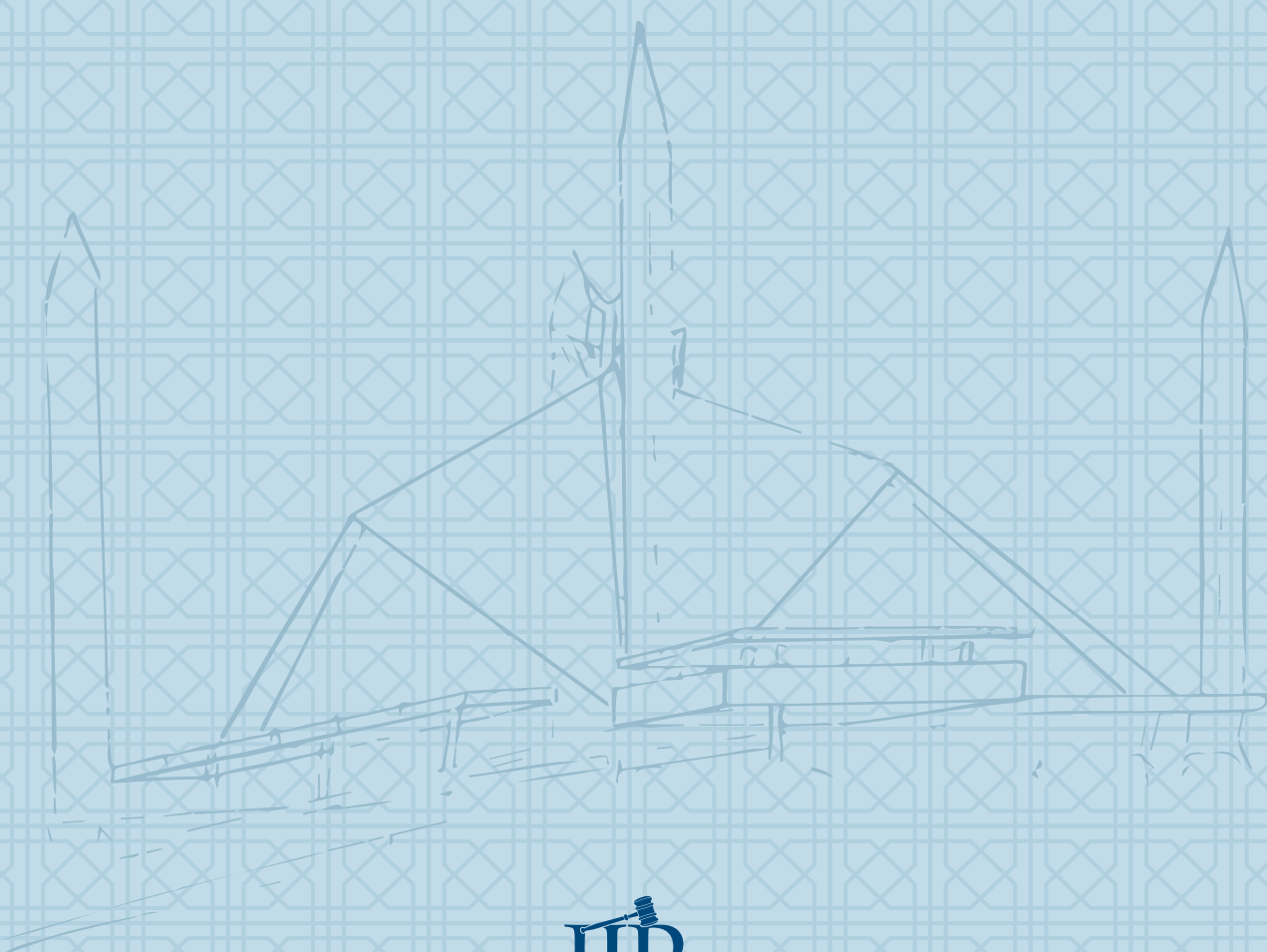




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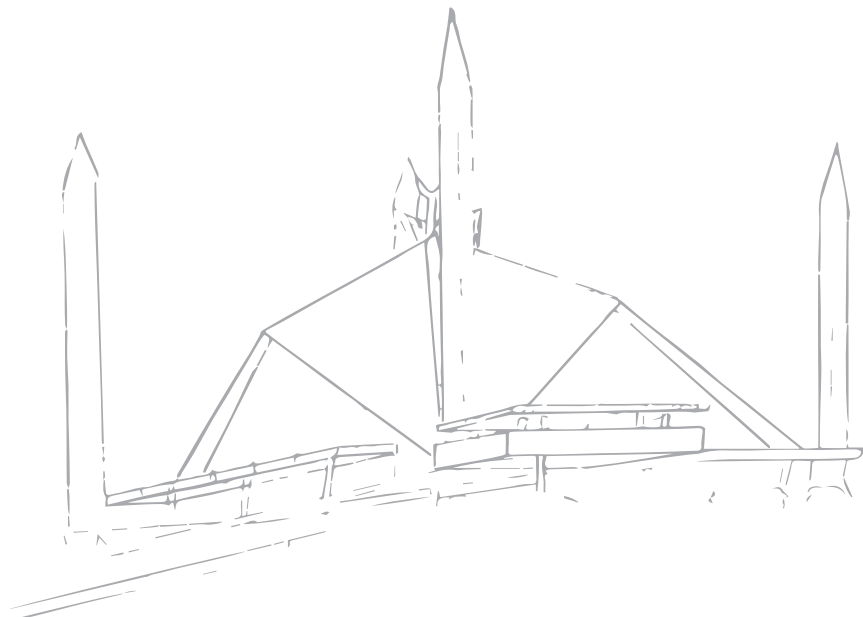
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COMBATING TERRORISM IN PAKISTAN: REASONS, RISKS AND CHALLENGES

Sardar M. A. Waqar Khan Arif *

Abstract

Terrorism is a complex phenomenon and states are under obligations to prevent it at the first instance. Indeed, terrorism is a crime against humanity. The bulk of International legal instruments and international community also condemns it at every level. Terrorists respect no frontiers or boundaries. Indeed, terrorism is multifaceted phenomenon because violence is committed on innocents and civilians by various groups. However, effects of terrorism are quite shocking and it damages humanity worldwide. In this context, this article examines the context and scope of combating terrorism in Pakistan, more precisely its causes, reasons, risks and challenges. It addresses reasons and causes of terrorism and discusses its risks and challenges in the modern era. Especially post 9/11, Pakistan has suffered a lot. Although Pakistan has experienced shocking effects of terrorism in various ways but remain at front in order to combat war against terrorism. At the same time, the phenomenon of terrorism is quite complicated and difficult to control in all situations. However, the paper argues that it is need of the hour to take immediate and necessary steps to combat terrorism in order to protect lives of innocent people and to save humanity.

Keywords: *Terrorism, Human rights, terrorism in Pakistan, post 9/11 developments, risks, reasons and causes, Challenges*

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Introduction

The term Terrorism is a very complicated and broad term that can be linked with economic, social, civil, domestic and political dimensions of states. It has various aspects and tools by using of which terrorists create fear in the minds of the people in order to endanger society and individuals or for achieving their objectives. There are various reasons and causes of terrorism. The best example of witnessing shocking effects of terrorism is Pakistan. Pakistan has experienced its consequences after 9/11 attacks and the people of Pakistan have witnessed a number of sharp armed and suicide attacks. Such attacks have shaken the fabric of society. In particular, after attacks of 9/11, the economic progress of Pakistan is hampered and political system within country has shackled.

To a great extent, terrorism has ruined individuals, civil society, law enforcement agencies and military. The worldwide peace has also been harmed because of sharp attacks of terrorists on innocents, civil society, civilians and public at large.¹ In such alarming situation, Pakistan has tried best to overcome challenges posed by terrorists in order to eliminate its roots. In other words, the people of Pakistan have risked their lives to save others and Pakistan remained active in elimination of terrorism.

In this context, this article is divided into VI sections. Section I is introductory whereas section II defines the phenomenon of terrorism. It also discusses impressions of terrorism and identification of terrorists. Section III traces causes and reasons of terrorism. Section IV addresses the situation post 9/11 in Pakistan. Section V describes risks and challenges for combating terrorism at global level. Finally, conclusions will be drawn up.

¹ Sabir Michael, "Terrorism a Socio-Economic and Political Phenomenon with Special Reference to Pakistan", *Journal of Management and Social Sciences* Vol. 3, No. 1, (2007), pp35-46.

Defining Phenomenon of Terrorism

The term terrorism is a complex term and its uniform and standardized definition is missing. While in historical context, it refers to the reign of terror during French Revolution (1793-1794). The word terrorism is used by rebels, in the reign of terror. The rebels have tried to justify their attacks of violence on civilians in much tricky way. They also tried to portray their actions for self-defense during French Revolution.

However, the effects of the reign of terror were quite alarming and shocking which has shaken the fabric of the society. During French revolution, hundreds of men and women were killed by acts of violence. Meanwhile, the list of gross violations of the rights of people is uncountable. Terrorism was proclaimed as ‘order of the day’ during French revolution under French National Convention which is quite surprising. Even the likely victor, Maximilien Robespierre, declared that “terror is nothing other than justice, prompt, severe, inflexible” in 1794. The definition of terrorism was missing till that time.

However, when the situation became normal after few years, the debates over definition of term has started. The acts of brutality and cruelty were taken into consideration by many people of that time. For instance, Edmund Burke considered such acts as against the dignity of humanity which was carried during French Revolution. He also has warned about ‘thousands of those hell hounds called terrorists’.² The word terrorism is attributed to bloodshed and acts of violence during French Revolution. It was also used in the dictionary, Academie Franchise, to reflect acts of violence and cruelty in 1798. At that time, it was difficult to discover broad definition of terrorism by states because of its complex and complicated nature.

²Edmund Burke, *Reflections on the Revolution in France*, London: Penguin Books, (1790), p14.

It is important to note that there is no universal consensus of states on definition of terrorism. After first and second World Wars, states became more curious for finding out broad definition of terrorism. However, it can be defined as: use of violent behavior by one party to other party for achieving religious, political, social, ideological or economic objectives. The purpose of terrorism is to achieve certain objectives by using violence or to create fear in the minds of the people. There are various other factors linked to the phenomenon of terrorism, such as, social and economic factors. However, in all cases, the intention of terrorists is to create fear and achieve certain objectives by way of killing individuals, people at large, innocents, civilians etc. The effects of terrorism are quite different in nature as compared to other severe crimes.³

For instance, the level of damage in terrorism is quite greater than ordinary crimes. The target of ordinary crimes can be defined and are limited whereas in terrorism, the target often exceeds and general to individuals, civil society, members of armed forces, police etc. The reason is that terrorism is directed on innocents and civilians. Terrorism affects larger segment and spectrum of society. How it can be distinguished with ordinary crime? The answer is that terrorism is more severe in nature because of its shocking effects and unlawful objectives or purposes. The level of intensity and organization in terrorism is shocking and harmful for public at large. In an ordinary crime, the parties concerned are affected only. The attacks are full of *malafide* intentions and objectives. Such an intention or objective may have various dimensions. However, aim of terrorists is to damage the society which is condemnable in its all contexts. It is necessary to combat terrorism by taking special measures by states in order to protect basic human rights of the people at large. The acts of terrorists are both *mala in se* and *mala prohibita*.

³ Brooke Barnett & Amy Reynolds, *Terrorism and the Press: An Uneasy Relationship*. New York: Peter Lang; Hoffman, Bruce, (2009), p27.

The former are those which are wrong or immoral in them whereas the latter are made illegal and unlawful by legislation of the concerned state.⁴

It appears that the term terrorism refers to those acts which are harmful to society at large. It is illicit method of dividing people and used in times of conflict and peace worldwide. It may have various shapes. The person who commits or perform such illegal acts of violence is known as ‘terrorist’ and if such acts are performed by more than one persons, it is termed as ‘terrorist organisation’. The people involved in such organizations do not believe in human dignity. They have indeed no room for protection of basic rights of the people rather they commit acts which are harmful to society. It is well established under the norms of international law that use of force is prohibited and everyone is entitled to protection of his basic human rights.⁵

All forms of violence are prohibited under International Humanitarian Law (IHL). Even, during war, the parties are required to obey the provisions of international law. Terrorism may be in the shape of using force from one group against the other. The purpose and objective of small group is to take advantage over the other. In this context, it is also referred to ‘asymmetric warfare’. The party committing acts of violence do not believe in the norms of international law even during war. The terrorists use unconventional and unexpected tactics to defeat the opponent for achieving their objectives.⁶ Thus it is clear that the term terrorism is full of sporadic acts of violence and is prohibited in its all shapes. There are various impressions of terrorism and also it is difficult to identify the terrorist. Given general definition of terrorism, it is necessary to examine (i) impressions of terrorism and (ii) identification of terrorist.

⁴ George E. Rush, *The Dictionary of Criminal Justice* (5th ed.). Guildford, CT: McGraw-Hill, (2002), pp. 204–205.

⁵ Article 51 of the The UN Charter, 1945).

⁶ James F. Hoge and Gideon Rose, *How Did This Happen? Terrorism and the New War*, New York: Public Affairs, (2001), p13.

Impressions of Terrorism

During French revolution or in the era of old wars between parties, the impression or gesture of terrorism was quite different and is changed. In general, acts of terrorism are condemned and prohibited by all states. The impressions of terrorism can be divided into four signals as follows: First, the impact of acts of violence are found in late 19th and early 20th century; Second, the atrocities committed during first World War and the acts in the colonial or national boundaries; third, the phenomenon of international terrorism emerged when states or groups intervened in the affairs of other states or groups through violence. The national boundaries are crossed and acts of violence are committed in other states which are case-sensitive; and fourth, the attacks of 9/11 which shacked peace worldwide. It is most threatening signal for establishing peace within states and worldwide. The fourth signal of terrorism is most dangerous because it has destroyed peace globally. New technologies and means and methods are used in order to achieve certain objectives. The weapons of mass destruction are used by terrorists. History reveals that in this phase cross border terrorism, killings at borders use of prohibited weapons and modern technology is used to defeat others. The fourth phase is also known as Global war on terrorism (GWOT), by virtue of which, the phenomenon of terrorism became *Bellum omnium contra omnes*(the war of all against all).⁷

As noted above, the global form of terrorism is more dangerous in its all length. Although the United Nations (UN) has codified various instruments for protection of rights of the people but still there are certain challenges to combat terrorism. The acts of armed non-state actors are also shocking and dangerous. The bulk of IHL reveals that not everything is fair in war but at global level violations of the norms of international law has taken place. For instance, the attacks

⁷ David Rapoport, *Inside the Terrorist Organizations*, New York: Columbia University Press, (1988), pp2-10.

of 9/11 and attacks of killing or acts of violence in various states. It is important to note that on the basis of religious and ideological beliefs, disturbances are created worldwide. For instance, the acts of rebels to kill people in Tokyo subways through poison gas attacks in 1995. Such acts also lead to terrorism and are quite complicated.⁸ It is argued that states must agree upon the elimination of all kinds of terrorism by taking into account interests of other states. States have obligations and responsibilities to respect, protect and fulfill basic human rights of everyone. However, in practical terms there are certain challenges which are needed to be addressed in the light of norms of international law. It is a need of the hour to overcome challenges in order to maintain security and peace worldwide.

Identification of Terrorist

In simple words, identity means distinct or special personality of person concerned. In fact, it is a set of factors or characteristics which one possesses. It can be in different shapes, identity cues or using different insignia. Human dignity is categorized as: (i) natural identity (innate or inherent identity with race or gender); (ii) ascribed identity (identity that is given by others) and (iii) self-ascribed identity (created by oneself or temporary identity designed by one for another).⁹ These identities are generally used for humans. However, the question is that how to identify a terrorist or how to distinguish it from others? The answer to this question is quite simple. No one can be born a terrorist so it is clear that natural identity (at the time of birth) does not lead to being a terrorist. It is because everyone is born free and innocent. However, terrorist identity leads to either self-ascribed identity or ascribed identity. Self-ascribed because someone may use a person or group of persons for achieving certain objectives and ascribed because it is created by

⁸ Ronald D. Crelinsten, "Images of Terrorism in the Media: 1966–1985", *Journal Terrorism*, vol. 12, issue 3, (1989), pp167–198.

⁹ Halah Afshar, Rob Aitken and Myfanwy Franks, "Feminisms, Islamophobia and Identities", *Political Studies*, 53(2), (2005), pp262–283.

oneself.¹⁰ However, the fourth phase of terrorism is more complicated because terrorists use modern technology in order to harm people and achieve their objectives. The determination of terrorist identity is quite complicating for states. Indeed, the identification of terrorist is a big challenge.

This section reveals that the phenomenon of terrorism is quite complicated and needed to be addressed by states in order to avoid terrorism worldwide. States are required to combat terrorism in its all forms and shapes. The new phase of terrorism is more complicating because of use of modern weapons and technology, such as, cyber terrorism. The identification of terrorist is also a big challenge. States are required to overcome these challenges for maintain peace and security. Based on general definition, impressions and identification, an attempt is made to explore reasons and cause of terrorism in the next section.

Reasons and Causes of Terrorism

There are various reasons and causes of terrorism. The most important are discussed as follows: One of the most important reason and cause of terrorism is poverty. It is well recognized theory that people are involved in terrorism because of poor financial crisis. It is believed that if people are deprived of their basic rights and resources, they will react ill show their resentment or anger in the shape of involving themselves in terrorism. The purpose of involvement is their disappointment and dissatisfaction with the system of the state. In order to express their outrage and indignation, they will to perform illegal acts. It is also believed that people are instigated to commit acts of violence due to financial crisis.¹¹ The term poverty is broad in its context and is not only limited to financial crisis. Other factors also give rise to poverty. For instance, low

¹⁰ Edwin Bakker, *Jihadi Terrorists in Europe, Their Characteristics and the Circumstances in Which They Joined the Jihad: An Exploratory Study*. The Hague: Clingendael Institute; Lifton, (2006).

¹¹ Edward Newman, "Exploring the "Root Causes" of Terrorism", *Studies in Conflict and Terrorism*, (2006).

literacy, less opportunities in education, employment and health sectors, inequalities and discrimination, social inequality, low gross domestic product (GDP) and cultural or social distinction.¹²

Another theory for involvement in acts of terrorism is that of incidents of natural disasters. Natural disasters also create a way for poverty which leads to disappointment and dissatisfaction of the availability of resources and needs to the people.¹³ A Natural disaster is also one factor of poverty. However, this is another variation of the poverty theory. It is important to note that due to natural disasters, hardship and difficulties are created within society. As a result, people show their resentment in the shape of involving themselves in acts of terrorism. The question is that how natural disasters can be controlled? Of course, it is big challenge for states to reduce impact of natural disasters on its people in order to protect their rights. However, it varies from state to state. If state is developed then the situation of natural disasters can be handled in an effective way but if natural disasters occur in the states that have low gross national product (GNP) per capita then it is difficult for that state to overcome challenge of natural disaster. Ultimately, it gives rise to poverty which leads to involvement of people in acts of terrorism.¹⁴

It is important to note that violation of basic rights, such as, education, employment etc also links with the acts of the terrorism. The human development index (HDI) includes gross income, education and basic needs and necessities. There exist correlation between human

¹² Pedahzur Ami, Arie Perliger and Leonard Weinburg. "Altruism and Fatalism: The Characteristics of Palestinian Suicide Terrorists", *Deviant Behavior* (2003), pp405-23.

¹³ Claude Berrebi and Jordan Ostwald, "Earthquakes, hurricanes, and terrorism: do natural disasters incite", *Springer Science & Business Media*, (2011), pp383-403.

¹⁴ Shahram, Chubin, Jerrold D. Green, and Andrew Rathmell, "Terrorism and Asymmetric Conflict in Southwest Asia", *Santa Monica, CA: RAND Corporation*, (2002).

development and terrorism. In general, violation or deprivation of social rights may also lead to involvement of people in acts of terrorism.¹⁵

Another theory on the subject provides that acts of government towards states towards citizens give rise to terrorism. These acts may include repression, deprivation of basic rights, snatching of civil liberties, deprivation of civil and political rights of people and authoritarianism.¹⁶ Indeed, it is most sensitive area because in democratic countries people elect their representatives for fulfilling their wishes and aspirations in the shape of providing them facilities at all levels. If the government is weak and unstable then people react and show their anger in the shape of involving themselves in the acts of terrorism. The relationship of trust is broken between people and representatives and it gives rise to anger and hatred. That hatred ultimately leads to performing acts of violence which are harmful for others. Other causes of hatred in the hearts of people include gross human rights violations, acts of repression by government, instability, despotism and suppression.¹⁷

The disappointed people are taken up by the members of terrorist organizations and used against government. It is also because of mistrust and misconceptions created in the minds of innocent people in the name of revolution. The environment of dissatisfaction is beneficial for terrorist organizations to recruit those people and achieve their objectives against state. Similarly, if government is fail to provide basic facilities, such as, housing, clothing, shelter etc. then hatred in the hearts and minds of the people will come into play and members of terrorist organizations take benefit at this moment. Also if liberty of the citizens is restricted, the people will react due

¹⁵ Alex P. Schmid,. "Prevention of terrorism", in *Root Causes of Terrorism: Myths, reality and ways forward*, Routledge, (2005), p227.

¹⁶ Claude Berrebi and Jordan Ostwald, "Earthquakes, hurricanes, and terrorism: do natural disasters incite." *Springer Science & Business Media*, (2011), pp383-403.

