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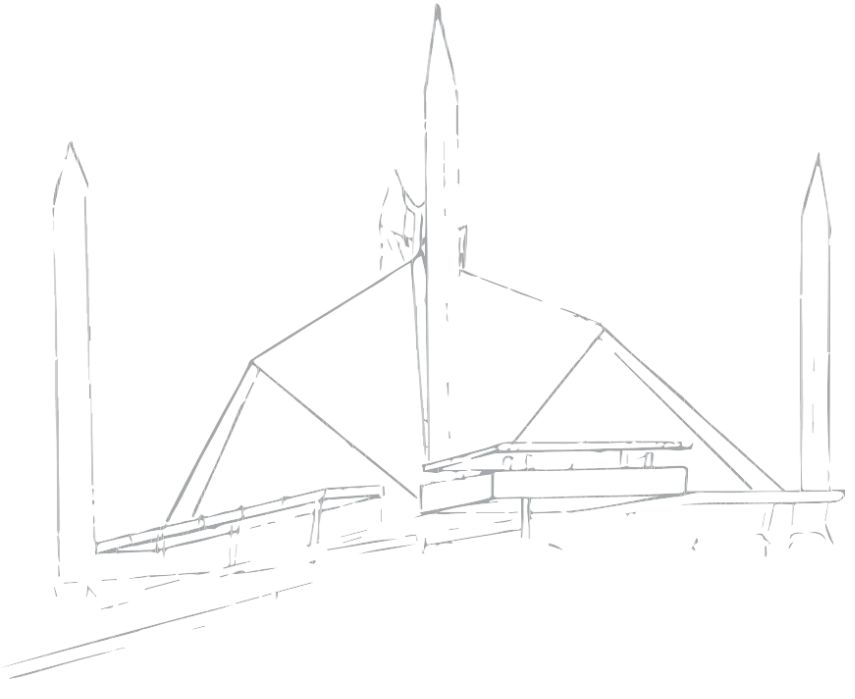

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Contents

A Quest for a 'TWAIL' Approach in International Investment Arbitrations: An Appraisal of Tethyan v. Pakistan

Jason Beckett*

Abstract

International Investment Arbitration is an institution of growing importance to global economic governance. Twenty years ago, its Tribunal awards were measured in the tens of millions USD, today they can reach tens of billions – enough to push under-developed states into financial crisis. This study contends that the growth in awards, and the reasoning used to justify the awards, manifest a structural bias in favour of investors. To illustrate this bias in practice, the present work focuses closely on a single arbitral award, offering a granular analysis of its reasoning. Thus, it explores in what ways, and to what extent, did the Tribunal in *Tethyan* transform the law regarding investors' legitimate expectations, and states' correlative duties? In doing so it uncovers the subjectivity and politics of this supposedly objective decision. To demonstrate this, this study highlights the ways in which the Tribunal in *Tethyan* v. *Pakistan* invented facts, imposed duties that it had previously ruled not to exist, and manipulated novel obligations to produce the grounds it needed to establish that the "readily ascertainable" value of a $ 219 million investment amounted to $ 4.1 billion ($ 5.9 billion including interest accrued).

Keywords: Investment Arbitration, TWAIL, Critical Legal Theory, Poverty, Development, Adjudication

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1. Introduction

The case, *Tethyan* v. *Pakistan*,[1] a classic example of the bias of neo-liberal economic policies, is discussed in the present work. It concerned the expropriation of a mining project by the government of Pakistan. This expropriation was held to be unlawful, and damages were awarded. Tethyan invested $ 219 million in the project. The Tribunal ordered Pakistan to pay them $ 5.9 billion in compensation. The disparity between investment and return is startling: a $ 5.7 billion profit; a 2600% return over thirteen years! Examining the reasoning employed to justify this astonishing return, the author found it to be technically sloppy and formally unpersuasive. It was structured by an ideology favourable to investors' interests; a subconscious bias.

It is argued that this award is unreasonable, even punitive. It is based on a logic that traps under-developed states, locking them into the neoliberal structures and imbalances of the contemporary global economy. International Investment Arbitration does not take place in a vacuum, let alone a heaven of legal concepts; rather, it is part of a wider system of contemporary neocolonial global governance. The critique presented in this study is in the context of the role it plays there. This analysis is inspired by Third World Approaches to International Law (TWAIL) insights, and the TWAIL quest for a just global economic order.

The underdeveloped world is ruled by a neocolonial legal system, which the author has previously conceptualised as the "Global Legal Order" (GLO).[2] This system is characterized by its commitment to neoliberal

[1] Tethyan Copper Company PTY Limited (Claimant) and Islamic Republic of Pakistan (Respondent), ICSID Case No. ARB/12/1 (International Centre for the Settlement of Investment Disputes 2019), para 1735, https://www.italaw.com/sites/default/files/case-documents/italaw10737.pdf.

[2] Jason Beckett, 'The Divisible College: A Day in the Lives of Public International Law', *German Law Journal* 23, no. 9 (December 2022): 1159–92,

economic policy and its capacity to enforce its commands coercively. It is comprised of four interlocking institutions: the IMF; the World Bank; the WTO; and the system of International Investment Arbitration. There is more to neocolonial governance than the GLO, which co-exists, and interacts, with other aspects of "material" Public International Law (PIL).[3] Nonetheless, the GLO functions as an autonomous legal system, with all its structural biases toward neoliberal economic and social policies.[4] It needs to be critically analyzed to progress towards a just legal and economic system worldwide. This study, therefore, will set out a granular analysis of one of its component parts – International Investment Arbitration. International Investment Arbitration is a key and rapidly evolving element of the modern world's Law & Economics scheme, especially as the WTO dispute settlement system is currently paralysed by the USA's refusal to approve the nomination of Appellate Body members.[5]

Given its increasing importance, it is vital to examine the practices, politics, and biases of investment arbitration. In the present paper, the focus is on the case of *Tethyan Copper Company* v. *The Islamic Republic of Pakistan.* This concerned the indirect expropriation of a gold and copper mining project in Balochistan, Pakistan.[6]

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doi:10.1017/glj.2022.79; Aya Kamil, 'Debunking the Neoliberal Globalization Success-Story', *LSE Undergraduate Political Review*, 18 February 2021, https://blogs.lse.ac.uk/lseupr/2021/02/18/debunking-the-neoliberal-globalization-success-story/; Ian Bruff and Cemal Burak Tansel, eds., *Authoritarian Neoliberalism: Philosophies, Practices, Contestations* - (London: Routledge, 2021).

[3] Geoff Gordon, "Contradiction & the Court: Heterodox Analysis of Economic Coercion in International Law", *Temple International and Comparative Law Journal* 34, no. 2 (2021) 283.

[4] Beckett, "The Divisible College".

[5] Matteo Fiorini, et al, "WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences." Available at: WTO dispute settlement and the Appellate Body crisis | VOX, CEPR Policy Portal (voxeu.org).

[6] On the distinction between direct and indirect expropriation, see Christoph Schreuer, "The Concept of Expropriation under the ECT and other Investment Protection Treaties" in *Investment Arbitration and the Energy Charter Treaty* (C. Ribeiro ed., 2006) 108.

It is impossible to build a pattern from a single case, but equally it is impossible to do justice to the analysis of individual cases within a complex pattern. In this paper the author presupposes the pattern without a claim that the bias of this single decision demonstrates the bias of International Investment Arbitration as a whole. In fact, through this case the hypothesis of neocolonial, neoliberal, governance can be genuinely exhibited. The Tethyan case offers a particularly clear articulation of International Investment Arbitration's biases, but it is not an aberrant decision. Rather it is its very mundanity that marks it out as important:

> Billion-dollar-plus awards, unknown in investors – State arbitration before late 2012, have become less unusual in the last five years, and even with all the excessive saltiness added to the soup of their likely success, billion-dollar disputes are now completely routine.[7]

International Investment Arbitrations are typically decided by three-member Tribunals appointed by the parties (each party nominates one arbitrator, and those two agree on a third arbitrator to chair the Tribunal). Decisions are taken by majority vote, and dissenting opinions are allowed. *Tethyan* took place under the International Centre for the Settlement of Investment Disputes (ICSID) institutional structure, which is the most commonly used. The Tribunal decided it unanimously in favour of the investor. This is not atypical. As others have demonstrated, International Investment Arbitration Tribunal decisions heavily favour foreign investors and offer little acknowledgement of the regulatory and social needs of host states.[8] This delimits the economic options available to under-developed

[7] Martins Paparinskis, "Crippling Compensation in the International Law Commission and Investor–State Arbitration," *ICSID Review - Foreign Investment Law Journal* 37, no. 1& 2 (2021) 2-3.

[8] For an expert, but accessible, overview see Toni Marzal "Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS," *Journal of World Investment & Trade* 22, no. 2 (2021): 249–312. See also John Linarelli et al., *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford University Press 2018), 145-174; Mafruza Sultana, "The Fair and Equitable Treatment

states, and adds further restrictions to the policy-space open to them. International Investment Arbitration,

> … intrudes into an internal process and externalizes it by demanding conformity with imposed standards of treatment, ensuring that the state has to sublimate its essential national interests to the protection of the foreign investment or face the heavy cost of arbitration and the possibility of an even heavier burden by way of an award for damages against it.[9]

International Investment Arbitration is also taking over judicial functions previously held by the WTO, which has been gradually sidelined by over-developed states. This is a strategic response to a power struggle as,

> … developing countries have gained negotiating power in the WTO, 'and cannot so easily be pressured, marginalized or ignored by richer members' … the US and the EU have come to see PTAs [Preferential Trade Agreements] as superior tools for the pursuit of their commercial interests.[10]

These PTAs complement and extend a network of Bilateral Investment Treaties (BITs). Both PTAs and BITs contain arbitration clauses which remove jurisdiction from the domestic courts and grant it to the institutions of International Investment Arbitration instead. This allows corporations from one state to have their foreign investments in another protected at the international level. International Investment Arbitration is justified as superseding corrupt, inept, or inefficient local judiciaries, as it has been since colonial times.[11]

(FET) Standard in International Investment Arbitration: Developing Countries in Context by Rumana ISLAM. Singapore: Springer, 2018," *Asian Journal of International Law*, Book Review 10, no. 2 (July 2020): 414–15, doi:10.1017/S2044251320000119; Muthucumaraswamy Sornarajah, Resistance and Change in the International Law on Foreign Investment, (Cambridge: Cambridge University Press, 2015).

[9] Linarelli et al., *Misery*, 5

[10] Silke Trommer "The WTO in an Era of Preferential Trade Agreements: Thick and Thin Institutions in Global Trade Governance" *World Trade Review* (2017) 501, 502.

[11] Kate Miles, *The Origins of International Investment Law.*

The institutions of International Investment Arbitration display an inordinate bias in favour of investors, and against the interests of host states. Its internal logic is pro-investor because "a powerful group of multinational corporations, large law firms, and a select group of arbitrators" have implemented "rules developed in arbitral awards to create an inflexible system of investment protection to the detriment of developing states."[12] This serves a disciplinary and deterrent end, reminding under-developed states of their place in the global pecking order, and structurally reinforcing this by subjugating their interests to those of foreign investors. In fact, "International Investment Arbitration today operates essentially as a vehicle of neo-imperial governance",[13] where "investor-state arbitration reflects [the] colonial … outlook of the developed countries, with the abuse of natural resources of developing countries at its focal point."[14]

Arbitral awards must be taken seriously, as they can be executed against state assets anywhere in the world. And under the New York Convention,[15] domestic courts globally are obligated to enforce these awards. In the Tethyan case, the award was also enforceable under the

[12] Linarelli et al., *Misery*, 148.

[13] Akbar Rasulov, "The Empty Circularity of the Indirect Expropriations Doctrine: What International Investment Law Can Learn from American Legal Realism." Jurisprudence & Legal Philosophy eJournal (2015): 21, available at https://ssrn.com/abstract=2618621. A slightly modified version of this work is also available in Akbar Rasulov, 'The Empty Circularity of Regulatory Takings: The Legacy of a Legal Realist Critique for a 21st-Century Context', in *Research Handbook on Political Economy and Law*, ed. Ugo Mattei and John D. Haskell (UK: Edward Elgar Publishing Limited, 2015), 371–99, https://www.elgaronline.com/edcollchap/edcoll/9781781005347/9781781005347.00033.xml.

[14] Syeda Eimaan Gardezi and Faqiha Amjad, 'A TWAIL Perspective on the Challenges Associated with Upgrading International Arbitration in Developing Countries like Pakistan | SAHSOL', 106-117, accessed 28 September 2024, https://sahsol.lums.edu.pk/node/17096.

[15] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Available at: Texts The New York Convention » New York Convention.

ICSID Convention.[16] The case was determined by the Tribunal's interpretation of the BIT between Australia and Pakistan,[17] specifically its provisions on fair and equitable treatment and legitimate expectations.

There are almost 3000 BITs in effect today.[18] Most include Fair and Equitable Treatment (FET) clauses, which were rejected in earlier multilateral conventions.[19] In effect, "the major capital exporting countries have used BITs as a means of achieving their expectations, which were difficult to achieve at the multilateral level."[20] The texts of most BITs are relatively benign, but their interpretation and application by tribunals is not. The arbitral tribunals' decisions consistently favour investors over host-states.[21] In their implementation, BITs become analogous to the "unequal treaties" of the colonial era. Arbitral awards make manifest contemporary "regimes of economic exploitation",[22] just as they clearly reflect historical antecedents. When analysing such inequalities, Matthew Craven has put it rightly as follows:

> … agreements to promote free trade or the protection of foreign investments, the parallels with 19th Century extraterritorial regimes predicated upon maintaining the 'open door', [and] insulating traders and investors from the arbitrary excesses of local law … appear all too obvious.[23]

[16] Convention on The Settlement of Investment Disputes Between States and Nationals of Other States (1966). Available at: CRR_English_CRA.qxd (worldbank.org).

[17] 'Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments' (1998).

[18] Rumana Islam, *The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration Developing Countries in Context* (Singapore Springer Singapore, 2018), 2.

[19] Ibid., 35; See also Christoph Schreuer "Fair and Equitable Treatment in Arbitral Practice" *The Journal of World Investment and Trade* (2005) 357-8.

[20] Islam, "FET", 2.

[21] Sornarajah, *Resistance*.

[22] Matthew Craven "What Happened to Unequal Treaties? The Continuities of Informal Empire," *Nordic Journal of International Law* 74, no. 3-4 (2005): 335-382.

[23] Ibid., 382.

These 19th Century regimes, "unequal treaties", were negotiated under force of arms or threat thereof, a form of legalised extortion. As the name suggests they benefitted one party at the expense of the other, the treaties ending the Opium Wars offer striking examples of inequality.[24] This colonial system of governance-through-violence was used to force open markets to Imperial capital, industry, and merchants: to Imperial plunder. Today the coercive force used is economic rather than military, but "the latent conditions for the persistence of unequal treaties remain intact". These enable "the continuance of colonial models of power and authority."[25] Under-developed states are governed through their debt, and dependence on foreign investment. This neocolonial governance-through-debt is used to force open markets to Imperial capital, industry, and merchants: to neocolonial plunder.[26]

As this study will demonstrate, the neoliberal bias of the awards – and the expanding scope of FET protections[27] – has exposed "the unbalanced foundations of investment regulation that overprotect investors at the expense of the home state's regulatory space."[28] While this has already been generally shown by Sornarajah,[29] and by Linarelli et al.[30] The contribution of the present work is to offer a more granular analysis of a single decision as an illustration of how this system functions in practice. It endorses Sornarajah and Linarelli's claims and analyses, but acknowledges

[24] Jason Beckett, "Harry Potter and the Gluttonous Machine: Reflections on International Law, Poverty, and the Secret Success of Failure," *Trade, Law, and Development* XIII, no. 2 (2021): 317.

[25] Craven, "Unequal Treaties", 381.

[26] The author examines some of this plunder in "Harry Potter", and "The Divisible College".

[27] See Scheuer, Fair and Equitable, 364-7.

[28] Fabio Morosini and Michelle Badin (eds), 'Introduction' in *Reconceptualizing International Investment Law from the Global South,* (Cambridge: Cambridge University Press, 2017) 2.

[29] Sornarajah, *Resistance*.

[30] Linarelli et al., *Misery*.

that they are sweeping. This work, therefore, will offer a detailed analysis of a single Award to add substantive meat to their analytic bones; to illustrate the plausibility of their arguments as they play out in arbitration. This analysis takes place in the context of the increasing value of arbitral awards:

> In the early 2000s, awards of compensation in the tens of millions of USD were considered large. These sums seem quaint in retrospect. Today, the largest award of compensation in investment treaty arbitration is the USD 40 billion awarded in Hulley v. Russia. This was the largest of several related claims arising out of the nationalization of Yukos, in which a total of USD 50 billion was awarded. There are now 50 known cases in which a tribunal has awarded compensation in excess of USD 100 million.[31]

One such award is the *Tethyan* case. There, the Tribunal awarded compensation of $ 5.9 Billion (including interest accrued at the date of the award) for the indirect expropriation of an investment of just $ 219 million. I want to explain how this happened, and show the structural biases at play in such decisions.

2. Tethyan Copper v. Pakistan

It has been claimed, "the starting point is that investment law is a field of public international law, and the same generalist rules and assumptions on sources and dispute settlement law apply as they would in any other field of international law."[32] However, the *Tethyan Copper v. Pakistan* Award is illustrative of particular biases specific to International Investment Arbitration. It is important to remember that International Investment Arbitration is not merely an academic discourse, it is an institutional

[31] Jonathan Bonnitcha and Sarah Brewin, 'IISD Best Practices Series: Compensation Under Investment Treaties' (IISD), 1, accessed 8 May 2024, https://www.iisd.org/publications/guide/iisd-best-practices-series-compensation-under-investment-treaties.

[32] Paparinskis, "Crippling Compensation", 3.

practice. It is an object of analysis, a thing which can be empirically described. Thus, it is not enough to speculate on what International Investment Arbitration should be, we must also interrogate what it currently is, and why it is that way. The Tethyan award offers a particularly clear illustration of the biases of International Investment Arbitration.

The Tethyan Copper Company, part of an Australian corporation, sought to open a copper and gold mine in Balochistan, Pakistan. They negotiated with the Government of Pakistan (GOP), and were awarded an Exploration License. Once in possession of the license, Tethyan invested in geological and metallurgical surveys of the site, economic extrapolation of the results, and plans for the mine. There was a "total of USD 219 million that Claimant actually spent on its further exploration work".[33] The surveys showed that the site had vast potential reserves of both copper and gold, and these were commercially extractable.

Tethyan entered negotiations to convert their exploration license into a mining lease. In accordance with Pakistani law, these negotiations took place between Tethyan and the regional Government of Balochistan (GOB). The negotiations did not go well, and Tethyan was refused the mining lease. The mining lease application was rejected on 21 September 2011 with the formal reasons for rejection listed.[34] Tethyan objected to the validity of these reasons, and took the matter to arbitration under the prevailing Australia-Pakistan BIT.

The arbitration took place in two stages: first a decision on jurisdiction and liability, then a separate award of damages. The first Tribunal established jurisdiction over the case, and held Pakistan liable for indirect expropriation in breach of legitimate expectations. The study at

[33] Tethyan Quantum, 1735.
[34] Ibid., 141.

hand does not offer a critique of these awards. Instead, it has picked up the story at the second, so-called Quantum of Damages, award. This is the space in which liability is transformed from an abstract concept to a concrete cost – the quantum of liability is "established". It is a space of expertise, where law defers to economics, and "facts" (such as fair market value) are objectively assessed. At least such is the mythology.[35]

In the Quantum Phase, the Tribunal affirmed that it had jurisdiction over the case as the "Claimant had an "investment" within the meaning of Article 1(1)(a) of the Treaty".[36] It also affirmed that this investment had been indirectly expropriated by the GOB.[37] Consequently, the GOP was liable to compensate for the harm Tethyan had suffered. The Tribunal also revisited the question of liability, declining to formally consider potential alternative reasons for refusal, which Pakistan had sought to adduce in arbitration. This return to the question of liability facilitated the Tribunal's determination of the *extent* of Pakistan's liability. This established the scope of Tethyan's legitimate expectation, which was delimited implicitly and widely. Delimiting the extent of liability is integral to establishing the value of an award. The Tribunal held that the harm Tethyan had suffered could be quantified – under either customary international law or art. 7 of the BIT – as the "readily ascertainable" "fair market value" of their investment, "but-for" Pakistan's unlawful acts.[38]

Having outlined the structure, the study will put forward a critical analysis of the reasoning supporting the Tribunal's judgment. This is designed to expose the ideological core of the Tribunal's decision. First, the author will look at the Tribunal's reasoning in rejecting Pakistan's newly

[35] Marzal, "Quantum Injustice".
[36] Tethyan Quantum, 134.
[37] Ibid., 156.
[38] Ibid., 281.

raised concerns, and how their belief that the GOB going it alone with the mining venture was somehow *ultra vires* influences their judgement. The paper then exposes the implicit logic driving the Tribunal's construction of Tethyan's legitimate expectation. Then it would be demonstrated how this was unnecessarily, and perhaps unlawfully, expansively delimited.

2.1 Liability Reaffirmed and Delimited

Although liability was established in earlier proceedings, the Tribunal returned to the issue to clarify the extent of Pakistan's liability. That meant they had to establish the scope of Tethyan's legitimate expectation, they did so, using an economic, rather than a legal, approach. Three questions arose for the Tribunal:

1. The delimitation of the extent of the GOB's *duty* to award the lease;
2. To what extent they had breached this duty;
3. And, the consequent scope of liability (how the investment should be valued.)

