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Editor's Note

Greetings from SIL!

As we begin a new academic year, we have begun to refine the policies for the Spectrum of International Law – we have now a mix of scholarly articles, student-written pieces and interviews. The interviews have resulted from meetings between our students and individuals whose stories and work we feel ought to be shared. We have settled on two issues a year, where we initially anticipated three – this is a compromise because of the many demands on what seems to be increasingly limited time and a desire to print as many issues as we can. If you look at the Life at SIL page, you will be able to see where the time went – the collage is a pictorial depiction of the activities our students have initiated, organized, participated in or simply enjoyed.

From attending the Pawnay 14 August performance en masse at the Pakistan National Council of Arts and meeting Mr. Anwar Maqsood to attending a series of workshops on child rights conducted by Ms. Manizeh Bano of Sahil, from a college trip to Khanpur Dam with all the accompanying water sports to a group internship organized by the Women Aid Trust where the students worked with women prisoners incarcerated at Adiala Jail, from organizing a grand welcome for new students and faculty to the cricket matches (played against other teams and tournaments screened in the common room) – it has been a time worth experiencing. All of these activities happened in addition to a full schedule of classes, regular law moots and critical thinking classes and mock trials!

A recent Facebook status update reminded me of a favourite poem and the excerpt "Do I dare Disturb the universe? (T. S. Eliot) – for us at the School of International Law the answer is a resounding yes. The purpose of the myriad workshops, seminars, extracurricular plans, et cetera is so that the students at SIL find that corner of the universe they dare to disturb. The lectures, tutorials and academic support is there to give them the capacity to impact the world and all the rest of it (most of it) is so that the impact they choose to have is positive.

This academic year also saw a new editorial team take over the work part of printing the Spectrum. A student editor along with two deputy student editors, supported by the senior programme coordinator, collected and edited the articles and helped with the design and layout. On behalf of the editorial team, I would like to thank all of our authors for their contributions and cooperation with us, should any of you want to read the magazine on a screen and not on paper, it (and older issues) can be downloaded through our website: http://sil.edu.pk/promos.html . We always welcome feedback (and articles and advertisements), so please do write to us, and write for us, at publications@sil.edu.pk

Thank you,
Syeda Shehrbano Kazim

Editorial Team

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Alternative Dispute Resolution in Pakistan: Realistic or Idealistic?

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Introduction

The legal system in Pakistan leaves much to be desired - plagued with a plethora of problems and underlying inefficiencies, it often comes under strict scrutiny and a barrage of criticism. To ameliorate some of the issues it has, we must first delve into the alleged shortcomings it bears.

One of these, undoubtedly, is the immense backlog of cases it has the ill-fortune of boasting. With an excess of over 1.5 million cases backlogged in the Courts, formal Dispute Resolution becomes an inefficient mechanism by which justice can be served, as spending 5 to 10 years in litigation is simply not an option. Any person familiar to the cardinal principles of law and justice will tell you, “Justice delayed is justice denied”. Matters which could have easily been settled out of court have been prolonged within the tangled web of the judicial system at the detriment of both, those who seek remedy, and those who claim to provide it.

Lawyers universally agree that the best suit is the one which is avoided, and ethically it is their obligation to provide their clients with the best possible advice in light of their conundrum. Often, such advice would entail straying from the conventional norms and age old practices of litigation, and seeking more viable alternative methods to mitigate the issues they face.

This article aims to define the basic functioning mechanisms of ADR and focuses upon the already established ADR procedure within Pakistan. Are these procedures an efficient means by which lawyers can provide remedy to potential clients seeking to avoid court action? Or do they just further complicate an already over-burdened system? .

Alternative Dispute Resolution

The intricacies of Alternative Dispute Resolution (ADR) revolve around the ideology that trial in a court room must always be the last resort. Corporate and legal communities worldwide acknowledge ADR as a more apt way of resolving disputes, as opposed to time consuming litigation procedures. Cutting costs, reducing workload on the judiciary and eluding the adversarial litigation process are just some of the benefits it provides. The scope and ambit of ADR is considerably vast and includes anything but a trial coupled with those cases which are 'not fit for trial'. Dispute settlement through ADR is not only used for domestic issues but is also an increasingly growing international phenomenon in the context of cross border transactions.[1]

Negotiation, conciliation/mediation, and arbitration generally categorize an ADR system. Negotiation systems create a structure to encourage and facilitate direct negotiation between parties to a dispute, without the intervention of a third party. Mediation and conciliation systems are very similar, in that they interject a third party between the disputants, either to mediate a specific dispute or to reconcile their relationship. Mediators and conciliators may simply facilitate communication, or may help direct and structure a settlement, but they do not have the authority to decide or rule on a settlement. Arbitration systems authorize a third party to decide how a dispute should be resolved.

Having understood in simple terms what it is that ADR entails, it is essential to have an understanding with regards to how the different categories of an ADR system have been implemented in Pakistan, and whether or not this implementation has successfully aided in bettering the options available to disputants.

ADR in Pakistan

Primarily, the two kinds of ADR being practiced in Pakistan are; 'Traditional ADR' and 'Public Bodies Based ADR'. The former refers to the traditional/centuries-old system. This was sufficient for simple cases, but when it came to the status quo issues, it would readily succumb to elite capture. This system includes the Panchayat (in Punjab) and Jirga (in NWFP and Balochistan).

The latter includes the ADR attached to public bodies and includes Arbitration Councils, Union Councils and Conciliation Courts. Arbitration Councils were confined to issues of divorce, permission for second marriage, and maintenance for existing wives. Union Councils provided

the arbitration forum (through elected councilors) under the Muslim Family law Ordinance 1961 and looked after a few selected family related issues. Conciliation courts were established under the Conciliation Courts Ordinance 1961 and were vested with limited civil/criminal/pecuniary jurisdiction.

A majority of the above mentioned initiatives were rendered ineffective, as local councils (which had an important role in these forms of ADR) were dissolved frequently, and no clear strategies for the capacity building of the members of these bodies were ever formulated. It is also pertinent to note that in a legal system such as Pakistan's, there is limited awareness as far as ADR is concerned. When one looks to the more fluently functioning legal systems such as those of England or the USA, there is clearly a more marked availability of the ADR system, where as in Pakistan, a more traditionalist approach is taken when dealing with disputes. Courts are seen as the more effective means of garnering a solution, and ADR is not given as much importance. This can perhaps be accorded to the lack of information available to the general public with regards to how it works, and changing this may see an increased influx in the number of ADR cases, and a rapid reduction in the burden on courts.

Statute provides the following:
Recent Initiatives regarding ADR in Pakistan:

A. 'Code of Civil Procedure' (CPC) which is the primary procedural law for civil matters in Pakistan, has been amended (under AJP) to provide an enabling mechanism for Court Annexed ADR in Pakistan (Section 89-A).

B. The 'Small Claims and Minor Offences Ordinance' 2002 has been promulgated for providing an exclusive forum (at the district level) for facilitating the resolution of smaller disputes. This law also provides ADR mechanisms for facilitating the resolution and settlement of disputes within the framework of the formal court system. This could be transformed into an excellent forum for addressing disputes in the emerging justice sector in Pakistan.

C. Under the 'Access to Justice Program', the review of the 'Arbitration Act' represents a significant policy action. This review needs to be undertaken with urgency, and capacity building initiatives put in place, to promote an effective arbitration regime in Pakistan.

D. A new local government system has been introduced in Pakistan, establishing elected local governments at the level of Union Council, Tehsil (Sub District Level) and the District level. The institution of Musalihat Anjuman (literally meaning conciliation forums) has been provided at the level of Union Councils for dispute resolution through ADR (including conciliation, mediation and arbitration). The finalization of the rules of Business for these bodies is essential to popularize the use of ADR.

E. The 'Karachi Centre for Dispute Resolution' (KCDR) started operations, in February 2007. The Centre, the first of its kind in Pakistan, follows international standard rules and a code of ethics governing mediation proceedings. The Karachi Centre for Dispute Resolution is offering Mediation as an institutionalized alternative dispute resolution (ADR) mechanism. This option is available to the parties whose Commercial cases are either pending before any court/ judicial forum, or who have not yet filed a case in the Court. KCDR has been established with the assistance and support of the High Court of Sindh and the International Finance Corporation/World Bank Group. It is registered as a Not-for-Profit Society under the Societies Registration Act of Pakistan (XXI of 1860).

Having shed light upon the several initiatives being taken by the Pakistani legal system regarding the promotion of ADR, it is imperative to assess their significance and success. An important fact to acknowledge is that the Alternative Dispute Resolution system is receiving recognition in its totality. However, the question remains, how feasible are these options when there is still a lack of awareness present? With the increasing level of competition within law firms in current times, there is no level playing field with regards to firms which specialize in ADR, and firms which focus on litigation. A traditionalist view (from a legal practitioner's perspective) is always going to edge towards litigation being a more lucrative means of making a living. Specializing in ADR is then, going to be more of a cost in the short-term, and provide benefits in the long-term. How many are willing to step into the quagmire that is specialization? Tackling these problems is not an overnight process. It requires more education being doled out with regards to these areas, and a widening of knowledge with regards to the long-term cost-benefit analysis.

Conclusion

Despite the availability of ADR (albeit limited) there is an alarming increase in the number of cases resulting in long-drawn litigation. It is, therefore, high time for the corporate and civil community to adopt ADR mechanisms, which

ultimately prove beneficial not only to the parties, for they get rid of the expensive litigation, but also to the courts whose burden is lessened.

Pakistan is on its way to being well-placed to meeting the modern day challenges and requirements of dispute resolution in the context of international commercial law. As courts become more comfortable with ADR, they are likely to move toward a policy of enforcing written agreements to mediate disputes prior to submitting disputes for resolution before the courts. One can easily say that the growing popularity of ADR methods owes greatly to the lengthy process of litigation and the fact that some cases in Pakistan take decades before they are finally decided.

Time will tell in which direction the legal wind decides to blow, but a fact to be noted is that ADR is indeed the way forward, and a progressive means by which disputes can be resolved. Settling disputes "now", saving money, maintaining control, organizing multiple party negotiations and preserving continuing relationships are only a few of the incentives one can give to disputants seeking to take advantage of ADR. One can only hope that these incentives are successfully communicated to the masses in need of availing them. .

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1. Arbitration/ADR Versus Litigation by Aftab Ahmed Khan, Published September 4, 2006, Pakistan WSG Submission September 4, 2006.

Trading in Future's Contracts: Shariah's Perspective

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Futures Contracts

In WC Finance Company vs. Masri [1986] All England Report 44, Legget J defined a futures contract as "a legally binding commitment to deliver at a future date, or take delivery of, a given quantity of a commodity, or a financial instrument, at an agreed price." In other words, a futures contract is a standardized contract entered into in order to buy or sell and underlying instrument at a specified price at a specified time in the future. This specified price is called the settlement price, the price set for the commodity at the time of entering into the contract is called the futures price and the date at which the obligations under the contract are supposed to be discharged is called the settlement date.
Trading in commodities began in the 18th century in Japan with rice and silk trading and in Holland with tulip bulbs. Central grain markets were established in the United States of America in the mid 19th century; farmers could bring their produce here and sell it at a centralized market place, either in a then-and-there agreement resulting in immediate delivery (also called a spot or cash market) or for forward delivery. These agreements for forward delivery, between the farmer and the buyer, became the precursor to today's futures contracts traded on exchanges, instead of being done privately between the parties. Futures contracts on underlying financial instruments were introduced in the 1970s by the Chicago Mercantile Exchange (CME). These quickly overtook futures commodities in terms of trading volumes and ease-of-access in global terms. Their huge success lead to the introduction of futures exchanges around the world, some examples being the London International Financial Futures Exchange in 1982 (now Euronext.Liffe), Deutsche Terminborse (now Eurex) and the Tokyo Commodity Exchange (TOCOM). Today there are more than 75 futures and futures options exchanges trading around the world.

Forward contracts, the fore-runners of futures contracts, emerged in markets around the world as early as the mid 19th century. Even though the concept behind forward and futures contracts is more or less the same – that is, to allow traders to enter into contracts today for transactions which will be materialized in the future – the way in which they function is quite different. While forward contracts are private contracts between the two contracting parties, futures are administered under the "auspices" of a futures exchange or market. While forwards are traded over-the-counter and can even be simple contracts signed between two parties, futures are exchange-traded derivatives; for every futures contract, the exchange's clearinghouse acts as a central counterparty. Furthermore, in the case of physical delivery, the forward contract will specify who the commodity is supposed to be delivered to, whereas in the case of a futures contract, the clearinghouse of the exchange will determine who the counterparty for that particular contract is and the delivery will be made to the counterparty.

In order to ensure their liquidity, futures contracts are highly standardized, mentioning the underlying asset or instrument, the price per unit of this asset, the amount or number of units of this asset to be delivered or traded, the delivery date, the last date of trading and the currency in which the price of the commodity in question is quoted, etc. Consummation of the contract can be carried out in one of a number of ways: by physical delivery (the amount of the asset specified in the contract is delivered to the buyer; in practice very few futures contracts actually reach this stage of "fruition"), by cash settlement (a cash payment is made based on the underlying reference rate which is outside the control of the parties to the contract) or through expiry (the time when the final price of the commodity is determined).
Since futures contracts are highly standardized contracts traded on a futures exchange, they place an obligation on the contracting parties, as opposed to a right, to buy or sell the commodity pre-determined in the contract. Due to this obligation, the only way the parties can exit the agreement is by a futures position holder offsetting his position by either selling a long position or buying back a short position. The holder of the long position is the one who agrees to receive the commodity; his stakes have a positive relation to the price of the commodity, i.e. the higher the price the higher his profits. On the other hand, the holder of the short position is the one who agrees to sell the commodity; his stakes having a negative relation with the price of the commodity, i.e. the lower the price the higher his profits. Before the date of delivery, the position holders are asked to either sell their contracts in the futures market or prepare to take delivery and pay the spot price for the commodity for that specific day. In practice, physical

delivery of the underlying asset of the contract only takes place in a minority of contracts (about 3%), most are cancelled out by purchasing a covering position – either buying a contract to cancel out an earlier sale (covering a short) or selling a contract to liquidate an earlier sale (covering a long).

The two parties trading in futures contracts are hedgers and speculators. Hedgers are usually either the producers or consumers of a commodity, have a direct interest in the commodity/underlying asset and seek to protect themselves against the risk of declining prices in the daily market. Speculators, on the other hand, do not have a direct interest in the physical possession of the instrument; indeed, they may never own the instrument physically, they merely aim to profit from the very price change that hedgers seek to protect themselves against. A speculator buying a contract low (in price) in order to sell high in the future may be doing so from a hedger who is seeking to evade any future losses accruing to himself. The closer it gets to the expiration date of the futures contract, the more accurate and conclusive the pricing of the contract.

When a party seeks to open a futures account, a minimum amount must be deposited in it, this amount being the 'initial margin'. Any gains or losses accruing from the daily fluctuations of the price of this futures contract are then adjusted with this amount, and given to the party once the contract is liquidated. The 'maintenance margin' is the lowest amount an account can reach before needing to be replenished. Futures exchanges also determine a minimum amount that the price of a commodity can fluctuate upward or downward, this minimum amount is known as a “price tick” or a “commodity tick”. Since all contracts have different specifications, these ticks will also depend on the contract itself. They establish a fair amount of certainty as to the fluctuations that the price of a futures contract may experience.

Pakistan's first technology-driven online commodity futures market, National Commodity Exchange Limited, was incorporated on the 20th of April, 2002. It was planned that the market would begin by trading in gold and other commodities such as wheat, yarn, cotton and sugar, etc. would follow. In the second phase of operation, the exchange is likely to start trading in financial futures contracts. The single most important benefit of this exchange was expected to be hedging in the commodity market, the largest beneficiary of which is likely to be the agriculture sector. Given that Pakistan's is largely an agrarian economy, the exchange is likely to provide marketing venues for farmers and growers and is expected to benefit them greatly.

Futures Contracts and Shariah

Majority jurists of Islamic law especially Hanafi jurists do not consider futures contracts, Al 'Aqd al-Mudaf li al-Mustaqbal, as valid, their primary reason being the prohibition against Gharar (uncertainty). They consider contracts that take effect in the future as fasid (irregular) contracts. They believe that the effects of any contract should ensue immediately and that it should be nafidh, the premise most probably being the repugnance of Shariah towards any sort of agreement that might result in some sort of injustice, unjust enrichment, etc. Therefore, majority jurists believe that a contract whose obligations are to be discharged at some point in the future might result in uncertainty as to some fact or requirement of the agreement itself. However, given that the contracts are so standardized, every detail of the agreement being specifically contained in the document, and also the fact that it is regulated by and traded on a futures exchange, the clearinghouse of which acts as the central counterparty and guarantees all trades, there usually isn't any likelihood of uncertainty manifesting itself. Also, unlike an options contract, where the parties only have a right to buy or sell the commodity, they have an obligation to do so under a futures contract; this fact gives these contracts more standing.