¹⁷ Edward Newman, "Exploring the "Root Causes" of Terrorism", *Studies in Conflict and Terrorism*, (2006).

to inequality and political freedom.¹⁸ However, it is need of the hour to take necessary steps for fulfilling rights of the people by the members and authorities of the government.

Another major cause of terrorism according to the scholars is religion. Religion itself is not a reason or cause but misinterpretations of the norms of religion are a genuine reason. Everyone has right to promote and protect his religion within defined sphere by the respective state. However, religious extremism and hatred also give rise to acts of terrorism. Religion is connected with every human being and guides human being to live life in peaceful way. However, religious beliefs may give rise to the acts of terrorism if misinterpreted. The imposition of own religion on others is quite complicated. The divisions and hatred among members of religious community also signifies negative image.¹⁹ However, it is argued that in all circumstances, it is responsibility of the government to protect religious, economic, social, political and cultural rights of the people in order to combat terrorism. In this regard, formulation of policies and implementation of these policies must be ensured by states. The Divisions of groups on the basis of religion is a reason which gives rise to hatred among each other. Similarly, ideological beliefs may also be used to advance acts of terrorism. For example, racist groups, eco-terrorists or people believing in one ideology may use violence against others. Another reason for terrorism is social and political injustice. If people are deprived of their basic rights and injustice prevails within society then people may lead to involve themselves in the way of terrorism as a last resort. The disenfranchisement and deprivation of basic rights give rise to revenge and related activities.²⁰ Keeping in view reasons and causes of terrorism, an attempt is made to elaborate the situation of Pakistan and challenges for combating terrorism in the next sections.

¹⁸ Alberto Abadie, "Poverty, Political Freedom and the Roots of Terrorism", *Havard University and NBER*, (2004).

¹⁹ Factsheet on History of terrorism – Factsheet, education Scotland foghlam alba, Online available at: <http://www.educationscotland.gov.uk/readyforemergencies> (Last accessed: 30 November, 2018).

²⁰ Ibid;

The Case of Pakistan Post 9/11

Pakistan has experienced brutal acts of terrorism post 9/11 in particular. Pakistan has involved itself in the GWOT in order to eliminate terrorism and to establish peace within region. It is important to note that several forms of terrorism and terrorist activities are carried out in Pakistan. It is a big problem indeed which has endangered the life of the nation. No other country has faced such problem post 9/11. There are various factors for emergence of the evil of terrorism in Pakistan, such as, sectarianism, religious extremism, fanaticism, ethnicity, economic crisis and so on. These factors have shaken the fabric of societies of Pakistan and the people of Pakistan. The country has many challenges towards development and stability.

Pakistan has remained in the front line against terrorism post 9/11. The war of United States of America (USA) against neighboring country of Pakistan has changed shape of entire region. Pakistan has remained active in war and tried best to eliminate terrorists. In Afghan war, various groups have perpetrated and performed acts of violence inside and outside Pakistan. One of the reasons is sectarian violence which gives way to terrorist activities within and outside Pakistan. Pakistan has witnessed violent attacks of terrorist organizations in its length. The region of Pakistan was surrounded by violent groups and violent activities of such groups left negative signs on the peaceful image of Pakistan for other countries. The attack of 16 December, 2014 on children is unforgettable for Pakistan. Similarly, bombing and suicide attacks within Pakistan left their mark on the people of Pakistan. Indeed, the people of Pakistan have experienced an irreparable loss. The target places by terrorists were safe places and targeted innocents. Attacks are also carried out on Military officials and personnel.

In 2009, number of terrorist incidents has taken place in the region of Pakistan. According to survey of Pakistan institute of Policy studies (PIPS), approximately 3021 people

were died and 7334 were injured during 2009 because of the attacks of terrorists. The rate of injuries and deaths was increased. In suicide attacks, 1300 people died and 3600 people get injured.²¹

The forces of USA were active in the field of Afghanistan in order to combat terrorism. According to American point of view, various terrorist organizations stay in federally administered tribal areas (FATA) region of Pakistan. Drone attacks are started by the USA in 2004. The USA has also considered that certain ethnic groups are living in the regions of Pakistan, Afghanistan and Iran. During war, thousands of people died many houses were demolished in order to combat terrorism post 9/11. Although there was criticism by the groups in Pakistan on involvement of Pakistan against GWOT, the Pakistan has remained active and participated in order to eliminate terrorism. It is also because Pakistan is ally of the USA.²² The perspective of USA was that incident of 9/11 was carried out by people who hide themselves in Afghanistan and Pakistan. Different accusations were also made on the dignity of Muslims and Islam. However, Walter Laqueur argued that: “Islam is a peaceful religion and American perception about the Muslims is unsatisfactory because Muslims are not terrorist but the advocate of peace”.²³

Pakistan remained active for eliminating terrorism in its all forms. The military forces of Pakistan have carried out various operations in order to eliminate terrorists. Pakistan has started various operations against terrorists, such as, operation Rah-e-Najahat and Operation Zarb-e-Azb. During these operations many responses from the terrorists in the shape of suicide attacks and killings has been taken place. The groups were trained and they used guerilla tactics. They

²¹ Declan Walsh, “Pakistan suffers record number of deaths due to militant violence”, *The Guardian*, 11 January, (2010).

²² Report titled "Terrorism in Southwest Asia", A report of the congressional research service, (2004), p185.

²³ Walter Laqueur, *The New Terrorism: Fanaticism and the Arms of Mass Destruction*. New York: Columbia University Press. (1999), pp127-129.

targeted law enforcement agencies, military, civilians and individuals in various ways. In 2007 and 2008, approximately 1503 people died and 3448 casualties have been taken place because of suicide attacks and bombing. More than 60 attacks were made on the security forces of Pakistan.²⁴ The incident of 9/11 has left devastating effects on social and economic progress of Pakistan. According to the report of Human rights Commission of Pakistan (HRCP), the situation of human rights remained dismal and gross human rights abuses were committed in the region of Pakistan.²⁵

Along with participation in GWOT, Pakistan has international legal obligations to respect, protect and fulfill human rights of the people. The officials of Pakistan have captured terrorists as well. However, Pakistan has to comply with the provisions of national and international law. For instance, principle 5 of the Basic principles on the Independence of the Judiciary provides that: “Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals”. The Universal Declaration of Human rights (UDHR) provides that: “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal” (The UDHR, 1948). Similarly, the international Covenant on Civil and Political Rights (ICCPR), provides that: “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.²⁶ Keeping in view these provisions,

²⁴ Attacks Clashes claim 3448 lives in 2007 published in Daily Times, 5 January, (2008).

²⁵ Report of HRCP titled: "State of Human rights in 2017: Highlights", HRCP, (2017)

²⁶ Article 14 of the ICCPR, (1966).

Pakistan has tried best to punish those persons who were involved in terrorist activities.²⁷ However, still there are challenges.

There were accusations on Pakistan regarding supporting terrorism Post 9/11 especially Mumbai attacks in India and Harboursing Usama Bin Laden in Abbottabad. The role of Pakistan was challenged on many occasions but it remained to focus on elimination of all forms of terrorism. In both incidents, the role of Pakistan remained unanswered.²⁸ However, it is argued that mere accusation or claims are not necessary to prove that Pakistan is sponsoring terrorism. Indeed Pakistan has suffered a lot post 9/11 for elimination of terrorism. The people of Pakistan have risked their lives in order to combat terrorism. Mere allegations do not mean that Pakistan is involved in activities of terrorism. No one knows that where terrorists reside? It is difficult to identify terrorists. However, it would be accurate to say that Pakistan has fought against terrorism at his best. It appears that Pakistan is active in combating terrorism post 9/11. The operation of *Zarb-e-Azb* is also designed to fight against terrorism which remains successful for elimination of terrorists. However, still there are certain challenges. Pakistan is required to eliminate all forms of terrorism in order to protect lives of innocent people. It is argued that anti-terrorism measures must be taken against enemies in order to maintain law and order and peace. The risks and challenges pertaining to terrorism at global level are discussed in next section.

Risks and Challenges at Global Level

Terrorism is 'violent tactics' strategy, being used increasingly to influence and change political, social and economic policies of those in authority. It has the capacity to produce, in large masses,

²⁷ Shafqat Munir, "Post 9/11 situation affecting lives and livelihoods of the people of Pakistan", JDHR, (2017) Online available and retrieved from: <https://www.google.nl/search?dcr=0&ei=TJhHWvzhCMfGwQK934OIdw&q=Post+9%2F11+situation+affecting+lives+and+livelihoods+of+the+people+of+Pakistan+by+shafqat+munir> (Last accessed: 30 November, 2018).

²⁸ Eamon Murphy, "The Making of Terrorism in Pakistan: Historical and Social Roots of Extremism", *Journal of Strategic Security Routledge*, Newyork, (2014).

a widespread belief in the futility of resistance and a loss of faith in the state and its agencies and their ability to protect life, liberty and property. These patterns of thought gradually create a denial among the people of their own fear and an increasing justification of the terrorist cause. The big challenge for combating terrorism globally is first, the rise of Non-State Actors; which must be taken into consideration by all states.

Second, the regimes which support terrorism must be identified by states. The emergence of regimes who support terrorism are questionable. There is need to control activities of such regimes. Steps may be taken to control the overcome the financing of such terrorists. Terrorist financing may well take place at both organizational and individual levels; but the perpetrators have a different motive which rarely relates to pure personal greed, and the activity is often inextricably linked to 'normal' account activity or perhaps low-level fraud or criminal activity.

Third, Cyber terrorism is a challenge which need to be controlled by states at all levels because by virtue of cyber terrorism, some states are raising armies of hackers to hack into sensitive sights of adversaries to obtain data. Hacking is also being employed to disable important nets and cause a large scale economic devastation. Fourth, the domestic extremism may also be avoided by states in order to combat terrorism. The term domestic extremism means individuals or groups that follow a variant of ideologies that support the threat and/or use of violence for political, religious or social objectives. Other challenges include: bias, parochial practices, violence, armed attacks, violence etc. States are required to take effective steps for elimination of terrorism in all forms.

Conclusion

It is concluded that the phenomenon of Terrorism is neither definable within geographical boundaries nor is it within traditional moulds of rationality. Modern technology and globalisation do not recognise geography. State sovereignty stands diluted; it is easily challenged. Terrorist groups do not owe loyalty to

any national flag, religion or even ethnicity. They extinguish innocent lives as legitimate victims and seek ‘martyrdom’ in suicide missions.

Terrorism is an ancient practice that has existed for over 2,000 years. There is no universally agreed-on definition of terrorism. At best, there is a “most universally accepted” definition of it, which is the following: terrorism is the use of violence to create fear for (1) political, (2) religious, or (3) ideological reasons. Of particular relevance is the comparison between old and new terrorism. While old terrorism strikes only selected targets, new terrorism is indiscriminate; it causes as many casualties as possible.

Many terrorists have an ascribed identity (i.e., it is imposed on them) or self-ascribed identity (i.e., they choose it). In addition, many of them come from middle- and upper-class backgrounds, are young, and increasingly include females. The paper has revealed that poverty, government repression or effectiveness, and other social factors contributed to the presence of terrorism within any given country. Pakistan has experienced certain effects of terrorism especially post 9/11 and still there are certain challenges. These include: rise of armed actors, domestic extermination, extremism, cyber warfare, violation of human rights, armed attacks etc. There is needed to take necessary steps to eliminate roots of terrorism in order to secure progress of Pakistan and to save humanity.

CYBER CRIME: PAKISTANI PERSPECTIVE

Mahboob Usman*

Abstract

Many scholars, lawyers, students and legislatures working on the cybercrime found it difficult to know what cybercrime exactly is? How many cybercrime are prevailing in the Pakistani legal system and how much is punishment for these crimes? Lack of proper awareness and understanding of the issue has caused many difficulties for the researchers, law enforcement agencies, legislatures and judiciary because when they talk of the cybercrime they include many things which are not cybercrime or they exclude which are cybercrime. The present paper analyzes in some detail the cybercrime, definition, origin of the internet, complications, famous cybercrimes, their punishments and role of NR3C in some details. It concludes that the existing legislation on the subject is not sufficient; therefore, the legislator needs to legislate on the matters which are not covered under the existing legislation.

Introduction

Rapid evolution of information technology is transforming our society and its institutions which have created many problems, *inter alia*, is a Cybercrime. It has a wide range of applications in every walk of life, and has directly or indirectly affected almost all sectors of the society. Nevertheless, developing countries are not acquainted with technology, these lag in technological progress which leads to computer crimes and other associated complications. Numerous electronic crimes which are prevailing in Pakistan are not covered under any suitable legislation. Even though the recently enacted Prevention of Electronic Crimes Act, 2016 (PECA) does not cover many of the existing crimes.

Without determining the exact role of any entity, it is not possible to find the accurate solution for that. Pakistan is newly introduced in the cyber world therefore; it has a lot of significance to understand its contribution at what stage Pakistan is, in case of cyber world. In Pakistan, however, three decades ago commission of cyber-crimes was not significant as most of people were unaware of cyber-crimes. Internet aids the world with numerous benefits to society and business; besides these blessings it opens doors for criminal activities too. This jeopardy has failed to become part of Pakistan's legal system, because the world is enacting many laws for tackling emerging cyber-crimes, and the legislature in Pakistan is not taking it seriously to control the emerging situation. The Pakistan internet market has grown multiple with the majority of the internet users in big cities, in addition to small number of users in other cities and rural areas. These cities provide majority of the "customer base and expansion in activity is also likely to remain primarily confined to these cities because of the concentration of economic activity in these cities."²⁹ The availability of computers and the internet connections, provide "unprecedented opportunities to communicate and learn in Pakistan. However, certain individuals (and corporations) do exploit the power of the Internet for criminal purposes."³⁰ Hence, we can easily conclude that Pakistan is not free from cyber space problems.

In Pakistan, first law on cyber-crime was enacted through "Electronic Transactions Ordinance, 2002,"³¹ which addressed a few crimes, as the main purpose of the Ordinance was "to recognize and facilitate documents, records, information, communications and transactions in electronic form, and to provide for the accreditation of certification service providers."³² Thus, it was a step towards the new era, till the promulgation of PECA, the provisions of this Ordinance

²⁹Zibber Mohiuddin, "A paper presented on: Cyber Laws in Pakistan; A situational Analysis and way forward", (International Judicial Conference on June 24, 2006 Supreme Court of Pakistan Islamabad), 17.

³⁰Ibid.

³¹Electronic Transactions Ordinance, 2002 (LI of 2002).

³² Ibid. Preamble.

were used to cover the cyber-crime. Under this Ordinance many aspects of cyber-crime were not covered. With the emergence of electronic crime, the demand for legislation on the subject increased. Consequently, in 2007, the then President of Pakistan promulgated “the Prevention of Electronic Crimes Ordinance, 2007”, to give legal cover to few of the existing crimes. Similarly, the same Ordinance was again promulgated in May 2008, February 2009 and the last promulgation took place on 4th July 2009. These Ordinances were not tabled in parliament and lapsed on completion of constitutional time as, in Pakistan; the Presidential Ordinance is only applicable for one hundred and twenty days³³ from the date of its promulgation. These Ordinances were a stop gap arrangement, which borne no fruit for judiciary as well as for law enforcement agencies. We can easily conclude that there was no particular law to cover the cyber related issues in Pakistan till the enacted of PECA.

Masses are not seriously looking forward for significant steps to protect the nation from cybercrimes where in most cases it is not possible to apprehend the offenders who are either not within national borders or because they are working secretly. However, the newly enacted legislation strengthens the law enforcement agencies by extending the International cooperation for investigation purposes.³⁴ Elimination of cybercrime totally from the cyber space is challenging, it is quite possible to take suitable initiatives to reduce it by creating awareness among the users of the internet. The initial step is to make people aware of the sensitiveness of these crimes and further make the application of the laws more severe to check the commission of crime.³⁵

³³Pak. Const. art. 89, cl. (2) (a) (i)

³⁴ S. 42 of PECA, 2016.

³⁵ Mohiuddin, “Cyber Laws in Pakistan, 19.; <http://supremecourt.gov.pk/ijc/articles/10/5.pdf> (accessed on 5th March 2015)

Definition of Cyber Crimes

The foremost problem for the cyber crime's study is the absence of proper definition for the term cyber-crime, some jurists tried to define this term but still there is no consensus on the definition of the term. Cyber-crime is generally described as "cyber-crime is a generic term that refers to all criminal activities done using the medium of computers, the internet, cyber space and the worldwide web."³⁶ In other words, it is a crime in which a computer is the target of the crime or is used as a tool to commit an offense.³⁷ This definition does not cover many aspects of the cyber-crime as sometimes mobile phone is used for committing crime but the given definition does not include the mobile. Dr. Debarati Halder and Dr. K. Jaishankar have provided a useful definition that covers other modern day devices. Their definition is;

Offences that are committed against individuals or groups of individuals with a criminal motive to intentionally harm the reputation of the victim or cause physical or mental harm to the victim directly or indirectly, using modern telecommunication networks such as Internet (Chat rooms, emails, notice boards and groups) and mobile phones (SMS/MMS).³⁸

The term "cyber-crime" is also used synonymously with technological crime, high tech crime, high technology crime, internet crime, economic crime, electronic crime, digital crime, *inter alia*, labels used by people to describe crimes committed with computers or the Information Technology devices.³⁹ Rather, instead of trying to understand cybercrime as a single

³⁶Prashant Mali, *A Text Book of Cybercrime and Penalties* (Indiana: Repressed Publishing LLC, 2006), 3.

³⁷<http://www.techopedia.com/definition/2387/cybercrime> (accessed on 10th December 2014).

³⁸Debarati Halder and K. Jaishankar, *Cyber Crime and the Victimization of Women: Laws, Rights and Regulations* (Hershey: Information Science Reference, 2012), 15.

³⁹*Encyclopedia of Cybercrime*. eds. Samuel C. and McQuade (Westport: Greenwood Press, 2009), s.v. "Cybercrime".

phenomenon, it might be better “to view the term as signifying a range of illicit activities whose ‘common denominator’ is the central role played by networks of information and communication technology (ICT) in their commission.”⁴⁰

Origin of the Internet and cybercrime

Cyber-crime has evolved with the evolution of the Internet and expansion of IT, which have provided many opportunities for criminals to destroy the society by using new techniques.⁴¹ It begins with the advancement of the Internet, assuming that without the latter, the former could and would not exist. To put it differently, it is the Internet that provides the essential electronically generated atmosphere in which it takes place as we use Internet for communication, so we become the victim of cybercrime.⁴²

Cybercrime’s history starts with the development of a network, the Advanced Research Projects Agency Network (ARPANET),⁴³ funded by the U.S military in the 1960s. Basic purpose of the ARPANET was to launch means by which “secure and resilient communication and coordination of military activities could be made possible” in the threat of nuclear confrontations.⁴⁴ The ARPANET’s technology “would allow communications to be broken up into ‘packets’ that could then be sent via a range of different routes to their destinations, where they could be reassembled into their original form.”⁴⁵ Establishment of ARPANET played significant role in the advancement of the internet, which also opened doors for research and

⁴⁰MajidYar, *Cyber Crime and Society* (London: SAGE Publications Ltd, 2006), 9.

⁴¹*Encyclopedia of Cybercrime*, s.v. “Cybercrime”.

⁴²Yar, *Cyber Crime and Society*, 83.

⁴³ The internet has a very interesting history, which brought a new era and renaissance for the whole world. As history of the internet is not my topic, I have just highlighted the history briefly. Detail history can be found in a book titled “*A Brief History of the Future The origins of the Internet*, written by John Naughton and published by Orion Books Ltd, London in 2001 ”.

⁴⁴Yar, *Cyber Crime and Society*, 7.

⁴⁵ Ibid.

cyber-crime. In the 1970s other networks parallel to the ARPANET, like UK's Joint Academic Network (JANET) and USA's American National Science Foundation Network (NSFNET), were established; during this era the Electronic email was introduced.⁴⁶ In 1981, access to ARPANET was expanded and in 1982, the Internet protocol suite (TCP/IP) was introduced as the standard networking protocol.⁴⁷ In early 1980s the NSF provided funds for the establishment of national supercomputing centers at "several universities, and provided interconnectivity in 1986 with the NSFNET project, which also created network access to the supercomputer sites in the United States for research and education organizations."⁴⁸

However, in 1980s the Commercial Internet Service Providers (ISPs) began to emerge,⁴⁹ and Private connections to the Internet by commercial entities became widespread rapidly, the ARPANET and the NSFNET were decommissioned in 1990 in 1995 respectively, "removing the last restrictions on the use of the Internet to carry commercial traffic. Since mid-1990s, the Internet has had a revolutionary impact on culture and commerce."⁵⁰ The research and education community continues to develop and use advanced networks such as NSF's very high speed Backbone Network Service (BNS), Internet2, and National Lambda Rail.⁵¹ Netscape browser was the first commercial browser which was launched in the year 1994 by the Microsoft by its own browser the Internet Explorer.⁵² Since the commercialization of the Internet it has created many problems for the world. Developing countries generally lag behind on scientific developments, while computer has presented a new and complex situation like white-collar computer crimes. Digital crimes "occur within the white-collar crime, which is a special domain

⁴⁶http://en.wikipedia.org/wiki/History_of_the_Internet (last accessed on 30th December 2014)

⁴⁷ Ibid

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Yar, *Cyber Crime and Society*, 7-8.

of financial crime.”⁵³ It is a crime against property for individual or organizational gain, committed by upper class members of society who are educated, wealthy, socially connected and are employed in any legitimate organization. In fact, in this situation elite class criminal is less likely to be apprehended because of his social status in the society. Despite the efforts made by law enforcement agencies, more often offenders escape punishment.

