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IN THIS ISSUE

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Letter from Editors

Dear Readers,

It gives us immense pleasure to introduce Volume 1 of the Themis Law Journal (TLJ), a unique publication which aims to provide a platform for legal scholarship and discourse on contemporary legal issues in Pakistan and resultantly gives an opportunity to the general public to inquire, learn, and be involved in legal scholarship. This edition is the result of the collaborative efforts of our management, as well as the members of the legal fraternity, who have made invaluable contributions to making this vision transpire into reality.

The Themis Law Journal seeks to combine excellence with quality. We endeavour to reach out to a diverse array of readership, including the corporate sector, governmental sector, academics, law students and the general public. The basic idea is to enable a productive investigation into the issues in our society and allow a forum for healthy debate to fill the gap between perception and reality. Each article included in this annual issue emphasises the extraordinary work of Themis School of Law's students and faculty, and the members of the legal fraternity and their insightful contributions to the legal profession and Themis School of Law.

We also wish to highlight that Themis School of Law has, since inception, strived to become a centre of scholarly excellence and has continued to adopt a progressive and dynamic approach towards legal education. Our efforts are evident from the innovations in our curriculum, which seeks to inculcate not only strong legal concepts in our students, but also imparts essential professional skills in our students which are crucial to a successful career, in both law and other sectors. Our students as well as our faculty members are a true hallmark of our law school and both seek to give back to the community in a selfless yet monumental way.

We would like to thank all the contributors for their contributions, the students for their relentless efforts, and you, the audience, for your interest in the Themis Law Journal. We hope you enjoy this edition of the Themis Law Journal and find the articles intellectually stimulating and inspiring at the same time. If you enjoy reading our articles and would like to share your own writing, please note that the Themis Law Journal always welcomes submissions to our future print editions and you may write to us at lawjournal@themis.com.pk.

Sincerely,

Syed Shayan Ahmed
CEO & Director Law Programme
Editor-in-Chief

Barrister Ayesha Iqbal
Programme Leader
Co-Editor

Themis Law Journal's Sub-Editors

Mr. Mohammad Ali Magoon:

Mohammad Ali Magoon, a final year LLB (Hons) student at Themis School of Law, has been an integral member of the Editorial Board of multiple publications at the law school. He has also been the Publication Head of the half-yearly newsletter of Themis School of Law. Having eagerly worked alongside the auspicious writers, he has contributed to a great extent liaising with the reporters, editors and authors. Mr. Magoon is passionate about legal writing and discourse and works relentlessly towards ensuring quality publications are produced by the institution.

Ms. Noormah Ahmed:

Noormah Ahmed is a passionate reader and writer and is an active member of the Editorial Board. She is currently a First Year LLB (Hons) student at Themis School of Law and has previously completed her Bachelors in Commerce from Karachi University. Noormah has been a prominent and avid blogger for Yamaha Pakistan and has also assisted in creative content writing for a law consultancy firm. She has actively contributed in the compilation of the Themis Law Journal by gathering, preparing and liaising with the editors and authors of the journal.

Mr. Awais Siraj:

Awias Siraj is an active and enthusiastic member of the Editorial Board and has been a constant contributor to the Themis Newsletter. Moreover, he was also an active member of the Legislative Review and Amendment Team at Themis School of Law, which undertook extensive research and proposed amendments to Manzil Pakistan, a non-profit policy think-tank, seeking to advocate for updating and revising the family laws of Pakistan. Awais is currently a First Year student at Themis School of Law.

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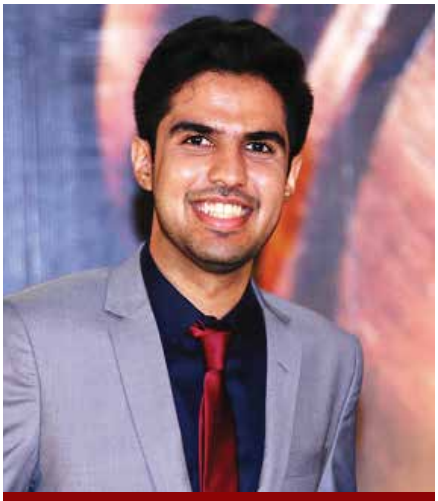

MR. KAWISH NAQVI

Final Year LLB Student
Themis School of Law

Courts and Judges

Supreme Court of Pakistan

1. JUSTICE ASIF SAEED KHAN KHOSA
2. JUSTICE EIJAZ AFZAL KHAN
3. JUSTICE GULZAR AHMED
4. JUSTICE SH. AZMAT SAEED
5. JUSTICE IJAZ UL AHSAN

Parties

Appellant: IMRAN AHMED KHAN NIAZI

Respondent: MIAN MUHAMMAD NAWAZ SHAREEF, Prime Minister of Pakistan / Member of National Assembly, Prime Minister's House, Islamabad and nine others.

Material Facts

The Panama Papers were released in April 2016 and caused an uproar in major parts of the world. The Panama Papers revealed that three of Pakistani Prime Minister, Mian Muhammad Nawaz Shareef's children owned offshore companies and assets which have not reflected on Mr. Shareef's family's wealth statement.

The companies identified as being owned by the Shareef family included three British Virgin Island-based companies titled Nescoll Ltd, Nielsen Enterprises Ltd and Hangon Property Holdings Ltd, incorporated in 1993, 1994 and 2007 respectively.

These companies have allegedly been used to channel funds to acquire foreign assets, including some apartments along Park Lane in London's Mayfair area.

The insinuation that the companies were meant to hide or launder ill-gotten wealth or to avoid taxes called Mr. Shareef's credentials as well his credibility into question.

However, Mr. Shareef and his family members have consistently denied any wrongdoing and had attempted to prove that the wealth was acquired in legitimate and genuine manner. In November, 2017 the Shareef family officially informed the Supreme Court that their London property, the Avenfield apartment more specifically, was purchased through investments in companies owned by the Qatari ruling family.

The Prime Minister in reference to the preliminary investigation stated that the leaks were conspiracies to be used to remove Mr. Shareef from his current position as the Prime Minister of Pakistan and specifically stated that the leaks were meant to "target me and my family for their political aims". In an address to the nation on 5th April 2016, Mr. Shareef specifically stated in his defence "…who use ill-gotten wealth don't keep assets in their own names", reflecting the state of affairs as perceived by him.

Question of Law/Issues

I. What is the scope of the proceedings before this Court under Article 184(3) of the Constitution and whether disputed or intricate questions of fact can be decided in such proceedings with or without recording of evidence?

II. Whether the four properties held in London, acquired in the name of Mr. Hussain Nawaz Shareef, son of Mr. Mian Muhammad Nawaz Shareef, had been acquired by Nawaz Shareef and his family through funds legitimately generated and transferred and whether acquisition of those assets has duly and properly been explained and accounted for by Nawaz Shareef or his family?

III. Whether Mr. Nawaz Shareef and his family have any decent explanation available for acquiring properties and setting up various businesses in general in different parts of the world?

IV. Whether Mr. Nawaz Shareef is not "honest" or "ameen" as required by Article 62(1)(f) of the Constitution as he has failed to duly account for his and his immediate family's wealth and assets and his various explanations advanced before the nation, the National Assembly and this Court in that regard have been evasive, contradictory, unproved and untrue rendering him disqualified from being elected to or from being a member of the Majlis-e-Shoora (Parliament)?

V. Whether Mariam Safdar, daughter of Mr. Nawaz Shareef, was Nawaz Shareef's 'dependent' in the year 2013 and in his nomination papers filed for election to the National Assembly in the General Elections held in that year Mr. Nawaz Shareef had failed to disclose such dependency and had, thus, been guilty of suppression of a material fact for which the neces-sary legal consequences ought to follow?

VI. Whether Mr. Nawaz Shareef had been evading taxes and he had thereby rendered himself disqualified from being elected to or from being a member of the Majlis-e-Shoora (Parlia-ment)?

VII. Whether some allegations of indulging in corruption, corrupt practices and money laundering, etc,leveled against Nawaz Shareef, Muhammad Ishaq Dar and others in the past had unduly been scuttled through some judicial recourses and what would be the remedies available for reopening of those allegations and for their prosecution?

Order of the Supreme Court

1) By a majority of 3 to 2 (Asif Saeed Khan Khosa and Gulzar Ahmed, JJ) dissenting, who have provided separate declarations and directions, we hold that the questions, “How did Gulf Steel Mill come into being? “What led to its sale?"; “What happened to its liabilities?”; Where are the sale proceeds?; How did the proceeds reach Jeddah, Qatar and the United Kingdom?; “Whether Mr. Hussain Nawaz and Mr. Hassan Nawaz in view of their tender ages had the means in the early nineties to possess and purchase the flats?”; “Whether sudden appearance of the letters of Hamad Bin Jassim- Bin Jaber Al-Thani is a myth or a reali-ty?”; “How bearer shares crystallized into the flats?”; “Who, in fact, is the real and beneficial owner of M/s Nielsen Enterprises Limited and Nescoll Limited?”, "How did Hill Metal Establishment come into existence?”;”Where did the proceeds for Flagship Investment Limited and other companies set up/taken over by respondent No. 8 come from?”, and “Where was the Working Capital for such companies acquired from?; “How did the huge sums run-ning into millions gifted by Mr. Hussain Nawaz to Mr. Nawaz Shareef come into existence from? These questions are integral questions to the investigation and this decision and need to be answered. Therefore, a thorough investigation in this behalf is required.

2) In normal circumstances, such exercise could be conducted by the National Accountability Bu-reau but when its Chairman appears to be indifferent and even unwilling to perform his part, we are constrained to look elsewhere and therefore, constitute a Joint Investigation Team (JIT), including members of:

A. FIA (Federal Investigation Agency)
B. NAB (National Accountability Bureau)
C. SECP (Security and Exchange Commission of Pakistan)
D. SBP (State Bank of Pakistan)
E. ISI (Inter-Services Intelligence)
F. MI (Military Intelligence)

3) The Heads of the aforesaid departments / institutions shall recommend the names of their nominees for the JIT within seven days from the decision, which shall be placed before the judges in Chambers for nomination and approval. The JIT shall investigate the case and collect evidence, if any, showing that Mr. Nawaz Shareef or any of his dependents or benamidars owns, possesses or has acquired assets or any interest therein disproportionate to his known means of income.

Mr. Nawaz Shareef, Mr. Hussain Nawaz and Mr. Hassan Nawaz are directed to appear and associate themselves with the JIT as and when required. The JIT may also examine the evidence and material, if any, already available with the FIA and NAB relating to or having any nexus with the possession or acquisition of the aforesaid flats or any other assets or pecuniary resources and their origin. The JIT shall submit its periodical reports every two weeks before a Bench of this Court constituted in this behalf. The JIT shall complete the investigation and submit its final report before the said Bench within a period of sixty days from the date of its constitution. The Bench thereupon may pass appropriate orders in exercise of its powers under Articles 184(3), 187(2) and 190 of the Constitution including an order for filing a reference against Nawaz Shareef and any other person having nexus with the crime if justified on the basis of the mate-rial thus brought on the record before it.

4) It is further held that upon receipt of the reports, periodic or final decision of the JIT, as the case may be, the matter of disqualification of Mr. Nawaz Shareef shall be considered. If found necessary for passing an appropriate order in this behalf, Mr. Nawaz Shareef or any other per-son may be summoned and examined.

Investigation Results of the Joint Investigation Team

1. The JIT collected enough evidence to prove that Mr. Nawaz Shareef, his dependents and benami-dars own, possess and have acquired assets which are disproportionate to their known sources of income and they failed to account for these assets.

2. Authentic documents of correspondence between Mr. Errol George, Director Financial Inves-tigating Agency and the Anti-Money Laundering Officer of Mossack Fonseca & Co. (B.V.I.) Lim-ited confirm that Ms. Maryam Nawaz is the beneficial owner of the Avenfield apartments. The following was further proven by the JIT:

- The Trusteeship document provided by Mr. Shareef's family was not authentic.
- The use of Calibri font before its release is another circumstance through which it can be inferred that the documents provided were not genuine.
- Narrative of Mr. Tariq Shafi regarding receipt of 12 million AED on sale of 25% shares of Ahli Steel Mills formerly known as Gulf Steel Mills is false.

3. The Qatari letters provided by Mr. Shareef is unverifiable as the author of the letters never confirmed the authenticity of the letters through legal methods before the JIT.

4. Respondents failed to provide credible justifica-tion with regards to the inconsistencies in the money trail narrative provided as evidence.

5. There were various discrepancies between 1st Qatari letter and Mr. Tariq Shafi's letter allowing an adverse inference to be drawn regarding the authenticity of both documents.

6. No proof was provided by the Respondents with regards to transporting machinery from Dubai to Jeddah, as claimed by the Shareef family.

7. No justification with reference to the expenditure of Saudi Arabia Riyal, SAR 63.1 million by Mr. Hussain Nawaz was supplied despite the fact that Mr. Hussain Nawaz was entitled to 1/3rd of SAR 63.1 Million.

8. No evidence was supplied with regards to the sources for the Hill Metal Establishment.

9. Mr. Nawaz Shareef failure to disclose his assets with regards to being the Chairman of Capital FZE, is sufficient to call for a disqualification. Disclosure is and always has been a mandatory requirement under Section 12(2)(f) of Representation of the People Act, 1976.

10. Assets of Mr. Hassan Nawaz and Mr. Hussain Nawaz have grown manifold despite all of their businesses running in losses, as alleged also allows for an adverse inference to be drawn.

11. Facts and figures prove that inflows and outflows of Hill Metal Establishment were also fabri-cated and provided as evidence in support of Mr. Nawaz Shareef's case.

Decision of the Supreme Court in view of JIT's findings

1. The Prime Minister of Pakistan, Mr. Mian Muhammad Nawaz Shareef has been disqualified as a Member of the Parliament with immediate effect. The Cabinet of Mr. Mian Muhammad Na-waz Shareef's government must also be disqualified.

2. Ms. Maryam Nawaz is liable to prosecution for forgery of various documents as provided in ev-idence to the JIT.

3. Prime Minister Nawaz Shareef has been disqualified under Section 9(a)(v) of the National Ac-countability Bureau Ordinance, 1999 for not being able to justify his own and his family's assets.

4. Evidence reveals that a triable case under Section 9, 10 and 15 of the Ordinance will be made out against Mr. Nawaz Shareef and his children for the 16 offshore companies as held by them.

5. A reference be filed against Mr. Ishaq Dar whose assets have increased from Rs. 9.11 million to Rs. 831.70 million.

6. A reference will be filed against Mr. Nawaz Shareef, Ms. Maryam Nawaz, Mr. Hassan Nawaz, Mr. Hussain Nawaz, Captain Safdar pertaining to the acquisition of the Avenfield Apartments. NAB will consider "the material already collected" which was obtained "during the course of investigations conducted earlier" and provide their decision.

7. Mr. Nawaz Shareef is not found to be honest under Section 99 of Article 62 because Mr. Shareef hid his company in Dubai and furnished a false declaration under solemn affirmation. Election Commission of Pakistan has been directed to send a notification of disqualification.

8. Two further references will be filed against Mr. Nawaz Shareef, Mr. Hassan Nawaz and Mr. Hussain Nawaz regarding Azizia Steel Company and Hill Metal Establishment.

9. Another reference will be filed against Mr. Ishaq Dar for possessing assets and funds as not reflected in his income. Hence, Mr. Dar is disqualified from his government office.

10. NAB is ordered to file more references against individuals in the event of any new property is being dicovered.

11. NAB has to file references within six weeks and Accountability Court shall complete the process in six months.

12. If Accountability Court finds any documents which are unauthentic or forged, immediate ap-propriate action will be ordered against the individual / organisation providing such documents.

13. Chief Justice of Pakistan will appoint one of the five judges to look after the proceedings by NAB and Accountability Court.

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Recent Initiatives

- Published "Manual for Legislation Drafting".
- Collaborated with Pakistan Institute for Parliamentary Services (PIPS) to train provincial and federal government drafters for Legislation Drafting.
- Collaborated with PIPS & academic institutions to produced advocacy papers and draft bills under a long term project, "Review of Legislative Framework in Pakistan".

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Power of Words and Power of Law: Exploring the Characteristics and Implications of Legalese

MS. LUBNA FARHAN

Author's Profile

Lubna Farhan Ali is a researcher by passion and an ELT practitioner and entrepreneur by profession. She is an Applied Linguist and actively participates in research related events and activities. She has presented her papers at ICLAP (3rd International Conference of Linguistic Association of Pakistan); USICOLL (1st International Conference on Literature and Linguistics, University of Sindh); ICIETESS (International Conference on Innovation and Emerging Trends in Education and Social Sciences, Iqra University), (ICELLES) (1st International Conference on English Language, Literature, Education & Society, Lahore Garrison University) and conducted workshops at SPELT and other forums. Her areas of interest include comparative linguistics, English for specific purposes and strategic vocabulary development in ESL/EFL context.