There was a further complication, as Tethyan were required to negotiate *both* a Mining Lease *and* a Mineral Agreement with the GOB. These two sets of negotiations had been conducted in parallel. However, the negotiations over the Mining Lease were unsuccessful, and no settlement was ever reached over the terms of the mineral agreement, "the Tribunal notes that the applicable tax and royalty rates were still subject to the Mineral Agreement negotiations. While such negotiations had apparently stalled".[39] The Mineral Agreement negotiations were discontinued after the lease was denied.[40]

[39] Ibid., 148.
[40] Ibid.

Tethyan challenged the rationality and legality of the reasons given for the denial of the mining lease. They alleged that the GOP had breached the Fair and Equitable Treatment (FET) provisions of the treaty, in particular breaching Tethyan's "legitimate expectation" that the exploration license would be converted into a mining lease.[41] Pakistan defended the reasons given, and adduced alternative justifications during the proceedings; these were rejected on a mixture of procedural and substantive grounds. Pakistan was held to have expropriated the investment, and focus turned to the effects, if any, of the purported illegality of this expropriation.

Tethyan argued that compensation for unlawful expropriation should be established according to customary international law standard of fair market value. Pakistan countered that, if they had breached their obligations, the case amounted to an indirect expropriation, and damages should be awarded according to the provisions on expropriation in article 7 of the BIT. These potentially allowed for a more discretionary approach to valuation, balancing the interests of the parties. There were two intertwined disputes at stake in the arbitration:

1. The scope of Tethyan's legitimate expectation (did it include an expectation of a Mineral Agreement?)
2. The value of Tethyan's investment (which depended on the scope of the legitimate expectation and the choice of valuation method)

Tethyan's legitimate expectation was a derivative of its protection under the FET provisions of the treaty. Schreuer concedes that the "standard of fair and equitable treatment is relatively imprecise", but argues "this lack of precision may be a virtue rather than a shortcoming".[42] He reasons that the "principle of fair and equitable treatment allows for independent and

[41] Ibid., 153.
[42] Islam, "FET", 364-5.

objective third-party determination".[43] The author's aim in this paper is to show that the so-called "independence and objectivity" of the Tribunal is an inaccurate representation of the process. Tribunal awards are ideologically determined, and appear objective only to those who share that ideology. The arbiters demonstrate their external sympathies, which in fact determine the ruling.

2.2 The Legitimate Expectation

As Marzal emphasises, the 'legal' concept of legitimate expectations is quite distinct from the 'economic' concept of fair market value.[44] Indeed, the latter is determined by the former. But the Tribunal rarely attends explicitly to the legal concept it is constructing. Rather it determines the scope of the expectation implicitly, as part of constructing fair market value. This treats the expectation as a fact whose content can be determined by economic analysis, rather than a legal construct, with a legal definition and a legal delimitation. The Tribunal have, in effect, transformed the *legal definition* of legitimate expectations, moving from a focus on formal legal obligation to an emphasis on rational economic behaviour, a duty on under-developed states to behave as economically rational actors constrained by the current, unchallengeable, economic order. They have done so without analysis.

The arbiters' faith in economics is misguided, they are ultimately dealing with a question of law. Put simply, "tribunals are wrong to interpret the law in relation to calculation of compensation/damages the way they do."[45] There should be legal standards, not purely economic ones:

> The economic value of foreign investment is still inevitably shaped through law. The law in question, though, is a

[43] Ibid., 365.
[44] Marzal, "Quantum Injustice".
[45] Ibid., 253.

> privileged regime that, hidden under the pretence of value as a pre-legal phenomenon, has been autonomously developed by arbitrators themselves, leading to a greatly expanded notion of compensable harm.[46]

This is the ideological core of contemporary investment arbitration practices, and it determines the Tribunal's decision. It is also logically flawed. In reality, "the harm that must be fully compensated is not a brute fact, but a contingent legal construct."[47] The harm is defined by the extent of the legitimate expectation. This is true regardless of how the Tribunal conceptualises the matter. In attempting to treat Tethyan's legitimate expectation as an economic fact, the Tribunal has precisely altered the *legal definition* of legitimate expectations, at least for this award. The problem is that they have done so without examining the previous legal definition, nor explaining or justifying why it had to be replaced with this particular new one. "The Tethyan award is probably the best and most extreme example of this tendency to replace legal authority with deference to economics".[48]

Turning to the award itself, the Tribunal held that the protection of an investor's legitimate expectations is an important element of the FET standard under Article 3(2) of the Treaty.[49] The Tribunal further held that,

> Respondent had created legitimate expectations on Claimant's part that it would be entitled to convert its exploration license into a mining lease 'subject only to compliance with routine Government requirements.'[50]

These were the requirements of applying for a mining lease and negotiating a minerals agreement. The government encouraged them to expect this to be a formality.[51] Consequently, Tethyan had a legitimate

[46] Ibid., 295.
[47] Ibid., 281.
[48] Ibid., 279.
[49] Tethyan Quantum, 138.
[50] Ibid., 153.
[51] Ibid., 138.

expectation to receive the mining lease unless adequate reasons were adduced to refuse it. Through their assurances to Tethyan, the governments had forfeited their sovereign discretion to deny the lease.

2.3 The Reasons for Refusal: Given in the Letter, and Adduced at Trial

In situating this critique of the damages phase, it is important to highlight that pro-investor biases run throughout the Tribunal's award. Their focus was directed to the Notice of Intent to Reject, in which the GOB proffered several reasons for denying the mining lease. However:

> For the reasons set out in detail in the Decision on Jurisdiction and Liability, the Tribunal concluded that "none of the reasons given in the Notice of Intent to Reject could have justified the denial of the Mining Lease Application."[52]

The Tribunal went further, also dismissing the reasons adduced by Pakistan's advocates for how the decision could have been justified. It did not give them much weight, often noting they had not been brought up at the time. "Respondent should not be allowed to rely on reasons additional to those invoked in the Notice of Intent to Reject".[53]

> As a result, the Tribunal's finding that Respondent *should not be allowed to rely on any additional reasons in this arbitration* in order to avoid liability under the Treaty applies with equal force.[54]

This is not an impartial judgement; it is an ideological decision – as indeed is the Tribunal's judgment as a whole. Such judgments "derive … despite pretences to the contrary, from subjective perceptions of what fairness or policy requires."[55] The politics of the award are subtly manifest in this refusal to allow Pakistan to adduce new reasons for refusal in arbitration.

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[52] Ibid., 141.
[53] Ibid., 143.
[54] Ibid., 172.
[55] Marzal, "Quantum Injustice", 253.

This prevents Pakistan ameliorating its administrative and bureaucratic shortcomings by employing external expertise at the arbitral stage. That is, Pakistan may actually have had a right to refuse the lease for reasons their less expert staff did not know of. This possibility could have been considered seriously, but the Tribunal *chose* not to do so:

> The challenges that the host developing countries face under current interpretations of their treaty obligations reflect the catalyst role of a lack of resources, experience, sophisticated administrative capacity and other vulnerabilities in the investment dispute context.[56]

Pakistan's advocates were not in fact allowed to introduce new arguments, as these were simply discounted by virtue of not being part of what the Licensing Authority wrote. Pakistan may have had a right to refuse the agreement, but not for the reasons actually given. The alternative reasons were excluded from the analysis though they may have been pertinent. Consequently, without adequate analysis, Pakistan becomes bound to issue to the license that they may have had no duty to agree to. They were punished for a lack of expertise in governmental bureaucracies – penalised for things they may have been allowed to do, but have done in the wrong way. There was a subtext to the Tribunal's reasoning:

> However, the Tribunal did find that the Licensing Authority denied TCCP's Mining Lease Application because the GOB had decided to develop its own mining project rather than to continue collaborating with Claimant.[57]

This decision to go it alone appears to have been considered *ultra vires* by the Tribunal, who assume that FDI is the only way to get megaprojects financed. State, and especially under-developed state, investment of this form is anathema to the neoliberal ideology that infuses International Investment Arbitration. In this worldview, states develop by

[56] Ibid.
[57] Tethyan Quantum, 413.

attracting FDI, and so conditions favourable to FDI (i.e. favourable to the investors) must be fostered.[58] Both the GOB's decision, and their failure to disclose it, were deemed acts of bad faith:

> The Tribunal is convinced that the real motive for the denial was the fact that the GOB had decided to develop and implement its own mining project rather than to collaborate with Claimant … and that the grounds invoked by the Licensing Authority served only as a pretext to conceal this motive.[59]

Pakistan could have expropriated lawfully; by simply stating they were taking over the project and initiating negotiations over fair compensation. Instead, they chose to expropriate indirectly, by denying the lease under false pretexts. The Tribunal views this as unlawful behaviour. This moral judgement of bad faith hangs over their decision:

> The Tribunal further recalls that while Respondent now points to numerous allegedly critical issues that rendered the project unfeasible, neither [sic] of these issues was raised by the Licensing Authority in its Notice of Intent to Reject. Based on the record of these proceedings, the Tribunal is also not aware that any other agency or official of the GOB or the GOP raised these issues during the time period in which the joint venture partners were still collaborating or even when the GOB had decided to take over the project and deny TCCP's Mining Lease Application in violation of Respondent's obligations under the Treaty.[60]

This focus on Pakistan's actual conduct, rather than on their legally permissible options, is a choice; a choice to punish them for a lack of administrative sophistication, by refusing to allow this to be ameliorated during proceedings. This punitive posture is perhaps unsurprising, as:

> Tribunals will often consider that the victim of an unlawful expropriation is entitled to damages for two additional items

[58] Beckett, "The Divisible College".
[59] Tethyan Quantum, 153.
[60] Ibid., 173.

> that would otherwise not be compensable: the first is the loss of any increases in value up to the date of the award, and the second is consequential losses.[61]

This widens the scope of the host state's liability, effectively punishing them for behaviour the Tribunals deem uncivilised. It widens the scope of the investor's legitimate expectation, and thus increases the size of their award. The Tribunal was not only restating Pakistan's liability, but setting the ground to determine the extent of that liability; the extent of Tethyan's legitimate expectation.

Next the author will examine the Tribunal's interpretation of the expropriation clause, demonstrating its political nature and structural bias. From there it will be shown how this same bias determines the valuation method used, and the way the dispute is framed.

2.4 Valuing Liability: The Expropriation Clause

The subjectivity, the politics, the bias, of the award come much more clearly into relief in the reasoning on the quantum of damages. The Tribunal take a dim view of the GOB's covert intention to develop the mine alone. Implicitly held to be *ultra vires*, this intention is never modelled as a serious prospect, let alone accounted in evaluation models. This implicit holding clouds the judgment, as the Tribunal sides with the investor at every turn. Performing a mix of sly normative sleights of hand and spectacular syllogistic summersaults, they gradually lower the necessary standards for the ascertainment of the value of the award. Their reasoning is littered with obvious ideological assumptions, and a clear preference for Tethyan's paid experts.

The parties disagreed as to whether the case should be assessed under the rules on (lawful) expropriation in Article 7(2) of the BIT, or based

[61] Marzal, "Quantum Injustice", 284.

on the standard of full reparation under customary international law.[62] Article 7(2) provides:

> The compensation referred to in paragraph 1(c) of this Article shall be computed on the basis of the market value of the investment immediately before the expropriation or impending expropriation became public knowledge. *Where that value cannot be readily ascertained*, the compensation shall be determined in accordance with generally recognised principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, and other relevant factors."[63]

Pakistan made two interrelated arguments. First, that art. 7(2) applies to both direct and indirect expropriations, and therefore covers so-called unlawful expropriations.[64] Second, the market value of Tethyan's investment cannot be "readily ascertained", and therefore the alternative valuation provisions of art 7(2) should apply.[65] Tethyan countered that art. 7(2) only applies to lawful expropriations and "maintain[ed] that the market value of its investment can be ascertained based on the valuation performed by its valuation expert Prof. Davis."[66]

The Tribunal avoided the decision on the applicability of art 7(2) by holding that, in the circumstances of this case, it and customary international law mandated the same standard: fair market value.[67] It then sided with Tethyan, holding that the market value of the investment was "readily ascertainable" using a "discounted cashflow" (DCF) method:

> … the Tribunal does not consider that there are "fundamental uncertainties" that would preclude the application of a DCF method or, more precisely, the

[62] Tethyan Quantum, 276.
[63] Ibid., Emphasis added.
[64] Ibid., 230.
[65] Ibid., 279.
[66] Ibid.
[67] Ibid., 281.

> application of the modern DCF method used by Prof. Davis.[68]

Here the Tribunal altered the question, from whether the valuation is "readily ascertainable" to whether there are "fundamental uncertainties" in the valuation method. This implies that some uncertainty is permissible in a "readily ascertainable" valuation.

Moreover, this reasoning is based on a series of contestable assumptions, including at least: the applicability of modern DCF over the Pakistan's proposed evaluation methods; the GOB accepting an offer it had already rejected; the level of deposits; the prices of copper, gold, and oil across the projected 56-year lifespan of the project; the renewal of the lease; the availability of adequate water to facilitate the mine's functioning; and the likelihood of political or social unrest. To hold that all of these are "readily ascertainable" (or even ascertainable without "fundamental uncertainties") offers an illustration of the Tribunal's structural bias toward investors. This substantiates Rumana Islam's argument that FET is not extended to host states' legitimate interests:[69]

> The Tribunal considers that Prof. Davis' methodological argument, i.e., that it would be inaccurate to refer to analyst forecasts to determine risk-adjusted prices sought as input for the modern DCF model and that forward market prices are the best and in fact only indication of how the market prices that risk, is generally plausible.[70]

Note that the test appears to have changed again, this time from "readily ascertainable" to "generally plausible", which seems a far more lenient standard.

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[68] Ibid., 301.
[69] Islam, "FET".
[70] Tethyan Quantum, 1508'

2.5 Choosing a Valuation Method

Having determined that the market value was readily ascertainable, the question facing the Tribunal was *how* to ascertain the "market value" of Tethyan's investment at the point of expropriation. Pakistan rejected DCF as an appropriate evaluation technique, while Tethyan insisted on the applicability of modern DCF.[71] The Tribunal had to choose between these to make the market value "readily ascertainable", as they produced radically different results. Only once they had settled on a method could the Tribunal begin the task of unveiling the project's "readily ascertainable" value.

The Tribunal chose Tethyan's method, the modern discounted cashflow (DCF) technique, to determine the but-for valuation of the lease's value:

> While this approach may be associated with some uncertainties, e.g., regarding the projection of future metals prices … these uncertainties also affect the traditional DCF method and therefore do not justify rejecting this method or the use of risk-adjusted prices.[72]

This is a somewhat absurd and yet not uncommon, line of reasoning, "some uncertainties" actually means completely conflicting approaches and valuations. This is a concession that the approach doesn't work "scientifically", it requires political and economic choices on the part of the Tribunal – who must estimate the fates of the multiple variables involved in modern DCF. That however, is apparently OK, because traditional DCF suffers from the same flaws. The logic appears to be: if it doesn't work there, it might work here:

> Some mining professionals oppose the use of forward curves in metal price forecasts. This opposition is often supported by citing concerns about liquidity, incomplete forward

[71] Ibid., 304.
[72] Ibid., 356.

> curves, or the observation that a forward price is a mathematical calculation. … however, … these reasons do not prevent the use of forward curves in generating a price forecast since they would also invalidate the use of derivative methods when generating cash flows and estimating value in a wide range of valuation problems.[73]

So, despite opposition based on reasonable concerns, the method should be retained, because the same valid concerns would also critique other methods. All methods are subject to critique, the choice between them is entirely subjective, yet the Tribunal concludes:

> Prof. Davis explained that the methodology he uses has been developed precisely in order to avoid the practical "fixes" that are sometimes used the industry in order to arrive at a value within the range of what they consider reasonable. Specifically in the present case … [we see] the method using a scientific approach to adjust the risk at source.[74]

Behold, from the morass of political decisions that preceded it, a *scientific approach* has emerged! Prof. Davis has objectivised the discipline of valuation, or rather discovered its objective form:

> … the Tribunal considers that certain adjustments have to be made to the inputs used by Prof. Davis in his calculation. In the Tribunal's view, however, none of these adjustments warrants the conclusion that the DCF method cannot produce a sufficiently reliable result. To the contrary, the Tribunal is convinced that in the particular circumstances of this case, it is appropriate to … [use] a DCF method.[75]

There are two things of note here. First that the test has morphed, again, from a "readily ascertainable" value, into "a sufficiently reliable result", which seems a somewhat lower standard. And second, the reasoning is nonsense, but it appears to be sincerely held nonsense. As Marzal has noted:

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[73] Ibid., 354.
[74] Ibid., 358.
[75] Ibid., 335.

> such calculations are premised on a fundamental consensus that presents the work of arbitrators in this area as essentially uncontroversial fact-finding assessments … this consensus is in reality built on a series of myths and unjustifiable assumptions.[76]

Throughout their analyses, the Tribunal assumes the objective superiority of modern DCF. This reflects a "profound shift in the legal reasoning of tribunals, which has made the three pillars of full compensation/reparation, FMV [fair market value] and DCF seem unquestionable."[77] Marzal argues that:

> … the main reason for the unstoppable rise of DCF as the preferred valuation methodology, is the popularity of the idea that 'value' is not a legal but an economic concept, and that 'valuation' is governed entirely by economic and financial logic rather than by legal principle. It is probably this idea that has contributed the most to the inflation of awards.[78]

Rasulov likewise argues "that all value is essentially a creature of law."[79] Value cannot exist without an entire legal-regulatory apparatus around it, determining what can be appropriated (owned), what can and cannot be done with it, how it can be traded, and, ironically, what would be its expropriation value.[80] The Tribunal's specific decision (the quantum award) is paradoxically made into a variable in its own determination. However, the Tribunal was not presented with this penetrating critique, and simply assumed value is an "economic concept", a pre-legal fact. Conscious or not, this is an ideological decision on the Tribunal's part, a decision to join a growing trend toward the, "… widespread use of DCF, a method that

[76] Marzal, "Quantum Injustice", 250
[77] Ibid., 254.
[78] Ibid., 271.
[79] Rasulov, "Empty Circularity", 384.
[80] Ibid.

until recently tended to be resisted by lawyers as excessively speculative, and which is generally known to lead to much higher amounts."[81]

This decision is both problematic, it inherently advantages the investor, and structuring, it holds the judgment together. Even if we were to accept it (which we should not) it raises the subsequent question of when modern DCF (as opposed to DCF generally) came into being. "In this regard, the Tribunal also takes note of Prof. Davis' oral testimony in response to the question whether the approach he had presented would actually have been used in the market at the relevant time, i.e., at the valuation date."[82]

Interestingly, the Tribunal does not actually provide an answer to this question, but given the novelty of the modern DCF approach (it had been suggested in only one arbitral case to date[83]) it would not seem unfair to assume the answer would be no. The Tribunal fudges this issue, discretely introducing a presentist narrative. "As valuation practices for mineral properties develop in the industry itself, the assessment of damages may likewise evolve in investment treaty arbitration."[84]

But the question was not "how has the industry developed?", but "what valuation would a buyer have sought in 2011?" The presentism elides this temporal shift, and the Tribunal evades its own question, allowing for the use of its preferred method: "the Tribunal concludes that it is appropriate to value Claimant's investment in the Reko Diq project by using the modern DCF approach".[85] This is because, "[i]f in practice a buyer was most likely to have adopted the methodology recommended in the CIMVal opinion, it

[81] Marzal, "Quantum Injustice", 274.
[82] Tethyan Quantum, 357.
[83] Ibid., 359.
[84] Ibid., 360.
[85] Ibid., 361.

is irrelevant that an expert considers that some other methodology would have been better."[86] So, now we have a new "most likely" test. It may also be worth noting that the CIMVal opinion was a response to a discussion paper written in 2012,[87] while the valuation date for the project was 2011.

2.6 The Scope and Value of the Legitimate Expectation: The Question of the Mineral Agreement

Having chosen a valuation method, the question then turns to the scope of Tethyan's legitimate expectations. Fair market value was to be determined by working out what an arm's-length buyer would have paid for the lease, at the time of expropriation, "but-for" the governments' unlawful acts. In this regard, "the Tribunal agrees with Respondent that a but-for valuation cannot assume that a Mineral Agreement would have existed as of the date of valuation."[88] This holding could have framed the question: what was the mining lease worth without the mineral agreement? Assuming a government acting in good faith, but having (relatively) high expectations and a willingness to go it alone if needs be, what would an arm's-length buyer have paid for the lease, and the opportunity to negotiate? Two points arise here, first that this framing is no more readily ascertainable than the alternative, and second that the very existence of alternative possibilities renders the notion of ready ascertainability absurd.

The Tribunal ignored these problems and returned to its finding that "there would have been a mutual interest to achieve agreement on the remaining issues".[89] In other words, the Tribunal precisely *do* "assume that a Mineral Agreement would have existed as of the date of valuation". In fact, as we shall see, they actually invent that agreement in their judgment.

[86] Ibid., 348.
[87] Ibid., 347.
[88] Ibid., 285.
[89] Ibid.

This is how the Tribunal defines the scope of Tethyan's legitimate expectation. Tethyan clearly had a legitimate expectation to the mining lease.[90] However, the *value* of Tethyan's legitimate expectation was entirely contingent on that expectation's scope.

The scope of Tethyan's legitimate expectation was central to the Award, yet never actually discussed. The expectation was held to be the fair market value of the investment, and that was deemed to be a pre-legal economic fact. It had simply to be measured, not justified. But this is inaccurate, both "legitimate expectations" and "fair market value" are creatures of law, they exist only as they are protected by law. One key question elided by this line of reasoning was: "What is the scope of the legitimate expectation?" That is: "Does the legitimate expectation to the mining lease include a legitimate expectation to a Mineral Agreement?"