That said, these jurists do consider certain types of futures contracts as valid, namely usufructs (most common example being contracts of leasing and manufacturing, etc.), kaffalah (suretyship), hawwalah (assignment of debt), and contracts of agency, divorce and waqf. A contract of bequest also admits of delay or of execution at some point in the future, so such a futures contract would technically be held valid by most Islamic law jurists. The contract of sale, according to the view of all jurists, is an immediately enforceable one and they therefore do not admit the delay that takes place due to the natural course of a futures contract. Admitting this delay would lead to, according to them, uncertainty.

Another type of contract whose effects do not materialize immediately is a contingent contract, Al 'Aqd al-Mu'allaq, one which is subject to the happening of an uncertain event. Logically speaking, one would think that Islamic jurists would have more contentions with contingent contracts, given their more precarious nature. In a futures contract, the settlement date, the futures price and the

settlement price are all mentioned and the futures exchange guarantees the trade, whereas in a contingent contract, the execution of the contract depends on the happening (or otherwise) of the event/contingent. Commenting on the viewpoint of jurists, Dr. Muhammad Shafiq observes, "Indeed the only gharar in a future contract lies in the possible lapse of interest of either party which may affect his consent when the time set therein comes. If someone buys something by 'Aqd al-Mudaf and his circumstances change or the market changes bringing its price down at the time set for fulfillment of contract, he will undoubtedly be averse to its fulfillment and will regret entering into it. Indeed the object itself changes and the two parties may dispute over it."[1]

Commentators have often made very firm statements as to the validity of futures contracts, but as Dr. Muhammad Hashim Kamali, professor of law at the International Islamic University of Malaysia states in his article "The Permissibility and Potential of Developing Islamic Derivatives As Financial Instruments", there are "weaknesses in the evidential bases of these verdicts, some of which tend to ignore the actual mechanics of derivatives trading and apply the rules of a conventional sale to a new and substantially different mode of trade."

One argument against the validity of futures contracts is the possible wrongful devouring of another's property. It is important to note in this context that these contracts are concluded with the mutual consent of both the contracting parties. "Oh Ye who believe! Eat not up your property among yourselves in vanities; but let there be amongst you traffic and trade by mutual consent" (Qur'an, 4:29)

This verse from the Holy Qur'an establishes mutual consent as the single most important validating factor for a contract or agreement between parties. There is no clandestine dealing involved, the futures are traded on exchanges and the prices for these are published in the media every day along with the necessary information required for these contracts to properly function, so there is a substantial amount of transparency in the operation of these contracts. Futures contracts contain all the necessary ingredients of a contract, especially a valid offer and acceptance, and a valid futures contract will also be devoid of any element that negates either party's consent. Traders of futures contracts are required to register themselves with the relevant futures exchange and thus these exchanges decide whether a particular trader has the legal capacity to trade.

Another issue is that of the supposed non-existence of the subject matter of the contract at the date of entering into the agreement. It is argued that mere promises are made at this date without anything of material significance changing hands. Shariah is said to look down upon agreements where both the delivery of the subject-matter and the payment of the price is deferred to a later date. It does however consider valid Salam sales where the price agreed in the contract is paid at the date of entering into it and the delivery is delayed to a later date. It also considers valid deferred sales or Bai' bithaman 'ajil, where the delivery of the commodity in question is made at the contract signing date but payment is adjourned to a later date. It is claimed that a futures contract indulges in excessive risk-taking and gharar which Shariah seeks to prevent by placing a prohibition against it, one that governs all contracts and transactions. To counter this argument, the regulatory role of the futures' exchange seeks to prevent this uncertainty and does in fact do so, more often than not. The clearinghouse of the exchange ensures that all the contracting parties discharge their obligations as agreed upon in the contract and this proves to be an extraordinary move to guarantee fair and legally correct execution of the contract.

As regards Salam sales, there are some conditions that must be fulfilled before a valid Salam agreement can be entered into. Mentioning these conditions is imperative at this point so that an ordinary futures contract is not clothed as a Salam sale just in order to be legalized. First of all, barring gold, silver and currencies, Salam sales cover almost everything, specifically goods, etc. Secondly, the buyer must make full payment to the seller at the date of entering into the agreement; otherwise it would seem to be the sale of a debt for a debt, which is clearly prohibited. All jurists are unanimous on the view that if the payment for the sale is deferred, the very purpose of the transaction will stand defeated. Thirdly, a Salam sale can be carried out only on commodities that can be identified with precision. That said, it is also important to note that a valid Salam sale cannot include commodities which are too specifically mentioned, because there is a good chance that that specific commodity may not be available for delivery on the settlement date, which will eventually lead to the uncertainty that jurists want to establish as the single negating factor for futures contracts. Lastly, the exact date and place of delivery must be mentioned clearly in the contract for a Salam sale.

Another bone of contention is that there might be short futures contracts which the producers of a commodity enter into in order to fix the price of a commodity that they

are yet to produce. Short selling would, therefore, include selling of a commodity that even the producer does not own yet. This brings the hadith of the Prophet Muhammad (PBUH) into play, "The messenger of Allah forbade me to sell a thing which is not my property" (Tirmidhi). If we take this hadith at face value, it will clearly denounce even Salam sales, which is clearly not intended, as Shariah categorically holds these, and certain other types of sale, as valid. If their contention is with the fact that promising to sell a commodity one hasn't even produced yet is very likely to lead to uncertainty (gharar) in the future, verily one might own the commodity and yet not be able to deliver, for one reason or another. Again, the clearinghouse of the futures' exchange guarantees the performance of these agreements. Therefore, that should prove to be some sort of a mitigating factor as far as the contentions of these jurists are concerned.

As is obvious, new contracts are rampantly entered into and yet quite a few of them fail to take off. The same risks would plague the trading of futures contracts in an Islamic system of finance. It would be vital to steer clear of interest-yielding transactions, gambling and trading in prohibited objects like alcohol and pork. This selective process would, however, render the range of available instruments and products very limited.

To that note, whether Shariah deems as valid commerce that is inherently based on speculation is a worrying question. One of the two types of traders that trade in futures contracts are speculators and since the price of a futures contract is adjusted daily and "marked-to-market", speculation does have a substantial role to play in the working and functioning of futures contracts. It is argued by Islamic jurists that speculation in its worst and most worrying form would culminate itself in the form of gambling, becoming a game of chance. The Quran and traditions of the Holy Prophet (PBUH) prohibit any income made from games of chance, or income which hasn't been earned by much productive effort. Maisir, the word used for gambling, means earning any amount of money by mere chance and speculation. However, going by analogy, Shariah has condoned instruments and contracts like Musharikah and Mudaribah, in which speculation has a far greater role to play, and where the risks of a business or agreement failing are much greater than in a futures contract. Since speculation is such an inherent "side-effect" of trading in futures contracts, and it seems as if it can't be abolished altogether, strict regulatory controls should be established instead. Malaysia, for example, has come a long way in this regard. Futures trading began in the mid 1980s and after extensive losses in currency futures, new regulations to this effect were promulgated in 1995.

Futures trading in Malaysia began in a not necessarily Islamic framework, but in line with its American predecessor and thus during its first couple of years of functioning, American experts were invited to advise on its operation. Dr. Muhammad Hashim Kamali now envisages that the functioning of Islamic derivatives might mirror that of the banking system in Malaysia – a dual system, one based on the American prototype and a second concurrent one based on a newer, less secular system of operation. Given that such a dual system of banking is already in place in Pakistan, attempts can be made to smoothly introduce financial futures contracts into the capital market.

To further strengthen the argument for futures contracts, as mentioned before, they are highly standardized. They seek to mitigate price volatility in the commodities market and bring in stability. The daily publicly observable prices of these commodities provide a credibility that makes them a better option for investment. Last but definitely not the least, the Qur'an does not expressly condemn or refute futures contracts, in fact: "Oh ye who believe! When you deal with each other in transactions involving future obligations in a fixed period of time, reduce them to writing". Given that this ayah has not made clear precisely what type of future obligations/contracts it is talking about, whether 'Aqd al-Mudaf li al-Mustaqbal or 'Aqd al-Muallaq, we have no reason to limit its scope to just Salam sales or any one type of futures agreements. So it could be said that the Qur'an has validated all sorts of futures agreements, as long as they have been properly reduced to writing. Furthermore, if it can be certain that the government of the day and the regulators under the auspices of the relevant futures exchange will keep a strict check on the futures market and its trading, it will definitely live up to the expectations of others as being a major financial hub with much promise.

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The UK Corporate Governance Debate

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The current system of corporate governance in the UK has its origins in the recession of the '90s that followed the '80s boom when suddenly without warning some huge high profile companies (US: Enron, WorldCom, Tyco, HealthSouth, UK: Polly Peck, Robert Maxwell, BCCI) collapsed. What followed was a series of reviews of corporate governance techniques initiated by the industry (BOE, FRC, LSE and combined accounting bodies).

Cadbury Committee (1992)

The Cadbury Committee was of the opinion that the solution lay in quality financial reporting. This could only be ensured by improving boardroom accountability so:

1. Major transactions should be decided by the whole Board rather than the few senior managers.
2. The CEO and Chairman of the Board should be two separate people to prevent concentration of power in one individual.
3. The Board should contain a sufficient number of independent Non-Executive Directors (NEDs) to influence board decisions.
4. There should be a committee structure supervising appointment and remuneration of directors and the audit process.

The LSE implemented these recommendations but not as enforceable Listing Rules so there was no penalty for non-compliance. The company only had to explain why it chose not to comply. There was no external scrutiny of these explanations either. Cadbury never defined 'independence' of NEDs. And never set out how many NEDs were needed for them to positively influence boardroom activity.

Greenbury Committee (1995)

Directors were receiving exorbitant pay packages. The Greenbury Committee was set up which decided that there was inherent conflict of interest in directors deciding their own pay packages.

It recommended:
1. There should be no executives on the remuneration committee.
2. The remuneration committee should keep in view the wider economic conditions inside and outside the company when deciding pays.
3. Share options should be terminated and replaced by a three-year performance related criteria to be put before shareholders.
4. There should be a higher level of salary disclosure in annual accounts of the company.
5. Long-term service contracts should not be allowed. One-year, maximum two-year rolling contracts should be permissible.

The recommendations were implemented in the same non-binding 'comply or explain' manner. There was not much success. Improved salary disclosure resulted in directors competing with each other on how high the director of his calibre in that other company was being paid. Companies employed salary consultants to advise the remuneration committee. They recommended higher salaries so the people employing them would be happy with their recommendations and keep them on.

Hampel Committee (1998)

This recommended:
1. Cadbury, Greenbury and its own recommendations should be consolidated.
2. NEDs should have a leader, creating three power bases in the management hierarchy, the CEO, the Chairman and the leader of the NEDs.
3. Institutional investors should consider voting at Annual General Meetings.
4. Detailed remuneration should be disclosed including hidden costs and pension allowances.
5. Directors should not give an opinion on the effectiveness of internal financial controls. The Turnbull Committee (1999) disagreed with Hampel here and the former's recommendation was implemented by the LSE.
6. Sometimes, the Chairman and MD/CEO can be the same individual.

The report rejected the European formula of a two-tier board where a board of NEDs supervises the Board of

Executives. It rejected compulsory voting by institutional investors. Overall no major positive ideas were presented. There now exists a consolidated corporate governance code known as the Combined Code.

The Follow On In 2002, the government introduced the Directors Remuneration Reporting Regulations (2002) which require that directors' salaries be put to shareholders whose votes are not binding but a negative vote acts as a major deterrent. The government also published its White Paper in 2002 which recommended leaving the Combined Code as a self-regulating matter.

Remuneration issues and self-regulation issues aside, following Enron's collapse in the US in 2002 despite NEDs monitoring its board, the effectiveness of NEDs was up for review again.

Higgs Review (2003)

It recommended: -

1. At least half of the board excluding Chairman should be independent NEDs.
2. Position of CEO and Chairman should not be combined.
3. NEDs had four major jobs: -

a. Challenge and contribute to development of strategy.
b. Scrutinise performance of management and the reporting of that performance.
c. Ensure that financial information is accurate and risk management systems are robust and defensible.
d. They are the ones responsible for determining appropriate levels of remuneration of executives and appointing and removing senior management.

4. NEDs should meet annually without executives or Chairman. Annual report should state whether they have done so.
5. A senior independent NED should be identified to be a further point of contact for shareholders.
6. Independence was defined. A NED is considered independent when the board determines that the director is independent in character and judgment and there are no relationships and circumstances which could affect or appear to affect the director's judgment.
7. The board should identify in its annual report the NEDs it determines to be independent.

The recommendations were implemented by the LSE through the Combined Code. It finally gave a definition of independence but it lacks in that it leaves the company itself to decide who is independent without external scrutiny.

Post-Higgs

Having seen the likes of the Lipton/ Lorsch model, th Quinennial model, the European model, the Free Market Model and a thick volume of debate on governance methods, the UK right now has in place the following mechanisms for management accountability: -

1. NEDs
2. Disclosure regime (Listing, Takeovers, Mergers)
3. Director Remuneration Reporting Regulations 2002
4. Committee Structure
5. Business Review requirement in the Companies Act 2006

There have been no post-Enron collapses. However, all over the world including UK, the present recession labelled to be the greatest since the Great Depression, is being attributed to failures of corporate governance regimes mostly in the banking sector. In the UK, Chairman FRC Sir Christopher Hogg has announced a review of the Combined Code. In addition, the governance of banks is currently the subject of a separate review under the leadership of Sir David Walker.

The OECD (Corporate Governance Lessons from the Financial Crisis, OECD, Feb 09) opines that earlier reforms in member countries (including UK) laid down too much focus on financial reporting and external checks on it and ignored analysing risk management frameworks which are the core of corporate governance. Suggestions include the risk committees to comprise independent NEDs with high banking and financial expertise. Such people however are difficult to find, limited in number and already employed elsewhere Fraser Henry Report (2003). Also, the concept of NEDs needs further tweaking.

The Fraser Henry Report (2003), a Scottish project on success of Higgs observes that executive directors influence who will be an NED. This may lead to the NED feeling obliged to the executive directors. Pr. Lucian Bebchuk (Harvard Magazine, 2003) opines that shareholders should be involved in hiring of NEDs rather than executives. Giving NEDs a financial interest in the company also poses a risk to their independence. There should be a limit on the number of non- executive directorships an individual may hold so they can devote enough time. There should be regular communication between NEDs and shareholders. NEDs should not be penalised if they take a stand against executives in a particular matter. NEDs must be represented on the audit committee and remuneration committee so

that they have access to all relevant information.

Recent Developments

In November 2009, Sir David Walker unveiled his report on corporate governance in the financial services industry. He made the following discoveries: -

1. The boards of big banks did not understand the scale of the risks their organisations were running.
2. Non-executives of big banks did too little to rein in the excesses of the executive directors.
3. Shareholders in banks also failed to curb reckless gambling by financial institutions, that the owners did not 'exercise proper stewardship'.
4. Bankers were paid in a dangerous way which encouraged them to speculate imprudently.

He suggested the following solutions: -

1. Financial institutions should have risk committees headed by a NED to assess substantial transactions and stop one if it was deemed too risky.
2. Bank and financial institution NEDs should devote 30–36 days each (compared to their present 20-25 days) year to the role. They also must be properly trained and scrutinised closely by the FSA to ensure that they can hold executives to account.
3. The chairmen should similarly commit no less than two-thirds of their time to the business. The chairman should have significant and relevant 'financial industry experience' and should face re-election by shareholders every year.
4. The remuneration committee should set the pay of executive directors and 'high end' individuals below board level. 'High end' individuals are those 'who as executive board members or other employees perform a significant influence function for the entity or whose activities have, or could have, a material impact on the risk profile of the entity'. The pay of these 'high end' employees should be disclosed (anonymously) in the annual report in bands ranging from '£1 million to £2.5 million, in a range of £2.5million to £5 million and in £5 million bands thereafter'.
5. The transactions that engaged bonuses should be assessed and bonuses delayed for a maximum of five years till results reveal whether performance did indeed benefit the bank in the way intended.
6. The board and the FSA should monitor more closely the selling activities of major shareholders.
7. Institutional shareholders and fund managers should work closely with the companies that they invest in. To encourage this they should comply or explain with the stewardship code overseen by the Financial Reporting Council in the same manner as the combined code.

To reflect wider concerns about UK corporate governance, a new version of the Combined Code on Corporate Governance was produced in May 2010 and is now called the UK Corporate Governance Code. In October 2010 BIS launched a review of 'corporate governance and economic short-termism'. An independent review of remuneration issues in the UK was undertaken by the High Pay Commission in 2011.

