain
The writer is currently pursuing an LLM from Michigan State University

It has been said that as an established principle of law and international comity, the act of state doctrine demands that one State, ordinarily, should refrain from questioning the validity of the acts of another State, neither under domestic nor under international law[1]. This doctrine stems from the notion of separation of powers in the structure of government inherent in a modern State. Any judicial scrutiny of the acts of another state in their own sovereign territory may entail repercussions and may endanger diplomatic policy of a nation; a field where political branches of the government hold exclusive competency[2].

The act of state is a principle of guidance applied by municipal courts. According to the principle, a municipal court shall not pass judgment on the validity or legality of acts of foreign governments performed in capacities as sovereigns within their respective realms[3]. The principle stems from valid considerations of policy which includes the need to leave the executive branch to proceed unencumbered in its keeping of international relations.

The doctrine can be traced back to the case of Underhill v. Hernandez[4]. In this instance, plaintiff, Underhill, a U.S. citizen, maintained a water supply line in Bolivar, Venezuela. The Plaintiff in the instant case brought a suit for false imprisonment, assault and battery against the before the circuit court of the United States for the Eastern District of New York. The Defendant was the Commander for revolutionary forces in Venezuela. The sitting justices forwarded the principle which then became the foundation for the doctrine.

"Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves[5]".

The court went on to explain the doctrine as being derived from sovereign immunity and international comity[6] saying further that acts of legitimized warfare as an act of an independent nation cannot be thought to be a cause of action for a plaintiff[7]. In cases following Hernandez, courts have consistently declined to hear cases which called for the questioning of the acts of a foreign government[8].

Perhaps better put, with recent case law supporting the proposition, is that the doctrine does not stem historically from a general principle of International Law[9], rather it synthesizes from constitutionally prescribed separation of powers so as to harmonize the allocation of powers between the branches of government[10].

Most scholarly writing, at one time, seemed to suggest that the act of state doctrine, as a defense to a cause of action, is inapplicable in the situation where the executive branch has waived its objection to the proceedings[11]. This is known simply as the "Bernstein Exception." This name comes from the opinion set forth in Bernstein v. N.V Nederlandsche-Amerikaansche[12]. In Bernstein, the owner of stock in a German company sought to recover proceeds from a Dutch Corporation that had converted this stock in a plan with Nazi officials[13] In an initial appeal, the courts refrained from passing judgment on the fact that the case would inevitably call forth a judgment to be passed on the act of Nazi officials[14].

However, shortly afterwards, a press release was issued by the Department of State[15] declaring that it was the policy of the executive branch to "relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials[16]. Based upon this expression, the second circuit changed its prior decision, allowing the court below to pass judgment upon the acts of that particular régime during that particular time, as it related to the cause of action[17].

Later, in First National City Bank v. Banco Nacional de Cuba[18] the Supreme Court held that the act of state doctrine did not apply in an instance where the Cuban government expropriated property from US citizens without compensation[19]. Here, the Bernstein exception was put into play as the legal advisor of the Department of State advised the court not to apply the act of state doctrine in "this or like cases"[20]. Here, Justice Rehnquist, writing for the plurality, concluded that a "waiver" on behalf of the government

would free the court to pass upon the legitimacy[21] of the acts of the Cuban Government[22].

Relating to the exception forwarded by the Bernstein[23] one cannot but ponder as to the jurisprudential effects such a rule may carry with it. As to the fact of making an act illegal merely because it gathers popular political support has no real precedent to support it. Mere creating of an offence in regards to the acquiescence of the executive branch carries severe doubt in the mind of the author relating to the constitutionality of the doing so. The Bernstein Exception as explained by Justice Rehnquist in First National V Banco Nacional de Cuba[24] has never expressly been endorsed by a majority decision of the Supreme Court. And speaking directly at point the Court concluded[25]: "It is highly questionable whether the examination of validity by the judiciary should depend on an educated guess by the executive as to the probable result and, at any rate should a prediction be wrong, the Executive might be embarrassed in its dealings with other countries"

Past cases have seemingly been inclined to regard the act of state doctrine as a judicial device and have seemed to disregard the vitality of the "Bernstein exception."[26] Moreover, such questions of fact might be necessarily and properly political in nature and should be characterized as such.[27] Although the executive branch holds a monopoly on deciding policy regarding foreign relations, such supremacy should not call forth for judicial deference on matters better brought forth on diplomatic fronts. Executive consent has never made a political issue at hand justiciable[28]. The "Bernstein Exception," as enunciated by Justice Rehnquist, would probably not be applied in subsequent cases as it seems to lie at odds with the previous precedent of the courts. More importantly, the opinion set forth in Bernstein and had attached to it the opposition of six justices who called for the rejection of the Exception.[29] In Bernstein, Justice Powel, in a separate concurring opinion determined that a court would only refuse the adoption of the exception if it in some way detrimentally impacted the relationship of the US with that particular nation state, then and only then would the courts gather an obligation to render a judgment based on the standards accorded under international law[30]. In his opinion, Justice Douglas also rejected the application of the Bernstein exception but placed more emphasis on the fact that the Cuban government had voluntarily entered an American Court as a plaintiff and fair dealing allowed the court to hear the claim at hand[31]. However, voluntarily entering a court for the purpose of a claim has traditionally been a sound basis for exerting jurisdiction and not for the purposes of waiving the act of state doctrine as a defense to a counterclaim[32].

On point of the "Bernstein exception", clear distinctions can be drawn as to the facts of Bernstein and that of First National. In Bernstein, the expropriating government no longer was in existence, yet in First National it was. Secondly, and more importantly, the policy adopted towards the Nazi regime was not only a stated policy of the US but rather has strong grounding in the consensus of the International community as a whole, and hearing it would not in-turn lead to politicizing the judiciary[33]. Claiming that effective executive waiver in the matter would be decisive seems to go against the case of Sabbatino where the Government took a neutral position in the matter. Justice Rehnquist seemed to try and distinguish the matter by postulating that:"[A]ny exception to the act of state doctrine based on mere silence or neutrality on the part of the Executive might well lead to a conflict between the Executive and Judicial Branches. Here, however, the Executive Branch has expressly stated that an inflexible application of the act of state doctrine by this Court would not serve the interests of American foreign policy"[3] The uncertainty and circular argument regarding the Bernstein Exception seems to act as confined only to the particularized facts of First National[35].

The case of Kirkpatrick[36] involved US bribery of Nigerian officials in the context of a private lawsuit for damages under US antitrust laws on behalf of the disappointed bidder[37]. In this case, as with many before it, the Nigerian Official was not a named party, and hence the Foreign Sovereign Immunities Act did not apply[38]. The court rejecting the Application for the act of state doctrine here saying that: "In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory… Act of state issues only arise when a court must decide- that is, when the outcome of the case turns upon- the effect of official action by a foreign sovereign. Then that question is not in the case, neither is the act of state doctrine[39]."

Here, we see that the court says that for the act of state doctrine to apply, the act must be "official" and performed "within the territory of the foreign sovereign." The court then goes further by saying that such a doctrine would only be an issue where the case demands that the court pass judgment upon the validity of the foreign act[40]. In this case,

the court did not require the invalidation of the Nigerian contracts tainted by bribery. The act of state doctrine applies only to "official" acts occurring within the territorial limits of that state. In summation, the defense may be successful in situations where the legality of the "official act" is not being questioned. The doctrine though has been chipped away through successive cases, still holds true. A successful plea of an act of state would shield the defendant from criminal liability in certain disputes.

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1. Jack E. Sands, International Law - Act of State Doctrine - First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), 49 Wash. L. Rev. 213 1973-1974
2. Id
3. Ian Brownlie ,Principles of International Law, Page 504, (7th Ed. 2008)
4. Underhill v. Hernandez, 168 U.S. 250 (1897)
5. Opinion delivered by Mr. Chief Justice Fuller Id. at 252
6. See id.
7. See id.
8. Veronica Ann Deberardine, Foreign Corrupt Practices: Creating an exception to the Act of State Doctrine, 34 Am. U. L. Rev. 204. See also, Baker v. Carr, 369 U.S. 186, 211-213 (1962) (although all foreign policy issues are not political questions, courts should be careful not to intervene excessively in this area)
9. Sources of International law As stated in the charter of the International Court of Justice, Article 38
10. Sabbatino 376 US 398
11. See Restatement (Second) of Foreign Relations Law of The United States at §41 comment h.
12. 173 F.2d 71
13. Bernstein 173 f 2d 71, 71-73
14. Bernstein 173 f 2d 71, at 76
15. Clayco, Conrnell Int'l lj 408, 410
16. Bernstein, 210 F 2d at 376 (as the court quoted the press release from the Department of State)
17. Bernstein, 210 F 2d at 376
18. 406 US 759 (1972)
19. 406 US 759 (1972), 772
20. 406 US 759 (1972), at 764
21. Clayco 17 cornell intl lj 408, 411
22. Clayco 17 cornell intl lj 408, 411 note 31. .First National406 US 759 (1972), at 773 Justice Brennan's dissent included the fact that in this particular area, the test factors laid out in Sabbatino ware controlling.
23. Bernstein, 210 F 2d
24. First national 406 US 759 (1972)
25. First national 406 US 759 (1972) at 436
26. International law- Act of State doctrine – First national bank… 49 Wash L Rev 213 at 219 1973-1974
27. International law- Act of State doctrine – First national bank… 49 Wash L Rev 213 at 219 1973-1974
28. International law- Act of State doctrine – First national bank… 49 Wash L Rev 213 at 219 1973-1974 note 35 Cf. Muskrat v. United States
29. International law- Act of State doctrine – First national bank… 49 Wash L Rev 213 at 219 1973-1974
30. First national 406 US 759 (1972)
31. First National 406 US at 772
32. International Law- Act of State doctrine 49 wash L Rev 213 Note 40 Citing First national 406 US at 773-774 (J Powels dissent)
33. International Law- Act of State Doctrine 49 Wash law L rev. at 218.
34. International Law- Act of State Doctrine Wash L Rev. 218 Note 28. Quoting Justice Rehinquist First National City Bank 406 US at 767.
35. 406 US 759 (1972)
36. W.S. Kirkpaatrick & co. v. Environmental Tectonics Corp., 493 US 400
37. DISCOVERING SECRETS: ACT OF STATE DEFENSES TO BRIBERY CASES, 38 Hofstra L. Rev. 163 2009 at Page 183
38. Discovering Secrets38 Hofstra L. Rev. 163 2009 at 184
39. Discovering Secrets, 38 Hofstra L. Rev. 163 2009-2010 quoting Justice Scalia, Kirkpatrick, 493 US at 405-406
40. Kirkpartick 493 US at 406

Critical Thinking: An Educationist's Viewpoint

Nida Tareen

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She is the Principal of School of International Law and teaches both the undergraduate and postgraduate law courses

As Principal of a law school, I have the responsibility of coaching/mentoring not just students but future lawyers or legal consultants or perhaps even legal academics! Suffice to say this is a task that cannot be dealt with lightly. A part of our legal curriculum at SIL are law moots for our LLB students and a critical thinking class for our LLM students. The structure typically revolves around a topic of legal or socio-political significance being given to students whereby they are placed in opposing teams and are expected to defend their stance. Initially there were a few cries of protest from the students who felt that they wouldn't need such activities for the end goal - the exam!

However, such exercises remain pivotal in the understanding of law as a subject in all its diversity and most importantly to score that much coveted distinction or merit. Critical thinking requires a student to analyze a given topic from various angles and put him/herself in the shoes of his own critic. If I believe in the right to choose, what justification would I provide to someone who wants to end his own life via euthanasia? Why let the right to choose be excluded when the question is ones right to choose to live? Who defines the limitations? And based on what criteria? These are some of the challenging and morally perplexing questions one has to face as a lawyer and what better time than to start as a student of law? Or if I believe that every state is sovereign within its jurisdiction, does that mean that the state is free to commit horrendous crimes against humanity with its own citizens? If there is a clash between two competing principles of international law, state sovereignty versus protection of human rights, which would prevail? Moreover how do you learn to defend a viewpoint which you might not agree with?

These are just some of the issues a typical critical thinking mooting class deals with. Topics have ranged from 'International Law has done us more harm than good' to 'Capitalism is on its way out' to whether 'Palestinians ought to be granted statehood' and 'the credibility of the United Nations as an international peacekeeping organization.'The idea is to place the students out of their comfort zone and force them to research, analyze and articulate their given stance. At the same time they have to learn to pre-empt the opposition's critical rebuttal points and have an answer ready for possibly anything!

Engaging a student in a classroom remains the most difficult task for any lecturer. There would hardly be a classroom where at some point the students do not wish to attend or skip a certain chapter. That inevitably happens when we tend to approach a subject as just that … a subject encased in the textual guise of mere case law and citations. It isn't surprising then why many students leave their studying for the last month where they cram and rote memorize as much as they can to get through the exams. Teaching methodology needs to incorporate this mooting/critical thinking style approach for students to actually take interest in a subject. For instance, in the Law of Contract, it isn't enough to simply study the rules of consideration. One method that could be utilized is to present an actual case to the students and ask them to analyse it to deduce whether a valid consideration has been provided. One of my favourite exercises involves taking a case (actual or fictitious) and dividing a class into two sides. Each will then have to prove their client is in the right and in the process they will literally have to think "outside the box" by coming up with all possible legal arguments to justify their claims. In addition, when they have to face rebuttal attacks from the other side, they have to abandon their "prepared" arguments and "think on their feet" so to speak.

This method of spontaneous thinking helps in "crunch time" when one is faced with tricky questions in an exam. When a student has been subjected to grueling research on different topics for a critical thinking class and has had to defend a sticky stance against all odds and find some legal rationale to justify it and lastly to address attacks coming in from the opposition, he or she ends up prepared to argue and reason through legal arguments. It is hoped and expected that by inculcating these exercises in any law school's curriculum we will be on our way to creating intelligent lawyers rather than simply book smart students who understand very little beyond the scope of the textual framework of their subjects. SIL is greatly inspired by a quotation found in nearly all our classrooms soft boards.

Tell me and I forget
Teach me and I remember
Involve me and i understand.

Domestic Violence - the Invisible Victims

Sonia Ahmad
The author is currently doing her LLM after having completed
her LPC from BPP Law School and LLB from University of Leicester in England

When one thinks of domestic violence, the first thing that springs to mind is a vulnerable woman, battered and bruised. However, recent evidence and reports have confirmed that is not always the case. Data from Home Office statistical bulletins and the British Crime Survey show that men made up about 40% of domestic violence victims each year between 2004-05 and 2008-09, the last year for which such figures are available[1]. These statistics are only those that are reported. Most crimes are unreported due to the fact that victims find it difficult to disclose personal details. Especially in the case of male victims as it goes against the alpha male image that they must live up to. Therefore, although these statistics are alarming, they are still underestimated.

In conducting research for this article, I looked at some websites for refuge for domestic violence victims in the UK. Most of the websites advertised women as victims and specified that the refuge was for women. Parity, an equal rights group in the UK, asserts that men are unfairly treated in the provision of refuge places, stating that in England and Wales there is provision of 7,500 refuge places for women but only 60 for men[2]. In an article in the Guardian, John Mays of Parity states 'Male victims are almost invisible to the authorities'.

Male victims may be invisible to the authorities but when it comes to thinking of a perpetrator, men are an immediate suspect. For example crimes such as sexual abuse, harassment, GBH and even disorders such as paedophilia have been reserved for men as the perpetrator. There seems to be a major shift whereby the sexist justice system and society we live in now refuses to recognise men as victims. What has caused this failure?

Is it a feminist conspiracy to publicise these crimes as weapons used by men against women. Or is it just that woman took over majority of statistics over the past years and therefore authorities are ill equipped to deal with male victims? If it is the latter, then the sooner we acknowledge and recognise it as a very serious and current problem amongst men, the sooner it can be dealt with efficiently and encourage male victims to come forward with their cases and give them the support they need. The long formed view of women being the only victim needs to be changed. It is thought that since men are physically stronger than women they are in a better position to protect themselves in a situation of domestic violence. But domestic violence comes in many forms and all may cause dangerous long term damage. These include threatening behaviour, emotional, financial, sexual and psychological abuse[3]. The dangers also continue onto the next generation. Alarming statistics: sons of violent parents have a rate of wife-beating 1000% greater than those of non-violent parents. The daughters of violent parents have a husband-beating rate 600% greater. Only about 10% of violent couples have a family history that was non-violent[4].