ABSTRACT

Eloquence and proficiency are considered to be the hallmark of a lawyer's personality. To convince a jury in a court, excellence in communicative skills is a prerequisite. However, it seems paradoxical that the same eloquent lawyers seem incapable of expressing themselves with accuracy and precision when it comes to writing or drafting the legal documents. Legal language i.e. Legalese is characterized by archaic and arcane lexicon, long winded, peculiar structures and verbosity. Most of the times, complexity of the language masks the simplicity of the content but lawyers seem prone to trot out their most archaic, redundant, and convoluted phrases when drafting legal documents. Considering the fact that the knowledge of the features and the stylistic characteristics of Legal English is of great significance to the learners and professionals belonging to the law fraternity, this paper aims to plunge deep into the complexities that make Legalese a peculiarly mystical language.

Introduction

The colonial rule of British in the sub-continent ended with the emergence of two rival states: Pakistan and India. Both these countries are multilingual with English working as their official language. English, nowadays, is associated with globalization, progress and interconnectedness. It is a language of power and prestige in Pakistan as well. This paper aims to merge two types of powers: power of words; and power of law, and explore their interdependency. Law, anywhere, is expressed through language. Language of law and its instruction is a much neglected area in pedagogy, academics and research in Pakistan. Though the language of the documentation, execution and amendments of law is English, most of the learners study law in Urdu. It may ultimately lead to academic and professional incompetence. This thematic paper, based on secondary research, has been divided into three broad sections. First section aims to explore the origin and definition of legalese, ending on a humorous note. Second and third sections respectively deal with the labyrinthine syntax and arcane lexicon of this peculiar register of English language. The paper aims to answer the following two questions:

1. How does the language of the law differ from ordinary speech and writing?
2. Do these differences enhance clear and precise communication or detract from it?

Section One: What is Legalese?

Law students, teachers, judges, lawyers and all those involved in drafting and articulation of the laws collectively form the legal discourse community. There are different types of legal discourses: e.g. the language used between the client and the lawyer or between two lawyers; the language of law reports and academic texts on legal matters; the language of the courts; the language of legal documents. Legalese is the product of a history that is littered with the tales of invasions, colonization, trade, and religious fraught. In it is engraved the story of the adventures of Anglo-Saxon mercenaries, Scandinavian raiders, Latin-speaking missionaries, and Norman invaders, all of whom left an impact on the language of its law. It is representative of the specific style of English that is used by lawyers and other legal professionals in their professional routines. Legalese, predominantly written, is characterized by highly complex, run-on sentence structures, nominalizations, verbosity, Latin expressions, embedded clauses and passive verbs. Legalese is distinguished, differentiated, separated, not only by vocabulary, lexis, words and lexicon but by its own specialized, unique, different, grammar, syntax and structures.

Considering the cryptic and labyrinthine nature of the legal parlance, it is bound to sound strange to the people outside the legal fraternity. Freedman (2007) delves deep into the peculiarities of legalese and leaves his readers baffled: “Consider the fact that Congress once passed legislation declaring that “September 16, 1940 means June 27, 1950.” In New Zealand, the law says that a “day” means a period of 72 hours while an Australian statute defines “citrus fruit” to include eggs. To American lawyers, a 22-year-old document is “ancient,” while a 17-year-old is an “infant.” At one time or another, the law has defined “dead person” to include nuns, “daughter” to include son, and “cow” to include horse; it has even declared white to be black”. Such intricacies make the legal parlance ambiguous, mysterious and incomprehensible.

Below is an interesting example of how uniquely verbose and unnecessarily complicated Legalese sounds in comparison to plain English:

Note: “The following paragraph was written (as satire) in 1835 by the Englishman Arthur Symonds. But it remains a brilliant parody of the way lawyers choose to write even now. Then, as now, lawyers were prone to be verbose, prolix, sesquipedalian, loquacious– wordy.”

THE ORANGE GIFT

"An example of the ills of legalese"

When a layperson wants to give you an orange, he or she merely says, "I give you this orange."

But when a lawyer does it, that's how he'll sound:

"Know all persons by these present that I hereby give, grant, release, convey, transfer and quitclaim all my right, title, interest, benefit and use whatsoever in, or and concerning this chattel, otherwise known as an orange, or citrus aurantium, together with all the appurtenances thereto of skin, pulp, pip, rind, seeds and juice to have and to hold the said orange, for his own use and behoof, to himself and his heirs, in fee simple forever, free from all liens, encumbrances, easements, limitations, restraints or conditions whatsoever, any and all prior deeds, transfer, or other documents whatsoever, now or anywhere made to the contrary notwithstanding, with full power to bite, cut, suck or otherwise eat the said orange or to give away the same, with or without its skin, pulp, pip, rind, seeds or juice."

Section Two: The Legal Syntax

1. Long winded and complex sentences

Sentences in legal language tend to be highly complex with a lot of embeddings and intricacies. Sometimes, a single sentence is used to state an entire statute. Peter Tiersma (2006) gives an example of a long winded statement "taken virtually verbatim from an actual—and fairly typical--modern will: *I give, devise and bequeath all of rest, residue and remainder of my property which I may own at the time of my death, real, personal and mixed, of whatsoever kind and nature and wheresoever situate, including all property which I may acquire or to which I may become entitled after the execution of this will, in equal shares, absolutely and forever, to Archie Hoover, Lucy Hoover, his wife, And Archibald Hoover, per capita, to any of them living ninety (90) days after my death."* Such structures inundate the reader by a flood of convoluted and largely empty prose. According to Tiersma, "All that need to be said is, *"I give the rest of my estate in equal shares to Archie Hoover, Lucy Hoover, and Archibald Hoover, assuming they survive me by at least 90 days."*

Such convoluted sentence structures are one of the most easily observable idiosyncrasies of legalese. Often, the verb is separated from the subject in these unusual structures with unending strings of embedded clauses and split verb complex. Such sentence structures tend to hamper comprehension.

Here is a classic example of one of the unusual sentence structures on a confident display in the legal documents. UN Resolutions are generally made up of unending strings of clauses, e.g. following is the Resolution 2038 (2012), adopted by the Security Council at its 6726th meeting, on 29 February 2012:

"The Security Council, recalling its resolution 1966 (2010) adopted on 22 December 2010, having regard to Article 14, paragraph 4, of the Statute of the International Residual Mechanism for Criminal Tribunals (the Mechanism), annexed to resolution 1966 (2010), having considered the nomination by the Secretary-General to appoint Mr. Hassan Bubacar Jallow as Prosecutor of the Mechanism (S/2012/112), noting that, according to article 7, paragraph (a) of the Transitional Arrangements annexed to resolution 1966 (2010), the Prosecutor of the Mechanism may also hold the office of Prosecutor of the International Criminal Tribunal for Rwanda (ICTR), recalling that pursuant to resolution 1966 (2010) the Mechanism's branch for the ICT shall commence functioning on 1 July 2012, decides to appoint Mr. Hassan Bubacar Jallow as Prosecutor of the International Residual Mechanism for Criminal Tribunals with effect from 1 March 2012 for a term of four years."
Note: (Around thirteen phrases and clauses used in a single sentence)

2. Impersonal Constructions

Impersonal constructions are another feature of legal statements. Legalese tends to avoid the first and second person expression and the judges prefer to refer to themselves as the court rather than I (Crystal, 1970, p.202; Tiersma, 1999, p.71; Butt & Richard, 2006, p.208). By omitting the first person singular, judges achieve their aim of exuding and achieving maximum objectivity and authority.

The use of the pronoun "we" by the Multi-judge panels, is often used to refer to quite old decisions made by their predecessors. This gesture is used to reinforce the perceived timelessness and continuity of the law.

One of the characteristics of the written will is the omission of the second person singular and the use of the first person singular instead. Furthermore, repetition of a noun (the driver, the player) is used to gain precision in legal documents. In absence of direct orders and warnings, to make the legal rules impersonal, everybody, every person, everyone is preferred, and nobody, no one is used in generalized prohibitions. "The aim is to create the impression that law is unbiased and impartial, but such generalizations are vague, and their efficiency is often disputable" (Tiersma, 2006).

3. The rule is to be Passive

"Passive voice is frequently used by legal writers because of its useful indirectness" (Butt & Richard, 2006, 153–154). Therefore, it is used to avoid the reference to the actor (e.g. the man was murdered at 6:45). It is also preferred when the need arises to deliberately de-emphasize or obscure the agent, or there is a possibility of more than one possible agent (Tiersma, 1999, p.74–77). Passives are common in court orders because they exude an aura of objectivity and authority. The use of passive voice helps the law appear maximally impartial, divine and objective; creating the impression that law takes its course without the interference of a human agent. Such impersonal statements, although making the law appear supremely impartial, once again undermine clear communication.

The use of passive voice is "less common in contracts, where the parties typically wish to spell out exactly who is to do what, and thus have an interest in precise reference to the actors… The passive voice is always more difficult to follow than the active voice because it reverses the true sentence structure; thus it should be avoided unless absolutely necessary" (Garner, 2002, p.40–42).

4. Nominalizations prevail

Nominalizations allow the law to be stated as generally and objectively as possible. These are "nouns derived from verbs and are used instead of verbs while speaking of actions such as: *to give consideration instead of to consider, to be in opposition rather than to oppose, to be in contravention instead of to contravene, to be in agreement instead of to agree"* (Gotti, 2005, p.77). The number of strong verbs is reduced with the help of nominalizations in the text — the introduction of a copular verb and a noun phrase helps to split the meaning (Gotti, 2005, p.78). Tiersma asserts that "nominalizations, just like passive voice, are most often used in order to obscure the agent" (1999, p. 77) as "expressing the action by a noun and separating the agent from it by means of a copular verb helps to obscure the link between them" (Lakoff, George & Mark, 1981, p.128–132). Distancing certain lexical items helps to manipulate the meaning slightly because the placement of a strong verb right after the agent makes the direct connection between them more obvious.

However, Gotti (2005) claims that "there are cases in which nominalization makes it possible to achieve greater precision, even if using a verb would allow for fewer words" (P. 78).

Finally, nominalizations, by some researchers, are considered to be the "hallmark of the desired formality" (Butt, 2002, p.153). Plain English proponents agree that "communication is always more effective when strong verbs are used rather than nominalizations" (Butt, 2002, p.153; Tiersma, 1999, p.206). However, "it is hard to eradicate nominalization, as lawyers do not say: to arbitrate, but to go on arbitration, because the arbitration is a legally defined procedure and should be considered as such" (Bhatia, 1993 p.20).

Section Three: The Legal Lexicon

1. Legal Jargon

The legal jargon is a specialized register of the language that ensures quick and efficient communication amongst the legal fraternity. This improves the internal communication of lawyers but conceals the specific meanings of the, making the non-lawyers baffled. "Legal jargon has a number of specialized terms that lawyers invented to ease their communication, varying from slang or near-slang (horse case) to almost technically precise terms (res ipsa loquitur), but the legal jargon has not reached the level of professional, technical terms. Other examples of the jargon are: boilerplate clause, corporate veil, bequest, emoluments" (Rylance, 1994, p.52).

2. Foreign words

Legal English is traditionally slow and resistant to change. Many outdated, primitive words, mainly of Latin and French origin, abound in legalese. Most of these words have lost their place in modern standard English long ago.

"Foreign words derived from Latin or French underwent either the process of transliteration or the direct borrowing process. The examples of native terms in legal English from the Anglo-Saxon period are: *goods, guilt, bequeath, manslaughter, oath, right, murder, sheriff, steal, theft, thief, swear, ward, witness, writ.* Latin is alive either in churches or in legal documents. It is the most celebrated language by the legal fraternity who routinely use the following Latin expressions: *caveat emptor, pro se, in propria persona, ipso facto, versus, Amicus Curiae, obiter dictum, affidavit, negligence, ad hoc, de facto, de jure, bona fide, inter alia, frustrating, inferior, legal, adjacent, quit, subscribe.* Hudson writes that, *"The survival of Latin tags in our legal system is primarily designed to give mystery and majesty to otherwise ordinary mortals and their fallible proceedings, as is the case with wigs and robes."*

Words of French origin also abound in legalese e.g. *attorney, claim, appeal, complaint, court, damage, default, counsel, defendant, demurrer, indictment, judge, jury, justice, party, evidence, plaintiff, plea, sentence, payment, possession, property, sue and verdict, court martial, letters testamentary, malice aforethought, attorney general, solicitor general.* However, foreign words became overwhelming. The question raised by the researchers is if this multitude of "expressions could be avoided, and if one should use inter alia, for instance, when among other things is equally appropriate" (Haigh, 2004, p.97).

3. Doublets and Triplets

Legalese abounds in synonyms. Use of a number of synonyms referring to the same legal concept complicates the legal drafts. It all started during Renaissance, when English law was a bilingual affair. French was supposed to be used by lawyers and judges and English was the language of the common man. Lawyers, to ensure smooth communication, developed the habit of using three or more words where one would suffice. They started using English and French synonyms in the same statements to define and elaborate upon the same concepts for important legal discussions. These synonym pairs and strings (i.e. doublets and triplets) are defined as binomials.

"Binomials have two lexical units (nouns, adjectives, adverbs or prepositions), which are usually joined by a conjunction and *(act and deed, custom and usage, leave and license, legal and valid, object and purpose, over and above, pains and penalties)*. As in legal English they consist of two words with the same conceptual meaning, one of them is redundant and does little to the meaning itself" (Garner, 2002, p.13). Garner gives some examples of these doublets, *"breaking and entering, goods and chattels, made and signed, will and testament,* in which the English word was complemented with its French or Latin equivalent."

Freedman (2002) gave some examples of these joined phrases that abound in legal documents:

"(French-derived words in italics)
devise and bequeath
breaking and *entering*
fit and *proper*
free and *clear*
goods and *chattels*
had and *received*
peace and quiet
right, title, and *interest*
will and *testament*"

Legalese is known for its wordy and redundant phraseology. According to Schwartz (2017), "Legalese embraces repetition: one word is good; six words are better. Why refer to the provisions or terms of an agreement when you can mention the "terms, provisions, covenants, agreements, representations and warranties" of an agreement?" Lawyers, to help their clients believe that what they say or write is meant to have legal effect, tend to use fanciful, superfluous words. So, subsequent to (not after), prior to (not before) and commence (not begin) are the norms that help you sound like a lawyer. This legal tradition too dates back to the middle Ages when quasi-magical powers were accorded to legal phrases. Today, magic is not associated with big words but to sound grand and majestic, better to have a few rattling around at the tip of your magic wand.

Pompous, repetitive and lofty use of words often hampers comprehension in legal discourse. According to Child (1990), "Writing in plain English need not mean giving up sophisticated use of language and affecting a chatty informality. On the contrary, it requires sophistication to produce documents that are consistently coherent, clear and readable. By contrast, this "specialized tongue" of lawyers, "legalese," may even be easier to write because it relies on convention instead of thought. At best, however, the result is wordy, pompous and dull. At worst it is unintelligible."

As an example of how legalese affects comprehension, Schwartz (2017) gives the following two paragraphs. The first is written in English and the second re-written in legalese.

"Jim had the flu and went to see Dr. Jones. The doctor told Jim he would be better in 10 days if Jim stayed home, drank liquids and slept for eight hours each night.

If his condition did not improve by the end of 10 days, the doctor said he would provide antibiotics." (Plain English)

"Jim had the flu (hereinafter referred to as the "Disease") and went to see Dr. Jones (hereinafter referred to as the "Doctor") and the doctor told Jim that Jim would be better in ten (10) days, provided, however, that (i) Jim stayed home, (ii) Jim drank liquids, and (iii) Jim slept eight (8) hours each night (hereinafter collectively referred to as the "Remedial Conditions") and provided further that if by the expiration of said ten (10) day period and full and complete fulfillment of the Remedial Conditions the Disease was no fully or partially abated to the full and complete satisfaction of the Doctor, in the Doctor's sole and unfettered discretion, then the Doctor would prescribe antibiotics." (Legalese)

Legalese has become quite notorious due to its deliberate imprecision and a lot of popular humor targets its arcane, complex and verbose mode of communication. Many lawyer jokes seem to make a similar point:

Note: Original source is unknown but the following piece of legal humor is a frequently quoted one.

> “After months of bickering, a divorce lawyer completes negotiations with the other side and calls his client with the good news.
>
> "So what did you work out?" George asks the lawyer.
> "Well, what it boils down to is that the party of the first part, to wit, George Smith, shall convey to the party of the second part and to her heirs and assigns forever fee simple to the matrimonial estate, including all property real and personal and all chattels appurtenant thereto."
>
> "I don't get any of that," George muttered.
> "That's right."

5. Use of Alliteration

“Alliteration is the phenomenon of two or three words in a phrase beginning with the same sound or the repetition of a particular sound in the first syllables of a group of words. A phrase with alliteration which has survived to this day is to have and to hold. However, the function of alliteration was not only a poetic one. It served as a tool for remembering words more easily in a society imbued with illiteracy” (Giannoni, 2010, p.168).

Alliteration adds a lot of rhythm to legalese and that seems to be the only feature of it that adds beauty to this uniquely special register of English language. Some of the examples include: any and all; have and hold; each and every, clear and convincing; safe and sound; part and parcel; rest, residue and remainder. Alliterative phrases are conjoined with the law’s origins as an oral tradition as legal acts were taught from one generation to the next spoken formulas during Anglo-Saxon times.