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Investing in the Future of Pakistan: Understanding Why it is Important to Ensure the Protection of the Rights of Children Affected by Armed Conflicts

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Introduction

The foundations of a harmonious and peace loving society as envisaged in the Charter of United Nations (UN), wherein there is respect for and faith in the fundamental human rights and in the dignity and inviolability of man, rests upon creating and maintaining a society in which the basic and core human values as proclaimed by the UN in its Charter and various other Declarations and Conventions, including inter alia, the Universal Declaration of Human Rights (1948), the 1966 Covenants on Civil and Political and on the Economic Social and Cultural Rights, and the Declaration on the Rights of Child (1959), are instilled and internalized.[1] In particular, the focus and emphasis on child rights and child protection should be a paramount consideration for all policy makers and state actors, given the nexus between the peculiar vulnerability of children, their tender age of influence and the fact that they are the ambassadors carrying the future of their nations. The special rights of the child were first enunciated in the Universal Declaration of Human Rights (UDHR) 1948, which provided in Article 25 (2) that, "Motherhood and Childhood are entitled to special care and assistance."[2]. Further, it has been noted in the Declaration of the Rights of Child (1959), that "the child by reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection, before as well as after birth."[3]. More importantly, this Declaration recognizes that "the child for the full and harmonious development of his personality needs love and understanding."[4]. Thus given that (a) all human beings are entitled to their basic rights and freedoms, "without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, birth or other status",[5] and (b), that nurturing a harmonious society necessitates nurturing of the children in a healthy, friendly, peaceful and secure environment, the rights of children must not only be promoted, but also actively protected.

Children and Rights

The UN Convention on the Rights of Child (hereafter "the Convention") 1989, and its two Additional Protocols set out the basic rights and protection regime for children.[6]

Article 1 of the Convention defines the child as any human below the age of 18, 'unless under the law applicable to the child, majority is attained earlier.'[7]The Convention provides for the Rights of Child which include not only the basic human rights such as right to life, freedom of expression, access to information etc,[8] but also the rights which are peculiar to the children in their respective context, such as for example, right to identity and nationality and the right not to be separated from parents unless necessary in their best interest, etc.[9] The Convention addresses some of the particularly grave issues affecting children including trafficking, adoption, education, exploitation, refuge and social reintegration.[10] It imposes several obligations on the States to respect and ensure the rights in the Convention through legislative, administrative or other endeavors, together with the obligation to ensure that both parents recognize their common responsibility for the upbringing and development of their children.[11]

Children and Armed Conflicts

Although, the Convention has attracted immense popular support from the international community in spirit, nonetheless, there exists in the world certain grave situations and circumstances including most abhorrently, war and other 'armed conflict' zones, as a result of which most of the rights in the Convention and the healthy and secure development of a child are compromised.[12]In Pakistan for instance, many children have either, been killed, kidnapped, used as human bombs or exposed to violence in one way or another as a result of the internal strife, ethnic violence and other conflicts that have plagued the country since its very inception. Many schools, particularly those for girls have been blown in the north-west region of Pakistan and socialization to violence amongst other things, has directly contributed to the increased propensity of young boys to take to violence which in turn has led to the development of a culture of violence and the trend of settlement of disputes through unsanctioned use of force rather than through state institutions such as the police and the judiciary. Thus, in view of the fact that armed conflicts can have lasting and devastating impacts on the development of children in particular and societies in general, the United Nation's

General Assembly adopted the Optional Protocol on the Involvement of Children in Armed Conflict by Resolution 54/263 in 2000, to address this issue specifically and to advance this issue in the list of the agenda items of nation states as well as of the international bodies.

Protection of Children under the Optional Protocol

The Optional Protocol to the UN Convention on the Rights of Children (1989) expressly deals with the issue of protecting children from being involved in armed conflicts and explicitly recognizes that 'harmful and widespread impact of armed conflict on children has long-term consequences for peace, security and development'.[13] The Protocol is more ambitious than Article 38 of the Convention, in that it calls for raising the age of possible recruitment of persons into armed forces and their participation in hostilities from 15 to 18 years so children up to the age of 18 years are ensured protection from the impacts of armed conflict.[14] In addition to this, the Protocol in its Article 4, introduces a new obligation on the State Parties to further ensure that armed groups that are distinct from the armed forces of the State also do not recruit children below the age of 18. In that the State Parties are not only to ensure the prevention of such recruitment, but also under a duty to criminalize such practices within their domestic laws.[15] The Protocol also calls upon the State Parties to demobilize the children being used in armed conflicts and to provide appropriate assistance for their recovery and social reintegration where necessary.[16] These obligations are discussed in detail below.

Obligations of the State under the Protocol vis-à-vis Armed Forces of the State Parties

Article 1 of the Optional Protocol on the Involvement of Children in Armed Conflict states that, “State Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.”[17] Article 2 further clarifies that, “State Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.”[18] Moreover, Article 3 elaborates that State Parties should raise the minimum age for voluntary recruitment of persons into armed forces to 18 years and must, amongst other things, maintain safeguards to ensure that such recruitment is (a) genuinely voluntary, (b) done with informed consent of the person's parents or legal guardians, (c) such persons are fully informed of the duties involved in such military service and (d) such persons provide reliable proof of age prior to acceptance into national military service. [19] In addition to this, there is a general obligation on the State Parties under Article 6 of the Protocol as per which they are to 'take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of this Protocol within its jurisdiction.'[20]

Obligations of the State Parties under the Protocol vis a vis the Armed Groups Distinct from the Armed Forces of the State

Article 4 of the Optional Protocol prohibits the recruitment of children under 18 from being (a) recruited or (b) used in hostilities by armed groups that are distinct from the armed forces of a State.[21]. In this context, the Protocol is a lot more assertive for it addresses not only the prevention of recruitment of children under 18, but also the situations where they are 'used in hostilities', such as for instance as human bombs in suicide attacks. Furthermore, Article 4 (2) imposes a two-fold obligation on the State Parties which are required to (a) 'take all feasible measures to prevent such recruitment and use', and (b) to adopt all necessary legal measures to 'prohibit and criminalize such practices.'[22]. Hence, the obligation of State Parties in relation to armed groups is again more extensive than in relation to the armed forces of the State, in that in case of armed groups, the State Parties are required to not merely prevent the recruitments but also under a duty to criminalize such practices by imposing penal sanctions within their domestic laws. Obligations of State Parties under the Optional Protocol in relation to the Recovery and Social Reintegration of Children Article 6 (3) of the Optional Protocol requires the states to take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities are demobilized or otherwise released from service. They are also under a duty to accord to these persons where necessary, all appropriate assistance for their physical and psychological recovery and their social reintegration. Additionally, the State Parties are obliged under Article 7 to cooperate with each other including through technical cooperation and financial assistance.

The extent of de facto Compliance of existing Pakistani laws with the Provisions of the Optional Protocol

The laws governing the recruitment of soldiers in the armed forces of Pakistan are, (i) The Constitution of Pakistan, 1973, (ii) The Pakistan Army Act, 1952, (iii) The Pakistan Junior

Cadet Corps Act, 1953, (iv) The Pakistan Air Force Act, 1953, (v) The Pakistan Navy Ordinance, 1961 and (vi) The Pakistan National Service Ordinance, 1970. While the Pakistani laws pertaining to compulsory recruitment of soldiers as contained in the Pakistan National Service Ordinance and others are by and large compliant with obligation under Article 1 of the Optional Protocol, the provisions concerning the enrolment criteria for voluntary recruitment for services in the armed forces appear to be less clear, especially under the Pakistan Navy Ordinance under which any person duly enrolled for the services shall be bound to perform both 'during his/her minority and after he/she attains majority', as made explicit under sub-section 3 (a) of Section 12 of this Act.[23]. This appears to be in stark contrast with the provisions of Article 3 of the Optional Protocol and for this reason, the minimum age of 18 years even for voluntary recruitment for service in the armed forces of the state need to be prescribed and inserted into the relevant applicable laws once Pakistan has ratified the Protocol. In short, Pakistan should endeavor to set the minimum age of 18 years for both voluntary and compulsory recruitment into its armed forces uniformly and ensure that there remains no discrepancy in the prescribed minimum age for recruitment under all relevant and applicable laws that govern the point.

The Pakistani laws preventing and criminalizing recruitment and use of children in hostilities by armed groups distinct from the armed forces of the State are (i) The Prevention of Anti-National Activities Act, 1974, (ii) Anti-Terrorism Act, 1997, (iii) The Pakistan Penal Code, 1860 and (iv) Khyber-Pakhtunkhwa Child Protection and Welfare Act, 2010. While these laws partially attempt to prevent and criminalize the recruitment of 'persons' for hostilities by armed groups distinct from the State, there is still the need for addressing the particular need to prevent the recruitment of children by inserting an express provision to that effect in the relevant applicable law such as the Prevention of Anti-National Activities Act (1974). Likewise, under the Anti-Terrorism Act, Pakistan does make an attempt to criminalize the training of children for acts of terrorism or handling fire arms, explosives and other chemical weapons under Section 21 C. However, it also makes it an offence upon the child to receive such training under the same Section, thereby, rendering the child in conflict with the law, making him/her criminally responsible to have received such training.

This goes against the spirit of the Convention as well as the Optional Protocol under which children and their rights are to be protected, and that they need special care and assistance because of their peculiar vulnerabilities.[24] Moreover, child soldiers and those affected by armed conflicts should be treated as “victims” rather than as criminals.[25]. Furthermore, the government is under an obligation under Article 6 and 7 of the Protocol to focus on the social reintegration of such children and holding them accountable as criminals is likely to lead those children to further alienation. Hence, an overall policy reform would be required at this stage for reforming the approach towards children in this scenario, and ultimately treating children as 'victims' rather than as 'criminals' will have to be reflected in the language of the law to comply with the international approach and obligations. The Pakistani laws that currently address the obligation under Article 6 (3) of the Optional Protocol are (i) The Sindh Child Protection Authority Act, 2011 and (ii) Khyber-Pakhtunkhwa Child Protection and Welfare Act, 2010. These two provincial laws cater to the need to provide appropriate assistance for the recovery and social reintegration of the children affected by armed conflicts by establishing designated child protection authorities and officers who have a duty to protect and provide for basic necessities such as food and shelter to the 'child at risk'. However, Punjab and Balochistan remain outside the purview of these legislations and therefore no uniform system or policy for rendering assistance to children at risk exists throughout the country as envisioned under Articles 6 and 7 of the Optional Protocol.

Pakistan's position under International Law

Pakistan became a signatory to the Convention on 20th September 1990 and ratified the same on the 12th of November, 1990. The State of Pakistan is therefore under a legal obligation to implement the provisions of the Convention, which states inter alia, in Article 32 that, 'the child has a right to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.[26]. Under Article 36, the State Parties have an obligation to protect the child 'against all other forms of exploitation prejudicial to any aspects of the child's welfare.'[27]. Furthermore, Article 38 of the Convention calls upon the States to ensure respect for rules of international humanitarian law relevant to children and in particular, to ensure that children below 15 are not recruited into their armed forces. Additionally, Pakistan signed the said Optional Protocol on 26th September, 2001, as a result of which it has a standing international obligation to ratify the

same and incorporate it in its domestic laws.

Pakistan's Social and Global Responsibility

Both the Convention and its Optional Protocol impose the obligation on the State Parties to ensure and protect the rights guaranteed in those instruments. By ratifying the Convention and by signing the Optional Protocol regarding the Involvement of Children in Armed Conflict, Pakistan has therefore accepted a mandate for global accountability on the welfare of children. Secondly, by ratifying the said Protocol, the State of Pakistan would be complying with its international commitment to deal with the issue of involvement of children in armed conflict which it took upon itself at the time of signing the Protocol in 2001 and considering that in essence there already do exist Pakistani laws that more or less are in de facto compliance with the provisions of the Optional Protocol shows that it is not an area that is completely alien to the Pakistani parliament and so therefore its amendment or insertion should not seem to be an issue. Thirdly, considering that Pakistani children have been exploited, trained and used in armed conflicts according to a report by the Society for the Protection of the Rights of Child (SPARC, 2003), Pakistan is mandated by virtue of its social compact with its citizens and by virtue of its obligations (both national as well as international) towards its people to protect the rights and lives of its people, including children.[28] This obligation becomes even more serious in view of the fact that in Pakistan majority of population is below the age of majority and therefore requires special care and assistance both, for healthy development of the children and for nurturing a harmonious future society of responsible individuals.[29]. Ratification of the Optional Protocol to the UN Convention on the Rights of Child on the Involvement of Children in Armed Conflict is therefore, the right step forward in Pakistan's commitment to fight terror, to uphold the rights of its people, to save its children and provide for them a secure and healthy environment, in improving its image both at home and abroad and to fulfill its international obligations under the various UN Conventions.

Conclusion

In short, for Pakistan - a country which was amongst the first signatories to the UN child rights convention and in whose history, political instability and religious discord, has fuelled violent tendencies in people, the question of ensuring child rights and protecting them from violence or from being involved in armed conflicts and other hostilities becomes very important for the purpose of harnessing a harmonious and peace loving society and to break away from the culture of violence that currently seems to prevail. For this reason alone, Pakistan must invest in its future and ratify the Optional Protocol to the UNCRC on the involvement of children in armed conflicts.

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1. Charter of United Nations (1945), Universal Declaration of Human Rights (UDHR) (1948), International Covenant on Civil and Political Rights (1966), International Covenant on Economic Social and Cultural Rights (1966), Declaration on the Rights of Child (1959), Convention on the Elimination of all forms of Discrimination Against Women (1979) and Convention on the Elimination of all forms of Racial Discrimination (1965).
2. See Article 25 (2), Universal Declaration of Human Rights (1948).
3. UN Declaration on the Rights of Child (1959), Preamble, Para 3.
4. Declaration on the Rights of Child, Supra note 3, Principle 6.
5. Universal Declaration of Human Rights (1948), Article 2.
6. The UN Convention on the Rights of Child (UNCRC) was adopted by the UN General Assembly Resolution No. 44/25 on 20th November, 1989 and it entered into force on 2nd September, 1990.
7. UNCRC, supra note 6, Article 1.
8. *Ibid*, Articles 6, 13 and 17 respectively.
9. *Ibid*, Article 8 and Article 9 respectively.
10. *Ibid*, Articles 11 and 35, 20-21, 28, 19 and 32, 22 and 39 respectively.
11. *Ibid*, Articles 4 and 18 respectively.
12. It is however, pertinent to note that the term 'armed conflict' is not here being used as a legal determination to establish that a situation of 'armed conflict' within the meaning of Geneva Conventions of 1949 and its Additional Protocols exists in the State under review. The idea is to use this term in its generic sense to denote a meaning of instability leading to internal strife, conflict or war-like situations wherein children are exposed to arms and ammunition and are victims of violence, keeping it in line with the stance taken by the UN Secretary General on Children and Armed Conflict in his report at the 59th session of the UN General Assembly, where it was recognized that, *"in the context of the present report, it should be emphasized that there is no universally applicable definition of "armed conflict" in general and in particular that the mandate of my Special Representative for Children and Armed Conflict does not contain a definition of the term. In the performance of his mandate, my Special Representative has adopted a pragmatic and cooperative approach to this issue, focusing on ensuring broad and effective protection for children exposed to situations of concern, rather than dwelling on the definition of the term "armed conflict". Reference in the present report to any State or situation should not be construed as a legal determination that there exists a situation of armed conflict within the meaning of the Geneva Conventions and their Additional Protocols."* See Para 7 of the Report of the UN Secretary General on Children and Armed Conflicts (59th Session) 2.
13. See the Optional Protocol to the UN Convention on the Rights of Child on the Involvement of Children in Armed Conflicts (2000), Preamble, Para 3.
14. See Optional Protocol, Supra note 13, Article 3.

15. *Ibid*, Article 4.
16. *Ibid*, Article 6.
17. *Ibid*, Article 1.
18. *Ibid*, Article 2.
19. *Ibid*, Article 3.
20. *Ibid*, Article 6.
21. See Optional Protocol, supra note 13, Article 4.
22. *Ibid*, Article 4 (2).
23. See the Pakistan Navy Ordinance, 1961, Section 12 (3) (a).
24. See Optional Protocol, supra note 13, Preamble, Para 2 and 15.
25. UN-SRSG on Children and Armed Conflict, Human Rights Council Presentation, 12 September 2011 where she said, "*Given the forced nature and the root causes of their association with armed groups, and, considering their age, children should be treated primarily as victims, not as perpetrators*," the child rights advocate said and called on Member States to prosecute adult recruiters who force girls and boys to commit violations. Many are themselves abused, exploited and beaten into submission by their commanders while associated with an armed group. As cited at http://www.un.org/children/conflict/english/pr/2011-09-12269.html. Last accessed on, 10 December 2011, 2:26 pm.
26. *Ibid*, Article 32.
27. *Ibid*, article 36.
28. SPARC report as cited in, '*Pakistani Children being trained for war*', staff report, Daily Times, 20th September, 2004 at http://www.dailytimes.com.pk/default.asp?page=story_20-9-2004_pg7_24.