A trend amongst the Pakistani immigrants to the UK is to get their daughters married to men from Pakistan, usually from the same family or village. This ensures their children marry in the same caste or warrants obedient sons-in-law. The newlywed husband arrives, having left his home, his family behind, isolated, for a happy marriage. In return he is treated as a servant and often beaten. They are especially vulnerable as they are in a new place and know no one other than their abusers i.e. those people who brought them to England for a 'better' life. The extent of abuse is often severe, yet they are afraid to come forward. If they do the authorities think it is a joke and they may be subject to ridicule. Although domestic abuse is common in Pakistani households towards women due to the cultural impression that it is ok to beat your wife if she is out of line, it is not as well known that men too are being subject to violence.

Although the point of this article is to point out the increasing number of male victims who are not recognised, it is not attempting to focus on gender and for whom it is worse. The more we focus on gender the further we part from the actual crime. Domestic violence is a very current and widespread issue and is wrong despite your gender, despite your cultural views and despite your race.

1. http://www.guardian.co.uk/society/2010/sep/05/men-victims-domestic-violence
2. Campbell, Denis (5 September 2010). "More than 40% of domestic violence victims are male, report reveals". The Observer. Retrieved 13 September 2010.
3. Home Office (2005a para 10)
4. The Hidden Side of Domestic Violence by Phillip W. Cook 1998

The Enforcement of Foreign Judgments in Pakistan

Qasim Murad
The author is an Associate at Ashtar Ali & Co. The views expressed in this article are the views of the author and are not to be considered the views of the firm

The enforcement of judgments can be problematic in Pakistan. Parties involved in litigation for years, or even decades, may face an uphill task enforcing, or implementing, judgments passed in their favour. The rules for the execution of judgments, i.e. for the enforcement of a court's decision, are just as detailed and as complex as for the conducting of a trial.[1]

This may be doubly true for the enforcement of judgments passed by foreign courts, which need to satisfy the added requirements of enforceability contained in our rules of civil procedure. Everything may go to plan for a foreign litigant with a decision in his favour if the trial has been conducted fully and properly in a foreign court. However, our rules may not allow for the enforcement of judgments passed following expedited or special procedures, where the party against whom a judgment is made has not been given a full trial or right of hearing. These judgments are known as "default judgments" (the full definition is given below) and their enforcement in Pakistan may raise unexpected hurdles. This article seeks to examine whether or not default judgments passed in the United Kingdom, can be enforced in Pakistan.

THE LAW

In order to examine whether a default judgment can be enforced in Pakistan, it will be helpful to briefly reproduce the relevant provisions of the Code of Civil Procedure 1908 (the "C.P.C.") relating to the enforcement of foreign judgments.

A foreign judgment has been defined in the C.P.C., as well as in case law, as any decree or executable order passed by a foreign court[2]. A judgment passed by a foreign court in a reciprocating territory, such as the United Kingdom, will be enforced in Pakistan as if it had been passed by a District Court[3] under section 44-A of the Code of Civil Procedure.

"44-A. Execution of decrees passed by Courts in the United Kingdom and other reciprocating territory.

(1) Where a certified copy of a decree of any of the superior Courts of the United Kingdom or any reciprocating territory has been filed in a District Court, the decree may be executed in Pakistan as if it had been passed by the District Court."

For our purposes, there is an important caveat provided in sub-section 3 (given below) of section 44-A.

"(3) The provisions of Section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clause (a) to (f) of Section 13." (emphasis added)

(Section 47 relates to the powers of the Court enforcing a judgment to deal with any questions arising out of the execution)

Under sub-section 3, execution of a judgment passed in a foreign court will be refused if it falls under the exceptions enumerated in section 13.[4]

Of importance to us, in considering default judgments and their enforceability, is clause (b) of section 13;

"13. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

(b) where it has not been given on the merits of the case." (emphasis added)

The court enforcing a judgment is possessed with the jurisdiction to examine whether the foreign judgment has been given on the merits of a case?[5] What then constitutes a judgment "on the merits" in our courts? The basic test employed to determine this question is whether the judgment was passed as a penalty for the conduct of one of the parties (such as failure to appear and plead, or to comply with a court order) and a finding in the affirmative will render the judgment unenforceable in Pakistan.[6]

Are default judgments passed as a penalty for the conduct

of one or more of the parties to a trial? In order to answer this question, it is necessary to look at the way default judgments are passed in the United Kingdom, and how they have been defined in English cases.

DEFAULT JUDGMENTS

Default judgments, or judgments in default, are defined in Black's Law Dictionary as below:

1. A judgment entered against a defendant who has failed to plead or otherwise defend against the plaintiff's claim, often by failing to appear at trial.

2. A judgment entered as a penalty against a party who does not comply with an order, especially an order to comply with a discovery request.[7]

In England and Wales, the express provisions relating to entering a default judgment include two types of default judgments[8]. Default judgments, or judgments that are entered when a party fails to perform an act that is expected of them, are also known as judgments in default.

Part 12 of the Civil Procedure Rules, colloquially known as the White Book, is reproduced below.

"12.1 In these Rules, 'default judgment' means judgment without trial where a defendant –

(a) has failed to file an acknowledgment of service; or

(b) has failed to file a defence"

This part includes general provisions for the entering of a default judgment against a defendant for failure to appear when summoned.

A default judgment can also be passed against a party if they fail to comply with a previous court order and such default in compliance will be considered a failure to file a defence under Part 12 of the Civil Procedure Rules. Essentially, a failure to comply with court orders may result in the defendant being debarred from a right to defend the suit. For example, a party may fail to comply with the provisions of an injunctive order restraining them from performing a certain act, such as selling property which is the subject of litigation. The court has the power to make an order against the offending or defaulting party conditionally upon such failure to comply with the terms or conditions specified in the injunctive order, which is generally known a "unless" order.[9] The relevant rules are contained in Rule 3.4 of the Civil Procedure Rules.

"3.4
(1)In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.

(2)The court may strike out a statement of case if it appears to the court –

(c)that there has been a failure to comply with a rule, practice direction or court order."

The "strike-out" mentioned above refers to the power of the court to debar a defendant from defending his claim in court, thereby meaning that a defendant does not have the right to appear at his trial.

MERITS

According to the description and definition given above, it would seem that a default judgment is passed in the United Kingdom as a penalty for a particular course of action, be it default of compliance with a court order, or a requirement to appear and plead the case. A court in Pakistan enforcing a judgment passed in the United Kingdom may very well consider that a debarring of a right to defend is a penalty. Any judgment passed subsequently will not therefore be on the merits of a case. It is very likely that a court in Pakistan will refuse to enforce such a judgment.

In addition, default judgments have traditionally been defined as not being judgments on the merits of a case under the (parent) English case law.[10] They arise out of the need in English Jurisprudence for an effective and appropriate sanction to compel due compliance by the parties to the proceedings with the rules of court or the orders of the court. Such non-compliance is treated as a "default," and the sanction for such default is that the defendant may have his defence struck out and a default judgment entered against him. In either case, the action is disposed of without a full trial.[11]

Default judgments have not gone without opposition, even in the United Kingdom. They have been objected to for being contrary to the fundamental rights to a fair hearing and full trial. It has been held that if a failure to comply with a court order has not rendered a fair trial impossible, an order striking out a case even for contumacious breach is likely to be a breach of Article 6 of the European Convention on Human Rights as being a breach of the Respondent's

right to a determination of his civil rights and obligations at a fair and public hearing within a reasonable time by an independent tribunal.[12]

The courts in England and Wales have thus been wary of making judgments in default of compliance with a court order. It is often left as a sanction of last resort, and courts will not close a defendant's right of defence unless there are no other sanctions available to prevent prejudice to the claimants.[13] In Biguzzi v Rank Leisure Plc,[14] the Court of Appeal drew attention to several alternatives to a strike out under Rule 3.4 which may be appropriate to deal with non-compliance within time-limits laid down by rules or orders.

However, it may be possible for a judgment in default of compliance with a court order to be considered a judgment on the merits. A default judgment has many of the characteristics of a judgment after trial.[15] Further, the argument can be made that ex-parte decrees (the same as default judgments) are entered and enforced in Pakistan regularly. Provisions exist for the setting aside of such decrees if the defendant can prove that there was sufficient cause for his lack of appearance.[16]

Enforcing judgments made in Pakistan while applying separate standards to judgments passed following the same procedure in reciprocating territories may give the impression of double standards in the justice system. At the very least, it could be said to be discriminatory.

Lastly, a judgment entered in default is, as discussed above, used in the rare circumstances in which no other sanction is possible to ensure compliance with a court order. It is only passed when the case of one of the parties to a claim in the United Kingdom may be prejudiced after considering all the relevant circumstances and weighing up carefully the order that it would be just to make on the facts before it. Proceedings will only be struck out once the court considers that the inability of the court to deal with the case fairly.[17]

CONCLUSION

Although a plethora of decided cases would suggest that a default judgment is not a judgment on the merits of a case, and thus cannot be enforced in Pakistan under the rules of procedure, the argument can be made that such a judgment shares many of the characteristics of a judgment after trial, and is passed after strictly complying with statutory and judicial rules for doing so.

Further, as different types of default judgments exist in Pakistan and are enforced regularly, it may be discriminatory for the courts of Pakistan to refuse to execute them.

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1. See Part II and Order XXI of the Code of Civil Procedure 1908 (Act V of 1908).
2. A.I.R. 1929 Lahore 492 and section 2 subsection 6 of the Code of Civil Procedure, 1908
3. Code of Civil Procedure 1908 (Act V of 1908) section 44-A, subsection 1
4. *Grosvenor Casino Limited v. Abdul Malik Badruddin (*1997 SCMR 323)
5. Under section 47 of the Code of Civil Procedure 1908 (Act V of 1908)
6. PLD 1987 Karachi 593
7. Black's Law Dictionary, Seventh Deluxe Edition
8. Civil Procedure Rules, Part 12.1
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13. *Whittaker v. Soper* (2001) EWCA Civ. 1462 CA
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15. *Halsbury's Laws of England*, 4th Edition, Vol. 37 at para. 393
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Enforcement of Human Rights

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'Before one assesses the effectiveness of the UN system for the enforcement of human rights, one has to be clear about the meaning of 'enforcement'. This statement talks about whether the UN has been successful in its system of enforcing human rights in the different states.

The quotation above is absolutely right in the sense that first we should know the meaning of enforcement before we go on to figure out whether the UN system for the enforcement of human rights has been effective or not. In my opinion, enforcement means implementation of some aspect into another thing. But formally, it is a scenario which enforces, constraints, gives force, authority or effect to insuring observance and obedience to that aspect.

The UN has not been effective in its enforcement of human rights because there are problems related to how mechanisms operate, how people can get remedies, how states can respond to any act of breach done by them. If we compare the difference between domestic law and international law, it will be known that there is no automatic remedy in the international arena where people or states can be justified. The International Court of Justice (ICJ) which as the name suggest is an international court yet has “exclusive jurisdiction” meaning that the jurisdiction is granted to a particular court to the exclusion of others.

In other words, the enforcement of international human rights law is the responsibility of the Nation State, and it's the primary responsibility of the State to make human rights a reality. There is currently no international court that upholds human rights law (the International Criminal Court deals with crimes against humanity, war crimes and genocide). Although the Council of Europe is responsible for both the European Convention on Human Rights, and the European Court of Human Rights that acts as a court of last appeal for human rights issues in member states. In practice, many human rights are very difficult to legally enforce due to the absence of consensus on the application of certain rights, the lack of relevant national legislation or of bodies empowered to take legal action to enforce them.

Another major problem is the complaint system for these Human Rights issues. There is not one but certain different aspects which can be applied which is sometimes good considering the situation at hand but they are usually considered as a negative line to confuse people. The first to be discussed is the 1503 procedure which is a universal mechanism bearing the number of the resolution by the former UN Commission on Human Rights which established it. The procedure is confidential and examines the human rights situation within a state. The individuals or non-governmental organizations (NGO's) who file a complaint will not be informed about the steps taken. Generally, they receive as the only answer a letter confirming the reception of the complaint. It doesn't accept anonymous complaints which mean the complainant has to specify him/herself or a state must name itself. There are so many conditions which the complainant (besides specifying his/her name) has to fulfill like exposing the complaint for the existence of a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms, a description of facts, apparent evidence, indication of rights which have been violated, purpose of the complaint and finally exhaustion of all available remedies within it's country. And it must be known that every condition must be fulfilled in order for the process to go ahead so that the concerned person can get justice in a good way.

Another procedure was adopted in 1967 by the Economic and Social Council called the resolution 1235. This is of great importance for the development of review procedure based on notices as it grants to Human Rights Commission explicit powers to perform review. This empowers the commission to examine notices of repeated types of human rights violations, such as the apartheid policy pursued by South African Republic and in the territory of West Africa. This provides in-depth research into situations consisting in repeated types of human rights violations and report on that subject to the Economic and Social Council. We must keep in mind that unlike the 1503 procedure, the 1235 one is not confidential where the commission holds an annual public debate on gross human rights violations committed by a given state.

Special procedures also prevail which are there to investigate, monitor and recommend solutions to human rights problems consisting of fact-finding missions, thematic mechanisms and advisory services. There are treaties and their respective supervisory bodies which

overlook the aspects of specific areas and enhance the mechanisms for it. Modern interpretation of the original Declaration of Human Rights was made in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993. The degree of unanimity over these conventions, in terms of how many and which countries have ratified them varies, as does the degree to which they are respected by various states. The UN has setup a number of treaty-based bodies to monitor and study human rights, under the leadership of the UN High Commissioner for Human Rights (UNHCHR). The bodies are committees of independent experts that monitor implementation of the core international human rights treaties. They are created by the treaty that they monitor.

- The Human Rights Committee promotes participation with the standards of the International Convention of Civil and Political Rights (ICCPR). The eighteen members of the committee express opinions on member countries and make judgments on individual complaints against countries which have ratified the treaty. The judgments are not legally binding.

- The Committee on Economic, Social and Cultural Rights monitors the International Convention of Economic, Social and Cultural Rights (ICESCR) and makes general comments on ratifying countries performance. It does not have the power to receive complaints.

- The Committee on the Elimination of Racial Discrimination monitors the Convention against Elimination of Racial Discrimination (CERD) and conducts regular reviews of countries' performance. It can make judgments on complaints, but these are not legally binding. It issues warnings to attempt to prevent serious contraventions of the convention.

- The Committee on the Elimination of Discrimination against Women monitors the Convention against Elimination of Discrimination against Women (CEDAW). It receives states' reports on their performance and comments on them, and can make judgments on complaints against countries which have opted into the 1999 Optional Protocol.

- The Committee against Torture monitors the Convention against Torture (CAT) and receives states' reports on their performance every four years and comments on them. It may visit and inspect individual countries with their consent.

- The Committee on the Rights of the Child monitors the Convention on the Rights of the Child (CRC) and makes comments on reports submitted by states every five years. It does not have the power to receive complaints.

- The Committee on Migrant Workers was established in 2004 and monitors the International Convention for the protection of the Rights of all Migrant Workers (ICRMW) and makes comments on reports submitted by states every five years. It will have the power to receive complaints of specific violations only once ten member states allow it.

- The Committee on the Rights of Persons with Disabilities was established in 2008 to monitor the Convention on the Rights of Persons with Disabilities.

Each treaty body receives secretariat support from the Treaties and Commission Branch of Office of the High Commissioner on Human Rights (OHCHR) in Geneva except CEDAW, which is supported by the Division for the Advancement of Women (DAW). CEDAW meets at United Nations headquarters in New York; the other treaty bodies generally meet at the United Nations Office in Geneva. The Human Rights Committee usually holds its March session in New York City.

Even though it looks like it is very clear to understand but there are problems in it like treaties overlap with each other in relation to provisions and reservations. The first issue to be considered is the coexistence of related provisions in different instruments. There are numerous instances of the overlapping of related or similar provisions in various instruments, one of the consequences is the obligation for states parties to submit reports to and engage in discussion with different bodies with respect to similar rights, freedoms or principles. That there existed related provisions in various instruments also give rise to certain implicit and explicit discrepancies. Examples include rights of individuals and the problem of the provision being a legally or a non-legally binding instrument. Since there is no single body entrusted with the task of monitoring the implementation of all the instruments, it follows there maybe differences in the interpretation given by different bodies to similar provisions, either in their general comments, their recommendations or in the concluding observations adopted following the consideration of reports. However, there remain a number of situations where the opinions expressed and the interpretation given to rights or practices differed slightly from one body to another, perhaps because the attention of committee

members was diverted to different issues, this has happened in countries like China, Guatemala, United Kingdom etc.