Cyber Crimes and Conventional Crimes

Crime⁵⁴ is as old as the human society, but modern devices have introduced cybercrimes. Those crimes which are committed by using computer, directly or indirectly, are called cyber-crimes however those which are committed by using old techniques or methods are called conventional crimes. Apparently, there is no difference between both forms of crimes, nonetheless a deep examination leads us to its distinction which lies in the involvement of medium used while committing the crime. At any stage where cybernetic intermediate is used then it is called cybercrime where technological devices are not used then it is called conventional crimes.

The Internet use in Pakistan

In Pakistan, since the mid-90s the Internet access is available. The Pakistan Telecommunication Company Limited started offering access via the nationwide local call network⁵⁵ since then the cybercrimes started emerging in our society. Pakistan is among the top Asian net users countries.⁵⁶ This ratio is increasing on daily basis as the government has provided laptops and the internet facility to the talented students besides reducing the prices of the accessories and the internet. 3G and 4G technology has also brought revolution in the IT field. Due to increased number of internet user, the

⁵³Petter Gottschalk. *Policing Cyber Crime* (Hershey: Petter Gottschalk & Ventus Publishing ApS, 2010), 14.

⁵⁴ A crime is normally defined as any act or omission which is prohibited by law and in case of breach of it penal consequences are awarded. Mostly, in corporate crimes the act is performed which leads to cyber-crime and financial loss to such affected corporations.

⁵⁵<http://www.internetworldstats.com/asia/pk.htm> (last accessed on 3rd March 2015)

⁵⁶ Ibid.

manual business is shifting on the internet, which has reduced paper work replacing the manual system with computer. Although, it is a blessing for human beings to save their precious time, but fraud, cheating and many other illegal activities are also being carried out through internet and computer.

Complexity of Cyber Crimes

The problems is not with the problems, it lies somewhere inside the system or the investigator. In Pakistan, the problem is that many investigators have neither requisite expertise nor the required experience to deal with investigation, evidence collection, evidence preservation and presentation to the court. Therefore, the offender cannot be punishment. Technology is “constantly evolving, investigating electronic crimes will always be difficult because of the ease of altering the data and the fact that transactions may be done anonymously.”⁵⁷ Due to alteration of data, the investigation of cybercrimes is very complicated as compare to manual crimes. However, by adopting latest techniques the complexity of the digital crime can be reduced.

National Response Centre for Cyber Crimes

The Government of Pakistan has established the “National Response Centre for Cybercrime”⁵⁸ (NR3C) under the administrative control of Federal Investigation Agency (FIA), to investigate the cybercrimes, trace the criminals and use their efforts to stop misuse of the internet. NR3C has expertise to deal in the following subjects’ i.e. digital forensics, information system security audits, technical investigation, penetration testing and training in these fields.⁵⁹ Since its establishment, it is working for the capacity building of law enforcement agencies, Bench and bar, and other Government organizations. In addition to this, it has also piloted a large number of seminars, workshops and training programs to create awareness among the academia, print and

⁵⁷ Vacca. *Computer Forensics: Computer Crime Scene Investigation*, 219.

⁵⁸ S. 29 of PECA, 2016. NR3C was established in 2007 under section 25 of the PECO, 2007, since then this department is dealing with cybercrimes.

⁵⁹ http://www.nr3c.gov.pk/about_us.html (accessed on 3rd March 2015).

electronic media and lawyers. NR3C has also arrested and prosecuted many criminals including two boys for hacking Supreme Court website.⁶⁰ NR3C is a law enforcement agency of the Federal Government to fight the cybercrime. Feeling importance of the issue, this Hi-Tech crime fighting unit was established in 2007 to identify and curb the phenomenon of technological abuse in society.⁶¹ NR3C's primary function is to deal with technology based crimes committed in Pakistan or abroad committed by Pakistani nationals. This is the only unit which directly receives complaints and assists other law enforcement agencies in cyber cases.⁶²

1. Targets of Cyber Crimes

Underworld criminal does not have any specific target however the main target of these criminal is the “databases and archives of governments and national security infrastructures are prime targets for cyber exploitation by the criminal underworld, because they house masses of confidential, top secret social, economic and military information.”⁶³ In addition to this, the databases of banks and private organization are also the target of these criminals.

Types of Cyber Crimes

Owing to continuous evolution and development of IT, many new crimes are being faced by the world. There is no limit to such crimes, therefore it is difficult to cover all of them in present article. Thus, few of them are discussed to understand their nature and complication. The emergence of World Wide Web has enabled unprecedented access to information, and has created unexpected “opportunities to attack information assets.”⁶⁴ Proper understanding of these

⁶⁰ <http://propakistani.pk/2010/10/27/nr3c-arrests-two-boys-for-hacking-sc-website/> (accessed on 3rd March 2015)

⁶¹ http://www.nr3c.gov.pk/about_us.html (accessed on 3rd March 2015).

⁶² Ibid.

⁶³ <http://whitepaper.techweekeurope.co.uk/advertiser/secunia> (accessed on 15th December, 2015).

⁶⁴ Michael R Galbreth and MikhaelShor. “The Impact of Malicious Agents on theEnterprise Software Industry”. MIS Quarterly 3 (2010), 595-612.

crimes is important to legislate on these issues, without proper understanding, measures cannot be adopted to prevent them.

Every crime has a hidden motive; in financial crimes the motive is to gain money, same rule is applicable to online financial transactions. Observations show that the motive behind such crimes is money rather than revenge or fun or something else (it is not the general rule sometimes people commit these crimes for the sake of revenge and other purposes also). It includes computer manipulation, hacking into bank servers, cyber cheating, money laundering, hacking accounting scams, credit card frauds and accounting scams etc. These are “profit-driven crimes, they should be understood mainly in economic rather than sociological or criminological terms.”⁶⁵ The theory of these crimes suggests that “financial crimes are opportunity driven, where executive and managers identify opportunities for illegal gain.”⁶⁶ High up of the organization and outsider are equally involved in these illegal activities. Mali says “with the tremendous increase in the use of the internet and mobile banking, online share trading, dematerialization of shares and securities, this trend is likely to increase unabated.”⁶⁷

Advance Fee fraud

Few decades ago, it was very difficult to cheat, to get money and deprive someone of his earnings. Nevertheless, the internet has made it easy for criminals to cheat and deprive innocent people of their earnings. One of them is the advance fee fraud which is “intentional misrepresentation for the purpose of gain.”⁶⁸ Advance fee fraud⁶⁹ is a financial crime that spreads with the introduction of the internet communication, electronic business and electronic

⁶⁵ Gottschalk. *Policing Cyber Crime*, 14.

⁶⁶ Ibid.

⁶⁷ Mali, *A Text Book of Cybercrime and Penalties*, 6.

⁶⁸ Gottschalk. *Policing Cyber Crime*, 21.

⁶⁹ Advance fee fraud is also known as lottery scam and email fraud.

commerce,⁷⁰ which is carried out by white-collar criminals. These criminals approach the victims without prior information and to obtain email address they use social websites, magazines, journals, newspapers and directories.

Advance fee fraud is actually a kind of lottery scam which begins with surprising email notification that says “you have won!”, “you have won such and such amount!”, “King of this (tribe name), businessman or politician has died and he left his wealth and he advised to distribute among the needy people. Sometimes this type of email comes from a widow on death bed and occasionally it contains name of any famous corporation or company. “Most of these scam emails promise the receiver millions of dollars.”⁷¹ The common of all these scams is that some scanned documents are emailed to victims, when receiver of the said email is convinced of the genuineness of the transaction, some fee is requested for bank charges, when fee is received, the receiver disappears. In this way millions of people get defrauded every year through these scams. Besides, “many email lottery scams use the names of legitimate lottery organizations or other legitimate corporations or companies, but this does not mean the legitimate organizations are in any way involved with the scams.”⁷² Mostly greedy people try to keep secret and become the victims of such scams and frauds. The recipient of such email is asked to keep the notice secret, not to discuss with anyone else, and to contact a claims agent to receive the said amount..

Bank Fraud

Bank fraud is a new method for frauds. In bank fraud, an employee of bank sends emails (appear to be from the bank) to their clients for sharing of their personal information such as Credit Cards and Debit Cards information, which he uses for his personal benefit including

⁷⁰ Gottschalk. *Policing Cyber Crime*, 21.

⁷¹ Mali, *A Text Book of Cyber crime and Penalties*, 62.

⁷² Aaushi Shah and Ravi Srinidhi, *A to Z of Cyber Crime* (Pune: Asian School of Cyber Laws, 2012), 150.

unauthorized purchases and cause loss to the client for his trust upon the bank employee. Whereas, client considers it, that the employee is seeking information on behalf of bank.

Cyber Defamation

Cyber defamation is the same as conventional defamation but in cyber defamation, computer or the internet is used to defame the reputation of a person. There are three ingredients of cyber defamation, if these are found in any published statement then it is considered cyber defamation otherwise this statement will not fall within this category, elements are;

- i. the statement must refer to the victim;
- ii. the statement must be false and defamatory and
- iii. the statement must be published by electronic means.

If the above mentioned elements are found in any statement, then it is called cyber defamation. If any of the above mentioned element is missing so it will not be considered cyber defamation. The statement published against any organization, financial institution, company or bank defaming their reputation among the competitor of the market and making loss to their credibility and their business is also cyber defamation. Issue arises when someone has published a defamatory statement using public computer or some institution's computer, whether the computer owner is liable or the actual offender? It needs serious consideration. Many companies are destroying the business of other companies while publishing fake and defamatory comments including the hacking of that company's website to show the negligence of other company for security of clients.

Cyber Pornography

Over the last few decades, the “internet has provided an expedient mode of communication and access to a wealth of information.”⁷³ It is a “valuable tool; however, it can also be detrimental to the wellbeing of children due to numerous online hazards.”⁷⁴ Cyber pornography is assumed to be the largest business on the Internet in contemporary era. Millions of pornographic websites are evidence of this business/industry which is promoting pornographic websites, pornographic online magazines, photos, pictures, books and writings. Though pornography is not illegal in many countries, still child pornography is strictly illegal in most of the countries.⁷⁵ The rapid growth of “electronic and computer based communication and information sharing during the last decade has changed individuals’ social interactions, learning strategies and choice of entertainment.”⁷⁶ The Internet has created a new communication tool, particularly for young people “whose use of e-mail, websites, instant messaging, web cams, chat rooms, social networking sites and text messaging is exploding worldwide.”⁷⁷ There is the “potential for children to be abused via cyberspace through online sexual solicitation and access to pornography.”⁷⁸ Indeed, the internet is “replete with inappropriate material, including pornography, chat-rooms with adult themes and access to instant messaging wherein others could misrepresent themselves.”⁷⁹ As children are actively “utilizing the internet where unknown others can have access to them or where they can be exposed to inappropriate sexual materials,

⁷³Stefan C. Dombrowski, Karen L. Gischlar and Theo Durst, “Safeguarding Young People from Cyber Pornography and Cyber Sexual Predation: A Major Dilemma of the Internet.” *Child Abusive Review* 16 (2007): 153-170.

⁷⁴*Ibid.*

⁷⁵*Ibid.*

⁷⁶“Prevention and intervention of cyber abuse targeting children and adolescents: A systematic review to evaluate current approaches.” is a research report submitted in “University of Toronto” in 2013.

⁷⁷ *Ibid.*

⁷⁸Dombrowski, “Safeguarding Young People from Cyber Pornography and Cyber Sexual Predation: A Major Dilemma of the Internet.”: 153-170.

⁷⁹*Ibid.*

they require safeguarding and education in safe internet use.”⁸⁰ To put it another way, we can say that “the cost to children and society of sexual perpetration is too great to overlook the hazards of online solicitation.”⁸¹

In March 2016, in Pakistan, the child pornography was defined⁸² and criminalized.⁸³ In August 2016, similar offence was defined through PECA⁸⁴ which increased the maximum fine from seven hundred thousand rupees to five million rupees but the imprisonment was same as in the Pakistan Penal Code.⁸⁵ Hence, we can easily conclude that where the computer is used for distribution or transmission of any child pornographic material is more serious as compared to conventional means.

Cyber Stalking

Stalking is not a new phenomenon; from the beginning of the humanity, powerful people started using different tactics to stalk the weaker, since then this method is being used to stalk weaker. It is defined as “the use of the Internet, e-mail, or other electronic communications devices to stalk another person.”⁸⁶ In other words we can say that “an element that the person being stalked must reasonably feel harassed, alarmed, or distressed about personal safety or the safety of one or more persons for whom that person is responsible.”⁸⁷ In other words, it refers to the use of “the internet, e-mail, or other electronic communications devices to stalk another person.”⁸⁸ Same principle is applicable to companies where larger and powerful companies stalk weaker to

⁸⁰Ibid.

⁸¹Stefan C. Dombrowski, John W. LeMasney, and C. Emmanuel Ahia. “Protecting Children From Online Sexual Predators: Technological, Psychoeducational, and Legal Considerations.” *Professional Psychology: Research and Practice* 1 (2004): 65-73.

⁸² S. 292 B Of the Pakistan Penal Code, 1860,

⁸³Ibid., S. 292 C.

⁸⁴ S. 22 of PECA, 2016

⁸⁵ Ibid.

⁸⁶Shah, *A to Z of Cyber Crime*, 42.

⁸⁷*Black's Law Dictionary*, v.s. “stalking.”

⁸⁸ Mali, *A Text Book of Cybercrime and Penalties*, 35.

destroy their business and to control the market. Whoever commits this offence is liable for imprisonment up-to three years or fine up-to one million rupees or both and in case of minor, imprisonment will be up to-five years and fine up-to ten million rupees or both.⁸⁹

Cyber Terrorism

The growth and increase in social, political and economic dependence upon the internet affords terrorist organizations “a new arena in which to pursue their goals by staging attacks or threats against computer networks and information systems.”⁹⁰ Cyber terrorism is defined as “the premeditated use of disruptive activities, or the threat thereof, in cyberspace, with the intention to further social, ideological, religious, political or similar objectives, or to intimidate any person in furtherance of such objectives.”⁹¹ Keeping in view the different perspective of it, many scholars have defined it differently. Verton has defined it as “the execution of a surprise attack by a subnational foreign terrorist group or individuals with a domestic political agenda using computer technology and the Internet to cripple or disable a nation’s electronic and physical infrastructures.”⁹² Some countries have legislated to curb this situation including the UK⁹³ and US.⁹⁴

Data Diddling

It is the simplest form of committing computer crime, which is defined “the illegal or unauthorized alteration of the data.” It is a common crime which is prevailing all over the world, it occurs during transfer of data. It has affected individuals, financial institutions (banks, changing credit ratings, altering security clearance information credit records etc.), educational

⁸⁹ S. 24 (2) of PECA, 2016.

⁹⁰ Yar, *Cyber Crime and Society*, 50-51.

⁹¹ This was proposed by RohasNagpal, in a conference held in Madrid, Spain in 2002.

⁹² Yar, *Cyber Crime and Society*, 51.

⁹³ UK Terrorism Act of 2000.

⁹⁴ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (The USA PATRIOT) Act, was passed on 26th October 2001.

institution (for changing the University, College and School transcripts i.e. modifying grades) and all other virtually forms of data processing including inventory records and fixing salaries. Criminals can cause billions of dollars' loss to any financial institution and company, because detection of such alteration is not possible to curb this situation within shortest possible time. This is called "electronic forgery" in Pakistani legal system and the criminal is awarded punishment up to three years and fine up to two hundred and fifty thousand rupees or both⁹⁵ and if the criminal commits this crime in respect to critical infrastructure, he will be imprisoned up to seven years and fine up to five million rupees or both.⁹⁶ In other words, computer and IT devices are blessings for the criminals to forge any document, currency notes, academic certificates, medical certificate, electronic records, bank records, financial institution records, company records, institution records, postage and revenue stamps and other government and private records by using computer, scanners and printers.

Denial of Service Attack

Denial of service (DOS) attack (also known as Distributed Denial of Service (DDoS) attack) refers to a cyber-attack "which prevents a computer user or owner's access to the services available on his system."⁹⁷ This is initiated by "sending excessive demands to the victim's computer, exceeding the limit that the victim's servers can support and make the servers crash"⁹⁸ and "results in authorized users being unable to access the service offered by the computer."⁹⁹ In DOS attack, the hacker closes the access to the website, where the customer cannot get access to the website leaving organization to face the close of business for some time. Earlier, some

⁹⁵ S. 13 of PECA, 2016.

⁹⁶ Ibid., 13 (2).

⁹⁷ Ibid., 30.

⁹⁸ Mali, *A Text Book of Cybercrime and Penalties*, 46.

⁹⁹ Ibid.

hackers in past have shut down access to leading e-commerce websites i.e. amazon.com, ebay.com etc., where they faced billions of dollars loss.¹⁰⁰

Digital Piracy

Digital stealing is about “robbing of people’ ideas, inventions, and creative expression everything from trade secrets and proprietary products and parts to movies, music and software.”¹⁰¹ In the meantime, it is a growing threat with the growth of digital technologies and Internet file sharing networks.¹⁰² Digital piracy¹⁰³ is the “illegal copying of digital goods (including trademarks), software (including source code), digital documents, digital audio and video for any reason other than to back up without explicit permission from and compensation to the copyright holder.”¹⁰⁴ Copyright infringement, trademarks violations, theft of computer and software piracy etc., are the few examples of intellectual property crimes. Copyright protected material’s downloading is not only the digital piracy but posting a copyrighted work without the explicit permission of the owner is also copyright infringement.

Email Bombing

Email bombing refers to “sending a large number of emails to the victim resulting in the victim’s email account (in case of an individual) or mail servers (in case of a company or an email service provider) crashing.”¹⁰⁵ In other words, email bombing is a form of DOS attack “that floods an inbox and mail server with messages. If enough messages are sent, the system may be overloaded and will stop working.”¹⁰⁶ The DOS attack and email bombing are not similar, as a

¹⁰⁰ Ibid.

¹⁰¹ Shah, *A to Z of Cyber Crime*, 37.

¹⁰² Ibid.

¹⁰³ Digital piracy is also known as copyright infringement and intellectual property crimes.

¹⁰⁴ Gottschalk. *Policing Cyber Crime*, 25.

¹⁰⁵ Shah, *A to Z of Cyber Crime*, 152.

¹⁰⁶ Mali, *A Text Book of Cyber crime and Penalties*, 41.

few people think, both are different. Email bombing plays role to destroy the companies' business by blocking email facility, whereas clients face difficulties to access this facility.

Email/Web Spoofing

Cambridge dictionary has defined spoof as “to try to make someone believe in something that is not true.”¹⁰⁷ A spoofed email is one that “appears to originate from one source but actually has been sent from another source.”¹⁰⁸ These messages appear to be from a bank, company, or other legitimate institution or organization. Web and email spoofing occurs when cybercriminals create “web sites, web-based traffic, email, or instant messages that appear to be legitimate in every way but are actually fraudulent communications designed to socially engineer people into giving up confidential information that can then be used to commit crimes.”¹⁰⁹ Web and email spoofing typically occur together “as when an attacker sends an e-mail with a link to a spoofed web site.”¹¹⁰ Sometimes criminals send spoof SMS instead of spoof email, both are similar to some extent, however, in SMS spoofing cell phone number is used instead of an email ID. Spoofing is a crime in Pakistani legal system, and whoever commits this crime is imprisoned up to three years and fine up to five hundred thousand rupees or both.¹¹¹

Fake Social Media Accounts

Fake social media accounts are those which are created by using other persons' name instead of their own name. Mostly famous persons' names are used to cheat innocent people. Creation and active operation of fake social media accounts is as easy as drinking water, this illegal and immoral activity is carried out throughout the world, especially in Pakistan there is no mechanism to check fake accounts. According to The Cable News Network (CNN) 83 million Facebook

¹⁰⁷ Cambridge Advanced Learner's Dictionary, s.v. “spoof”

¹⁰⁸ Shah, *A to Z of Cyber Crime*, 83.

¹⁰⁹ *Encyclopedia of Cybercrime*, s.v. “fraudulent schemes and theft online” 75.

¹¹⁰ Ibid.

¹¹¹ S. 26 of PECA.

accounts are fake and dupe¹¹² which are malicious in nature and undesirable for society. All social media websites are being used to create fake accounts, cheat innocent people and sell illegal articles. Previously fake social media accounts were used to be a problem faced by adolescent girls, now everyone is facing the problems caused by fake accounts.

In other words, it is called Identity fraud/theft which is the fastest growing while-collar crime in many countries, especially in developed countries.¹¹³ It is a “form of stealing someone's identity in which someone pretends to be someone else by assuming that person's identity.”¹¹⁴ This is done to access someone's credit card or other personal information for financial gain for personal use, leaving the victim upset emotionally and financially. While identity theft occurs when somebody uses another person's “identifying information, like name, social security number, or credit card number without permission and commits fraud or other crimes.”¹¹⁵ It deprives the real owner of his causing right while loss to his interests. This has been penalized through enactment of PECA which prescribed imprisonment up-to three years and fine up-to five million rupees or both.¹¹⁶

Similar to fake social accounts, fake websites are created throughout the world to cheat the innocent people. These websites look identical to original ones but it involves “manipulating the domain name system to take unsuspecting victims to fake websites.”¹¹⁷ The browser reaches some fake website, rather than original website. This is done to deprive people of their wealth. Many national and international organizations are involved in commission of this fraud. Many factors are involved to cheat the internet users including design, appearance and lack of

¹¹²<http://edition.cnn.com/2012/08/02/tech/social-media/facebook-fake-accounts/> (accessed on 18th February 2015).