Recall, negotiations over the Mineral Agreement had stalled before the refusal of the mining lease, and were terminated entirely in its aftermath. Yet in an audacious piece of reasoning the Tribunal noted that had the Mining Lease Application been granted, "the parties may well have decided to revive [negotiations on the Mineral Agreement] after the grant of the mining lease, given that Claimant would then have been the only one allowed to conduct mining operations in the area."[91] Yet again the Tribunal substituted the "readily ascertainable" standard, this time to a lowly "may well have". Moreover, their reasoning deviates significantly from the traditional logic of legitimate expectations.[92]

The traditional question is: Was Tethyan legally entitled to expect a minerals agreement, that is, did the Government of Baluchistan have a legal duty to conclude an agreement? The answer to this question, as the Tribunal

[90] Ibid., 20
[91] Ibid., 148
[92] Marzal "Quantum Injustice", 297-300

acknowledged, is no;[93] and the matter should have ended there. However, the Tribunal instead introduced a new standard, a new definition of legitimate expectations. This led to a new question: Were the parties likely to conclude negotiations in the hypothetical reality where a mining license had been awarded? This evidently subjective and speculative question is given material form by the underlying assumption that the parties would act as "rational economic actors".

The Tribunal stopped short of holding that Tethyan had a legitimate expectation to a mineral agreement, but did gesture towards their own reconstruction of the definition of legitimate expectations:

> The Tribunal recalls that Respondent had created legitimate expectations on Claimant's part that it would be entitled to convert its exploration license into a mining lease … As a result of this finding, the Tribunal did not have to express an opinion as to whether the Governments' conduct in the Mineral Agreement negotiations amounted to a breach of the FET standard.[94]

This suggests that the GOB had obligations under the FET standard to conduct Minerals Agreement negotiations in a particular way. The tribunal does not directly rule on these obligations, and so we are left unsure as to what they are. However, in the context of the overall judgment, it becomes clear that these obligations concern the economic parameters of the negotiations. Pakistan's "permanent sovereignty" over its natural resources notwithstanding, the GOB has a legal obligation not to be economically unreasonable in negotiating the sale of those resources.

Without ever explicitly making the incentive to negotiate into a duty, the Committee determines that reasonable negotiations would (likely) have been concluded between Tethyan and the GOB. This turn from

[93] Tethyan Quantum, 285
[94] Tethyan Quantum, 153-4.

legitimate expectations in their traditional sense of bearing a legal obligation, to the new notion of economic probability, presupposes that the parties will behave as rational economic actors respectful of context and current market expectations. It grants Tethyan the legitimate expectation that Pakistan behave as a rational economic actor. That is, it imposes on Pakistan (and potentially other host states) a legal duty to act in economically rational ways. This is a radical alteration to the concept of legitimate expectations, and a significant expansion of their scope. This reasoning, in effect, allows the Tribunal to rule as if Tethyan *did* have a legitimate expectation of a Mineral Agreement at the prevailing market rate. This flows from Pakistan's duty to negotiate in an economically rational manner.

2.7 Justifying the Imaginary Mineral Agreement

Having determined, in effect and only ever by implication, that the GOB did in fact have a duty to grant Tethyan's legitimate expectation of a Mineral Agreement, the Committee held:

> … if the GOB had not decided to take over the project from Claimant, it would have continued to negotiate with Claimant and an agreement would likely have been reached between the negotiating parties, including the GOB, regarding the terms and in particular the fiscal regime that would apply to the project.[95]

Note that the test of "readily ascertainable" has been altered again, this time to a rather lowly "would likely" standard.

Although the Tribunal acknowledged that the GOB did not have a duty to reach a mineral agreement, this did not entail that the GOB had the right to reject an unsatisfactory proposal, only an unreasonable one. However, in their view, no satisfactory proposal had been submitted,

[95] Ibid., 415.

negotiations had stalled, "… while some issues could be solved in the fall of 2008, "there were also remaining certain terms which we could not resolve" which included the fiscal regime and stability, royalty rate, stamp duty exemptions and amendments to the 2002 BM Rules.[96] However,

> On the other hand, the Tribunal recalls its findings that in the absence of Respondent's breaches, once Claimant would have received a mining lease, there would have been a mutual interest to achieve agreement on the remaining issues in the Mineral Agreement negotiations.[97]

Still the Committee claim that this mutual interest is not tantamount to a duty:

> The Tribunal wishes to emphasize that is not assuming that the Governments were under a legal obligation to conclude a Mineral Agreement or that they did not have any discretion as to the terms that they would negotiate with Claimant. However, as the Tribunal already held in the Decision on Jurisdiction and Liability and as it maintains in this Award, it would have been in the mutual interest of the negotiating parties to reach an agreement in order to ensure that the project would in fact be financed, constructed and become operational.[98]

This is a consequence of redefining legitimate expectations as predictable facts (what was likely to have occurred) rather than traditional legal obligations. Traditionally, the legal concept of legitimate expectations is concerned with what the duty-bearer (here Pakistan) is legally bound to do, not what they might, in fact, be likely to do. In this framework, Pakistan has no duty to award the minerals agreement, and Tethyan has no legitimate expectation of it. The Tribunal ignored this legal delimitation, replacing it with a legitimate expectation of rational economic behaviour. Consequently, Tethyan had a legitimate expectation that an agreement

[96] Ibid., 394. The "BM Rules" refers to the Mineral Rules enacted by Baluchistan in 2002 to implement the National Mineral Policy, dated September 1995.

[97] Ibid., 285.

[98] Ibid., 408.

would be reached at prevailing market rates – that is, that the GOB had no right to set its own terms, demand its own rates for its own resources, or go it alone. Although the Tribunal acknowledged that:

> … the Governments were not willing to accept whatever terms Claimant suggested but they "wanted a fair deal, and they were willing to walk away from the table if TCC would not give it to them." According to Respondent, the Governments were also conscious of creating precedents for other investors that would request similar exemptions or concessions if these were granted to Claimant.[99]

And that:

> Respondent further argues that the Governments would have little interest to make any concessions regarding the tax and royalty structure and that Claimant would have been under an obligation to realize the project regardless of any concessions to be made.[100]

Ultimately the Tribunal rejected this position: "In the Tribunal's view, this argument is detached from reality."[101] In other words, under-developed states have no right to hold out for fair terms for their resources; that is economically unreasonable behaviour. This brings us to the subtext of the Tribunal's judgement, under-developed states are used to the imposition of neocolonial governance, they accept it, and investors are entitled to expect it.[102] The Tribunal seems to have settled into the view that GOB would take what they were given, and that their attempts to set up an alternative option (running the mine themselves) were in bad faith. Going it alone ought to be a legitimate option for governments, it would enhance their bargaining power vis a vis foreign investors. But that does not appear to be the Tribunal's project at all.

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[99] Ibid., 389

[100] Ibid., 407

[101] Ibid.

[102] The author has expanded on neocolonial governance in Beckett, "Divisible College".

The GOB, which was after all providing 100% of the minerals to be processed, wanted a bigger slice of the pie. However, they were not entitled to expect this, as Claimant's financing expert Mr. Pingle stated

> … "[t]here is a point in almost every large project when the foreign governmental institutions meet with the host government, without private parties present. At that point, the foreign governmental institutions lay out their minimum requirements for them to make their loans or investments. It makes a significant difference to a host government when it realizes that massive FDI and a loan package worth billions of US $ turn on its unwillingness to agree to standard documentation." … The Tribunal finds this statement convincing and considers that it supports its finding that a Mineral Agreement providing in particular for fiscal stability would have been concluded after the mining lease was granted to TCCP.[103]

The (neo?) colonial tone of this "convincing statement" is striking, as is its casual denigration of host state sovereignty and agency. Moreover, "standard documentation" is a euphemism for imposed terms, low royalties, demand of a special tax regime, etc. This seems to fly in the face of basic freedom of contract, the GOB obviously felt the deal was not sufficiently beneficial to them, and that they could do better elsewhere or by themselves. But that option was denied to them by the Tribunal.

Having implicitly deemed the options of negotiating a better deal or running the project alone to be invalid, the Tribunal effectively held that the GOB had an obligation to grant the Minerals Agreement. This flows from Tethyan's legitimate expectation of rational economic behaviour on Pakistan's part. The Tribunal would then construct the minerals agreement that rational economic actors would have reached; the deal the GOB were legally obligated to accept.

[103] Tethyan Quantum, 416-17.

2.8 The Imagined Negotiations of a Reasonable GOB. Settling on a Set of Outcomes the GOB had Specifically Rejected

Tethyan and the GOB were far apart on the key issues of royalty and tax regimes. Tethyan was proposing a 2% Royalty, GOB wanted 5-6%; Tethyan wanted Export Processing Zone (EPZ) status, GOB refused this idea:

> Respondent submits that: (i) Pakistan would not have agreed to a royalty rate below the minimum of 5% required by law; (ii) Pakistan never agreed to grant EPZ status and Claimant abandoned this request during negotiations; (iii) the parties "were nowhere close to agreeing to the overall fiscal regime"; and (iv) the Governments "roundly rejected" a provision providing for an automatic renewal of the 30-year mining lease.[104]

The Tribunal emphasises in places that the GOB was under no legal duty to conclude the minerals agreement, or grant an EPZ. However, having discounted their alternative proposition (going it alone) as somehow unethical, nonetheless concludes that they would probably have done so. This economic probability is then transformed into a legal duty by the Tribunal. This is the effect of the choice to frame the issue in economic terms. Rather than focus on the conventional legal question of what Pakistan was legally bound to do, the Tribunal changes the definition of legitimate expectations into a right to expect the host state to act in an economically rational manner – as it "most likely" would have. In Tethyan, this rational action was defined in very precise terms:

> … the Tribunal finds that it is most likely that Claimant and the Governments would have reached an agreement on the terms of a Mineral Agreement. It further finds that those terms would most likely have included:
>
> (i) a sliding scale increasing from 2% to 4% over the life of the mine, on the basis that the GOB's interest in

[104] Ibid., 388.

> the project would have been restructured to a 25% net profit interest;
> (ii) EPZ status or similar tax concessions for the first fifteen years of the project while returning to the normal tax regime for the remainder of the mine's life; and
> (iii) a provision regarding the renewal of the Mining Lease. As for the renewal, the Tribunal finds, however, that a willing buyer would have factored in the risk that the value of the renewal would not materialize or that the renewal would not be on the same commercial terms and would thus have been prepared to pay 75% of the value associated with a renewal of the Mining Lease.[105]

Note that the "readily ascertainable" test has been amended again, this time to a "most likely" test. Moreover, the Tribunal has essentially determined that the GOB was obligated to accept Tethyan's terms, with two amendments:

1. Royalties were raised from 2% to a sliding scale 2-4%.
2. The certainty of renewal of the lease was discounted 25%.

Otherwise, the Tribunal imposed the rejected Tethyan offer.[106] This was an evidently biased, and poorly reasoned, decision, at odds with the standard conventions of legal reasoning. The mining lease renewal, for example, should – under conventional legal analysis of legitimate expectations – have been discounted 100%, because the GOB had the right to refuse it. From a conventional legal perspective, the *likelihood* of the lease being renewed is irrelevant, the question does not focus on what the investor is likely to receive, but on what they are entitled to demand:

> The fact that discretion is involved … means that the beneficiary of the extension lacks any legitimate claim to it (from a legal point of view). The extension is, in other words,

[105] Ibid., 459.
[106] Ibid., 460.

> in the hands of the State, and to award damages for its loss would negate this.[107]

The Tribunal holds quite the opposite, looking only at the likelihood of, rather than the legitimate expectation to, renewal. This is based on Pakistan's newly minted duty to behave in an economically rational manner. This is the substitution of conventional legal analysis with pseudo-economic theory, which the Tribunal has effectuated throughout its award. In doing so, it has quietly, and expansively, delimited (extended) the scope of Tethyan's legitimate expectation, to the detriment of Pakistan. This is done without reasoning, without apparent thought. It is common-sense, the reapplication of unjustified assumptions about facts and the respective roles of economics and law in determining value. This is how ideology works. It remains nonetheless a form of legal reasoning, defining the legal construct of value, to reach a legal decision.

The Tribunal is deploying a form of legal reasoning that differs substantially from conventional understandings. In this new form of reasoning, the host states' duties under legitimate expectations are not discovered by looking at traditional legal rules and sources – such as the jurisprudence and literature on legitimate expectations – but by normativising economic predictability. They have, in effect, created a duty for Pakistan to act as it "most likely" would have, i.e. as a reasonable economic actor constrained by circumstance. That probability is manifested as a legal duty.

The logic appears to be that Tethyan would eventually have made a bid that offered fair market value, which the ("reasonable") GOB would "most likely" have accepted. This "fact" determines the scope of Tethyan's legitimate expectation; its predicted likelihood becomes the substance of

[107] Marzal, "Quantum Injustice", 304.

Pakistan's duty. Law is implicitly redefined as economic prediction – the Tribunal's prediction of Pakistani action becomes Pakistan's *duty* to act as predicted. Their neocolonial duty to act in an economically reasonable manner. The Tribunal's offer is final, and Pakistan is obliged to accept this. Owners of mineral reserves can only negotiate the value-split of their exploitation within defined parameters:

> … the Tribunal considers it reasonable to assume that in return for an arrangement under which the GOB would not have been required to make any equity contributions and would have received guaranteed annual minimal payments during the initial payback period, the GOB would have agreed to a lower royalty rate during this period. At the same time, the GOB may well have maintained its request for a higher royalty rate in subsequent years and the Tribunal therefore considers it likely that the parties would have agreed on a sliding scale.[108]

The readily ascertainable test has once more been replaced, this time by "reasonable to assume" and "considers it likely" standards. Moreover, it is not really "reasonable to assume" that the GOB would have accepted a combination of offers it had already rejected. What if the GOB was "unreasonable" in its expectations, because it believed the alternative offered more value? Why does the Tribunal have the right to decide on a reasonable agreement? Because of their alleged expertise:

> The Tribunal therefore concludes that it was likely that the GOP would have granted EPZ status or similar tax concessions to the Reko Diq project for the first fifteen years of the project, as it has been assumed by Prof. Davis.[109]

Note: the GOB specifically rejected an EPZ.

> As demonstrated by the sensitivity analysis performed by Prof. Davis on this point, granting EPZ status for the first fifteen years of the project would still have provided the

[108] Tethyan Quantum, 425.
[109] Ibid., 440.

> Federal State with 29.6% of the project's total cash flows (compared to 42.6% if no EPZ status were granted).[110]

This is an imposed loss of 13% of total cashflow for 15 years, but it is apparently justified because Tethyan were providing the equity. However, it is, again, worth noting that while GOB would provide no equity in the project, they would provide 100% of the minerals to be processed for profit. This seems a fair equivalent to a capital injection, a joint investment between equal parties; in fact, in value terms the state's investment is significantly larger. To make the project viable, the value of the minerals must vastly outweigh the costs of extraction. But the Tribunal never configures things in that way. It never asks why the investor should be entitled to 70.4% and then 57.4% of the total cash flows, when the host is providing (investing) all of the resources.

This choice of 'resources-for-sale' frame is an ideological decision, it is under-reasoned, but it is important. Imposing this frame, rather than a 'co-investment' one, produces the structural imbalance, or bias, of the Tribunal. Framing the parties as co-investors would alter the legitimate expectations of each. Recognised as the larger investor, the state would be entitled to expect, and indeed demand, the larger share of the profits. The concepts of reasonable negotiations and a reasonable agreement would be turned on their heads. However, the Tribunal does not reflect on its framing of the dispute.

Instead, having devised its "reasonable deal", the Tribunal went on to calculate the value of the investment based on that deal being in place. From the prediction that a hypothetical reasonable GOB would most likely have accepted a hypothetical reasonable offer, the Tribunal constructs a legal duty for the actual state of Pakistan. The Tribunal's award entailed

[110] Ibid., 439.

that the GOB was legally obliged to accept a reasonable offer, and sanctioned them for not doing so. From here it follows that they were obliged to grant the mineral agreement, and so the investment should be valued as if they had done so. This valuation should not merely reflect the money and time invested by Tethyan, but rather what an arm's-length buyer would have paid for the lease, and the *specific* mineral agreement that the Tribunal created, given the metallurgical reports and predicted profits. This would be done on the basis that the mine would have been a success, "… the Tribunal is convinced that in the particular circumstances of this case, it is appropriate to assume that Claimant's investment would have become profitable and to determine these future profits by using a DCF method.[111]

Put together, the mining lease, mineral agreement, and expected profits yielded a surprisingly determinate value:

> Respondent shall pay to Claimant USD 4,087 million as principal amount of compensation for the breaches, as determined in the Tribunal's Decision on Jurisdiction and Liability dated 10 November 2017, of Respondent's obligations under Articles 3(2), 7(1) and 3(3) of the *Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments* relating to Claimant's investment in Pakistan.[112]

So, to recap, the GOP's experts claimed that the net value of the asset was close to zero, Tethyan's expert claimed it to be $8.5 billion, and the Tribunal held it to be $4.1 billion. To reach this conclusion, the Tribunal made assumptions about the GOB accepting a Mineral Agreement it had rejected (and was, officially, under no duty to accept), the applicability of modern DCF, the nature of value, the scope of Tethyan's legitimate expectation, the extent of the reserves, the future prices of copper, gold, and oil, the presence of sufficient accessible water, the possibilities of political and social unrest,

[111] Ibid., 335.
[112] Ibid., 1858.

or environmental catastrophe. So many assumptions, all contested, so many calculations, all incompatible, and yet the market value of the investment was deemed "readily ascertainable". "On that basis, the Tribunal concludes that, based on the modern DCF valuation model of Prof. Davis, the value of Claimant's investment amounts to USD 4,087 million."[113]

It is only *after* this reasoning process – and its assumptions about the Mineral Agreement, the forecast prices of gold, copper, and oil, the level of deposits, the availability of funding, the discounts for risk and the renewal of the lease, and the applicability of the novel "modern DCF" – that the value of the investment, with the expected mining lease *and* the imaginary Mineral Agreement, becomes "readily ascertainable":

> Based on its findings with regard to water, security, environmental and social impacts, permitting and the negotiation of a Mineral Agreement, the Tribunal is convinced that these risks are adequately captured in the delay modelled by Prof. Davis.[114]

Yet initiating the process in the first place was predicated on market value already being "readily ascertainable". The market value of the investment was not readily ascertainable until the Committee made it so. Ascertainment was not made because it was objectively 'ready'. Instead, market value was constructed by the Tribunal's decisions to make it appear (somewhat implausibly in author's opinion) "readily ascertainable". The award was not made because it was "readily ascertainable"; the value was made "readily ascertainable" because the Tribunal ordered a precise award to be enforced.

[113] Ibid., 1601.
[114] Ibid., 1565.

3. An Alternative Approach to Valuation – Article 7 (2) of Australia-Pakistan BIT

The political economy of international investment arbitration needs to be examined, especially given its growing role in global governance. There is a punitive feel to FET, not only does it expand the investors' protection, but it locks-in specific assumptions about how the market ought to work, and how the spoils ought to be shared:

> … current practice, even if operating under the pretence that the calculation of compensation/damages leaves little room for discretionary judgment, is in reality built upon a series of contestable choices that have served to construct a notion of compensable harm, one that is both contingent and specific to international investment law, as well as largely favourable to investors.[115]

This is a result of treating legitimate expectations as an economic fact which can be delimited scientifically. Ideological choices are being hidden behind a technocratic veneer. Legitimate expectations are being defined and expanded beyond their conventional legal form. The Tethyan case comes close to suggesting that being charged only current "market rates" is a legitimate expectation for prospective investors. This would appear to preclude individual, or groups of, host-states from challenging the current global distributional models.

Had the GOB's right to reject a bad deal and go it alone been respected, we could easily argue that the value of Tethyan's investment could not be readily ascertained. Indeed, nothing requiring so many speculative and contested assumptions could really be said to be "readily ascertainable". In that case, under art. 7(2):

> … the compensation shall be determined in accordance with generally recognised principles of valuation and equitable

[115] Ibid., 295.

> principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, and other relevant factors.[116]

Application of this provision could have allowed a balancing of interests, rather than the all or nothing approach pursued by the Tribunal. Tethyan deserved compensation for the expropriation of its investment, but the award given was excessive – in effect a $5.9 *Billion* award from a $219 *Million* investment. In the Tribunal's words, "Claimant's losses are equivalent to the (entire) value that its investment would have had if TCCP's Mining Lease Application has not been denied in violation of Respondent's obligations under the Treaty."[117]

This makes sense insofar as we assume Tethyan had a legitimate expectation of a mining lease. However, the *value* of that lease is dependent upon the existence, and terms, of a Mineral Agreement, and all the other assumptions detailed above. This agreement did not exist, and the Tribunal appeared to rule that Tethyan did not have a legitimate expectation of it. Nonetheless, the Tribunal's decision unfolds on the premise that because the Mineral Agreement would likely be forthcoming in theory, Pakistan had a legal duty to realise this in practice. This allows it to determine the content of the reasonable agreement that the parties would have produced. Market Value, at least here, is blatantly a legal construct, not an economic fact:

> The realisation that profits largely depend on the applicable legal environment, and that determining that regulatory background forms part of the legitimate exercise of State prerogatives, means that tribunals cannot determine appropriate levels of future profits on any objective basis.[118]

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[116] Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments, art. 7 (2).

[117] Ibid., 273.

[118] Marzal, "Quantum Injustice" 308.