A further issue relates to the effect of reservations made by state parties. Reservations maybe made by a state party to a particular provision of a specific convention even in circumstances where no similar reservations exist to a related provision in the covenants or in another instrument. This problem calls for an appropriate exchange of information about reservations entered by each reporting state to related provisions in other human rights instruments. Coordination still needs to be better. Similarly, problems arise where a reservation to a provision in an Optional Protocol purports to effect a reservation to a specific provision in another instrument. This issue arose in relation to Germany's reservation to article 5, Para 2 of the Optional Protocol (ICCPR) under which the competence of the committee wouldn't extend to communications 'by means of which a violation of article 26 of the covenant is reprimanded, if and in so far as the reprimanded violation refers to the rights other than those guaranteed under the covenant'.

The system is somewhat fair because it does provide people ability to get justice for a human right problem but the way it is gotten should be improved and be more flexible must be consistent in the way that it should be the same for all aspects.

Yes. There is Something Called Immigration Law.

Zulfiqar Ali Syed

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People do migrate, on various stages of their life for various reasons, if they don't migrate; they definitely love to visit different places, as meaningful business cannot be done without wider interaction. The most powerful passport is the one which allows your free movement in the world. Due to the development of European Union, it is now possible for British nationals to take an early train from London Kings Cross to Paris and have breakfast, lunch in Brussels and dinner in Den Haag. It might be lot of traveling but it proves the freedom of movement enjoyed by the people of that region, and the growth it brings to their personalities and business.

Holders of a British Passport can visit 171 countries in the world without visas; holders of a USA Passport can visit 169 countries in the world without requiring visas. On the other hand, holders of a Pakistani Passport can only visit about 28 countries without a visa, and most of these countries are either amongst the smallest countries in the world or are amongst the least economically active.

A Pakistani passport holder's access to the world increases if s/he has a British, EU, Canadian or USA visa on his/herpassport. However, getting these visas is not easier, and requires good understanding of the relevant rules and regulations.

Mainstream lawyers shy away from the Immigration work believing it not to be proper legal work. In contrast we observe specialized immigration practices flourishing in developed countries and even in some developing countries. It is commonly observed that the host country lawyers are normally considered to be best suited to deal with immigration matters, even though the application may be generated outside the country. One such example is that of United Kingdom.

UK has a population of over a one million Pakistanis who have settled down in the UK whilst retaining regular interaction with their families in Pakistan. Then there are those people who have a genuine attachment with the country, either due to their parents, or spouses, or even children. The border does actually divide families. UK immigration law is under constant change, whereas it is now providing more opportunities for the businessman, it is also restricting the movement of younger people, in terms of family and friends visits. While the Pakistan-UK trade volume is only 1.6 Billion US dollars, it has immense potential to increase. However, Pakistan based businesses must be well equipped to deal with the matters relating to Immigration and business related rules and regulations.

Similarly, Europe provides a huge opportunity, but due to lack of access means only a handful of people benefit from these business opportunities, and even they get rattled by the changes, losing serious amount of funds in process.

Some visa refusals to the UK are entitled to a right of appeal, such appeals are better prepared in Pakistan, as all the relevant evidence along with the primary witness statements are easily available locally. However, the matter is heard by a single immigration Judge who reviews whether the Entry Clearance officer has made the decision accordingly to the prevailing law. It has been observed that the oral hearings are more effective then the paper hearing. In the oral hearing, a UK qualified lawyer represent the matter in court, there are few organization in Pakistan who have specialized UK qualified lawyers who can effectively represent the matters in tribunal. Student, and general visitor visas does not attract full right of appeal.

Moreover, it is important to realize that under the UK immigration law anyone found to be using false documents will be refused their entry to the UK and will be bar for making any further application to the UK for up to 10years. Many people are not aware of this consequence.

Unfortunately USA and Canada disallow any right of appeal, and hence it becomes more important that the applications are prepared with due diligence and care. However in most cases a review for a decision can be requested as a matter of a good practice.

Immigration offence, is an offence of circumstances, you are simply committing it by being in a place where you should not be, or by failing to observe the conditions on your permission to stay or enter in the country. Sometimes, visitors unknowingly engage in business activities whereby they procure an investment from their host country - this is not legal and therefore not permissible. Similarly, a number

of developed countries provide medical treatment free to their nationals and this facility is not available to people who have a visit visa. In the case of an emergency one can, however, get immediate medical attention/treatment, but visitors must carry clear documents and any relevant previous medical records while traveling indicating the reason the treatment is required.

Belonging to a developing country our labor force also faces various problems when they travel abroad. Their lack of knowledge about the prevailing laws in the host countries normally means that they get poorly treated and poorly paid. Similarly their respective families back home suffer not only due to the separation with their loved one(s) abroad but also from the stress of knowing that their respective family member abroad is facing extreme difficulties.

Practicing Immigration law can be very rewarding in personal terms. One can encounter issues where families were separated due negligent advice they may have received, an incorrect application and/or the carelessness of an entry clearance officer. The right advice can thus lead to the saving someone's educational future, marriage or even attendance at the most important graduation ceremony of an applicant.

There is a dire need to regulate immigration advisors in Pakistan. There is a huge failure on the part of the government of Pakistan, and the legal sector in neglecting this area of practice affecting the lives of a huge number of people. One of the ways to counter the problems relating to the immigration is to establish a deeper understanding of the law and regulations world over and conduct documented research. Foreign remittance is one of the main sources of income into the country earned through the hard work of a number of overseas Pakistanis present and settled all over the world.

Legal Paternalism: Can it be justified?

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… the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. (1978, 9) – John Stuart Mill, On Liberty

Legal Paternalism is the theory that the state or an individual can interfere with another person, against that person's will, using the justification that the person will be protected from harm or will be better off as a result of the interference.[1] The theory draws its basis from the concept of the patriarch or father; the father acts in the best interests of the child, whether the child agrees or not, because he knows what is right for the child. Therefore, according to legal paternalists, the State should ban drugs because people might take them, even though the only possibility of harm is to the users themselves.[2] Similarly, legal paternalists believe that the State should enforce programs that compel the subjects of the State to better themselves financially, such as social security or other welfare projects.

Of course, as in the case of all contentious views, this viewpoint faces considerable opposition. Legal paternalism faces substantial antagonism from Libertarians. They believe that the State does not have the right to control the actions of individuals when harm is not being caused to others. Libertarians place great emphasis on freedom of action and individual liberty.

John Stuart Mill was one of the strongest opponents to the notion of paternalism. He is considered to be the first philosophers to elucidate what is popularly termed to be the 'harm principle'. The harm principle states that every individual has the freedom to act as he wishes, as long as these actions do not harm others. He believed that maintenance of one's liberty was more important than protecting people from themselves.[3] He said that individuals understood their own interests better than anyone else and hence such protection was unnecessary.[4] Furthermore, he pointed out that all human beings were dissimilar and therefore blanket restrictions were useless.[5]

The question of course is; are all libertarians completely opposed to paternalism? The answer must be that they are not. As in the case of almost all legal theories, a middle ground is often formed because of the needs and desires of that great god, rationality. Mill, for example, believed that legal paternalism could be justified where, for instance, an individual attempted to sell himself into perpetual slavery. He made it clear that the reasoning behind non-interference with individual actions was the protection of liberty. Once an individual attempts to sell himself, he 'abdicates his liberty'.[6] Mill wrote that "He (the individual) therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. ...The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom."[7]

This is not the only exception to Mill's opposition to paternalism. He also reserved his definition of liberty for rational adults and provided exceptions for choices or decisions unfairly affected by factors such as duress or ignorance.[8] These exceptions or provisions are called soft paternalism.

Soft paternalism is the notion that the state has the right to prevent self-harming conduct only when the conduct is either involuntary or where temporary interference becomes necessary to determine consent.[9] Hard paternalism is the notion that individuals must be protected from self-harm, even if said self-harm is voluntary, via criminal legislation if necessary.[10]

The noted legal philosopher H. L. A. Hart, despite being a great proponent of human freedom, opposes Mill's anti-paternalistic views, even stating that Mill's views of Paternalism were 'fantastic'.[11] Hart believes that it is possible to support a moderate notion of liberty and accommodate paternalism without falling into the trap of moral paternalism proposed by Devlin.[12] Differentiation can be made between moral and physical paternalism. Moral paternalism operates under the notion that morally corrupt acts should be criminalized or prevented even if there is no physical harm being caused to the offender simply because of the immorality of the act.[13] Physical paternalism justifies interference when the self-harm causes physical repercussions.[14]

The British jurist, Patrick Devlin casts Hart in the role of a supporter of physical paternalism, but points out that once a person is a physical paternalist, he must be a moral paternalist too, since immorality is simply another kind of harm.

Hart, however, steps away from moral paternalism by insisting that his support of paternalism stems from his belief that people may harm themselves. He also mistrusts the solidity of the notion of consent, pointing out that consent may be given at a time of 'transitory desires' or in other situations where a person's judgment is clouded.[15] This view does seem to lean towards Mill's exceptions or 'soft paternalism', but one must remember that Mill believed that once information or consent was obtained, the individual must be allowed the freedom to go his own way. Hart does not support this argument. Mill uses the famous example of a man about to walk across a damaged bridge. Our hypothetical man cannot be told of the danger, since he only speaks Japanese. A soft paternalist would feel justified in forcibly preventing him from crossing the bridge in order to ascertain if the hypothetical man is aware of the true condition of the bridge. But, once the soft paternalist discovers that the hypothetical man is aware of the danger and still wishes to traverse the bridge, perhaps wishing to commit suicide, the paternalist must accept his will and step aside. A hard paternalist would argue that it is permissible to use force to prevent voluntary suicide.

These opposing views can be seen as reflected in the laws of various states. For example, in the state of Victoria, Australia, laws on suicide expressly state that a person is allowed to use any force necessary to prevent another from committing suicide. Attempting to commit suicide continues to be a criminal offence in many nations, such as India and Singapore. Such laws are under scrutiny at present since they criminalise assisted suicide as well as attempts. The debate on euthanasia and the 'right to die' is getting more heated each day and it looks as if there might be a push for the soft paternalism view.

There are of course nations which are already inclined towards soft paternalism, a view reflected in the laws on suicide in the Netherlands. Thomas Szasz, a psychiatrist and academic wrote that attempts by the state to interfere with suicidal behaviour were essentially coercive attempts to pathologize morally permissible exercises of individual freedom.[16] He points out that suicide prevention is essentially a euphemism for incarceration in a mental hospital[17] and also declares that there is no evidence that suicide prevention actually has an effect. Szasz believes that the law grants psychiatrists the power to impose unasked for services on patients in their supposed best interests. Obviously, he is leaning towards the libertarian viewpoint which fixates on the idea of 'self-ownership', i.e. that a person has the right and freedom to destroy their bodies if they choose. One could argue that this conflicts with Mill's notion that a person abdicates their liberty if they attempt to sell themselves in slavery. We run into murky waters here. Surely, if a person cannot sell themselves in slavery, they also do not have a right to destroy their bodies? The matter becomes even more complex if we delve into moral and social norms, since there are groups that oppose suicide because of moral or religious reasons or consider accepting suicide as legal tantamount to promoting a social evil.

The problem with debates on paternalism is that the matter is never as simple as it appears to be initially. For example, there are laws around the world forcing cyclists to wear helmets. It is difficult to support the opposition to such laws, yet one can expect libertarians to argue that such rules encroach upon the freedoms of individuals. Similarly, there are work related laws that prevent individuals from working more than a certain number of hours a week, even though there might be employees who would prefer to work the extra hours to earn a higher income. As John Hosper wisely points out, what we want for an individual is not the same as what he may want for himself.[18] Hosper has managed to strike the nail on the head.

The state may believe that it is in a better capacity to make the right choice for an individual but it is impossible to deny the fact that freedom of action and self-determination will be irrevocably affected. A fine line has to be trodden in relation to protecting the individual and denying him his sense of self. History shows that this line often veers more to one side than the other.

As it stands then, legal paternalism posits hard questions against the very idea of personal freedom. Though a person enters a social contract with the state, does that necessarily mean a person signs over their choice to life as well? Though a lot of exceptions to the rule exist, legal paternalism does tend to be favoured by most states in the name of security.

The conundrum lies in the fact that circumstances involving legal paternalism are usually not black and white situations. For instance, if we return back to Szasz and his dissenting opinions on psychiatric views in relation to patients who are suicide risks, we can run into novel situations. What if a

patient is suicidal because of psychiatric condition that can be cured or at least assisted through medication or therapy? What if our hypothetical patient was unable to take advantage of such help because of financial issues or a simple lack of knowledge about his true mental state? Is the suicide of such a creature really an expression of freedom of will or the result of external forces operating upon his psyche? Here libertarian viewpoints fall into disfavour as Hosper adopts a rather more moderate view. He claims that when a person's actions disappear more and more into the voluntary sphere, the state's right to interfere will disperse. He points out that the word 'voluntary' has many connotations, and that Libertarians consider it to mean 'non-coercion'. This declaration of Libertarians appears to be a rather arbitrary conclusion.

Hosper can be accused of straddling the fence on this issue, but he is not wrong in doing so. It is difficult to see the wisdom in a purely libertarian approach. It is also hard to see the wisdom in a hard paternalist's views as well. This is a matter in which the middle ground is perhaps the best place to be, not merely from a theoretical standpoint but also from that of a practical being.

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Myth of Parliamentary Sovereignty and the Sub Judice Rule

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In 2009, the infamous Farah Hameed Dogar issue initiated an interesting debate in Pakistan over the relationship between the Parliament and the Supreme Court. The Chairman of the National Assembly's Standing Committee on Education had been advocating the supremacy of Parliament at the top of his voice. Several former Judges of the superior Courts as well as lawyers were also seen trumpeting the cause of Parliamentary Supremacy. The refusal of the Education Minister to discuss the jacked up marks issue before the Standing Committee till the decision of the Islamabad High Court was termed by some circles as contempt of the mandate of the people of Pakistan. Earlier, some parliamentarians had even dubbed the issuance of an injunction by the Supreme Court against the proceedings of N.A Select Committee, as a trespass upon the Sovereignty of Parliament. Without going into the factual controversies surrounding the issue of raising Ms. Dogar's marks, herein lies an endeavour to ascertain whether our Parliament, in the given constitutional set up, is truly Supreme and if so, whether it can take cognisance of or discuss any matter or issue which is sub judice that is up for judicial consideration.

The concept of absolute Parliamentary Supremacy is derived from the British Constitution. In the UK, by reason of the absence of the written constitution, which asserts the sovereignty of people and that of the constitution, as interpreted by the judiciary - over the legislature and executive, the vacuum is filled by the doctrine of Parliamentary Sovereignty or Supremacy. Under this doctrine, the sovereignty vests with the Parliament over which no legal controls are exerted. The exact connotation of the British doctrine of Parliamentary Sovereignty can be visualised from the writings of A.V. Dicey, who defines the principle of parliamentary sovereignty as “neither more nor less than this: namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament”.

Hence, as per the enunciation of the British Constitution, the Parliament is the supreme law making body and may enact law on any subject matter whatsoever and no person or body, including a court of law, may question the validity of an act of parliament. The Parliament is absolutely supreme beyond any limit of curtailment. The extent of the British Parliament's sovereignty can be gauged from that fact that even if it enacts that all men should be women they would be women so far as the law is concerned (Sir Ivor Jennings in The Law and Constitution, 1959).

The Parliament of Pakistan is the creation of a written constitution and by reason thereof, it can only exercise those powers which it expressly bestows thereupon. Thus unlike the British Parliament, the Parliament in Pakistan can only function within the parameters enunciated by the constitution. For instance, our Parliament cannot make any law which is inconsistent with or in derogation of the Fundamental Rights stipulated and guaranteed by the Constitution. Even if Parliament purports to make such a law, it would be void under Article 8 and of no legal effect whatsoever. Similarly, Article 142 of the Constitution bars the Parliament from making laws with respect to any matter not enumerated in either the Federal Legislative List or the Concurrent List. Article 162 further restricts the power of the Parliament from passing a Bill or amendment which imposes or varies a tax or duty, the whole or part of the net proceeds whereof is assigned to any province, or which varies the meaning of the expression “agricultural income”, or which affects the principles on which money is or may be distributable amongst the provinces, unless previous sanction is obtained in respect thereof from the President. Article 68 imposes yet another restriction on the Parliament to discuss the conduct of the Judges of the Supreme and High Courts in and regarding the discharge of their duties.

The biggest impediment in the way of Pakistani Parliament's claim over sovereignty is the doctrine of Separation of Powers which is deeply inculcated and finely woven into the Constitutional framework. As reiterated earlier, the Parliament can only function within the four corners of the codified and well defined constitution. If the Parliament makes a law which is contrary to the provisions thereof, the Courts have been provided teeth strong enough to bite at it and declare that piece of legislation as null and void.