¹¹³ Gottschalk. *Policing Cyber Crime*, 23.

¹¹⁴ Shah, *A to Z of Cyber Crime*, 138.

¹¹⁵ Ibid.

¹¹⁶ S. 16 of PECA, 2016.

¹¹⁷ Shah, *A to Z of Cyber Crime*, 165.

awareness among the users, which make it difficult to recognize the original one. These websites have become “increasingly pervasive and trustworthy in their appearance, generating billions of dollars in fraudulent revenue at the expense of unsuspecting internet users.”¹¹⁸

People may think that it is easy to detect fake websites; nevertheless detecting the fake websites is difficult task due to design and appearance of fake sites which look like original ones. Moreover, fake websites “frequently use images and contents from existing legitimate websites,”¹¹⁹ which make further difficult for user to understand that which one is genuine and which one is fake. If fake website is designed as an online business company (if someone makes website like ebay or amazon, it will not be possible for an ordinary person to know the actual difference between the existing legal website and fake website), people will not be able to know the fraud which is being committed with them, therefore they will lose their money besides losing trust in the company without knowing the actual situation.

Website defacement is usually the “substitution of the original home page of a website with another page (usually pornographic or defamatory in nature) by a hacker.”¹²⁰ Governments and religious sites are mostly targeted by the hackers to display their political and religious beliefs respectively, in addition to disturbing images and offensive phrases. Moreover the financial websites are also hacked to gain financial benefits and to hack the personal data of clients/consumers. Sometimes the hacker hacks websites just for fun. Corporations are also “targeted more often than other sites on the Internet and they often seek to take measures to protect themselves from defacement or hacking in general”.¹²¹ If website of any organization or corporation is hacked; visitors, consumers and clients may lose faith in such sites that cannot

¹¹⁸ Gottschalk. *Policing Cyber Crime*, 17.

¹¹⁹ Ibid.

¹²⁰ Shah, *A to Z of Cyber Crime*, 231.

¹²¹ Ibid.

promise security. As after defacement “sites have to be shut down for repairs, (sometimes for an extended period of time), causing expenses and loss of profit.”¹²²

Internet Time Theft

This connotes the usage by “an unauthorized person of the Internet hours paid for by another person.”¹²³ In the internet time theft unauthorized person, (who is also the in-charge of the computer or network or system), without owner’s permission, accesses, transfers data or copy data, introduces virus into any computer, disrupts, denies, provides assistance to anyone to facilitate access to a computer, by tampering with or manipulating any computer, charges the services availed of by a person to the account of another person, destroy or delete and steal the information from any computer commits the Internet time theft. Later this data or information is used to commit other crimes, including financial crimes.

A malicious agent (is also known as malicious software) is “a computer program that operates on behalf of a potential intruder to aid in attacking a system or network.”¹²⁴ Though “a computer virus traditionally was the most prominent representative of the malicious agent species, spying agents have become more common, which transmit sensitive information from the organization to the author of the agent. Another kind of agent is the remotely controlled agent, which provides the attacker with complete control of the victim’s machine.”¹²⁵ Malicious software is also used for this purpose, which is classified as “malicious software based on the perceived intent of the creator rather than any particular features.”¹²⁶ This includes “spy ware, botnets, keystroke loggers, and dialers. In a botnet, the malware logs in to a chat system while a key logger intercept the user’s keystrokes when entering a password, credit card number, or other

¹²² Ibid, 232

¹²³ Mali, *A Text Book of Cyber crime and Penalties*, 56.

¹²⁴ Gottschalk. *Policing Cyber Crime*, 22.

¹²⁵ Ibid.

¹²⁶ Ibid.

information that may be exploited.”¹²⁷ This software automates a “variety of attacks for criminals and is partially responsible for the global increase in cybercrimes.”¹²⁸ In Pakistani legal system, it is called malicious code, which is punishable up-to two years and fine up-to one million rupees or both.¹²⁹

Online/Internet Gambling

Many websites exist which offer online/internet based gambling. In some countries it is permissible while in other countries it is prohibited. The issues arises when a person residing in a country, where gambling is illegal and gambles on such website. Then what will be the punishment for the gambler in case of his involvement in gambling or loss of his money in gambling?

Salami Attacks

The attack is called salami attack as it is “analogous to slicing the data thinly, like a salami.”¹³⁰ According to Encyclopedia of White-collar & Corporate crime, Salami is “in banking, a fraud that involves taking all of the round-down fractional cents from periodic interest payments and crediting them to a single account. Thus each transaction has only a thin slice removed.”¹³¹ Salami attacks are used for committing financial crimes, where the employee “makes the alteration so insignificant that in a single case it would go completely unnoticed.”¹³² For instance, a bank employee inserts a program, into bank’s servers, that deducts a small amount of money from all customers’ accounts. Due to small amount of deduction from the

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ S. 23 of PECA.

¹³⁰ Mali, *A Text Book of Cybercrime and Penalties*, 45.

¹³¹ Encyclopedia of White-collar & Corporate crime, v.s. “Salami”

¹³² Mali, *A Text Book of Cybercrime and Penalties*, 45.

accounts, no account holder will be able to notice this unauthorized debit, but the bank employee will make a sizeable amount of money every month.¹³³

Sale of Illegal Articles

Few decades ago sale of illegal articles was difficult task; through the Internet it is common to find illegal articles on just a click, i.e. narcotics drugs, weapons and other article's information is posted on websites, from where people get information and buy illegal products. It is practically "impossible to control or prevent a criminal from setting up a website to transact in illegal articles"¹³⁴ due to "several online payment gateways that can transfer money around the world at the click of a button."¹³⁵ Likewise, it has created a "marketplace for the sale of unapproved drugs, prescription drugs dispensed without a valid prescription, or products marketed with fraudulent health claims"¹³⁶ which pose a "serious potential threat to the health and safety of patients."¹³⁷

Stock Robot Manipulation is a computer program which is able to manipulate stock-trading. This program generates "fake buying and selling orders that terminate each other, while at the same time influencing stock prices. Then the program performs real buying and selling orders where stocks are bought at low prices and sold at high prices."¹³⁸ This type of manipulation is illegal, which cannot be permitted in any case, because if someone uses this program he can easily crash the whole stock market, and investor will lose their legitimate business.

A Trojan is "an unauthorized program which functions from inside what seems to be an authorized program, thereby concealing what it is actually doing."¹³⁹ Common types of Trojans

¹³³ Ibid.

¹³⁴ Shah, *A to Z of Cyber Crime*, 193.

¹³⁵ Mali, *A Text Book of Cybercrime and Penalties*, 19.

¹³⁶ Ibid.

¹³⁷ Shah, *A to Z of Cyber Crime*, 193.

¹³⁸ Gottschalk. *Policing Cyber Crime*, 23.

¹³⁹ Mali, *A Text Book of Cyber crime and Penalties*, 52.

are; Remote Administration Trojans (RATs), Password Trojans; Privileges-Elevating Trojan, and Destructive Trojans. There are many other Trojans which affect the normal functions of any computer, from deleting any file to uploading any virus in the victim's computer. Thus, many hackers use it as a tool to get the password and personal information of the victim.

Use of Encryption by Terrorists

Encryption is a “technique which enables communications to be encoded prior to transmission, so that they are unreadable if intercepted; only the intended recipient has a key which enables the message to be decoded and restored to its original legible form.”¹⁴⁰ Stating differently, it is the process of transforming or changing plain text or data into a form or cipher that cannot be read by anybody other than the sender and by the intended receiver. Threat of cyber terrorist attack on critical infrastructures is “more a case of strategically useful fancy than hard fact. However, this does not necessarily mean that there are no significant convergences between terrorist activities and the Internet.”¹⁴¹ In contrast to the other computer-focused crimes, it has been argued “that the Internet plays a significant and growing role in computer-assisted terrorist offences.”¹⁴² Lot of criminals are using this technology to protect information stored on their hard disks, which creates many problems for law-enforcement agencies to detect and understand the exact nature of messages. Notably, terrorist groups make use of the Internet “in support of their conventional, terrestrially based activities to finance their illegal activities.”¹⁴³

Virus / Worm Attacks

Computer viruses are “small software programs that are designed to spread from one computer to another and to interfere with computer operations.”¹⁴⁴ It “might corrupt or delete data on the

¹⁴⁰Yar, *Cyber Crime and Society*, 58.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Mali, *A Text Book of Cybercrime and Penalties*, 49.

victim's computer, use the victim's e-mail program to spread itself to other computers, or even erase everything on the victim's hard disk."¹⁴⁵ These are mostly spread by "attachments in e-mail messages, instant messaging messages, attachments of funny images, greeting cards, and audio and video files."¹⁴⁶ These can also spread through downloads on the Internet, where "they are hidden in illicit software or other files or programs."¹⁴⁷ Whereas worms, unlike viruses do not need "the host to attach themselves to, they merely make functional copies of themselves and do this repeatedly till they eat up all the available space on a computer's memory."¹⁴⁸

Web Jacking

The web jacking is done through force to get ransom, where the perpetrators have "either a monetary or political purpose which they try to satiate by holding the owners of the website to ransom."¹⁴⁹ This happens when somebody forcefully takes control of a website (by cracking the password and later changing it), where "the actual owner of the website does not have any control over what appears on that website."¹⁵⁰ Even the Supreme Court of Pakistan's website was hacked by hackers¹⁵¹ in 2010 to put pressure on Pakistani government for release of Dr. Afia., and they also posted some objectionable material on it.¹⁵² Again in 2011, the apex court's website was "defaced by a hacker who asked the Chief Justice to ban all pornographic websites and do more to help the poor."¹⁵³

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Mali, *A Text Book of Cyber crime and Penalties*, 59.

¹⁵⁰ Ibid.

¹⁵¹ Two hackers were involved in hacking the Supreme Court website, one was Pakistani national and other was Indian national.

¹⁵² www.ndtv.com/world-news/pakistan-supreme-courts-website-hacked-433856 (accessed on 13th February 2015)

¹⁵³ <http://timesofindia.indiatimes.com/world/pakistan/Pakistan-Supreme-Courts-website-hacked/articleshow/10136938.cms> (accessed on 13th February 2015)

Conclusions

There are many challenges to overcome cyber-crimes successfully, to prevent such crimes education and public awareness is necessary. Due to lack of awareness of existing cyber-crimes in Pakistani society, the general public is facing many problems. Even the law enforcement agencies are unaware of these crimes due to complex nature of these crimes. Therefore, the proper understanding of such crimes is necessary to control them. Without knowing them, we cannot make adequate laws to punish the criminals. New tools for enforcing gambling laws on the Internet are necessary and to enact law to prohibit wire transfers to Internet gambling sites or the banks which represent such sites. Besides, online consumer protection legislation should be introduced to protect the online consumer and online business industry. Moreover, goods are not provided as per standard or not delivered, consumer protection is also mandatory. Illegal purchase and sale of goods on the internet shall also be prohibited.

The telecommunication is directly involved for providing services to the internet user, data transmission is very fast. There is a dire need to get the information as early as possible for the investigation purposes. However, if the telecommunication industry is not providing latest data and detail of it, then it will make very difficult for law enforcement agencies to investigate the crimes expeditiously. Keeping in view the demands of 21st century, if ample laws are enacted to keep and protect the relevant data. This will bring many opportunities for law enforcement agencies for collection of sufficient evidence for prosecutions of the offenders.

A PANORAMA ON PERFORMANCE INDICATORS AND EVALUATION OF JUDGES: AN ANALYSIS

Asghar Ali Salarzai*¹⁵⁴

Abstract

Access to justice is one of the fundamental rights of every citizen. States are bound to protect this right by providing justice through a fair, impartial and competent judicial system. It is thus intrinsic that States must ensure to establish and maintain an impartial, competent, efficient and effective judiciary. Like other public institutions, judiciary, is also run by public funds, thus its performance may also be subjected to social audit. Internally the judicial decisions are cheked through the scheme of appeal and revision. However, such evaluation are merly confined to see the exercise or non-exercise, use or mis-use of certain judicial powers. This evxercise has nothing to do with the quality of juducial decision making. There is no other formal mechanism to evaluate the performance of judges both qualitatively and quantatevly. Arguably, independence of the judiciary demands that the performance of judges may not be subjected to evaluation. However, there is an emphire of litrature to show that one way or the other, different states have adopted different approaches to evaluate such performance. After encompassing the available litrature, this article argues that independence of judiciary in the strict sense does not exonerate judges from evaluation of their performance. Based on best practices, the article discusses different types of performance indicators, approaches and modes of performance evaluation, and challenges to the evaluation mechanism. The articles review the evaluation system prevalent in Pakistan. Emphasizing the efficient use of technology, court and case management, the article presents a model of evaluation for judges in Pakistan. The paper

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concludes that a quality control cell at the level of each high court shall be indispensable before starting any evaluation program.

Key words: Performance indicators, evaluation, judiciary, case management, integrity.

Introduction

Delay in disposal of cases has greatly stigmatized the justice system of Pakistan. Critics argue that the judiciary may very frequently pass directives for reforming policing and land revenue systems, appointments, promotions and transfers in the civil service generally – but not for reforming the judicial system itself¹⁵⁵. A very heavy duty is, thus, placed on the shoulders of the judiciary to reform its own evaluation system. While judiciary may very well point out a number of contributory factors for delay— litigants unwillingness, non-cooperation of the bar, non-attendance of revenue staff in civil, and police officials in criminal cases— to name a few, it has no other option but to bring dramatic changes in measuring its service delivery. A very visible, effective and efficient system is thus need of the hour. Critics argue that, “It (judiciary) will devote the full-time services of a SC judge to various inquiry commissions ranging from electoral malpractices or even into the purchase of a couple of London flats – but the only half-hearted attempt at court system reform in recent years (by way of the Judicial Policy, 2009) merited nothing more than the part-time attention of the apex court’s registrar¹⁵⁶.”

This and some other disparaging remarks¹⁵⁷ have made out a case for judiciary, as an institution, to put an effort, at least to overhaul the present outdated evaluation system. Not only from the standpoint of delay in disposal, the judiciary have to shoulder some other daunting tasks—court management, case management, performance evaluation— to name a few. While evaluating the performance of judges, the judiciary has to set some performance indicators.

¹⁵⁵ Salaudin Ahmed, justice delayed is justice denied, Daily Dawn 20 December, 2016

¹⁵⁶ Ibid

¹⁵⁷ Day in and day out, delay in disposal of cases are criticized on print, electronic and social media

Judged by their legal acumen, communication skills, judicial decision making, case and court management techniques, knowledge of law, appreciation of evidence, maintenance of court decorum, administrative qualities, liaison with other stake holders¹⁵⁸, watch on court staff and level of patience, a comprehensive set of performance indicator and performance evaluation program seems indispensable.

An Introduction to the Present Performance Evaluation

As a career judge, this author has had the opportunity to experience different methods of measuring the performance of judges. In the province of Khyber Pakhtunkhwa, in the first decade of 2000, a time bound delay reduction (TBDR) plan was in vogue. Cases were classified in different categories. Through each disposal, the concern presiding officer would get units. In some areas, judicial officers, earning highest units were granted incentives¹⁵⁹. At present, the performance of judges is evaluated through a cumbersome procedure of “Disposal based Performance Evaluation Policy (DPEP)”. The policy is replicated in a DPEP profarma. It distributes cases to different areas. The areas include old— cases filed before 31 December 2011 is placed at area “old/target”. The second area is called “backlog”. All those cases, which are not disposed in the stipulated period is placed in backlog category. The third area is called “new cases”. Fresh institution and cases not converted to backlog is placed in this area.

The profarma starts with performance sheet. The sheet consists of personal information of the judge, court and station. It also contain entries in respect of pendency, fresh institutions, disposal, transferred in and transferred out cases, stay matters, misc application etc. It is followed by the next sheet, called “control centre”. It controls the whole profarma. It contains the personal ID of the Judge and the number of working days. This sheet is followed by a “check list” sheet.

¹⁵⁸ Litigants, lawyers, revenue officials, district administration and police are some of the important stake holders

¹⁵⁹ The practice was in field in Malaknd division till 2008

This sheet shows disposal and pendency of different civil and criminal cases. The performance is evaluated through a scoring system. Based on disposal, judges are placed in category A, A+, A-, B, B+, and B- and so on.

“A” category is assigned to those officers who have no target case in their diaries. A+ is assigned to those judges, when there is no backlog case in his/her court. The profarma nowhere guides the judges how to improve performance. Say for example, what would a judge do if he/she wishes to score A or A+? Judged by the contemporary standard of evaluation, the present system could not be termed a wholesome performance evaluation system for various reasons: Firstly, the policy is quantitative in nature. It ignores the quality of judicial decision making and other allied traits of judge craft. Secondly, the profarma can only be termed as Data collection apparatus. It does not portray the performance of judicial officers. For instance, fresh, backlog and target cases are fixed in the diary of court “A”. The DPEP would show the scoring somewhere in D, D+ or D-. On the other hand, court “B” has only fresh cases. The profarma will automatically show the score/category either A or A+. If through an order of the competent authorities, target cases are transferred from court A to court B, the entire scoring system would dramatically change. Without disposing a single case, the score of court A will change to A or A+ while score of court B will change the same way in the opposite direction. It may happen that court staff manipulates the scoring system. Without proper check and balance machinery, the profarma seems least effective for the evaluation of performance of judges.

In the Federal capital Islamabad, provinces of Punjab and Sindh the situation is different. The performance of judges is measured through a unit policy. The performance is replicated in a monthly statement showing institution, disposal and pendency of the cases. The profarma shows the name of the judicial officer, number of pending cases, number of fresh institutions, number

of contested judgments. The focus is only on numbers, the quality of judgments/decision is nowhere taken in to consideration. The system is quantitative in essence.

Performance Indicators

Performance indicator is a measure that helps answer the question of how much, or whether, progress is being made toward achievement of certain objectives¹⁶⁰. Usually Indicators are used to measure progress in the accomplishment of certain significant goals. In justice sector institutions, these goals may range from delay reduction, timeliness, effectiveness, access to justice on the basis of gender, ethnicity, or economic class. Organizations working in the development sector define indicators in nearly the same way. For instance the Organization for Economic Co-operation and Development (OECD) defines an indicator as, a ‘direct and valid statistical measure which monitors levels and changes over time in a fundamental social concern¹⁶¹.while the smaller Performance Assessment Resource Center (PARC), based in Birmingham, England, says, “An indicator is something that can be seen, experienced, or recorded. It is a sign that something exists, or has happened, or has changed¹⁶². The World Bank defines an indicator as ‘information [that] can be used...to assess performance and assist in planning for the future¹⁶³. Similarly, indicators can be used to measure the daily activities through which an institution can attain its objectives¹⁶⁴.

¹⁶⁰ Handbook of Democracy and Governance Program Indicators (Washington, DC: U.S. Agency for International Development, 1998)’ (Judicial Sector Indicators (JSI),a World Bank Information System available on the web at http://www4.worldbank.org/legal/legop_judicial/whatisjsi.html.)

¹⁶¹ Measuring Social Well-Being: A Progress Report on the Development of Social Indicators, Paris: OECD, 1976.)

¹⁶² (Good Monitoring and Evaluation Practice: Guidance Notes (Birmingham: PARC, October 2001.

¹⁶³(Judicial Sector Indicators (JSI),a World Bank Information System available on the web at http://www4.worldbank.org/legal/legop_judicial/whatisjsi.html.)

¹⁶⁴ Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector, Vera Institute of Justice, November 2003, p5

Difference between Actual Performance and Performance Indicators

A delicate difference exists between actual performance and performance indicator. A performance may be defined as “the complete set of characteristics of a product or a service, which enables it to satisfy needs or demands”. A performance indicator can be defined as “a variable which provides information on one of the characteristics that are important for the quality of a product or a service.

Approaches to Performance Evaluation

Performance evaluation of judges is a hypersensitive undertaking. While evaluating judges or the institution of judiciary care must be taken to fully safeguard the independence of the individual judges and judiciary as institution. This necessitates designing of such a program which could not only achieve the purpose of evaluation but also ensure that the judges do not feel that either they are distrusted or that their independence has been encroached upon. Around the world, keeping in view the purpose of evaluation, different approaches are adopted for performance evaluation. The most common approaches to performance evaluation are “soft” and “tough” approaches.¹⁶⁵ These approaches are also called as “developmental” and “judgmental” evaluation by various commentators¹⁶⁶. In the soft version, learning and dialogue are focused. The tough version creates explicit incentives for performance. The table below¹⁶⁷ makes some distinctions between the two;

¹⁶⁵ Ibid p-19

¹⁶⁶ See for example Crohen, Madeleine(2004). A Radiography of the Judicial System in Romania from the perspective of young judge”. Article published in DilemaVeche nr. April 2004.

¹⁶⁷ Note 3 supra p-20

Soft Version	Tough Version
<ul style="list-style-type: none"> • This version is aimed at learning and improving the performance • Low degree of specification of expected performance • Evaluation is made by colleagues. Opinions are exchanged on the degree of performance and assistance provided for improvement. • The output of the performance evaluation process is mainly verbal text. • The evaluation results in identification of training needs and stimulate self-improvement. 	<ul style="list-style-type: none"> • Incentives for performance are created • High degree of specification of expected performance • The evaluated is subordinate to the evaluator, who delivers an authoritative judgment on the performance of the evaluated • The output of performance evaluation process is mainly quantified • Good performers earn career progression or increase in salary. Bad performance is grilled and may sometime end in dismissal from service.