This means Market Value could have been constructed differently, or the Tribunal could have accepted that market value could not be "readily ascertained". The Tribunal chose a particular understanding of value and ascertainability; they constructed a particular legal object, a manifestation of value to be valued. An alternative reading of "loss suffered" might be developed. This could cover only the initial investment, plus loss of time and effort – Tethyan being equitably paid for what they have put in. "Some form of equitable balancing of the various legitimate interests and prerogatives at stake is inevitable, which should lead tribunals to determine compensation for loss of profits based on a fair or reasonable rate of return."[119] Instead, we have the speculative, and effectively punitive, full market value standard imposed. This manifests a compound analysis, dependent on the GOB having breached its Tribunal imposed *duty* to reach a reasonable Mineral Agreement. Without the assumption of a "reasonable Mineral Agreement" the investment's value cannot be readily ascertained. Put simply Pakistan is being punished for wanting a fairer deal for *its own resources.*

Pakistan's resources are conceptualised as assets to sell, but could be alternatively understood as multi-billion-dollar investments by the state. In that framing, we are reminded that the state is actually the larger investor, and it is unclear why they ought to accept the smaller part of the return. The structural bias, or internal logic, of international investment arbitration is exposed by this perspective. The preference for a 'resources-for-sale' frame, over a 'co-investment' one, is a political decision. It produces the structural imbalance, or bias, of the Tribunal. This may be unintentional, but it is not unimportant. Conceptualising the parties as co-investors would

[119] Ibid.

radically alter the parameters of the legal construct of "reasonable negotiation".[120]

In another alternative, Tethyan could even be framed as service providers, with Pakistan commissioning them to provide the infrastructure to exploit the resources in return for a share of the profits. The three frames position the parties differently relative to one another. In the third the state has the upper hand, in the second the parties are equal, but in the first (currently hegemonic) framing, the interests of the investor are prioritised over those of the State and its citizens. The under-developed state is framed as dependent, rather than as abundant.

The decision in Tethyan also serves as a warning to other states that FET will be defined and defended expansively, that investor rights will be prioritised over host-state needs. Such awards and potential awards constrain state policy-making space, after all labour and environmental legislation is not always economically rational, this, "raises the concern that too much investor protection will create an impression that the 'national sovereignty has been given up to control by faceless international tribunals, whose decisions may restrict the regulatory powers of host countries'."[121]

4. The Award in Context, the IMF Loan and Pakistan's Political and Economic Circumstances

As the Tribunal was ordering a near $6 billion award against them, Pakistan was negotiating an Extended Fund Facility with the IMF to bail out its economy. These negotiations, and the gradual drawdowns from the Facility, continued until Imran Khan's ouster as Prime Minister, recommenced under

[120] For an earlier, more comprehensive attempt to re-imagine the law on expropriation from a Third World perspective, see Norman Girvan, 'Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint' in Richard B Lillich (ed), *The Valuation of Nationalized Property in International Law*, vol. III (USA: University Press of Virginia 1972–1987), 149.

[121] Islam, "FET", 16.

the new government, and were eventually concluded in 2024, with Pakistan securing a $7 billion loan.[122] Ironically, the bailout fund has ended up little over $6 billion (after 2 more years of interest). What the global legal order lends with one hand, it takes with another. what the global legal order lends with one hand, it takes with another. Pakistan returned to arbitration seeking both an annulment of the award, and an interim stay of execution. These were to be determined by an Arbitral Committee.

The annulment proceedings did not conclude, but as part of their argument in the stay hearing, Pakistan cited both the necessity for, and the fragility of, the IMF loan. Pakistan simply could not meet its domestic commitments if it were to pay the full value of its IMF loan to Tethyan. Tethyan was unsympathetic as, "TCCA cites that the IMF rescue is not new to Pakistan because it suffers from chronic problems with the IMF as indicated by it receiving 21 IMF loan agreements and 12 bailouts for over the past three decades."[123]

The Committee held that the decision on a stay had to be made under article 52(5) of the ICSID treaty: "The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision".[124] This gives the Committee a wide discretion,[125] and neither the Convention nor the ICSID Arbitration Rules give any guidance on how to exercise it.[126] However, the Committee does hold that "the right to life under Article 6(1) of the ICCPR" and "public health rights and public health

[122] 'IMF Executive Board Concludes 2024 Article IV Consultation for Pakistan and Approves 37-Month Extended Arrangement', *IMF*, 27 September 2024, https://www.imf.org/en/News/Articles/2024/09/27/pr-24343-pakistan-imf-concludes-2024-aiv-consultation-pakistan-approves-37-mo-extended-arr.

[123] Tethyan Copper Company PTY Limited (Claimant) and Islamic Republic of Pakistan (Applicant) (ICSID Case No. ARB/12/1) Annulment Proceeding, 147. Hereinafter Tethyan Annulment. Available at: italaw11880.pdf.

[124] Ibid., 126.

[125] Ibid., 129.

[126] Ibid., 130.

emergencies of international concern" as provided under Article 13(1) of the WHO's International Health Regulations 2005", are *not* "relevant rules". "Insufficient basis has been provided to consider such rules in the interpretation of Article 52(5)."[127] So, the Committee is not bound by even the most fundamental of human rights commitments when it decides whether circumstances merit a stay of enforcement. Nonetheless:

> Pakistan submits that immediate enforcement of the Award would lead to dire consequences to the country at a "uniquely bad moment in time". Pakistan emphasizes the hardship it would suffer due to the delicate state of the economy that needed a USD 6 billion IMF Extended Fund Facility in July 2019. … Immediate payment would lead to removal of funding for health, social, and welfare programs that would have "disastrous impacts for the people of Pakistan … particularly the most disadvantaged and vulnerable".[128]

However, the Committee was largely unmoved:

> Applicant's concerns that its right to life obligations under ICCPR or its obligations under the WHO's International Health Regulations might be affected could hardly be triggered by any lifting of the stay.[129]

The author is unable to understand the logic of this argument beyond the fact that enforcement can take some time. It seems to suggest that lifting the stay would have no immediate impact, and therefore the harm would be too remote:

> The chain of events that exists between lifting a stay of enforcement and the triggering of the right to life, public health rights, or public health emergencies of international concern appears too long and tenuous.[130]

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[127] Ibid., 133.
[128] Ibid., 143.
[129] Ibid., 156.
[130] Ibid., 133.

It is worth remembering that the Tribunal were happy to indulge a rather "long and tenuous" "chain of events" to procure the mineral agreement and the not "fundamentally uncertain" price forecasts needed to "readily ascertain" the value of Tethyan's investment. Nonetheless, the Committee continued:

> … while the Committee recognizes the potential hardship that Pakistan may suffer due to a lifting of the stay, it is not convinced of the likelihood that Pakistan would suffer the severe hardship on an immediate basis to the degree it claims.[131]

It is unclear whether "severe hardship" is a relevant consideration[132] because the Committee reasons that stripping Pakistan of the $6 billion emergency loan it got from the IMF would not cause severe hardship – at least in the short term.

Turning to the question of whether Tethyan would suffer any harm if the stay was not lifted, the Committee noted the argument of applicant, "that Claimant will not suffer any prejudice if the stay of enforcement is continued since post-Award interest is accruing at a rate of USD 700,000 per day."[133] To an outsider, this interest, which amounts to $256 million per year, may seem an exorbitant return for an actual investment of just $219 million. But for the Committee, the "interest does not adequately compensate an award creditor".[134] By way of explanation, the Committee continued approvingly:

> As the ad hoc committee in NextEra v. Spain determined: "Depriving the award creditor of their rightful remedy denies them the opportunity to allocate the benefits of such remedy as they see fit" and "while post-award interest may provide

[131] Ibid., 157.

[132] Paparinskis, "Crippling Compensation", argues that severe hardship or ruinous consequences should always be a consideration in the enforcement of awards, regardless of whether annulment proceedings are initiated.

[133] Tethyan Annulment, 81.

[134] Ibid., 161.

> some relief, it may not adequately compensate for the uncertainty, delay, and deprivation suffered by the award creditor".[135]

In contrast to Pakistan's irrelevant predicament, the harm facing Tethyan was deemed to be real and immediate. It had to be taken into account. The Committee compromised, extending the stay, but ordering Pakistan to produce:

> … an unconditional and irrevocable bank guarantee or letter of credit for 25% of the Award, plus accrued interest as of the date of this Decision, from a reputable international bank based outside of Pakistan, pledged in favour of Claimant and to be released on the order of the Committee.[136]

Pakistan failed to produce this guarantee, and the stay was briefly lifted. Enforcement proceedings ensued in numerous jurisdictions, and assets of Pakistan International Airlines were seized.[137] But that was then in the future, to where the Committee also looked, this time for justification. They actually held that lifting the stay might be in Pakistan's best interests:

> Demonstrating Pakistan's commitment to abide by its treaty obligations arguably might provide comfort to foreign investors on how Pakistan adheres to the rule of law and attract more foreign investment that could contribute to the country's economic development.[138]

That is, alleviating the suffering of the people of Pakistan would be less important than securing the confidence of foreign investors. Such it seems is the logic of the Committee.

5. Conclusion

The Tethyan case, like all arbitration cases, is unique and was decided on its own circumstances; perhaps not too much should be drawn from it. Yet

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[135] Ibid., 161.
[136] Ibid., 213.
[137] Pakistan, foreign mining firm to revive megaproject - News | Khaleej Times.
[138] Tethyan Annulment, 132.

it also taps into, and extends, a long history of international investment arbitration practice, which has systematically privileged investors. In the Tethyan award, the Tribunal frequently bent over backwards to find interpretations that suited the investor's interests. This was never clearer than in their deployment of the "readily ascertainable" criteria (and its various surrogates) and the arbitral creation of a reasonable Mineral Agreement, which reflected Tethyan's terms almost exactly. A quantum injustice one might say. Fortunately, international investment arbitration has no formal system of precedent, though tribunals borrow liberally from previous decisions. Tethyan embraced a fundamentally new conception of legitimate expectations, not as legal construct but as economic predictability. This, at the very least, sets the ground for arguing that investors have a legitimate expectation to an agreement on market terms, and all but asserts that host states have a duty to conduct mineral negotiations "reasonably". This, like the rule of the Global Legal Order generally, is bad news for those of us with dreams of constructing a more equitable global economic order, where the interests of the under-developed states are prioritised over those of global capital. This is where reconceptualising natural resources as co-investments and thus host states as co-investors could come in. In this framework, the host country (here the governments of Pakistan and Baluchistan) would be understood as the major investor in any project. Logically no investor will invest more in any mining project than the value of the resources to be extracted. A project's profit lies in the difference in value between an investor's investment (small) and the state's investment (large). It is with this axiom in mind that we should evaluate how that profit ought to be divided between the investors – that is, how *reasonable negotiations* ought to take place.

International investment arbitration is of great, and growing, importance as a form of global governance. It is justified as protecting

investors from the whims or incompetencies of local judiciaries in under-developed states. This clearly colonial framing ought to give pause as to the intentions and neutrality of international investment arbitration Tribunals. In the Tethyan case, we witnessed the Tribunal strip the GOB of their agency and freedom of contract. This manifested a clear neoliberal worldview, and an ideology aligned to promoting investor rights in the name of attracting investment. This eviscerates the political and economic agency of host states, and their capacity to develop. It is a political choice, and should not go unchallenged, international investment arbitration remains capable of better, more equitable, framings. It is our challenge to work towards these, and international investment arbitration is one of the arenas in which we must situate the struggle for global justice.

Postscript: Negotiating in the Shadow of This Law:

In March 2022, the Government of Pakistan and Tethyan came to an agreement to resume co-operation and develop the mine.[139] The terms of the agreement, negotiated in the shadow of an enforceable but unpayable debt, have not been publicly disclosed.

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[139] Pakistan, foreign mining firm to revive megaproject - News | Khaleej Times

Decoloniality and Mortgages: A Legal Discourse in Pakistan's Perspective

Muhammad Waqas Sarwar*

Abstract

This article argues that, after independence, Pakistan inherited the legal system of British India; based on the principles of common law having least concern with customary practices of the subcontinent as well as personal laws of indigenous communities; erected to strengthen the ongoing colonization of the subcontinent. Three quarters of a century has been passed since independence but still some of very important statutes are from colonial era; the "Transfer of Property Act, (TPA) 1882" is one of them, based on English principles of real property, deals with creation and disposition of rights and interests over immoveable property by act of individuals. Mortgage is the "transfer of an interest" in immoveable property to secure the repayment of a loan; TPA, 1882 provides six kinds of mortgages, most of them were those originated and practised in United Kingdom during eighteenth and nineteenth centuries or even before; customary mortgages of subcontinent were ignored while drafting TPA, 1882. Pakistan still has more than one hundred- and forty-years old kinds of mortgages which are also out of practice in the United Kingdom now. This article focuses on two kinds of mortgages namely "mortgage by deposit of title deeds" and "anomalous mortgage". The author critically analyzes these two kinds through the lens of decoloniality. This article first explores the concept of decoloniality and its intersection with law and mortgages then analyzes the kinds of mortgages mentioned above. Furthermore, the article suggests that mortgages may be modernized and decolonized through legislative amendments.

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1. Introduction

Decoloniality is a critical framework developed to confront and challenge the dominance of western knowledge, culture, and epistemology. Emerging primarily from Latin American scholarship, it critiques the long-standing imposition of western values, knowledge systems, and legal structures on colonized societies. This imposition, which began during the colonial era, aimed to eradicate indigenous cultures, wisdom, and legal traditions to serve the political and economic interests of colonial powers.[1]

Epistemic Disobedience comprises of dismissing western academies and their implications as superior and questioning the very notion of the fact that western knowledge and institutions are universal. It is a matter of holding on to native knowledge systems and speaking out against the majority paradigm. It is killing the all-pervasive power of western philosophy with the fact that it respects and elevates local, indigenous knowledge.[2] The practitioners of epistemic disobedience aim to emphasize the aspects that have historically provided less attention to the local culture and knowledge systems; especially in the fields of law, education and history.[3]

Epistemological de-linking is a liberating process that rejects Eurocentric biases, freeing knowledge from being tethered to European-

[1] Tanja Winkler, "What Might Decoloniality Look like in Praxis?," *Planning Theory* 23, no. 1 (February 2024): 3-21, https://doi.org/10.1177/14730952231163240.

[2] Naghmana Siddique, HM Zahid Iqbal, and Ambreen Bibi, "Contemporary Engagements with Decoloniality: Tracing Epistemic Disobedience and Decolonial Aesthesis in Pakistani Anglophone Literature," *Panacea Journal of Linguistics & Literature* 2, no. 2 (2023): 222-233, https://doi.org/10.59075/pjll.v2i2.311.

[3] Ali Meghji, "Dwelling in Epistemic Disobedience: A Reply to Go," *The British Journal of Sociology* 74, no. 3 (June 2023): 294-301, https://doi.org/10.1111/1468-4446.12987.

centered theories and models. It is about embracing every belief system and nurturing its growth. This approach acknowledges the need to shift away from western-centered systems of thought, theories, and learning paradigms.[4] The objective is to cultivate mental autonomy, which ultimately facilitates the creation of multiform knowledge systems.[5]

Epistemic resuscitation or revival is defined as the reinforcement of indigenous traditional knowledge systems, which at one point were marginalized or stood against due to colonialism, which resulted in their disappearance.[6] It is the restoration and renaissance of traditional knowledge, languages and individual or communal practices. The law serves as a platform for the construction of modern law through the recognition and incorporation of traditional laws, customs and forms into the formal legal order**.** This also includes educational reforms that incorporate indigenous knowledge into the curriculum, ensuring cultural preservation. These practices foster a sense of cultural pride and continuity.[7]

At present, the law is heavily influenced by western thoughts, which were disseminated during Europe's colonization of the world. This process was not a peaceful assimilation of legal doctrines but a deliberate effort to replace the existing legal systems of indigenous populations with those of the colonizers. The imposition of western law served to bolster colonial

[4] Jack T. Lee, "Romanticizing Decolonization and Asian Epistemology: Reflections on Identity and Space," *Asia Pacific Education Review* 24, (June 2023): 187-197, https://doi.org/10.1007/s12564-023-09835-3.

[5] Veeran Naicker, "The Problem of Epistemological Critique in Contemporary Decolonial Theory," *Social Dynamics* 49, no. 2 (June 2023): 220-241, https://doi.org/10.1080/02533952.2023.2226497.

[6] Asad Zaidi, "Pakistani World making in International Politics: Empire, Decolonization and Cold War Struggles 1950-1989" (PhD Thesis, London School of Economics and Political Science, 2022), http://etheses.lse.ac.uk/id/eprint/4486.

[7] Thapelo Tselapedi, "The Darker People, Decolonisation and the Making of 'the International': A Theoretical Enquiry" (PhD Thesis, University of Pretoria (South Africa), 2021), https://search.proquest.com/openview/0cde31159202aebdcec2f9df59cafca1/1?pq-origsite=gscholar&cbl=2026366&diss=y.

power, erode local customs and traditions, and justify the perceived superiority of the colonizers over the colonized societies.[8]

Multiple authors focused on interdisciplinary approaches while participating in decolonial discourse; these authors critically explored how the colonial past still affects modern legal systems and advocate for legal system reconstruction as a part of decolonization.[9] Decolonial legal critiques contribute by analyzing historically and ideologically the grounds of international legal orders. In highlighting the role of international law in colonialism, it has been pointed out that international law used to be an instrument to perpetuate and exercise colonialism. International law more often serves the interests of dominant states rather than powerless or marginalized ones as a result of colonial history. This assessment posits that the primary principles of international law are linked to colonial practices and, there must be an academic re-examination to deal with their colonial origins.[10]

A second approach has been proposed; which is the decolonial interrogation of the human rights course. This approach asserts that the human rights discourse is steeped in western traditions of morality and philosophy that lack the knowledge to accommodate the experiences and values of other societies. Scholars of decoloniality postulate that human rights laws should be modified to take into account different cultural

[8] Foluke Ifejola Adebisi and Katie Bales, "Reinventing Possibility: A reflection on law, race and decolonial discourse in legal education," in *What Is Legal Education For?*, ed. Rachel Dunn, Paul Maharg, Victoria Roper (London: Routledge, 2022), 85-110.

[9] Karina Theurer, "Minimum Legal Standards in Reparation Processes for Colonial Crimes: The Case of Namibia and Germany," *German Law Journal* 24, no. 7 (November 2023): 1146-1168, https://doi.org/10. 1017/glj.2023.81.

[10] Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," in *The Nature of International Law*, ed. Gerry Simpson (London: Routledge, 2017), 437-516.

viewpoints and respect indigenous people's self-determination.[11] The nineteenth century witnessed the British colonial encounters on Islamic legal traditions in British India. This encounter has exhaustively made changes to, redefined, and even subdued Islamic law to suit the system of administration of colonial masters. English left long ago but their footprints can easily be seen on legal systems of both India and Pakistan.

Pakistan's legal scholars have also contributed to the discourse of decoloniality and law. These eminent people enhance and encourage Pakistan's legal system's intellectual struggle to analyze colonial influences and how to correct them. Their pieces provide for academic investigation, policy dynamism, and legal analyses to improve justice and equality in Pakistan. In a nutshell, these scholars altogether argued that gaining an understanding and overthrowing colonial influences over modern legal systems will depend on an intersection of decoloniality and law. They advocate for a "decolonial legal theory and practice" centered on the appreciation of indigenous laws, and the world order should be more inclusive and equitable at the global level.

2. Impact of Colonialism on Subcontinent

The British colonial era marked the system of law of present India and Pakistan with an indelible impression. The implementation of the codes was a tactic aimed at disseminating colonial dominance and dismantling the indigenous legal system. This process, initiated around 1830, aimed to replicate English common law in Indian society. Lord Macaulay's famous assertion that no country needed a legal code more than India, and that this

[11] Makau Mutua, "Critical Race Theory and International Law: The View of an Insider-Outsider," *Vill. L. Rev.* 45 (2000): 841, https://digitalcommons.law.villanova.edu/vlr/vol45/iss5/2.

need could be met by adopting English legal principles, underscores the colonial perspective and its influence on the legal system.[12]

Between 1861 and 1887, the colonial administration passed 15 statutes that significantly reshaped the legal landscape of British India. These statutes introduced both the substantive laws and procedural laws for British India, some of which are still in force today, and were hailed by colonial authorities like Whitley Stokes as a benevolent step towards sharing "the blessings of a conscientious, clean, and ascertainable law" with India.[13] However, the entire process was marred by the colonial ambition to gain unfailing authority over the region, revealing the underlying motives and challenges of the time. The law formalized a set of regulations for the standardized administration of justice, which was applied under colonial interests. It produced the condition that the legal procedures and results were foreseeable and in agreement with the purpose of the British Empire.[14]

To uphold the dominance of British common law, the colonial government worked to suppress and eventually replace the diverse tribal laws and practices prevalent in the Indian subcontinent. This not only disrupted the legal traditions but also the social and cultural fabric of the people, underscoring the broader impact of actions of colonial masters. Integrate the colonized societies into the colonial legal framework; the introduction of a single uniform legal code was the attempted process of melding the colonized societies into the unifying colonial legal system.

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[12] Raza Saeed, "Law and Coloniality of Empire: Colonial Encounter and Normative Orderings in the Indian Sub-Continent," *YB Islamic & Middle EL* 19, no.1 (2016): 103-133.

[13] Amna Hassan, "Impact of the European Private Law Codification Outside Europe I: Common Law in the Old Colonial Empire (Pakistan)," *Dezs\HoMárkus Research Group for Comparative Legal History, DIKE* 3, no. 2 (2019):170-183, https://doi.org/10.15170/DIKE.2019.03.02.11.

[14] Katharina Rietzler, "Counter-Imperial Orientalism: Friedrich Berber and the Politics of International Law in Germany and India, 1920s–1960s," *Journal of Global History* 11, no. 1 (2016): 113-134.