Pakistan's judicial history is replete with precedents wherein the Supreme Court judicially reviewed the acts of

Parliament. In Mehram Ali Vs State (PLD 1998 SC 1445) various provisions of the Anti Terrorism Act, 1997, which was passed by the Parliament, were held to be repugnant to the fundamental rights hence rendered as null and void by the Supreme Court. The exercise of judicial control over Parliament to such an extent is beyond imagination in the context of British Constitution because in UK, the acts of parliament are beyond the scope of Judicial Review. In the premise, where so many restrictions are imposed upon the Parliament by the Constitution, how can sovereignty and supremacy be attributed unto the former?

In Pakistan, no one institution of the state can claim supremacy or sovereignty. Whether it is the executive, the judiciary or the legislature, all of them have to perform within their own sphere prescribed by the Constitution. In fact the Objective Resolution, which has been inculcated into the Constitution by virtue of Article 2-A, sovereignty belongs to Allah Almighty alone and the people's representatives only exercise that as a sacred trust, within the limits prescribed by Him.

The Parliament in Pakistan has been unequivocally barred from taking up or even discussing any sub judice issue. Many Parliamentarians and even some jurists may not agree and quote Article 66 of the Constitution which stipulates freedom of speech in the Majlis-e-Shoora (Parliament). Parliamentarians do enjoy the freedom of speech. But at the same time we have to ascertain what exactly the term “freedom of speech” actually means? Are we talking about absolute freedom free from any sort of constraint? Article 19 of the Constitution, which endows the fundamental right of Freedom of Speech, categorically makes it subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence. The term contempt of court itself is elaborately defined by the Constitution in Article 204, as abusing, interfering with or obstructing the process of the Court in any way or disobeying any order of the Court or to do anything which tends to prejudice the determination of a matter pending before it.

The Parliament is expressly debarred from discussing any matter which is sub judice and pending adjudication before a High Court or Supreme Court. Even otherwise, since the freedom of speech under Article 66 of the Constitution is subject to the Constitution, as a corollary, it must follow that the freedom of speech of a Member of Parliament is subject to the contempt law under the aforesaid Article 204 and therefore the privilege of freedom of speech is not absolute. Even in the UK, where Parliament is supreme, the sub judice rule exists and is strictly adhered to. Where civil proceedings are either before a Court or awaiting trial, members of Parliament are barred from raising them in debate. Even if the matter has not yet reached the Courts, debate may be barred if the Speaker considers that there would result a real and substantial danger of prejudice to the trial arising as a consequence. Similarly, no reference may be made to criminal proceedings from the time of the framing of the charge until the final appeal is determined.

While the enthusiasm of our Parliament and its Select Committee is appreciable, we should not forget that like the parliament, judiciary is also an equally important pillar of the state, whose reverence should not be belittled by flouting its orders and judgments. The tug of war between Parliament and the Supreme Court and the flouting of the latter's Order by the former, reminds one of Socrates, who was accused, tried and convicted by the grand jury of Athens for corrupting youth with his teachings. Despite the possibility of escape, Socrates chose to accept the verdict of death which had been imposed upon him in order to demonstrate his fidelity to the law. When pressed by Crito, his student, to escape, Socrates considered the questions which would be put to him by the laws and the Constitution of Athens were he to succumb to the temptation to escape the penalty of the law:

“Can you deny that by this act [of escaping] which you are contemplating you intend, so far as you have the power, to destroy us, the laws, and the whole state as well? Do you imagine that a city can continue to exist and not be turned upside down, if the legal judgments which are pronounced in it have no force but are nullified and destroyed by private persons?” [Crito, in Hamilton and Cairns, 1989, p. 50 b]. In submitting to death, Socrates was giving recognition to the supremacy of the law and the Constitution.

If we also want rule of law and democracy to flourish in Pakistan, it is imperative to enable all three pillars of the state, the executive, the legislature and the judiciary, strengthen their respective roots within the sphere prescribed for them by the Constitution. Our Parliament is neither supreme nor does it have a tacit license to flout the sub judice rule. The hands of our Parliament are clamped by the clutches of constitution and the doctrine of separation of powers. Any endeavour on part of the parliamentarians to undo that, would be counterproductive for the rule of law and democracy in the country.

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Rule of Law and Pakistan

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'Strengthening the rule of law is a goal for both developing and developed countries. Under the rule of law, the rights and obligations of all – including the poor and marginalized - are defined and enforced. That enables people to live their lives in environments which are rules-based, and for the authorities to be able to tackle those predatory networks which exploit people where there is no recourse to the law. Establishing the rule of law is both an important objective in its own right, and it is critical to broader development progress.'

Helen Clark[1]

Governance is a multi-actor process. It is based on the good governance value set, and the rule of law takes a key priority in ensuring the effectiveness of governance as a system. The rule of law in turn is dependent on the police, judicial and legal institutions of the country. The quality of the police service is closely linked with the performance of the judicial and legal sectors and consequently with the quality of justice administered in the country. Combined, the justice sector is responsible for safeguarding and promoting the rights of every citizen of the state. When one of these institutions fails to provide adequate service delivery, it results in gross violations of both the law and human rights, compounding in increasing corruption, critical law and order situations and discrimination against the weaker sections of the society. This in turn perpetuates the vicious cycle of poverty, oppression and denial of rights.

'No action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with the law'.

Article 4, Constitution of Pakistan (1973)

The above quoted rule of law is embodied in article 4 of the Constitution of Pakistan that clearly empowers the law as a security framework for both the state of Pakistan and her citizens. However, the enforcement of Article 4 in Pakistan appears to be partial since multiple constraints effect its implementation. The most serious constraints affecting the quality of the rule of law and thus, governance in Pakistan are found in the political culture, and in sanctions and incentives effecting the judiciary, police, and administration. The judiciary has repeatedly been compromised by political practices, and has not been able to gain the necessary degree of independence from the executive, especially in terms of securing a sustainable level of financing. Similarly, the police services remain heavily affected by a patronage-based system that sets them in an oppressive relationship with the citizenry, particularly with those at the bottom rung of society.

One of the key constraints to the rule of law in the justice sector pertains to an outdated legal institutional framework. The police system, for instance, adopted by Pakistan at the time of independence was meant to rule, not serve, the citizens of the country. Police Act, 1861 that formed the legal basis for the Pakistan Police, placed the district police under the general direction of the district magistrate in addition to its own hierarchical control, aiming primarily at the collection of land revenue and maintenance of law and order with a coercive focus.

The police system had been geared at raising semi-militarized, semi-literate, underpaid bodies of men for maintaining order by overawing an often, turbulent and hostile-native-population. It did not aim at creating quality professionals tasked with the prevention and detection of crime in plural, multi-ethnic, socially conscious communities, through a just and impartial enforcement of laws[2].

The police, the legal sector and judiciary all suffer from the lack of a coordinating body for developing policy, and from a lack of system for collection of empirical data for the system's performance evaluation, improving accountability, or recommending reforms.

The government legal services have been set up to administer rather than develop laws. Government legal services have traditionally been given a low priority, resulting in the severe limitation arising in the government's capacity to respond to legal issues.

Prosecution occupies a critical position between investigation and adjudication. Without quality prosecution services the criminal justice system will not be able to protect the weak and the vulnerable. This is a key problem facing the justice sector in Pakistan. While prosecutions for the 'ordinary man' are handled in a

mechanical manner, preferential treatment is given to high profile cases or more influential groups.

Case management and delay constitute a major problem in the judicial sector. Delay is caused by such factors as inadequate and/or incompetent judges, dilatory tactics by the bar, lack of witnesses and frivolous litigation, poor prosecution services, transfer of judges and/or transfer of a case from one judge to another and nonobservance of the civil procedure court.

Corruption is another malaise plaguing every aspect of our justice sector. A 2002 survey by Transparency International states that routine corruption, one that occurs as part of everyday business and interaction with the public sector, was found to be most prevalent in Pakistan in the police, power, taxation, judiciary, customs, health, land and education sectors.

The police system in Pakistan is generally perceived as being notorious for corruption. And while politicization of police and a weak institutional framework are to some extent responsible for this, the culture of controlled access to information and limited accountability must share the blame as well. The judiciary too is perceived as rating high on corruption. A CIET/NRB survey (2002) revealed that 59% people paid an average of Rs. 28,747 to police and 79% of them paid Rs. 45,171 for court services.

Corruption in the Judiciary, police and other law enforcement agencies is of most concern to the public, not simply because the incidence is so high, but also because it tends to be coercive rather than collusive and because the public recognize the devastating impact on law and order, human rights and the legitimacy of the state. It is a massive breach of trust. (National Anti-Corruption Strategy 2002, p.7)

Again the Transparency International Corruption Perceptions Index 2010 places Pakistan at 2.3, on a scale from 10 (highly clean) to 0 (highly corrupt). This in itself reveals the acute dearth of justice and failure of our legal judicial system.

The blatant disregard for law and the ostentatious asset accumulation and display by the top public office holders has led to a decline in the moral standards and values of the society. The corrupt are no longer ostracized and they enjoy respect in society on the basis of wealth accumulated through illegal means, while the country remains under developed and poverty stricken. There has been a loss of legitimacy of state institutions in the eyes of the populace. (National Anti-Corruption Strategy 2002, p.9)

The citizenry of Pakistan also finds it difficult to take legal action against the public-sector service providers for non-performance of service delivery (such as roads and other infrastructure, health care and sanitation, water and education) or for abuse of power by the service providers. Lack of a client focus in government activity particularly in law ministries, has allowed these organizations to continue to provide service(s) for which there is no or limited demand or for which the service requirements have changed without any mechanism for product development being available.

The weaker sections, particularly the poor are forced to resort to informal system of governance redressal, such as 'panchayats' or 'jirgas' which are generally influenced by the local landlords, thus the power gap between the influential and the poor only widens. The administration of 'injustice' only increases with increasing impunity by the local power structures.

Judicial analysts agree that the main problem for access to justice in Pakistan is not due to a general lack of legislation but due to the lack of enforcement of those laws. There is a need to transform this lack of enforcement into a strong capacity to reform the justice sector to enable it to provide justice to be 'delivered at the doorstep' of the ordinary man.

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1. Helen Clark, Administrator of the United Nations Development Programme at UN General Assembly, New York, 11 April, 2011
2. Shoaib Suddle, Improving the Police's Role and Performance in Protecting Human and Economic Security: Ideas in Police Reform, P.2

SPECTRUM OF INTERNATIONAL LAW
A PROJECT OF SCHOOL OF INTERNATIONAL LAW

Skewed Media Policies Result in Under-representation of Rural Pakistan

Palwashay Arbab
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"Journalism can never be silent: that is its greatest virtue and its greatest fault. It must speak, and speak immediately, while the echoes of wonder, the claims of triumph and the signs of horror are still in the air." Henry Anatole Grunwald

This excerpt of the former Editor in chief of Time magazine and US ambassador to Austria, truly defines the raison d'être of real journalism. Creating awareness and enlightening the masses about all that they ought to know is and must be the utmost priority of any journalism institution. Today media plays that role, or at least is thought to play that role. The media in Pakistan or in that case globally, was born to inform, educate, influence and entertain its masses and professional journalists are responsible to create a sense of belonging and to encourage the youth of a nation to behave like responsible citizens of a State. The media must be used to raise awareness and educate the masses to overcome various social problems and development of civic sense. On the contrary, Pakistani media has taken a completely new direction and is determined to create a dreadful situation in the name of 'freedom of press'. They have long forgotten their reason of existence and have played a major role in disintegrating the Pakistani population instead of uniting it as a nation.

Since the independence of Pakistan, problems regarding true representation of all cultures and regions in the country have existed within its media. At first it subsisted in the Print media; hardly any newspaper or periodical was living up to its role as a watchdog of the state and protecting the rights of all citizens. They were all mere collaborators and puppets of the leaders and those who were not were silenced. In 1964, when broadcast journalism in Pakistan started, the problem still prevailed as the same faulty policies were followed. And unfortunately even in today's day and age, not much change has been seen- the local media has not promoted any cultural intercommunication among the various cultures in Pakistan.

For instance, the residents of Lahore will hardly be exposed to any news about other regions of the country unless it is a major news story. There is no ordinary, day to day coverage of other regions and areas whatsoever of a culturally diverse country as ours. Recently, a BBC Urdu correspondent roamed the streets of Punjab's largest and most cosmopolitan city, Lahore, to ask random people on the street how much they knew of Balochistan. His report is compiled under the heading "Punjab Balochistan Ko Kitna Jaanta Hai?" (How well does Punjab know Balochistan?). 86% of the respondents did not even know a single city in the province. They were completely oblivious of the unrest in Balochistan and half of those interviewed did not know what language was spoken in the largest province of their country. Keep in mind, that Lahore is not a rural backwater where media is not easily accessible, that Punjab's population comprises some 60 percent of the Pakistan's population and that in the last three years the issue of Balochistan has probably been one of the most talked about issues in domestic politics. Think for a moment what it says about our educational system, our media, our democracy, our policy-making, our national integration and yes, our popular prejudice.

The issue is not that of the general knowledge of the people of Punjab or Balochistan. The issue that this short documentary highlights is the complete indifference of the people of Punjab and for that matter, the rest of Pakistan to the plight of the Baloch and Balochistan. This is mainly because the Pakistani media does not consider it worth reporting on. They have more urgent issues like worthless news on what a certain political leader is wearing, how many broken marriages he/she has or if a cricket match had been fixed or not.

The media's job is to raise awareness and educate the masses to overcome various social problems and development of civic sense and that is to be done by educating the people about what is happening within the country first. Here, the media's policies of recognizing and respecting various cultures to create cultural consciousness must be questioned. And this is where the problem of provincial autonomy comes in, as Pakistani media follows what the government/ military does or asks it to do no matter how much they publicly ridicule them.

All the provinces of Pakistan have a cultural history since the last five thousand years. Therefore we cannot expect a 5000

year old culture and community to forget about their traditions, language and ethnicity. And since the creation of Pakistan was due to the unified decision of all the provincial assemblies (meaning all diverse cultures and ethnicities), the government and its subsequent media, has no right to ignore their customs and stress on unanimous policies to be followed by all provinces. The consequence of this budding problem and discriminatory policy started with Bengal- all demands and problems of the Bengalis were resisted. 56 % of Bengalis spoke Bengali and throughout the 24 years that Bengal remained with Pakistan no arrangement for adopting Bengali as a subject in educational institutes was made. They were denied of their own language in their own country. Shockingly the media at that time declared non-Urdu speaking population as traitors. Today, Balochistan and Gilgit-Baltistan are facing the same problems and have been demanding provincial autonomy for long now. All these policies relate to the question of provincial autonomy which still is a looming issue in Pakistan today, as no one changed the policies; neither elected government nor the martial law.

Regrettably, the same centralized policy is being followed by our media. There is a serious 'watertight compartmentization' of media policies. The media is walking the footsteps of the same prejudiced policies of the failed governments, that had come and gone in the history of Pakistan, by not showing the Pakistani population the “true picture” of the sorry state that the “ignored” areas are in, due to Government's ignorance and self-interested bias. What the media and other state institutions do not realize is that these ethnically discriminatory strategies will only weaken the nation and demoralize the people.

Pakistan is an artificial nation that has been carved out of another country. Being new and isolated from its South Asian culture, Pakistan needed tangible cultural roots. Vacuums were already produced in its existence by isolating it from its indigenous culture. A one religion-one-language policy was forcefully adopted but the result was unfortunately more unrest and turmoil. Heroes of former times were made villains and the latter heroes. A disconnect was thus created in the society, which makes it crucial for us to create an identity for ourselves, which our policies have been unsuccessful in doing so. This role should then have been taken by the media which they unfortunately did not undertake either. Public sentiments and opinions are nurtured via the media which they have failed in doing so, by not creating a sentiment of respect for other prevailing cultures in the country. Pakistan`s media is robust and can play a constructive role, if there is a wish to do so. However, on issues of freedom and repression the media becomes faint-hearted and selective in its approach. Some recent examples of its reticence are its stance on the repressiveness in Balochistan, interior Sindh and Gilgit-Baltistan.

It seems that media contributes to multiply wording over issues and crisis instead of spreading actual root causes and facts of the issues. For example who knows that there are no health facilities outside Quetta in the whole of Balochistan? Or howwomen have to walk more than 15 miles to get water for their homes? Or that people still live in caves in some areas of Balochistan? The Balochis are not receiving any loyalties or even menial jobs in Gawadar; mostly Pathans or Punjabis are employed there. To them it seems that they are being colonized by the Punjabis.