However, to get fruitful results, the evaluation program shall be an excellent combination of both the versions.

Performance Evaluation in other Jurisdiction

Different jurisdictions are confronted with different challenges. Thus the purpose and mechanism of performance evaluation differs from jurisdiction to jurisdiction. So much so different methodologies are adopted in different parts of the same jurisdiction. Take the case of the United States of America. Among others, four states, including the District of Columbia, use

performance evaluation in the process of and as a basis for reappointing judges, two states use them to enhance public confidence in the courts and judges and therefore publish the outcome of performance evaluations, and five states only use them for self-improvement and capacity building of judges¹⁶⁸. Other countries, such as France and Germany, use performance evaluation of individual judges for career advancement and promotion purposes¹⁶⁹. Whilst the Netherlands do not have a formal system of performance evaluation of individual judges that is linked to promotions, their system enables self-improvement and general administration of justice by identifying capacity building needs. This allows court chairs to see which judge is under-performing and to adjust resources to support such a judge¹⁷⁰. To have a model evaluation program for Pakistan, the evaluation systems of some other jurisdictions are examined below.

Individual evaluation of magistrates in Austria¹⁷¹

In Austria Judges are evaluated after two years of their appointment to a new position. However, court presidents, vice-presidents and the heads of panels in the courts of appeal are exempted from any evaluation. A judicial board is constituted which carries out evaluation. The judicial board is composed of two ex officio members (the president and vice-president of the court) and of three members elected by the judges of these courts. In addition to carrying out the evaluation, the judicial boards are also responsible for appointment of judges as well. The evaluation form covers a number of areas. Some of the key areas are: formal knowledge, decision making ability, working speed, capacity to work under stress, mode of expression, social and personal behavior.

¹⁶⁸ National Centre for State Courts 'Guidance for Promoting Judicial Independence and Impartiality- Revised edition' 2002. The National Centre for State Courts' mission is to improve judicial administration in the courts of the United States and courts throughout the entire world, see [http:// www.ncsc.org/](http://www.ncsc.org/).

¹⁶⁹ United Nations Office on Drugs and Crime, 'Resource Guide on Strengthening Judicial Integrity and Capacity' 2011

¹⁷⁰ Ng, Gar Yein, 'Quality of judicial organisation and checks and balances', Intersentia, Antwerp 2007 p.94.

¹⁷¹ Source of information: Stava (2005) and Kodek (2005).

The evaluation is graded. The judge will receive one of the five possible grades: “Excellent”, “Very good”, “good”, “passed”, and “failed”. The result of the evaluation is delivered to judges evaluated. Feeling aggrieved of the grading, they have a right to appeal to the judicial board of the next higher court. If the grade is below “very good”, the evaluation is repeated the following year. A gradation below “good” may result in a financial disadvantage.

Individual evaluation of magistrates in Belgium¹⁷²

Until 1998, there was no individual evaluation of the magistrates in Belgium. Keeping in view the public discontent and erosion of trust in the institution, the government introduced the system of evaluation of judges with the following dual objectives:

- 1) To identify dysfunctional magistrates. The evaluation aimed at identifying the problems being faced by a particular magistrate. As an internal management tool, the evaluation helped the institution to take action against the concern magistrate. It also enables the magistrates to help themselves and improve grey areas.
- 2) To allow for a comparative assessment of the magistrates. The assessment was used for career development of the magistrates. The system evaluates; judicial knowledge, work efficiency, communication skills, ability to make decisions, professional ethics, loyalty to one’s colleagues, self-management, interest in continuous learning, ability to adapt, spirit and engagement. Magistrates will receive an overall mark of either “very good”, “good”, “satisfactory” or “not satisfactory”. Deductions from salary are made of magistrates whose performance is rated as “not satisfactory”. There is no right of appeal against the rating decision, but the magistrate is allowed to record his own remarks. The system allows magistrates to perform self-assessment. At final stage of the evaluation, a conversion takes place between the

¹⁷² Source of information: Conseil Supérieur de la Magistrature (2005), Hoge Raad voor de Justitie (2003, 2004), and Depré & Plessers (2005)

evaluated and the president of the respective jurisdiction which is considered as part of evaluation.

Individual evaluation of magistrates in France

France is one of the pioneer States in judicial performance evaluation. Its evaluation process dates back to 1850¹⁷³. In France the performance evaluation form includes the following four major themes, which are again composed of several sub-themes:

- General professional abilities: To make decisions; listen; and adapt to new circumstances
- Technical and legal skills: Knowledge of the law and ability to utilize this knowledge; chair sessions and meetings and keep record
- Organizational and management capabilities: To lead a project; motivate others; set goals and determine the means to achieve them
- Professional engagement: Capacity to work; readiness to engage in continuous learning; willingness to maintain professional relationships with other institutions.

The magistrate's performance is marked on every sub-theme using 5 grades: "Exceptional", "excellent", "very good", "satisfactory" and "not satisfactory. The rate "exceptional" has recently been added to the model, and is supposed to be given only to the truly outstanding performers¹⁷⁴. The system has, however, exempted certain areas from being evaluated. It includes;

- The contents of judicial decisions
- Religious or sexual orientations
- Personal life
- Commercial, political or philosophical activities

¹⁷³Jesper Wittrup (2006)

¹⁷⁴ Source of information: Conseil Supérieur de la Magistrature (2005) and Errera (2005)

Performance Indicators for Judges¹⁷⁵

Deliberation on the performance of courts always remained a delicate subject. Commentators argue that the independence of judiciary in general and judges in particular resulted in what is called an “overestimation” of the attention to the subject of performance. It is argued that judges do not like to compare their judicial work with for example administrative work that is carried out in another department or governmental agency¹⁷⁶. The question whether the protection of independence of judiciary is a valid argument to over sight the significant issue of setting performance indicators and then evaluating the judges is a contested one. Though preservation of independence of the judiciary and judges may still be a valid defense but since the independence of a judge is closely connected with the freedom of decision making and non-interference by the executive and legislatures in the judicial work, therefore, by any stretch of imagination, it does not mean that a judge is not accountable for the work s/he is delivering. Someway or somehow, the performance of a judge and a court must be evaluated, because courts are financed by public means and play an important role in the protection of the rule of law in countries and the day-today life of citizens¹⁷⁷.

Purpose of Evaluation

Around the world, performance evaluations are conducted for a number of purposes, thus performance indicators vary from state to state. If the real purpose of the evaluation is to improve professional development, it can be accomplished by different means. Performance evaluation is one of them. Keeping in view the judicial culture, the ethnic diversity, disparity in economy, education, class and culture, an indigenous performance evaluation mechanism needs to be put in

¹⁷⁵ Perhaps a minute discussion on each and every performance indicator may be beyond the mandate of this paper. However, deliberations on the issue may still sound good to a number of practitioners and academicians

¹⁷⁶ Dr. Pim Albers Special advisor of the CEPEJ, Council of Europe, “Performance indicators and evaluation for judges and courts” www.coe.int/cepej.

¹⁷⁷ Note 3 supra

place in Pakistan. In doing so, however, the evaluation mechanism of a number of jurisdictions may be helpful. The available literature on the subject suggests that performance measurement may be used to¹⁷⁸:

- a) Evaluate and learn
- b) Budget and allocate resources
- c) Motivate staff to improve performance
- d) Promote the organization by convincing stakeholders that the organization is doing a good job
- e) Control behavior

Arguably performance measure must help the policy makers to identify the gaps and make efforts for improvement. Evaluation with this aim, portray the performance of the individual and the institution as a whole that what works and what need to be worked upon. Evaluation in such form helps the judges in self correction. However, when evaluating courts we may, with inspiration from the so-called Balanced Scorecard approach¹⁷⁹, distinguish between two major types of indicators: “Goal indicators” and “alarm indicators”. Goal indicators are about aspects of performance we should always be concerned about. Standards and goals for improvement should be assigned to these indicators. In courts, indicators for timeliness would be typical goal indicators. Alarm indicators are on the other hand indicators that tell us whether we have reason for concern about some aspect, or not. Normally, we don’t have to care much about improving the status of this indicator, but on rare occasions it may go into alarm status, and we will have to

¹⁷⁸Jesper Wittrup (2006) p- 75

¹⁷⁹ Kaplan & Norton (1996)

take some action. Indicators for cassations may be considered to be an alarm indicator for courts¹⁸⁰. In judiciary, performance indicators revolve around the following areas¹⁸¹;

1. Indicators for Setting time standards
2. Indicators for workload and productivity
3. Indicators based upon internal evaluation of quality and service
4. Indicators based upon external evaluation of quality and service

Modes of Performance Evaluation

In Pakistan, performance evaluation of the judges of the district judiciary is the responsibility of the respective high courts. However, unfortunately no indicators are set against which to measure the performance. This has resulted in an ad hoc interpretation of the notion, and inconsistencies in the policies surrounding the concept. At the institutional level, no serious efforts have ever been made to evaluate the performance of the judges. Except a half hearted attempt, in the shape of a by product of a research study, has been made by the KP Judicial Academy¹⁸² to explore whether the justice system prevailing in Malakand can deliver justice services¹⁸³? The issue of evaluating the performance of the system in general and judges in particular remained a mystery. With the establishment of the judicial academies at the provincial level, it is hoped that the respective high courts may set the record right and explore some performance indicators and provide a mechanism for performance evaluation.

Around the world, a court of law is described as a “system-model”. In this system model, while keeping in view the involvement of a number of stake holders, three performance

¹⁸⁰Jesper Wittrup (2006) p-76

¹⁸¹ibidi

¹⁸² A recently established judicial training school for the personnel of all justice sector institutions at the province of Khyber Pakhtunkhwa. www.kpja.edu.pk

¹⁸³ The study was conducted with the help of UNDP’s rule of law in Malakand Project. The author was a member of the project. Detailed report of the study is available at www.kpja.edu.pk

indicators could be set up. They are; input, throughput and output indicators. The input part of a court can be resources and cases. Generally, personnel (judges and court staff), material (court buildings, office equipment, etc.) and finances (the budget of a court) are some of the major resource of the courts. The level of these three types of resources greatly affect the productivity of a court. For instance, lack of resources (in terms of judges, staff, equipment, and budget) can lead to an increase in the length of proceedings, mounting the backlog of cases. Incoming cases fall in the category of input part. A high influx of cases with the same level of court resources can lead to an increased pendency in the courts¹⁸⁴. Before arriving at a conclusion, a number of processs are carried out e.g attendance of the opposite party, and recording of evedince. These are the throughput. On the completion of the process, the court pronounces judgement which is the output part. One of the indicators to measure the throughput of courts is – logically – the length of proceedings and the backlog of cases.¹⁸⁵

The performance of judges is influenced by a number of external factors. Changes in: society, the budget of the State, legislation, etc. can lead to a fluctuation of cases filed in the courts wchich may lead to a fluctuation in the workload of cases that can be handled by judges. For example if some legal steps are reduced or time bounded¹⁸⁶ in the procedural law, it may lead to a high productvity of the judges.¹⁸⁷. Thus, perhaps, an independent evaluation mechanism may take into account these external factors. On the other hand it is argued that any policy to

¹⁸⁴ Dr. Pim Albers Special advisor of the CEPEJ, Council of Europe, “Performance indicators and evaluation for judges and courts”http://www.coe.int/t/dghl/cooperation/cepej/events/onenparle/MoscowPA250507_en.pdf_truncated

¹⁸⁵ Note 5 supra p. 2

¹⁸⁶ The Sharia Nizam Adal Regulation (Regulation) can be a best example. The regulation has made it obligatory on the plaintiff to send a copy of the plaint to the defendant before its submission in the court. It has also bound down the plaintiff to submit the statements of the prospective witness in the shape of affidavits.

¹⁸⁷ Note 6 supra p3

improve the performance or quality of the judiciary can be grouped into four major areas: 1) governance policies; 2) structural policies; 3) procedural policies; and 4) managerial policies.¹⁸⁸

The Need for Evaluation

Needles to say that judiciary is the third and one of the most important pillars of the state. It guarantees the protection of human rights, and ensures rule of law. Since, the efficiency of the justice system has become a central issue in several communities, therefore, while keeping in view its important role in good governance and rule of law, a number of states are working on reform agenda.¹⁸⁹ It is also noteworthy that a number of states are bringing drastic changes in their civil procedures rules and/or to implement methods of case management (such as the USA and United Kingdom). As has been pointed out, courts function on public funds. Therefore, a social audit of its performance is not only desirable but has also become indispensable. Leaving the cost-benefit analysis aside, the high courts shall measure the performance quantitatively and qualitatively.

Around the world, even developing countries, are focusing on qualitative evaluation¹⁹⁰. It is highly desirable that instead of accumulating statistics, the high court should concentrate on the quality of the work as well. This will, on one hand improve judicial opinion writing, and increase public confidence on the institution on the other. This can be done through the involvement of researchers and academicians. Even a quality control/enhancement cell can either be established at the high court or in judicial academies. The cell shall be made independent and given a mandate to evaluate the performance of judges after issuance some performance indicators to all the judges. The cell, after evaluation, may recommend the names of best performers to the high

¹⁸⁸Jesper Wittrup, "Analysis of the system for measuring and monitoring judicial performance in Romania" 2006

¹⁸⁹ While a number of states, to reform its justice system, has started specialized trainings in judicial academies, the KP Judicial Academy is a recent effort to achieve this objective

¹⁹⁰ See for example, Maria Dakolias, "Court Performance Around the World: A Comparative Perspective" Yale Human Rights and Development Journal, Vol 2, 2014, pp 87—144

court for award or incentives. This will, on one hand, encourage the judicial officers, and ensure transparency on the other.

Who can Evaluate?

Every evaluation program should not only be obsessed by the aspiration of public accountability but should be equilibrium of independence of judiciary and public accountability. Commentators argue that in order to keep the equilibrium, the evaluation shall ideally be carried out by the judiciary itself. Although some external factors¹⁹¹ also affect the evaluation but executive should be kept out of the process of evaluation. The existing scholarship shows that in the majority of the countries, evaluation is carried out by the judiciary itself. In some European countries, special evaluation committees/councils¹⁹² are established. In the other countries evaluation is carried out by the judicial boards¹⁹³ and judicial academies¹⁹⁴.

Whether the evaluation is carried out by a board, an academy or a council, the evaluators must be trained properly. They are supposed to be impartial, having expertise in the field and in close connection with the evaluated. It is also desirable that before starting any evaluation program, the evaluators should know the purpose of the evaluation. Ideally there should be a committee of experts to train the evaluators how to evaluate. To make the program successful it would be better that the committee shall monitor the evaluation process. The High Court shall introduce a new grading scale. Such grades must account for the knowledge of law, ability to apply the law, conduct with the litigants, temperament, honesty, integrity, qualification, and special aptitude in a field. Only speedy disposal should not be the sole insignia for good performance. Speed must correspond with the quality of judicial opinion writing, appreciation of

¹⁹¹ For example the infrastructure and budget of the court, indicators relevant to lawyers, litigants, prosecutors and other relevant stake holders

¹⁹² See for example Italy and Germany discussed above

¹⁹³ For example Austria and Belgium discussed above

¹⁹⁴ See for example Indian evaluation system

law and facts and sturdy communication skills. A fallacy should also be detached. Performance evaluation is and can never be used as disciplinary proceedings. Thus it should not be aimed at trapping the judges. It should rather be used to promote professional development resulting into better service delivery. Thus evaluation for the sake of punishment should be avoided. It is also advisable that the contents of the judgment should not be discussed. It would ensure independence.

Challenges in Performance Evaluation

Countries in transitions, including ours, are facing a number of challenges¹⁹⁵. There is a public perception that institutions are weak and professionalism is scarce. In such eventuality, a number of stumbling blocks have to be detached before launching any new program. Thus a range of challenges must be taken in to consideration before starting any evaluation program. They include;

- Lack of professionalism: Due to lack of experts/professionals in the field it is possible that the program may be mishandled. If evaluators are not properly trained or if they had no prior experience of evaluation, there will be a feeling of anxiety and distrust on the program. The evaluated will feel that they have been evaluated by amateurs. Such a clumsy program will bound to fail. Thus lack of professionalism is a gigantic challenge.
- Developing and Internal stress: Although the best way of evaluation is that the judiciary shall be evaluated by the judiciary itself. However, it will lead to an internal tension. The evaluated will feel that they are being evaluated by non-professionals. The evaluators may sometime misuse the evaluation out of professional jealousy and some time by settling scores. Thus lack of experience and unreliability of the evaluators may lead to internal conflicts and tensions.

¹⁹⁵ Bad governance, rule of law, red tapism to name a few

- Impartiality: When the evaluated and the evaluators are working colleagues, it is apprehended that they may, out of courtesy, do not evaluate impartially. There is every probability that they will award the same category to the majority of the officers at the same station in order to avoid a feeling of discrimination. Thus a distinction could not be truly reflected in the evaluation about the actual performance of two officers with different aptitudes.
- Defective self-assessment: unless the evaluation questionnaire is not professionally prepared, there is always a possibility that the self-assessment may not truly reflect the personality and professional competence of the evaluated. When the individual officers apprehend that their shortcomings may adversely affect their professional progression, they will never point out their own inadequacies.
- Discontent in the officers: Psychologists argue that people in general react more severally in response to the possibility of losing something than they do with regard the chance of gaining something. Thus if performance evaluation is made with the single agenda of pin pointing the inefficient, it may lead to a discontent in the officers.
- Lack of ownership: Unless the officers are made to understand that the evaluation is made for some good reasons, they will never own it. Due to indiscriminate policies, officers do develop a sense of hatred for the institution, thus they will not easily own the system. Before starting an evaluation program policies should be rationalized and made officers friendly so that they own the institution.

Conclusions

Administration of justice in the strict sense does not necessarily denote disposal of cases alone. It is a collective endeavor which includes timelines, effectiveness and excellence. Omission of anyone of it may tint the image of the judge in particular and the judiciary in general. To measure the performance of judges, the high court ought to adopt contemporary means of evaluation. It should identify performance indicators, design a questionnaire survey, pilot test the questionnaire and then evaluate the performance of judges. Such evaluation may not be necessarily for the sake of evaluation only. The program may be scientifically designed and expert human resource allocated to it. The program should be made transparent. The focus should be on professional development. Some incentives for the judges may make it more effective. The evaluators must be properly trained. In order to achieve maximum satisfaction of the litigants, case and court management techniques have to be revisited. Judges may be trained in grey areas. The evaluators should be closely monitored. The evaluation shall not be used for taking disciplinary actions. The system so designed shall be properly improved to achieve excellence.

The present system of equalization of cases must be done away with. Cases may be weighted. It must be divided in different stages. Time be allocated to each stage. This will help identify the root cause of delay. External and internal evaluation tools be identified and worked upon. While evaluating, the contents of a judgment should not be discussed to ensure the independence of the judge. After comparison of performance, judges scoring high must be publically recognized. This will on one hand encourage them to work with more zeal while motivate others to follow suit on the other.

Before launching any such program, the evaluators and the evaluated must be consulted. A quality control cell in the high court may be established. The cell shall monitor the whole program. It is supposed to be fully equipped with up to date IT equipments and enjoy full independence. Ideally a judge of the high court, having strong academic back ground with some experience in the field of research may be made the overall In charge of the program. Such a judge must have exceptional communication skills and excellent analytical reasoning with an unyielding grasp on the contemporary methods of evaluations. The system be re-visited after every four years and amended according to the requirements. If we did this, we may expect that our future generation will remember us in good words.

THE GIFT OF USUFRUCT IN FAVOUR OF WIFE

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Abstract

The gift of property to wife, especially to an issueless, for her life time, has been a common practice amongst the Muslims of the subcontinent. The case laws show that there have been differences between heirs of husband and wife over ownership of the so gifted property, after her death. What is the true position in the issue under Islamic law, and what is legal position in the light of case laws in Pakistan? Can a gift be construed in some situations as gift in lieu of debt? What if a husband disposes of his property, or its usufruct, through will in favour of his wife? This work tries to answer these questions.

Introduction

The Islamic Law divides a property into Corpus and Usufruct¹⁹⁶ thereof. Both the Corpus and usufruct, separately and combined, can be transferred by its owner to another person. Islamic Law recognizes transfer for no consideration under *Hiba* and *Ariyath*, both fall under the English law term “Gift”.

Al-Umra is kind of *Hiba* in which “gift of usufruct” is made for life time of the donee. Whether corpus of the so gifted property will be inherited by heirs of the donee, or it shall revert to the one who made the gift, or his heirs, in case he is not alive? The Islamic jurists are divided into two groups in responding to the question. The first group hold that in such case the even the corpus will be considered as gifted, and thus the donee’s heir will inherit the property, along with all rights in it. The second group holds that the property shall revert to the donor.

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¹⁹⁶The right of enjoying the fruits of property of another persone.g. the wife of a deceased person living in anestate h ouse until her death. <https://legal-dictionary.thefreedictionary.com/usufruct> last accessed10.03.2017

The Pakistani courts have decided that condition is void and effective, when a corpus is gifted, with the condition that at the death of donee the property shall revert to the donor. However, when only the usufruct is gifted, with the said condition, then the property will go back to its original owner or his heirs, the condition being valid.