Incorporating western patterns was helpful for the British colonial representatives in exercising control over the magnanimous and varied population of the Indian subcontinent.[15]

The long-term influence of this codification is well-illustrated through the legal systems of these two countries to date. Many laws that were made in colonial times are still in force. These laws are reflections of the persevering principles of the British legal system. However, this legacy necessitates balancing the existing colonial legal systems, which have been inherited, with the contemporary needs of the society, which are changing with regard to both culture and law.[16]

The codification of laws in British India was part of a careful effort to dominate colonial rule and crush the indigenous legal traditions. Although it provided a certain and unified legal framework, it had deep and lasting impacts on the judicial systems of India and Pakistan, which is a problem that continues to exist since they are in a quest for good governance and justice. The introduction of codified common law did not out rightly abolish customary practices but placed the burden of proving their existence on those who claimed such rights. Over time, the reliance on common law principles in judicial decisions led to the gradual fading away of indigenous legal practices.[17] Colonialism almost affected every branch of law. But this article primarily focuses on "mortgages", especially two kinds of mortgages.

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[15] Aziz Rahman, Mohsin Ali, and Saad Kahn, "The British Art of Colonialism in India: Subjugation and Division," *Peace and Conflict Studies* 25, no. 1 (2018): 1-26, https://nsuworks.nova.edu/pcs/vol25/iss1/5.

[16] Elise Huillery, "History Matters: The Long-Term Impact of Colonial Public Investments in French West Africa," *American Economic Journal: Applied Economics* 1, no. 2 (2009): 176-215, https://sciencespo.hal.science/hal-01052798/file/app.1.2.176.pdf.

[17] Bernard Cohn, "Colonialism and Its Forms of Knowledge: The British in India," in *The New Imperial Histories Reader*, ed. Stephen Howe (London: Routledge, 2020), 117-124.

3. Background of Land and Property Laws of Pakistan

Land laws of the colonial era still mark the landholding pattern and property rights in Pakistan; the ownership and management of land traces are very deep and sustainable. These laws originated in British colonial times with the sole purpose of increasing revenue and consolidating the colonial powers, and most of the time, they ended up preserving the powers of colonial officials administrating the land.[18]

The adoption of such laws always began with the formalization and codification of land rights, which totally ignored the traditional and customary ownership systems. The legal reclassification was, therefore, instrumental in the local tribes seeing all their ancestral and traditional land rights diminished or not even recognized at all in the new systemic structure. Typically, colonial administrators tended to use land distribution systems that created a class of landlords who were loyal to the rule of the colonial regime, whichever further extended colonial influence and control over the region.[19]

Before the colonial era, property laws had many forms and were subject to rules rooted in customs, shaped by personal laws of communities and nourished by decisions of Indian judges. The drafters of Transfer of Property Act 1882 employed the crystallization and standardization strategies; crystallization means to make the law clear enough, hence, left very little room for judicial development of law; standardization denotes a notion that property must have a standard form and subject to a standard

[18] Fatima Tassadiq, "Colonial Laws, Postcolonial Infrastructures: Land Acquisition, Urban Informality, and Politics of Infrastructural Development in Pakistan," *Environment and Planning D: Society and Space* 42, no.3 (2024): 401-421, https://doi.org/10.1177/02637758241240363.

[19] Zia Akhtar, "Colonial Legacy of Pakistan and Genesis of a New Constitution," *European Journal of Law Reform* 22, no.3-4 (2022): 267-288, https://www.elevenjournals.com/tijdschrift/ejlr/2022/3-4/EJLR_1387-2370_2022_024_003_002.

rule, for whole the then British India, and the role of local customs and usages regarding property must be curtailed. It was 1882 when the Transfer of Property Act was finally enacted, the law regulating the mortgages of immoveable property incorporated in the Act as a whole. In British India the mortgages were legislated first for Bengal in 1798 but the legislation failed to respond effectively to multiple notion of issues of mortgages commonly practiced then, resultantly chaos and uncertainty had been increased, both creditor and debtor involved in vague litigation and the value of mortgaged property compromised. The enactment council shared the first draft which received criticism, because, among other things, mortgages were not properly comprehended. Sir Rashbihari Ghosh, an Indian scholar of mortgage law, reported to have said that customary mortgages in India are countless. Hence, the final draft of the Act, section 58, after enactment, host definition and essential of mortgage in general and then provides four kinds of mortgages, by detailing their core essentials with high degree of specificity. Anomalous mortgage included for creating a space for "all mortgages" customarily practiced in India and explicitly different from those enumerated in the Act. Mortgage by deposit of title deeds became part of the Act by an amending Act 20 of 1929.[20]

4. Law Relating Mortgages in Pakistan

Mortgage is a transfer of an interest in a specific immoveable property for the sole purpose of securing the repayment of a sum of money, already advanced or will be advanced in future, as loan or to secure the performance of an obligation which may give rise to a pecuniary liability, the transferor of an interest is known as "mortgagor" and to whom the interest has been transferred known as "mortgagee" the property employed as security is

[20] Shyamkrishna Balganesh, "Codifying the Common Law of Property in India: Crystallization and Standardization as Strategies of Constraint," *The American Journal of Comparative Law* 63, no. 1 (2015): 33-76, http://www.jstor.org/stable/26386648.

known as “mortgaged property” the loan which repayment has been secured known as “mortgage money”. Mortgage money includes the principal amount of loan plus interest, though interest is forbidden in Islam but contemporary mortgages' law still hosts provisions of interest.

Mortgage is a transaction which creates an interest in immoveable property, therefore, can only be affected by an instrument and such instrument known as “mortgage deed”. There are six kinds of mortgages including “simple mortgage” “mortgage by conditional sale” “usufructuary mortgage” “English mortgage” “mortgage by deposit of title deeds” and “anomalous mortgage”.[21] The author observed that each kind of mortgage can be analyzed through the lens of decoloniality; but the scope of this article would be limited only to “mortgage by deposit of title deeds” and “anomalous mortgage”.

4.1 Mortgage by Deposit of Title Deeds-Legislative Evolution

Mortgage by deposit of title deeds is an equitable mortgage by nature originated from the decision of an English court. Therefore, it would be appropriate to explore the origin, scope, evolution and contemporary implications of mortgage by “deposit of title deeds” in English law. Equitable mortgages may be created of legal or equitable estates and in English law equitable mortgage operates as a contract by which a charge is created on the property but such contract does not convey any legal estate to the creditor.[22]

Deposit of title deeds constitutes an enforceable security against depositors, first, established in *Russel v. Russel* (1783). A borrower deposited the title deeds of his leasehold estate with the lender for a loan

[21] Transfer of Property Act, 1882, sec. 58.

[22] The Law Commission, *Working Paper No. 99 Land Mortgages*, 1986, London: Her Majesty’s Stationery Office, https://lawcom.gov.uk/project/land-mortgages/.

and resultantly secured a loan from the lender. Later on the debtor became bankrupt; the lender for realization of loan brought an action in the court of Chancery for the sale of debtor's leasehold estate. It was argued by the debtor that the creditor's action was against the law because it amounted to creating a legal charge over debtor's leasehold estate without writing, therefore, causing violation of 4th clause of Statute of Frauds, enforced. The principal question before the court was whether the debtor's act of depositing the title deeds of leasehold estate with the lender operated as a security for the loan which had been advanced to the debtor. It was found that the title deeds of leasehold indeed deposited with the lender as security, therefore, entitled the lender to have a charge over leasehold notwithstanding in the absence of a written agreement constituting the same and consequently justified this presumption that parties were intended to create a mortgage. Russel case founded the rule that deposit of title deeds of property as security of loan is not only evidence of mortgage but "act of depositing" is a part performance of the agreement which makes it enforceable in equity.[23]

Prior to the verdict in Russel v. Russel by Lord Thurlow, any party, with whom title deeds were deposited, was only permitted to hold the title deeds of property so as to secure payment from debtor by embarrassing him, however, no charge being created upon the estate and if the right granted to the creditor had stopped here it would not have been in the nature of a mortgage at all. After Russel the same principle has been reinstated in the cases of *Featherstone v. Fenwick* (1784) and *Hartford v. Carpenter* (1785). Where, it was held that the deposit of title deeds entitled the holder of such deeds to have a mortgage though there was no special agreement to assign but holder's lien upon property effectuated, hence, the deposit affords an

[23] Russel v. Russel, (1783) 1 Bro. C. C. 269.

assumption that such was the intent of parties while depositing and accepting title deeds. The same principle was reaffirmed in *Edge v. Worthington's case*. The Russel case introduced an exception to the Statute of Frauds and Perjuries 1677 and such exception justified, firstly, due to commercial necessities that might have existed in late eighteenth and early nineteenth century England. Secondly, the justification of exception was the significance of "title deeds" as proof of ownership of property, at that time there was lack of land registries in England, therefore "title deeds" was the sole badge of ownership and title to land could not be proved without having title deeds. Therefore, if a person could not have deeds of the property, then no potential vendee would attract. The equitable mortgage by deposit of title deeds was not required registration because there was no document to be registered but where the deposit made along with an instrument evidencing the transaction than registration is required to retain its priority among multiple charges.[24]

Lord Cairns reported to have said that in equity, it is a well-established rule that deposit of documents, comprising title, without anything else, without anything verbal or written will construe a charge upon the referred property.[25] Later the English statutory law preserved the doctrine of equitable mortgage by deposit of title deed; the Law of Property Act, 1925 does not affect the doctrine, in fact, it provides that it shall not prejudicially affect the interest or right of a person arising out of or following on the possession by him of any documents concerning to a legal estate in land, furthermore it shall not affect any question arising out of or consequential upon any omission to acquire a document relating to a legal

[24] W. D. Rollison, "English Doctrine of Equitable Mortgages by Deposit of Title Deeds or Other Muniments of Title," *NOTRE DAME LAW REVEW* 6, no.3 (1931): 341-361, https://scholarship.law.nd.edu/ndlr/vol6/iss3/6/.

[25] Shaw v. Foster, (1872) 5 H.L. 321 (340).

estate in land or any question arising from absence of possession by any person of any documents relating to a legal estate in land.[26]

As regards the registration of mortgage by deposit of title deeds the law provides that every mortgage, whether legal or equitable, constituted after the commencement of Law of Property Act 1925 affecting a legal estate in land, but not being a mortgage protected by the deposit of documents relating to the legal estate, shall stand according to its date of registration as a land charge in pursuant to the Land Charges Act, 1925.[27] The author submits that the law of Property Act 1925 made a clear room for an equitable mortgage protected by deposit of title deeds.

From its creation the mortgage by deposit of title deeds got the attention of the commercial world and became an effective and easy mode of creating security of loans. A significant change was introduced by the Law of Property (Miscellaneous Provisions) Act 1989, it provides that a contract for the sale of land or a contract affects any other disposition of an interest in land can only be made in writing and by incorporating all the terms upon which the parties have expressly agreed either in a single document or in each instrument where contracts are exchanged and every such document must be signed by each party. The section 40 of Law of Property Act 1925 having the law of "part performance" has also been repealed.[28] It was held that after commencement of Law of Property (Miscellaneous Provisions) Act 1989 an equitable mortgage by deposit of title deeds in violation of section 2 of said legislation could no longer be constructed and enforced.[29] The author submits that an equitable mortgage by deposit of title deeds founded by Court of Chancery and ended by an

[26] Law of Property Act 1925, sec. 13.
[27] Ibid., sec. 97.
[28] Law of Property (Miscellaneous Provisions) Act 1989 sec. 2.
[29] United Bank of Kuwait plc v. Sahib, [1997] Ch 107.

enactment. Now in England mere deposit of title deeds with the creditor has no value unless accompanied by written evidence as per law.

4.2 Mortgage by Deposit of Title Deeds in Pakistan

The mortgage by deposit of title deeds was not in the scheme of TPA 1882 until 1929 by an amending Act, it become part of TPA 1882 as clause "f" of section 58; initially it was available in the towns of Calcutta, Karachi, Bombay, Madras and Rangoon…etc.[30] A proviso has been introduced therein by Finance Act of 1986.[31]

When a person, with the intention of creating security for a loan advanced or to be advanced, delivers the documents of title of specific immoveable property to a creditor or his agent then mortgage by deposit of title deeds is created. The mortgage by deposit of title deeds may also be created in favour of a banking company by making an entry in record-of-rights[32] against the entry relating to such immoveable property.[33] The mortgage by deposit of title deeds is indicial with simple mortgage; the same provisions that govern simple mortgage shall apply to a mortgage by deposit as much as applicable.[34] Following are essentials of a mortgage by deposit.

1. Documents of Title; documents of title must consist upon those documents evidencing the valid title of mortgagor or in absence of

[30] Act XX of 1929 sec. 19, https://www.indiacode.nic.in/repealed-act/repealed_act_documents/A1929-20.pdf, accessed May 4, 2024.

[31] Finance Act 1986 sec. 2, https://molaw.gov.pk/SiteImage/Misc/files/Collections/1986.pdf, accessed May 1, 2024.

[32] The term "record of rights" has been explained by section 39 of Land Revenue Act 1967 consisting upon documents including details of persons having rights and interest upon a particular piece of land, nature of their rights and interests and liabilities/conditions attached thereto. An entry in record of rights shall be deemed to be conclusive proof of existence of any right or interest in land unless contrary proven. In land revenue law, record-of -rights is an essential document affecting and extinguishing rights in relation to land.

[33] Transfer of Property Act 1882, sect. 58(f).

[34] Ibid., sec. 96.

original documents duplicate may also be admissible. To constitute a mortgage under clause (f) of section 58 of TPA 1882 the documents of title of specific immovable property must disclose an apparent title or interest of the mortgagor in that property. If documents deposited by mortgagor don't disclose any interest or title in such property then the transaction failed to attract the provision of section 58(f) of TPA 1882. The rule was affirmed and it was held that against the property which is subject matter of the suit, documents of title deposited by depositor along with the memorandum of deposit of title deeds only comprise of sale agreement and the sale agreement, on the face of it, allegedly cancelled by vendor due to non payment of consideration on time, therefore, the depositor in lieu of such sale agreement doesn't have any title or interest, hence, no mortgage has ever been created over suit property under section 58(f) of TPA 1882.[35]

2. Existence of Debt; a debt must exist; a mere deposit of title documents without existence of a debt shall not constitute a mortgage. The author submits that existence of debt is core essential of every mortgage; where existence of debt doesn't prove, mere deposit of title deeds wouldn't create the status of "mortgagee" in favour of its holder.

3. Delivery to Creditor; the documents must be delivered to creditor or to duly appointed agent of creditor as security against an existing or future debt. Delivery may be actual or constructive where documents are already in creditor' possession.

[35] Australisia Bank Limited v. Faruqui House Building Corporation Ltd PLD 1975 KH 870.

4. Sale; a mortgagee by deposit of title deeds may institute a suit of sale of mortgaged property for recovery of loan at mortgagor's default. Personal liability; where proceeds of sale prove insufficient to discharge the mortgage money in full then a suit for recovery of remaining amount may also be filed by the mortgagee. Registration; a mortgage by deposit of title deeds doesn't require registration.[36] A mere deposit to a creditor or agent with the intent of creating a security of loan would be sufficient to create a valid mortgage by deposit. But where the parties draft a written instrument incorporating terms and conditions therein then registration is compulsory being a non-testamentary instrument creating or disposing of rights or interests in immoveable property.[37]

The author submits that "mortgage by deposit of title deeds" in Pakistan still can be affected without registration if parties entered into such mortgage verbally, but such mortgage is extremely hard to prove in court; it must be made compulsory that mortgage by deposit of title deeds shall be affected only by an instrument. To modernize and decolonize the contemporary law of mortgages of Pakistan the author further submits that rather than a separate form of mortgage, it should become part of simple mortgage; "that a simple mortgage may also be constituted by deposit of title deeds but "registration of deposit" must be compulsory to avoid any sort of ambiguity".

4.3 Mortgage by Deposit of Title Deeds in India

India inherited the same TPA 1882 after independence and it is still enforced there. Beside minor differences no major change has been introduced yet. In India, essentially, a mortgage by deposit of deeds may be

[36] Transfer of Property Act 1882, sect. 59.
[37] Registration Act 1908, sec. 17.

created in the towns of Calcutta, Bombay and Madras but the state government may also be authorized to extend the operation of section 58(f) to other towns too. Along with aforesaid mentioned towns a mortgage by deposit of title deeds may be created in various towns, now, throughout India. As regard the proviso which was included in TPA 1882 in Pakistan by Financial Act of 1986 no such proviso exists in Indian legislation. Author submits that regarding the essence of "mortgage by deposit of title deeds" both (Pakistani & Indian) legislations are quite the same.

4.4 Anomalous Mortgage

An anomalous mortgage has not been given a definition. Anomalous mortgage had not been made part of the section 58 of TPA 1882 initially; it was the part of section 98 of TPA 1882. The amending Act 20 of 1929 split section 98 and first part of the section was included in section 58 of TPA 1882 as sub-section (g) and the rest remains in section 98. Before the inclusion of anomalous mortgage in section 58, there were six kinds of mortgages regulated by the Act, which included a "simple mortgage", an "English mortgage", a "usufructuary mortgage", a "mortgage by conditional sale", "combination of simple mortgage & usufructuary mortgage" and "combination of a mortgage by conditional sale & usufructuary mortgage". Many other classes of mortgages popular among masses usually practiced in a particular business and ethnic community or area fall within the ambit of section 98 before amendment and regarded as anomalous. Amendment abolished the last two kinds of mortgages mentioned above and introduced two new classes, "mortgage by deposit of title deeds" and "anomalous mortgage".[38]

[38] Darashaw Vakil, *Commentaries on The Transfer of Property Act*, 2nd ed. (New Delhi: Wadhwa and Company Nagpur, 2004), 875.

An anomalous mortgage is a mortgage which is by characteristic neither a simple mortgage nor a mortgage by conditional sale, a usufructuary mortgage, an English mortgage and a mortgage by deposit of title deeds.[39] The obligations and rights of parties having an anomalous mortgage shall be ascertained by their contract and such contract documented as "mortgage deed". Whether a mortgage is "anomalous" or not the intention of the parties and nature of transaction must be gathered from mortgage deed and so far as the mortgage deed does not extend to determine the rights and liabilities of parties then local usages determine the fate of transaction.[40] But the parties by executing a deed of anomalous mortgage cannot undo any of the statutory rights available to either party in a mortgage such as the right of redemption given to a mortgagor.[41]

A mortgage may be anomalous if it was constituted by a combination of two or more kinds of mortgages specified in section 58 of TPA or it was a mortgage customarily practiced in any area of the subcontinent. Local mortgages prevailed in different parts of subcontinent especially in Malabar were anomalous mortgages and usually governed by local customs and usages, therefore, to protect them legally clause (g) has been introduced. Some forms of anomalous mortgages are discussed below.

a. ***Zarpeshgi*** is a transaction that may possess the features of a lease and a mortgage. The question whether a *zarpeshgi* was a mortgage or lease entirely depends upon the nature of transaction and intention of parties. If there is a secured debt and a right of redemption then the transaction is a "*zarpeshgi* mortgage". In "*zarpeshgi* lease" the lessor has been given an advance and lessee has possession for a

[39] Transfer of Property Act 1882, sec. 58 (g).
[40] Ibid., sec. 98.
[41] Ibid., sec 60.

term during which the lessee compensate himself for the advance made along with profits out of the proceeds of property.[42]

b. ***Otti* mortgage of Kerala** is an anomalous possessory mortgage as practiced and understood in Kerala. It gives the mortgagee the right to possess and enjoy the rents and profits of mortgaged property without any liability to account. The mortgagor is personally liable for the mortgage amount. Unless there is a contract to the contrary, an *otti* mortgage cannot be redeemed before the expiry of twelve years from the date of its execution.[43]

c. ***Kanom* & *Peruarthuam* mortgages of Malabar.** *Peruarthuam* as a customary mortgage of Malabar having a unique feature, that is, while redeeming the mortgage instead of actual mortgage amount, current market value of the mortgaged property is payable by the mortgagor. A *kanom* is an anomalous mortgage having the features of both a usufructuary mortgage and a lease and governed by customary law of Malabar. The lessee is the mortgagee and lessor (mortgagor) known as the *Jenmi*. A *Jenmi,* in the absence of a contract to the contrary, cannot redeem the mortgaged property before the lapse of twelve years from the date of execution.[44]

There were various local mortgages including "*Iladarawara* mortgage", "*Lahan Gahan*" "San-mortgage of *Guzerat*" "*Nirmutal*" "*Taran-Gahan*" "*Drishtabandaka*" "*Muddata Kriyan*" and "Nazar Gahan" …. etcetera, all governed by local usages and if not explicitly violated any of the terms of TPA 1882 then be considered as anomalous.[45] But now it's

[42] Vakil, *Commentaries on The Transfer of Property Act*, 843.
[43] Ibid., 877-878.
[44] Ibid.
[45] Ibid.

very rare to have such a mortgage in practice. All such types of mortgages became obsolete gradually.

5. Contemporary Relevance of Decoloniality

In any case, the significance of decolonizing the legal system in Pakistan in modern times is under-evaluated. It is a complex and crosscutting one that brings into focus many governance and social justice issues as well as cultural questions. The process cannot be limited only to achieve justice; new civil legislation must be developed that actualizes Pakistan's current conditions. The author submits that the decolonization of the legal system facilitates the implementation of appropriate governance and qualified administration. A law that adopts regional norms and values such as religion and ethics is more likely to be followed closely by the people, which ultimately will increase the level of credibility and trust of the government among the citizens. Similarly, the system ensures that the local problems and disagreements that arise get solved faster by taking into consideration cultural practices and norms.

Alongside the rise of anti-colonialism, people started raising the calls for increased social justice. In the majority of the cases, the norms of the colonizers didn't take into consideration the benefits and prosperity of the community but were designed just for the rule and extraction of resources from the locals. The process of reforming these laws and abandoning hidden biases, as well as putting a proper emphasis on fair and equity principles, is part of the solution to this problem. Thus, it is significantly putting in place amendments to the clauses in laws that are against the interest of masses.[46]

[46] Muhammad Asadullah, "Decolonization and Restorative Justice: A Proposed Theoretical Framework," *Decolonization of Criminology and Justice* 3, no 1 (2021): 27-62, https://doi.org/10.24135/dcj.v3i1.25.