Those outside the borders of Balochistan are not aware of this because the media has not exposed this side of the province to them. Now the Balochis have started killing any Punjabi they see on their land, as they see them as a cause of their impoverishment. The media is quick to report such news- the 'barbarianism' of the Balochis, to the rest of the world but not the deep-rooted cause behind their festering anti-Punjabi sentiments. Yes, it is without doubt that some mighty lords in Balochistan are creating communal troubles but the fact is that even their pay rolls come from the State.

There is a complete media blackout regarding the internal problems of provinces other than Punjab in Pakistan. The major cities' media audience is fed with state propaganda. They will broadcast brief news on protests in Gilgit-Baltistan but with no news regarding why the situation is so. More than 90% of the local population does not even know that Gilgit-Baltistan is a disputed territory like Kashmir and that right now there is a government led military operation taking place there. Human rights abuses are widespread and common in Gilgit Baltistan for many decades but unfortunately absence of local media; independent judiciary, and misrepresentation and distortion of facts have helped the State to hide its illicit practices; normally carried out in the disguise of political authority. A large portion of our population faces severe human rights abuses that encompass political, religious, gender, ethnic and economic factors. Areas face serious and widespread discrimination in the form of economic, social and political spheres. More than 200 political activists and leaders of this land are facing death sentence on sedition charges against Pakistan under section 124 A,

because they dared to protest against Pakistani occupation in peaceful public gathering. The local indigenous servants of the region get less salary and less powers and no promotion in comparison to Punjabis and Pathans present there. The people of this media neglected region now just want independence, like Balochistan from Pakistan as they are tired of being faced with deprivation, injustices and lack of freedom here.

What Pakistan is facing now is the result of an identity crisis because of the consistent and arrogant denial of the cultures within the country.

Within Pakistan, the various entities must be given their identity by incorporating their say in the decision making of the federation otherwise we will soon see more models of Bangladesh here. The Balochs were pushed against the wall. While we hollowly celebrate Pakistan Independence Day in Punjab, in Balochistan they celebrate it as a 'black day'. On the other side, the people of Khyber-Pakhtun-Khwa are now weary of the futile strategic interests on their dead bodies. There are very grave concerns in KPK over what is going on in the name of strategic depth. Similarly, in Karachi dozens of people fall each day.

These are the results of the denial of identities and due share to the federating units in the country's affairs. More security and more military operations just aggravate the situation. It is time to get into the shoes of the Balochs, Pakhtuns, Sindhis and other ethnic identities of Pakistan; otherwise it will be too late.

In the 21st century the new media plays a vital role in formation of public opinion and enlightenment but the media of Pakistan has done a great disservice to the Pakistani nation by not showing them the truth. If our masses are misinformed, as they are here, and are denied of their right to basic knowledge, they will always have a bias view towards their own people. The media is fed with ISPR lies and propaganda and the public is fed with the same. This shows that the media has not learnt any lesson from the 1971 debacle and are continuing to alienate their people. Therefore, the media must serve as a watchdog and highlight the negativities of the government and military that are leading to grave provincial problems.

The media acts fearfully because the rightist retribution is instant. For it to remain healthy, it needs to be protected and groomed by the state to become a progressive transformative agent. Its power to do well and take Pakistan out of the grip of terrorists in Swat and Fata was evident when it transformed the mindset of Pakistanis by airing the video that showed the whipping of a girl in Swat by the Taliban in April 2009.

It changed the mindset of the people, which in turn transformed national policy and created a demand for immediate retributive action against the Swat militants — something that the political leadership and the security services were unable to achieve earlier.
This indicates that the Pakistani media can play a major constructive role as a strategic communicator for changing negative attitudes. However, to achieve beneficial results, a sound national strategy is a must.

The Internationalisation of Competition Law

Salma Saifullah Khan

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There are over eighty countries with Antitrust/Competition laws. It is now evident that national authorities can no longer individually deal with hardcore cartels, transnational mergers and other anti competitive practices. Apart from that, the concerns of Multinational Enterprises MNEs) are growing. They require consistent and speedy results but because of the increase in national antitrust laws, it is very likely that inconsistent results will increase too. For example the Exxon/Mobil multinational transaction is being notified in twenty different jurisdictions, hence, leading to conflicting decisions by the authorities. Furthermore, many developing countries do not have competition laws and some of the developed countries may impose their own antitrust laws on them which in turn will affect their economy further. Therefore to combat all these problems, many international bodies have tried to internationalize competition law and they have taken initiatives towards greater international cooperation.

One of the first attempts was by the United Nations Conference on Trade and Development (UNCTAD). In 1980 they adopted the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, which was primarily aimed at the developing countries and how they all should cooperate with each other, improve their laws on restrictive business practices and how MNEs should respect the domestic laws on restrictive practices. In 2000 UNCTAD passed a Resolution which stated more cooperation was needed amongst the national authorities and gave preference to bilateral agreements. These are great steps towards achieving international cooperation but the Set is non binding and has not been recognized as a source of public international law.

The Organisation for Economic Cooperation and Development (OECD) is another international institution that has fully participated in matters relating to competition policy. It has provided technical assistance to many countries by introducing antitrust law and policy in their domestic legal systems and has been helpful in training national judges and officials in antitrust authorities. In 1995 they published a Recommendation which provides for voluntary notification, consultation and cooperation in competition law cases. Moreover, in 1998 they adopted another Recommendation in which they asked member countries to make such laws that 'effectively halt and deter hardcore cartels.' From then on they have published various reports and recommendations on eliminating hard core cartels by advising to provide for effective sanctions to deter firms and individuals from participating in such cartels. They gave an example of the United States of America, that around sixteen large cartels cases investigated there may have caused harm in excess of $US 55 billion and therefore effective sanctions need to be enforced and the need for greater international cooperation would be needed to combat cartels. Despite its active role, the OECD also has its drawbacks. It consists of the developed countries only and this might be the reason why their Multilateral Agreement on Investment failed because they failed to take in the account of developing countries interest. Like the UNCTAD, the OECD too issues only non-binding Recommendations.

International Competition Network (ICN) has put in an important contribution to the international competition policy. The ICN consists of several antitrust authorities, including US Department of Justice, the US Federal Trade Commission and the European Commission. It's an independent body and has no links to any other institutions but stresses on working closely with other organizations such as the World Trade Organisation (WTO), the OECD and UNCTAD. It has a unique structure, with no permanent secretariat and is a type of a virtual network. From merger control, it has shifted its focus on cartels and has established a new Working Group to examine approaches by competition authorities' member to abuse of dominance. Their other achievement made recently was the creation of a Business Outreach Toolkit to improve communication between competition authorities and private firms. As we can see they have all the expertise needed but they lack a rule making body which is essential for the internationalization of competition law, and just like the above two international organizations, they too have non-binding recommendations.

From the above mentioned organizations we can clearly see that they indeed have contributed a lot to further international cooperation but they lack certain qualities in order to streamline and perhaps codify the internationalization of competition law that will enhance

the existing efforts on the area as well as bring about a much needed uniformity to the system. The World Trade Organization (WTO) is one organization that might be capable to do all that.

The WTO is a unique international organization and rule-making body which consists of a very wide membership base of both the developed and developing countries. One of its advantages are that they have a binding set of rules that are made through negotiation, consultation, and cooperation which then go on to govern the economic conduct of countries. Their dispute settlement mechanism is known to be the 'crown jewel' of the multilateral treaty agreement and their basic obligation of national treatment, most favoured nation (MFN) and transparency supports the operation of antitrust laws. Even though the WTO doesn't have a multilateral agreement solely on anti competitive practices but it does contain some provisions on it in other agreements of the WTO. For example the Agreement on Technical Barriers to Trade (The TBT Agreement) provides that technical regulations should not be more trade restrictive than necessary, and that alternative measures that are less trade restrictive should be first taken into account. The General Agreement on Trade in Services (GATS) states that a member should ensure that a monopoly supplier does not act in a manner inconsistent with the MFN principle, must accord same treatment to persons from any member, which use its services and that they should not abuse its monopoly position. The Agreement on Safeguards and Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) also contain some provisions relating to anti competitive practices.

One tends to wonder as to why till now there hasn't been a proper inclusion of a competition law regime in the WTO. David J. Gerber in his article 'Competition law and the WTO: Rethinking the Relationship' rightly points out the obstacles that are blocking the inclusion of a competition law regime. He states that the main reason is the lack of confidence in the norms and procedures of the WTO. Developed countries like the United States fear that competition law in the WTO will be directed at the multinational firms which are mostly US-based and that the developing fear that the this inclusion will assist US, European and Japanese firms in getting access to their markets and raw materials. He suggests that the WTO should give significant weight to every member's interests. Furthermore, members should perceive their interest and goals interwoven with goals and interests of other members, and that one should not think that competition law must serve trade interests, because one is inclined to assume that the WTO's objective is to protect international trade and that competition law must therefore serve trade objectives, but it should be perceived as to be co-equal with trade law rather than subservient to it. WTO should also not incorporate the entire competition law regime but start with the ones that are agreed by all, for example all countries agree that cartels should be prohibited.

Article V of the WTO agreement talks about cooperation and regular consultation with other organizations such as the International Monetary Fund (IMF) and the World Bank. In my opinion they should form a cooperative relationship with the International Labour Organization (ILO) and the ICN. The WTO has a rule making body but perhaps little expertise in matters relating to competition law and the ICN has all the expertise but lack a uniform rule making body, so if they cooperate with each other the internationalization of competition law could be advanced further. The ILO could be of a great help too. Perhaps they could provide technical assistance to the developing countries and guide them to improve their labour laws (minimum wages, healthy environment etc). This will prosper their economy because the multinational enterprises are known to be bigger than the states themselves so they will still enter the market for their ultimate profits and thus it could be a win-win situation for all the affected stakeholders. The internationalization of competition law could be a goal that is still within our reach despite the varying differences between the developed and developing countries.

SPECTRUM OF INTERNATIONAL LAW
A PROJECT OF SCHOOL OF INTERNATIONAL LAW

The Administration of Justice in the Reign of Akbar and Awrangzeb: an Overview

Muhammad Munir

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Introduction

Muslims came to India in a great number when Sindh was brought under their rule in 712 A.D. by Muhammad b. Qasim (d. 98/717) at the time of the sixth Ummayyad Caliph, al-Walid b. 'Abdul Malik I (d. 86/705). Later, Mahmud b. Subaktageen of Ghazni (d. 421/1030) occupied a major portion of the Punjab, followed by Shahabuddin Muhammad Ghori (d. 602/1206) who annexed Punjab making it a part of the Caliphate. Delhi fell to the Muslim Commander Shahabuddin Ghori in 1192. The Delhi Sultanate was founded by Qutbuddin Aibak (d. 607/1210-11) of the Slave Dynasty in 1206. Though initially Qutbuddin Aibak made Delhi his headquarters as the viceroy of his royal master, Shahabuddin Ghori, officially the Sultanate came into existence in 1206, when the viceroy became the first independent Sultan of Delhi after the death of his royal master in 1206. The Slave Dynasty lasted till 1290, when the second Muslim dynasty, the Khaljis, got power in India. The Khaljis were defeated by the Thughluqs, the third dynasty, in 1320, while the Thughluqs were overpowered by the Sayyids, the fourth dynasty in 1414. The Sayyids ruled until 1454 when they were beaten by the Lodhis, the fifth dynasty that lasted till 1526. The Lodhis were defeated by Zaheeruddin Babar (d. 936/1530) who laid down the foundations of the Mughal Empire and Muslim power reached its zenith in India. Six extraordinary emperors, in a direct line of descent from Babar, ruled between 1526 and 1707. The Mughal dynasty was interrupted by the Suris from 1539 till 1555 when Nasiruddin Humayun (d. 963/1556) was restored to power. Humayun, on his restoration, "put the idea of a suzerain Caliph to an end," (I. H. Qureshi, The Administration of the Sultanate).

Although the Mughal dynasty continued till 1857, it was in decay since the death of Muhiyuddin Muhammad Awrangzeb in 1118/1707. here we will concentrate on the judicial system of Jalal uddin Akbar (1556-1605) and Awrangzeb (1658-1707) because the Empire under these two is believed to be at its climax. However, between the reigns of these two the contribution of Nuriddin Muhammad Jahangir (d.1037/1627) cannot be ignored and must be discussed to have a complete picture. Akbar and Awrangzeb were very different in terms of religiosity and presented distinct, opposing political models.

Akbar tried to create a hybrid between Islam and Hinduism – in his new order (tariqat) which was believed to be a synthesis with Hinduism, providing some form of accommodation on the cultural and religious planes. The latter rejected this model outright. The former was praised by his Hindus subject while the latter by the Muslim population. The judicial system under both Akbar and Awrangzeb were very much similar, as will be explained below. With the exception of Awranzeb, the Mughul governments in India were purely secular in nature. Although the Emperors were deeply religious men, they did not view themselves as monarchs who had to guard the interests of only one section of their subjects. In matters of governance they held the scales evenly balanced between all communities under their sway.

Judiciary under Akbar

The Mughul rulers of this epoch ruled by decrees or farmans. The Sultan was the chief executive, sole legislator, and the chief judge of the land. All the three powers concentrated in him. Akbar had forbidden the killing of cows by law, because that was offensive to Hindus. He had also abolished jizyah (poll-tax) early in his reign to please his Hindu subjects. He had also appointed a large number of Hindus to responsible posts. Abul Fadl b. Mubarak (d.1011/1602) remarks, that "[F]or monarchs the worship consists in the proper discharge of their duties to their subjects", (Sheikh Abul Fadl, A'in-i-Akbari, vol. I, trans. H. Blochmann). Mulla 'Abdul Qadir Badauni (d. 1024/1615) once remarked that Akbar insisted that the cases of Hindus be decided by Hindu judges and not Muslim Qadhis, (Abdul Qadar Badauni, Muntakhab al-tavarikh). Akbar was under the influence of his secretary Abul Fadl who wrote Akbarnama. He is believed to be the champion of heterodoxy. He could well be called the chief architect of Akbar's new cult or order (tariqat) in which he deviated quite a lot from orthodoxy. The success of Muslim rulers in India was gauged by their ability to tread the fine line between being an orthodox sunni khalifah, while at the same time mollifying a potentially aggressive, non-Muslim subject population. Akbar believed that: Justice and Beneficence must be exercised alike for all subjects (jami ʿriʿayat). The King is the shadow of God and the gift of Divine mercy is common to his subjects believers and non-

believers. A king must curtail the hand of oppressions (zulm) upon the weak because the prophet says 'the cry of the victim of injustice even if he be a kafir is never rejected by God'. (Abul Fadl, Akbarnamah, vol. III) His Hindu subjects were the main beneficiary of his scheme. His greatest contribution to a country whose sole industry was agriculture was his systemization of the revenue assessment. Under the zabity system introduced by him, he levied a fixed tax which was quite fair to the peasant. Under the previous system, the price of each variety of grain had to be determined each season. He divided the whole country into 119 dasturs (assessment circles). Each piece of the land in the various dasturs had to pay a fixed amount which depended on the area and quality of the land. The system is largely unchanged in present day India and Pakistan.

Abul Fadl was responsible for the conflict between Akbar and his first Qadi-al-Qudat – ʿAbd-un-Nabi. The reason of the conflict is interesting. The qadi of Mathura had ordered the construction of a mosque. A Brahman Hindu removed the construction material out of his hostility to Islam. The qadi summoned the Brahman to his court. The arrogant Brahman not only disobeyed the order but used abusive language for the Prophet (PBUH). The local qadi informed the Qadi al-Qudat who summoned the Brahman to his court and found him guilty of blasphemy. The Brahman was sentenced to death by ʿAbd-un-Nabi. Since all capital punishments had to be approved by the Emperor, the case was submitted by the Qadi al-Qudat to Akbar for confirmation and orders. Akbar refused to execute the Brahman because he was deviated from orthodoxy. In addition, influential Hindu officials working with Akbar interceded with Akbar on behalf of the Brahman. Akbar ordered a secret inquiry into the facts of the case and gave this task to the staunch opponents of ʿAbd-un-Nabi. The inquiry, however, confirmed the charges. Akbar was even then reluctant to execute the Brahman and asked ʿAbd-un-Nabi not to execute the man. ʿAbd-un-Nabi, however, pressed for execution. When Akbar could not find a way out he did not give clear orders and left the matter to ʿAbd-un-Nabi who executed the man. Akbar did so because he was too circumspect to take upon himself the responsibility of setting aside the decision of the court.