Division of property into corpus and usufruct under Islamic law

Islamic law divides property into Corpus and usufruct. The division has many legal consequences. The concept of *MilkiyaThama* (where an owner of a property enjoys all the three basic rights¹⁹⁷ of a property), and *MilkiyaNaqisa* (where a person enjoy some of those rights) is based on the division between Corpus and usufruct. Where an owner enjoys all rights (i.e. the basic three one) property; he is said to be having *MilkiyaThama* (full ownership). On the contrary if right to possess and right to usufruct are vested into two different persons, then each is said to be having *MilkiyaNaqisa* (lesser ownership) of the property.

The same difference is manifested from the terms of *Albai'* (which covers sale and exchange transaction of English Law) and *Ijara* (lease). Under Islamic law the first term is applied where all the three rights (in other words *MilkiyaThama*) are transferred from one person to another through sale or exchange transaction. But the term *Ijara* is applied where only Usufruct of a property is transferred for a specific time for some consideration.

A gift is generally considered as “transfer of property or benefits thereof to another person for no consideration”.¹⁹⁸ It is defined, under Sec. 122 of the Transfer of Property Act, 1882, ‘as the transfer of certain existing moveable or immoveable property made voluntarily and

¹⁹⁷ These rights are right to possession, right to use, and right to dispose of.

¹⁹⁸ Syed Ameer Ali, Mahommedean Law, vol. 1, (Lahore: Law Publishing Company),34

without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee'.¹⁹⁹

Essential elements of Gift

There are three essential elements of a Gift. These elements have been recognized by all Muslim jurists.

1. "A declaration by the donor. There must be a clear and unambiguous intention of the donor to make a gift.
2. Acceptance by the donee. A gift is void if the donee has not given his acceptance. Legal guardian may accept on behalf of a minor.
3. Delivery of possession by the donor and taking of the possession by the donee. A guardian may keep possession of the Gift property on behalf of a minor donee."²⁰⁰

Types of *Hiba* (Gift)

Under Islamic law there are three types of *Hiba*.

Hiba, as absolute *Hiba*, is transfer of property from its owner to another for no consideration. It resembles the "Gift" of English law. The Second type is *Hiba-bil-Iwaz*, which is a gift for some consideration, which the purposes of Islamic law, it attracts all characteristics and laws of the *Al-baai'* (sale). The third type is *Hiba-bi-Sharth-i-Iwaz*, in which a gift is made for some consideration receivable at some subsequent time. It is also treated as sale.²⁰¹

The English law term "Gift" covers two different conception of the Islamic Law, one is *Hiba* and the other is *Ariyath*. The *Hiba* means the transfer of *Tamlik al ain* (transfer of the corpus along with usufruct) or *MilkiyaThama*, is an immediate and unconditional transfer of the

¹⁹⁹ Available online at: <https://www.lawkam.org/property/gift-transfer-property-act-1882/6619/> last accessed 25.08.2017

²⁰⁰ Available at: <https://www.lawctopus.com/academike/concept-of-gift-under-muslim-law/> last accessed 25.08.2017

²⁰¹ Ibid

ownership of some property or of some right, without any consideration. *Ariyath*(commudatum) is known as *Tamlík al manafe* or the grant of some limited interest in respect of the use or “usufruct” of some property or right.²⁰² In this kind of Gift only usufruct is transferred for a specific period; and the ownership of corpus remains with the donor.

Our focus in this study is on *Ariyath* made in favor of wife. The judiciary in Pakistan has followed the *Hanafi* school of thought in number of cases; which are given in the following discussion.

The Bidayath-ul-Mujtahid says:

Hiba is of two kinds. First is the thing gifted along with the ownership, second is thing gifted to take benefit without giving ownership. The later has been further subdivided, gift given for a specific time known as *Ariyath*, and gift given for lifetime and returned after his death, known as *Al-Umree*.²⁰³

Types of *Hiba* in respect of transfer of property for ever and for some given time

When all those rights which are enjoyed by the owner of a property are transferred to another without any consideration it's called *Hiba* or absolute gift. When usufruct of a property is transferred, it is called *Ariyath*.

There is no concept of reversion of the property in the case of absolute gift. The *Ariyath* contains an implied condition, that is to say, that after enjoying the specified benefit out of the property, the donee has to give back the property to its original owner. For example, when a person “A” lends his car to another person “B,” to travel from Peshawar to Islamabad, and then

²⁰² Rad-ul-Mukhtar, in book of Ariyath has described it in the following words. تملك المنافع مجاناً.

²⁰³ Available online at

http://library.islamweb.net/newlibrary/display_book.php?bk_no=97&ID=424&idfrom=677&idto=680&bookid=97&startno=2 (26 .08.2017)

back from Islamabad to Peshawar. The arrangement is called *Ariayth* under Islamic law. “B” has to return the car to “A” after his journey is once over.

The issue arises when a person gifts usufruct of his property to another for the life time of the donee. This arrangement is known as “*Al-Umra*”. Whether the property should now revert to the donor as per condition of the gift or not? Under the general principle it should revert, But the there have been *Ahadith* which discourage “life Grant”, and consequently which lay down that “the property should vest in the donee and his heirs, and should not be reverted”. At the same time other reports (*Ahadith*) which lead us to a contrary result that the so gifted property would revert. This position is supported by the general principle of Islamic law that ‘the *Muslims go by their stipulations*.’²⁰⁴

When an *Ariyath* is made for life time of the donee, it is called *Alumragift*. In *Ariyath* the gift property is to be returned to the donor as per condition of the gift transaction; but when *Ariyathis* made for life time of the done, then the legal consequences change. The traditions of the Holy Prophet show two different approaches in matter of *Al-Umra* gift.

1. *Jabir b. 'Abdullah* (Allah be pleased with them) reported Allah's Messenger (May peace be upon him) as saying: “Whoever a person is gifted a life grant, then it is for him (belongs to him and to his posterity, for it belongs to him who has been given it). It would not return to him who gave it for he conferred it as a gift (it becomes the property of the donee and as such) rules of inheritance will apply to it.”²⁰⁵
2. *Jaber b. 'Abdullah* (may Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying: “He who conferred a life grant upon a person, it becomes his possession and that of his successors, for he surrendered his right in that

²⁰⁴ المسلمون عند شروطهم

²⁰⁵ *Sahih Muslim, Chapter 3 AL-'UMRA (LIFE GRANT), Book 12, hadith Number 3972, Translation*
http://www.iiu.edu.my/deed/hadith/muslim/012_smt.html (11.04.2014 2053PST)

- by his declaration. (This property) now belongs to one to whom this lifelong grant has been made, and to his successors. *Yahya* narrated in the beginning of his narration: Whatever man is given a life grant, it belongs to him and his posterity.”²⁰⁶
3. *Jabir b. 'Abdullah al-Ansari* (Allah be pleased with him) said: Allah's Messenger (May peace be upon him) said: Whoever a person conferred *Umra* (life grant) upon a person and he says: “I confer upon you this and upon your descendants and anyone who survives you, and that becomes his possession and that of his posterity. It would become (a permanent possession) of those who were conferred upon this gift, and it would not return to its owner (donor), for he gave that as a gift in which accrued the right of inheritance.”²⁰⁷
 4. “*Jabir (b. 'Abdullah)* (Allah be pleased with him) reported Allah's Messenger (may peace be upon him) as saying: Life grant is for one upon whom it is bestowed.”²⁰⁸
 5. “*Jabir* (Allah be pleased with him) reported that a woman gave her garden as a life grant to her son. He died and later on she also died and left a son behind and brothers also, The sons of the woman making life grant said (to those who had been conferred upon this '*Umra*): This garden has returned to us. The sons of the one who had been given life grant said: This belonged to our father, during his lifetime and in case of his death. They took their dispute to *Tariq*, the freed slave of '*Uthman*. He called *Jabir* and he gave testimony of Allah's Messenger (May peace be upon him) having said: Life grant belongs to one who is conferred upon this (privilege). *Tariq* gave this decision and then wrote to *Abd al-Malik* and informed him, *Jabir* bearing witness to it. *Abd al-Malik* said: *Jabir* has told the truth. Then *Tariq* gave a decree and, as a

²⁰⁶ Ibid, *Hadith* number 3973.

²⁰⁷ Ibid, *Hadith* No. 3974

²⁰⁸ Ibid, *Hadith* No. 3977

result thereof, it is to this day that the garden belongs to descendants of one who was conferred upon the life grant.”²⁰⁹

In these *Ahadith* it is clear that a “life grant” or gift for life time is an exception to the concept of *Ariyath*. The *Ariyath* will be converted to the gift of *Hiba*, if it is made for the life time of the donee. In other words the gift of usufruct is valid when it’s made for a period other than life time only. A gift of usufruct (*Tamleekmanafi*’) for life time of the donee will be considered as the gift of property along with all the essential rights or gift with transfer of full ownership (*tamleeka’in*).

However, there are *Ahadith* that guide us to another and a different view has been narrated, which shows that if an *Umra* gift is made with condition that the property should revert to me (the donor) at the death of the donee; then it would revert to him or his legal heirs upon the stipulated incident.

1. *Jabir* (Allah be pleased with him) said: “The *Umra* for which Allah's Messenger (may peace be upon him) gave sanction that a person may say: This (property) is for you and for your descendants. And when he said: That is for you as long as you live, and then it will return to its owner (after the death of the donee). *Ma'mar* said: *Zuhri* used to give religious verdict according to this.”²¹⁰
2. *Malik* narrated to me from *Nafith* that *Abdullah ibn Umar* inherited the house of *Hafs* *abint Umar*. He said, “*Hafs* gave lodging to the daughter of *Zayd ibn al-Khattab* for as long as she lived. When the daughter of *Zayd* died, *Abdullah ibn Umar* took possession of the dwelling and considered that it was his.”²¹¹

²⁰⁹ Ibid, *Hadith* No. 3982.

²¹⁰ Ibid, *Hadith* No. 3975

²¹¹ Translation of *Malik's Muwatta* Book 36, Number 36.37.45: http://www.muwatta.com/ebooks/english/al-muwatta_english.pdf (15.08.2017 21:16 PST)

The View of *Fiqhi* Schools on *Al-Umra* Gift

In the following lines views of the Sunni school on the issue are given.

Under the *Hanafi* Law, when it is clear that the intention is to make to “A” a gift of the corpus of a thing, and it is conditioned that he should take a limited interest in it or take it only for his life, the condition would be void, and the gift would take effect absolutely.²¹²

Neil B E Baillie puts it as under:

The word gift is veiled under an illusion, but is known to signify the gift. For example; ‘thy garment is this piece of cloth’ or ‘I have invested thee with this mansion for my age’, which would be a gift. ‘This mansion is to thee umree’ (for thy age-umr), or ‘hyatee’ (for thy life life-hyat), and when thou are dead it reverts to me,’ in which case the gift is lawful, and the condition void.²¹³

In *Albadi’ as Sani’* it appears

When the condition of gift is made subject to life, it is forbidden. When it is given, it becomes his or her property, and after his death, legacy transfers to the heirs”. On other hand, when a gift is made in such words which shows that only “usufruct” of the property is gifted; the transaction becomes ‘*Ariyath*’, even if it’s named mistakenly as ‘*Hiba*’. The *Hanafi* view is that in such a case, the condition is valid. The donee will be entitled to benefits out of the property till his death, and at his the property shall revert to the donor, or donor’s heir. The very statement of *Albadi’ as Sani’* is followed by the following paragraph. Which provides that when at the time of making the gift only usufruct is transferred; the condition of reversion will be valid.²¹⁴

²¹² Syed Ameer Ali, *Mahommedean Law*, p.134

²¹³ *Neil B E Baillie, Digest Of Moohummadan (Law, Lahore, Premier Book House), 2nd ed., p.517*

²¹⁴ Alkasani, *Al-Badai’ As-Sanai’*, (Beriut, Darulkutub al-Ilmiya) 2003, 2nd ed., vol.8, pp.88-89. (ater making a comparison with original source the text was copied from

http://library.islamweb.net/newlibrary/display_book.php?idfrom=2880&idto=2900&bk_no=12&ID=664
11.08.2017)

The donee will be entitled to benefits out of the property till his death, and at this the property shall revert to the donor, or donor's heir *Imam Abu Hanifa*, and *Imam Muhammad* have opined this, while *Imam Abu Yusuf* was of the view that even here the condition will be void, and no reversion would take place."²¹⁵.

The construction of the words of the donor, play an important role in determining that whether he meant *Hiba* or *Ariyath*. For example: "This house is for you" is a complete *Hiba*, provided other condition is fulfilled. 'the conveyance is for you' or 'benefits of this house is for you' results in *Ariyath*. And apparently a similar statement again makes it a '*Hiba*', 'this house is for you to live in' has been construed as '*Hiba*', holding 'to live in' as an advice after transferring the property.

Maliki view on the Subject

The *Muwata* of *Malik* the following *Hadith* have been narrated.

*Malik narrated to me from Nafi that Abdullah ibn Umar inherited the house of Hafsa bint Umar. He said, "Hafsa gave lodging to the daughter of Zayd ibn al-Khattab for as long as she lived. When the daughter of Zayd died, Abdullah ibn Umar took possession of the dwelling and considered that it was his."*²¹⁶

Al-Mudawanath-ul-Kubra describes the view of *Maliki* school on the matter as that when a person makes a life grant of his house to another, with condition that it should revert to me on your (donee) death. The same should revert to the donor or his legal heirs on the death of the donee.

²¹⁵ Ibid,

²¹⁶ Translation of *Malik's Muwatta* Book 36, Number 36.37.45: http://www.muwatta.com/ebooks/english/al-muwatta_english.pdf (accessed 13.08.2017)

When Imam Malik was asked about aboutumree gift? He said, “When a person gifts somebody till his death, the property will return to the owner, as it is a valid principle of Islamic law, to meet the condition.”²¹⁷

Even if the donor stipulates that it should return to me on the death of the last male child of the heirs of the donee, it should be returned to the legal heirs of the donor (how low so ever) accordingly.

Shafi’ view on the matter

The *Shafi’* view in Al-Umm is as under.²¹⁸

When Imam Shafi was asked about *Umree* gift, he said, “The gift is for the donee and would not be returned. Imam Ghazali has described the *Shafi’* view on the life grant in the following way.”²¹⁹ (Translated from Arabic):

And whereas the life grant is concerned, there are three possible situations.

The *first (situation)* is that a person says: I have gifted you this house for your life time. And when you die, it is for your heirs. This (transaction) is valid, because he has intended thereby making of a gift, though he made his statement a bit lengthy.

The *second (situation)* is that when the donor says it is for you during your life time. And (he) does not mention what to be done with the property after the donee’s death. Then there are two opinions. The former is that such transaction is invalid. The recent is that it is valid, and the property will be owned by the donee.

²¹⁷ https://library.islamweb.net/hadith/display_hbook.php?indexstartno=0&hflag=1&pid=9097&bk_no=20&startno=0 (١٨، ٨٢، ١٧)

²¹⁸ Arabic text copied from https://library.islamweb.net/hadith/display_hbook.php?hflag=1&bk_no=47&pid=14681 (19.05.2014)

²¹⁹ Imam Ghazali, *Alwaseet fi Almadhab*, Darusalam, 1997, vol. 4, p .266

The *third situation* is that when the donor says (to the donee) “when you die, the property shall revert to me”. Here are two opinions. One is that such transfer is invalid. The other is that the transfer is valid, and the condition (of reversion) is invalid.

***Hanbali* view on the subject**

There are two opinions in the *Hanbali Fiqh*. The preferred is that when a life grant is made with condition that the gifted property shall come back to the donor at the death of the donee, the transfer would take place absolutely, and condition will be null.²²⁰

Judicial Decision on Gift of Usufruct (*Al-Umra*Gift)

The Pakistani courts have differentiated between gift of corpus and gift of usufruct. According to the decision if a Gift of Corpus is made, then any condition attach to it, which is derogatory to the transfer of corpus, would be invalid. On other hand if it is manifested that the gift was intended to be only of usufruct, then the condition of reversion of the property would be valid. Though, this position does not seem to be in accordance with the *Hanfi* School of view, as the *Hanfi* view is that when a gift is made for life time, then the gift should be completed, and the condition derogatory will be void, and there is no such differentiation between the corpus and usufruct, when it comes to a gift for life time (*Al-Umra*).

The courts have also show tendency to declare any gift made in lieu of dower of wife as *Hiba-bil-iwaz*; which for the legal purposes is a *Al-baia*’ (sale transaction), rather than a mere gift. In such cases the gifted property has been held to be given to wife for her dower.

In the following lines some important Pakistani cases are reproduced.

²²⁰*Ibn-i-Qudamath, Al-Mughni, Dar AlmKuthub, (Riyadh: 1997),285-286, vol. 8,*

Sardar Nisar Ali Khan vs K.B. Sardar Mohammad Ali Khan²²¹

A Shia Muslim made gift in favor of his nephew 'A' for life time. At the death the property was to be transferred to another nephew 'B', and after 'B', the property shall go to another nephew of the testator 'C', provided that if 'C' be alive at B's death. 'C' had power to nominate his successor. 'C' died prior to 'B', so 'B' considered himself to be having power to nominate his successor. He nominated *Nawazish Ali khan*, son of 'C' (appellant) to succeed after his death.

The appointment was challenged by *Ali Raza Khan* who was a grandson of the testator. The question before the Privy Council was that whether 'B' had power to nominate his successor. The Privy Council held that when a usufruct is gifted, the corpus will be reverted at the end to the testator's heirs. The property was legally held by 'A' and 'B', but 'B' had no power to nominate another successor. The property was held to be reverted to the heirs of the testator.

The Privy Council arrived to another conclusion as well. It held that should 'C' be alive after 'B', and should he have enjoyed the property, he would have no power to nominate his successor. This conclusion may be differed, however.

Mst. Khan Bibi v. Safia Begum²²²

Abdurahim, a Sunni Muslim, died, leaving his widow, mother and two sisters. One of the sisters brought a suit for her share in the deceased property, which was consisting of two houses. There was no dispute over one house; however the widow contended that one out of the two houses was given to her by the deceased during his life time. She produced a document and a number of witnesses in favor of her claim. Accordingly the trial judge accepted widow's ownership of one house as gifted to her by the deceased.

²²¹ Available online at: <http://www.legalcystal.com/946222> (last accessed 10.08.2017)

²²² PLD 1969 Lahore 338

The gift deed recited as under:

“The possession of the donee on the house in question will be up to her life time, and so long as she lives the donor will not alienate the house or dispossess her. Similarly the wife will have no right to mortgage, alienate or gift the property to anyone”

At the end of the document it's mentioned.

“After the death of the wife, the whole house will revert to the donor or his heirs in its entirety.”

The question before the High Court was whether the “life grant” in favor of wife was a gift of usufruct till the death of the donee (the widow), was gift that would end with her death, and the property would revert to the donor, or that the gift was *Umra* gift, whereby the widow is now full owner of the house, the condition attached thereto being void.

The counsel of the sisters argued that the widow has only right of usufruct till her death, and this right does not prevent the house to be distributed amongst the heirs as per their shares.

The counsel for the widow contended that the gift was *Al-Umra* gift. Therefore the widow is now full owner of the house. In support of its view the counsel produced the text from *Hidaya*(Hamlton), *Digest of Muhammadan Law* (BE Bailie), *Sahih Muslim* and other books. These arguments were based on the above mentioned *Ahadith*, and *HanafiFiqh*.

The counsel for contesting respondent produced case law on the issue. In *Mst. Hameeda v Mst. Budlun*(17 Suth. W R 525) the Privy Council had observed:

“The Privy Council reversed so much of the decisions of High Courts as ruled that effect of the arrangement between the plaintiff and her son, by which the son relinquished his share in his late father's property, was not that the mother took an absolute interest in the property in satisfaction of her claim of unpaid dower, but she should have only a life-interest, the son retaining the legal reversion in himself.”

Another case which was presented, and on which the High Court placed reliance in its decision was *NagoorAmmal v. M.K.M. Meeran* (AIR 1954 Mad.770). In the case the Gift-Deed of a Sunni-Muslim in favor of his second wife was considered. It was held therein that there was no absolute gift of the corpus, but it created only a life-interest in favor of the wife.

The Court held:

“The consensus of opinion of different authors of *Muhammadian* Law supports the preposition that where corpus of the property is transferred for life time and the condition are attached thereto, the gift is valid, but the condition is void. However where the contention of the maker of the gift is to transfer the usufruct of the property, then in that case a limited interest is created for a particular time and, therefore, condition can be attached to it such as the reversion of the property to the donor after the expiry of the limited period.”

The learned Court further held that the corpus of the said house was retained by the deceased, and the widow enjoys only life-interest. It has also declared that the transaction was indeed *Ariyath* and not the *Hiba*.

It appears that the court has placed much reliance on the court decisions; which itself have misunderstood the Islamic law on the issue. The Court has not given any satisfactory answer that why it has ignored the *Ahadith* and *Fiqhi* text produced by the widow’s counsel.

Farid v. Mst. Noor BiBi²²³

Though the case has not directly discussed the concept of *al-Umra* gift, but it is ratio is that when a gift is completed once, it cannot be revoked later on. It has also declared that use of phrase ‘till life or till second nikh’, when such phrase is used in a gift deed made in favor of wife, will be of no use, once the gift is completed.

²²³ PLD 1970 Lahore 502

The facts of the case are as that the plaintiff gifted a land to his wife at the time of marriage. The gift deed contained the above mentioned phrase. The marriage ended soon with divorce. The husband filed a suit to get the gift deed, and mutation there upon, cancelled. His contention was that the gift was made only to provide maintenance to her, and as long as, after divorce, he is no longer responsible for maintenance, therefore his property should be returned to him. The respondent raised the plea that the gift was completed in all respects, and therefore, is irrevocable.