6. Legal Archaism

Legal vocabulary is commonly criticized of being full of primitive and antiquated features. Archaic morphology; use of the subjunctive, especially in the passive *(be it known);* the legal use of *aforesaid, same, said, such and to wit; and words like hereby, herewith, hereinafter, thereunder, thereof, forthwith and whereto* are some of the shackles that the legal language seems unable to break free from.

All these expressions might have a legitimate function in the past but they are not a part of the Standard English communications now and consequently do more harm than benefit to the perceived ease and flow of communication.

Economy of reference is one of the quoted reason behind their widespread use in legal documents (Tiersma, 1999, p.94); moreover, the desired “touch of formality” is achieved by their archaic character (Crystal, 1970, p.208) and they give the people a “legal feel” (Butt 2006, 147) as well. Nonetheless, they are often criticized by the opponents of legalese as primitive, imprecise and obsolete (Tiersma, 1999, p.94–95).

Time has moved on and language is an ever changing phenomenon. It changes in response to the needs of the people and their circumstances but somehow legalese could not be the companion of rapidly changing time and the language. It is still peppered all over with turgid and arcane words and phrases of a dead language i.e. Latin. The question arises if we still need to heavily sprinkle an international language i.e. English, with obsolete and archaic foreign lexicon?

7. Legal Terminology

An expression's relatively perfect meaning, brevity of expression that adds to the efficacy of communication and usage by a particular trade or profession helps it in turning into a technical term.

According to Hiltunen (1999), "Technical terms or terms of art are pure legal terms. Tort is a typical example. Some of them are familiar to laypersons *(confiscate, forgery, patent, share, royalty),* while others are generally only known to lawyers *(bailment, counterfeit, swindling, abatement)*. In the latter case, the problem of miscomprehension of legalism emerges." (p.150). Most people believe that there are not many technical terms in the legal language; however, any law dictionary may reveal the true picture. Such terms tend to be less exact in law than in the hard sciences. An explanation of it may be found in the fact that concepts that are referred to by the legal terms are subject to change over time and place.

Implications: Legalese: To Use or Not to Use

It is assumed that the legal system has goals that may conflict with the goal of clear communication. It is assumed that the law has to be stated as authoritatively as possible and a highly formal, arcane and ritualistic language helps accomplish this goal by segregating the legal proceedings and the ordinary life; conveying an aura of timelessness and turning the law into an almost eternal decree. It helps to ensure credibility, evoke awe and demand respect for the law. A certain sense of legitimacy is enhanced by depicting the courts as virtually unchanging institutions of ancient lineage.

Legalese represents the frozen and the fossilized variety of English that stopped growing a century or two back. Its followers comprise of the people who staunchly support the very complex, turgid and mystical linguistic practices of an ancient profession. Some of its features are nothing more than time-worn habits that hamper comprehension and have long outlived any useful communicative function. It does enhance "the cohesiveness of lawyers as a group", but should be abandoned in favor of modern, standard, plain English to achieve the paramount goal of clear, efficient and effective communication.

Law should be stated as clearly and plainly as it can be to ensure general understanding of "the rights and obligations conferred by a constitution, the opinions expressed by a court, the regulations embodied in a statute, or the promises exchanged in a contract (Butt, 2013)."

The answer to the problems of legalese is the plain English movement, aiming at simplification of the language of documents. Plain English Movement supports the user-driven approach to writing and designing documents. It avoids archaic words, jargon, unnecessary technical expressions and complex language. But it is not simplistic English. It aims to communicate information in the most efficient and effective way possible while remaining technically correct.

It achieves these goals by considering the needs of the intended users of the document.

Recommendations:

Many researchers (Garner, 2002; Tiersma, 2006; Freedman, 2007; Butt, 2013; Schwartz, 2017) through the plain English movement support the drafting of the legal documents that have approachable layout and logical structure written in clear language. In terms of readability, grammar, lexicon, and punctuation, the plain legal language would be governed by rules no other than those governing the ordinary modern day English (Butt & Richard, 2006). However, despite a lot of efforts to reform the legal language, it seems neither plausible nor possible to oust the above discussed idiosyncrasies of legalese completely. Slow but steady efforts have definitely improved general linguistic features of Legal English to some extent. Standard language courses should be introduced at law colleges and universities especially in the local Pakistani context where literacy rate is not commendable and incomprehension and lack of awareness causes a lot of damage in the form of delayed justice.

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Does the Death Penalty Actually Achieve a Purpose?

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The death penalty is a hotly contested issue in almost every legal system in the world. Even where the matter has been settled by legislation or constitutions, debates arise time and again as to the merits and demerits of the penalty. There have been numerous instances of countries abolishing the death penalty, de jure or de facto, but reintroducing it as a deterrent.

Article 3 of the Universal Declaration on Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) along with Article 2 of the European Convention on Human Rights (ECHR) all guarantee every human being the right to life and hold that no one can be arbitrarily deprived of this right. Article 6 of the International Covenant on Civil and Political Rights (ICCPR) puts qualifications on the use of the death penalty, clearly laying out the prerequisites to be met if the punishment is to be administered.

The European Union as well as the Council of Europe member states have denounced the death penalty, with Protocol no. 13 which prohibits death penalty in all circumstances being signed and ratified by all member states, except two. And although these laws are not transcendent in nature, meaning that a dualist state or even a monist country cannot be forced to adopt them if it is not a signatory to the treaty through which these laws were implemented, their very presence indicates that the problem is not the lack thereof of a "general provision on the death penalty" but the implementation of these very laws or the refusal of retentionist countries to ratify laws on the said subject matter.

A glance into history is sufficient to realize that punishment, or more specifically, the death penalty is not a new phenomenon but predates hundreds of centuries. This is evident as the death penalty has been recognized as a prescribed punishment for heinous crimes by all consecrated scriptures, including the Holy Quran.

This dogma can be distilled into a single line: *Eye for eye, tooth for tooth, hand for hand, foot for foot.* Hence, I will argue that religion is the most manifest reason as to why capital punishment or the death penalty continues to exist, especially in theocratic states as well as countries like the Islamic Republic of Pakistan, with five out of the top six countries (Iraq, Egypt, Pakistan, Iran and Saudi Arabia) that execute prisoners have laws influenced by religion being quasi or full theocracies. With regard to the second limb of the question, the efficacy of the death penalty is dependent on the overall machinery of justice and how well it works together with the penal code to bring about justice. As for the death penalty actually achieving a purpose in the countries adopting it, it varies from state to state, with no tangible difference in the reduction of crime being seen in Pakistan. The UDHR is the recognized, original code wherein international human rights are preserved and which later on paved way for other laws to come about. Article 3 of it clearly states that everyone has the right to *"life, liberty and security of person"*. However, it remains silent by choice on the issue of punishment by death since the states acknowledged that every country, under the concept of Margin of Appreciation, should have the right to make laws on matters of utmost importance, keeping their socio-political, religious and cultural norms in mind.

This then can be considered acceptance of the fact that an issue of such magnitude could not be generally decided for and applied to every country, and even if it were, countries opposing it would never ratify it which would make the whole exercise futile. Article 6(1) of the ICCPR which affirms *"Every human being has the inherent right to life. No one shall be arbitrarily deprived of his life."* along with Art. 6(2) made further progress in this regard as it acknowledged that the death penalty was to be awarded only for *"serious crimes in accordance with the law in force at the time."* This was an improvement upon Art. 3 of the UDHR since it touched upon the death penalty and confined its use for grave crimes only. Once again the states ratifying it were allowed to come up with their own definitions of what a serious crime was, with some arguing that this caveat defeated the original purpose of the covenant which was the complete abolishment of capital punishment. Moreover, there have been various specific standards and statements about the crimes for which the death penalty should not be used. Article 4(4) of the American Convention on Human Rights (ACHR) states that the death penalty shall not be inflicted *"for political offences or related common crimes."* Again, what constitutes as political offences and crimes is not elaborated upon.

Art. 3 of the Vienna Convention which while not expressly prohibiting death penalty forbids *"the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."* The International Court of Justice has held that common article 3 codifies a customary rule which can again be employed to support the thesis that it is not the lack of universal laws or even established belief but the unwillingness of countries to deviate from their current position concerning death penalty. All this can be said to contribute to the broadening international consensus in favour of abolition of the death penalty, yet, many countries, including Pakistan, continue to retain the death penalty, with executions in the latter resuming and rising sharply after the lifting of the moratorium following the brutal December 2014 attack by the Taliban. Hence the fact there is no general prohibition does not explain continued retention of the death penalty since unrelenting states would seek to remain retentionist even if there was such a prohibition.

The Constitution of the Islamic Republic of Pakistan clearly states that "Islam shall be the State religion" and that any law repugnant to the injunctions of Islam can be repealed and challenged in the superior judiciary. Many verses in the Quran allow for the use of capital punishment when used as a lawful means of seeking justice. For example, it is stated, *...Take not life, which Allah has made sacred, except by way of justice and law. Thus does He command you, so that you may learn wisdom" (6:151).*

"In other words it says that although murder is considered a sin, it is permissible to utilize capital punishment when required by law. It is because of this that arguing against something which the Quran allows is inviting accusations of following a parallel path or using one's own judgment against that of the sacred scripture all too easily. In simpler words, the chances of being labeled "Mushrik" are all too high. Those who still oppose the death penalty plead that the sayings in the Holy Book should not be taken at face value and that there are a plethora of explanations which can be employed for a single verse. How is it then possible to allow a simplistic interpretation in a matter in which a human life depends on? The retentionists argue that death penalty primarily acts as a deterrent against crime and aids in the maintenance of peace. It is said that seeing people suffer for their wrongdoing makes others think before they set out to do something inhumane or illegal themselves. It makes them fearful of the hypothetical consequences of their possible actions. But this can only work where there is virtual certainty as to death being the end punishment for a specific action. The Quran has identified such areas as being intentional murder and "Fas'ad Fil Ard", which can be understood as 'Corruption on Earth'. The word corruption is open to interpretation but can include rape, adultery, treason, apostasy, and homosexuality amongst others. A criticism against the argument of deterrence comes from Cardinal Avery Dulles, Catholicism and Capital Punishment, First Things 2001, who points out that

"executions, especially where they are painful, humiliating, and public, may create a sense of horror that would prevent others from being tempted to commit similar crimes...In our day death is usually administered in private by relatively painless means, such as injections of drugs, and to that extent it may be less effective as a deterrent." He also goes on to say that *"sociological evidence on the deterrent effect of the death penalty as currently practiced is ambiguous, conflicting and far from probative."* This, when compared against the Islamic teachings, produces an interesting result as Islam clearly specifies that punishments of any kind, death penalty included, should be handed out in public so that it infuses terror in the hearts of people. People must be able to witness the consequences of the crimes so that it causes actual deterrence. Still, it is possible to argue that deterrence is a very abstract concept and truly gauging its effectiveness is not possible.

Immanuel Kant in his work Metaphysics of Morals argues that any person violating the law loses the right to be a society member, opposes social order and must be subsequently deemed guilty and punished. He also goes on to say that the failure of the law to punish a violation or a crime indicates weakness in and of the law itself. This understanding can be aided in perceiving another argument in favour of punishment by death which is retribution.

Retribution in simpler words is the argument that the guilty deserve to be punished in proportion to the severity of their crime.

The principle of proportionality is stressed upon which dictates that the punishment should not add more to the sum of human misery than what is needed. While this seems just to some, others claim that retribution is a morally dubious concept as death penalty is just a way of seeking revenge. Another criticism is that often death row inmates are made to suffer for many long years before they are actually executed which adds to their misery and is by no means fair, just and reasonable. This is also true of the situation in Pakistan where many death row inmates have been in jail for more than a decade. John Stuart Mill, an eminent political philosopher and advocate of the death penalty, believes that death is the least brutal way of punishment. He substantiates this by asking a thoughtful question: *"What comparison can there really be, in point of severity, between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, debarred from all pleasant sights and sounds, except a slight mitigation of bodily restraint?* By doing this, he envelops humanity around the concept of punishment by death by implying that quick death is more humane compared to a torturous imprisonment which is not only longer but more painful apart from being a burden on the finite resources of the state. Moreover, another basis for the preservation of the death penalty in Pakistan and in other Muslim countries seems to be the many alternatives to it that Islam provides. These are the options of obtaining Qisas (retribution) and Diyat (blood money) along with the option to pardon without any material trade off.

The Qisas and Diyat provisions of the Pakistan Penal Code (PPC), 1860, clearly delineate that the heirs of the deceased in a case of murder may pardon the offender or enter into compromise with him even at the last moment before execution of sentences, upon which execution could not take place. Under sec. 309, legal heirs can forgive the murderer in the name of Allah without getting any monetary compensation in the form of Diyat, while under section 310 the legal heirs can compromise after receiving Diyat in their respective shares. These laws in turn came about as the Federal Shariat Court in several Shariat petitions challenged the government and declared that the existing provisions of PPC related to murder and bodily harm were contrary to the Islamic injunctions. Following this, several laws were repealed, and replaced with those in line with the Islamic teachings. Against a backdrop of this, it is difficult to imagine a country like Pakistan doing away with the death penalty, where the clergy can exert considerable pressure on an elected government to change laws under the pretext of religion. Hence, the practical implications of abolishing death penalty are bound to be negative, something which no government will ever risk doing. Although data is available for the number of executions committed by most retentionist states (barring China)--which albeit not very precise is still helpful--during the course of writing this paper I couldn't find substantial research undertaken to see whether crime rate was directly or inversely proportional to an actual increase in the number of executions.

It appears that lifting of the moratorium has not brought about any tangible change to improving the current situation in Pakistan according to the data presented by the Justice Project. It informs that Punjab has emerged as the overwhelming practitioner of the death penalty, accounting for 83 per cent of executions. However, it has witnessed only a 9.7pc drop in murder rates from 2015-2016. Sindh, on the other hand, has viewed a drop of nearly 25pc in murders over the same time period, even though it carried out only 18 executions compared to Punjab's 382. This then indicates that the death penalty might not be as effective a deterrent as it is claimed to be. However, supporters of the penalty would argue that sentencing a few won't bring about material change and that a systemic overhaul is important before the benefits of administering death penalty can be witnessed. They also argue that the masterminds behind ghastly crimes like bombing remain untouched, and it is only their pawns who are caught which makes the entire exercise cosmetic. Naturally, change cannot be seen if the actual perpetrators of crimes are not caught.

Furthermore, the 'conscientious scrupulosity' that John Stuart Mills cautioned was imperative in order to make a judgment on the allowance of a death penalty is unlikely to be found within our machinery of justice. While no human judgment is infallible, the accused has always the benefit of the merest shadow of a doubt in theory.

The reality, however, might be something else all together. In October Pakistan's Supreme Court acquitted Ghulam Sarwar and Ghulam Qadir, two brothers, who were on death row for murder, but the judges were astonished to find that the men had already been hanged a year earlier. Researchers claim that this is not the first time this has happened. To add insult to injury, the legal counsel provided to these death row inmates, who most often than not belong to the underprivileged section of society and have no access to the superior courts, is terribly poor. Lawyers lacking competency and financial incentive are assigned these cases which helps nobody.

Hence, it is safe to say that the religion as well as the socio-cultural climate of a particular country, and not the lack of a general prohibition in international law, explains the continued retention of death penalty in retentionist states. As far as the question of death penalty actually achieving a purpose in those countries, change can only take place when there is an able legal machinery to support penal justice. Until that happens, to safeguard the innocent it seems rational to put a suspension on capital punishment as the potential for gross miscarriages of justice taking place is quite high.

Court Decorum and Legal Ettiquettes

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Author's Profile

Mr. Abrar Hasan - Advocate is a lawyer of the Supreme Court of Pakistan and High Courts, he is an LL.B and Juris Doctor (JD-Special Studies) from Georgia State University, USA as a special foreign student. He has also been appointed as an arbitrator by the International Court of Settlement, Belgium.

Canons of professional conduct and etiquette provide that every Advocate is duty bound at all times to uphold the dignity and high standing of his profession. No fear of judicial disfavor or public unpopularity should restrain an Advocate from full discharge of his duty and the Advocate should strive his best to plead the case of his client to his utmost ability, of course, within the bounds of law. An Advocate should not render any service or advice involving disloyalty to the law or disrespect to the judicial officer or corruption of any person or persons exercising a public office or private trust. An Advocate is required not to indulge in deception or betrayal of the public. No Advocate is allowed to use his previous designation or post such as "Retired Justice", "Ex-Judge", "Ex-Attorney General". " Ex- Advocate General" or any such other designation as prefix or suffix, either on letterheads, name plates, sign boards, visiting cards etc. The canons require an Advocate to maintain towards the Court a respectful attitude. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due to 'the Judges' station is the only proper foundation for cordial, personal and official relations between the Bench and the Bar, as per the canons.

If we keep these canons (breach of any of which will amount to misconduct) in our mind and compare the condition and state of affair prevalent today, we will irresistibly conclude that there are only a few who are adhering to and following these rules. If we scrutinize routine individual conduct of the members of our profession and the conduct of the Bar Associations collectively, a very sad picture emerges.