Akbar sacked all his existing Qadis and one of the conditions of appointment necessary to the highest judicial and religious post was adherence to Akbar's religious philosophy. Moreover, the emoluments and grants of religiousness were cut down and gradually old recipients of grants were totally eliminated. Despite the incident noted above, the judiciary by and large functioned freely.[1] The heterodox ʿulama gathered around Sheikh Mubarek – Abul Fadl's father, to play a trick that would make Akbar an Emperor of the highest legal authority. Sheikh Mubarak Nagauri drew up a document to which the leading ʿulama of the court were forced to affix their signatures. Its main purpose was to establish that if the jurists differed on a point of the law, Akbar would decide what interpretation he would enforce. The document was called mahdar. The scheme did not succeed as such because no situation has been reported in which the ʿulama had differed to such an extent that Akbar had to intervene personally. Abul Fadl painted and propagated the image of Akbar as a 'supreme dispenser of justice.'

The most visible manifestation of the emperor's role in judicial affairs was the evolution of the jharoka-i darshan, which had been a Hindu institution innovated by Akbar to facilitate public appearance. According to Mitchell "adapting a previously Hindu facility such as this was one of the many examples of Muslim Indianization common to the sixteenth and seventeenth centuries." In general, Mughul Emperors were impartial and stern in delivering justice to their subjects. Abul Fadl mentions that: "His Majesty in his court makes no difference between relative and stranger and no distinction between a chief and a tangle haired beggar." Akbar gave death sentence to a powerful military Chief of Gujrat for the murder of one Changez Khan on the complaint of the mother of the deceased.[2] Akbar's judicial policies seem to be partly motivated by the humanitarian principles of sulh-i kul and partly to reassure the Rajput nobility serving in the Mughal court.

The second important Mughal emperor to mention in this work after Akbar and before Awrangzeb, is Jahangir. He ascended the throne in 1605 and retained his father's definition of a just ruler. As a king the first order he gave was "[F]or the fastening up of the Chain of Justice, so that if those engaged in the administration of justice should delay or practice hypocrisy in the matter of seeking justice, the oppressed might come to this chain and shake it so that its noise might attract attention."[3] Following this he issued twelve ordinances, varying from the banning of river toll fees to prohibitions against facial disfigurement. Whenever, he periodically shifted his royal court, one of his first orders was to have a temporary judiciary built in the new city. He did this in Ajmir and Ahmadabad. He used to hear civil and criminal cases every week.[4]

In his letter of January 17, 1615, Sir Thomas Roe, Ambassador of English King James I from 1615 – 19 to the

court of Jahangir, sums up what he observed in his initial days in the court and says that "They have no written law. The King by his owne word ruleth, and his governours of provinces by that authoritie. Once a week he sitteth in judgment patiently, and giveth sentence for crimes capitall and civill."[5] He took equality before the law so seriously that, after hearing how the governor of Punjab, Saʿid Khan Chaghta'i, was ruthlessly extracting revenue in his area, the Emperor sent him a message that "[M]y justice would not put up with oppression from anyone, and that in the scales of equity neither smallness nor greatness was regarded. If after this any cruelty or harshness should be observed on the part of his people, he would receive punishment without favour."[6] Jahangir deplored murder committed by the nephew of Khan ʿAlam, Hushang, and when he was found guilty, the king said, "God forbid that in such affairs I should consider princes, and far less I should consider amirs. I hope that the grace of God may support me in this." With these words, the emperor had Hushang executed. He was very particular about guaranteeing the rights of minorities. In 1608, he issued a firman to the governor, officials and jagirdars of the province of Gujrat ordering them to safeguard the temples and dharamsalas of the Jain community. They were also ordered not to levy taxes on pilgrims visiting the tirtha of Shatrunjaya.

Judiciary Under Awrangzeb

Under Awrangzeb, courts were extremely independent and were used as a byword for independence, so much so that when Awrangzeb himself wanted the court to give capital punishment to an accused in a case, the court refused to accept the plea.[7] Alamghir had been extremely neutral otherwise. He appointed a group of eminent jurists to try Dara Shikoh, his brother who was accused of apostasy. Dara Shikoh was another Akbar in the making because he was more learned. He had translated many books on Hindu philosophy; was the leader of the heterodox and was an opponent of orthodoxy. Alamghir wanted to demonstrate to the world that he was neutral in the trial and that his treatment of his father, whom he jailed because he had sided with Dara Shikoh, was justified. The special tribunal held that Dara Shikoh's religious opinions amounted to apostasy and he was executed in September 1659. Alamghir did not intervene in the case although it was political in nature. Alamghir is credited for ordering the famous Al-Fatawa al-Alamgiriyah (hereafter Fatawa) – also known as Fatawa Hindiyah – by a Royal Commission of ʿUlama under the supervision of Sheikh Nizam. The Code was the great Corpus Juris of Aurangzeb's reign and is more or less an exposition of the substantive law then prevailing in India. It was not only used by the Qadis of Alamgir but also by other Emperors till the end of the Mughal dynasty.

Legal Reforms of Aurangzeb

Of all the Mughal rulers Aurangzeb introduced a series of legal reforms in the administration of justice, some of which survive to this day in both Pakistan and India. First, he introduced the system of "Remand" of accused by the court to the police custody. The Kotwals were ordered to obtain a written order from the Qazi to keep a man under custody for the purpose of investigation. Secondly, he took particular notice of the delay in the disposal of cases and issued directions that all criminal cases must be tried without delay. If after the first date of hearing the case was not taken up, the next day the Kotwal was required to send the prisoners daily to the courts till matters were decided (har roz anja be ferisand ke maamlah ra be istejal faisal numayend). Thirdly, he issued a Firman that no one was to be taken into custody until prima facie legal evidence was available and that no prisoner was to remain in jail without a lawful charge (hech kas be hisab dar qaed na manad).[8] Fourthly, Aurangzeb wanted transparency in administrative as well as judicial matters and to this end he directed the keepers of State records of rights to permit the public to examine the same. Fifthly, for the first time in the reign of Aurangzeb 'Vakils' (lawyers) were appointed to defend suits against the State in every district. They were known as Vakil-e-Sarkar or Vakil-e-Shara'. These Vakils had to give free legal advice to the poor. They were appointed by the Chief Qazi of the Province or sometimes by the Qaziul Quzat. Sixthly, Awrangzeb had framed written regulations (Zabath) on every subject and required strict adherence to them. This was in addition to his achieving the compilation of Al-Fatawa al-Alamgiriyah. Finally, Awrangzeb also reformed the appeal system. He issued orders that parties should get their disputes decided by the local Qazi in the first instance before bringing their cases to him.

Awrangzeb issued orders for the preparation of "Mahzarnamahs" or records of judgments of higher Courts for circulation among the Qazis and Muftis. Unfortunately, no published record of these cases is available. The only manuscript with details of cases and judgments is Baqiyat al-Salihat, which contains fifty judgments during the period 1550-1850 A. D. Some authors have mentioned that the Mughul Qadis were very corrupt. However, it is difficult to believe their assertions and ignore Manucci, a European, who has recorded his eye account. Khawfi has also praised the independence and impartiality of Mughul's judicial system.

Court Organisation and Personnel

Before giving details of court structure and personals it is necessary to mention the central government of the Mughals. The Emperor was the Commander-in-Chief of the entire army and Navy. The Emperor had a council of ministers, the most influential among them was the Wazir or Vakil-e-Mutlaq or Dastur-e-Muaʿzzam. He was like the modern day Prime Minister. Other ministers approached the Emperor through him. The revenue, finance and agricultural departments were under the Diwan-e-ʿAla who was also the final appellate court for revenue cases. Military administration, the salaries and accounts were under the Mir Bakhshi while the administration of justice, jails, customs, baitul mal and mosques were under the Chief Justice, Qadi al-Qudat. Other notables ministers were Darogha-e-Topkhana (Master General of Ordnance); Darogha-e-Dak (Post Master General); Mir Saman (Lord High Steward of the Imperial Household); Sadrus Sudur in charge of the Ecclesiastical Department; and Mohtasib-e-Mumalik-e-Mahrusah or the Chief Mohtasib. He was the Chief Public Prosecutor in State cases and was also the Chief Censor of Morals.

Diwan-e-Mazalim

From the very beginning of the Muslim Empire, cases were categorized as civil, criminal and political. The latter two were always tried by the Khalifah himself while the former two types were decided by the Qadis. Political and administrative cases were sometimes secular in nature and were described as Nazar fi al-Mazalim by the Fuqaha (Muslim jurists). Both Akbar and Awrangzeb devoted one day of the week to such cases and called it Diwan-i-Mazalim. At the Imperial Capital (Darul Sultanat), the Emperor was the first judge of the realm and the 'fountainhead of Justice'. Shah Jahan and Awrangzeb used to hold this special court on Wednesdays. On that day the Emperor would come directly from the window or balcony where he used to appear before the public every morning, to the Diwan-i-Khas (or Hall of Private Audience) and would sit on the throne of Justice. The Hall was filled with the judges (Qadis), muftis (ʿulama), the kotwal or prefect of the city police, the superintendent of the law court (darogha-i-adalat) and the muhtasib. Plaintiffs were presented one by one before the Emperor and narrated their grievances. The Emperor would gently ascertain the facts by asking questions, consult the muftis and pronounce the judgment accordingly. As the fountainhead of justice, he tried original civil and criminal cases and also sat as the final aegis of appeal within the Empire. Moreover, all capital punishments were required to be confirmed by the Emperor. All the European travellers have given their accounts of how the Mughul Emperors held courts on a special day.

The Chief Justice or Qadi al-Qudat

Below Diwan-i-Mazalim, there was the court of Qadi al-Qudat or the Chief Justice. The appointment of the Chief Justice was made by the Emperor. The Chief Justice had the power to try original civil and criminal cases, and to hear appeals from and to supervise the working of the Provincial Courts. He was assisted by one or two Qadis of eminence. Below the Qadi al-Qudat's court the Imperial capital had its own Qadi who was like the Chief Qadi of a Province. The military area in the capital had its own Qadi (Qadi-e-Askar) who moved from place to place with the troops. Thus, the capital had a lower court presided over by the qadi, a court of appeal presided over by the Qadi al-Qudat and above that the Royal Court (Diwan-i-Mazalim). Many officers were attached to the courts mentioned above. They were Darogha-e-Adalat who used to receive applications filed in each court; Mufti – whose job was to give legal opinion, but not to give judgement. The Mufti attached to the Chief Justice's Court was known as Mufti-e-Azam or Sadre Jahan. There were Mohtasibs attached to the Capital who were generally the Prosecutors in Canon Law cases; Mir ʿAdl was an administrative officer to assist the court. A very important post in the Capital was that of Diwan-e-Ala, who was the final authority on Revenue and Financial matters. Appeals in these matters rarely came to him from the Provinces.

Provincial Chief Qadi

In the Provinces (Subahas) there used to be a Governor or Subahdhar. During the later Mughal period (1750 – 1857) the Governor, especially in Bengal, did a lot of judicial work and for this purpose two officers were attached to his court. However, the Governor used to appoint an official called the Darogh-e-Adalat-e-Aliah to run the judicial work of the Governor (post abolished in 1820). The Provincial Judicial Department was under the Chief Provincial Qadi called Qadi-e-Subah who was appointed by the Emperor and had original civil and criminal jurisdiction and was the Chief Court of Appeal in the Province hearing appeals from the District Qadis. Officers attached to the court of the Chief Provincial Qadi were: a Mufti; a Mohtasib; Darogha-e-Adalat-e-Subah; Mirʿ Adl; Pandit; Sawaneh Nawis; and Waqae Nigar. Beside the court of the Chief Qadi of Subah there used to be the office of Diwan-e-Subah for revenue

and financial cases. Appeals usually went to the Governor but sometimes they would go to the Diwan-e-Alah in the Capital.

District Qadi

There used to be a qadi in each sarkar (district) who was under the Qadi-e-Subah. The former was in charge of civil and criminal judicial administration and heard appeals from the courts situated in other areas of the district. The District Qadi Court had various officers attached to it. They were Darogah-e-Adalat; Mir ʿAdl; Mufti; Pandit or Shastri; Mohtasib;9 and Vakil-e-Shara'.

Officials with some Judicial Functions

There were some other officers related to but not direct part of the judicial department of the Mughals. The first such officer was the Sadr who was in charge of the Ecclesiastical Department in the district. He was appointed by the Sadrus Sudur. His duties included: checking of the 'Sanads' of Qadis, Mohtasibs, Khatibs, Imams, Muezzins and Mutawallis; issuing 'parwanahs' for the daily stipends of officials and Ulamas in the city and other towns; and passing bills for payment to charitable endowments. His judicial functions were limited to settlement of claims relating to madad-e-mʿaash grants or sitting on a Bench with the District Qadi to try Canon law case. There used to be a Faujdar – whose judicial functions included trying petty offences. Later on his powers were enhanced. Kotwal was another official who was subordinate to the District Qadi and had jurisdiction in minor offences. Another official was called Amalguzar who decided rent and revenue cases. To his court was attached a Darogah-e-Katcheri. Waqae Nigar or Waqae Nawis or Akhbar Nawis recorded proceedings of the courts mentioned above on daily basis and sent them on to the Emperor. These reports were scrutinized by Qadi al-Qudat or Qadi-e-Subah.

Qadi-e-Parganah

He was the principal officer in the parganah (town). His jurisdiction extended over the villages included in his Parganah. His powers were similar to the District Qadi however, the former could not hear appeals as there were no subordinate courts to him. A number of officials were attached to his court. They include a Mufti, a Mohtasib-e-Parganah, a Darogah-e-ʿAdalat where necessary, and a Vakil-e-Sharʿa (who had a staff of three clerks and one accountant). In some Parganahs there used to be a Faujdar-e-Parganah who exercised the same powers as the District Faujdar. A few districts had Amins or Revenue officers, while in other places there were no faujdars at all and their duties were performed by Shiqdars or Kotwals. Sometimes the local landlords were appointed in Parganahs to try Common Law cases. Appeals from their courts lay to the District Qadi's Court. Karori and Amin-e-Parganah used to decide revenue cases in the Parganah.

Panchayat

Much before the advent of Muslims to India there existed a very good system for resolving small civil as well as petty criminal cases among the population in Indian villages. The early Sultans retained the same system. A village used to have a council of elders called panchayat. These panchayats were very active. The punishments took the forms of public humiliation, fines and ostracism. The last punishment had serious social and economic consequences, especially in a caste based society. Hence the orders of the panchayats were invariably obeyed. Serious criminal cases came under the jurisdiction of the qadi. Its main functions were the settlement of disputes. Matrimonial, communal differences, land, quarrels concerning watering fields and sharing of the produce were settled by the panchayat.

The legal relations between the non-Muslim subjects of Muslim rulers in India were regulated according to the principles of their own faith (Digest of Muhummadan Law, Baillie). In disputes between a Muslim and a non-Muslim, the decision was given according to Islamic law, as already mentioned. When the case was between two Hindus it was referred to the judgment of the pundits. They (Panchayat) held their sittings in public and administered justice in the village in cases involving petty civil disputes and where minor offences were concerned. The decisions of the Panchayat were binding and normally no appeal was allowed. The decrees were generally executed. The Headman or the Chaudhri was usually the head of the Panchayat and had to maintain peace and security in the village. Under the later Mughuls, subordinate courts were established in many of the sub-districts presided over by a Naib-i-Qadi. Jain argues that the Mughul judicial system was simple and served the needs of the people. All capital cases had to be approved by the Emperor while all important civil cases were also brought to him. The Qadi was the Chief Judge in criminal cases, and tried them according to Islamic law. Cases between Muslims, as well as cases in which one of the parties was a Muslim, were tried by him. The Qadi in each Sarkar had the power to appoint their assistants or Naib-i-Qadi in important centres. In each sarkar, the Kotwal performed many duties. He acted as a

prefect of the police and a municipal officer. Secular type of criminal cases went to him. The Mufti was a learned theologian and consulted books on Islamic law regarding disputes and advised the Qadis who pronounced the sentence or decision. It appears that each and every Qadi consulted a Mufti before giving a decision. However, Hussein argues that only Qadis who were not quite sure about some legal points referred the case to a mufti and took a fatwa from him.

The Mir 'Adl

There was a department for discharging the executive duties of the court. The Mughuls called the officer responsible Mir 'Adl. Abul Fadl, Akbar's secretary, has summed up in Ain-i-Akbari, the relationship between the Qadi and Mir'adl in a nutshell: “One finds out, the other puts (the finding) into effect.” The Mir'Adl used to draw the attention of the Qadi to a miscarriage of justice and to delay the execution of some decisions pending trial before a higher court. Moreover, he used to make sure that parties and the witnesses attended the Qadi court, and that the decrees of the court were executed.