The author further submits that a decolonized legal system may also be helpful for reinstating Pakistan's cultural identity. It becomes the implementation of the restoration of both indigenous and Islamic legal traditions, which have suffered marginalization since the oncoming of colonization. In addition to this complementation, from one point of view, not only pay tribute to the culture's rich history but also promote national identity and unity. It is conscious, and it agrees with the fact that the traditional legal system includes all the practices of different traditional laws within the country; hence, the people feel like they belong to and are proud of their natural legal system.

The economic consequences of the decolonized legal system also include a lot more than creating a context in which more effective economic policies could be developed. Providing a regional-based policy that is applicable to support indigenous enterprises, preserve the working rights of the indigenous, and sustain natural resources is of paramount importance. International laws and treaties are often only partially conducive to development goals or priorities in local economies in modern times. For this reason, they present challenges on how economies can navigate through them.[47]

It is pertinent to mention that Pakistan has taken two significant steps to strengthen the efforts of decolonizing the contemporary law. First; establishment of "Council of Islamic Ideology" having the mandate to review the existing laws so as to bring them in conformity with Islamic injunctions. Second; promulgation of "The Financial Institutions (Recovery of Finances) Ordinance, 2001" regarding enforcement of mortgages where

[47] Maleeka Tul Zahra et al., "Socio-Economic Implications of Colonialism: A Comparative Study of Africa and Indian Sub-Continent," *Journal of Languages, Culture and Civilization* 5, no. 2 (2023): 125-140, https://doi.org/10.47067/jlcc.v5i2.

financial institutions are mortgagees. Both steps have been discussed briefly hereunder.

Pakistan has established the "Council of Islamic Ideology" for Islamization of laws. The council has been established to advise the legislatures whether or not a proposed law is repugnant to injunctions of Islam. The functions of the council shall also include making recommendations for bringing existing laws into conformity with the injunctions of Islam.[48] In its 17th session the Council of Islamic Ideology scrutinized the Transfer of Property Act 1882 through the lens of Shari'ah and later on published its report. The Islamic law of "*Rahn*" is based on *Holy Quran* and *Sunnah* and prevalent law of mortgages on many points contradicts Islamic law of *rahn* especially Islamic law strictly prohibits *riba*/interest but contemporary law of mortgages include interest in the principal amount (mortgaged money). The council comprehensively analyzed the chapter four (mortgages) of TPA, 1882 in which it has been found that almost every single provision concerning mortgages (58 to 104) is contrary to the principles of *Holy Quran* and *Sunnah* and such contradiction cannot be undone merely through introducing amendments in the contemporary law; rather council suggested that Islamic law of *rahn* which was incorporated in *"Majallat al-Akham al-Adliyyah"* with appropriate modifications shall be made the law of *rahn* in Pakistan.[49] The author submits that the council published its report in 1984 but after the passing of forty years the recommendations of the council are still awaiting legislative fortification.

Pakistan's mortgage law is largely rooted in the colonial era. The British colonial administration's promulgated Transfer of Property Act of

[48] Constitution of Pakistan, 1973 article 230.

[49] Council of Islamic Ideology, "*14th Report on Islamization of Laws*", https://cii.gov.pk/E-Books.aspx, accessed May 4, 2024.

1882 which established the legal basis for transfers of interests over immoveable property, including mortgages. This Act established laws and processes for numerous property transactions that still enforce. The Transfer of Property Act of 1882 regulates people's property rights, including rights of mortgagors and mortgagees. Over time, new laws have refined and updated mortgage law, among them the 2001 Financial Institutions (Recovery of Finances) Ordinance is important. This ordinance addressed changing needs of the financial industry, particularly credit and mortgage enforcement. This ordinance simplified and speeds up the procedure for recovery of loans by financial institutions as compared to the more than a century old Civil Procedure Code, 1908.[50] Therefore it is not only a special law for the financial industry; but also, a constructive step of Pakistan towards the goal of decolonizing the law.

6. Concluding Remarks

In conclusion; the decolonial critique of legal changes in colonized contexts brings to the forefront the negative impact of Western legal codification, which is characterized by coercive aspects and marginalization. It suggests that colonial remnants should be subjected to reconsideration and the creation of new post-colonial legal systems that will reflect the wealthy historical and cultural elements of the societies instead of the colonial legacy, which unenthusiastically still prevails. Decoloniality embraces a revolutionary lens that makes it possible to comprehend the deep background of colonialism on the legal system and its legacy in developing countries. Western legal thought is being questioned by it, and it should recover and modernize indigenous legal traditions, thus a more just and equitable global legal order will be created. Pakistan inherited the legal system of British India but even after passing three quarters of a century

[50] The Financial Institutions (Recovery of Finances) Ordinance, 2001.

some of very important statutes are those from the colonial era, Transfer of Property Act 1882 is one of them. The national legal order of Pakistan is based upon the principles of common law, hence the economy base on interest / *riba*; although many efforts have been made to decolonize the law and erase the element of interest / *riba* from economy but the destination is still far away; To establish a national legal order for Pakistan, which would be based upon Islamic principles as well as informed with contemporary discourse of decoloniality, more sincere efforts are need of the hour not only from government but also from Islamic scholars, academia, intellectuals and economists.

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An Analytical Study of Compliance of Banking Institutions of Pakistan with Anti-Money Laundering Regulations: Legal Challenges and a Way Forward

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Abstract

The primary aim of this paper is to analyze the compliance of banking institutions in Pakistan, with international and domestic anti-money laundering (AML) regulations. Recently, at least 6 Pakistani banking institutions have been implicated in an investigation involving money laundering, according to a report released by Buzzfeed News and International Consortium of Investigative Journalists (ICIJ). Moreover, the US State Department has designated Pakistan as a State of Special Attention for laundering money and suspicious transactions. For this research, doctrinal legal research methods are used to critically examine the statutes, regulations, policies in Pakistan alongside international laws, treaties, conventions and other existing data requiring banking institutions' compliance with AML regime. Money laundering has a negative impact on the economic growth of the country through boosting the underground economy and criminal enterprises, as well as illegal inflows and evasion of taxes. The strict banking secrecy is a major obstacle for banking institutions' compliance with the anti-money laundering regulations. Banks prioritize the interests of their clients over compliance with regulations. The lack of any major penalties such as fines or imprisonment for the employees in case of non-reporting, absence of use of innovative technology and absence of any profound whistle-blowing policies also helps criminals to exploit the banking institutions systems for laundering money. The paper provides new perspectives into assessing banking institutions' compliance with all applicable anti-money

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laundering standards such as the FATF, as well as Pakistan's domestic AML regulations.

Key Words: Money Laundering; Banking Institutions; Anti-Money Laundering Compliance; and Anti-Money Laundering Regulations

1. Introduction

Money laundering is illicit transportation of funds from one jurisdiction to the next without informing local authorities in order to avoid paying taxes, concealing ill-gotten gains, and transforming criminally gained wealth into legitimate properties. It has a negative economic impact on a nation's economy through boosting the informal economy and illicit behavior, as well as illegal inflows and tax evasion. It is a worldwide problem since it has become a vital part in tracking illegal finances, particularly from organized criminals.[1] Criminal organizations attempt to hide their criminal proceeds by laundering money via banking institutions, global commerce, and other means. Furthermore, it is important to remember that not all laundering money procedures necessitate overseas activities; certain criminal gains are typically cleaned onshore. As a result, money laundering that necessitates global transactions will result in unlawful cross-border capital transfers.[2]

Financial institutions such as banking corporations are considered key players for the free and stable cash flow in a financial market. However, these institutions sometimes become enablers of money laundering and get involved in laundering crime proceeds. Their involvement in money laundering also severely impacts the financial stability and steady development of the economy of the country. Money laundering is perhaps

[1] Muhammad Saleem Korejo, Ramalinggam Rajamanickam, and Muhamad Helmi Md. Said, "The Concept of Money Laundering: A Quest for Legal Definition," *Journal of Money Laundering Control* 24, no. 4 (2021): 736.

[2] Nella Hendriyetty and Bhajan S. Grewal, "Macroeconomics of Money Laundering: Effects and Measurements," *Journal of Financial Crime* 24, no. 1 (2017): 81.

most common in the banking industry, because banking institutions handle money deposits, withdrawals, and transfers. As a result, it is vital to assess these financial firms' adherence with anti-money laundering rules.[3]

According to a report of The International Consortium of Investigative Journalists (ICIJ), six Pakistani banking corporations have been implicated in money-laundering. The investigation was carried out by Buzzfeed News and ICIJ, disclosing the involvement of international banks in laundering money for 39 dubious transfers, totaling around $3 million. All those deals were made during 2011 and 2012. According to the report there were more than 2200 transactions made which were red flagged worldwide and information was shared by institutions such as intelligence organizations, US Department of Treasury, and Financial Crimes Enforcement Network. International banks transferred more than $1.7 trillion in dubious transfers between 1998 and 2018, as per the report, and alerted bank customers in much more than 171 nations who were recognized as being engaged in possibly criminal activities.[4]

In the given scenario, this research paper aims to analyze banking corporation's compliance with anti-money laundering regulations. This paper starts with elaborating concept of money laundering done via financial institutions such as banking institutions and how financial institutions get involved in laundering of money. Furthermore, the compliance rate of the banking institutions with AML regulations is major issue leading Pakistan to grey list or also known as increased monitoring list of Financial Action Task Force. Consequently, this paper also explains

[3] Peter Yeoh, "Banks' Vulnerabilities to Money Laundering Activities," *Journal of Money Laundering Control* 23, no. 1 (2020): 135.

[4] Economic Times, "At Least Six Pakistani Banks Named in Global Money Laundering List," The Economic Times, accessed October 24, 2023, https://economictimes.indiatimes.com/news/defence/at-least-six-pakistani-banks-named-in-global-money-laundering-list/articleshow/78252908.cms?from=mdr.

the various domestic and international regulations and issues of compliance by banking institutions in Pakistan. Lastly, this paper proposes a way forward to enhance banking corporation's compliance with AML regulations.

2. Banking Institutions and Money Laundering: Facilitators or Innocent Bystanders

Money laundering is a type of fiscal offense in which offenders transform soiled funds into clean funds. This activity has a negative impact on the economy, as well as the socioeconomic and cultural landscape. Money laundering was once largely used to describe financial activities engaging criminal organizations. Currently, governments and business regulatory bodies frequently broaden the scope, which describes it as "any financial transaction that generates an asset or a value as a result of an illegal act, which could include tax evasion or false accounting".[5] It has also been described as "a method employed by criminal offenders to conceal the source of their ill-gotten profits in order to enjoy their purified funds without hindrance from opportunistic underground competitors or police authorities".[6]

Money laundering costs the worldwide community hundreds of billions each year. In Pakistan, projections of unlawful money that flows place over $10 billion avoiding taxes and also being syphoned off outside of the nation, according to report issued in 2017.[7] The inability of banking institutions to meet with anti-money laundering (AML)

[5] Haitham Nobanee and Nejla Ellili, "Anti-Money Laundering Disclosures and Banks' Performance," *Journal of Financial Crime* 25, no. 1 (2018): 108.

[6] Ibid.

[7] Dawn, "In Pakistan, Estimates of Illicit Financial Outflows Among the Highest," Dawn, accessed October 29, 2023, https://www.dawn.com/news/1318697#:~:text=In%20Pakistan%2C%20estimates%20of%20illicit,financial%20outflows%20in%20the%20world.

regulatory standards has resulted in regulatory penalties from the US Office of Financial Asset Control (OFAC), the UK Financial Conduct Authority (FCA), and the State Bank of Pakistan (SBP). In the US, the Department of Financial Services (DFS) fined Habib Bank Ltd.'s New York branch $226 million. Its operating permit in New York was revoked in 2017. Furthermore, HBL's UAE subsidiary was fined Rs. 36.63 million by the SBP in Pakistan for failing to comply with FATF AML screening standards. The penalty was issued by the SBP as a result of poor client screening measures. Employees of the bank were engaged in promoting banned individuals in their transactions. The organization was also engaged in dealings with people who were politically vulnerable.[8]

3. Methods Used in Money Laundering via Banking Institutions

3.1 Loan-Back Money Laundering

Loan-back money laundering is effective and frequently used at the placement stage of laundering when the money is channelled into legal banking systems. It involves a person or company borrowing what is technically a ‘loan’ from his/her/emergency’s own unlawful cash through ‘foreign companies,’ thus concealing the source of the money. As a method to exploit the weak compliance of the financial systems in Pakistan, it takes advantage of AML (Anti-Money Laundering) noncompliance and the confidentiality of the banking sector. Realizing how this scheme fits into Pakistani legal system, P1 shows where laws might be weak for countering

[8] Department of Financial Services, "DFS Fines Habib Bank and Its New York Branch $225 Million for Failure to Comply with Anti-Money Laundering Laws," New York Department of Financial Services, accessed October 29,2023, https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1709071#:~:text=DFS%20Annual%20Reports,DFS%20Fines%20Habib%20Bank%20and%20Its%20New%20York%20Branch%20%24225,and%20Other%20Illicit%20Financial%20Transactions.

such an intricate laundering mechanism and where enforcement can be sketchy.[9]

The Anti Money Laundering Act (AMLA), 2010 is the law applicable in Pakistan regulates AML provisions of reporting, due diligence and set up penalties in case of violation.[10] According to Section 7 of AMLA, being a financial institution, there is an added responsibility to file STRs where the reported transaction is suspicious regarding the legitimacy of the source of funds. Namely, the section focuses on controlling "suspicious or Sophisticated" transactions. In the context of loan-back laundering, on a practical level, financial institutions would presumably be to alert any aberrant loan behaviors especially those that involve funds that passed through high-secrecy locations.[11]

Section 2 and 3 of AMLA continue with more definitions incorporating provision of offenses relating to money laundering that call upon parties to keep records and report suspicious transactions to the FMU. The responsibilities of the FMU include evaluating the legitimacy of funds flow and any loan deals that seem to have a correlation between the lender and borrower.[12] However, as already mentioned, there is a legal tool – the AMLA – which legalizes the action. For instance, Pakistan's Protection of Economic Reforms Act, 1992 (PERA) that formerly allowed no limitation on inward foreign currency transfers and was exploited to launder via foreign "loans." Section 9 of PERA, for instance, prohibited such tax authorities from investigating foreign currency accounts, thus permitting the creation of other obscure third layers to facilitate money laundering

[9] Friedrich Schneider and Ursula Windischbauer, "Money Laundering: Some Facts," *European Journal of Law and Economics* 26 (2008): 387. https://doi.org/10.2139/ssrn.3280294.

[10] "Anti-Money Laundering Act" Act No. VII (2010).

[11] "Anti-Money Laundering Act" Act No. VII (2010), sec.7.

[12] "Anti-Money Laundering Act" Act No. VII (2010), sec.2-3.

under the disguise of orthodox transactions such as transfers and loans. Although changes have been introduced to enhance supervision, this original framework has earlier allowed techniques, including loan-back laundering, to evade supervision.[13]

Likewise, Section 33A of the Banking Companies Ordinance, 1962, also prohibits disclosure of information of clients with the exception that disclosure is required by law. This provision has been a thorn in AML investigations in the past since institutions are not always obligated to give full details when there is no apparent sign of wrongdoing; something that is hard to identify in highly disguised loan-back schemes. The Asghar Khan Case of the Supreme Court of Pakistan in (HRC 19/1996) realized in 2018 is an example of how the Pakistani courts struggle to fight money laundering. While mainly highlighting the problem of corruption, it demonstrated the challenges of tracking funds and providing evidence of the source of suspicious financial operations familiar with complex loan-back laundering cases.[14]

This article recommends that, for loan-back laundering, the focus must be put on the strengthening of relations between agencies and the provision of the timely reporting systems. This kind of money laundering techniques requires a completely different legal setup in Pakistan that might require amending the existing AMLA that outline disclosure requirements relating to loans associated with foreign firms and tightens reporting penalties relating to concealment. Additionally, the incorporation of tools like machine learning and AI in banks would only make their possibilities of identifying fewer ordinary transactions associated with loan-back laundering even better.

[13] "Protection of Economic Reforms Act" Act No. XII of (1992), sec.9.

[14] Air Marshal (Retd) Muhammad Asghar Khan versus Federation of Pakistan and others, Human Rights Case No. 19/1996, PLD 2013 SC 1 (Supreme Court of Pakistan).

3.2 Bank Control Strategy

The bank control strategy is one of the most refined techniques employed by criminal groups to clean up money they have acquired through unlawful business through buying large shares in banks. By such control, they control the bank worth and operations to facilitate unmonitored money laundering processes. This strategy takes advantage of weakness that exists in areas that lack much regulation because banking regulatory agencies tend to recognize currency shifts in controlled banks as actual cash flows. But this has led to much scrutiny and regulatory agencies from across the world are now looking into such practices.[15] A good example of this is the HSBC bank, which was fined $2 billion in U.S for simulating money laundering. This example describes how basic and inadequate AML controls affected and could potentially continue to affect international monetary establishments. Regarding AML and countering bank control strategies, it is still possible to observe the gradual enhancement of the legal regulation of Pakistan.[16]

In Pakistan, several laws also exist for AML and banking control regulations these include Anti Money Laundering Act (AMLA) 2010, Protection of Economic Reforms Act (PERA) 1992 and sections of Banking Companies Ordinance 1962.[17] Presently, under the AMLA 2010, Section 7, banking institutions are required to report suspicious transaction. This comprises transactions that are outside the ordinary banker's experience in the typical transactions of the stock exchange market; these transactions

[15] Vandana Pramod, Jinghua Li, and Ping Gao, "A Framework for Preventing Money Laundering in Banks," *Information Management & Computer Security* 20, no. 3 (2012): 183.

[16] BBC News, "HSBC 'Sorry' for Aiding Mexican Drugs Lords, Rogue States and Terrorists," accessed October 31, 2024, https://www.bbc.com/news/business-20673466.

[17] "Anti-Money Laundering Act" Act No. VII (2010), "Protection of Economic Reforms Act" Act No. XII of (1992); "Banking Companies Ordinance" Ordinance No. LVII of (1962).

may include, for instance, an extremely large flow of capital from investors with suspicious characters. Pursuant to Section 7 of AMLA, every bank has to file STRs on every suspicious activity that the bank undergoes encounters. However, this is always a problem in terms of enforcement, especially when criminal organizations take the mantle of ownership and Effect over the banks.[18]

The Protection of Economic Reforms Act 1992 (PERA), in particular Section 9, now permits certain forms of protection for foreign currency accounts and was used historically to avoid tax evasion. This provision introduced weaknesses exposed by money launderers posing as legal and genuine bankers. Some of the criminal groups had stakes in the proprietorial banks and used PERA to disguise their foreign currency receipts from detailed regulatory scrutiny and it became difficult for the authorities to untangle ulterior criminal operations. Due to these shortcomings, changes were made in an effort to strengthen control mechanisms, so that those members of societies possessing banking institutions that commit crimes would not be able to abuse the freedom of opening accounts.[19]

Other legislation that also helps in preventing money laundering and undue Bank influence is Banking Companies Ordinance 1962.[20] Sections 33A and 41 also provide requirement concerning the rights of the banks to maintain confidentiality for clients' information. Section 33A, however, has imposed a restriction to the sharing of information hence poses some challenges on the banks that are under criminal control to operate under the

[18] "Anti-Money Laundering Act" Act No. VII (2010), sec.7.

[19] Wen Xuwu, Kashif Imran Zadi, and Usman Hameed, "Protections and Facilitations for Foreign Investors: Legal Perspective under Pakistani Laws," *Journal of Development and Social Sciences* 3, no. 1 (2022): 63.

[20] "Banking Companies Ordinance" Ordinance No. LVII of (1962).

lens.[21] The rules that exist in an effort to shield customer information can contribute to the shield of criminal parties from identification. In later that year, efforts for enforcement resulted in the Pakistan asking banks to provide client details to FBR for enforcement of the Benami Transaction Prohibition Act 2017 Some banks however avoided exhaustive cooperation.[22]

In the Suo Motu Case No. 2 of 2018, the Supreme Court of Pakistan went through several high-profile cases of money laundering through local banks including Habib Bank Ltd (HBL) and Summit Bank. The probe confirmed that these institutions had been facilitating the existence of bogus accounts meant for laundering of big volumes of the money. Other influential personalities were associated with these accounts, showing weakness of banking systems targeted by criminal groups in control of banking services. This case illustrates how the questions of corporate ownership made money laundering possible while raising the issue of regulation as a constraint.[23]

There is a vivid example of the insufficient AML controls and bank's impact on America's legislation in the case of the FinCEN's action against Standard Chartered Bank. In 2012 the bank was fined $340,000, 000 because it was engaged in transactions with Iranian clients in violation of sanctions while using its branches in other countries to circumvent the American AML laws. The bank allowed high risk transactions to be hidden with non-descript labels in payment messages, a situation which was encouraged due to laxity in the oversight of some foreign branches. This case also shows that even when operating only a fraction of a bank, criminal

[21] "Banking Companies Ordinance" Ordinance No. LVII of (1962), sec.33A-41.

[22] Sonal Aditi, "An Insight on Benami Transaction (Prohibition) Amendment Act, 2016: An Impact Analysis," *Issue 5 Indian JL & Legal Research* 4 (2022): 1.