The legal profession can not be adopted as merely a source to make money. Profession of law is not a trade or business. It should not, therefore, be adopted to mint money. A 'street lawyer', taking up cases pro-bono-publico or persuading public interest litigation before the court should be more respectable than the lawyer churning out

papers sitting in his cozy office and submitting bills after bills to his "valued" clients-bills which are usually "fixed" and promptly paid due to "special connection". According to common definition of lawyers "the term refers to a group of men pursuing a learned purpose". In the adversary system, the administration of justice is a team work. No doubt judge is the captain of the team and it is essential that he should be competent as well as honest, but howsoever able a judge may be he can achieve very little unless he is assisted by competent lawyers.

It is the duty of every Advocate to uphold at all times the dignity and high standing of his profession, as well as his own dignity and high standing as a member thereof.

According to the canons of conduct and etiquettes, as framed by the Pakistan Bar Council, an Advocate shall not, in the absence of the opposing counsel, communicate with or argue before a judge or judicial officer except in open Court and upon the merits of a contested matter pending before such judge or judicial officer; nor shall he, without furnishing the opposing Advocate with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge or judicial officer. The rule shall not apply to ex-parte matters or in respect of matters not subjudice before the judge or judicial officer concerned.

Clients, not Advocates, are the litigants. Whatever may be the ill feeling existing between the clients, it should not be allowed to influence Advocates in their conduct and demeanor towards each other or towards the parties in the case. All personal clashes between Advocates should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of Advocates appearing on the other side. Personal colloquies between Advocates, which cause delay and promote unseemly wrangling, should be carefully avoided.

Junior and younger members should always be respectful to senior and older members where the latter are expected to be not only courteous but also helpful to the junior and younger brethren at the Bar.

Nothing operates more certainly to create or foster popular prejudice against Advocates as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defence of transactions.

It is improper for an Advocate to assert in argument his personal belief in the client's innocence or in the justice of his cause. His professional duty is strictly limited to making submission at the Bar consistently with the interest of his client.

It is the duty of an Advocate to maintain towards the court a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamour. At the same time, whenever there is proper ground for complaint against a judicial officer, it is right and duty of an Advocate to ventilate such grievances and seek redress thereof legally and to protest the complainant and persons affected.

An Advocate shall not advise a person, whose testimony could establish or tend to establish a material fact, to avoid service of process, or conceal himself or otherwise to make his testimony unavailable.

An Advocate shall not intentionally misquote to a Judge, judicial officer or jury the testimony of a witness, the argument of the opposing Advocate or the contents of a document; nor shall he intentionally misquote to a Judge or judicial officer the language of a book, statute or decision; nor shall he, with knowledge of its invalidity and without disclosing such knowledge, cite an authority of a decision that has been over-ruled or a statue that has been repealed or declared unconstitutional.

Marked attention and unusual hospitality on the part of an Advocate to a Judge or judicial officer not called for by the personal relations of the parties subject both the Judge and the Advocate to misconstructions of motive and should be avoided. An Advocate should not communicate or argue privately with the Judge as to the merits of a pending cause and he deserves rebuke and denunciation for any advice or attempt to gain from a Judge special consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect to the Judge's station, is the only proper foundation for cordial, personal and official relations between the Bench and the Bar.

The primary duty of an Advocate engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the concealing of witnesses capable of establishing the innocence of the accused is highly reprehensible.

Publication in newspaper by an Advocate as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement or reference to the facts should reach the public, it is unprofessional to make them anonymously. And ex-parte reference to the facts should not go beyond quotation from the records and papers on file in the court but even in the extreme cases it is better to avoid any ex-parte statement.

It is the duty of Advocates to endeavor to prevent political considerations from outweighing judicial fitness in the appointment and selection of Judges. They should protest earnestly and actively against the appointment or selection of persons who are unsuitable for the Bench and this should strive to have elevated there to only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of the questions before them for the decision. The aspiration of Advocates for judicial positions should be governed by an impartial estimate of their ability to add honour to the office and not by a desire for the distinction the position may bring to themselves.

An Advocate should in general refrain from volunteering his legal opinion or addressing any arguments in cases in which such Advocate is not engaged unless called upon to do so in open court by a Judge or judicial officer. In advancing any such opinion he must do so with a sense of responsibility and impartially without any regard to the interest of any party.

In reciprocity, a Judge should be God-fearing, law-abiding, abstentious, truthful of tongue, wise in opinion, cautious and forbearing, blameless, and untouched by greed. While dispensing justice, he should be strong without being rough, polite without being weak, awe inspires in his warning and faithful to his word, always preserving calmness, balance and complete detachment, for the formation of correct conclusions in all matters coming before him.

In the matter of taking his seat and of rising from his seat, he shall be punctilious in point of time, mindful of the courtesies, careful to preserve the dignity of the Court, while maintaining an equal aspect towards all litigants as well as lawyers appearing before him.

Functioning as he does in full view of the public, a Judge gets thereby all the publicity that is good for him. He should not seek more. In particular, he should not engage in any public controversy, least of all on a political question, notwithstanding that it involves a question of law.

A Judge should avoid extra-judicial duties or responsibilities, official or private. He should equally avoid being a candidate, for any elective office in any organization whatsoever.

In conclusion I would state that the subject of professional ethics and conduct should not only be taught in Law Colleges but it is the duty of senior Advocates to impart such teachings to those who join the profession of law as their junior colleagues.

Featured Interview

Inside the World of Litigants - Ms. Saman Imtiaz

MS. SAMAN IMTIAZ

Author's Profile

Saman Rafat Imtiaz is an Attorney-at-Law and an Advocate of the High Courts. She obtained her law degree from the University of Richmond, Virginia, U.S.A., after completing her undergraduate in business administration from The American University in Dubai, U.A.E. She has been practicing law in Karachi, Pakistan since the year 2004. During this time, she has had the experience of working with three leading law firms and the opportunity of working with some of the greatest legal minds in the country.

She provides practical solutions and effective representation by combining her legal education and experience with her degree in business. She has had the honor of being granted special permission to appear before the Honorable Supreme Court of Pakistan.

1) What actually got you interested in the legal profession as a young woman?

I actually happened to take a course in Business Law while I was undertaking my Bachelor's Degree from the American University, Dubai and Business Law was a required course. This course was my introduction to the legal world which proved to be life altering for me. And I decided that this was my calling.

2) Any particular reason you were undertaking your Undergraduate Degree in Dubai?

Actually, I wanted a strong liberal arts education and I was not quite sure what I wanted to do. So, I wanted to go to the USA because in the USA they focus on the liberal arts education and they allow you the freedom to be able to choose various fields and kind of dabble in it and then decide in what you want to specialize. But unfortunately, when I applied for my student visa it got rejected.

So after completing my A Level, I went to DHA for some time for Bachelors in Arts and then to Karachi University. I took Economics as my major and then I applied to the USA and my visa got rejected. As my mother was living in Dubai at the time and American University, Dubai had just opened up therefore I joined the same and was amongst the first batch. That is how I ended up there.

3) What was the most challenging aspect of your transi tion from a law student to a junior associate and then eventually opening your own law firm?

It is kind of difficult to say because there were so many challenges and then the challenges changed from being a student to an associate and then starting your own. The challenge from going from a student to an associate is really figuring yourself out. What is there that you want to do? I was kind of fortunate when I picked law, I knew what I wanted to do. I wanted to be a litigator. But still when you start practicing, it is so different from what they teach you in law school. It is just completely a different world altogether.

When I started working in Pakistan, I was lucky that I picked a firm where it had a strong corporate side as well litigation which was Mohsin Taybeli & Co. So that is where I started in 2004. I told the senior partner that I am very sure that I want to be a litigator. I consider myself very lucky because I really think to become a well-rounded professional, and especially if you are going to have your own firm, then you need to have exposure to both the corporate and the litigation side, and I was able to get both at the firm.

The next challenge was when I came to the litigation side. What the need of the firm was to have an associate who did research, drafting and everything. In the beginning it was fine as I was learning but there came a point where I felt that I am not able to get to the next stage. But again the challenge was to get certain exposure and chance. So you know at a certain point you are learning and you are okay being an associate and doing research and drafting but you will pitch in to argue matters at greater length which are more complex and you feel ready for it. Unfortunately, in Pakistan the litigator partner does not need another litigator. The law firms generally get passed down from generation to generation and then another reason for it might be that the market is too small.

The other challenge that I dealt with came straight from the clients. All clients come for the litigator who is well known in that firm and they pay for that name. They do not prefer or are comfortable with a junior associate to represent them as they don't want to risk their case.

In terms of my own legal practice, there are lots of challenges obviously,: one challenge is to get recognition from the bench.

And the other challenge is the business aspect; that is to be able to generate business. Generating business is harder, because the more business you have the easier it is to develop the relationship with the bench. And again, because, as far as (even though it is a male dominated society), lawyers are concerned, they are not used to seeing that many female lawyers, even now.

However, building the relationship with the bench was easier, in fact, I always say that to myselfe, being a woman, I felt it was an advantage at times, as far as the bench is concerned. The environment is a different matter. Although the environment is challenging but it depends on how serious you are about your ambitions and to keep yourself focused and there will come a point when these things will stop to matter as such.

4) As one of the leading woman advocates in the country, what in your opinion, hinders young women from joining the legal profession in Pakistan?

The environment is such that, it is very intimidating for the females. That is one reason. Second is obviously, the culture, because the ones who are able to stick it out, their family life and cultural expectations get in the way because it is a very demanding profession, especially when you are on your own and you are not able to balance your work and personal life, that becomes a challenge.

5) What are the important attributes in your view that an associate lawyer must possess to be a successful practitioner?

Thirst for knowledge! You need to be curious. Even if you have dealt with the same provision of law for ten years, in your practice, a new case will come and you will have to take a different approach. Fortunately, or unfortunately, in Pakistan we do not have specialised firms. Everyone has a general practice. So, when you are starting off, there is so much to cover that unless you have that curiosity you will not be able to do it. First five years, you are just amassing a basic level of knowledge so that you can have a meaningful discussion with the client. Somebody who wants to learn, irrespective of their intelligence level, their right attitude will lead them the way.

6) Who is your legal hero and why?

I think Benazir Bhutto was a real hero, because she became a Prime Minister when I was around twelve. It was very important for girls of that age, at that time, to see a female Prime Minister, which was empowering and inspiring. I think it has affected me and my career in a great and positive way. I was fascinated when I read her biography. My instructor who taught me law, and who is also my mentor, has also changed my life in a meaningful way.

7) If not law what career you would have preferred to excel at?

I was interested in so many things. If I wasn't a lawyer, I would have been an artist or I would have been a journalist, may be.

8) What advise would you give to young law students who are on the brink of entering the legal profession?

As an employer, what I look for is aptitude, thirst for knowledge and putting in the hours because reading counts a lot. So, for fresh graduate or law students, read, read and read, there is no short cut to reading. Pick any provision and read the cases to clarify your concepts. First of all, you need to learn, creativity comes later.

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Featured Interview
In House Counsel - Dr. Fakhara Rizwan

DR. FAKHARA RIZWAN

Author's Profile

Dr. Fakhara is a credible and undeniably inspiring woman to both, aspiring lawyers and women in general. Not only her achievements, but courageous struggle is also inspirational for other women lawyers. She is a self-made person, who had faced opposition and challenges to assert herself in a male-dominated society as an individual, more specifically in a male-dominated profession of law as an expert of her field. She has defined independent strength modestly with her determination, in a less supportive environment. Her fearlessness, determination and fervor to her work is inspirational for all women who wish to pursue a legal career. She has always been vocal about the lack of diversity, of all kinds, in the legal sector of Pakistan, especially on lack of female judges at the senior most positions.

She is a qualified corporate lawyer, distinguish to be the only Pakistani having doctorate on the subject of Corporate Laws related to takeovers and mergers. A member of International Bar Association and its committee on

1) What are your education and professional qualifications and work experience?

I did my LLB from Karachi University and then went to Malaysia with an aim to practice law in Malaysia. I was unware that the foreign lawyers were not allowed to practice in Malaysia. I started work as a paralegal staff in a law firm, and meanwhile took part in the struggle to allow foreign lawyers to practice in Malaysia. Eventually, Malaysia amended its laws related to legal practitioners, and permitted foreign lawyers to enroll with certain terms and conditions. I was the first Pakistani lawyer to enroll and so far the only Pakistani lawyer. During my work in Malaysia, I provided consultancy to Pakistan High Commission and to several corporate entities on retainer-ship basis. I was engaged in welfare work related to destitute Pakistani immigrants and detainees. I did LLM Business Law from International Islamic University Malaysia, leading to Ph.D. in Laws. Currently, I am pursuing MBA from IBA.

2) What prompted your switch from private practice to in-house?

I practiced law in Malaysia and returned to Pakistan with an intention to practice law in Pakistan. But, in my view, practicing law is very challenging in Pakistan. Women in developing countries like Pakistan, face several challenges because cultural and structural factors have traditionally safeguarded the interests of men and in some ways left the women to fend for themselves. Men also tend to dominate many aspects of business life, and the legal profession is no exception, with mostly men in leadership positions. Neither the legal system, nor law firms have been very supportive of women lawyers. Women are also rarely appointed as the judges of High Court and the Supreme Court. Several factors are responsible of the myriad issues faced by women lawyers in Pakistan, most notable being the conservative cultural system, which considers a woman of confidence, independence and awareness a threat to its stability. Traditional-minded clients are another factor that prevents independent practice by women lawyers. One of the common challenges faced by women lawyers is the balancing of their roles as home-makers and managing their professional responsibilities. Because the legal profession is well-known for long working hours and each assignment needs complete dedications. In the legal profession, networking is a critical marketing skill to obtain and maintain a good client base.

Author's Profile Continued

the Corporate and Acquisition & Mergers. One and only Pakistani member of Malaysian Corporate Counsels Association. Vice-Chairperson of Non-Banking Financial Institutions & Modaraba Association and representative of the leasing industry in Federation of Pakistan Chamber of Commerce & Industry. Her ability to take on multiple roles and furiously dedicate herself for her work has played an important role in her success.

She is a social activist and motivational speaker; with an enormous experience to participate on international forums. Martial Artist (black belted) but poetess by nature; with publication of three books (Adhuri Takmeel). Her articles on Corporate Laws and social issues are published in several Law Journals and newspapers. She did her first degree in law (L.L.B) from SM Law College, then L.L.M Business Law from International Islamic University Malaysia; leading to Ph.D.

For cultural reasons, in Pakistan, women face extreme challenge when it comes to networking because this could raise concerns about character of these women and result in social stigma.

3) How different do you categosized the work of a litigant and an in-house counsel in Pakistan?

Working in-house is significantly different than working at a law firm. In a law firm, especially in big law firms, the role of lawyers is defined as per its expertise, such as criminal practitioner, corporate lawyer, tax lawyer etc. However, the in-house counsel does little bit of everything. The prime difference is that the in-house counsels do not face a pressure to be a rainmaker or recruit new clients. Whereas, the job stability, and defined working hours are important perks attached to the role of an in-house counsels.

4) Being the first Pakistan to be called to the Malaysian Bar, what were the challenges and hurdles that you faced in accomplishing this achievement?

As I mentioned earlier, the foreign lawyers were not allowed to practice in Malaysia. Therefore, the journey was very challenging which include both financial as well as professional challenges. The local law firms were not very welcoming for foreign lawyers, so the Monterey reward was very less as compare to the contribution. I faced these challenges until I registered my own law firm with partnership of a Malaysian lawyer, and then the things changes significantly. This is a bitter truth that the challenges faced by junior lawyers in Pakistan, even the lawyer with reasonable experience, are grave than the challenges I had faced in Malaysia. Because in Malaysia, the legal profession is highly paid and well-regarded.

5) What one aspect, if any, would you wish to import from Malaysian legal framework and inculcate in the Pakistani legal system?

I wish I could bring their meritocratic system of judiciary and legal structure in Pakistan. The judges are highly qualified and trained, the decisions are given on the basis of merits without any undue influence from the lawyers' personal profile. The law firms take ownership of their junior lawyers, provide them reasonable stipend from day first and train them methodically.

6) What has been the highlight of your professional life so far?

Practicing in Malaysian was not a well deliberated decision; but accepting the job offer to work as a paralegal staff and then struggling to practice their, was out of determination. The first day in Arbain and Co., Advocates and Solicitors, was the first critical step of my career. I earned a lot of respect and financial strength while working in Malaysia. Leaving the established law firm and practice in Malaysia, to return to homeland was another critical decision. In Pakistan, instead of practicing law, beginning a career as in-house counsel was a difficult decision but it rewarded me the day when I was appointed as the Company Secretary and Head of Legal Department of AlBaraka Bank Limited. I was the youngest most to hold such a senior position in any bank.

7) What in-house ethical considerations in your vast experience are particularly difficult to handle?

I would suggest to re-phrase this question particularly for woman lawyers working as in-house counsels.