TWENTY NINE See Pakistan Population Census (1998), as cited in the Draft National Child Protection Policy, NCCWD, *Situation of Children in Pakistan*, (2008) 5.

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CSR = Secondary Joint Responsibility: A Case of Thailand

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Currently, the trend of the public's demand regarding social responsibility from public and private organizations and agencies is increasing. So far, most of the organizations have focused on outputs and profitability thus neglecting and overlooking the environment, communities, consumers and employees' benefits which are the most important components in bringing about sustainable development where the production activities have the greatest social impact. Therefore, there is an increasing awareness of Corporate Social Responsibility (CSR) throughout the world. In Thailand, the private sector has been more active in CSR, but it is not as widespread as it should be because most of the companies that operate CSR are either large or multinational companies. However, small companies, or SMEs, are less involved in CSR (Prayukvong and Osen, 2010) and 99.6 percent of Thai entrepreneurs are SMEs (Office of Small and Medium Enterprises Promotion, 2011). Thai corporations still have a limited understanding of CSR so most of the activities relate to the donation of money and goods rather than taking part in social responsibilities as they should ("A Survey on The Situation of CSR", 2007). Compared to other countries, Thailand is considered as a follower in CSR.

According to the Survey of the Grand Thornton in B.E. 2552, Thailand is still behind its competitors in CSR, especially in the adaptation of the business processes. Additionally, the research of Fredrick William found that when considering the major industry budget for CSR by country, Thailand is last in the survey of 34 countries (Srisawek, 2011, September 13). In my opinion, there are several obstacles which cause the number of CSR inititatives in Thailand to remain small, which subsequently do not contribute well to society.

Lack of clarity in the philosophy behind CSR

The limited understanding of the philosophy behind CSR causes the private sector not to fully engage in CSR activities or just participate to a limited extent in order to obtain a good image. Most companies have no specific budget allocation for CSR or CSR budgets are often the first to be cut when a company has financial difficulties. Regarding the reasons that cause the lack of understanding of the CSR philosophy, I would like to return to the basic question: When there is a social problem, who is responsible for it? Society consists of three institutions: 1) The State, politicians, and government officers who are responsible for policy formulation and implementation; 2) the private sector and business corporations; 3) humanitarian organizations including charities, foundations, associations, and many forms of the NGOs that take a crucial role in civil mobilization for certain social issues.

The negative point of view of the private sector toward CSR can be divided into three groups. The first group thinks that social issues are not their responsibility, but are the responsibility of the state because they pay taxes to hire these people who have volunteered to serve to resolve the common issues and problems of society, so the CSR by the private sector is are only an additional bonus. The second group thinks that NGOs should stand up for social issues because the government is not sincere in keeping its word. As Nikita Khrushchev, the former leader of the Soviet Union, once said, “Politicians are the same all over. They promise to build a bridge even where there is no river” (“Nikita Khrushchev”, 2012). Therefore, the CSR activities which are not addressed left behind by the state should be taken up by the NGOs. With this idea, the CSR of the private sector will not happen.

The third group believes that the business community has no responsibilities to society which is the concept of a group of economists like Milton Friedman who believes that “the social responsibility of business is to increase its profits” (Friedman, 1970). Businesses are primarily responsible for themselves, by making a good business, maximizing production and employment. Therefore, the private sector should not get into other activities that diverge from its competency. However, the answer may differ with each individual. In my opinion, businesses need to have a social responsibility because I believe that living together is like making a social contract, as many philosophers have said, everything that people in the community have done has resulted in a social contract with each other ("Social Contract", n.d.). In the case of businessmen, doing business has an implied social contract even it is not a written one. In this social contract, it is not simply a contract to sell goods or products, but a commitment in order to produce social goods or common goods in society.

If everyone believes that social responsibility is the role of the private sector and if we are aware that we have a commitment to a shared responsibility, then the question becomes "How should the private sector implement social responsibility?" Is CSR the Sole Responsibility of the private sector or not? In my opinion, it is not. The reason is that, if the private sector alone is to be responsible for both business and society it will cause a conflict of interest for business organizations. In order to maximize profits for the company, they might have to trade off the profit for society. Most importantly, the private sector alone cannot solve all the social problems. The government must be involved as well.

Is CSR a partial responsibility of the private sector? I do not agree because the social issues cannot be divided in such a way that only a part is the responsibility of the private sector. Is CSR an additional responsibility of the private sector? I do not agree that CSR is an extension of the main function of the private sector. But it is the main responsibility that must already exist. Is CSR an Optional Responsibility of the private sector? In my opinion, this responsibility is not an option for the private sector to choose either to do or not to do. Is CSR a Joint Responsibility of the private sector? On this point, I agree. CSR is not the responsibility of any private individual, but a collective responsibility as an integrated system. It is a shared responsibility with the public sector and organizations in the Third Sector as well.

If it is a joint responsibility, the question is how? There are many ways for it to be done jointly; as a Primary actor (act as a core leader), Secondary actor (act as a follower), Junior Responsibility (responsible in minor issues) or Senior Responsibility (responsible in major issues). In this regard, I think, in concept, CSR is a Secondary Joint Responsibility which means that even if the corporate goal of the private sector is to maximize profits, the corporation will have to look around and be socially responsible for social betterment together with other sectors at the same time. Each will be responsible according to their strengths. We know that the strength of the state is that it is authorized by law and it has about 2 million government officers. ("Thailand's Cabinet to Consider Reducing the Size of the Public Sector Workforce", 2010). The budget is of around 2.4 trillion baht (in the 2013 Fiscal Year) (Bureau of the Budget, 2012). In addition, politicians and government officers are legitimate representatives of the people to oversee the overall picture of the country. The strengths of the organizations in the Third Sector, including NGOs, are their flexibility and their missions are ideology-driven, not personal benefit- driven missions. Moreover, they understand the problems well. They have more sympathy for the people and are willing to get involved in solving people's problems.

The strengths of the private sector are the effectiveness of the management and their understanding of the overview picture and facts regarding the economy. They also have competent personnel. If we understand the true philosophy of CSR and how to perform CSR, we will look at social issues in an integrative manner and thus be able to fix them together. The CSR work will not be loosely but firmly cooperated in order to solve social problems.

CSR is a Social Service more than Social Development

CSR as a social service, in my opinion, is charitable work, solving one particular matter at a time but there is a lack of a development point of view. Social services and social development are different. Social service is like giving fish to feed people from time to time, but social development is like teaching people how to fish. It is to help people so that they can help themselves, make them strong and able to stand on their own. CSR should focus on the development of society more than services which should be used occasionally, but not primarily.

Lack of Depth in Conducting CSR Activities

In Thai society, CSR still lacks depth. Companies are doing it at their own initiative in a scattered manner and with no specific targets therefore it could not make any real change in society. I think that CSR should be performed in depth, not superficially. It does not mean that businesses have to do everything; on the other hand, corporations should do CSR by focusing on one small particular matter and completely remove it or make substantial changes on it. This is CSR that is done outside the organization, not from within the organization. We cannot forget that big corporations such as Enron, World Com and many other companies that are out of business had done CSR and that shows that CSR is not a symbolic guarantee of quality or success of the organization. To perform good CSR, the corporation has to start from within the organization itself. For instance, almost all of the companies in Thailand have three accounts, one account for the Revenue Department, a second account for the partnership and a third account to keep within the organization ("Banyong Limprayoonwong's Active Plan", 2011). To perform true CSR, such an incident should not happen. True CSR is to start within the

organization first by making a transparent accounting system with a single account and pay taxes properly.

If the private business organizations change their approach to CSR, I believe that a number of problems in Thai society, as well as that of many other developing countries, will be solved and thus their society can be developed enormously. It is a situation in which the burden of responsibility is not only on the government, but all parties must contribute and play their roles appropriately. As a result, the government is able to use the budget previously allocated used for solving those problems, for the development of the country more appropriately.

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An Interview with Clive Smith and Shahzad Akbar: Say 'NO' to Drones

Mr. Suleman A. Zeb

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'Nervously, sitting with my folder containing my notes, I could hardly wait to interview Mr. Clive Smith and Mr. Shahzad Akbar about their anti-drone attacks activism. They finally staggered into the room, worn out from their rally towards Waziristan where they went with Imran Khan and over a thousand fellow activists. Sadly for them, they still had to face me before they could raise their feet and call it a day's end. I first interviewed Mr. Shahzad Akbar, a lawyer who represents drone victims and is the on-ground organizer for Reprieve and Mr Clive Smith, who instituted the Foundation for Fundamental Rights. He is extremely passionate about this particular topic and does not hesitate in sharing his views. The questions I posed pertained to the march into Waziristan. I asked him about the level of satisfaction he has achieved from the march. He responded by stating that he was very satisfied with the outcome, despite not being able to actually enter into Waziristan. He felt this march created an appropriate level of required awareness of the issue at hand, and the amount of people who rallied alongside him proved the fact that drone strikes are strongly opposed in Pakistan.

His major concern, however, was for the families that were affected by these drone strikes. It is for these families, those who have already been victims of the strikes, that he has joined this initiative, and to prevent more families from suffering from such attacks. He also reaffirmed the fact that his campaign did not start and end with the rally towards Waziristan. There was more to come, more to plan and more to achieve. Legal cases representing the survivors of the drone attacks were still to be heard. He made it clear, that he was not going to rest till the issue had been dealt with. With foreign activists joining him in the march, he is sure that the stories of the survivors he has had to face will be heard all over the world. Mr. Shahzad also commented on the initiative that has to be taken by the Government of Pakistan on drone attacks. Issuing statements in the international media is not enough, and our leaders have to take affirmative action against those who are sending in drones. He hopes that this rally would at least put the current government under enough pressure to issue a formal policy against drone attacks in Waziristan. He stated that he was in this fight till the end, and that there was more to come, and all opposing this campaign need to be ready for him.

Mr. Smith proved to be just as passionate, if not more, than Mr. Shahzad Akbar. He is the strategist behind the anti-drone campaign in Pakistan. He believes that public attention on the drone issue is the key point in order to bring about change, and is willing to do whatever it takes, no matter how unachievable it may seem, to gain that public attention. With his vast international network, he has succeeded in attaining attention for the drone issue with sincerity and fervour. His courage is unquestionable and he backs it all up with his impulsive behaviour and his own unique sense of humour. Before I could even ask him any questions, he asked me about my interrogation techniques and whether I was to also going to perform torturous methods on him. His comments about the Waziristan rally seemed to describe a holiday in Rome, with discussion about the company that joined him and the view on the roadside; he confirmed the fact that he had a jolly good time marching into what is deemed to be the most dangerous place on earth. He also gave his views about being stopped at the border. “There was no danger at all, if somebody wanted to blow us up they would have already done so,” he stated.

The conversation extended to his general view on drone attacks, and not just his rally into Waziristan. I asked him about his views on US legislation that will give the police the right to use drones in the US. He replied astonishingly in favour of the legislation. He stated only when they know how it is to have a drone fly over their heads and shoot missiles at them, will they understand how devastating these machines really are. He greatly emphasized the fact that those in the West do not understand how the families of those who have died due to drone attacks are affected, due to the fact that they are not experienced in the matter. This is why he has tried time and again to raise public awareness on the issue. He stated that the arguments in favour of drones are wrong, and that under no argument can a drone strike be seen as legal. He also stated that he does not feel as though those posing these arguments are lying, he feels that they believe in these arguments and that a change in the mindset of those in favour of drone attacks are essential.

Before I interviewed him, I came into possession of a letter he had written to President Obama titled, Drone “Kill list”

(Please Don't Authorize my Assassination). Amongst other things, he asked Obama to apologize to those that have been affected by the drone attacks. "I know that politicians find apologies to be uncommonly difficult, but we can do at least part of the job for you. I plan to say sorry to the innocent victims of drones in Waziristan – to Sadullah, for example, the 15-year-old student who lost both of his legs, one eye and most of his dreams when a Hellfire missile struck his home in September 2009 (That was one you authorized, Mr. President)."

He also discussed the "Secret Kill List" that President Obama's Administration leaked, where a PowerPoint display of Muslim men is presented, and it is decided who should be top of the assassination list. All in all, it was a very interesting conversation, Mr. Smith has the capacity to reach into the heart of the issue and give an analysis of the situation which would at times be humorous, but still leaves a bold impression.

Both Mr. Clive Smith's and Mr. Shahzad Akbar's passion and tenacity for the issue is incomparable, their courage unmatched, and their efforts unrivalled. They have promised us that there is more to come, and that those who argue in favour of drone strikes will have to pass through them, a feat which is impossible.

The Oppressed Become the Oppressors

Mr. Nauman Masood Butt and Ms. Neshmiya Adnan Khan

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"We are starting with this fundamental principle that we are all citizens and equal citizens of one State." Muhammad Ali Jinnah, Presidential Address to the Constituent Assembly of Pakistan on 11th August, 1947

It has become a wide misconception that the Islamic Republic of Pakistan was meant only for the Muslims of India. In actuality, it's founder Muhammad Ali Jinnah, envisioned a place where all the minorities that were blatantly being denied their civil rights in the Subcontinent would be able to freely and openly practice and exercise them in this new Country. It was meant to be a state which granted each and every citizen of Pakistan, regardless of caste, creed or religion, equal status and rights under the law. As the Quaid made it quite clear in his first address to the Constituent Assembly of Pakistan on the 11th of August 1947:

"If we want to make this great State of Pakistan happy and prosperous, we should concentrate on the well being of the people, and especially of the masses and the poor. Everyone of you, no matter what his colour, caste or creed, is first, second or last, a citizen of this State with equal rights, privileges and obligations…"

However, any person who has kept himself in touch with the current events in Pakistan would know that the current status of Pakistan is far off than what it was envisioned to be by its creator and founding father. Instead, it has now become the hub for discrimination over matters of religion and belief and the way the State has dealt with the Ahmadi Community in Pakistan is one of the prime examples of this injustice and inequality. The fundamentals upon which Muhammad Ali Jinnah envisioned the state of Pakistan to be grounded upon were eventually enshrined and codified by Pakistan's first Constitution in 1956. Articles 20[1], 22[2], 26[3], 27[4], and 28 [5] in sum gave equal rights to all the citizens of Pakistan to practice, profess, propagate and promote their religion and provided protection against religious discrimination. These provisions had their roots in Articles 1(3) and 55(c) of the U.N. Charter, which emphasise non-discrimination on the basis of religion, and in Article 18 of the Universal Declaration of Human Rights (albeit the requirement that only a Muslim can be the President of Pakistan seemed a tad contradictory to the infallible and fundamental rights guaranteed by this Constitution.) However, future events eventually led to the creation of exceptions to the aforementioned fundamental right, the major bount of which was felt by the Ahmadi community. The persecution of the Ahmadi Community is not a new phenomenon nor is it one that began with the Zia-ul Haq Regime. In 1953 one of the most important events in Pakistan, yet one of the least known, took place, The Lahore Riots. These began as a series of agitations in the Ahmadi Community in several parts of Pakistan and eventually erupted into full scale violent riots lasting for 70 days which led to the deaths of over two hundred Ahmadis and resulted in the injury of several more. At this particular point of time, the Ahmadi Community still enjoyed the equal status and rights provided to them by the 1956 Constitution of not only every other citizen of Pakistan, but every other Muslim as well i.e. they still had the right to call and present themselves as the followers of Islam. This may have once been one of the reasons why swift action was taken against those responsible for the riots and its main instigator, Abul Ala Maududi[6], who was eventually arrested, tried[7], and sentenced to death.[8]

An event of such wide scale violence and anti-Ahmadi sentiment was not seen for some time following the Lahore Riots however, the Ahmadi community was still being targeted and attacked for its religious beliefs. Pakistan's second Constitution saw the light of day on the 1st of March 1962, which was promulgated by the then President of Pakistan, General Ayub Khan. This constitution maintained the equal rights status of each citizen of Pakistan, and Ahmadis were still seen as the followers of Islam for the purpose of this constitution. In 1973, the National Assembly, under the democratic government led by Zulfiqar Ali Bhutto, approved a new constitution. This constitution, albeit enshrining the same fundamental rights guaranteed by the previous two Constitutions also embodied the legal and political machinery of the Sharia law as espoused by the orthodox religious clergy. It was the same religious clergy that called for the persecution of the Ahmadi Community. To them this inherently Islamic Constitution had one major defect: it did not declare the Ahmadi Community as non-Muslims. The omission of such a clause in the constitution led to the biggest wave of anti-Ahmadi sentiment and movements in Pakistan in 1974. This

movement was led again by the Jamat-e-Islami and several other Islamist Parties. The violent unrest in the country allowed the Islamic clergy to use this opportunity to pressurize Zulfiqar Ali Bhutto to declare all Ahmadis as non-Muslims. Succumbing to pressure, on the 7th of September, 1974, the national assembly by majority voted and approved, although it was in blatant contradiction to both the preamble as well as the fundamental rights guaranteed by the 1973 Constitution[9], the 2nd Amendment to the constitution, which thus stated:

260(3)-A person who does not believe in the absolute and unqualified finality of The Prophethood of Muhammad (Peace be upon him), the last of the Prophets or claims to be a Prophet, in any sense of the word or of any description whatsoever, after Muhammad (Peace be upon him), or recognizes such a claimant as a Prophet or religious reformer, is not a Muslim for the purposes of the Constitution or law.