The court has arrived at two important conclusions. The first is that whenever such phrase is used in favor of wife, it signifies “the life-interest in the corpus”. The other is that the condition of “for life or till her marriage” was void.

The Court held:

From the above, it is apparent that normally whenever a widow takes an estate under the technical condition) she takes a life-estate in the property, and not mere right to maintenance out of the usufruct of the property.

The decision continues:

In the light of the above discussion, the use of the words ‘till life or till second nikha^l by the Revenue Authorities, of course, on the statement of the appellant, means nothing else than a life estate in the property, i.e. in the corpus of the property for maintenance. Therefore, agreeing with the learned courts below, I hold that the corpus of the land in dispute was gifted away by the appellant to the respondent. I further hold, relying on the ruling in the case of Mst. Khan BiBi, that the gift of the land is that of corpus of the land and that the condition attached to it, as to it be only for life of the donee or till her marriage, is void; and the gift would continue to operate without the said condition. The

result of the above finding is that the gift of the land in dispute in favor of the respondent is complete in every respect and the condition being void, it is absolute.

Murid Hussain v. Mst. Bakhsh Ilahi²²⁴

. Where the husband transferred to his wife “income of a land for maintenance till her life time”, The court decided that such arrangement was Ariyath. She had a right to receive usufruct of the property and no more and it could continue only till the life time of the wife. She had no right to alienate the property. As the wife has since died, the property in suit would revert to the heirs of the husband, whoever they are, at the time the husband died.

Abdul Hameed v. Muhammad Mohiyuddin Siddique Raja²²⁵

It is very important case on the issue of *Al-Umra* gift. The court has examined the relevant *Ahadith* and the *Hanafiqh* text thoroughly. It has also examined the *Mst. Khan Bibi v. Safia Begum* and *Farid V. Mst. Noor BiBi* cases.

The question before the Court was whether a gift by a person to his issueless wife for life could be construed that it was a gift of immovable property, the condition of usufruct being void?

The appellant contended that the donor statement contained that the land was given to the wife for maintenance during her life only, and this shows intention of the donor that he had gifted usufruct of the land, and not the land itself. Further, that the donor used the word, given for life, i.e. till she lives. According to the appellant these words are not used by a donor whose intention is to gift corpus of the property. The counsel of appellant relied on the case of *Mst. Khan BiBi*, and stated that the principles of Muslim Law on the question of *Hiba* and *Ariaythare* fully stated in this judgment.

The appellant counsel presented the following *Hadith*.

²²⁴ PLD 1975 Lahore 1484

²²⁵ PLD 1997 SC 730

Narrated *Jabir (R.A.):Allah's Messenger (S.A.W.)* said, "what is given in life-tenancy belongs to the the one to whom it is given".

Muslim has: "Keep your properties for yourselves and do not squander them, for if any one gives a life tenancy it goes to the one to whom it is given both during his life and after his death, and to his descendants."

A version has: "The life-tenancy which *Allah's Messenger (S.A.W.)* allowed was only that in which one says, 'it is for you and your descendants', when he says, 'it is yours as long as you live, it returns to its owner.'"

The learned counsel for the respondent on other hand argued that the instant case is a case of transfer of corpus of property, and the words for life or till second nikh'are to be treated according to the well-established principles of *Shariah* to be ineffective and void. The Gift should be allowed, as it was *Al-Umra* gift, and the condition should be ignored.

The court has examined the Islamic Law on the issue in detail; especially the relevant Ahadith in *Nayl-ul-Awtar*, and the text from *Al-Hidaya*, and *FatawaAlamgiri*. The court, then, held:

[A] gift of property for life made by a person to any person, who may be his issueless wife, where intention is to transfer and convey corpus of the property is to be construed as an outright and absolute gift of property and any condition attached derogatory to the transfer of corpus in that case would be void. In other words any derogatory condition sought to be attached on the "Umra" gift will be void and shall not be recognized.

The court decided the case in favor of wife, and declared her owner of the disputed property. The court also declared the condition of 'for life or till second nikh'as ineffective. Similarly, in *Mst.*

*SamiaNaz v. Sheikh PervaizAfzal*²²⁶ a gift deed was considered, and the Supreme Court upheld the High Court construction of the deed as gift of usufruct, and not the gift of the corpus.

Kazim v. Muhammad Iqbal²²⁷

In this case the court has construed a gift in lieu of dower as *Hiba-bil-Iwaz*, whereby the donee gets exclusive rights in the gifted property. Held that where deed of gift by husband in favor of wife, was by necessary intendment, a dower deed, such wife becomes full owner of the property, and her title thereto could not be questioned. Any condition laid down in the deed the donee would enjoy usufruct only would be void and of no effect.

Kaneez BiBi v. Sher Muhammad²²⁸

The case has elaborated three different rules regarding gift. The first is about transfer of possession; which an essential element of the gift. The court held that where a gift is made by husband to wife living in the same house, then there is no strict need of proof of transfer of possession. The same is applicable to a gift made by father to his child, while living in the same house.

The Second principle is about revocation, or otherwise, of the gift. The question was whether after making the gift, any subsequent action of the donor in respect of the gifted property signifies revocation of the gift? The Court held that when the donor and the donee are of close relation, and the mutation has been once proved, then, such action would be considered as to be having done on behalf of the donee, and not in his own capacity as owner.

The Third principle is related to the *Hiba-bil-Iwaz*, where a gift was made by Father-in-Law to his Daughter-in-Law in lieu of marriage, and the deed contained that “she will be entitled to the

²²⁶ 2002 SCMR 164

²²⁷ PLD 1987 Pesh. 152

²²⁸ PLD 1991 SC 466

outcome of the property”. The court held that the gift was not only of usufruct, but of the corpus as well.

Analysis of the Case Law and *Hanafi* View

The case law shows that the courts have accepted the view of Imam Abu Hanifa and Imam Muhammad. The view of Imam Malik also coincides with them.

When the corpus is gifted, then any derogatory condition attached to the gift, will be void. Such conditions include terms like ‘the donee shall own it for his/her life time’, ‘gifted for life time’ or ‘the property to be revert after donee’s death’.

When the gift is only of the usufruct, all such condition will be effective, and the reversion will take place.

However, the courts should try to focus construction of instruments according to the principles and requirements of the local languages, rather than mechanically applying the examples quoted in the Fiqh books, for *equity looks to the substance rather than the form*.²²⁹

Will in Favor of Widow

Through “Will” or “*Wasiyath*”, a person can transfer his property to another, at his (donor) death, without receiving any consideration. Under Islamic law, the up to maximum one-third of the total property can be transferred to a non-heir. A will in favor of a legal heir is invalid and ineffective. It can be allowed only with the consent of all other legal heirs.

In *Farida Khatoon v. Dr. Masood Ahmad Butt*²³⁰, the Supreme Court examined the situation of a will made in favor of wife. The court held that such will was not sustainable, as the shares of the heirs under Shariah cannot be deferred.

²²⁹ العبرة في العقود للمقاصد والمعاني لا للألفاظ والمباني

²³⁰ 2009 SCMR 464

The facts of the case are that the deceased left behind a widow and a brother as heirs. The deceased had issued two instruments. The first was a gift deed, through which he transferred half of his property to his wife during his life time. The second instrument was named as *WasiaythNama*, through which he transferred usufruct of the remaining property to the wife.

At death of the donor, his widow took possession of the remaining property, whereas his brother asked for his share in the remaining property. The trial court found that she is entitled to one-fourth of the usufruct, and the three-fourth would be held by the deceased's brother. The Lahore High Court reversed judgment of the trial court of three-fourth in favor of the appellant.

The Supreme Court considered the question, that either a share in inheritance under Islamic Law be deferred through a Will of usufruct. The Court held that the said will was not sustainable in the eye of law, as the right to inheritance cannot be deferred or suspended by custom or usage.

The decision of the court is though not detailed, and it does not give reasons that how or why such will was not sustainable. However, it is very clear that in this case the will was made in favor of a legal heir, which is not allowed under Islamic Law.

Conclusions

The Islamic law divides property into Corpus and Usufruct thereof. Both can be alienated through Gift, i.e. *Hiba* and *Ariyath*. In *Hiba* transaction one transfers full ownership of a property to another, inclusive both of Corpus and usufruct, along with power to alienate the gifted property. In case of *Ariyath*, only usufruct is transferred.

When a gift is made for the life time of the donee, then the reports from the Holy Prophet (S.A.W.) has two different views. Some of the *Ahadith* show that in such case the property would not revert to the donor, and other reports show that it would be reverted. Accordingly the *Fiqhi*

views have also showed both tendencies. *Imam Abu Hanifa*, *Imam Muhammad* and *Imam Malik* have opined in support of reversion; while other jurists have viewed that the condition of reversion will be void.

The Courts in Pakistan, have adopted the view of *Imam Abu Hanifa*, *Imam Muhammad*, on *Al-Umra* gift or gift that makes ‘life grant’.

The courts have declared a gift made in lieu of dower as “*Hiba-bil-Iwaz*”, and that when a gift is made by husband to wife; there will be no need to prove strictly transfers of possession, provided they live together. The court has denied sustaining a will made in favor of wife.

LEGAL FRAME WORK RELATING TO REAL ESTATE SECTOR IN PAKISTAN: A CRITICAL ANALYSIS

Shahid Rizwan*

Abstract

The Following Article focuses on the problems faced by real estate (housing) developers in Pakistan in the legal framework in the real estate sector in Pakistan. The present legal framework instead of developing this sector is a major obstacle in the development of this sector. The presence study will discuss the problems in the land acquisition process faced by these developers. This will also highlight the clash among various laws and the solutions, that how these laws can be harmonized and how the relevant laws should be amended for development of this sector.

Introduction:

Shelter is one of the basic necessities of life and occupies the biggest portion of any human settlement. Housing ownership promotes social cohesion and citizens' participation in other development activities.²³¹ Good housing and home ownership tend to produce better citizenship no single factor will do more towards maintaining a higher standard of civilization than it.²³². Pakistan is signatory to habitat agenda and the Istanbul declaration on human settlements promised "The full and progressive realization of the right to adequate housing".²³³ There is a shortfall of 4.30 million housing units in the country and there is an annual demand of 570, 000 housing units as against supply of 300 000 units. There a recurring annual shortfall of 270,000

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²³¹ Medium Term Development Framework 2005-2010.p-175.

²³² John M. Gries "Housing In The United States" The Journal of Land & Public Utility Economics, 1, 1925, P 23-35.

²³³ Lou Haysom , "No place Like Home", Agenda, No. 30, Provinces in Focus, 1996, p.87-90.

housing units each year.²³⁴ From this statement the potential of investment in the real estate sector of Pakistan is reflected. With immense potential excessive liquidity in the financial system of Pakistan after 9/11 incident proved fuel to the fire and the real estate market underwent an intense period of growth post September 11 when investors from the Gulf and Pakistanis in Europe pulled billions of dollars out of western markets. As a result of that development overseas remittances jumped from 1.5 billion dollars to 4 billion dollars in 2002.²³⁵

Investment by the private sector in the real estate sector also stimulated the real estate sector. The central bank's decision to reduce interest rate also took a role in promoting real estate investment because interest rate reduced to 3% from 22% resulting in greater use of credit and financing options²³⁶.

General feeling among the people to make their future secure has also driven them to invest in the real estate sector. Due to declining performance in other sectors such as manufacturing and processing the power brokers and capitalists focused on land transactions as an enterprise. Land is an immovable asset and the risk in the temporal loss of investment is limited due to this reason it became a roaring business²³⁷. The feeling among investor that in the age of hyperinflation the investment in housing and real estate was more beneficial was also another cause as it was considered in America that housing was a good investment and a best hedge against inflation and this thing increased the demand so many small investors entered the market²³⁸. The above factors contributed to diversion of funds to speculative trade in the real estate sector of Pakistan as it happened in case of America where along with other economic

²³⁴ National Housing Policy 2001, P1.

²³⁵ www.finance.gov.pk visited on 1st March, 2008.

²³⁶ Daily, Dawn 29 December, 2007. Zahid Iqbal. "Article", "Pakistan: The Housing Market Thrives as More Pakistani Capital Returns Home".

²³⁷ Daily, The News, 6th December 2007, Alludin Masood, "Article", "Housing Deficit".

²³⁸ Frederick P. Stutz and Arthur E. Karthman, "Housing Affordability and Spatial Price Variation in the United States", *Economic Geography*, 58, 1982, P 221-235.

factors causing housing problems the chief factor was the belief that housing was a commodity which had speculative possibilities²³⁹. High population growth, inadequate attention toward construction of new houses, migration from rural to urban areas and break up of the traditional joint family system have largely contributed to the shortage of houses in the country.²⁴⁰ In the above scenario there has been mushroom growth of cooperative housing societies as well as private housing companies. Most of these cooperative housing societies and private housing companies have registered themselves to registrar cooperative housing societies and with Securities and Exchange Commission of Pakistan even without having an ownership of one inch of land. These housing societies bypassed the laws, rules and regulators with impunity in inviting applications for allotment of land for housing in these societies and have deprived the genuine investors from their money. Interesting thing to note is that the above practice was done because either there was no law or law was there but there was no authority to check the mal practices. Another group of housing societies have done the same kind of practice but with different strategy by inviting applications of plots far in excess of land held by them and by issuing fake allotment letters.

Research Questions:

The present study mainly focuses on three legal aspects of this topic

1. Whether the present process of land acquisition followed by the real estate (housing) developers need some suitable amendments or not?
2. Whether the present legal framework relating to registration of real estate housing developers is constitutional or not?

²³⁹ Bernard J Newman, "Factors in the Housing Problem", *Annals of the American Academy of Political and Social Science*, 190, 1937, P1-6.

²⁴⁰ *ibid*

3. Whether housing should be declared a profit making venture (trading activity) or a non profit (non-trading activity)?

Acquisition of Land against the Intention of Legislatures of Land Acquisition Act 1894:

The first step to launch housing scheme is the acquisition of land, and the Land Acquisition Act encourages the housing companies for carrying out the housing activity as it is clear from the preamble of the Land Acquisition Act 1894. The *Land Acquisition Act* mentions the acquisition of land needed for public purposes and for companies.²⁴¹ There is no dichotomy between need and public purpose or a company. There is no justification for making such a dichotomy. By making so the purpose of the law will be stultified. The expression must be regarded as one whole and the declaration held to be with respect to both the elements of the expression. The Land Acquisition Act in Pakistan does not incorporate the land needed for housing within the definition of public purpose as is the case in India. The public purpose can be equated with any welfare contributing objective such as construction of road, railways, port, dam, school and the construction of houses for the poor. Such public welfare activity can be undertaken by the public sector as well as by the private sector. The inclusion of the words and for the companies connotes the intention of the law makers to encourage private sector to make investment in such schemes and projects which are beneficial to the public i.e. construction of houses for the poor. For the acquisition of land there has to be some public purpose and it must appear from preamble or may otherwise be clearly incorporated in the body of the Act itself, requirement of a public purpose in a statute cannot be merely added on by subsequent averments or affidavits by its authors it is something which must spring from or be inherent in the statute itself.²⁴² Land

²⁴¹ C.M. Yasin, Land Acquisition Act 1894, preamble, 3rd Edition, Khyber law publications, 2005.

²⁴² A.B.Puranik, Land Acquisition Act 1894, 2nd Edition, C.T.J. publications, 1994, p-198.

acquisition is founded upon the doctrine of *salus populi suprema lex*.²⁴³ The expression public purpose is elastic and takes its colour from the stature in which it occurs; the concept varies with the time and state of society and its need.²⁴⁴ Due to this reason the Indian legislatures have made in the Land Acquisition Act. The concept of public interest has been further elaborated by the judgment of Lahore High Court, purpose furthering general interest of community as opposed to particular interest of individuals and to be construed according to the spirit of times in which legislation enacted. It is not possible to define what a public purpose is but there can be no doubt that when there is acute shortage of houses and accommodation the provision of housing sites for relieving congestion is a public purpose.²⁴⁵ But it is not necessary to prove public purpose that each and every person of the society is benefited even when a section of the public only is benefited still the purpose does not cease to be a public purpose.²⁴⁶ Due to this reason the court had to say that public purpose cannot be defined strictly.²⁴⁷

When proposed acquisition was intended to serve a public purpose in the generic sense the acquisition primarily for a company will not affect the validity of its acquisition.²⁴⁸ Indian legislators by expressly recognizing the housing as a public purpose activity have made amendment in the Act by incorporating the provision of land for residential purpose to the poor or landless within the definition of public purpose²⁴⁹. In the case of Pakistan it is the need of the hour to amend the law in order to declare the acquisition of land for housing within the definition of public purpose and for the encouragement of the housing companies because the public purpose is an elastic concept which varies with the needs of the society, Indian

²⁴³Islamia University Bahawalpur Vs. Khadam Hussain & Five Others. MLD 1990, 258

²⁴⁴Hari Hara Prasad vs. Jaganadham. AIR, 1955, Andhra 184.

²⁴⁵Sardar Mohammad Iqbal Khan Mokhal, Land acquisition Act 1894, 1st Edition, Law publishing company, 1979, p-54

²⁴⁶Veeraraghava Chariar and others Vs. The Secretary of State for India, AIR 1925 Mad 837.

²⁴⁷Mullah Ghulam Ali and 3 others Vs. Commissioner of Karachi and 3 others PLD 1983 Kar 87.

²⁴⁸S. Somawanti and others Vs. The Secretary of Punjab and others. AIR 1963, SC 151.

²⁴⁹Indian Land Acquisition Act 1894. Section 3 (f) (v), 2nd Edition, CTJ publications, 1994.

Legislatures have realized this thing ,now it is the time for our parliament to think over this aspect.

Term market value is not defined in Land Acquisition Act but can be described as owner though not obliged to sell is willing to accept and a vender not obliged to purchase is willing to pay.²⁵⁰

In order to obviate the difficulties faced in the acquisition of land for public purpose amendments have been carried out by each provincial government in the Act according to its requirements. Out of these amendments the most important amendment was carried out by the West Pakistan so as to amplify the core bone of contention, relating to determination of the market value by adding an explanation .i.e. for the purpose of determining the market value the court shall take into account transfers of lands similarly situated and in similar use .The potential value of land to be acquired if put to a different use shall only be taken into consideration if it is proved that land similarly situated and in similar use has before the date of notification under section 4 has been transferred with a view to be put to the purpose relied upon as effecting the value of the land to be acquired. The most contentious point which has been subject to litigation in the courts is regarding criteria used by the collector in determining compensation. The term market value is not defined and it has led to a lot of litigation. It was held by the court that the best method to work out the market value is the practical method of prudent man of section 3 of the Evidence Act to examine and analyze all the material and evidence available on the point and to determine the price which a willing purchaser would pay to a willing seller for purchase of acquired land in the prevailing normal circumstance without bargain being influence by an any extra news consideration.²⁵¹ Market value of land is to be taken as existing on the date of publication of the notification under section 4(1). Price in preceding year instead of 6/7 years

²⁵⁰ M.A. Malik ,The land Acquisition Act 1894,1st Edition,P.L.DPublishers,1995 , p-40.

²⁵¹ Sheikh ManzoorHussain Vs. The Multan Improvement Trust and others PLD 1972, Lah. 225 .

will be considered along with potential value of land.²⁵² In awarding compensation for land the court has to determine the market value of the land in question on the basis that all the interests in that land have combined. In other words valuation is to be put in that piece of land; irrespective of the different interests which several persons might possess in regard to any portion of the concerned piece of land.²⁵³ Factors to be taken into account for assessment of compensation includes the nature of land its present use and capacity for a higher potential, its location and impact of such use on the land.²⁵⁴ Compensation to be paid to land owners for their acquired land would be determined on the basis of one year average sale in the vicinity to the date of notification.²⁵⁵

Court is to consider evidence brought on record by the parties and the land acquisition collector while determining compensation of acquired land in addition to one year average price.²⁵⁶ Under the land acquisition the market value which has to be determined for purpose of compensation include estimate of actual speculative advances in the values of lands in consequence of improvement, already made in the locality are in consequence of opportunity for any purpose. The market value in villages, takes into account the use already made up of similar lands in the locality. If the land has further potentialities, the market value includes the value of such further potentialities.²⁵⁷ Mere past sales could not legitimately form basis for calculating compensation, landowner were bound to satisfactorily establish the potential value and use to which such land could be put in near future so that real value could be appropriately ascertained.²⁵⁸ Due to these

²⁵² Land Acquisition Collector Abbottabad and others Vs Muhammad Iqbal and Others SCMR1992, SC 1245.

²⁵³ Shrimati Kusumguri Ray Munshi and others Vs. The Special Land Acquisition Officer. AIR 1963, Gujrat, 92.

²⁵⁴ Adusumilli Gopal Kirishna vs. Deputy Collector Land Acquisition. AIR 1980, SC, 187.

²⁵⁵ Govt. of Pakistan through Secretary Ministry of Defense and others Vs. Sardar Muhammad Sons and others. PLD 1987, Peshawar, 77.

²⁵⁶ Muhammad Saeed vs. Collector Land Acquisition and others. , SCMR2002, SC, 407.

²⁵⁷ Yeshwantrao Govindrao Vs. The Collector of Nagpur. AIR 1961, Bom, 129.