Women lawyers, both practicing and in-house counsels, commonly face gender inequality and harassment from male-colleagues, at every level of their career. It is very important to educate all professional women to contest for their due space in society as well as in organizations, and to handle harassment in a proper manner.

8) How important is it for in-house teams to be strong on relationships, both with its in-house lawyers, as well as with external legal services providers?

Management of professional relationships and team building is the strongest and most efficient approach in maintaining and creating value in legal services. By establishing a relation of confidence and trust with the external lawyers, the in-house team can drive the legal advice to new level of professionalism to ensure success. The personal and emotional linkage between the in-house team and external lawyers is very crucial.

9) How much legal work is retained in house and how much is outsourced to external legal service providers?

A general statement may not justify this question because it is very subjective. Generally, it depends upon size of the company, the strength of the legal department, nature of the business etc. However, it can be stated safely that the efficient legal department transfers the less than forty per cent work to the external counsels which mainly relates to representation in the court of law. Most of the work related to expert advice, transactional documents, compliance related matters, is generally handled by in-house counsels.

10) If you had one piece of advice to give to in-house counsels in Pakistan, what would it be?

The in-house counsels shall centralize the in-house department, strengthen it with suitable resource, maintain a library and reduce dependency on the external counsels.

11) In your free time, what is your favorite pastime to indulge in?

I am a poetess by nature with publication of three books with the name of Adhuri Takmeel. Either I read poetry or listen music, especially the Sufiana Kalam.

Legal Framework for Islamic Finance Institution

MUFTI KHAWAJA NOOR-UL-HASSAN

Author's Profile

Mufti Khawaja Noor ul Hassan is the resident Shariah board member and the head of Shariah compliance at Barkat Islamic Banking of Faysal Bank.

A legal and administrative framework is one of the basic pillars of being competitive in the modern-day dynamics that determine any institutional structure. In order to ensure that financial transactions are executed effi ciently, with ample confi dence regarding their enforceability, a concrete and well-designed process is required to eliminate any doubts regarding any violations of the Islamic law. That will ultimately enhance the effectiveness of Islamic financial institutions as well as the system.

A legal and regulatory framework for Islamic banking is the most important of the bases but unfortunately, at present there is no independent body as such to regulate the sector in this regard. At the moment, Islamic fi nance institutions operating in most countries (including Islamic countries) are subject to the same customary laws as applicable for the conventional banks; thus Islamic banks are being subjected to the same secular legal and regulatory framework, with little or no consideration for Islamic finance transactions, their uniqueness from conventional banking and the Shariah implications.

In countries where the regulators and the judicial system have recognized the separate procedural and ideological positioning of Islamic banking, the development of a separate regulatory and legal framework has resulted in the accelerated growth of the Islamic finance industry. Examples include countries like Bahrain and Malaysia, where separate legal and regulatory frameworks have been introduced for Islamic banking, resulting in the manifold growth of the industry in recent times.

Nevertheless, having a separate legal and regulatory framework does not mean having a relaxed framework and giving a competitive edge over the conventional counter parts; rather the Islamic fi nance institutions have an additional responsibility to adhere to Islamic principles and guidelines, on top of the existing strict banking standards observed by the conventional counterparts. However, in order to ensure the harmonized discharge of such responsibilities, the legal framework should have specifi c provisions that support the execution of Islamic legal documentation in the court of law as well since the prevailing Islamic contracts executed by Islamic finance institutions have practically no or very minimal implementation support in the customary commercial and companies' laws.

Capacity-building

In addition to all of the aforementioned points, the regulators also need to create an environment by bridging the gap between the legal practitioners and Shariah experts.

For this purpose, the regulators should also implement any fit and proper criteria for the involvement of legal practitioners with a strong emphasis that the legal practitioners involved in any Islamic fi nancing transactions should have suffi cient Islamic fi nance certifi cation. This is necessary as Islamic finance transactions are usually asset-based so the legal practitioners should have sound knowledge and understand the concept of risk associated with Islamic transactions and loss-sharing.

Synchronization of Customary Laws Under Shariah Guidelines

The final point should be the development of a comprehensive and dependable legal and regulatory framework for the Islamic finance industry under Shariah guidelines. This is imperative as it will boost public confi dence in the Islamic banking system and allow Islamic fi nance institutions to operate with Shariah principles and Islamic legal documentation.

It should be clearly understood that the synchronization of all relevant customary laws under the principles of Shariah is extremely important as otherwise, Islamic fi nance transactions are dealt only inside Islamic fi nance institutions and only in the agreements executed amongst Islamic fi nance institutions and their customers. In order to deal with the legal issues being faced by the Islamic finance industry, the following are some steps that should be taken:

An Islamic finance legal framework: As emphasized previously, in order to support the growth of Islamic fi nance on a strong footing, the duality of the present banking system must be recognized and accordingly, a separate legal framework needs to be established to cater to the issues related to Islamic fi nance institutions. An international adjudicating body should also be established in order to facilitate dispute resolution in cases of cross-border Islamic finance transactions.

Resource development: Islamic fi nance should be included in the curriculum of law degrees/courses as a compulsory subject.

Islamic banking courts: Presently, the cases related to Islamic finance are subject to the same courts as that for conventional finance; there is a dire need to establish separate Islamic banking courts.

Amending existing commercial laws: Local commercial laws should be amended so that Islamic finance institutions can engage in Islamic transactions without any additional tax and legal implications.

There is a dire need to establish separate Islamic banking courts.

Disclosure of Information in Context of Pakistan's Capital Market and Corporate Laws

DR. FAKHARA RIZWAN

Author's Profile

Dr. Fakhara is a credible and undeniably inspiring woman to both, aspiring lawyers and women in general. Not only her achievements, but courageous struggle is also inspirational for other women lawyers. She is a self-made person, who had faced opposition and challenges to assert herself in a male-dominated society as an individual, more specifically in a male-dominated profession of law as an expert of her field. She has defined independent strength modestly with her determination, in a less supportive environment. Her fearlessness, determination and fervor to her work is inspirational for all women who wish to pursue a legal career. She has always been vocal about the lack of diversity, of all kinds, in the legal sector of Pakistan, especially on lack of female judges at the senior most positions.

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ABSTRACT

Corporate laws of any country exerts considerable influence on its capital market by defining the legal and regulatory structure and standards of corporate governance, including adequate disclosure of information and transparency. There is thus a direct relationship between a country's corporate laws and development of its capital market. The role of corporate governance in the capital market is not very effective in a developing country like Pakistan. Capital markets in developing countries do not always provide inducement for better corporate governance; that is mainly because of the dominance of a few large players and low institutional activity which may go hand in hand with poor quality as well as quantum of disclosed information and lack of transparency. Disclosure of information and transparency enhance investors' confidence in a firm's financial and operating performance as well as its assets and liabilities. This eventually enhances a firm's ability to access equity and debt finance, further helping in the development of the country's capital market.

Introduction

Firstly, let me provide some background information on how a company finances its day-to-day activities. Companies are generally commercial organizations and they exist to make profits, and in order to make profits, they require adequate level of capital. A sole proprietor, running a small business, generally has two options to raise capital/funding for his business. Firstly, dipping into own savings and secondly, borrowing. This is also true for partnerships. In the initial phase where cash flows are negative or losses are being incurred, unless one is wealthy, these savings could dry up fairly. Financial institutions paradoxically prefer to lend to those who already have a lot of money. This may not be a great problem if he/she chooses to remain small, but many businesspersons often like to expand their businesses; these can generally only be financed by financial institutions if the business is incorporated.

Author's Profile Continued

A member of International Bar Association and its committee on the Corporate and Acquisition & Mergers. One and only Pakistani member of Malaysian Corporate Counsels Association. Vice-Chairperson of Non-Banking Financial Institutions & Modaraba Association and representative of the leasing industry in Federation of Pakistan Chamber of Commerce & Industry. Her ability to take on multiple roles and furiously dedicate herself for her work has played an important role in her success.

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A listed company may draw on the same sources of finance as a sole proprietorship: saving and borrowings. In addition, a company may raise funds by issuing shares. The capital subscribed for the shares is used by the company to finance its operations. There is theoretically no limit to the amount that can be raised by the issue of shares. A private company with milliners as members could raise billions. Normally, however, when a private company outgrows resources of its members, the managers' thoughts turn to a flotation on the stock exchange.

A company may also borrow from the public by issuing debt instruments viz bonds/debentures. Shares and bonds/debentures, which are also generally called securities, are broadly categorized into debt securities, equity securities and hybrid instruments. Debt securities consist of such as bank notes, bonds/sukuk, Term Finance Certificates, PIBs, and debentures. As for equity securities, these generally comprise ordinary shares/common stock and preferred stock. Hybrid instruments generally include features of both debt and equity instruments, e.g. convertible bonds. Only the public listed companies can offer securities to the public. These securities represent value that is dependent, inter alia, on the profitability or future prospects of the company.

The raising of common equity capital refers to the process when the company issues common stock/ordinary shares to meet its capital needs, and holders of those shares become company's shareholders. They are generally entitled to a dividend for their investment, the amount dependent on the company's profitability and dividend policy. The raising of debt or loan capital includes the process where the company issues bonds/sukuk or debentures to the public to meet its needs. Bonds or debentures are essentially acknowledgements of debt which can be issued to individuals or group of investors. Holders of these debt instruments are entitled to a fixed or variable rates of interest on their investment and a return of the principal amount loaned on maturity of the debt.

Disclosure of Information

In order to encourage investment, all modern societies have legislation regulating raising of funds from the public. Principally, the objective of all these laws is to ensure that corporations, prior to seeking public funding, by way of equity, debt or hybrid instruments, will provide adequate disclosure to the investor so as to enable that investor to decide whether or not to invest in the corporation. It is necessary to have regulations to protect the interests of the public at large. There are rules designed to ensure that sufficient information is given to the public to help them make informed decisions and to keep undesirable practices to a minimum.

The laws and regulations related to securities have been developed to make sure that the statements made by issuers of securities are true and do not mislead investors, either by including misstatements or by deliberately excluding important information. Hence, laws relating to public fund raising and the issuance of disclosure documents must ensure that adequate information is provided to a prospective investor before he or she makes a decision to invest. Besides, due diligence is also to be exercised by those who prepare these disclosure documents. Regulating the matters related to adequate disclosure of information is an essential part of the laws for investor protection. The financial products are not physical goods, members of the public must exercise the due care and read offer documents in order to assess the financial product.

The accuracy of offer documents is therefore becoming crucial. Hence, the company is required to issue a prospectus to the public. One of the most important disclosure document is prospectus. A prospectus is a document that is intended to inform the investing public of such matters as are relevant to the decision to invest.

Purpose of Disclosure

The objective of the disclosure documents is to promote disclosure of information that investors reasonably require in order to make informed investment decisions and to protect investors from exploitation. Disclosure documents are required when companies invite investors to provide them capital.

Disclosure requirements are important as it helps to achieve the objective of establishing a fair and well-informed market.

A prospectus, being the critical disclosure document, provides all the information that an investor might reasonably need to know in order to make a reasoned decision about the merits and demerits of the investment proposal. To ensure fairness, the same information shall be available to all investors at the same time. The accessibility to reliable information is vital for an efficient capital market. Disclosure documents are required to contain all the known and reasonably anticipated risks associated with the industry in which the company operates. The requirement of adequate disclosure and transparency allows the investors to make an informed investment decision.

Disclosure of material information in an effective way enables the investors to make more confident assessments about securities without undertaking their own costly inquiries. It is generally more practicable and cost effective for the fundraiser, rather than the numerous investors, to undertake inquiries and disclose details about its own business. If no fundraising law existed, investors could easily be defrauded by the use of false information. Capital markets would easily lose credibility. Disclosure documents are more than marketing tools. They also create legal rights and obligations between the investors and the legal entity offering the securities. It provides a potential method of protecting interests of the investors, for instance by clearly identifying the risks involved in the investment opportunity offered.

Pakistan's Capital Market and Legislation

Pakistan's capital market is governed by the Companies (Issue of Capital) Rules 1996, Securities Act 2015, Public Offering of Securities Rules 2016, Public Offering Regulations 2017, Pakistan Stock Exchange Rule Book, and Companies Act 2017. The Ministry of Finance is responsible for controlling the market which is actively represented by the Securities and Exchange Commission of Pakistan (SECP/Commission). The Commission was set up in pursuance of the Securities and Exchange Commission of Pakistan Act, 1997 and became operational on 1st January 1999. The current mandate of the Commission includes following:

- Regulation of corporate sector and capital market;
- Supervision and regulation of insurance companies;
- Supervision and regulation of non-banking finance companies and private pension schemes; and
- Oversight of external service providers to the corporate and financial sectors, including chartered accountants, credit rating agencies, corporate secretaries, brokers, surveyors etc.

The Commission's ultimate responsibility is to develop a fair, efficient and transparent regulatory framework for the protection of investors. Apart from discharging its regulatory functions, the Commission is also obliged by statute to encourage and promote the development of the securities and futures markets in Pakistan. It has direct responsibility to supervise and monitor the activities of market institutions and regulate all persons licensed under the Securities Act 2015. The Commission's enforcement and legislation is divided into four sections, namely criminal prosecution, civil actions, administrative actions and cases compounded. Criminal prosecution and civil actions are those cases that the Commission brings forward to court while the administrative actions pertain to the warning, revamp or licence being revoked by the Commission. Cases compounded are those cases with less serious offences where the Commission will offer certain amount of compounds (penalties in monetary terms) and warning letter.

The Commission governs the Pakistan Stock Exchange Limited (PSX), being responsible for the enforcement of the capital market rules and regulations. The two main agencies that regulate the Pakistan's capital market are therefore the SECP and PSX. SECP is a statutory body with investigative and enforcement powers that has an important role to play with respect to corporate fraud, since it has the power to prosecute companies for committing fraudulent acts. PSX, the main stock exchange in Pakistan, was incorporated in 1949 as a company limited by Guarantee. In result of demutualization, the Exchange stood corporatized and demutualized as a public company limited by shares under the name of Karachi Stock Exchange Limited, with effect from 27th August 2012. Afterwards, the three stock exchanges namely Karachi Stock Exchange, Lahore Stock Exchange and Islamabad Stock Exchange were integrated into Pakistan Stock Exchange Limited (PSX) on 11th January 2016. PSX provides a central market place for listed companies in Pakistan to transact business in shares, bonds and various other securities. PSX has its own listing and disclosure standards that must be followed by listed companies.

Prospectus

Before obtaining public funding, a company is required to prepare and register a prospectus with the Securities Commission, which is the approving and registering authority for prospectuses. A prospectus is the most common form of disclosure document and must be prepared for an offer of securities. A prospectus is a detailed and often lengthy full disclosure document.

The overall aim of its disclosure provision is to ensure that prospective investors are given sufficient relevant and accurate information to make an informed investment decision. Securities Act 2015 defines prospectus as a document, notice, circular, material, advertisement, offer for sale document, publication or other invitation offering to the public or any section of the public, inviting offers from public for subscription or purchase of securities of a company, body corporate or entity, other than deposits invited by a bank and certificate of investments and/or deposits issued by non-banking finance companies.

The Prospectus contains information on the character, nature and purpose of an issue of shares, debentures, or other corporate securities. The Prospectus must contain all material information and facts relating to the company and its operations. This will enable a prospective investor to make an informed decision as to the merit of the investment. Most importantly, it should be furnished to an investor before any subscription/investment is made. Any information that is misleading, false, misstatements and omissions in a prospectus can be regarded as defective information. With regards to the contents of a prospectus, it is to be noted that the new provisions adopt a different approach to the previous laws regulating prospectus contents. Previously, the approach taken was described as a 'Merit-based' approach.

Under this approach, the law specified in detail the type of information that had to be found in the prospectus. This approach has now been discarded and replaced with a 'Disclosure-based' approach. The benefit of this new approach is that it will promote a higher degree of transparency and accountability which in turn promotes good corporate governance. Furthermore, it also provides a certain degree of freedom to the issuer to determine what information is relevant to the prospective investor. The contents of a prospectus are very detailed, that include overview and history of the company, memorandum of association, details of directors and management, financial information, directors' report etc.

Everyone involved in the preparation of the prospectus which includes the directors of the company, promoters, accountants and professional advisers are responsible to ensure that there is no omission of facts which would make any of the statements misleading. They are to be mindful of the provisions under the governing laws on liability for false or misleading statements or material omissions in the prospectus as they will be held fully accountable should the prospectus contain any false or misleading information. The directors and promoters of the issuer company are fully responsible for the accuracy and transparency of the information contained in the prospectus.

Directors must not turn a blind eye to mis-statement any information in the prospectus and must conduct reasonable level of inquiry which is expected of a director. This is because given their involvement with the day to day affairs of the corporation, directors should have knowledge of its operations and access to information. Directors would most likely know or should have known about any material errors or omissions in the statements.

Well, a principal adviser must perform due diligence verification covering all aspects of the company business which includes corporate structure, risks, key management, financial position, material litigation, borrowings. Underwriters too must live up to the standard of due diligence as underwriters cannot merely rely on the assurances by management but must independently verify the accuracy and completeness of information in the prospectus.