[23] Suo Motu Case No. 2 of 2018, PLD 2019 SC 1 (Supreme Court of Pakistan).

organizations or sanctioned entities can seriously leverage weaknesses in AML systems domestically and internationally.[24]

This research infers that the bank control strategy underscores the requirements for improving the efforts of regulating the banking sector in Pakistan – especially the demands for more rigorous ownership and openness standards. The last changes in the AMLA and the shift towards a coordinated approach to combating financial crimes are evidence of Pakistan's efforts to combat these types of offenses. However, this has also been evident in the openness of criminal organisations in the two case laws, HBL and Asghar khan, where such unfair layers persist and go unnoticed until an organised criminal body exploits the loophole. Subsequent changes must address ownership disclosure, improve banks' relationships with the FMU, and larger penalties under AML legislation to prevent abuse of bank control for money-laundering purposes.

3.3 Bank Secrecy and Benami Transitions

This principle of bank secrecy is anchored on the British common law that was imported into Uganda with the early colonization by the British people.[25] This keeps the consumer in ownership of their account information, as such, it provides a contractual backbone for banks not to disclose data to third parties without express legal permission. However, this principle has sometimes come into the conflict with the AML and the transparency measures in the context of Pakistan particularly after enforcement of Benami Transaction Prohibition Act of 2017. This act aims

[24] The Guardian, "Standard Chartered Fined $340m for Iran Money Transfers," The Guardian, accessed October 31, 2024, https://www.theguardian.com/business/2012/aug/14/standard-chartered-fine-iran-sanctions.

[25] Volodymyr Cherniei, Serhii Cherniavskyi, Viktoria Babanina, Olena Tykhonova, and Hanna Hudkova, "Characteristics of Liability for Disclosure of Bank Secrecy in Europe and the United States," *Revista Jurídicas CUC* 19, no. 1 (2023): 338.

at benami operations which means garnering property or assets on behalf of other individuals, and frequently for unlawful purposes such as embezzlement, fraud, and money laundering.[26]

In Pakistan same as other countries to brighten up the money laundering and for the purpose of transparency in the transactions the Benami Transaction Prohibition Act of 2017 has been raised. Section 3 of the Act has prohibited the entities of benami property and benami transactions.[27] Whereas section 5 has provided the power to authorities to search/ investigate into the suspected benami property/ benami transactions, can allow the Government to confiscate and take over ownership of assets involved in such activities.[28] However, there is an enforcement problem for these provisions because of the traditional bank secrecy laws in various countries that hamper the exchange of reports between banks and regulatory authorities.[29]

Furthermore, the Banking Companies Ordinance 1962, section 33A, described it as unlawful for bank officials to divulge information of the customer and banks cannot reveal the information of accounts of the customer as per the rules and regulations of the section unless some certain conditions are met and or the law permits it.[30] This section shows that the protection of privacy is important since the customers' data can only be released by following the court order or by the direct invitation of the police in the course of investigation. In addition, Section 46A of the State Bank of Pakistan act 1956 also supports this with a clause to the effect that banks

[26] Aamir Khan and Naureen Akhtar, "Role of Shell Companies in Money Laundering Schemes: Identifying and Mitigating Legal and Technical Challenges for Banks in Pakistan," *Islamabad Law Review* 7, no. 1 (2023): 1

[27] Benami Transaction Prohibition Act, Act No. V (2017), sec. 2-3.

[28] Benami Transaction Prohibition Act, Act No. V (2017), sec. 5.

[29] Bahawal Shahryar, "Tax Amnesties in Tax Reform Policy: A Case Study from Pakistan and Lessons for Developing Economies," *Asian Journal of Law and Economics* 12, no. 1 (2021): 37

[30] "Banking Companies Ordinance" Ordinance No. LVII of (1962), sec.33A.

cannot divulge any particulars relating to foreign currency accounts except where required by law or through a court order to do so.[31]

In spite of these protections, the Protection of Economic Reforms Act of 1992 (PERA), and more particularly Section 9 at that, has in the past denied investigators access to foreign currency accounts that many individuals used to conceal money acquired criminally. Even though subsequent changes to PERA have implemented tighter restraints, the tradition of specifically guarded accounts remains a problematic element of Pakistani transparency. The Benami Transaction Prohibition Act of 2017 was another initiative towards reduction of tax and money laundering by dealing with property ownership.[32] However, to avoid compliance with data requests, banks have argued reliance with sections 33A of the Banking Companies Ordinance and others they claim require them to observe confidentiality. In late 2019, the FBR went on record asking for banks in Pakistan to provide client details to help implement the Benami Act. Most banks, however, refrained from full compliance arguing that it was a violation of the secrecy laws and which would lead to erosion of clients' confidence.[33]

The conflict between bank secrecy and AML has always posed a challenge for regulators for getting hold of relevant information in cases of benami transactions. Although confidentiality is of paramount importance as a component of how the concept of the customer is built, such secrecy

[31] State Bank of Pakistan Act, Act No. XXXIII (1956), sec. 46A.

[32] Ali Hassan, "Impact of Money Laundering on Economic System: International Legal Framework and Corresponding Development in Pakistan," *Law and Policy Review* 3, no. 1 (2024): 118.

[33] Musarat Amin, Rizwan Naseer, and Nasreen Akhtar, "Pakistan in the FATF Grey-list: Compliance and Policy Readjustments," *Pakistan Journal of Terrorism Research* 3, no. 1 (2021): 6.

can contribute to financial crime by reducing the ability of the regulating authorities to focus on suspicious transactions.[34]

The present research analyses that the Pakistani law has strong roots of bank secrecy which act as a major hindrance to transparency and AML under this Benami Transaction Prohibition Act. Even though customers' information is sensitive to protect the public interest, excessive measures against secrecy provide chances of Money laundering and Tax evasion. More often recently, Pakistani courts have tilted towards disclosure in a regulatory context but in fraud there must be a balance between the clients and regulators. Under the Pakistani laws, the bank secrecy provisions rather can be tightened by amending the Section 33A of the Banking Companies Ordinance and at the same time stringent reporting requirements coupled with the best practices can establish the balanced framework where the confidentiality go hand in hand with the required transparency in accordance with the international norm of AML.

3.4 Fake Bank Accounts

This method of money laundering has recently received a lot of attention since it helps criminals avoid surveillance by law enforcement regulators through operation of fake accounts, otherwise opened under fake identities or using another individual's identification information, allow a large flow of money while masking the source and owner. It is more applicable in those legal systems that uphold the highest levels of bank secrecy. In Pakistan money laundering through the use of fake bank accounts has been greatly

[34] Muhammad Shoaib Cheema, Muhammad Tahir Mansoori, Imam Uddin, and Abdul Karim Usman, "Beneficial Ownership in the Sharī 'ah and Modern Law: A Case of Sovereign and Quasi-Sovereign Ijārah Ṣukūk Structures in Pakistan, Bahrain, and Malaysia," *Islamic Banking and Finance Review* 8, no. 2 (2021): 86.

established especially from persons who were exposed to politics and other influential people as has been seen through a brief analysis of some cases.[35]

AMLA prohibits money laundering in Pakistan and its mechanism is supported by the Banking Companies Ordinance 1962, Benami Transaction Prohibition Act 2017, and State Bank of Pakistan (SBP) regulations. In the light of the AMLA 2010 the financial institutions in Pakistan are obliged to have proper KYC policy in place along with the due disclosures of all suspicious transactions to the FMU. Section 7 of the AMLA requires banks to fill in STRs for the activities where there are reasonable grounds to believe transactions are in relation to transfer of funds in connection with an offense. However, there is a problem enforcing this provision since such accounts may continue to exist due to bank secrecy at high executive level and unsuitable reporting mechanisms.[36]

Sub sections 33A and 41 of the Banking Companies Ordinance 1962 requires the banks to maintain the privacy of their clients. Preservation of customer's data privacy is important in securing customers' trust, however, has been exploited by money laundering perpetrators to open dummy accounts that operate out of the purview of regulatory authorities. Section 33A then raises high standards of nondisclosure that are applicable to banks and other financial institutions and allows disclosure only when some legal necessities arise. However, this can cause problems from an AML perspective, as institutions might widen these confidentiality obligations, especially when dealing with suspicious accounts.[37]

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[35] Rao Imran Habib, Attia Madni, and Naureen Akhtar, "Role of Banks in Money Laundering through Fake Bank Accounts and Writing off Loan in Pakistan: An Analytical Study," *Journal of Accounting and Finance in Emerging Economies* 6, no. 1 (2020): 190.

[36] Nasir Sultan and Norazida Mohamed, "Financial Intelligence Unit of Pakistan: An Evaluation of its Performance and Role in Combating Money Laundering and Terrorist Financing," *Journal of Money Laundering Control* 26, no. 4 (2023): 876.

[37] Ibid.

The Benami Transaction Prohibition Act 2017 has been enacted to curb impersonation of the ownership of properties and accounts, which is a well known way of money laundering. While Section 3 of the Act disallows benami (fake) transactions, Section 5 empowers the officials to probe such transactions and deal with properties connected to benami transactions. When used in faked bank accounts this legislation allows authorities to seize funds related to money laundering as well as prosecute those involved. However, many cases have not been properly enforced, and even where there have been attempts to prosecute violators the numbers are few.[38]

The money laundering through the use of fake bank accounts in Pakistan was particularly brought to light by Suo Motu Case No. 2 of 2018. The case involved some of the most influential politicians and business players charged with money laundering, involving billions of rupees through accounts belonging to poor people, most of whom had no input on the transactions. Some of the banks which were used by the operators were also observed to have failed to follow standard KYC measures, through which such accounts could not have been created. The Supreme Court highlighted the function of banks on identifying and reporting such accounts and instructed banks to enhance their Process of KYC with reference to AML systems to avoid using the banking system for illicit purposes.[39]

Another case in question is Federal Investigation Agency v. Omni Group (2018), within the report of Federal Investigation Agency (FIA) identified that more than one account was operated to siphon money for PEPs and corporations. This research showed that account holders

[38] The Express Tribune, "Top Court Seeks Details of 28 Fake Bank Accounts," accessed October 31, 2024, https://tribune.com.pk/story/2275956/top-court-seeks-details-of-28-fake-bank-accounts.

[39] XinhuaNet, "Pakistani Government Says Economy Not Facing Crisis," accessed October 31, 2024, http://www.xinhuanet.com/english/asiapacific/2018-10/23/c_137552876.htm.

unknowingly participated in such transactions thus exposing a myriad of inadequacies of AML compliance. The Supreme Court required SBP and other financial institutions to take much more rigorous measures in identifying and monitoring the suspected accounts to avoid such incidence.[40] However, as evidenced by the existence of fake accounts in Pakistan, failure of AML laws in compliance, enforcement and lack of cooperation from one agency to another still persists. While maintaining bank secrecy is a good practice it has unfavorably provided cover for criminal activities especially when handling fake accounts. Thus, lax measures for KYC noncompliance and the absence of adequate technology-based controls for oversight enable this practice, negating the objective of financial transparency.[41]

According to this article it is evident from an understanding of some of the money laundering techniques including the use of fake bank accounts, loan back schemes and the bank control strategy that most banks are more than willing to become willing facilitat**ors** during money laundering activities than innocent bystanders. Banking institutions perform activities and tools that, in the absence of control, allow criminals to 'launder' the money, putting it through 'legal' channels. Situation like closure of HBL New York branch for noncompliance with regulation, Suo Motu Case No. 2 of 2018 involving Sindh Bank, UBL and Summit Bank clearly indicate that poor KYC and non-robust compliance framework of banks provides fertile ground for money laundering activities to take place in these banks. Similarly, laws like Banking Companies Ordinance 1962 and Protection of

[40] The Nation, "Fake Bank Accounts Cases Against Zardari, Others Shifted to Karachi," accessed October 31, 2024, https://www.nation.com.pk/07-Aug-2023/fake-bank-accounts-cases-against-zardari-others-shifted-to-karachi.

[41] Business Recorder, "Omni Group Employees, Ordinary Citizens: Rs 423.7 Billion Laundered Through 32 Fake Bank Accounts," Business Recorder, accessed October 31, 2024, https://www.brecorder.com/news/4690061/3-omni-group-employees-8-ordinary-citizens-rs-4237-billion-laundered-though-32-fake-bank-accounts-fia-20190504469755.

Economic Reforms Act 1992 do contain the privacy clauses namely Section 33A and Section 9 which organizations use to hide their tracks and money from regulators under the veil of client secrecy. Such factors point to the reality of the fact that because of a lack of adequate compliance measures, or internal checks and balances, or sometimes even an intentional ignoring of such vices by some banks, the institutions involved are all but passive players in the commission of money laundering.[42]

Moreover, this article also asserts that the continuous creation of fake accounts and the exercise of bank secrecy laws that delay AML leave a testimony that clients' relationship prevails over regulatory requirements. In the Federal Investigation Agency v. In Omni Group (2018) case, fake accounts were identified to be involved in money laundering by the politically exposed persons (PEPs), which indicated a lack of AML compliance and KYC standards. That this was not a one-off was due to systemic deficiencies that saw these banks operate outside the basic enforcement standards. Pakistani banks are now facing escalating pressure to spin their compliance solutions up to date and use more advanced approaches to screen suspicious transactions, such as artificial intelligence. However, until harsher penalties and new legal changes are put in place, there is a continuance for banks to act as facilitators to financial criminals. As a result, they become enablers by deed, by default or by turn, to money laundering scams detrimental to the economic health of banks and nations.

[42] "Banking Companies Ordinance" Ordinance No. LVII of (1962), sec.33A.; "Protection of Economic Reforms Act" Act No. XII of (1992), sec.9.

4. International and Domestic Anti-Money Laundering Regulations: Issues of Compliance

4.1 International Standards for AML Compliance by Banks

The desire to regulate money laundering across the world has provided clear international standards and policies to ensure that banking institutions abide by anti-money laundering. While borders are opened for legitimate flow of funds, international money launders use these channels to filter their black money.[43] One example is Banco Santander v. U.S. Department of Justice (2015) case. Banco Santander, a major Spanish bank, was implicated in a money laundering case after it was revealed that it processed transactions linked to drug cartels and terror organizations. The bank eventually reached a settlement with U.S. authorities and was required to pay a significant fine for failing to adhere to anti-money laundering (AML) regulations, demonstrating the global reach of AML laws.[44] These reasons have led global international organizations and national governments to put up measures and guidelines that promote the implementation of AML policies within the world's financial institutions, some of which include the FATF recommendation, the BCBS guideline, and the EU AMLD. However, lack of proper enforcement, variations in the legislation of the different countries, secret banking jurisdictions present themselves persisting issues to AML compliance.[45]

The Financial Action Task Force (FATF) is currently the main international organization concerned with the promotion of AML standards.

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[43] Normah Omar and Zulaikha Amirah Johari, "An International Analysis of FATF Recommendations and Compliance by DNFBPS," *Procedia Economics and Finance* 28 (2015): 23.

[44] Banco Santander S.A. v. United States Department of Justice, No. 15-1604, 2015 U.S. App. LEXIS 9016 (2d Cir. May 22, 2015).

[45] Nankpan Moses Nanyun and Alireza Nasiri, "Role of FATF on Financial Systems of Countries: Successes and Challenges," *Journal of Money Laundering Control* 24, no. 2 (2021): 245.

FATF was set up in July 1989. Its 40 recommendations are the guiding principles for AML and CTF all over the world. These recommendations span from customer due diligence and record keeping to raising suspicious transactions and sharing of information between agencies. FATF Recommendation 10, for example, checks on customer identification and risk management, which put measures on ensuring that banks identify their customers, understand them and the nature of their businesses and develop risk profiles based on geographical, transactional and client evaluation.[46] FATF's primary asset, however, is its forty Recommendations including Recommendation 20 which requires banks to report any Suspicious Transaction Reports (STRs) that were generated if there are 'reasonable grounds to believe that the funds concerned are associated with money laundering'. FATF also put forward a risk-based approach to AML to mean that banks should adopt different levels of monitoring and reporting customer activity based on the risk level of the customer in question. Although they are not legal requirements, member states transpose these recommendations into their domestic legislation and are assessed annually, through mutual evaluations to check compliance.[47]

The Basel Committee on Banking Supervision (BCBS), is an international cost group of banking supervisory authorities charged with establishing sound banking standards, including AML standards. The Basel AML/CFT principles support the FATF recommendations that give operational details to banks to manage AML risks. For instance, the fifth principle requires the banks to establish and implement an effective AML framework that includes internal control, monitoring and CDD policies.

[46] Matthew Manning, Gabriel T. W. Wong, and Nada Jevtovic, "Investigating the Relationships between FATF Recommendation Compliance, Regulatory Affiliations and the Basel Anti-Money Laundering Index," *Security Journal* 34 (2021): 588.

[47] Emmanuel Senanu Mekpor, "Anti-Money Laundering and Combating the Financing of Terrorism Compliance: Are FATF Member States Just Scratching the Surface?," *Journal of Money Laundering Control* 22, no. 3 (2019): 471.

Other BCBS guidelines also include corporate governance that requires commitments from the senior management toward the AML compliance.[48]

The European Union has accented a systemic AML structure utilizing its Anti-Money Laundering Directives (AMLD), which at present has five versions (5AMLD). AMLD extends to all the EU member countries and requires the setting up of measures to identify the customer, report suspicious transactions and apply higher standard due diligence to customers with higher risk factors. The 5AMLD brought changes that would lead to more openness, especially through the provision of beneficial ownership registers and new vigilance regarding virtual assets and prepaid cards.[49]

While the international community has elaborate structures to meet the goals, these are wanted due to the differences in how the laws are applied and implemented. One way in which compliance has been complicated is where bank secrecy laws are in operation, as these compromise AML laws because of the limitation on the sharing of data. This challenge has been witnessed in Switzerland especially in the secret banking nation.[50] For many years, Swiss laws have shielded their banking system from foreign authorities on account information regardless of criminal investigations. Such policies have given criminals a leeway to use Swiss banks to engage in activities such as tax evasion and money laundering. Although Switzerland has adjusted some of these secrecy rules in the past few years

[48] Deutsche Bundesbank, "Basel Committee on Banking Supervision," accessed October 31, 2024, https://www.bundesbank.de/en/tasks/banking-supervision/bundesbank/basel/basel-committee-on-banking-supervision-622646.

[49] Jean-Baptiste Poulle, Arut Kannan, Nicolas Spitz, Sandra Kahn, and Anastasia Sotiropoulou, *Anti-Money Laundering and Terrorist Financing Directive*, in EU Banking and Financial Regulation, (Edward Elgar Publishing, 2024), 580.

[50] Roger Kaiser, "Compliance Requirements in the Future EU Anti-Money Laundering and Countering the Financing of Terrorism Framework," *Journal of Payments Strategy & Systems* 18, no. 1 (2024): 29.

due to pressure from international organizations, bank secrecy continues to be an impediment to good AML compliance.[51]

Danske Bank AML scandal of 2018 is an excellent example of tremendous money laundering arising from non-compliance with AML regulation and poor supervision. It was estimated that Danske Bank's Estonian branch was involved in around €200 billion of transactions raised for suspicions, to which more than half of the transactions linked to Russian customers. The bank has done no research on the customer as required in abstaining due diligence obligation, and also has carried out no investigation in spite of being informed by internal compliance officers not to conduct any business with the customer; has not filled in the required suspicious transaction reports STRs.[52] The case made Europeans' banking system understand their weakness in handling cross-border transactions and made them realise the importance of harmonisation of AML regime for effective implementation. This wreck emerged calls for the changes in the EU's AML framework that led to the introduction of the 6th Anti-Money Laundering Directive (6AMLD) which includes harsher measures and requires direct legal responsibility of managers for failure to comply.[53] Moreover, one important case is European Commission v. United Kingdom (2015) Case C-105/14. The European Court of Justice (ECJ) ruled that the UK had failed to fully implement the EU's Fourth Anti-Money Laundering Directive (4AMLD). Specifically, the UK did not comply with the

[51] Fabian Maximilian Johannes Teichmann and Marie-Christin Falker, "Money Laundering Through Raw Diamonds," *Journal of Money Laundering Control* 27, no. 1 (2024): 4.

[52] Elucidate, "What the Danske Bank Scandal Can Teach Us About Financial Crime Risk Management in Correspondent Banking," accessed October 31, 2024, https://www.elucidate.co/blog/what-the-danske-bank-scandal-can-teach-us-about-financial-crime-risk-management-in-correspondent-banking#:~:text=The%20money%20laundering%20scheme%2C%20which,various%20accounts%20around%20the%20world.

[53] Adeel Mukhtar, "Money Laundering, Terror Financing and FATF: Implications for Pakistan," *Journal of Current Affairs* 3, no. 1 (2018): 27-56.

requirement to establish mechanisms for identifying the beneficial owners of corporate entities. The ruling highlighted the importance of transparency in financial transactions and reinforced the EU's commitment to combating money laundering. This case emphasized that member states must fully align their national laws with EU directives, ensuring robust measures to prevent financial crimes like money laundering.[54]

According to this research, the current global AML compliance regime is vast and has major issues in enforcing banks to take up anti-money laundering standards all over the world. Some specific examples of bad practice include Danske Bank of Denmark, HSBC and the Lebanese Canadian Bank: this confirms the dangers of failing to apply and enforce compliance with AML guidelines and the complications of trying to standardize them. Although FATF, BCBS and AMLD have laid down stringent norms to check money laundering, the absence of uniform implementation coupled with problems like bank secrecy laws and complicated international operations still fuel money laundering across the world. Subsequent endeavours in AML regulation should comprise of integration of regulations globally, effective sharing of information and use of technology to boost on compliance and eradicating financial crime.