Qadi ʿAskar

Under the Mughuls there was a separate Qadi for the army known as Qadi-i-Askar. His jurisdiction was confined to military camps. In a case in which one party resided in the jurisdiction of the qadi-i-askar and other in that of the qadi of the city and the latter insisted on having the case tried in the city court, the qadi of the army could not try it unless he had been specially empowered to try all such cases. However, if both parties belong to the askar and wanted to take their case to the city qadi, they could do so, and the city qadi had the power to entertain it. What is clear from this is the fact that there was no difference as far as the content of law or its application was concerned. The Qadi of the city as well as the qadi of the military camp were applying the same law. There could be civil cases in which two individuals were involved and not a case involving discipline within the army or breach of army code, etc.

Mohtasib

One of the most important institution of the Mughal Empire was that of "hisba" under which mohtasibs were appointed. The Abbasid as well as the other Muslims rulers who ruled the Delhi sultanate also had the same institutions. Mawardi has given various duties of a mohtasib. The mohtasib was theoretically responsible for the maintenance of the Islamic code of morals and behaviour. There was no overlapping between the duties of a qadi and a mohtasib. The qadi had to adjudicate disputes that were brought before him. The mohtasib's jurisdiction extended to disputes relating to weights and measures, adulteration or fraud in merchandize and loans that were not disputed and yet which were not paid. Moreover, his duties included the prevention of nuisance, removal of obstructions from and encroachment upon public streets. The Ain-i-Akbari does not mention the institution of mohtasib but there is no evidence that it was abolished either. It is important, however, that some of the traditional duties of mohtasib were sometimes transferred to the Kotwal. All cities and townships had mohtasibs. All mohtasibs were under the sadr-us-sudur and were appointed by him.

Appeals

After sifting through various sources one cannot find precise rules of appeal as they exist today. What is clear is that the decision of the lower courts was appealed to the higher court and then to the highest court. The last court of appeal was the Emperor himself. Appeal against the decision of a qadi lay to the chief qadi (sadr) in the province and from there to the court of the Sadr-us-sudur or Qadi-ul-Qudat of the Empire. This was the appeal system for all civil suits and criminal cases of a religious character. Mirat-i-Ahmadi or History of Gujrat by Ali Muhammad Khan was completed in 1761. It is an excellent book and even the harsh critic of Mughuls, Sir Judanath Sarkar, calls it a very authentic book. It is considered to be the most authentic description of their legal and administrative rules because it is based on State papers. It gives full copies of imperial Firmans (decrees) addressed to the officials of this province. One of the famous firmans, sent by Awrangzeb Alamghir to the Diwan of Gujrat on 16th June 1672, gives his penal code in a nutshell. The whole firman cannot be given here but some of the court personnel, their jurisdictions, and the appeal system are extracted below to understand the nature of judicial system in Gujrat because the same was applied in other provinces of the empire. The code mentions that all serious criminal cases like theft, highway robbery and homicide are decided by the qadi. Moreover, in case of crimes for which punishment is not fixed in Islamic law, the court has the discretion to give the punishment of ta'zir. If capital punishment was awarded by the Qadi, the person was put in prison while the case was reported to the Emperor for confirmation. Cases of revenue were disposed off by the revenue officers. When a man was brought to the chabothra of the Kotwal under arrest by the police or revenue collectors or accused by a private complaint, the

Kotwal had to investigate the charge personally. He had to resort to court if there was a case against him. If there was a case of revenue department against him, the case had to be reported to the Governor (subahdar). The word subahdar and governor are used in the above firman interchangeably. In cases where the punishment was not fixed in Islamic law and the Qadi had to exercise his discretion, the opinion of the subhdar regarding conviction or execution was very important for the qadi. Moreover he was personally dealing with revenue cases.

7. Conclusion

In summing up the discussion about the Mughal judicial system, an account of the relationship between the executive and the judiciary is necessary. Moreover, the main reasons for the disintegration of the Mughals are very relevant here. As a matter of fact both the base and the superstructure of the Mughal state laid down by Aurangzeb continued till the death of Muhammad Shah in 1748. The central authority of the state weakened thereafter. However, even in the heyday of the Empire, the administrative machinery used to change slightly from monarch to monarch. Under the Mughals, judiciary and the executive functioned separately except that the King and his Provincial Governors exercised them together. However, when the Emperor or the Governor held trials, the proceedings in his court were purely judicial. When the Emperor heard appeals, he presided over a Bench consisting of the Chief Justice and Qazis of the Chief Justice's Court. As a Court of first instance, he was assisted by a Darogha e-Adalat, a Mufti and a Mir Adl. Similarly the Qazi-e-Subah was a member of the Governor's Bench and any decision by the Governor had to confirm to the legal opinion expressed by the Mufti. On the other hand relations between the Qazis and the executive were cordial during the reign of Aurangzeb as decrees of the law Court were obeyed and the Qazis were held in great respect. Aurangzeb held it to be a maxim that the complaint of a poor citizen against a highly placed individual was to be given credence. Some Hindu authors, nevertheless, accuse Qazis of Aurangzeb to have been corrupt. But it seems that they are biased. It is hard to find examples where a Qazi was removed by the Ruler on the ground that he gave an inconvenient decision. Aurangzeb had left a completely settled Empire at his death. Its disintegration commenced in the reign of Muhammad Shah (1719-1748). He is said to have thrown an urgent report of an important conspiracy into a barrel of wine as useless bother, and did not recover from the effects of his orgy till two days after. Chaos started on the death of Muhammad Shah in 1748. From 1750 A. D. onwards, there were five puppet Emperors, who were quite incapable of exercising the control necessary to preserve the vast Empire left by Aurangzeb. Consequently, the downfall of the Mughal Empire started when the Emperors were no longer able to uphold individual rights or to do justice between man and man, and when their subordinates became too powerful as against the decrees of the courts. As a result, in the Muslim India that remained, the judiciary became merged in the executive in a manner always discouraged by Islam and the early Caliphs. The Governors, who had assumed the powers of an Emperor in their Subhas, were now supervising corrupt judicial officials. Every judicial official was now trying every kind of case. The situation was summed up by an English official in 1772. “Abuses in the administration of Justice were to be imputed rather to the corrupt principle of the Muhammadan and Gentoo (Hindu) Judges than to any defects in the Law or in the regulations of the courts.” It was in this state of affairs when the East India Company was appointed Diwan of the Subah of Bengal in 1765 by a Royal Farman. It appeared that the fate of Muslim India had changed forever.

1. Qureshi, *The Administration of The Mughal Empire*.
2. Husaini, *Administration*.
3. Jahangir, *Tuzuk-i Jahangiri*, trans. and eds., A. Rogers and H. Beveridge, London, Vol. 1.
4. Hasan, *The Central Structural*.
5. *The Embassy of Sir Thomas Roe to India from 1615-19*, ed., Willium Foster, Munshiram Manoharlal, Delhi, 1990.
6. Jahangir, *Tuzuk*, Vol. 1.
7. N. Manucci, *Storia do Mogor*, ed. & trans. W. Irvin, R. A. S., London.
8. It is not clear whether it is a mere coincidence or otherwise that when Aurangzeb was issuing these regulations in India in 1679, the British Parliament was enacting the Habeas Courpus Act for England.
9. They were appointed on the orders of Awrangzeb to enforce morality. Their departmental chief was the *Sadr*. Prosecutions in Criminal Courts were conducted by *Mohtasibs* and the Police.

Dispute Resolution and the Oil & Gas Industry – When taking control goes out of control

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The Oil & Gas industry, being a private industry having a world of its own, is very untraditional to its approaches in law and towards its relationships. Its approach towards handling disputes varies from the approaches used in other industries. It works in ways to gain speedy and confidential resolutions so as to lose as less as possible to compete and maintain good relations with its players in the Oil & Gas industry. It is a global inter-related industry with a tight managed network of its own, working closely with its own State, other states, public agencies and other players in the industry. Therefore, parties wish to have a continuing relationship with the other partners, and thus, would want to resolve their disputes by simple means of negotiations. However, where negotiations fail, then a means of settlement and a medium becomes imperative.

Choice of Procedure

Parties may opt for various forms of procedures for resolving its disputes. This may differ where one party wants to instigate a proceeding or, by processes whereby both parties' would require participation. For disputes where one party is being affected, the party may go through processes such as complaints procedures or through regulators. This is where smaller issues may be dealt with in a quick and effective manner; however, the decisions made are only in form of proposals or recommendation and are not final and binding. For more serious issues, a party may pursue its cases in courts or tribunals. More frequently used are processes and disputes where both parties require participation. An informal and most common method is to resolve disputes through negotiations. Some agreements provide that the parties' senior management may meet and seek to discuss issues in good faith, the issue in dispute, with a view to secure early and informal resolution. This is sometimes called an amicable settlement. Another common method is of going through the process of mediation. This may be of different types, mainly being facilitative, evaluative and transformative. A provision may be made in the agreement for a conciliation, which is an agreed solution, by a conciliator who talks to both parties or hears their cases and comes up with a compromise which is acceptable to both parties. Parties may also use processes such as neutral evaluation and expert determination, the former dealing with an expert who will hear general issues and thereby giving advice while the latter deals with more technical disputes about different issues arising from contracts. Some agreements provide that the parties will jointly agree and appoint an independent expert for the determination of certain matters in dispute, with a provision for an independent third party to decide upon the appointment of an expert for the parties if they are unable to choose one on their own. More commonly and in more complicated disputes, the parties may recourse to arbitration, before a sole arbitrator or a panel of arbitrators, appointed in accordance with a prior agreed procedure. Arbitration is a procedure whereby the legal rights and obligations of the parties are determined with private proceedings. Agreements between parties usually address issues like the nature of the disputes to be referred to arbitration, the consent of the arbitral tribunal to act, the applicable procedural law, the venue of the arbitration etc. If no rules are provided by the agreement between the parties, then the local laws shall apply and it shall be left to the arbitrators to decide on the suitable procedural rules. Arbitration can either be institutional (or sometimes called administered) arbitration, or ad-hoc arbitrations. Institutional arbitrations is where the arbitration is conducted under with the established procedural rules of a recognised arbitral institution, for example, rules promulgated by the International Chamber of Commerce's International Court of Arbitration (ICC), the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), or the China Economic & Trade Arbitration Commission (CIETAC). Ad-hoc arbitrations are where the arbitration is governed by whichever procedural rules the parties wish to select, even if it is one of its own means.

Dispute Resolution, Arbitration v Litigation

Disputes are generally resolved more speedily by arbitration than by litigation. Laws, generally requires arbitrators and parties to expedite the dispute resolution process, whereas the litigation process due to its nature, is more time consuming and rigid. Where parties are from different jurisdictions, arbitration offers more impartiality in choice of venue of arbitration and its applicable rules as parties will not be willing to submit to the jurisdiction of national courts. In the Oil & Gas industry, privacy for

organisations and individuals are of key importance, thus parties would prefer to recourse to arbitration where proceedings and awards are kept confidential, rather than turning to the courts where litigation is conducted in public and the proceedings and judgments are kept under public record. As arbitrations and other processes of dispute resolutions are quicker, the costs would be lower than the costs of litigation. In comparison with the appointment of a judge who may have no technical background on the issues, it would be a better option to appoint an expert with the particular technical and commercial expertise on the subject matter of the dispute. Court judgments are harder to enforce in different jurisdictions whereas, there are some international conventions which give effect to recognition and enforcement of arbitral awards made in foreign jurisdictions.

Approaches to Dispute Resolutions

Parties should in the process of negotiations before entering into an agreement adopt positive approaches to the building and maintaining of relationships and to processes of dispute resolutions. A collaborative approach should be taken to the construction of contracts. This could include cooperative relationships which would facilitate the creation of culture of trust, open communication, feedback and a desire for continued improvement. Based on this approach, parties could come up with a mechanism whereby the best possible solution for an effective dispute resolution process could be formed jointly. This approach does not necessarily favour dispute resolutions but the approach could provide a speedy and effective process within the original contracting as opposed to the traditional ways of contracting.

Selection of Process

Parties to commercial contracts are free to fashion their dispute resolution agreement which caters to their needs, inter-alia choice of the dispute resolution procedure, and choice of a suitable forum. This is what makes arbitrations most prominent over the other processes. There are various choices parties can make when considering the factors which may affect different types of disputes and their resolutions. Parties may be concerned with the provisions set out in the agreement that may impact the dispute resolution process. A good example of such a provision may be the force majeure clause. Sometimes force majeure clauses may be forcefully imposed by one party onto another party for the former party's own convenience and benefit. Thus, parties should be careful with the construction and wordings of such clauses. Parties entering into agreements need to have vast knowledge of the industry to determine the nature of the dispute or the anticipated dispute. The location of the dispute and the timing of the activity are yet other factors which may affect the parties' choice. Generally, when parties enter into multiple agreements in related activities and contracts, it becomes imperative for the parties' to set out procedures, rules and choice of forum at the early stages of entering into the agreements. Similarly, parties' may not want to be bound by particular forum selection clauses in subsequent agreements as there might be obligations on the parties' to use certain processes which they might want to be aware of before submitting to them. Therefore, lawyers in the Oil & Gas industry need to be vigilant in drafting new and amending existing contracts. When dispute resolution clauses are not carefully drafted, it leads to uncalled for disputes and thus creating a lot of problems for both parties. It is only at this initial stage where the parties have the best opportunity to take control of how the disputes may be handled. It is very important for lawyers to have a good perceptive and knowledge of the culture of the industry and the workings of the relationships between the projects and contracts of the parties, in addition to the understanding of the choices of dispute resolution processes, its locations and the impact of the dispute resolution procedures.

Dispute resolution processes seems to be a foreseeable option for the players involved in the Oil & Gas industry. This is mainly due to reasons that the culture of this industry is very different and unique from the other industries. Maintaining good relations and minimising risks and reducing costs to the least are of utmost importance. The processes of dispute resolutions seems a more attractive option over the procedures of national courts as it tailors the needs of the parties' involved, in a more effective and organised way. However, the trend of litigation still exists in this industry. It may be said that the options considered by the industry are appropriate; however, due to the nature of the industry, most of the time even these options are exploited to the fullest. This sometimes makes this simple process more complicated and time consuming than that of the courts. The dispute resolution processes are being put to very tactical and calculated use. Every player wants to take advantage of the situation and make the most for them. A more positive and strategic approach needs to be adopted such as the collaborative approach towards drafting of contracts. This suggestive approach is an effective way of mitigating costs and minimising the unproductive adversarial ways of resolving disputes.

Quality Control Assurance: a need of the 21st Century

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The world has progressed exponentially in the past couple of decades. Twenty years ago, it took a great stretch of imagination to visualize simultaneous and similar development taking place globally. The civilized world was blatantly disengaged from the developing world, and there could hardly be a serious comparison in the standard and quality of life found in these opposite, almost alien worlds.
Globalisation and international trade has rapidly changed the face of the world as we know it. The various cultures of the world are fast amalgamating and a new breed of business is coming to the fore from this boiling pot. Brands, products and gadgets only seen on limited western television programs once upon a time have now become common household products in town and villages of third world countries, and similarly the unique and exotic artifacts, spices and souvenirs from far off lands are available at shopping malls and online forums in all corners of the world. The world is fast becoming a single platform for businesses, product manufacturers and service providers, providing consumers a diverse palette to choose from.

On the one hand, globalised business is a great opportunity for multinational companies and corporations to expand operations and tap into newer lucrative markets, but on the other, a great responsibility emerges to ensure standards and high quality. With cut-throat competition and high maintenance consumer demands most corporations have become bolder and innovative in their approach in order to maximize profits at lowest costs. This creates the possibility of faulty or below average products finding their way into our homes, causing risk and harm to us monetarily and some unfortunate times physically. This threat has been addressed by most establishments and governments by establishing International Standards of quality through mechanisms and checks such as ISO ratings, etc. Even so, with most products and services having no measurable international standards, or regulatory measures to ensure such standards, the function of Quality Control and Compliance has gained great importance.

The field of Quality Assurance has manifested in recent times in many forms both internally at multinational companies, and in independent bodies aiming to maintain a check and balance at free market practices gone wild. The function of Quality Assurance is perhaps the ultimate aim of more commonly recognized departments or units such as Compliance and Audit.

Quality assurance is the process of verifying or determining whether products or services meet or exceed customer expectations. Quality assurance is a process-driven approach with specific steps to help define and attain goals. This process considers design, development, production, and service. The most popular tool used to determine quality assurance is the Shewhart Cycle, developed by Dr. W. Edwards Deming. This cycle for quality assurance consists of four steps: Plan, Do, Check, and Act. These steps are commonly abbreviated as PDCA.

The four quality assurance steps within the PDCA model stand for:

- Plan: Establish objectives and processes required to deliver the desired results.
- Do: Implement the process developed.
- Check: Monitor and evaluate the implemented process by testing the results against the predetermined objectives
- Act: Apply actions necessary for improvement if the results require changes.