²⁵⁸ Water and Sanitation Authority Quetta through M.D and another Vs. Niaz Muhammad and 7 others. PLD 1992 Quetta 75.

problems the procedural and legal bottlenecks in the acquisition process shall be removed and land acquisition laws shall be suitably amended to make provision for unified, transparent and market value oriented systems and procedures which would also minimize litigation.²⁵⁹ Along with this ambiguous criterion for determination of market value the position has become more complex because land revenue department officials are involved in underhand dealings for arranging conversion of agricultural land to housing or other uses. Due to this reason court had to say that entry in the revenue record as to the nature of the land was not conclusive.²⁶⁰ Developers are required to submit layout plan for the whole land of the scheme including land yet to be acquired provided it is up to maximum limit of twenty percent. After grant of sanction from development authority when the developer proceed to purchase the twenty percent portion of land the owners of the land charge exceptionally high prices as the developer is bound to purchase that piece of land at any cost. Constitution of Pakistan guarantees that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.²⁶¹

The owners of the land by exercising the right provided by the constitution make reference to the court if the amount of compensation is less.²⁶² But the aggrieved housing company or the cooperative society has no remedy if the amount of compensation is high because the reference by a beneficiary is not allowed.²⁶³

The apex court of Pakistan has declared that a reference under section 18 of the Land Acquisition Act 1894 before the court by a beneficiary is not competent.²⁶⁴ A contrary view

²⁵⁹ National Housing policy 2001, p-15.

²⁶⁰ Project Director vs. Murad Ali and Company, 1999 SCMR 125.

²⁶¹ Constitution of Islamic Republic of Pakistan 1973, Article 4 (2) (a), 4th Edition, Pakistan law times, 2002.

²⁶² The Land Acquisition Act 1894, Section 18, 1st Edition, P.L.D Publishers, 1995.

²⁶³ Pakistan vs. Abdul Hayee Khan, PLD1995, SC 418.

²⁶⁴ Defense Department of Pakistan versus Province of Punjab, 2006 SCMR 402.

taken by the apex court of India is very important. It declared that the definition of person interested given in section 18 of Land Acquisition Act 1894 is an inclusive one and must be liberally constructed so as to embrace all persons who may be directly or indirectly interested either in the title of the land or in the question of compensation. It is not disputed that the lands were actually acquired for the purpose of the company and once the land vested in the government after acquisition it stood transferred to the company under the agreement entered into between the company and the government. Then it cannot be said that the company had no claim or title to the land at all. Secondly under the agreement the company has to pay compensation, it was most certainly interested in seeing that a proper compensation was fixed so that the company had not to pay a very heavy amount of money.

How it can be said that a person for whose benefit the land is acquired and who is to pay the compensation is not a person interested. Company was thus held to be person interested within the meaning of sections 18 of the Act.²⁶⁵ The position in Pakistan is that the acquisition of land for companies including housing companies has become an elusive exercise.

Universal declaration of Human rights declared Adequate Shelter for all and it was subsequently reaffirmation in 1996 at Habitat conference²⁶⁶. Shelter is one of the basic necessities of life and occupies the biggest portion of any human settlement²⁶⁷. There is a backlog of 270,000 housing units each year the demand in 2010 will be 8, 00,000 housing units per year.²⁶⁸ Meeting the backlog in housing is beyond the financial resources of the government. This necessitates putting in place a framework to facilitate financing in the sector by the private sector and for the mobilization of non-government resources. An investment of rupees Rs.950 billion is envisaged

²⁶⁵ Indo Swiss Time Ltd. vs. Umro and others. AIR 1981, HAD 213.

²⁶⁶ www.unhabitat.org visited on 15th August, 2008.

²⁶⁷ Medium Term Development Framework 2005-10, p-175.

²⁶⁸ National Housing Policy 2001, p-1.

in the Medium Term Development Framework for the development of housing including 920 billion investment by the private sector and rupees 30 billion in the public sector²⁶⁹ Government alone cannot meet the housing shortfall so government will Act as a facilitator instead of a developer.²⁷⁰

The Land Acquisition Act does not provide for prior possession of land by private housing company as reflected by the preamble of the Act as declared by the court that the preamble of the statute has been set to be a good means of finding out its meaning as it is a key to the understanding of it and it usually states or profess to state the general object, any intention of the legislature in passing the enactment.²⁷¹

However the development authorities in the provinces have been applying different rules for issue of no objection certificate to these housing companies. The condition of possession of at least 80% possession of land before grant of no objection certificate is mandatory. There is a dichotomy in the Land Acquisition Act and Punjab Private Site Regulations 2005. Under these rules the developers are bound to own 80% land and submit layout and location map of 100% scheme before grant of sanction for the scheme. As a result of this clash between these two enactments the developers are bound to purchase a major portion of land before sanction of the scheme and as a result of it the prices of land has increased many fold. Housing companies can afford to purchase a major portion of land before sanction of the scheme but cooperative societies cannot afford to purchase it due to its members of modest means. As layout plan of 100% land is submitted in advance for the grant of sanction and the remaining 20% land is acquired under Land Acquisition Act.²⁷² The acquisition of this 20% land becomes very difficult

²⁶⁹ Ibid , p183.

²⁷⁰ Ibid , p-9.

²⁷¹ Mohammad Asim vs. Collector of Land Acquisition Act, PLD1964B.J.30

²⁷² Local Government Ordinance 2001, Section 3(2) (g), 1st Edition, Mansoor Book House, 2007.

because the owners of this 20% land take full undue advantage of the weakness of land owners and charge very high prices. Under the above scenario when the companies and cooperative societies are forced to acquire remaining 20% land on very high prices and they have no recourse to the court the private sector is being discouraged so the apex court of Pakistan by looking into the ground realities and bitter truths in housing sector must take a sympathetic view as Indian courts are providing relief to developers in India.

In the case of America when housing companies are faced with the problem of land acquisition these companies adopt any of these three ways these companies either refuse to pay high prices to land owners and seek land elsewhere or pay the price or request the government to take the land from unsympathetic owners.²⁷³

In India a very good approach is used to tackle the problem of acquisition of land all the land on the undeveloped growing city are notified at an early stage and acquired by public authority at the prevailing agricultural prices. This would prevent the undesirable speculation that would otherwise occur in situation of lands changing from agriculture to non-agriculture nature.²⁷⁴ To make the land revenue record foolproof the whole record of land revenue must be computerized. As a short term measure to combat this issue of conversion of nature of land by land revenues department, before the issuance of notification under section 4 of the land acquisition Act, the record of the concerned area should be sealed to stop the Patwaris from making unauthorized changes in the record. The most suitable time to take this step is when the collector is of the view that the land be acquired by the acquiring agency after examination of feasibility.²⁷⁵ Pages

²⁷³ Arthur C. Holden, "The Land Problems in relation to Housing", *Annals of American academy of political and social science*, 190, 1937, p-50-59.

²⁷⁴ Rakesh Mohan, "Housing and Urban Development", *Economic and Political Weekly*, 27, 1992, p-1990-1996.

²⁷⁵ C.M. Yasin, *Punjab Land Acquisition Rules 1983*. Section 5, 1st edition, Khyber law publications, 2005.

of mutation must be signed in order to stop the practice of replacing and adjusting the pages containing unauthorized entries in the record.

Description of property sufficient to identify the property is the only condition for the registration of the non-testamentary document relating to immovable property.²⁷⁶ Similarly true copy of the map or plan and of the property if the land is situated in more than one district copies equal to that number of districts are provided for registration of a non-testamentary document pertaining to map or plan of any property.²⁷⁷

The above two sections of Registration Act need to be amended in such a way that revenue department is no more permitted to change in land use without reference to the authorities interested with the responsibility of town planning.

Lacuna in the Pre requisite conditions for the Registration of Developers of Housing Societies:

The fundamental purpose of the government is to protect the health, safety, and general welfare of the public .Whenever there arises in the state a condition of a substantial menace to public health, safety or general welfare, it becomes the duty of the government to apply whatever power is necessary and appropriate to check it.²⁷⁸ Supreme Court of Pakistan in the case of Shehla Zia versus WAPDA held that it is the duty of the government to ensure that all Pakistanis are provided with all amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. It is well recognized that the owner of a house enjoys a sense of security from the fact that he has a permanent residence that he is proud of his

²⁷⁶ Registration Act 1908, Section 21(1), B to Z printers Lahore,2008

²⁷⁷ Ibid ,Section 21(4) .

²⁷⁸ Philip H.Hill, “Housing Legislative Proposals”, Law and Contemporary Problems, 12, 1947, p173-185.

status as a property holder, and he cherishes the independence and the privacy it gives to his personal life.²⁷⁹

Shelter is one of the basic necessities of life²⁸⁰ but in this regard the situation in Pakistan is very poor and can be seen from the below figures.

Demand and Supply NHA's estimate upon the basis of 1998 census.²⁸¹

Years	Population	Required Housing Units	Total house Unite Million	Backlog
1996	13.05	23.7	19.3	4.4
1999	13.39	24.3	19.6	4.7
2000	13.74	24.9	19.9	5
2001	14.10	25.6	20.2	5.4
2002	14.47	26.3	20.5	5.8
2003	14.85	27	20.8	6.2
2004	15.24	27.7	21.1	6.66
2005	15.63	28.4	21.4	7
2006	16.4	29.1	21.7	7.4
2007	16.46	29.9	22	7.9
2008	16.89	30.7	22.3	8.4

There are many factors due to which there is a huge gap in demand and supply side among these high population growth, inadequate attention toward construction of new houses, migration and breakup of the traditional joint family system are important²⁸². Historically land was considered as a communal asset and was safeguarded and carefully distributed according to the needs of the people. Gradually this trend has changed in Pakistan due to dealing performance in other sectors such as manufacturing and processing the power brokers and capitalists focused on land transactions as an enterprise²⁸³

²⁷⁹ Ira S. Robbins, "Methods of Holding Residential Property", 190, 1937, p109-119.

²⁸⁰ Medium Term Development Framework 2005-10p-175.

²⁸¹ www.nha.gov.pk visited on 1st April 2008.

²⁸² Daily, The News, 6th December 2007, Alluding Masood, "Article" ", "Housing deficit".

²⁸³ Daily, The News, 16th December 2007, Dr. Noman Ahmad, Article, "Nothing for the Masses".

Real estate sector was further accelerated after the incident of 9/11 when overseas remittance jumped from 1.5 billion to 4 billion in 2002²⁸⁴. The decision of lowering the interest rate from 22 % to 3 % was also a reason to increase the speculation in real estate sector²⁸⁵

Due to these factors housing societies have been formed at large scale and these housing societies have offered plots to the applicants for in excess of the land in their possession. The aim was to collect as much money as possible from the public. The practice was endemic and went unchecked on account of loopholes in the registration laws. Cooperative societies are registered under Cooperatives Societies Act 1925. It prescribe the condition that no society should be registered under the Act unless it consist of at least ten persons and if it has object to raise funds from its members then the persons who want to form cooperative society must reside in the same town or village, tribe, class, caste, or occupation and no society can use the word bank or can conduct banking unless it is registered under this Act and has a paid up capital of rupees 20,000 or more and societies with limited liability should use limited as a last word of their names.²⁸⁶ Similarly Cooperative Societies Rules 1927 prescribe that every application for the registration of a society should contain, name, address, liability clause, area of operation, objects, par value of share, leverage scheme along with three copies of the bye laws. Furthermore if a member of the proposed society is a society an authorized member of the society must sign the application for the registration of the cooperative society.²⁸⁷

It is very very interesting to note that a cooperative housing society can be registered even without having an inch of land.

²⁸⁴ www.finance.gov.pk visited on 1st March, 2008

²⁸⁵ Daily Dawn 29 December, 2007. ZahidIqbal. "Article", "Pakistan: The Housing Market Thrives as More Pakistani Capital Returns Home".

²⁸⁶ Cooperator Societies Act 1925, Section 7, 1st Edition, New Fine Printing Press, 2008.

²⁸⁷ Cooperative Societies Rules 1927, Section 2, 1st Edition, New Fine Printing Press, 2008.

Similarly, private housing companies are registered under the companies' ordinance 1984. For registration of a housing company *Memorandums of Association* and *Articles of Association* are filed with the registrar along with the declaration by the proposed director in the Articles of Association that all the requirements of the Ordinance and rules have been complied with. If the registrar is satisfied that the company is being formed for a lawful profession, objects are not inappropriate, or deceptive or insufficiently expressed and all the requirements of the Ordinance and rules have been complied with in respect of registration of the company.²⁸⁸ Similarly, Companies General Provisions and Forms Rules 1985 prescribe that three copies of Memorandum and Articles of Association duly subscribed and witnessed should be stamped as per Stamp Act along with the declaration made by an advocate of high court or supreme court or a member of institute of chartered accountant of Pakistan or a member of institute of cost management and accounts of Pakistan and proposed director in the articles. Out of these persons the registrar can demand from any person a clarification or document to satisfy him.²⁸⁹

From the above two sections of the companies laws it is very clear that there is no condition of land for the registration of a housing company. A housing company without having any piece of land can be incorporated under the prevailing legal frame work of registration of companies. In the past private housing companies and cooperative housing societies took advantage of these loopholes in the registration process of housing societies and they offered plots without having any piece of land. As most of the people in Pakistan are simple and uneducated only few have knowledge of law. When people demanded a proof of the genuineness from these housing societies they were shown registration certificate issued under the registration laws and the people became satisfied as they did not understand the difference between permission to

²⁸⁸ Companies Ordinance 1984, section 30, 3rd edition, Federal law house, 2007.

²⁸⁹ Companies General Provisions and Forms Rules 1985, Section 2, 3rd Edition, Awaiz publications, 2003.

incorporate housing company and permission granted to start housing society. As a result of that a lot of people were deprived of their hard earned income. This practice is still going on because legal framework is still very poor.

These registration laws needed to be amended on urgent basis and no housing society should be registered without having possession of land. The next step is how these provisions of law should be amended because making possession of land as a pre-requisite for registration is of paramount importance due to two reasons. Firstly this new development will help to confine registration to the extent of genuine private housing companies and cooperative housing societies. Secondly the registration laws being very liberal it will close the door of registration of housing societies by spurious sponsor. If the condition of possession of land as a pre condition for registration is made a new issue raises what should be the percentage of land whether 80% as prescribe by the law²⁹⁰ There is a need to struck a balance between these two extremes in such a way that fake and greedy developers are discouraged and genuine and fair developers are encouraged. The provision 80 % possession of land by housing societies before the registration is not in the best interest for a number of reasons.

Firstly housing has been accorded a top priority for its beneficial effects on economic growth and employment generation, housing activities boost the economic activity in 40 allied industries.²⁹¹ Affordable housing for low income groups contribute to poverty alleviation measure.²⁹²

Real estate and construction industry can be called the mother of all industries as it triggers activities in the supporting industries.²⁹³ Due to investment in real estate state sector Gross

²⁹⁰ Punjab Private Site Regulation 2005, Section (3)(2) (g), 1st Edition, Mansoor Book House, 2007.

²⁹¹ National Housing Policy 2001, preface.

²⁹² Medium Term Development Framework 2005-10,p-177.

²⁹³ Ibid ,p-17.

Domestic Product increased to 5 % in 2006.²⁹⁴ Housing and construction sector have been notified by the government as a priority industry in “C” Category²⁹⁵. Thus this condition in the law is against the national policy as Medium Term Development Framework is prepared after consultation of the four provinces. The success to any policy lies in the unidirectional proceeding for the achievement of a settled goal. So the above condition is a deviation from the mainstream policy.

Secondly, the private sector is assigned the main role in the development of housing sector for public welfare. Pakistan is also a party to Habitat agenda in which private sector is identified as backbone of “Shelter for All” policy²⁹⁶. The inclusion of the words and for the companies in the preamble of the Land Acquisition Act connotes the intention of law makes to encourage the private sector to make investment in the projects and schemes which are beneficial to the public i.e. construction of roads, schools , health facilities and housing.

Total amount allocated for housing and physical planning in the public sectors development program (PSDP) is as under²⁹⁷

Years	Amount Allocated (Million)
2004-05	9
2005-06	7.5
2006-07	7.9
2007-08	8.5
2008-09	9.7
2009-10	10.5
Total	44.1

²⁹⁴ www.finance.gov.pk.visited on 1st March 2008.

²⁹⁵ Ibid ,p-2.

²⁹⁶ www.un.org.visited on 16th August 2008.

²⁹⁷ www.planningcommission.gov.pk visited on 17th August 2008.

If the entire budget of the current annual public sector development by leaving no money for other Public Sector Development Product projects is used for housing even then housing back lock can not be achieved. This necessitates putting in place a framework to facilitate financing in the private sector and mobilize non-government resources.²⁹⁸ When the acquisition of land is for a public purpose the consideration that the state has undertaken the task at the instance of a private entrepreneur or agency or a private institution is not germane. If the acquisition of land could materially help the national economy or the promotion of public health, or the furtherance of general welfare of the community or something of the like the acquisition will be deemed to be for a public purpose.²⁹⁹ Land required by the company for public purpose is served when land is acquired by the company of building or work which would serve public purpose.³⁰⁰ Acquisition of land by the government on the expense of the society for construction of residential accommodation for defense and civilian personal is for public purpose.³⁰¹

Where the notification not only state that the land is to be acquired for a company but the purpose is also expressly mentioned the notification cannot be said to be contrary to the provisions of section 4 of the land acquisition Act.³⁰² Where there is a public purpose the powers of the government to acquire land are not excluded because acquisition is for the benefit of the company.³⁰³ It is the opinion of the provisional government that land is acquired for the public purpose by the company.³⁰⁴

Allah Abad High Court went on to this extent that it declared that if land is required by the company for the construction of houses produces in part VII of the Act need not to be

²⁹⁸ National Housing Policy 2001, p-17.

²⁹⁹ Ram Narain Singh and others Vs. The State Behar and others. AIR 1978 Pat 136.

³⁰⁰ State of West Bangal and another Vs. SurendraNathBhattacharya and another. AIR 1980 SC 1316.

³⁰¹ Dr. Muhammad NaseemJavidVs. Cantonment Housing Society Limited through the Secretary Foretress Stadium, Lahore Cantt. and 2 others. PLD1983LAH 552.

³⁰² R.L. Aurora Ram Ditta Mal vs. State of Utter Pradesh and others. AIR 1958 All 126.

³⁰³ A. NatesAsari vs. State of Madras and another AIR 1954 MOD 481.

³⁰⁴ R.A Aurora vs. State of Utter Pradesh and others AIR 1958 All 872.

followed.³⁰⁵ The condition of 80% possession of land and submission of site development plan for the entire housing scheme makes the society captive of 20 % land which is yet to be acquired under Land Acquisition Act. The price of this 20% land is dictated by the owners in collusion with the officials of revenue department. The condition of 80%possession of land is against the intention of the legislatures of Land Acquisition Act 1894 which aims at encouragement of companies and cooperative societies in the economic activities for public welfare such as housing. The condition of prescribing 80 % ownership of land is also in utter disregard of ground realities in Pakistan. The members of the cooperative society are generally poor people and lower grade officials and due to low income they cannot afford to purchase land for their houses in defense housing authority or in a private housing companies the only way left for them is to have a house through cooperative housing society. The condition of 80% which is very high will close the last door open for the poor because they can not afford to accumulate so much funds from their own resources. It is inequitable as it will only encourage members with adequate financial means to form cooperative societies and discourage under privileged classes. Lastly it is also against the spirit of the Medium Term Development Framework 2005-10 passed by the planning commission in which all four provinces are parties and which is prepared after a detailed consultation by the Federal Government. So this condition is a divergence from the national policy.

A separate law for registration of private housing companies should be enacted for each province in which each province can prescribe a pre-condition of land for registration of housing companies by keeping in view its local conditions and development priority as each province as its own development propriety due to its specific geographic, economic and social differences with respect to other provinces.

³⁰⁵BhagwatDeyal and another Vs. Union of India and others AIR 1959 Pun 544.

Revenue department is empowered to permit change in land use from agriculture to industrial, commercial or housing purpose without intervention of development authorities³⁰⁶. As a result of that when information leaks out that housing society is being launched in the particular area the inhabitant of the adjoining lands do the above practice with the help of Patwaris. All land record must be computerized because poor land record system is the major cause of litigation in our country.³⁰⁷ As a short term measure when notification under section 4 of the Land Acquisition Act is issued on the same time the land record of that particular area should be sealed to stop the revenue department from doing this practice

Conclusions

From the above said discussion it is very much clear that the present process for the acquisition of land needs to be changed and the role of the government should be like a facilitator in the land acquisition process. Furthermore, each provincial government should legislate a separate law because housing is purely a provisional subject, in which each government can impose a pre-condition to start a housing scheme according to its own financial, geographical, political and cultural environment. The present legal framework for the registration of housing developers is unconstitutional and each provincial government should legislate its own legal framework relating to registration of real estate (housing) developers keeping in view its own peculiar circumstances.

³⁰⁶ Registration Act 1908, Section 21(1), B to Z Publishers, Lahore, Edition 2008.

³⁰⁷ KASB Securities Limited ,December 2005, “Research Paper on Real Estate Investment Trust”.

Notes for Contributors

Manuscript Preparation

- The language of the manuscript must be English (either American or British standard, but not the mixture of both).
- Title of the manuscript should be concise and informative.
- To facilitate an anonymous review process, please add a removable cover page. Place the title, author name(s), affiliation(s), contact information with e-mail, phone/fax number for the corresponding author, and a biographical sketch for each author on the cover page.
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- Legal maxims should be in italics.
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