By declaring them non-Muslims, the law had thus severed any association of the Ahmadis with the Islamic faith, thus downgrading their status from a Muslim to that of a minority. It has been said that after the approval of this amendment, the country saw a widespread attack on the Ahmadi Community which almost bordered on genocide. Many were also forced into exile. Things worsened for the Ahmadi Community and their rights were further narrowed with the introduction of Ordinance XX[10] which was promulgated by the regime of General Zia-ul-Haq in 1984. This Ordinance went a step further; by adding amendments to the Pakistan Penal Code, it made it a criminal offence for any Ahmadi to present himself as a Muslim or associate himself anyway to the Islamic faith:

298-B. Misuse of epithets, descriptions and titles, etc., reserved for certain holy personages or places:

(1) Any person of the Quadiani group or the Lahori group who call themselves 'Ahmadis' or by any other name who by words, either spoken or written, or by visible representation-
(a) refers to or addresses, any person, other than a Caliph or companion of the Holy Prophet Muhammad (peace be upon him), as "Ameer-ul-Mumineen", "Khalifatul-Mumineen", Khalifa-tul-Muslimeen", "Sahaabi" or "Razi Allah Anho";
(b) refers to, or addresses, any person, other than a wife of the Holy Prophet Muhammad (peace be upon him), as "Ummul-Mumineen";
(c) refers to, or addresses, any person, other than a member of the family "Ahle-bait" of the Holy Prophet Muhammad (peace be upon him), as "Ahle-bait"; or
(d) refers to, or names, or calls, his place of worship a "Masjid"; shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

(2) Any person of the Quadiani group or Lahori group (who call themselves "Ahmadis" or by any other name) who by words, either spoken or written, or by visible representation refers to the mode or form of call to prayers followed by his faith as "Azan", or recites Azan as used by the Muslims, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

298-C. Person of Quadiani group, etc., calling himself a Muslim or preaching or propagating his faith:
Any person of the Quadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name), who directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine. Since the passing and implementation of this Ordinance, thousands of Ahmadis have been arrested[11]. In 1989 and again in 2008, the entire 50,000 population of the Rabwah was charged with practicing Islamic worship[12]. Ahmadis are prevented from holding public meetings and are not even able to vote or to register to vote because registering to vote would require them to deny their association with the Islamic Faith. This also rings true passports, which has a clear cut section which requires one to declare Ahmadis as non-Muslims. Ahmadis are also barred from entry to public office except at the lowest level. As one can clearly infer, these changes and such outright discrimination against a minority goes completely against the grounds upon which the State of Pakistan was created.

The laws enforced by Ordinance XX of 1984 are not only in complete violation of the Article 18 of the Universal Declaration of Human Rights but also contradicts and violate the Constitution of Pakistan itself. Since the Ahmadis were now seen and treated as a minority they could still claim protection as a minority. Paragraphs 6[13], 8[14] and 9[15], of the Preamble of the Constitution[16] focuses on minority rights and their freedom of religion and speech.

Further paragraph 8 states that they must be given equal opportunities in law and in paragraph 9 it is mentioned that laws should be passed to protect legitimate interests and rights of minorities. The above mentioned paragraphs of the Preamble clearly shows that one of the purposes of the Constitution is to protect the religious freedom of the minorities however as mentioned above, Ordinance XX of 1984 by no means serves this purpose, rather it makes these fundamental rights illusory for the persecuted Ahmadi Community.

Furthermore, according to Article 20 of the Constitution[17] of the Islamic republic of Pakistan 1973, every citizen of Pakistan has the unfettered right to practice and spread his or her religion and religious beliefs. Henceforth every Pakistani has the right to establish places of worship as do educational institutions by virtue of the same article. Whereas, Article 18[18] of the Constitution grants every citizen of Pakistan the freedom of speech. The aforementioned articles, namely 20 and 18, are of great significance as they guarantee that religious freedom and freedom of speech cannot be restricted or fettered by law for any citizen of Pakistan. Even though Ahmadis are considered to be Non-Muslims, it does not mean that they are not citizens of Pakistan and hence they have the respected right to practice and propagate their religion and beliefs anyway they wish to, even as a minority.

As far as Article 260 is concerned, it is a mere definitive clause in the Constitution and by no means allows the state to create bylaws that shall discriminate against the Ahmadi Community, as was blatantly done by Ordinance XX of 1984. Hence, the laws brought about by Zia-Ul-Haq via in Ordinance XX of 1984 clearly infringe the fundamental rights of the Ahmadis, which have also been recognized at several occasions by the Human Rights Commission[19]. Even a layman may be able to suggest that the laws brought about in the 1984 Ordinance clearly are ultravires (i.e. invalid), discriminatory and against basic Human Rights. However the Honorable Supreme Court of Pakistan thought otherwise in the 1993 case of Zaheeruddin vs. the State.[20]

The appellants in the 1993 case argued that if read in line with Article 20 of the Constitution, Ordinance XX of 1984 is clearly against basic human rights, oppressively unjust, vague, unclear and blatantly discriminatory. The Supreme Court of Pakistan dismissed the appeal with a decision which was unfortunately true in law, yet strange in fact. It held that Ahmadis are rightly barred by law. One of the 3 Judges even declared that it was reasonable for a Muslim to be outraged and therefore attack the Ahmadis if they call themselves Muslims or if they pose as one. Furthermore, The Supreme Court of Pakistan instructed the Ahmadis to invent a religion of their own if they wanted to practice their faith at all. Yes, the law does state that the Ahmadi are non-Muslims, and hence a minority, but the law also fetters their right to claim their right as a minority as well. By doing so, the law could be seen as invalid if read in line with Paragraphs 6, 8 and 9 of the Constitution[21] as well as Article 20 of the Constitution. Why the particular law was not looked at from this aspect seems quite an odd omission by the Supreme Court Pakistan. The International Commission of Jurists, on their comments in relation to the aforementioned Supreme Court decision, suggested that

"In effect, therefore, the religious freedom they are offered is for a religion which is not their own.[22]"

Hence it is clear that the Supreme Court of Pakistan whose basic manifesto should be to protect the fundamental rights of the citizens of Pakistan irrespective of their religion or sect as guaranteed by the Constitution of Pakistan, clearly failed to do so in this case and ended up giving a very bias, vague and ill thought of decision.The reasoning that the Pakistan Supreme Court used in Zaheeruddin to justify the constitutionality of Ordinance XX is inconsistent with the basic requirements of pragmatism, reason and logic. Ordinance XX is clearly incompatible and in violation of the fundamental right of freedom of religion and conscience. Further, placing sanctions over religious views is contrary to the Constitution of Pakistan as well as international Human Rights and arguably Islamic law. The Pakistan Court deemed the laws against Ahmadis necessary to preserve public order, however the respected Court forgot that laws and acts that discriminate are themselves instigators of religious-based violence. Hence, it is thereby submitted that the Court could have ended up encouraging public disorder. Furthermore the analogy drawn by the Court between the copyright laws and religious terminologies is flawed and violates freedom of expression and religion. We, the authors, believe that no one as yet has claimed the right of patent-ship over Islam and its injunctions. Hence the courts irrationally held the religion of Islam and its contents as being exclusive to certain sects. The appellants also rightly argued that Ordinance XX is vague and unclear as truly it is drafted very broadly. It has been kept very open ended and subjective thus making every act of an Ahmadi's life potentially a criminal offence. For instance, the Ordinance states that if

an Ahmadi poses as a Muslim or

in any manner whatsoever outrages the religious feelings of Muslims, [he or she] shall be punished.[23]"

Hence, Ordinance XX doesn't clearly mention what the type conduct shall be treated as an offense. It basically allows for any person who is considered a Muslim by law in Pakistan to hold an Ahmadi liable if he so "outraged" him by his mere conduct. So Ahmadis are left to the mercy of other citizens who, for either some ulterior motive or personal gain, can exploit these laws as they wish to. In other words the Supreme Court's decision gives license and actually encourages other to create more disorder and violence in the name of defending their faith and the Prophet Muhammad's [P.B.U.H.] honour and thus allow them to molest and kill innocent Ahmadis for actions which would have "outraged" him, even if this "outrageous" action was done unintentionally. It can thus be inferred that the very source of extremism is within the embedded laws of the State. The State, which is meant to protect its citizens and allow them to live freely and openly without being discriminated against, is ironically the very tool that appears to be inciting discrimination and violation of basic fundamental human rights to these individuals. In conclusion, we would like to reiterate and stress strongly upon the basic ideology upon which Pakistan was created: it was meant to create a single majority, where no one, regardless of religion, cast, creed and even numeric strength should be able to dominate over another. A state, where every citizen of that country was seen and treated as being equal under the eyes of the law.

However, as one can clearly infer from the above discussion, this has not been so, and the legislation and judiciary have been acting in a manner which is very unlike what the ideology of this State calls for. It could be, thus, safe to say that we, as a society, who were once oppressed, have now become the oppressor. It is thus about time that the judiciary and legislature looks into these matters more thoroughly and reflect upon how distant we have become from the real purposes of this country and at least take a step in protecting the rights the of Ahmadis as a minority, if not as ones that may or could be affiliated with to the Islamic faith. Because regardless of their religious beliefs, the Ahmadi Community are still citizens of Pakistan and deserve the same rights and status as any other citizen.

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1. Right of each citizen to profess, practise, and propagate his religion.
2. Right to attend school without religious instruction freely.
3. Right to enjoy places of public entertainment without religious discrimination.
4. Right to qualify for appointment in the service of Pakistan without religious discrimination.
5. Right to preserve and promote his own language, script, or culture without religious discrimination.
6. (September 25, 1903 – September 22, 1979). Founder of the Jamaat-e-Islami, Party.
7. Report of the Court of Inquiry constituted under Punjab Act II of 1954 to enquire in to the Punjab Disturbances of 1953 [http://www.thepersecution.org/dl/report_1953.pdf]
8. The death sentence upon Maududi was, however, never carried out. It was later converted into one of Life imprisonment and eventually cancelled out, all in the same year.
9. Part II, Chapter 1, The Constitution of Pakistan, 1973
10. Anti-Islamic Activities of Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, XX of 1984.
11. http://www.thepersecution.org/facts/chronology.html
12. Entire Ahmadi Population cited as accused: FIR (NR 367) of PS Rabwah under PPC 1860 [15th December 1989]
13. Wherein adequate provision shall be made for the minorities freely to profess and practice their religions and develop their cultures.
14. Therein shall be guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality;
15. Wherein adequate provision shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;
16. Constitution of Pakistan, 1973
17. Part II, Chapter 1 of the Constitution, 1973.
18. Ibid.
19. http://www.thepersecution.org/hrcp/index.html
20. 1993 SCMR 1718
21. Preamble, Constitution of 1973
22. ICJ Report, 1987
TWENTYTHREE Section 298-B, Pakistan Penal Code 1860; brackets own.

SPECTRUM OF INTERNATIONAL LAW
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Acting, Reacting and Inactivity: An Analysis of Individual Disbelief

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Modern society as it has come to evolve presents an interesting question on how individuals tend to act. We have seen the likes of countless studies over how and why people partake or refuse to participate politically or socially. Moreover, there have likewise been inquiries into what triggers individuals to inspire them to act within socio-political realms. However, what I have found to be intensely troubling is the emergence of a pattern of what has consistently been termed social or political apathy. Further still, it is this looming sense of apathy that spreads and causes countless people to become, by any definition, inactive within their societies. Thus, it is the understanding of the very process of becoming inactive that I believe has caused much of the difficulty in finding an effective way to remedy it. With problems like "voter apathy" or "insufficient participation" affecting society on a global level, it is nothing short of necessary to understand how, what I will refer to as, socio-political inaction developed at all in addition to analyzing why it is so widespread.

Where this discussion must begin is with the tool that shapes how people interact and connect today: technological media. This can encompass the books we read from the gadgets all people are now so dependent on. That being said, no discussion of media is truly complete without addressing the relevance of Marshall McLuhan's Understanding Media: the Extensions of Man. Through this text, McLuhan demonstrates that all technological media represent a method of applying the basic capabilities of the five human senses on a larger level. Essentially, this means that the use of technology guides how, social patterns are constructed. Thus, what I intend to demonstrate is that inaction is a consequence of an underlying yet overbearing paradox within modern society.

The origin of this paradox is found in the progressive expansion of media that has inherently come to dictate human life to a point where we, as individuals, are unlikely to reap any benefit from our actions. Furthermore, that we are just as likely to fall in cycles of being helpless or feeling hopeless as a result. Basically, what this study entails is a comprehensive analysis of McLuhan's discussion over an existing conflict between speech and written text. Moreover, the effects of this conflict must be understood in the context of how technology effects man in general and subsequently his community. In doing so, I will define the terms: action, reaction, inaction, helplessness and hopelessness by using McLuhan as a guideline. Consequently, the purpose of this paper is to provide an analysis of how and why inaction exists at an individual level. Ultimately, I seek to prove that the state of socio-political inactivity and apathy occurs when an individual firmly believes they can no longer extend themselves to remain a functioning, significant member of their society.

McLuhan and the Irrationality behind Modern Society

The basis of modern society stems from a long-lived contradiction between spoken word and written text. What this conflict eventually formed in the present is a nonsensical combination between ancient ideals of forming community and the modern subjective individual.

Essentially, McLuhan begins by stating that spoken word has a natural link to a collective unconscious. This results from the idea that we speak at a basic level of appealing to human senses; in the sense that in order to speak you must be heard and vice-versa.

Written text, or more specifically, the alphabet is naturally grasped at an individual level. In this respect, it does not react to one's sense and in fact separates the individual from them. That being said, the alphabet serves as an extension of man in that we use it to create and control using written laws that ultimately guide social construction.

Consequently, we have evolved into a state of existence where we need not physically experience something to be inspired to act, but are pushed to act regardless. Where this then effects moderns society is through what McLuhan terms the linear nature of literate societies; where humans believe they function in terms of chains of cause and effect. So, this further implies that literate society is based on a root idea that to effect, one must produce cause.

In describing how we extend ourselves, McLuhan first provides us an excellent definition of an extension itself: as a technological advancement through which humans extend the use of their basic senses. Moreover, this is

furthered when seen in light of the idea that various forms of media are representative of the message as opposed to the content they are comprised of. Basically we begin with the idea that technology is something that allows people to extend the way in which we use our senses. Printed works, in this sense, are ascribed as application of one's sight and speech which in itself remains interesting when coupled with the fact that written text causes detachment from the senses.

Subsequently, human beings use media to individually attempt to become part of their larger community. Following this chain of thought, one will be naturally poised to raise questions over how a process deemed unique to each person can apply to society at a general level. This line of debate is a valid one: how does personal use of media affect society and social union as a whole? To this I choose to call on McLuhan in his statement that technological advancement and its subsequent use is akin to the use of natural resources: it is public domain and thus inherently applicable to both the societal and individual levels. As a result, technological media in itself is not subjective, but the ways in which it is used are. Moreover, one must note that the most basic human activity dictates that we, as people, strive to exist as part of a larger group. For this reason our entire eco-system is dependent on the flow of cooperative cohabitation. Beyond that, the cliched nature of giving what you get speaks volumes to the fact that people are inherently codependent. Further still, the most fundamental aspect of the continuation of a species and in turn life is that one being physically requires the existence of another to ensure its survival. Thus, I can firmly conclude that people do not and cannot exist being devoid of the desire to belong to a larger society. This is the fundamental goal: to create an irreplaceable role for oneself within a society. Consequently, McLuhan's technology media as extensions of man is best taken as something that allows man to accelerate his connectivity to a larger sense of belonging.

Herein lies the heart of the conflict that exists in the combination of being ancient community and modern individualism. Essentially, if one's ultimate goal is to function as an integral part of society by way of technological extension, the result is two-fold. First, each individual will be striving to join the community in a manner unique from anyone else. This process will, as a result, hold host to an infinite number of opinion regarding why and how attempts to create social unity should be carried out. Second and subsequent to this is the eventuality that there is no form of an ordering principle behind the inherent subject nature of how this process to create a functioning society of many will place. Further still, this will imply that every individual will likely be faced with conflicting attempts to become part of society or will simply find their attempt ineffective.