PDCA is an effective method for monitoring quality assurance because it analyzes existing conditions and methods used to provide the product or service customers. The goal is to ensure that excellence is inherent in every component of the process. Quality assurance also helps determine whether the steps used to provide the product or service, are appropriate for the time and conditions. In addition, if the PDCA cycle is repeated throughout the lifetime of the product or service, it helps improve internal company efficiency.

Quality assurance demands a degree of detail in order to be fully implemented at every step. Planning, could include investigation into the quality of the raw materials used in manufacturing, the actual assembly, or the inspection processes used. The Checking step could include customer feedback, surveys, or other marketing vehicles to determine if customer needs are being exceeded and why they are or are not. Acting could mean a total revision in the

manufacturing process in order to correct a technical or cosmetic flaw. Competition to provide specialized products and services results in breakthroughs as well as long-term growth and change. Quality assurance verifies that any customer offering, regardless if it is new or evolved, is produced and offered with the best possible materials, in the most comprehensive way, with the highest standards. The goal to exceed customer expectations in a measurable and accountable process is provided by quality assurance.
Since any measure is useless without a mechanism to check and ensure it's implementation, the phase of monitoring is integral to effective Quality Assurance techniques. Auditing, generally considered to be a financial tool used to catch big companies committing monetary fraud, has now become recognized to have a much broader scope than that.

Audits can be of three types, that is, 1st party (internal), 2nd party (partners/vendors/suppliers) and 3rd party (external). Furthermore, audits can also be categorized according to what they focus on such as systems, conformance, compliance, processes, products and departments. Quality Assurance is the success theme of the future. Good organizations and companies have started to incorporate it into their business strategy, developing well structured Compliance departments and units to carry out auditing tasks in order to maintain the standard expected in the market and ensure the company's reputation is not tarnished for being lax or careless with regard to consumer rights.

Various regulatory bodies, private establishments and even regulatory authorities have begun to emerge adding more structure to budding field. Mostly such organizations cater to specific genres or industries, focusing on requirements within that segment only. The ISO requirements are a classic example of such a body. The Society of Quality Assurance (SQA) focuses on clinical, non clinical studies and manufacturing practices. The Financial Services Authority UK has created a Quality Assurance/Internal Audit wing, subsuming some function of this wing in all aspects of its other business functions.

Multinational companies and businesses have recognized the need for such action on their own and as a result of external pressure from various standard conscious lobbies as well as concerned consumers, and the Governments and State Executive bodies have now started to look into the matter with interest. The need to legislate or at least regulate more profusely has arisen and it is likely that State intervention will become more rampant in judging the kind of products, processes and services available to every day consumers in all fields of business and to people from all walks of life.

The CSR Bandwagon - Are You Onboard?

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I am a fresh Law graduate, having just closed sacrosanct text books I am oozing with optimism and the desire to serve humanity. The world is an empty canvas and I'm out there to leave a mark. This was my philosophy two years ago having just graduated. Today, I work as a legal consultant advising clients on negotiating contractual agreements. I'm also Trust Secretary to a charity, "Thali" working to feed the less fortunate locally. My experiences have altered my naive idealistic vision to acknowledge that today everything is quantified and even morality is assessed by revenue generated off the sympathy votes. While any enthusiast leaves an educational institution thinking of ways to serve the public purpose, the corporate world fans the potential and competitive ability but fails to instill any social responsibility. Pakistan is still struggling with its interpretation of Corporate Social Responsibility. To most, it is a publicity ploy which requires a generous cheque to a worthy cause to ward off public pressure. Moreover, it is not the task of each employee but rather a matter for the HR or PR Departments.

At Thali, we initiated a system for redistribution of food within the community so that the vulnerable do not have to beg for food. The system requires corporations, catering services, restaurants and hotel businesses to redistribute the food saved from buffet layouts instead of throwing it away. It incurs no additional costs because the food is already prepared and is an automatic environmentally conscious method of recycling. The food is not going to waste but rather acts as a life saver. While this proposal is under consideration with several hotels who say they never have food left over, others have started to participate. What is the reason that CSR is not pervasive in Pakistan? Is it maybe because we haven't really thought about it and we still have a lot to learn from global practices?

The Morality Debate

Recently, the debate over the nature and extent of the social responsibilities of business has become heated and complex. Surprisingly, it is not a term to be found in any textbook of ethics or political philosophy. Firstly, the entire concept of categorizing anything within the parameters of morality brings up the argument that morality is a religious notion and not a standard that a business entity has to comply with. It is a human aspiration and therefore not a professional practice. Then comes the debate that business is a human by-product, industrial standards are manmade, and should stem from a morally sound space. As embedded in law, ethical business standards to have to be abided by. The underlying principles of negligence and consumer protection are based on ethics. The case that gave rise to tort [Donohue vs Stevenson] involved facts where a consumer ingested ginger beer and suffered food poisoning; it was the manufacturer that was held responsible for negligence. Therefore, social responsibility should not come across as a saintly task for a few - in a society with a conscience, business practices should not be allowed to evade moral bounds.

Corporate responsibility is welcomed from the customer point of view, because it provides assurance that corporations as well as individuals have obligations towards society at large. Conservative economists have claimed that business benefits society by creating wealth and that is its sole purpose. The assumption is that if everyone pursues their self interest, things will balance out and society at large will reap the rewards. This is the economic theory of the 'invisible hand' which goes back to Adam Smith's Wealth of Nations. Unfortunately there are too many real life examples where the unrestricted pursuit of profit has clashed with the interests of consumers, workers, society and the environment. Western governments today exert considerable restraints on business through legislation to achieve socially acceptable ends. Governments -- the UK government for example -- are now urging companies to do a lot more than the law requires. Statements from Gordon Brown1 and the Government would like us to believe that pursuing CSR is in a company's own self interest. CSR adds value to your 'brand '.

Is that true, or merely propaganda? Business people are not so easily persuaded. What may be more persuasive are the increasingly vocal special interest groups and Non Government Organizations (NGOs) whose widely publicized campaigns are making a real impact on consumer perceptions, as well as influencing government policy. Corporations complain that these interest groups are in many cases simply ignorant of what is economically feasible. Having gained their initial objectives they are

never satisfied but merely increase their demands. There is some justice in these complaints. Certainly the case can be made that NGOs themselves ought to behave more responsibly. Nevertheless, in the face of this mounting pressure, companies in the developed hemisphere are ready to do a cost-benefit analysis which takes CSR in account.

Should CSR be regulated by Law?

The current situation in the UK is a celebration of diversity. There are laws concerning minimum wage, Health & Safety and disclosure to investors, but none covering overall disclosure of environmental impact, little covering supplier relationships and almost nothing on community impact. Opinion in the CSR world is just as diverse, some favouring a legal framework for CSR and others fearing it would destroy everything. The most common reason given for why new legislation would set CSR back is the lowest common denominator argument. This suggests that if there were legislation around CSR, then companies will deliver what the law requires, but never more! Strangely, the EC Green Paper even suggests that CSR be defined as that which is not legally mandatory. This is a very odd position. In many parts of the world where legal norms are not well embedded, ethical performance is centrally concerned with whether or not the laws which do exist are actually observed in practice. Conversely it can be argued that UK is debating the standard for CSR. The present dilemma is just how much importance should be accorded to the notion that CSR obligations should be codified.

The South Asian paradox

In South Asia, progress on adoption of responsible business policies has been even slower than the relatively dawdling economic growth. Acceptance of CSR principles has been unorganized and businesses tend to prefer giving donations rather than researching, planning, developing and implementing social and community development projects to build CSR programsmes. With the exception of a handful of leading companies, businesses continue to perceive CSR as a burden rather than a requirement to promote and expand their operations by giving something back to the society. There is a clear need for creating awareness about doing responsible business and promoting ethical CSR rather than brand associated campaigns.

Initiatives in Pakistan

Pakistan is still struggling with its interpretation of Corporate Social responsibility. Of course, multinational companies and bigger corporations have made contributions towards social betterment; however they are unfortunately very isolated and done just for public lime light. To most, it appears to be merely a media strategy that entails them to write a blatantly generous cheque to an established charity and ward off the public pressure thereon. Moreover, majority of times, it's not an inherent task for each employee but rather a matter for the Human Resource or Public Relation Departments. While most countries across the globe are riding the so called second wave of CSR, which is efficiency-centered and market focused and have reached conceptual clarity, now looking at the impediments to CSR implementation, Pakistan has just started its journey. CSR Pakistan, a leading website (www.csrpakistan.pk) quotes in recent years responsible multinationals and national companies have started executing CSR projects and creating positive examples for others to follow. The momentum could build up but is contingent on a positive and sustainable business environment. Not all corporations have tangible CSR programmes and this could only happen if businesses operate freely and profitably to become ethical and socially responsible corporate citizens of Pakistan.

The Need Now

Most philanthropists agree that there is a need for some regulatory body to be established for surveillance of all CSR campaigns and initiatives as no company is bound to honor their social pledges because there is no regulator ensuring that they do so. Most NGO's within the country feel that approaching each corporate entity is a tiresome process which yields little success. What is required is in fact an institution, maybe the Securities and Exchange Commission of Pakistan, which NGO's can approach and who direct them to appropriate companies.

1. In a recent document on CSR, Gordon Brown was quoted as stating that: *'Today, corporate social responsibility goes far beyond the old philanthropy of the past -- donating money to good causes at the end of the financial year-- and is instead an all year round responsibility that companies accept for the environment around them, for the best working practices, for their engagement in their local communities and for their recognition that brand names depend not only on quality, price and uniqueness but on how, cumulatively, they interact with companies' workforce, community and environment. Now we need to move towards a challenging measure of corporate responsibility, where we judge results not just by the input but by its outcomes: the difference we make to the world in which we live, and the contribution we make to poverty reduction.'*

IPRs and Islam

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Of all the creative work produced by humans anywhere, a tiny fraction has continuing commercial value. For that tiny fraction, the copyright is a crucially important legal device." Lawrence Lessig

Two simple sentences encapsulate the concept behind the critically challenged and highly debated issue of copyrights. An artist may feel empty after completion of his masterpiece if no one is there to praise it. A poet may be at loss of words and spirit for self-admiration, for who could call him 'gifted' when he has not shared his deep thoughts. An innovator may find his invention worthless if he fails to write his method of assembling its components. Nevertheless, such displays may only become public if they are not plagiarized and granted exclusive rights. The topic of intellectual property rights (IPRs) is a relatively new concept introduced as a result of evolution of technology and requirement of legal devices to protect intangible assets. From a broad spectrum, the intellectual property rights include trademarks, patents, industrial designs and copyrights. While the former three categories are straight forward, the issue of copyrights has stirred debates among the Muslim and Western jurisdictions as to its limitations to protection. This article will primarily focus on the Western critiques followed by Muslim scholars, briefly glance at Pakistan's approach to IPRs and finally whether or not both jurisdictions' views are similar.

The Western critiques date back to Naturalists time including John Locke's labour theory, Garett Hardin's "tragedy of the commons," and Jeremy Benthem's "utilitarian" theory. Of all the aforementioned critics, Locke's labour theory is most luminous. In a nutshell, the labour theory rests on input of physical endeavor by humans; that input is worth economic value for which they get remunerated. This theory is prevalent in case of intellectual creation of ideas. Translating this theory in context of copyrights, any input of mental endeavor by humans is their property and hence worth economic value if sold, published or distributed. The dilemma arises when law has to strike a balance between dissemination and accessibility of information and protection of such copyrights. With regard to property rights and achieving equilibrium between public and private rights, James Boyle provides a justification for tilting towards private rights as a "romantic concept of the creative author." He goes on to elaborate by stating "we are driven to confer property rights in information to those who come closest to the image of the romantic author, those whose contributions to information production are most easily seen as original and transformative." In Boyle's opinion, the copyrights policy ought to promote "efficiency, justice, democratic values and privacy." On the other hand, Neil Netanel supports public accessibility to information and calls for limitation on copyrights policy. According to Netanel elevated copyright laws are troublesome as it "imposes "tax" on audience and authors."

The concern expressed by Netanel and other critics in favor of public rights is legitimate as overprotection of copyrights would foster unnecessary monopolies of authors and diminish future production of creative works. Consequently, concerns expressed by critics such as Boyle hold equal value as it would be unfair and unjust to exploit creators/authors by making their work publicly accessible while economic incentive does not do justice to their creative work. However, since a prudent copyrights policy is to be applied, weighing public rights over private rights, the likelihood is public rights will prevail. It would be inequitable to grant unlimited exclusive rights to authors and pave way for unnecessary monopolization. The justification behind this is the reason that enabled such authors to create new ideas is because they embarked on fishing expeditions to accumulate floating old ideas of others. We now observe how the Muslim school of thought deals with this predicament. Prior to determining how Muslim jurisprudence handles the aforementioned dilemma, it is essential to turn to history of intellectual ideas. Intellectual ideas or copyrights pre-date Islamic civilization as far back to 750 CE. The original work of a poet was well-regarded and respected whereas one who plagiarized the poet's work was highly condemned. The original work was protected and if published, the poet was compensated. Subsequently, a teacher/professor wishing to use author's work for teaching students had to first seek authorization from the original novelist. This type of authorization was called 'certificate of permission' or 'ijazah.' However, since post-Islamic period, the issue of copyrights has been regarded as not more than a norm.

Muslim scholars' have discussed at length regarding sharing of natural resources (mubah). According to various sources some natural resources can be acquired such as reclamation of dead land, hunting, finder of grazing field and miners and treasures if a person is the first to acquire the resources. This is known as the first acquisition theory; the presumption is a person who acquires first is likely to labor for possession purposes and therefore becomes authorized to appropriate profits from it. This theory resembles Locke's labour theory. Conventional scholars believe that term property is confined to physical and visible assets as opposed to intangible assets including copyrights.

On the contrary, the unconventional scholars have expressly acknowledged and accepted that ownership in Islam extents to intangible assets. They rely on primary and secondary sources of Islam. The Quran, being primary source, states in Surah Baqara not to “knowingly devour a portion of property of others wrongfully” and in the Last Sermon Prophet (PBUH) stated"Verily your blood, your property are as sacred and inviolable as the sacredness of this day of yours, in this month of yours, in this town of yours." Furthermore, Ibn Khaldun, one of the first scholars to correlate labour to monetary value, stated, “the effort to obtain sustenance depends on Gods determination and inspiration. Everything comes from God, but human labour is necessary for every profit and capital accumulation.” Translating this to creation of intellectual ideas would mean a person who acquires or reaps creative ideas based on common pool of knowledge is entitled to reap the fruits of his labour.

Moreover, Mufti Taqi Usmani of Pakistan has stated that there are no express provisions in the basic texts which limit ownership to tangible objects. Copyrights, patents, and trademarks are legitimate claims to ownership which give their owners the right to profit from these claims. Additionally, the Council for Islamic Jurisprudence in 1988 ruled that “nobody has the right to violate” intellectual property claims. However, a predicament is surfaced when to deciding whether or not to limit author's exclusive rights over his intellectual ideas. The scholars turn to Quran and Shari'ah for guidance as dissemination of knowledge is encouraged in Islam. Keeping this in mind, the scholars respect author's exclusive rights and provides for its safeguards; nonetheless in case of a conflict between individual's rights and public accessibility the latter will prevail. The rationale behind this approach is that otherwise expansive prohibition to seeking knowledge would amount to “concealment of ilm.” Such an act would be against the tenets of Islam.

Pakistan has been liberal in acknowledging and welcoming issue of IPRs and copyrights to be dealt with under State law, Copyrights Ordinance 1962 and Copyrights Rules 1967. The Copyrights Office was established in Karachi in 1963 and since 2005 it is a part of the Intellectual Property Organization (IPO) of Pakistan. The Intellectual Property Organization is under the administrative control of the Cabinet Division. The IPO has actively been seeking valuable advice from experts of the World Intellectual Property Organization (WIPO) and other friendly countries. In this regard an international workshop, “WIPO National Workshop on Geographical Indications,” was organized by IPO-Pakistan with the assistance of the EU and WIPO in July 2006. Pakistan has a long way ahead in this field nonetheless it is gradually going to become an expert.

To sum up two simple sentences by Lessig while signify the importance of providing protection to copyrights and quantifying them in monetary terms it is only to encourage individuals to continue laboring their minds and creating new ideas for future growth of common pool of knowledge and spreading ilm. It is evident that although Western and Muslim jurisprudence have their own ways and justifications in achieving equilibrium between private rights and public rights, the outcome of both is same. Both jurisdictions, in case of conflict, will prefer public rights over private rights. Similarly, albeit Pakistan's Copyrights Ordinance can be traced back to the British Copyright Act 1911, Pakistan would have introduced corresponding provisions and outcomes if strictly Islamic law was applied.


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