The term "due diligence" refers to the process of investigating a company's business, legal and financial affairs in preparation for a possible transaction. It means the process by which persons must conduct careful and reasonable enquiries for the purposes of timely, sufficient and accurate disclosure of all material information or documents. The main objective of the due diligence process is to enable the potential investors to gain a clear understanding of the issuer company and its business and its potential to achieve its targets and to enable the investors to assess the risks associated with the proposed transactions to be entered into by the issuer company in offering shares to the public.

Public listed companies are to disclose certain financial and operational information annually to their members and to the public. It is important that relevant information is disclosed to the public in order for the public to assess and review the issuer company's progress and achievements so that they may, if they are interested, invest in or disinvest from the said company.

Post listing, disclosures are effected through quarterly financial statements which are made through stock exchange, annual financial statements which are submitted to the Securities and Exchange Commission as well as continuous disclosures which are regulated by the rules of stock exchange. In a prospectus for example, directors are required to sign a responsibility statement in which the directors vouch for the truth of the statements contained therein. Not only that, public listed companies are also required to make immediate public disclosure of information, which is reasonably expected to materially affect the price or value of the company's securities, or would affect an investor's action. In addition, requirements to provide all material information on company's website has provided an additional comfort in current era of technology. The need for such continuous disclosure is to keep potential investors fully informed of all relevant information that would affect the price of the shares of the company and eventually affect their decision to invest. The company's having transparency and abiding the principle of maximum disclosure of information are more attractive for investors.

Conclusion

The capital market plays a critical role in enhancing corporate governance standards, the firm-level corporate governance however is also very significant to increase credibility of the market and enhance confidence of the investor. The corporate governance of any capital market is simultaneously determined by related governance components and characteristics of individual firm or corporation. Creating an environment of adequate disclosure and transparency, certainly result as development of capital market. Though there are numerous legal and regulatory requirements with regard to the disclosure of information, the corporation however should emphasis on the voluntary disclosures in order to attract strategic investors.

The Study of Victims in Criminal Investigation

DR. JAWED MASUDI

Author's Profile

The writer is a Criminologist and an Advocate High Court with vast experience in Corporate, Litigation and Criminal proceeding in the court of law. Over the last decade, he has ben developed a proven track record of leading and achieving key law and order objectives and projects in multiple Criminological approaches.

ABSTRACT

There are three main issues that can be provided through victimology and these are context, connections, and investigative direction. It is therefore important to enact a law which protects victims from further victimization and assists them during the criminal justice process. These inferences are somewhat basic, and just an example of the ways that victimology can provide information about many aspects of a criminal investigation.

Victimology is the study of victimization, including the relationships between victims and offenders, the interactions between victims and the criminal justice system. It includes the police and courts, and corrections officials and the connections between victims and other social groups and institutions, such as the media and civil society.

The possibility of providing investigators with a clue about the likely perpetrator of the crimes, and provide the profiler with vital information not only about the perpetrator, but about the victims themselves. Collectively, this information is referred to as "Victimology," or the study of victims: an examination of every facet of their lifestyle, background, health, and physical characteristics. It is hoped that through an in-depth examination of the victims, we may know the perpetrator a little better.

Victimology is important in the overall investigative process because it not only tells us who the victims were, their health and personal history, social habits and personality, but also provides ideas as to why they were chosen as victims. In many situations, the offender will hold back from choosing a victim until one that meets his needs comes along, possibly allowing him to fulfill some fantasy or desire he has. Because of this, the way the victim is chosen is important and gives an insight into how the offender thinks, which subsequently affects how the perpetrator acts. If we are able to determine how the offender is acting now, we may be

better able to determine his future behavior, possibly leading to a successful arrest. Closely related to victimology are the concepts of method of approach, method of attack and risk assessment. If we know details of the victims' personalities (i.e. they may be naturally cautious), then we may be able to determine, in conjunction with an analysis of the crime scene, how they were initially approached by the offender. The same will apply for the way they were attacked and overpowered.

If this information is not distinguishable through the crime scene, then an analysis of the victims' overall risk, that is, the chances of them becoming a victim, may be of some help. If we examine this along with the risks the offender was willing to take to acquire a certain victim, then we will have an overall picture of who the victim was and what drove the offender to choose this particular person as a victim.

I would like to draw the basic concepts and Issues and will provide the reader with an overview of the concepts of victimology. It will not provide an insight into why a particular offender will choose a particular victim, but will cover some of the general considerations of victim selection and acquisition.

Victimology in its most simple form is the study of the victim or victims of a particular offender. It is defined as “the thorough study and analysis of victim characteristics”, and may also be called "victim profiling". The reason a good victimology is important is that the victim constitutes roughly half of the criminal offence, and as such, is as much a part of the crime as the crime scene, weapons, and eyewitnesses. This is especially true when we are presented with a live victim, as this was the last person to witness the crime, and may be able to provide the best behavioral and physical description of the offender.

Apart from the above considerations, the victim's background may provide us with important information about past activities or lifestyle, possibly leading directly to the generation of a suspect.

The victim has traditionally been neglected in police investigations, and when a profile is requested, the victim information is often missing from the police reports. This should not be taken to mean that no police services use victim information, rather, until recently many have neglected to consider the victim's past as important. Often, the best way to approach a profile is through the victimology, and is one of the most beneficial tools in classifying and solving a violent crime.

In a perfect world, the following information should be available for the profilers on the victim before they begin to work the case: Physical traits, Marital status, Personal lifestyle, Occupation, Education, Medical history, Criminal justice system history, Last known activities, including a timeline of events, Personal diaries (if known and available), Map of travel prior to offence, Drug and alcohol history, Friends and enemies, Family background, Employment history.

The above list is not "exhaustive" in that it does not provide a total and absolute checklist of those things that should be included in the victimology. It is a rough guide only and each case, with a unique perpetrator and victim, will require its own unique victimology.

There are some important questions that should accompany any study of the victim, and these will hopefully lead not only to some answers, but also to more questions which should also be addressed. Again, this list is not complete, but should give the reader an idea about what to look for and ask of the crime:

- Why was this particular person targeted?
- How were the person targeted, or was the person a victim of opportunity?
- What are the chances of the person becoming a victim at random (and therefore opportunistic)?
- What risk did the offender take to commit the crime?
- How was the victim approached, restrained and/or attacked?
- What was the victim's likely reaction to the attack?

The answers to these questions will provide some ideas about the offender's motive and possibly his signature. From this, other examinations can be made about the offender's likely background including his knowledge of forensic and police procedures, his possible occupation, his physical characteristics and social skills. Where possible, inferences made by the profiler about the offender should be checked off against other inputs such as eyewitness accounts and the information available from the crime scene. If the information "fits," it is more probable that the conclusions are correct. If it does not "fit," then further support should be sought, or other possibilities explored.

In examining the victimology in this case, the victims' ages and current living arrangements meant that the odds of this occurring by chance were very slim indeed, suggesting that the victims had been pre-selected.

It was felt that older victims had been selected because they were more easily controlled and were less likely to have visitors at those early morning hours. Also, the fact that he had stolen a set of keys, duplicated, and then returned them signaled his intention to return at a later date.

So how did the offender come to meet all of these victims? Given that they all rented through the Housing Commission, it was felt that the offender probably worked for the Commission in some capacity. This could have been as a maintenance man, gardener, or painter or builder. It appeared that the offender knew the layout of the property, so more likely than not, he had been inside at some point prior to the offences. Given the lengths the offender went to in an attempt to conceal his identity also suggested he had personally encountered some if not all of his victims at some point. He felt that they may be able to identify him if he was not well concealed.

These inferences are somewhat basic, and just an example of the ways that victimology can provide information about many aspects of a criminal investigation. Simply by looking into victimology, we can determine whether the victims were chosen at random, possibly by whom, and we may even be able to determine some of the offender's characteristics through a good victimology. In the above case, the offender had pre-selected his victims, had entered their properties prior to the assaults, and was employed by the Housing Commission as a painter.

There are three main issues that can be provided through victimology and these are context, connections, and investigative direction. Using the above case, it would have been possible to provide investigative direction in that the police should look for a male who had prior access to the properties, may have been employed by the Housing Commission, and was probably employed in a profession such as a painter, builder, lawn-mower or general maintenance man.

By understanding how and why the above victims were chosen, a "relationship" between the offender and victims was established. The other kinds of links that may be provided between the offender and victim include work colleagues, geographic links (such as a neighbor), hobby related links (sports clubs), or social links (victim met the offender in a bar). The number of possible links is endless, so a good victimology is essential to narrow this down.

Victim risk is further broken down into several subcategories, and for a more in depth review of these, perhaps the best work available is that of Brent Turvey. Much of the following information has been taken directly from that source.

The victim lifestyle risk refers to the overall risk present by virtue of an individual's personality and their personal, professional and social environment. Lifestyle risk is basically affected by who that person is, and how the person relates to certain risks in the environment. There are certain factors which will increase a person's lifestyle risk, and these include the following:

Aggressiveness	Anger
Emotional outbursts	Hyperactivity
Impulsivity	Anxiety
Passivity	Low self esteem
Emotional withdrawal	

To put one of the above characteristics in context, imagine the following example: If the victim is prone to emotional outbursts, the individual may be more likely to storm out of a house during a fight to "cool down." While out, the person encounters an offender who assaults and abducts him/her. The emotional outburst has contributed to becoming a victim by virtue of the fact that it placed the person in harms way, and may lead others to believe the victim will not be back for hours, as this is usual following such a disagreement. This increases the amount of time the offender has to get away.

The victim incident risk refers to the risk present when an offender initially attacks a victim by virtue of a victim's state of mind, or hazards in the environment. Say for instance, that a person has just left work after being fired from his job. He has just invested a lot of money in property and is preoccupied with paying off his financial commitments.

When walking to his car in the evening, he fails to notice the person waiting around the entrance to the car park. The fact that he is preoccupied by his newly acquired financial state increases his incident risk because he is failing to notice unusual or potentially dangerous factors in his surroundings.

Offenders may also be exposed to incident risk, which refers to the possibility of them suffering harm or loss. Offender incident risk is subjective in that it is the risk perceived by the profiler for that offender. The following example will provide an idea as to how an offender's perceptions of a situation will misinform them as to the offender incident risk:

Conclusion

The victim has traditionally been ignored as a component of the crime. Hopefully, this article has provided the reader with an insight into not only how important the victim is to an investigation, but why they are important in the overall scheme of the crime. A complete victimology will usually provide information about the victim's life, and this coupled with an examination of other aspects of not only the victim's risk, but the risk the offender was willing to take to acquire that person as a victim, may provide information about the offender as well.

Any examination made of a crime with an unknown offender that does not consider the victim as a part of the crime will be lacking in information from the outset.

As the accuracy and completeness of the whole investigation rests almost completely on the accuracy and completeness of the information provided, it is important for investigators to focus as much on the victim as they do on the potential perpetrator. Only then will they be provided with the maximum amount of information to examine, in the hope of solving serious violent and serial crime.

The Develpment of Public Interest Litigation (PIL) in Pakistan and the Contemporary World

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Author's Profile

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ABSTRACT

Public interest litigation (PIL), an international movement, having its origin in the American and British system, is an evolving concept in the field of adjudication in Pakistan. The PIL has received considerable attention in recent years from both South Asian and western countries. In recent decades, the American practice has been a notional counterpart of public interest in courts in other constitutional systems. However, the South Asian incarnation of PIL is, in many ways, distinguishable from the Anglo-American experience. In PIL the court jurisdiction is not restricted to the aggrieved person but is made widely open to any individual or group, acting pro bono publico, who is seeking the redressal of grievances or elimination of injustice or discrimination from the society.

Introduction

The term public interest litigation (PIL), a new phenomenon in our legal system, is used to describe cases where conscious citizens or organizations approach the court bona fide in public interest. Public interest litigation means what it says, namely litigation in the interest of the public. … it must be emphasised that the raison d'etre of public interest litigation is to break through the existing legal, technical and procedural constraints and provide justice, particularly social justice to a particular individual, class or community who on account of any personal deficiency or economic or social deprivation or state oppression are prevented from bringing a claim before the Court of law.

PIL may be distinguished from ordinary litigation in following three ways viz; First, PIL is for the benefit of the people as a whole or a segment of the society. It aims to enhance social and collective justice and there must be a public cause involved as opposed to a private cause. This includes several situations:

Author's Profile Continued

Self-motivated with Strong Leadership and Administrative skills. Besides, vast experience in dealing and drafting all kinds of legal matters, petitions, appeals, suits, agreements and contracts, notices, legal replies, affidavits, statements, etc. Coordination and dealing with senior legal advisors, Barristers, advocates, lawyers, attorneys, regulators, senior officials and executives at higher management levels in public, private and corporate sectors. Also worked as Secretary General, ABAD, Karachi. A large number of publications in leading English Newspapers, leading Accredited professional journals and periodicals of repute. Several years of teaching experience up to degree level of various subjects at different Institutions.

a. Where the matter in question affects the entire public or the entire community, e.g. illegal appointment of an unfit person as a government servant;

b. Where the issue involves a vulnerable segment of the society, e.g. eviction of slum-dwellers without any alternative arrangement;

c. Where the matter affects one or more individuals but the nature of the act is so gross or serious that it shocks the conscience of the whole community, e.g. rape of a minor girl in police custody.

Second, in the situations mentioned above, any individual or organisation may approach the court. In other words, PIL involves liberalisation of the rules of standing. This includes cases initiated suo motu; because the judge himself is a concerned citizen in such a case.

Third, the court adopts a non-adversarial approach as opposed to an adversarial system of litigation. This includes procedural aspects as well as the aspects of granting relief. As a result, the court may treat letters as writ petitions, appoint commissioners, award compensation or supervise and monitor the enforcement of its orders.

In short, PIL may be described as a type of litigation where the interest of the public is given priority over all other interests with an aim to ensure social and collective justice, the court being ready to disregard the constraints of the adversary model of litigation. Thus when conscious citizens or organisations, with bonafide intentions, approach the court for the interest of the public in general or a disadvantaged or under-privileged segment of the society and not for any private, vested, special or group interest, it is termed as 'public interest litigation.

An injury to the public interest will be apparent only when some constitutional or legal rights, privileges or benefits are affected or where a constitutional or legal duty or obligation has not be performed. PIL becomes a necessity when protection of law is unavailable to the public or a segment of it due to ignorance, poverty, fear or lack of organised endeavor. It is a phenomenon unique in judicial history and perhaps equal, if not greater in significance to the precedent of Marbury v Madison, resulting in the doctrine of judicial review.

This form of litigation is indeed a novel juristic prescription for overcoming the formal defects in the legal system so as to guarantee real and substantive justice to the masses, particularly the poor and deprived sections. In a sense, the public interest litigation is a judicial response to redress the problems of the under-privileged, by giving them the right to seek access to justice. It is a strategy to meet the exigencies of time and cater for the demands of emerging realities. It is a development identical and equal in importance to the evolution of the law of equity.

Public interest litigation means litigation in interest of the public. The world 'public' means public at large, including all classes and sections of society without any distinction of gender, social status, and economic background, ethnic origin, religious credence or cultural orientation.

Origin, Background And Development Of Public Interest Litigation (PIL):

A scrutiny of PIL in various jurisdictions demonstrates a very interesting pattern. PIL first emerges as a result of expressions of social commitment of conscious individuals. Then it faces an initial period of recognition problem. Eventually, it breaks down the traditional constrains. Once successful, it is treated as a major development and becomes a permanent feature of the legal system. Finally, this success in its part inspires other jurisdictions to follow the same route. PIL thus travels from one jurisdiction to another. However, development of PIL is closely dependent on the constitutional culture and historical experience of the people.

Public interest litigation, an international movement, having its origin in the American and British system of laws has travelled far beyond those frontiers and with some variations of indigenous features, entered other common law jurisdiction, such as India and Pakistan. Initially, however, this movement commenced in the United States wherein during the late 1960s there emerged certain public interest law firms to provide legal representation to unrepresented or underrepresented groups or interests. These firms specialized in different disciplines such as environment, consumerism, civil liberties, minority rights etc.

The development of PIL in USA, England, and India has immensely influenced the Pakistani and Bangladeshi developments and understanding in Public Interest Litigation.

Public Interest Litigation (PIL) In India:

Towards early 1980's the Indian courts seemed poised to entertain cases of public interest and issue appropriate directions in such matters. These cases were initiated for the benefit of the deprived, dispossessed and disadvantaged sections of society.

Such proceedings were part of the legal aid movement initiated by certain public spirited groups. Free legal aid movement was sympathized with by the executive and supported by the judiciary. While deciding public interest cases the judiciary was willing to relax the rules, deviate from the standard procedures and ditch formalities and technicalities that stood in the way of providing substantive justice to the poor and downtrodden. The courts adopted this strategy so as to secure the blessings of the rule of law for the weak and vulnerable members of society who had traditionally been deprived of its benefits. It was a unique and singular event in the judicial history of India when the judiciary extended its support to the poor and expressed its solidarity with them. It was, of course, a purely indigenous response to address the problems of the underprivileged and give them access to justice. It was indeed a native recipe for making socio-economic justice accessible to all. Justice Bhagwati explains:

> "The weaker sections of Indian humanity have been deprived of justice for long years; they had no access to justice on account of their poverty, ignorance and lliteracy.They are not aware of the rights and benefits conferred upon them by the Constitution and the law. On account of their socially and economically disadvantaged position they lack the capacity to assert their rights, and they do not have the material resources with which to enforce their social and economic entitlements and combat exploitation and injustice."