Essentially, what we have created in the present day is a no-win situation. We strive to join the collective but are given the means to do so in an utterly disunited way. That being said, there are certain terms that remain necessary to the unfolding of my argument. In defining them, McLuhan once again proves useful. Action, for the purposes of this paper, is the process of finding new ways to use societal tools to become a significant part of community. Whereas, reaction then must represent patterns of how one is affected by the actions of others. Thus, inaction is refusal to participate in taking action. Basically, it is the equivalent to one no longer desiring to actively extend into the collective.

The question at hand asks what pushes one into a pattern of being inactive and apathetic. Moreover, since this argument clearly addresses issues of relative significance and insignificance, the necessity to define what creates the “rock-bottom” attitude that is often coupled with inactive individuals becomes equally as important. I believe this is best studied through the analysis of the terms helplessness and hopelessness and the distinction between them as it is clear that the realm of inactivity is a consequence of some emotional factor as well. However, this increases the likelihood that one can confuse hopelessness with helplessness. Whereas, for this particular study, both have a role in the widespread nature of insignificance, but in completely different ways. On one hand, helplessness is something that describes the physical state of being insignificant. While hopelessness represents the emotional state of feeling insignificant. It is with great ease that I admit that my definition of these five terms through a McLuhan-based guideline cannot be taken as true without testing them first. Consequently, it seems that the most efficient way of doing so is to apply the source of technological media that McLuhan brings up: print. While the media encompasses a great deal of things, the purpose of this paper is to examine the inactive individual. Moreover, we are not given better examples of such individuals than those found in the myriad of stories and other texts today. Thus, this requires the analysis of characters within famous texts to provide examples for the terms of action, reaction, helplessness and hopelessness. In holding these studies, I will use the conclusions of each story used to show that each of these four terms ultimately creates the inactive individual.

Action and Reaction
Achebe's Okonkwo as an Active Character

In attempting to understand how an active character can be described as such at the level of their community, there are few examples more fitting than the character of Okonkwo from Chinua Achebe's Things Fall Apart. From the start it is clear that above all, Okonkwo is an active man in that he detests the idea of not having something to do. As a result, he works continuously so as to avoid being dependent in any way. We are immediately able to see that Okonkwo defines himself as the antithesis of failure; which he considers to be the very core of his father's existence. What this then demonstrates is that Unoka, Okonkwo's father, holds a particular brand of failure that stems from how he cannot accept that his own life goals may include conflict with others'. This seems to be why he has stopped trying to make a place for himself within the community of Umuofia. However, it is odd to think why Okonkwo has come to think the way he does. Here, what remains interesting about this specific society is the relationship between individuals and their senses. The fact that they are not what McLuhan would label a “literate culture:” shows a unique problem in how individuals are detached from their sense regardless. Essentially, this society requires the direct use of its senses to function normally. Thus, when darkness falls, the entire village is limited by each and every individual's restricted sight until sunrise. Moreover, it seems that respect within the village social structure is gained by how an individual successfully manages to act with physical and social restrictions.

However, the people of Umuofia are affected by anything and anyone without truly knowing it. This is seen in how Okonkwo is more taken aback by Ogbuefi Ezeugo's facial expressions than his actual call for revenge against the village of Mbanta. Further still, the importance of the masked “eguwegu” demonstrates a general acceptance than one person cannot know everything about the way in which society functions. This basically implies that there is cultural understanding of the existence that social and political order exists with ways to belong to that order built within the construct. In addition, that there must be detachment from direct senses to create and maintain this order. Consequently, this highlights McLuhan's discussion of a battle between spoken word and written text in such a way that we accept the idea that people affect each other in every way and at every level. Moreover, there is an understanding that a fundamental aspect of community is the implied nature of interaction and, with that, the existence of the uncontrollable. Where one can apply this back to Okonkwo is through consideration of the idea that he takes the things that happen to him in stride, as though he truly believes he has enough control to make the most of every situation that may arise. Furthermore, this cycle of things is seen consistently as the plot unfolds. As soon as Ikemefuna is given to Okonkwo's care, he is put to work and becomes an integral part of the family. However, when confronted with the idea that Ikemefuna must die to satisfy socio-political practice, Okonkwo kills him without much hesitation. Basically, we see that the methods that people choose to live and act by remain of paramount importance in relation to their place in society. For example, when Okonkwo is exiled from Umuofia he wastes no time in beginning to rebuild the life he believes he should have: one that calls for action within society. Here, we see that the failure of his first attempt at social significance has not stopped him in the least.

Were this to be put in the guidelines set by McLuhan, the setting presented by Achebe provides an excellent example of analysis. We are clearly shown that all people naturally do make attempts to belong to their social surroundings. In addition, it is just as natural that any of these attempts has a chance of ending in failure. Thus, one must understand that a world is made up of several actors who act simultaneously. However, it is not until Okonkwo returns to Umuofia that we are truly able to see how his base instinct to always take action is affected by a paradox within society. The spreading of Christianity throughout Umuofia highlights the conflict between spoken word and written text quite literally through the ancient non-literate society of Umuofia versus the very definition of “people of the Book”. Here, Okonkwo finds himself in the no-win situation as a powerful individual fighting the seemingly unified way of community represented by monotheistic religion. Yet, despite the continuous string of bad luck that befalls Okonkwo, he never ceases to act. Perhaps his distaste for being passive equates a belief that he alone can affect everything. It is not until the very end of Achebe's story that Okonkwo realizes he must admit that there are things and people that cannot be controlled. Furthermore, this very realization causes his ultimate change. However, in changing Okonkwo chooses to kill himself; an act that, in this instance, stands as the ultimate form of inaction. Okonkwo's true fault was his own stubborn belief that he acted as a sole unit within his community. This took him to a point where he needed to lose everything to stop doing anything. Essentially, one has to note that society cannot function on and through one man alone. In this regard, there is no such thing as being truly and completely active.

Perhaps it is now worth a look to analyse the balance that the Orator, Okeye, represents. He is a man of importance that understands his place in relation to others. That being said, we must recognize that half of our action is just reaction.

George Grant's Lamentation as Reaction

The idea of reaction must be analyzed in a different manner from the way in which we analyze an obviously active character like Okonkwo. As we defined earlier, reaction is not the result of one's own doing, but how they are affected by what others do. In this sense, I did not find any person open up about how external forces affected him in the way that George Grant in his Lament for a Nation, does. Within this text, Grant discusses his feelings over the progressive loss of a uniquely Canadian type of nationalism and in turn identity. He does so by beginning his narrative in the time leading up to the 1963 election that would see the ousting of John Diefenbaker. Furthermore, Grant seeks to understand why and how Diefenbaker and his Progressive Conservative party had managed to enrage the majority of the Canadian voting population leading up to the election.

Before Grant even steps into the heart of his text, it is painfully obvious that he is unhappy with the state of affairs. He notes that he is not writing in the hopes of suggesting any solution but simply to lament the disappearance of older traditions. Thus, he places emphasis over how this text is a reaction to what has befallen his society and subsequently marks out two important things. First, Grant, unlike Okonkwo, is completely aware that he chooses to discuss things without proposing an action to follow it. He overtly succumbs to the sense of despair he feels over the events he has chosen to discuss. Moreover, this implies that he knows that there are things that he cannot control, nor does he desire to try to do so. Second, again unlike Okonkwo, Grant speaks solely in terms of others' actions; essentially presenting his reader with his entire journey to the point of lamenting for lament's sake through external actors. The importance of this is based in how this allows the reader to understand how technology, tradition and inter-societal disagreement took a toll on Grant at the individual level in addition to the society he yearns to be a part of.

In setting the historical scene of Canada during Diefenbaker's time, Grant is quick to point out how the country was in the midst of a rapidly changing socio-political atmosphere. This is seen through the importance he places on the economy of Central Canada and Diefenbaker's subsequent failure to understand and address the fact. In marking this out, Grant credits Diefenbaker with the belief that the economy was to remain second to Canadian nationalism in the eyes of the voters. Further still, Grant notes the extreme necessity in addressing the issues concerning the French-English divide in light of French-Canada. Or, rather it is key for every political leader to show some thought towards those issues. In defining the clear distinction between French and English Canada, Grant demonstrates the obvious existence of conflicting beliefs at the societal level before even reaching the individual level.

At this point, one must ponder on the implications of how the individual is ever expected to truly succeed in society if the community we want to belong to cannot seem to sort itself out either. Cultural differences aside, one of Grant's most enthralling points is highlighted in his discussion over the rise of “continentalism”. What this demonstrated was that much of Canada's own identity was sacrificed in the progress of fitting into a larger picture of a greater and more unified North America. The core of this argument shows that the influence from beyond the U.S.-Canada border combined with the rising popularity of liberal economic policies and the lack of attention toward French-Canada produced a country that began to play host to predominantly American values. What must be highlighted is the fact that the society Grant mourns is disappearing, in turn making his efforts to extend himself into it all the more futile. What use can technological media be when the society that is meant to use it cannot define itself? Thus, with continentalism on the rise, Canada held the same paradox of an old vision of community filled with modern individuals which now came complete with the expectation to accept the larger community of North America. In other words, one was pushed to join a community that hadn't fully formed in itself in a rapidly disappearing unique Canadian way. This is something Grant believes is inherently impossible. The issues Grant chooses to discuss fare rather engagingly through the lens of his trouble with continentalism.

When Grant explains the unfolding of Diefenbaker's struggle against allowing the Bomarc warheads to be put on Canadian soil, one has to wonder how this question was taken at the societal level. If technology acts as a way for humans to extend their senses and in turn capability, it seems that these warheads were representative of the very conflict Grant is experiencing throughout his work. Essentially, the fact that Grant would never be able to

reconcile to the continentalist Canadian ideal will undoubtedly allow him to stop attempting to do so. As if the prospect of having the power of the Bomarc missiles is equated to the grand power of being part of the infinitely large continent of North American. This is inherently why he only laments and does not propose solutions; he is at a loss on how to reconcile himself to his society in any way. The loss of tradition is something he yearns to fight against but will not follow through on because he ultimately believes he will fail. With that, Grant effectively defines his own no-win situation.

However, I then inquire, since when is the act of lamenting not a method of social extension? It seems highly unlikely that one reads Lament for a Nation and does not aspire to define Canadian nationalism in their own mind. Moreover, it seems just as unlikely that Grant wrote his work without having some idea of the effects it could have on those who read it. That being said, a closer analysis of Grant as a reactive man is necessary. There is no doubt that every individual must react to media extension in one way or another as the inevitability of social and political interaction will realize this fact. In spite of that, just as there is no life made completely of action, there cannot be a life consisting solely of reaction. Perhaps it lies in the way one phrases it: reaction is equal to how one is affected, and inaction is the refusal to participate in pursuing socio-political significance. How is an individual who lives solely by reacting doing anything other than being inactive? Thus, it is within this thought-process that despite Grant's claim that he does not seek anything other than to lament the loss of traditional Canadian values, he is actually extending what he personally saw unfold in Canadian politics through his text. One does not publish a printed work without the expectation that someone with read it and be affected by it. Consequently, Grant is seeking to convince himself that he is already an inactive character by way of what he could not control without realizing that his inaction has already produced social and political significance. Reaction, while it is an inevitable part of social function, cannot ever encompass the whole of it.

Helplessness and Hopelessness

While the study of how one becomes inactive undoubtedly implies an in-depth analysis of action and reaction, to leave it at that would ultimately fall short of truly explaining what lies beyond the simple definition of inactivity. The discussion of action through Okonkwo and reaction through Grant definitely allows an understanding that there is an element beyond the patterns both figures chose to engage in socio-political extension. The missing element is only found in conducting these character studies as we have done previously. Essentially, what is missing is an explanation of the actual physical and emotional consequences of insignificance and how these aspects factor into the choices an individual makes. Further still, the gap of knowledge leaves one questioning how prominent these factors are in the progression of inactivity. Thus, I labeled these two aspects helplessness and hopelessness. Where the former represents the physical state of being insignificant and the latter describes the emotional state of feeling insignificant. At the root, the analysis of these two terms will show that while action and reaction relate to causes of events, helplessness and hopelessness relate to the effects of those events.

Kafka's Metamorphosis: The Combination of Causality and Emotion

There are few things more frightening than the thought of waking up in a body other than your own. As McLuhan tells us, the senses we rely on are tuned so uniquely to every individual that to be separated from them so suddenly would epitomize shock and horror. This is exactly the situation Kafka presents with through the character of Gregor Samsa in Metamorphosis. As the story goes, Samsa wakes up one day having turned into a cockroach while sleeping. Samsa believes that if he is able to get up and resume the activities of his daily life, that he will be able to attain normalcy once again. Here, Gregor presents an interesting thought process: something uncontrollable has happened to him but he is seemingly unaffected by it in his mental state. Repeatedly, Gregor attempts to move his newly gained body in such a way to simply be able to get out of bed. In terms of actions and reactions, Gregor acts somewhat normally in that there is an understanding that he cannot physically control what has happened but what will come next. Moreover, the importance Gregor places on how work is a necessity implies that that is how he chooses to express his social significance. This is seen by his memorization of the train schedule; the very tool by which he extends the distances he can physically move within. Further still, Gregor makes habit of reminding himself of his own personal distaste for panic. This is only highlighted by his family, which has the complete opposite reaction and they lock him in his room out of fright and shock. Again, we are immediately presented with the ways in which individual attempts to function in group-settings can come into conflict. Gregor, as was pointed out, is dead set on the

idea that he can and will maintain the life he is accustomed to. However, in doing so, he still credits the existence of uncertainty as to how his family will react to his transformation. His family cannot begin to accept the change that has taken place which in fact causes Gregor's father to fall into a fit of rage. Oddly enough, this sense of emotional disbelief acts as a perfect example of trying to detach themselves from their senses. Essentially, Gregor's transformation was visibly too overwhelming for his father, a man who has recently fallen out of the workforce and respective social position, to bear. Thus, he locks Gregor where he does not have to be seen and "dealt with".

Upon awakening after his initial transformation and subsequent lock-up, it is clear that the true affects of this change have begun to sink in. As a result, Gregor is no longer too focused on returning to his old life but in fact how he will adjust in the present. He is, however, relieved with the fact that he is left alone to reflect and proceed as he sees fit. Here, the relationship between Gregor and his sister proves to be important. In trying to respect how she will react to the sight of his new form, Gregor hides when she is in the room but soon discovers he is now fond of darkness and silence. Upon realization this, Gregor reflects on how being out of the light and distanced from noises allows his brain to function without distraction. Essentially, he has been betrayed by his senses, leaving him to put all of his trust into his rationality; Gregor needs to be detached from his physical senses to stay emotionally stable to create a new sense of normalcy. Moreover, the fact that he cannot communicate physically has not changed his emotional ties with his sister. They seem to have an unspoken understanding of how to coexist in light of the change in family dynamic - as though she must pay him back for his previous support when she could do nothing, now that their roles have switched. Beyond this, Gregor begins to enjoy climbing and pacing around his room. The comfort of being able to move freely acts as a sort of metaphorical reminder that he is not permanently glued to the floor, after once walking so tall. As Gregor begins to feel somewhat comfortable in his insect body, he ventures out of his room and reaches out to his family. The pure terror in the eyes of his family that is described and his father's vengeful reaction causes Gregor a serious injury on his back. It serves to recognize Gregor's own ignorance here: he believes his transformation has not altered the way his family functions other than at physical level. This is why he believes his father cannot catch him in his fit of rage. Quite simply, Gregor is not used to seeing his father as a physically active man.

However, that ignorance over the change in his family's mentality is what begins to push Gregor into disbelief and anger over his own transformation. Consequently, it is only after Gregor is injured by his father that we see a deterioration of his calm, collected logic. When faced with the idea of losing the love of his family, the only form of society Gregor has left following his transformation, he loses the reasons he once held to think rationally. As Gregor gets weaker in light of his injury, bitterness takes over. The distance of his home and in turn his entire life begins to take its toll. He questions the point of continuing to act in this body if it will exist in isolation. As this progresses, he is no longer looked after by his family; he is now a burden where he was once a functioning and respected member of his family. Thus, in one last attempt to leave his room, Gregor once again rebels against the animosity of his family only to have his sister lock him back in his room. Furthermore, upon the realization that even his sister is completely fed up with him, his legs give way and he dies that night. Gregor's transformation and ultimate death underline many things. While his physical state is diminished from the starts, he functions freely at an emotional level until he is seriously injured. Thus, one has to note the symbolic nature of movement. Gregor continues to stay active and believes in the positive nature of his existence as long as he can physically move without problems. This is essential to how he views individual significance. In despising his father's initial type of physical inactions, Gregor views himself as an active man. Consequently, his injury finally takes away that capability and implies that Gregor is now completely helpless. However, upon his physical weakening, he loses his rationality. Basically, while Gregor has been physically restricted since his transformation, the final weakening coupled with the emotional disbelief negates any chance he once thought he had to maintain his significance. Upon fearing the coming of his insignificance, even Gregor's last attempt to leave his room out of rebellion speaks to the fact that upon failing one last time, the idea of the insignificant ant on the floor becomes much more vivid. Upon the true belief that he does not matter, Gregor finally stops moving and dies.