And with a view to enabling the exploited and underprivileged to get the benefits of rule of law and secure their due rights and interests, the judiciary was willing to extend a helping hand. The assistance from the judiciary was not just against the powerful social elite but also against the mighty government. Bhagwati, J. declared

"When the Court finds, on being moved by an aggrieved party or by any public spirited individual or social action group, that the executive is remiss in discharging its obligations under the Constitution or the law, so that the poor and the underprivileged continue to be subjected to exploitation and injustice or are deprived of their social and economic entitlements or that social legislation enacted for their benefit is not being implemented thus depriving them of the rights and benefits conferred upon them, the Court certainly can and must intervene and compel the Executive to carry out its constitutional and legal obligations and ensure that the deprived and vulnerable sections of the community are no longer subjected to exploitation or injustice and they are able to realise their social and economic rights.... It is vital for the maintenance of the rule of law that the obligations which are laid upon the executive by the Constitution and the law should be carried out faithfully and no one should go away with the feeling that the constitution and the law are meant only for the benefit of a fortunate few and have no meaning for the large numbers of half-clad, half-hungry people of this country."

While the concept of Public Interest Litigation was just taking shape, Bhagwati J., one of the pioneers of PIL in India, observed in People's Union of Democratic Rights v. Union of India:

Public interest litigation is essentially a co-operative effort on the part of the petitioner, the State or public authority and the Court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable section of the community and to reach social justice to them.

There is a significant new development from at least two standpoints. First, the courts are for the first time concerned with public interest matters. This is beyond the traditional role of the judges who previously adjudicated private disputes only. Second, it involves a public law approach with respect to the rules of standing, procedure and remedies so that private citizens can advance public aims through the courts.

Public Interest Litigation (PIL) In Pakistan

Public interest litigation in Pakistan is a newly evolving concept in the field of adjudication. Article 184(3) of the Constitution of Pakistan 1973 provides the concept of protection of Fundamental Rights through the use of Article 199 of the Constitution. Hence, the Supreme Court of Pakistan can pre-empt the jurisdiction of High Courts under Art.199 whenever "a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved."

The power of Art.184 (3) is "original jurisdiction" of the Supreme Court to enforce fundamental rights. We will also find words "human rights" used by the Supreme Court in its judgments given under the caption "Human Rights Cases" while they have not been mentioned anywhere in 1973 Constitution. It is the combined effect of the provisions of Art.184 (3) and Art.199 that helps us to understand as to what might be the human rights to be enforced. "Human Rights" is a general term while the term "Fundamental Rights" is specific one and is used in the Constitution as a practical term defining and limiting the exact meanings of various rights provided to all those who are citizens of Pakistan.

The Pakistani Supreme Court's meddling in pure politics under Chief Justice Chaudhry's headship is part of this global expansion of judicial power. From the time of Musharraf's first coup in October 1999 to Chaudhry's retirement in December 2013, the Supreme Court took cognizance of a broad swath of political questions. These political questions included matters such as regime legitimacy, law reform, economic policy and deregulation, regulation of electoral processes, eligibility of elected representatives to hold office, validity of constitutional amendment processes, intervention in executive appointments, conflict management, and even some issues bearing on foreign policy. Most of these political questions, along with other issues, were litigated and adjudicated under the ever-expanding umbrella of PIL. Besides receiving letters the Court also assumed suo moto jurisdiction in cases of human rights abuses reported by print or electronic media.

The courts have dealt with several cases under this jurisdiction and given appropriate remedy. In addition, the Supreme Court of Pakistan took notice of human rights violations revealed during the hearing of pending cases, and issued appropriate directions in such cases. The Supreme Court of Pakistan made it abundantly clear that no technical difficulties should prevent the court from deciding the cases of human rights violation.

Public Interest Litigation (PIL) In Bangladesh

Advancement of PIL in Bangladesh coincided with the restoration of democracy. Some attempts to introduce PIL in Bangladesh started since 1992 initially; it was difficult to overcome the threshold problem. However, efforts of the social activists enabled the progressive minded judges interpret the Constitution liberally through a series of cases. When success rally came in 1996, the Supreme Court not only found that PIL is valid under this constitutional scheme, but that the Constitution mandates a PIL approach.

Scope:

The scope of public interest litigation was determined by the Supreme Court of India in the case of S.P. Gupta v President of India. The Court observed:

> "Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Art. 226 and in case of breach of any fundamental right of such person or determinate class of persons, in the Supreme Court under Art. 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons."

As is clear, this jurisdiction is available for the redressal of grievances of an individual or group or community at large. This remedy is also available for a breach of law or rule or procedure or failure to perform a legal duty. Such a jurisdiction may also be availed for the observance of rule of law in the society. As observed by the Indian Supreme Court:

> "....as a rule of law, the Court may confine this strategic exercise of jurisdiction to cases where legal wrong or legal injury is caused to a determinate class or group of persons or the constitutional or legal right of such determinate class or group of persons is violated and as far as possible, not entertain cases of individual wrong or injury...."

Notwithstanding the Court preference for entertaining cases of public importance under this jurisdiction, no hard and fast rule has been laid down in this respect, and individual cases too, in exceptional circumstances, are maintainable.

Constitutionality

The constitutionality of public interest litigation is founded on the provisions of Article 32 and 226 of the Indian Constitution. The comparable provisions in the Pakistani Constitution are Article 184(3) and Article 199 of the Constitution. These articles give wide powers to the superior judiciary to enforce fundamental rights, ensure compliance with the rule of law and provide access to justice to all citizens, irrespective of any consideration of wealth or social status. Article 184(3) states:

> "Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article."

This clause has been regarded as the enabling provision for the Court to initiate appropriate proceedings for the enforcement of fundamental rights. The High Courts can also exercise similar powers under Article 199 of the Constitution. The main difference between the powers of the Supreme Court and High Court is that whereas the Supreme Court jurisdiction is restricted to issues of "public importance", no such condition is imposed on the High Court. The Supreme Court in the case of Benazir Bhutto v Federation of Pakistan, extended the scope of fundamental rights and observed that such rights include the rights guaranteed by Article 2A as well as the rights available under the Chapter on Principles of Policy. The Court stated:

> "While construing Article 184(3), the interpretative approach should not be ceremonious observance of the rules or usages of interpretation, but regard should be given to the object and the purpose for which this Article is enacted i.e. this interpretative approach must receive inspiration from the triad of provisions which saturate and invigorate the entire Constitution, namely, the Objectives Resolution (Article 2-A), the Fundamental Rights and the Directive Principles of State Policy so as to achieve democracy, tolerance, equality and social justice according to Islam."

This triad of provisions together with the preamble of the Constitution and Article 4 occupy a place of pride in the scheme of our Constitution, as this combination extends the concept and scope of human rights beyond its traditional compass. The emerging catalogue of human rights is so comprehensive that it includes all essential human rights, crucial for a civilised existence in the society. The preamble and Article 2A especially lay emphasis on the rights guaranteed by Islam. Indeed the right to have an access to justice is an important right guaranteed by the Islamic law. Article 4 gives every citizen the right to enjoy the protection of law and to be treated in accordance with law. This Article is stated to be the equivalent of the principle of the rule of law. The Chapters on Fundamental Rights and Principles of Policy ensure a vast array of fundamental rights including social, economic and political rights. The rights given in Chapter on Principles of Policy though not justiciable per se are actually an altruistic extension of fundamental rights and impose an obligation on the State to make necessary legislation for giving effect to such rights.

Thus it has been held both by the Indian and Pakistani Courts that the Principle of Policy are associated with and have a direct nexus with the Fundamental Rights, hence they are actionable and enforceable, just like human rights. Article 3 coupled with Articles 37 and 38 of the Constitution indeed cast a duty on the State to eliminate exploitation and ensure social and economic justice in the society.

The provision of socio-economic justice to all sections of the society, thus, is a dictate of the Constitution and the establishment of an egalitarian society, the destination of all the organs of the State. The Courts are, therefore, required to play, not just a neutral or non-partisan role but a positive and affirmative role, in giving effects to the dictates of the Constitution.

To play its role in the dispensation of justice, particularly distributive justice, the Supreme Court enjoys necessary powers and authority to play an effective role. Article 187(1) empowers the Court "to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter before it". Article 189 says that the decisions of the Supreme Court shall be binding on the subordinate judiciary. Besides, under Article 190 of the Constitution all executive and judicial authorities are required to act in aid of Supreme Court. These provisions enable and empower the Supreme Court to pass any appropriate order and give any direction to an executive authority or judicial body for the enforcement of fundamental rights in the society.

Procedure

The Superior judiciary is empowered to enforce fundamental rights and thereby ensure compliance with rule of law. Be that the case of enforcement of an individual right or provision of distributive justice to the community at large, the judiciary is mandated to ensure that adequate, effective and complete relief is given and substantive justice is ensured.

However, the issues in public interest cases are altogether different than the issues involved in private litigation. The issues in public interest litigation are commonly related to State repression, governmental lawlessness, administrative deviance, exploitation of poor and disadvantaged groups and denial to them to their legal rights.

Such issues call for corrective remedies, sometimes in the shape of new legislation. To decide these issues and give appropriate relief, the traditional Anglo-Saxon procedure is totally inadequate to meet the requirements of justice. The Anglo-Saxon law being transactional and individualistic in character is incapable of dealing with issues and concerns of collectivity and provision of socio-economic justice to groups or sections of society. The main hurdle in the traditional Anglo-Saxon system of jurisprudence is the sheer inability of poor litigants to seek justice. Being unequal in wealth and social status they do not get fair treatment and equal opportunities. Realising this hardship the judiciary has taken the view that in public interest cases a more relaxed and liberal procedure may be adopted to ensure real and substantive justice.

A change in procedure is necessary because lately the government activities and functions, especially in the area of socio-economic development are increasing and a new category of rights in favour of citizens and a new set of corresponding obligations on the State functionaries are emerging. Consequently, individual rights and duties are giving place to collective social rights and duties. Therefore, departure from the traditional rules of procedure is called for.

There are adequate provisions in the Constitution which justify such departure.

The enforcement of fundamental rights being an extraordinary jurisdiction, of course, implies the provision of extraordinary remedies by employing extraordinary procedure to do so. Thus the Supreme Court of India has taken the view that the exercise of powers under Article 32 of the Constitution must be purpose-oriented and appropriate means and procedures may be adopted to ensure the provision of real and substantive justice to the people, particularly to the poor and downtrodden.

The Supreme Court of Pakistan also made an identical observation on this issue. As stated by the Court in the case of Benazir Bhutto v Federation of Pakistan:

> "The plain language of Article 184(3) shows that it is open-ended. The Article does not say as to who shall have the right to move the Supreme Court nor does it say by what proceedings the Supreme Court may be so moved or whether it is confined to the enforcement of the Fundamental Rights of an individual which are infracted or extends to the enforcement of the rights of a group or a class of persons whose rights are violated."

The Supreme Court of India stated that the traditional rule of standing insisting that only an aggrieved person having suffered legal injury by reason of actual or threatened violation of his rights or interests can bring an action, is contrary to the norms of justice as it restricts access to justice by a large section of the population who may not fulfil the condition of being aggrieved though they may have special or sufficient interest in the matter.

Besides, the aggrieved person or group may not have the means to contest the action. Thus the Supreme Court of India as well as Pakistan has taken the view that in public interest cases, when a person or class or group of persons is by reason of poverty, helplessness, disability or socially or economically disadvantaged position, unable to approach the Court, any member of the public, acting bonafide, may move an action for relief. Thus the traditional rule of standing was relaxed and the person with sufficient or special interest was also authorized to bring an action.

This relaxation of the standing rule was indeed a follow up to the trend already set by the Courts in the United States and United Kingdom. In the United States the strict requirement of legal interest has been watered down and consequently the requirement of standing has been relaxed.

In the United Kingdom also both in the Mc Writer and Blackburn cases, dealing with the question of endorsing public duty against a statutory authority, the Court relaxed the standing rule and held that any member of public, having sufficient interest in the matter may bring an action. Quoting these precedents the Supreme Court of India concluded:

> "We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision."

It means that any member of the public or a social group, acting pro bono publico, may move the Court for the enforcement of fundamental rights. This could be done by filing a proper petition or sending a letter to the Court.

In several cases letters or telegrams addressed to the Court were converted in the regular petitions. This resulted in the creation of a new (epistolary) jurisdiction. This jurisdiction is, however, subject to certain conditions. The conditions are that the person bringing the action must be acting pro bono publico and not for personal gain or private profit or political motivations or other oblique considerations.

While adjudicating such cases, the courts relaxed the rules of procedure. In one case the Court ignored even the plea of res judicata, and in several cases the rules of paying court fee, filing an affidavit and engaging of a lawyer etc. were dispensed with.

Social Activism For Social Justice

Of all the perspectives from which PIL has been examined, the social justice preaches, accompanied with social activism, this is perhaps the most significant for the sub-continental proponents of PIL.

The social responsibility of the citizens, including the legal professionals, which stems out of their social consciousness, and considered to be responsible for the development and success of PIL.

Upendra Baxi's early critique of the Indian Supreme Court's activism in the mid-1980s is the classic statement of the distinctiveness of the Indian genre of PIL. Baxi uses the term —social action litigation‖ (SAL) to emphasize the very different historical triggers, institutional settings, and conceptual groundings of PIL in the Indian context.

Although the promoters of PIL in Pakistan shared the notion of social consciousness with their Indian counterparts, one distinguishing element was apparent from the very beginning – the emphasis on Islam.

In Pakistan, effective Islamisation of the laws of Pakistan started in the late 1970s. Social justice, as promoted by the Pakistani judges, is Islamic social justice. While introducing PIL, as they were under the Islamisation process, a most important issue for the pioneering judges was whether PIL conforms to Islamic principles. They established this conformity and proceeded further by showing that the inspiration and rationale of PIL can be drawn from Islam itself.

Conclusion

Judicial activism in South Asia, as well as the unique form of pro-poor litigation known as public interest litigation (PIL) has received considerable attention in recent years from both South Asian and western countries. The concept of public interest law or PIL is not new and is often instinctively traced back to the PIL phenomenon of the 1960s in the United States. In recent decades, the American practice has been a notional counterpart of public interest in courts in others constitutional systems.

However, the South Asian incarnation of PIL is, in many ways, distinguishable from the Anglo-American experience.

Over the years, Public Interest Litigation (PIL) has emerged as an effective tool for seeking judicial responses and subsequent government actions to the socio-economic challenges of the unorganized, powerless and those segments of the society who are precluded from resorting to legal redress owing to resource or knowledge constraints.

PIL has enabled public-spirited individuals, groups and conscious citizens to litigate in the interest of the poor and disadvantaged; and widened the scope for NGOs and civil society to participate in formulation of pro-people policies and laws.

In public interest litigation the court jurisdiction is not restricted to the aggrieved person but is made widely open to any individual or group, acting pro bono publico, who is seeking the redressal of grievances or elimination of injustice or discrimination from the society.

Is there a Right of Unilateral Humanitarian Intervention Under International Law?

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ABSTRACT

The article represents an attempt to draw a deepened understanding of the framework of humanitarian intervention within the annals of international law. It does so by assessing the legality of humanitarian intervention around the centrality of A. 2 (4) of the UN Charter prohibition on the use of force. As per the traditional paradigm on A. 2 (4) jurisprudence, the only exceptions to the prohibition are individual and collective self-defence enshrined under A. 51 UN Charter, and the use of UNSC's Chapter VII powers provide the only forum for accommodation of unilateral humanitarian intervention within a sovereignty and non-interference centric international use of force law. However, owing to the more recent prominence being attached to human rights protection under international law, certain ethical and moral precepts are being built to justify unilateral uses of force, without UNSC authorization, to uphold humanitarian intervention. The conclusion thus concedes the increased utility and importance of ethical and moral imperatives for unilateral humanitarian intervention, though such attempts fall short from a purely legal international law perspective.

The concept of unilateral humanitarian intervention is based on the use of force by one state, in the territory of another state, to protect the target state's population from the gross violations of human rights. The attacking state or its population is under no threat from the government of the target state. Rather, it assumes a unilateral right to intervene in the target state by force, under a 'humanitarian pretext', to secure the implementation of human rights, without the consent of the territorial sovereign. Whether such a right can validly exist has to be assessed, foremost, against the criteria set by the UN Charter in 1945 for the use of force, which laid down a general prohibition in the language employed by Article 2 (4):

> All member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

The prohibition imposed upon the use of force is by no means absolute, and the UN Charter contains an exception in the form of Article 51. The Article 51, however, has restricted the exception to instances of individual and collective self-defence, which can only be legally triggered in a situation of imminent threat of an armed attack, subject to the requirements of necessity and proportionality in any military response. Any examination of the legality of humanitarian intervention, therefore, has to flow from the centrality of Art. 2 (4) and the normative mechanism for the use of force established thereunder.

The Orthodox Approach to Legality

The traditional academic commentary on the legal existence of humanitarian intervention deems its legality to be of a doubtful nature. There is an explicit prohibition established by Art. 2 (4) of the UN Charter, and the only exceptions allowed are the collective and individual self-defence mechanisms incorporated in Art. 51. A military intervention in a UN member state cannot be legally sanctioned under any other justification, unless the meaning of territorial integrity is artificially stretched or the right to intervene is posited as a matter of customary international law. The principles of sovereignty and non-interference form the bedrock of the current system of international law, and there have been subsequent resolutions of the United Nations General Assembly which have sought to articulate the paramountcy of these principles.

The UNGA Resolution 2131 of 1965 has firmly entrenched the notion of non-intervention, stating that no Member State has the right to intervene, directly or indirectly, for any reason whatever, in the internal affairs of any other state, equating such armed intervention and all other forms of interference against the Personality of a state to be a contravention of international law. Moreover, the 1970 UNGA Declaration on Friendly Relations and Co-operation among States affirms the approach of non-interference in the internal affairs of other states.

The academics who are keen proponents of the doctrine often cite three prime examples of past conflicts where states intervened militarily in other states for humanitarian objectives. These oftcited examples are the Indian intervention in former East Pakistan to save ethnic Bengalis from massacres perpetrated by the West Pakistan Army (1971), the intervention of Vietnam in Cambodia (1978), and Tanzania's military foray in Uganda (1979). However, a striking commonality in all these examples is that all three states furnished the justification of self-defence for their military activities. The lack of any reliance upon the doctrine of humanitarian intervention by these states themselves showcases its doubtful legality, and the paucity for its support by the international community, whereby these countries refrained from articulating its existence. This confirms that the doctrine evolved from the more recent military practices of states during conflicts in the 1990s.

The existence of a rule of international custom is contingent upon both consistent and widespread state practice, together with the belief of states that the obligation upon them is legally binding (opinio juris). The evidence for the formation of a rule of custom establishing a right to intervene militarily for humanitarian objectives has shaky foundations, without any explicit declaration by states in the aforementioned examples that they intended to use force for humanitarian purposes.

Furthermore, the International Court of Justice, commenting upon the matter in its seminal ruling in Nicaragua v USA, denied that any legal rationale existed for the use of force to achieve humanitarian objectives, rejecting the notion that the United States could employ force against Nicaragua in order to ensure respect for human rights in that country, and being reluctant to see interventions as little more than permission for strong states to use force. This undoubtedly leads to the conclusion that the ruling 'unmistakably places the Court in the Camp of those who claim that the doctrine of humanitarian intervention is without validity'. From a strictly literalist paradigm, any use of force to advance humanitarian objectives in the territory of another state will run counter to the clearly stated provisions of the UN Charter and the authoritative opinion of the ICJ, and may amount to an aggression, according to the way the concept has been circumscribed by the UNGA. Under Article 3 of the UNGA Resolution 3314 on the Definition of Aggression, any invasion or an attack by the armed forces of a state on the territory of another state, however temporary, constitutes an act of aggression, and further that 'No consideration of whatever nature…. May serve as a justification for aggression'.

Therefore, from an orthodox and literal viewpoint, the UN Charter prohibition on the use of force does not envision any limited exception under the guise of unilateral humanitarian intervention. The only provision under the UN Charter which leaves the door ajar for the legality of humanitarian intervention is Art. 42, which authorizes the UNSC to take collective military action for the restoration of international peace and security. This requires the Council to establish the link between gross violations of human rights and threats to peace, which is not unprecedented, considering that the Council found these links in Resolution 68820 during the repression of Iraqi civilians in 1991, and Resolution 126421 which authorized humanitarian intervention in East Timor under UNSC's Chapter VII powers in the UN Charter.

The New Approach: Ethical and Moral Imperatives for Intervention

There is an opposing body of opinion, driven largely by academics, which views the legally valid existence of the doctrine of humanitarian intervention as lying outside the prism of the international law prohibition on the use of force built upon the inviolability of state sovereignty. This approach takes a broader view of the problem, articulating the concept of sovereignty as based upon upholding the existence of a new fundamental prerequisite; the protection of human rights. Under this approach, the existence of sovereignty is not absolute, built only upon the pillars of territory and governmental writ. It is conditional upon the responsibility of the government of a state to protect the human rights of its citizens. Therefore, where a government is unwilling or unable to protect its population from gross violations of human rights, or is a perpetrator of human rights abuse itself, its sovereignty is revoked to make way for the responsibility of the international community to redress the human rights situation on the ground, having recourse to military force if necessary. The legal crux of this viewpoint on humanitarian intervention is that human rights are norms of jus cogens, and the international community as a whole has a right to forcibly intervene to ensure their protection. The practice of humanitarian intervention has not only surfaced during the recent decades of international law development, but it stretches back as a concept to the nineteenth century use of force by states to protect ethnic minorities via military action in other countries. This right to forcibly intervene under the pretext of humanitarian intervention arises where the UN machinery has been ineffective, such as where there is a deadlock in the UNSC to use Chapter VII collective security measures, and a state or a group of states intervene, for the limited purpose of human rights protection. This recourse to force for humanitarian protection does not arguably run counter to the Art. 2 (4) prohibition, as it is not directed against the territorial integrity or the political independence of a state. The exercise is touted as a valid exception because the aim is not to overthrow the government of a member state, or indefinitely occupy its territory. The military action is consistent with the purposes of the UN because it protects those human rights norms which have attained the status of *jus cogens*.

The first pronouncement by a country on the utilization of the pretext of humanitarian intervention in a military conflict was the justification furnished by UK for military action in Iraq (1992) to protect the Shia and Kurd populations from being targeted by Iraqi government forces. The British Foreign Office stated:

> We believe that international intervention without the invitation of the country concerned can be justified in cases of extreme humanitarian need.

The doctrine, however, lay dormant until the NATO military action in former Yugoslavia in 1999. The NATO launched a concerted bombing campaign from April which lasted until June 1999 against Serbian military targets to stop the widespread human rights abuses, ethnic killings and massacre of civilians committed by Serbian forces against ethnic Albanians in the country. There was no UNSC authorization for the military strikes, but a UNSC resolution against the use of force by NATO, which had affirmative votes from Russia and China, two permanent members, was defeated by a majority vote. The action led to widespread political and academic debate, wherefrom a new template for future humanitarian interventions emerged. The NATO's military intervention in Yugoslavia established a precedent for humanitarian intervention justified under largely ethical and moral precepts.

The action was arguably validated by a number of novel exigencies. Firstly, there were ethical and moral imperatives justifying the need to avert an ongoing wide scale humanitarian tragedy. Secondly, the scarcity of subsequent broad condemnation of the military action by the international community at the UN constituted an implicit political acceptance of the emerging moral mantra for the practice. Thirdly, the action could be said to have an implied authorization from UNSC, thereby fulfilling the demands of the international community. The UNSC Resolutions 119928 and 120329 had asked Yugoslavia to undertake various steps to comply with the demands for cessation of hostilities and the establishment of a ceasefire. The UNSC Resolution 124430 was passed subsequently to endorse the agreement between the parties for a political settlement. Fourthly, where the international community hesitates in taking action without express UNSC approval, the human rights situation can worsen and lead to perpetration of genocide and war crimes, and any action might then be too little too late (for instance the genocide in Rwanda [1994] and the situation in Darfur, Sudan [2003]). Fifthly, the use of military force was multilateral which, if codified into treaty or custom, will diminish the dangers of abuse of the practice by a single hegemonic military power against weaker states. More importantly, the unequivocal use of the ground of humanitarian intervention by states for NATO military action in Yugoslavia has laid the groundwork for the formation of customary international law which can crystallize the notion as an exception to the general prohibition on the use of force under the UN Charter. However, justifying humanitarian intervention on the basis of morality, justice, ethics or fairness does not embed the concept as a valid rule of international law, either as a treaty provision or a custom. The normative framework governing the use of force has not changed since the NATO action in former Yugoslavia, and the affirmative academic opinion for the practice which originated thereafter makes no difference to this reality.

There have been no UNGA resolutions which have purported to vitiate state sovereignty in cases of human rights violations to make way for unilateral protective military action to achieve the singular goal of humanitarian intervention. Neither does the attempt to find the origin of the concept in nineteenth century examples holds ground, as there was no prohibition on the use of force at the time, and it was recognized as a valid instrument of national policy. The greatest setback to the ethical justification for the doctrine has come from the circumstances surrounding the 1999 NATO action. No consistent and unified legal justification for humanitarian intervention was advanced by states, as legal arguments were either not pleaded at UN forums or the media, or there were half baked attempts to cloud the justifications in the haze of morality and principles of humanity, barring Belgium which tried to justify its legality when Yugoslavia commenced proceedings for provisional measures in the ICJ. The variety of excuses offered for the NATO military action decrease the plausibility of the precedent in leading the way for the formation of customary law in the area. Further decreasing the legal quality of the affirmative line of thought is the fact that there has been no credible attempt to base the practice on an operational criteria. There are no legal guidelines highlighting the extent of human rights violations which can trigger the application of the doctrine, and the limitations upon its military scope, or any specific timeframe to redress the human rights abuses.

Conclusion: Falling Short on Legality

The general prohibition on the use of force, governed by Art. 2 (4) of the UN Charter does not recognize the right of humanitarian intervention as a valid exception. Although the NATO military action in Yugoslavia resurrected the notion from the dead, but it failed to give teeth to the concept as a legal precedent. The doctrine of humanitarian intervention has failed to evolve from a moral and ethical notion into a binding principle of international law. The use of force mechanism, as currently constituted under international law, is yet to find a way out of the suffocating embrace of the principles of state sovereignty and non-intervention.

Although the protection of human rights has garnered a footprint of increased importance in the annals of international law, but it is yet to mount a challenge to the status quo of sovereignty and the prohibition on the use of force. Arguably, if the status of human rights norms as *jus cogens* merits their protection by force, it does not automatically follow that this overrides the prohibition on the use of force. For this further step, it would be necessary to show that human rights are accepted by the international community as a norm from which no derogation is permitted, and also that states have accepted a right to protect them.

Even under the 1948 Genocide Convention, the ICJ has the compulsory jurisdiction to rule on the disputes relating to its application or interpretation.

It thereby follows that no state acting alone has a legal option of resorting to force against another state to avert the horrendous crime of genocide or bring it to an end. Only the competent organs of the United Nations (UNSC or ICJ) can exercise the right of humanitarian intervention.

Perhaps the problem lies in the very nature of the concept itself. It establishes a right to use force without a corresponding criteria which can guide the ensuing process when states resort to this option to stop human rights violations. Conferring a unilateral right upon states to use force can be easily abused by powerful states to militarily attack weaker states for their own interests. There is no provision which can guarantee that the attacking state pursues no aim other than the altruistic pursuit of humanitarian protection. The empirical evidence proves that in the actual instances of humanitarian intervention, the military force, technology and personnel were overwhelmingly contributed by a select group of Western states such as the USA, UK and France, which leads to allegations that this pretext is the twenty-first century equivalent of western hegemony and imperialism against the third world.

A military intervention determined by states alone downplays the interests of the actual vulnerable communities facing human rights violations and lacks any input by local representatives or the civil society. Giving powerful states an arbitrary right of military intervention, under any ground whatsoever, is inherently antithetical to the sovereign equality of states under the UN system.

It ignores the needs of conflict prevention and capacity building of states to address their human rights challenges. Moreover, military solutions for human rights violations are fraught with the dangers of more civilian casualties, collateral damage, and worsening an already volatile political situation. A country may descend further into violence and civil war and lose its institutional infrastructure, as witnessed in the case of humanitarian intervention in Libya in 2011.

An answer may need to be looked at elsewhere, in a process which reconciles the needs of sovereignty and human rights protection for states, and in a manner which prioritizes the concerns of the actual communities facing the risk of grave human rights violations.

Dworkin's Panama

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Author's Profile

The writer is a barrister who litigates at the Sindh High Court, a columnist and teaches Constitutional Law and Jurisprudence.

ABSTRACT

Ronald Dworking would often talk of hard cases, where law and morality might overstretch into crossroads. It was clear from his writings that for him the moral fabric of the dominant political theory of the polity assists judges in hard case, where no precedent is found or the answer has to be found in competing arguments. When the thrice elected Prime Minister of Pakistan Nawaz Shareef was disqualified by the Supreme Court, its jurisprudence was brought into question. The article tries to untangle the web with the intellectual subtlety of the principles and policies of Law's empire.

Panamagate struck Pakistan like a lightning bolt, but the political attrition of this was suffered the most by one family; The House of Shareefs. In what started off as political agitation, the matter soon came before the Supreme Court. This was by any means of the word a HARD CASE; the political theory that so intensely (read: yet subtly) provides the concatenation for our constitutional structure eroded like a volcano at the God's whim. What of abstracts, of rule of law, of separation of powers, of democracy, of injunctions of Islam, of Umar's sagaciousness, of Quaid's integrity, of Liaquat's honesty, of Iqbal's poetic justice, of Parliament's supremacy, of God's sovereignty, of mandate of vote, of mandate of justice but most of all what of the constitution itself when it was note very clear, could the judges have found a morally relevant principle to rule on the law as it is (rather than what it ought to be)?

If the judges could have indulged in such a jurisprudential exercise, then they have acted in a manner that would replicate the legal method of Judge Hercules. If both Judge Hercules and the Panama bench could come to the same conclusion on these facts; this tells us a lot about the law's objectivity and uphold Dworkin's conception of law as integrity as a whole. But would Judge Hercules come to the same conclusion?

The first strand of reasoning was that Prime Minister Nawaz Shareef, as he then was, was not honest under Section 99 of the Representation of the Peoples Act 1976 (ROPA) read with Article 62 (1) (f) of the Constitution of Pakistan. Both of these sections deal with a member of parliament being sagacious and honest. The Supreme Court had made up a joint investigation team to investigate money laundering allegations against the ex-Prime Minister, the JIT through its investigation established that the Prime Minister was entitled to a salary as an employee of his son's company in Dubai, since this was an asset and he had not declared it he was not honest for the purposes of both ROPA and the Constitution.

This as can clearly be deciphered can only be achieved through a moral reading of the constitution. Even for Judge Hercules this could not have been a simple application, this clearly did not 'fit' the law since there were no such precedents before and therefore had to be achieved through Hercules' interpretive method of substance. The idea was, could a member of Parliament, or even an ordinary citizen, be penalized in a summary manner, especially when there were other adequate remedies available at law. This is where the argument starts; yet such state machinery was unable to initiate the legal process for quite a long time, and with the state suffering because of political agitation, one 'legal' right answer had to be found. In trying to find that legal answer, Hercules would look at a morally relevant principle that would be justified by his jurisdiction's political theory that he subscribed to.

These morally relevant principles would include, the helplessness of the state machinery, the inability of law enforcement, the principle (as contrasted from a policy) of honest men being members of parliament, rule of law in the ethical, political and moral sense (and not necessarily the legal sense) that everybody would have to be answerable for a distinct breach of the law and the penalty would have to be proportionate to the level of the offence committed. The 'fit' here would be that since constitutional grounds were advanced, the summary jurisdiction of the Supreme Court could be invoked. This idea of a 'fit' is further established by article 187 of the Pakistani Constitution which gives the Supreme Court the power to do complete justice in matters before it.

Judge Hercules might as well therefore come to the same 'one right answer' regarding such disqualification of the Prime Minister.

But yet, would such a moral reading of the Constitution really help the Supreme Court (or any court) for that matter in always doing complete justice?

The accident of some judges finding certain opinions natural or novel should not be the base on which judgments can be concluded, especially if these are against 'positive sources of the law' such as precedent, statues or the Constitution (that lets assume for present purposes would raise no use of any interpretive technique).

Dworkin could not mean such a notion, for then his theory would be one of natural law, his theory is one of interpretivism, which in the nominal sense would mean that only where there are gaps in the law the judges may find the law with a morally relevant principle, and this is the abstract difference between positivism and interpretivism.

So the Supreme Court did not rule on the guilt of the Prime Minister, but on the material collected by the JIT; the Prime Minister's case was sent to an accountability court Section 9(a)(v) of the National Accountability Bureau Ordinance, 1999 for not being able to justify his own and his family's assets. The National Accountability Bureau was ordered to file references within six weeks and the Accountability Court to complete the process in six months. This 'fit' the law in the Dworkanian sense of the word, and therefore a moral reading of the constitution or the law was not required where the Supreme Court could convict the Prime Minister directly without recourse to the legal stratagem of the state. In other words, this side of the argument did not require a finding of the law.

What this really proves is that what Dworkin unearthed was a phenomena of legal objectivity, a legal method that would provide one right answer, whether that legal method is used by Justice Asif Saeed Khosa or by Judge Hercules. The debate doesn't end here, it only starts.

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