Beyond Gregor's physical movement, the other constant in his life is the maintenance of his rationality. As he phases in and out of sleep or is once again locked in his room, it can be marked as times between a failed attempt to be significant and the beginning of a new attempt. Each of these attempts is marked with a new physical restriction but is following a string of logical thought behind it. Thus, when Gregor finally gives in to fury and resentment, he succumbs to the very

thing he first claims stops men from action efficiently: giving into panic and rage. Ultimately, he believes himself to be physically and emotionally useless; something that he easily equates with death anyway. Essentially, what Metamorphosis shows us is quite clear: that physical helplessness does not cause inaction alone. Rather, it is the combination of the both the helplessness and the hopelessness that lead to complete disbelief and then a sense that in being insignificant, there is no point in extending into society. Both Gregor and his family stand as perfect examples of this: Gregor, a man physically restricted, did not act in his situation upon becoming hopeless that the situation was not worth living actively for. His family, especially his sister, were not physically bound into that situation but were emotionally tied to Gregor as a family member. It is not until Gregor's father and sister are physically exhausted from the work they are now forced to do to support everyone that the same desire to stop acting the maintenance of family structure set in. Essentially, this implies that just as our lives are made up of a series of actions and reactions, so we must be inspired to maintain society in this manner with both the physical capability and emotional belief that we can do so. "

The obvious trouble with addressing an issue that can be as person as why a person acts or does not act becomes a source of controversy in societies guided by tyranny, dictatorship and ignored minorities." The clear answer here is that this particular study applies to open society. This is not to say that any society exists without its own rules, but to imply the existence of societies where these rules are not decided by one man or the like. Coexisting implies openness, not following individual commands.

Moreover, I expect that people will criticize the fact that this study does not end in a proposal of how to fix the solution. In mentioning that there is no ordering principle behind technological media, I do not mean to imply that there can be one. In stating that the problem is being physically or emotionally restrict by society, the answer is not to add more rules. Instead, what I intended to do with this argument was open up the idea of inaction as rather nonsensical in most cases. In that, in choosing to be inactive, one is still choosing to do something. However, this cannot and should not be applied to those who live in suppressed society. It seems paradoxical to choose to be inactive when inactivity is the result of disbelief and unhappiness and the continuation of it would prove to cause more of the same feelings of insignificance.

Essentially, in redefining why apathy is so widespread, it serves to believe that it can be reversed.

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The Extraordinary Life of Humaira Awais Shahid

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Whilst female liberation and empowerment is an often debated subject in Pakistan, acknowledging those women who have brought about a positive change in society is an important aspect of it. Defying the norms and broadening the scope of opportunities for women is a difficult task but definitely something worth the effort and appreciation.

In a country where political turmoil and social unrest is a common denominator, only a few people, let alone women have been able to stand up for what they believe in and achieve something in that regard. One such strong and determined woman however is Humaira Awais Shahid; a human rights activist, a provincial legislator and a working journalist who has undoubtedly made her mark in Pakistan's undergoing development. Not only has she been writing, advocating and legislating against human rights abuses but she also stands as the first parliamentarian of the Provincial Assembly of Punjab to have repealed a law and passed a new, more effective one as a private member.
As a woman and now an influential activist, Humaira's life has undoubtedly been an intriguing one fueled by hard work, determination and a passion to bring about a positive change. Before stepping into politics, Humaira taught at Jinnah Institute. She started her political carrier as the head of a women trauma helpline, during which experience she was acquainted to the atrocities within her surroundings as stories relating to rape, domestic violence, crimes etc started pouring in. It was this encounter with the harsh realities of the world that encouraged her to take serious steps to prevent them or to tend to those who suffered because of them. Through this helpline, Humaira got a fair idea of how the system operated and the countless stories she came across, pushed her further to take an initiative.
Humaria met with several girls who had been forced into prostitution to pay off debts and loans. She discovered soon enough that the system was being driven by not only social circumstances but also huge mafias. Despite being faced with skepticism and criticisms, Humaira started to take active steps against the plight of these girls. Her efforts were rewarded by threats and further criticism. She, however, was determined and motivated and these threats in fact acted as catalysts to help her achieve a milestone.

Her pride worthy legislation i.e. 'The Punjab Private Money Lending Act2007' has accounted for spectacular reform within the primary sector which forms an imperative part of Pakistan's sustainability and growth. The legislation essentially prohibited interest based private money lending in Punjab and after its roaring success, it was adopted by the provincial assembly of the NWFP. Whilst this remains to be one of her most popular and successful achievements, Humaira must also be given due credit for passing many resolutions against acid crimes, fundamental rights of women in Islam, forced marriages, rights of women in Islam, the punchayat system (village councils) honor killing, rape, dowry, beggary, street and child prostitution, police reforms, budget development, Islamic micro Investment and finance projects and several other diverse issues faced by Pakistan.

Recently, she was re-elected to the Punjab provincial assembly on one of the reserved seats for women. As an MPA, she has been working on developing the legal mechanism of the Islamic Agricultural system known as 'Bai Salam'. This can be said to be one of her greatest achievements and propositions as it appears to be a sensational substitute for subsidies and usurious loans for small scale farmers. Fundamentally, Bai Salam is a transaction in which the farmer becomes the seller and undertakes to supply specific goods (mainly crops) to a buyer (being the bank) at a future date in consideration of a price fully paid in advance at the commencement of the contract. This system specifically addresses the needs of the farmer by allowing him to utilize the advance payment to meet his current working capital or liquidity requirements such as the purchase of seeds, fertilizers, inputs, lining of water courses, electricity charges and essentially anything that is needed to grow the relevant crop in addition to the family needs from sowing till harvest. This system is beneficial to not only the seller as he receives the price in advance but also the purchaser who purchases at a price lower than the price in spot sales thus ensuring a higher profit. If we look at it from an external point of view, no one can deny the fact that the very system of Bai Salam clearly favors small scale farmers, positively introduces corporate farming and greatly curbs inflation, hoarding and the abrupt changes in the price mechanism in hopes of revitalizing the agricultural economy of the country. Farmers are also at an advantage of producing crop without financial apprehensions and are therefore more likely to

ensure use of quality mechanisms and fertilizers. It is truly a great start of a positive social and economic shift. In the long run, the Bai Salam system is guaranteed to bring down the cultivation cost as the farmers will not be paying any interest or overpriced input cost for seeds, fertilizers, insecticides etc, which would naturally help them avoid usurious over pricing demands and economic exploitation. They will also be given an opportunity to freely bargain a fair price for their trade rather than let their loans and huge debts influence them. Reduced payments being made on time will bring down the cultivation cost of the farmer resulting in an increase in the profit margins. Moreover, the Bai Salam system also focuses to achieve 'Cooperative Farming' through cluster farming where a cluster of four small farmers, each holding land of 12 acres or less can group into two squares of land and enter into a Bai Salam contract. This gives farmers a better and much varied choice in cultivating major crops to be able to compete with large land owning agriculturists, thus providing great opportunities to operate parallel to big land holding agriculturists in regards to facilities and technologies which may otherwise be unavailable to them.

Though these are the initial steps, it allows for the government of Punjab and the financial institutions to start Ijara which is a system of Islamic financing and welcomes schemes like 'solar energy based tube wells', ' tractors' (which can be easily afforded by clusters), 'Sprinkle units' and other agricultural schemes of irrigation and lining of waterways. Not only is this a lucrative offer for farmers but also a socially, collaterally viable option for banks and financial institutions. The very fact that the crop's ownership will belong to the bank, government or a private company will have its own merits. It will result in an increased yield, production and quality of the product, access to new research and technological facilities and agricultural inputs can be facilitated at better affordable costs. What also needs to be acknowledged is that inflation and hoarding can be curbed through this method which will certainly be a relief for Punjab. If the government is the prime buyer of the crop, directly purchasing though Post-Salam contracts with the banks or a direct Bai Salam contract with the farmers, it will control the supply of the product in the market. Controlling the supply of and curbing the problem of hoarding will also result in a change of the price mechanism and render it less vulnerable to artificial price hike due to shortage. Pakistani laws are known to be religiously motivated but this system has not only proven to be popular amongst the religious groups but has also shown its economic efficiency. Simultaneously, the religious institutions and different schools of Islamic thoughts have shown an eagerness to adopt this idea and support to bring forward this positive social change. The Bai Salam is undoubtedly a milestone in bringing forward the riba free economic, social justice concept of Islam. This concept has written support through fatwas from major Islamic scholars and their willingness to support it is a lively aspect.

Today, this system undoubtedly stands as one of the most dynamic and favourable reforms for the people of Pakistan and its entire credit goes to Humaira Awais Shahid. It goes without saying that Pakistan is in desperate need for more women like her and we should strive to follow her footsteps. To bring about a positive change whilst being faced with adversity is certainly one admirable trait and to achieve what Humaira has achieved for Pakistan is certainly the very best deliverance of our duty that we owe to Pakistan.

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Non-discrimination under the WTO Provisions - A Detailed Analysis

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'the benefits of globalisation are obvious...: faster growth; higher living standards; and new opportunities, not only for individuals, but also for better understanding between nations and for common action. Our Problem is that, at present, these opportunities are far from equally distributed.'[1] .

[Secretary General Kofi Annan]

The need for economic globalisation created the phrase of 'international trade' which has for decades, now, acted as a bond between the rich, developing and poor countries. Peter Sutherland[2] in his article, was of the view that economic globalization is the only way to achieve peace, harmony and stability in this modern world. It is not only the countries which shall be affected, by promoting international trade, but the people who will attain a better living standard, in this striving world. Hence as Secretary General Kofi Annan pointed out the problem, I intend to incline my discussion towards one of the main principles of international trade, which is, having no trade barriers by upholding the principle of non-discrimination. The principle aim of the members of World Trade Organisation is to cater for domestic and international trade harmony, therefore all discriminatory measures shall have adverse affects towards the scope of international trade. The principle of non-discrimination is a vital part of the World Trade Organisation's multilateral trading system[3] which has gained remarkable success in solving the problem of trade restrictions. Furthermore, it can be categorised in two forms namely the most-favoured-nation treatment obligation and the national treatment obligation. The former requires all members of the organisation to treat the member countries in the same favourable way as it would do, to one of the favourite member states. However, for the purposes of this question, the national treatment obligation under the General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS) needs to be compared by looking at diversified angles of the obligation. For this comparison, it is important to define the Articles of GATT and GATS, concerning national treatment obligation. [4]

GATT 1994, Article III, caters for the obligation of national treatment. GATT 1994, Article III, Paragraph 1 directs member states to avoid the notion of protectionism. The spirit of this paragraph is to prohibit all member states from giving preference to domestic goods over imported goods, once the imported products have entered into the local market of the concerned member state. Hence any favourable condition towards a domestic product will undermine the scope of the stated paragraph. According to the US-Section 337[5] the article aims to repudiate any domestic measures applied individually or simultaneously, on imported or domestic products, consequently protecting the member state's domestic products. It was more specifically said in Japan-Alcoholic Beverages II[6], that any protection given to the domestic products by way of a discriminatory internal taxation or regulatory measures is a breach of the national treatment obligation. GATT 1994, Article III, Paragraph 2 addresses the issue of discriminatory tax provisions being applied to the imported products. The appellate bodies, panel reports and authors providing a commentary on this paragraph have categorised this paragraph in two sentences. The crux of the first sentence is whether local and imported products are 'like products' and whether the imported products are taxed 'in excess' of the local products. [7] The second sentence extends this scope by questioning the 'competitiveness' of local and imported products and if they could 'substitute' each other. Moreover, it questions the characteristics of the 'non similar tax' applied to imported products, which is in fact protecting the domestic product.[8] GATT 1994, Article III, paragraph 4 extends itself to the internal regulation applied to the imported products as opposed to the domestic products. The domestic laws or regulations are evaluated under this paragraph and it is seen, if the products were like products and that the domestic law or regulation had favoured the local production.[9] Hence it is evident that this article provides with a wider scope of application of the non-discriminatory measure to all trades in goods.

Unlike the GATT 1994, Article III, national treatment obligation has a different weight in the GATS 1995. Bimal Ghosh[10] states that unlike the goods, services are intangible and can be consumed simultaneously. Moreover they can be performed by cross border electronic means or by the movement of the service provider to the consumer's country of residence or vice versa. GATS 1995, Article XVII caters for the national treatment obligation. The article emphasises that the national treatment obligation is not

applicable to all services. It is only applicable to those member states who assume this obligation, in a specific service sector. Moreover the member states can make commitments by incorporating various regulations when committing themselves to the national treatment obligation applicable to services. These regulations could include residency requirement of the executives; certain investment requirements and different capital requirements as opposed to the domestic service providers. However keeping the commitments in mind, the spirit of the article, under GATS 1995, should not be hindered by discriminating domestic services with foreign services; consequently favouring the domestic and impeding the free trade rights of foreign service providers. The test for 'measures affecting trade in services'[11], 'treatment no less favourable'[12] and 'like services and service suppliers'[13] apply respectively if a member state is in breach.

With respect to the general overview of the articles concerning national treatment obligation in GATT 1994 and GATS 1995, as provided above, various comparisons can now be appropriately initiated. Gaetan Verhoosel[14] in his book asserts that the national treatment obligation in GATT 1994 and GATS 1995 are conceptually different however their wording is similar. He breaks down the language commonly used by both agreements in four parts which are as follows: 'the language in both provisions prohibits (a) either all laws, regulations and requirements or all measures, (b) affecting either the internal sale, offering for sale, purchase, transportation, distribution or use of goods or the supply of a services, (c) which accord less favourable treatment to either foreign goods or foreign services/service suppliers, (d) than to either like domestic goods or domestic like services/ service suppliers.'[15]

Scrutinizing the first part of the commonly used words by both agreements, it is witnessed that the panel uses a more purposeful approach in interpreting the words. In accordance with the GATT's agreement obligation, if a member state is in breach, the measure shall only be evaluated as contrary to the obligation in GATT 1994, Article III: 4; hence its applicability across the board is not of any relevance. The case of Canada – Administration of the Foreign Investment Review Act[16] gives an excellent account of the interpretation given by the panel. The panel stated in its report that the Act was a breach of the national treatment obligation, specifically being GATT 1994, Article III:4. The Act restricted the foreign investors to buy imported products, consequently favouring the domestic production. Moreover, the foreign investors were not under an obligation because the scope of GATT 1994, Article III: 4 does not apply across the board. Further, scrutinizing the first part of the commonly stated words, a 'requirement' is established within the meaning of the provision if a company while selling the affected imported goods, is legally or voluntarily obliged to carry out, in order to achieve an benefit from the member state.[17] Thus, it is clear that the applicable procedural guidelines are not distinct to the terms they intend to implement; hence they remain within the scope of GATT 1994, Article III: 4.[18] Comparing this discussion with respect to GATS 1995, Article XVII, Gaetan Verhoosel[19] is of the view that the element of 'measures', as used in the first part of the commonly used words, are only evaluated by their consequential affects on services or to the service providers. He goes on to argue that it is unfortunate that the true characteristics of the measures are not categorised as in the GATT 1994, where the scope of discrimination caused by such measures on imported products is much wider and better. Following the contrast provided above for the first part, I would like to move towards part 'b' of the quotation as provided above. The key word that is common in both agreements regarding national treatment obligation, is 'affecting'. With regards to the GATT 1994, Article III, the case of Italian Discrimination against Imported Agricultural Machinery[20] is important. The panel in this case notified that the laws and regulations that affected the procedures of sale and purchase or harming the healthy competition between the imported and domestic products shall comprehensively be covered under the head of 'affecting'. The panel in the EC- Bananas[21] case gave a wider meaning to 'affecting' with respect to GATS 1995, Article XVII. It did not restrain itself by interpreting the measures or regulations applied but instead the consequential effects of those measures or regulations were taken into consideration. Therefore, if the effect is taken into consideration it is evident that any type of regulation could be taken to task by the panel, which promotes discriminatory effects. Moreover in the case of Canada – Certain Measures Concerning Periodicals[22] the panel went on to say that if there was an intention for serious limitation, the drafters would have included them in the agreement, however they did not, which leaves the panel to decide the cases of discrimination under GATS 1995, by way of the effects caused by the measures or regulations applied to services or service providers. This takes us to part 'c' of the quotation which refers to 'less favourable treatment'. To interpret this phrase under GATT 1994, Article III, the case of US – Section 337 of the Tariff Act 1930[23] is of significant importance. The

panel in case was of the view that imported products should be given every equal opportunity available in the member ,state's legislation and member state's internal market; as the domestic products are provided. This could include laws, transportation, marketing, competition and distribution. Furthermore the panel went on to say that under the GATT's agreement, the manipulation of the discriminatory measure is irrelevant because it can only be accorded once the effect has taken place and not before that. Moreover if the procedural requirements for parties, dealing with imported goods is different, it should be seen that this difference creates a more favourable condition for the imported products. Therefore the spirit of GATT 1994, Article III is to promote equality between imported and domestic products from the grass root level and it does not make a difference if there are procedural diversities, as long as there is no 'less favourable treatment'. With this argument in mind, I can certainly point out with reference to Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef[24] that the national treatment obligation prohibits the scope of both de jure and de facto discrimination because it caters for both identical and different treatment of domestic and imported products. The appellate body in the referred case rejected the single minded view that a member state's measure only amounts to de jure discrimination amongst imported and domestic products. The appellate body notified that the 'condition of competition'[25] between the imported and local products cannot be ignored therefore a variation in the procedural requirement is not good enough to decide discrimination.

In comparison to GATS 1995, Article XVII it is hard to find an equivalent stance taken by appellate bodies or the Panel itself. However a detailed analysis of the case namely EC – Regime for the Importation, Sale and Discrimination of Bananas[26] provided with the distinctive views of the appellate body and the panel. In Paragraph 7.301 of the panel report, panel evaluated de facto discrimination by reading GATS 1995, Article II regarding most-favoured-nation clause in the light of GATS 1995, Article XVII regarding national treatment obligation. Though the appellate body in its report(Paragraph 231 and 232), did not reject the stance taken by the panel; it did provide an alternative view stating that it would have been advisable to read the most-favoured-nation clause in light of GATT 1994 which caters for the de facto discrimination, thus would have provided with a healthier comparison. The advice by the appellate body is unique in nature, because it provides with various forms of speculations concerning the stand which shall be taken in future cases. These forms could include that the appellate body did not talk about the similarity of de jure discrimination of imported goods and foreign services. Hence, will it be covered by GATS 1995 or would it be interpreted in relation with GATT 1994 is an open ended question. Moreover it directed the panel to view de facto discrimination in GATS 1995 in relation with GATT 1994. This could mean that the appellate body to some extend thinks that there is a similarity in the scope of both agreements and that the articles concerning discrimination of imported goods could have a similar meaning to that of, concerning discrimination of foreign services and service providers.

The last part of the quotation to which Gaetan Verhoosel refers, as being commonly used words in both agreements, is about the 'likeness' of goods or services.[27] The explanation of 'likeness' is subject to great complexity however the question of whether its scope is similar in meaning to national treatment obligation in both agreements is yet to be discussed with reference to case law and arguments. Considering 'likeness' under the GATT 1994, Robert Hudec[28] referred to two categories of belief. The first defines likeness of products with respect to the product's characteristics such as physical appearance, substituting factor and consumer's choice. On the contrary the second belief determines likeness of products through the objective and effects of the regulation applicable to the goods. Besides these two beliefs the panel, however had preferred to test a likeness of the product by its physical characteristics, 'end-uses'[29], diversified customer preferences in different member states and tariff classifications.[30] This stance taken by the panel, was changed in the case of United States – Measures Affecting Alcoholic and malt Beverages[31] where the panel interpreted GATT 1994, Article III in view of protection provided to domestic products, through discriminatory taxes and regulations applied to imported products. Therefore it is evident that the panel shifted to the approach that any discriminatory measure applicable on imported and domestic goods consequently protecting the domestic goods, shall come in the ambit of 'likeness' of products test . The un-adopted panel report of the case United States – Taxes on Automobiles[32] added to the arguments of the former case stating that if Paragraph 2 and Paragraph 4 of GATT 1994, Article III, are interpreted in accordance to Paragraph 1 of GATT 1994, Article III; it will become clear that the article restricts member states from accommodating measures which protect their domestic products in comparison to the imported products. However, the panel changed its views from the two cases

referred as above in Japan – Taxes on Alcoholic Beverages.[33] In this case the panel rejected to only take into consideration, the protective theory. It went on to say that the every case differs in nature, hence the definition of 'likeness' shall differ too. Therefore, the purpose and affect of the discriminatory measure cannot be ignored so Paragraph 2 of GATT 1994, Article III should not be read in the light of Paragraph 1 of GATT 1994, Article III. The appellate body however, differed from the panel report and over turned the decision. With regards to Paragraph 4 of GATT 1994, Article III being read in conformity with Paragraph 1 of GATT 1994, Article III, the panel in the case of EC– Certain Measures Affecting the Automotive Industry[34] followed the appellate body's decision in the case above, stating that it was not right to interpret Paragraph 4 of GATT 1994, Article III in isolation with the protective theory. The bottom-line to this discussion was brought by the case of European Communities – Measures Affecting Asbestos and Asbestos-Containing Products.[35] The appellate body in its comprehensive report specifically points out that Paragraph 2 and Paragraph 4 of GATT 1994, Article III should be read in context with Paragraph 1 of GATT 1994, Article III. It stated the scale of 'likeness' is boarder in Paragraph 4 of GATT 1994, Article III because it promotes an individual obligation applying to like products. On the contrary in Paragraph 2 of GATT 1994, Article III, there is a division of two obligations that are applied to like products, though two sentences. Hence both paragraphs fall within the ambit of Paragraph 1 of GATT 1994, Article III. Furthermore it scrutinized the health risk evidence with the same traditional criteria of 'likeness' emphasising that it comes within the meaning of the physical characteristic of the imported and domestic products. However the appellate body was of the view that in a case where the evidence is subject to the physical characteristics of the products, imported and domestic products shall be evaluated with respect to their physical properties. Therefore with reference to this discussion I am of the view that the appellate body shall evaluate each case individually and that in every case, subject to relevance, paragraph 2 and 4 of the GATT 1994, Article III will be read in accordance with paragraph 1 of the same article. Furthermore the likeness of products will additionally be evaluated according to the subject matter of the evidence provided for example tariff classification, similar physical properties and customers preference of products.

In contrast to the arguments provided above relating to'likeness' in GATT 1994, the appellate body and the panel took the concept of 'likeness' in GATS 1995 Article XVII, into consideration, in the case of EC – Regime for the Importation, Sale and Distribution of Bananas.[36] The panel in this case was able to find out that the 'nature and characteristics of both whole transaction and whole services' was alike.[37] Hence if these services were individually or collectively reviewed, it would be evident that they attained similarity, thus if classified as like services; the service providers automatically fell under the same heading. On appeal by the EC, to include the test of the 'aim and effects', in evaluating the licensing system, the appellate body was of the view that this test was for the purposes of GATT 1994, Article III due to the protective theory applicable to the domestic and not to be applied for the national treatment obligation in GATS 1995. The simple reason for this rejection of the appellate body is because GATS 1995, Article XVII refers to 'like' services and service providers and not to the competitiveness or substitution of these services. However, I feel this should not be the case. For example Japan incorporates a requirement on the transportation sector in its local market that all drivers need to pass the local driving standards and ascertain a local driving licence in order to drive in its territory, because Japan believes that the driving requirements of other member states do not meet its standards. If Korea complains to the panel about the de facto discrimination by Japan, stating that the foreign and domestic drivers provide like services in Japan; I believe Japan will conversely argue that the driving licence requirements in Korea itself are 'unlike' to that of Japan, thus it is not possible for Korean drivers to provide the same services as the Japanese drivers would do. Hence the idea of competitiveness of goods as provided in GATT 1994 Article III Paragraph 2 if interpreted with regards to services or incorporated with context to GATS 1995 Article XVII, would definitely help in determining if the services were 'like' or unlike. However until now this has not been done, therefore the answer to the problem in my example shall remain uncertain unless decided by the panel or an appellate body in any subsequent case. Ernst-Ulrich Petersmann[38] adds another point in this discussion stating that there are two main channels of trade in services. The first being commercial presence; the foreign service provider will be physically present in the territory of the member state which is importing the service, hence the members state's laws shall be directly applicable and any deviation shall amount to de jure discrimination under the national treatment obligation. The second channel important to the concept of trade on services is cross border provision where the consumption is abroad however is initiated in the home country. This causes doldrums in case of 'regulatory jurisdiction' however GATS

1995, Article XVII does cater for this channel. In the GATT 1994 national treatment obligation the article tends to collectively take the imported product and its producer under the heading of 'likeness', this should be done in the case of GATS 1995. This is because like service providers can be totally different from like services hence de facto discrimination of a like service provider may not prove to be discriminatory in terms of the services provided. Ernst-Ulrich Petersmann[39] elaborates this with an example that if a regulation directs the banks to ascertain a minimum reserve different from that of an insurance company, when providing the loan; it is evident that the service providers are distinct in nature however the service is 'like'. Thus as provided there should be a fundamental difference between the style of interpreting national treatment obligation under GATT 1994 and GATS 1995.

Following the similarities and diversities discussed above regarding the national treatment obligation under the GATT 1994 and GATS 1995, the question arises whether de jure or de facto discrimination will make a difference or not in accordance with the two agreements. De jure discrimination occurs when a member state of the World Trade Organisation imposes a discriminatory measure by law on the imported goods as opposed to the domestic goods. Hence a tax provision of six percent on imported goods in comparison to a five percent tax on domestic goods will clearly amount to a de jure discrimination. In comparison to this a de facto discrimination shall occur when a member state of the World Trade Organisation discriminates imported products in comparison to domestic products with respect to their physical characteristics. Hence if a member states applies a higher tax on caged hen eggs as opposed to free range eggs, a de facto discrimination could arise if the caged hen eggs are an imported product in the concerned member state.

With respect to the GATT 1994, Article III national treatment obligation, de facto discrimination has often been witnessed. The landmark case of Schieffelin & Co v. United States[40] is of vital importance in evaluating the stance of de facto discrimination in the GATT's agreement. In this case a $10.50 tax, as per the law of the United States, was applied to the 'each proof gallon or wine gallon below proof'[41]. It was found that although this tax was applied to all domestic and imported alcoholic products, the domestic producers were being favoured as they diluted the 'proof' as required for sale purposes, consequently paying a tax amount of $9.03 in comparison to the wine importer who still had to pay the $10.50 tax. This tax was challenged in this case however was never tested under the national treatment obligation GATT 1994 Article III, thus the complaint against the measure was unsuccessful. If it was challenged under the GATT 1994, Article III national treatment obligation principle, I am of the view that the panel and the appellate body would have considered it to be a de facto discrimination hence a classic example of the breach of the obligation. John H. Jackson[42] has, however, specified that this tax was later nullified by the United States hence it could be reviewed in accordance with the GATT principle. The panel however, in the case of Japan – Taxes on Alcoholic Beverages[43] ruled that a de facto discrimination, brought by any member state's measure or regulation, is necessarily a breach of the GATT 1994, Article III. The panel further provided two ways to evaluate de facto discrimination in context with the article. The first possible way was to extend the scope of 'likeness' of imported and local products by incorporating their competitiveness and substitutability. The second way, as Mitsou Matsushita in his book states, is by applying the 'effective equality of competitive opportunities for import tests, in light of the purpose of Article III, even to taxes, laws and regulations that appear to be, on their face neutral.'[44] This remarkable analysis of the panel was applied in the case of case of Canada – Imports, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies[45] where it was found that the prices applied to both local and imported beer was contrary to the competitive circumstances amongst the two products. Similarly in the case of United States – Measures Affecting Alcoholic and Malt Beverages[46] the panel found out that a tax provision, applied on a certain type of wine which was made from grapes only found in the Mississippi State (United States), was an example of de facto discrimination under the GATT 1994, Article III. It was not long until this new test namely the 'aim and effects' as applied in the above cases, which evaluated the de facto discrimination; was rejected by the appellate body in the case of Japan – Taxes on Alcoholic Beverages[47] on basis that the technical aim and purpose of the measures or regulations is irrelevant. However, it is relevant, if such a measure or regulation falls within the ambit of the protective theory under which a local product is being protected in comparison to the imported product.

Comparing the above discussion with the stance taken by GATS 1995, Aaditya Matto[48] emphasises that under GATS 1995, Article XVII Paragraph 2 national treatment obligation, both de facto and de jure discrimination are covered. He states that if a local service provider is given preference through regulations over the foreign service

providers, it will amount to a de jure discrimination. De facto discrimination on the other hand shall occur where a member state incorporates a regulation which indirectly affects the foreign service provider. An example as provided by Aaditya[49] could be of the requirement of residency in the member state where service is provided. Hence a domestic service supplier will be favoured as opposed to his counterpart foreign supplier consequently amounting to de facto discrimination. There is limited case law referring to de facto or de jure discrimination under national treatment obligation, however the appellate boy in the case of EC – Regime for the Importation, Sale and Distribution of Bananas[50] upheld the decision of the former case, Japan – Taxes on Alcoholic Beverages[51] by rejecting the 'aims and effect' test. Mitsou Matsushitain in his book states that the World Trade Organisation has shackled itself with the objective test approach provided in GATS 1995, Article XVII, paragraph 3, for the evaluation of de facto discrimination.[52] Furthermore Aaditya[53] elaborates that the use of term 'if it modifies the conditions of competition' in paragraph 3 is rather ambiguous. This is because with reference to the history of case law provided in the World Trade Organisation, the words 'if it modifies' would have provided better outcomes and flexibility in deciding what amounts to de facto discrimination, if they were written as 'if it creates unequal'. Professor Robert E. Hudec[54] equally dissents with the appellate body's stand in rejecting the 'aim and effects' test and limiting the scope of de facto discrimination. Furthermore he states that these are some of the core legal issues in the world trade organisation and that there is no space for ambiguity or careless interpretation of the article as it would drag the scope of free trade into apathy.

With regards to the limitations, Gaetan Verhoosel[55] states that either forms of discriminations under GATT 1994, Article III or GATS 1995, Article XVII can be saved by relying on the GATT 1994, Article XX or GATS 1995, Article XIV. The purpose of the regulation can only be assessed after its breach under the national treatment obligation. Hence a bond between the regulation and its objective is necessary which is provided by the latter articles of both agreements. Health, safety and environmental cleanliness are key objectives of some of the measure. For the purpose of GATTS 1994, Gaetan states that a 'two tier test' was proposed in the case of United States – Standards of Reformulated and Conventional Gasoline.[56] The test focuses on the term 'necessary' with respect to GATT 1994, Article XX(d) due to the risks of environment and health that were present. The appellate body in the case of European Communities – Measures Affecting Asbestos and Asbestos-Containing Products[57] reconfirmed that the life and health safety are of utmost importance hence measures attaining such objectives shall not amount to de facto discrimination.

Therefore, as seen above from the comparison through available case law and various commentaries by authors of the fields the element of de jure discrimination exists however it is the de facto discrimination that has remained under the spot light for quite some time. A member state who incorporates a discriminatory measure in law (de jure) regarding products has been witnessed in the earlier cases of WTO under GATT 1994, Article III, however the member states have not at the moment created discriminatory regulations in effect to services therefore less has been commented on this. Factors amounting to de facto discrimination have long been in consideration and have been over showed by the endless debates of 'likeness of products' in GATT 1994. These debates have given distinct outcomes as the panel and the appellate bodies have at times upheld the 'aim and effect' test and however rejected it with the 'protective theory' at different levels; thus a steadfast stand by the appellate body or panel is yet to be witnessed.

In conclusion to the comparisons and contracts provided above for the national treatment obligation for goods and services under GATT 1994 and GATS 1995, the inclination of my views is not towards one of the aspects of the appellate body's or panel's stand in determining the real interpretation of what is a discriminatory measure or what type of effect is created when a measure becomes discriminatory. With this interpretation which I optimistically seek from the future cases that have yet to come, I am of the view that the appellate body and the panel at the WTO level should be more consistent in defining what products and their produces; services and service providers fall within the ambit of 'likeness'. At some point I tend to depart from Ernst-Ulrich Petersmann's[58] pessimistic view who states that until now the appellate body and the panel has not been able to provide a predictable approach towards the interpretation of GATT 1994 Article III national treatment obligation and that the same is expected in case of GATS 1995, Article XVII national treatment obligation. The reason for my objection to this view is that the complexity of law and interpretation is high and that the appellate body is not wrong is stating that each case is distinctive in nature and that the measures amounting to de facto or de jure discrimination on imported products and producer; foreign services and

service providers are getting complex by the day hence the evolution required shall take its time until at a point where it will be felt by the appellate body that it has to maintain its ground from now on. Until that point, the interpretations concerning the national treatment obligation in GATS and GATT should be witnessed as an evolutionary process, where differences and similarities shall every now and then become visible.

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