4.2 Efforts Made by Pakistan to Ensure Strict AML Compliance by Banks

The AML compliance framework acts as a significant deterrent to the onslaught of illicit money. The compliance pillar may provide the biggest risk in terms of cash and money laundering. In a period of austerity, law enforcement authorities, like other public entities, are increasingly confronted to find the resources needed to successfully follow up on AML

[54] European Commission v. United Kingdom of Great Britain and Northern Ireland, Case C-105/14, European Court of Justice, Judgment of 8 September 2015.

disclosures. That gap is exploited by higher-level criminal groups that construct complex money laundering methods. Banking institutions face legal and reputational concerns as a result of this. The AML compliance includes the reporting of any suspicious activity by the clients or the banking institution itself such as making a series of transactions. Any information, behaviour, trends, or other variables that show abnormalities in a client's activities are often used as red flags. Based on the evidence and background one knows about the customer and their transactional activities, these transfers frequently exhibit contradictions with what is anticipated or deemed typical.[55]

The rate of compliance by banking institutions with AML standards is a serious concern that has landed Pakistan on the Financial Action Task Force's grey list (FATF). In 1990, the FATF Recommendations were published for the first time. Following that, the FATF Recommendations were amended in 1996, 2001, 2003, and 2012 to guarantee that they remained current, internationally pertinent, and relevant (Nance, 2017). Recommendation 20 of FATF states that a “suspicious activity report” (SAR) or a “suspicious transaction report” (STR) can be submitted to a financial monitoring/intelligence unit by a common citizen or a banking institution if they have any probable cause to believe that such activity or transfer of money was linked to a crime. A “suspicious transaction” is one that leads a financial statement to be concerned or dubious about the transaction due to its uncommon character or context, or the individual or group of persons participating in the transactions. In order to detect any modifications in the criminal’s level of transaction risk, reporting organizations analyse suspicions using a risk-based methodology for client

[55] Musarat Amin, Muhammad Khan, and Rizwan Naseer, "Pakistan in the FATF Grey-list: Challenges, Remedies and International Response," *Margalla Papers* 24, no. 1 (2020): 43.

fact checking, real-time payment filtering, monitoring procedures, and behaviours tracking. The FATF's Interpretive research Note on Customer Due Diligence highlights four types of risk variables including goods, services, and transactional issues, client's risk associated facts nation and geographically risk factors and distribution network challenges.[56]

Regarding the sanctions imposed by authorities, there are two points to consider. One, banks are likely to generate money by assisting clients' needs rather than adhering to statutory regulations. Their refusal to follow the rules is a regulatory failure, casting doubt on the efficacy of AML policies in various jurisdictions. According to an economic theory of crime, if the expense of committing a crime is greater than the reward of doing so, criminal behaviour will be discouraged. As a result, governments place a premium on stringent rules and oversight, including personal and criminal culpability for bank staff and even senior executives.[57] Despite this, banks are hesitant to act as authorities' operatives in combating against crime of money laundering. An efficient anti-money laundering strategy should be founded on a cost-benefit measurement of economic institutions rules. The current attitude of regulators, who "think that the most essential thing is to avoid terrible things happening in finance," is criticized by advocates of the cost benefit analysis of rules.[58]

Pakistan made money laundering illegal in December 2007 when it established a “Financial Mongering Unit”. AML Ordinance was enacted by in 2007. Following that, in 2010, Parliament approved the Anti-Money

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[56] Musonda Simwayi and Wang Guohua, "The Role of Commercial Banks in Combating Money Laundering," *Journal of Money Laundering Control* 14, no. 4 (2011): 333.

[57] Anupama Jacob, "Economic Theories of Crime and Delinquency," *Journal of Human Behavior in the Social Environment* 21, no. 3 (2011): 270-283.

[58] Nasir Majeed, Faiza Choudhry, and Muhammad Imran Khan, "The Anti-Money Laundering Legislation in Pakistan: A Thematic Analysis," *Remittances Review* 9, no. 2 (2024): 5.

Laundering Act 2010, often known as AMLA 2010, to tackle money laundering more effectively. Section 7 of the Act explains the Suspicious Transaction Report, generally known as the STR. This study looks at any unusual activities or sequence of transactions including dirty money obtained via illegal activities, transactions with no obvious lawful reason, or terror funding. The Anti-Money Laundering Act of 2010 (the AML Act) covers "Financial Institutions" as well as "Non-Financial Businesses and Professions" (NFBPs). The AML Act defines financial institutions and NFBPs as "Reporting Entities." Furthermore, regulations published by the Securities and Exchange Commission of Pakistan (SECP) apply to SECP regulated firms. SECP has also produced AML Guidelines for Non-Profit Organizations and Guidelines for Application of AML Framework under the AML Regulations 2018. Furthermore, the State Bank of Pakistan (SBP) has published anti-money laundering (AML) instructions for the banking industry.[59]

In addition, the regulations governing reporting of “Suspicious Transaction Reports (STRs)” in Schedule to AML Act,2010 provide that STRs shall always be notified whenever there is an indication of the connected crimes. Suspicious Transaction Reports (STR) must be sent to FMU by any practicing firm that is a reporting organization under the AML Act. Every suspicious person detected under suspicious transaction report must have their NTN and CNIC verified at Federal Board site and correctly registered in the STR. The statues of the person suspected as the active tax payer on the FBR portal must also be checked and record must

[59]Adeel Mukhtar, "Money Laundering, Terror Financing and FATF: Implications for Pakistan," *Journal of Current Affairs* 3, no. 1 (2018): 56.

be entered under STR. Furthermore, the amount of tax paid by such person must also be part of the suspicious transaction report.[60]

The enforcement of provision 6 of AMLA, 2010 is contingent on the cooperation of the banking sector in Pakistan. In Pakistan, law allows banks to maintain a higher-level bank secrecy in order to protect their clients. Banking corporations in Pakistan are usually not obliged to reveal any financial data regarding the accounts of their clients. Therefore, such laws prevent banking institutions from reporting any suspicious transactions made by their clients. There are various laws which creates strict bank secrecy. This includes section 33-A of Banking Companies Ordinance of 1962, Banker's Books Evidence Act's section 5 and 6, State Banks Regulations. Furthermore, it also includes section 46 A of State Bank Act of 1956 and Protection of Economic Reforms Act of 1992's section 9 and lastly, section 5 of Foreign Currency Protection Ordinance of 2001.[61]

In 2019, the Pakistani government requested that banks disclose their information with the Federal Board of Revenue so that the Benami Transaction Prohibition Act of 2017 may be enforced effectively. However, some banking organization continue to refuse to divulge any information about their customers or any questionable transactions to administration body. Pakistan has signed "the Automatic Exchange of Information Convention (AEOI) of the Organization for Economic Cooperation and Development". Its main purpose is to exchange information on any undisclosed economic properties owned by any partner country's residents.[62]

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[60] Kanwal Gul and Muhammad Zubair Khan, "Analyzing Anti Money Laundering Laws in Pakistan and Comparison of the AML Laws of Pakistan with FATF Standards," *Pakistan Research Journal of Social Sciences* 2, no. 4 (2023): 12.

[61] Imran Ali, "Anti-Money Laundering Act 2010: A Critical Analysis," *LUMS Law Journal* 5 (2018): 127.

[62] Ibid.

This article examines that strong bank secrecy is weakening the banking institutions compliance with the AML regulations. As a result, revisions to the above-mentioned legislation are required to oblige banks to notify any questionable monetary transactions made by their customers. It will certainly help in disclosing the criminal activities such as money laundering done via financial institutions.

5. Conclusion and Recommendations

Whenever it comes to assessing the effectiveness of anti-money laundering regulations, behavioural economics might be helpful. The design of these strategies is extremely important in the worldwide battle against laundering money since it has a direct influence on how controlled banking institutions implement and incorporate them into their internal structure in required to conform with regulations.[63] This is especially true when these rules impact compliance management within banking institutions by encouraging staff to over-report, resulting in more data being available but less reliability when it comes to spotting suspicious behaviour connected to possible money laundering schemes. Criminals' employment of sophisticated concealment techniques to make dirty money appear to be legal money is a key component of many money laundering schemes, demanding greater laws and money-laundering restrictions by governments and dedicated organisations. Thus, the use of innovative technology can only help to match such technical and sophisticated methods used by money launderers and can help banking institutions to detect any suspicious activity.[64]

[63] Irfan Hassan Jaffery and Riffat Abdul Latif Mughal, "Money-Laundering Risk and Preventive Measures in Pakistan," *Journal of Money Laundering Control* 23, no. 3 (2020): 714.

[64] Muhammad Usman Kemal, "Anti-Money Laundering Regulations and Its Effectiveness," *Journal of Money Laundering Control* 17, no. 4 (2014): 427.

Firstly, there are multiple technologies that can help banking institutions in Pakistan to improve their AML compliance. One of these techs is FinTech refers to the technologies that aids in the streamlining and automation of online banking. FinTech leads to innovative digital banking alternatives that have arisen in recent times such as cashless transactions, crowdsourcing portals, and digital currencies. With over approximately 84 USD billion spent annually on AML compliance programs in the European Union, monitoring and decreasing such expenses has become a major concern for banks as they confront greater competition. The next level tech known as "know your customer" (KYC) will be very vital in resolving the issues of compliance as cost will be also reduced. However, in this regulated framework, financial institutions must work together rather than compete to effectively combat financial crime.[65]

On the other hand, the majority of RegTechs strive to improve the battle against financial crime by banking institutions and authorities. More than 54 percent of the 342 RegTech businesses in 2018 focused on "AML and KYC" challenges. Given the present state of technological innovation and compliance needs, "RegTech 3.0" will focus on the expanding significance of data in corporate crime compliance efforts, commonly known as "KYD (know your data)", which has been made feasible by the advancement of FinTech solutions. Technologies such as "FinTech" and RegTech" both make it possible to sustain and enhance regulatory compliance on a continual basis. Thanks to a combination of dropping expenses of AML processes facilitated by the use of "FinTech" by banking firms and the adaptation of RegTech to effectively manage developments

[65] Naureen Akhtar, Aamir Khan, and Mohsin Raza, "Technological Advancements and Legal Challenges to Combat Money Laundering: Evidence from Pakistan," *Pakistan Journal of Humanities and Social Sciences* 11, no. 1 (2023): 483.

in "the FinTech" industry, there are a virtually infinite number of alternatives for future improvements and improvements of AML.[66]

Secondly, the emergence of new technologies such as artificial intelligence and machine learning is also helping banking institutions to enhance their AML compliance. On the one side, artificial intelligence, which is defined as a computer's ability to recognize individual interactions, has played an important role in contemporary "RegTech" developments. Machine learning, on the other side, is a subset of Artificial intelligence that pertains to automated system with self-improvement via experience learning. This distinction is critical in understanding the growing importance of each of these technologies as the foundation of several "RegTech systems" for know your clients and compliance with regulations. Artificial intelligence may provide greater guidance to probes by evaluating previous alerts on concerns such as politically vulnerable persons screens.[67]

Thirdly, machine learning, similar to artificial intelligence, could help in the decrease of false alarms during anti money laundering assessments. Furthermore, "machine learning" might enhance detection algorithms by evaluating the data from prior operations and defining thresholds above which a specific quantity or volume of transactions might be considered suspicious. As a consequence, transactions detection appears to be the major focus of "machine learning" for AML regulatory compliance.[68]

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[66] Salman Ali Ibrahim, "Regulating Cryptocurrencies to Combat Terrorism-Financing and Money Laundering," *Stratagem* 2, no. 1 (2019): 1.

[67] Ibid.

[68] Muhammad Fahad Anwar, Qamar Uz Zaman, Rana Umair Ashraf, Syed Iftikhar Ul Hassan, and Khurram Abbas, "Overview of Money Laundering Laws After 2020 Amendments in Pakistan," *Journal of Money Laundering Control* 25, no. 1 (2022): 205.

Moreover, this research also recommends that the lawmakers need to make amendments in current legislation relating to the strict bank secrecy which helps criminals to exploit the banking institutions systems for laundering money without leaving any traces. There must be some penal reforms to be introduced for employees of banks for non-reporting of any suspicious activities. The banking sector also needs to improve their detection and reporting system in order to maintain their reputation as a corporation. They must introduce whistle-blowing policy for their management and employees in order to reward and protect the individuals who report such criminal activities.

Banking institutions can sometimes become money laundering facilitators and get engaged in the laundering of criminal proceeds. Because of the products and instruments they give to consumers, banks make up the majority of banking institutions that are vulnerable to laundering money. Money launders thrive in nations and areas with strict bank secrecy can keep their account and fund data hidden and unavailable not only to the general public, but also to regulatory agencies, allowing them to enjoy their gains without being identified and compromising their origin. Pakistan's legislation is insufficient to combat the threat of corporate crime. The current technologies that are used in detection of money laundering are also very outdated and need replacement with modern innovative technologies i.e. use of artificial intelligence and machine learning technology. Regulatory organizations, for example, lack the capacity to monitor risk, the structure is ineffectual, investigation and conviction rates are poor, and financial analysis is virtually non-existent to counter the risk estimated by regulators. Finding case laws related to money laundering in Pakistan is challenging, as many high-profile politicians and criminals are involved in such cases. These individuals often manage to avoid indictment due to their political influence or powerful connections. In many instances, cases are

settled outside of court, leading to a lack of clear legal precedents. As a result, research in this area is often hindered by limited access to formal rulings. This complexity further complicates the legal landscape, leaving significant gaps in money laundering jurisprudence.

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Preserving the Cultural Heritage: The Significance of Protecting Basmati Rice as a GI Product for Pakistan and India in International Trade

Muhammad Danish Waqar Ansari *

Abstract

Basmati rice has historical, cultural, and economic significance for Pakistan and India due to its distinct long-grain quality, flavor, and aroma. It holds a colossal value in international trade, and because of its uniqueness, it is globally recognized as a Geographical Indication (GI) product. It is geographically exclusive to both Pakistan and India. Unfortunately, Basmati rice in Pakistan was registered in 2021 as the primary laws for protecting GIs in the state were enacted in 2020. Furthermore, with the growth of international trade, enforcement of regulations to protect GIs is also becoming increasingly complex, especially in the case of valuable agricultural products. This paper, therefore, investigates and compares the international instruments and the legal frameworks of Pakistan, India and the European Union (EU) concerning the conservation of GIs, especially when it comes to the preservation of Basmati rice. This paper also analyzes the cultural and economic importance of Basmati rice for both Pakistan and India by highlighting the need to protect this valuable commodity as a shared heritage. The objective of this paper is to accentuate the significance of safeguarding Basmati rice as a GI product in the context of international trade. This study was carried out using a descriptive and mixed research technique. The study also recommends possible improvements in the existing legal frameworks available for the preservation of GIs after examining international instruments. It concludes by highlighting the need to enhance the preservation of Basmati

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rice as a GI product, ensuring its continuous recognition and worth in international trade.

Keywords: Geographical Indications, International Trade Law, Basmati, Pakistan, India, European Union, Intellectual Property, International Instruments.

1. Introduction

In this modern era, protecting indigenous goods in the international trade system has become increasingly significant. For this purpose, the laws pertaining to the protection of GIs have played a vital role. A Geographical Indication (GI) is a sort of Intellectual Property (IP) that identifies an exclusive good that derives from a particular territory of a state or from a specific locality or region within that territory in light of its distinct characteristics, quality, or reputation particularly associated with its geographical origin. There are numerous GIs related to food and agricultural products. The main characteristic of GI products is that a certain level of product quality is associated with, or dependent on the temperament of the environment of the geographical area in which the production transpires. For example, local knowledge of the people, climate, soil composition, etc.[1]

There are different international multilateral laws, treaties, and agreements at hand for protecting GIs in global trade by reason of which countries secure their exclusive products associated with a specific geographical origin. Basmati rice is one of many GI products and is famous for its specific aroma, taste, quality, and long grain. These particular qualities are linked with Basmati rice because of a unique combination of climate, soil, and water, in addition to the inherent genetics pertinent to

[1] Tim Josling, "The War on Terroir: Geographical Indications as a Transatlantic Trade Conflict," *Journal of Agricultural Economics* 57, no. 3 (September 2006), https://doi.org/10.1111/j.1477-9552.2006.00075.x.

these features.[2] The extent of the farming zone of Basmati rice is restricted due to the requirements of particular agro-climatic conditions.[3] Basmati rice is only geographically exclusive to these specific areas of Pakistan and India, and both countries have registered it as a GI product as per their respective GI laws. Both countries are also fighting a legal battle with each other in the European Commission (EC) for exclusive Protected Geographical Indication (PGI) status for their specific varieties of Basmati rice with the aim of increasing exports in the European and international markets. It is consumed as an essential food across the globe, and preserving this shared heritage as a GI product is indispensable for Pakistan and India in international trade because of its economic, cultural, and historical importance.

2. Basmati Rice

It is a long-grain premium rice. The aroma feature of Basmati rice in both cooked and raw form and the unique shape of the grain, which on cooking doubles in length while its width remains intact, are the reasons for its high value.[4] Basmati Rice, as per the reports, is a good source of carbohydrates and has specific eating qualities. For example, when compared to other rice varieties, Basmati rice has a low glycaemic index.[5] Generally, Basmati rice (*Oryza sativa race Indica*) is analyzed by three primary determinants, namely aroma, taste, and appearance.[6] For centuries, it has been

[2] E. A. Siddiq, L. R. Vemireddy and J. Nagaraju, "Basmati Rices: Genetics, Breeding and Trade," *Agricultural Research* 1, no. 1 (January 19, 2012): 26, https://doi.org/10.1007/s40003-011-0011-5.

[3] Subhash Chander Ahuja, Uma Ahuja, and Siddharth Ahuja, "History and Folklore of Basmati Rice," *Wheat and Barley Research* 11, no. 3 (December 31, 2019): 206-207, https://doi.org/10.25174/2249-4065/2019/95207.

[4] J. Burns, M. McQuillan, and M. Woolfe, *Survey on Basmati Rice. Food Standards Agency Report 47.04* (United Kingdom: Food Standards Agency, March 2004), 29.

[5] Ibid.

[6] R.K. Singh et al., "Breeding Aromatic Rice for High Yield, Improved Aroma and Grain Quality," in *Aromatic Rices*, eds., R.K. Singh, U.S. Singh and G.S. Khush, Aromatic Rices (Oxford: IBH Publishing, 2000).

traditionally cultivated in the Southern and Northwestern parts of South Asia. Under humid, warm, and valley-like conditions, Basmati rice produces the finest quality of grains and also grows best.[7] It is a highly valued commodity due to its nutrient profile. This aromatic rice variety is packed with different fibers, minerals, vitamins, and proteins with a minimum amount of fat, which makes it a perfect healthy meal. It contains essential minerals and vitamins like zinc, copper, potassium, calcium, magnesium, B1, B6, K, and E.[8] Low arsenic levels are found in Basmati rice which is cultivated in Pakistan and India as compared to the other varieties of rice. As arsenic is a type of heavy metal, it increases the risk of heart problems, diabetes, and other health issues. It has various health benefits such as the management of diabetes, the regulation of blood pressure, the promotion of digestion, the keeping of the heart healthy, weight management, and the aversion of the risk of cancer.[9] Basmati rice is consumed as an essential food by the inhabitants of the South Asian subcontinent and their indigenous communes in the EU particularly in the UK. It is becoming an essential cuisine for the entire EU to a great extent.[10]

In retail and wholesale markets, Basmati rice is considered to be high-priced in comparison with non-Basmati rice. This premium price boosts the competition between the domestic and trade markets and also draws the attention of a number of players. Basmati rice seems to be a good nominee for a geographical indication on the basis of its best globally

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[7] R.K. Singh et al., "Small and Medium Grained Aromatic Rices of India," in *Aromatic Rices*, eds., R.K. Singh, U.S. SINGH and G.S. Khush, (Oxford: IBH Publishing, 2000).

[8] Sonika and Vijay Kumar Kaushik, "Basmati Rice: Quality Traits and Nutritional Content," *Just Agriculture 1, no.11* (July 2021): 4, https://justagriculture.in/files/newsletter/2021/july/006.%20Basmati%20Rice%20Quality%20Traits%20and%20Nutritional%20Content.pdf.

[9] Ibid, 5.

[10] Georges Giraud, "Range and Limit of Geographical Indication Scheme: The Case of Basmati Rice from Punjab, Pakistan," *International Food and Agribusiness Management Review* 11, no. 1 (February 15, 2008): 52, https://doi.org/10.22004/ag.econ.53628.

accepted aromatic quality and deep-rooted cultural identity in the subcontinent.[11]

2.1 Meaning of the Word 'Basmati'

It is an exclusive gift to the Indian subcontinent by nature. The word "Basmati" is composed of two syllables, i.e., "*Bas*" and "*Mati*". The term "*bas*" emanates from the *Prakrit* word "*vas*" and it has the Sanskrit root, "*yasay*", meaning aroma. Whereas "*mati*" means sense.[12] Basmati rice is also known as the "Queen of Fragrance".[13]

2.2 History of Basmati Rice

The history of the cultivation of Basmati rice dates back to 1000s of years. As per the historical documents, it was primarily harvested in China in 7000 BC. For centuries, it was only known and found in Asia but later tourists and travelers introduced it internationally. Basmati rice was brought to the Indian subcontinent by Alexander the Great. In the 700s, it was moved to Spain by the Muslim conquerors. On the basis of historical evidence, Basmati rice has been grown since 1500-1000 BC in the Indian subcontinent. Some evidence also shows that it has been grown in this region for almost 8000 years. The earliest samples of Basmati rice date back to 2500 BC and were found in Mohanjodaro in Pakistan. For centuries, it has been grown in India, Pakistan, Bangladesh, etc. Basmati rice is mentioned in the existing antique epic Punjabi poem of the eighteenth century known as *Heer Ranjha*, which was authored by Waris Shah.[14]

Basmati rice is a highly valued commodity consumed as a staple food globally. It has different varieties with unique characteristics. Basmati

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[11] Ibid.

[12] S. C. Ahuja et al., *Basmati Rice-The Scented Pearl* (1995; repr., India: Directorate of Publications CCS Haryana Agricultural University Hisar .125 OO4, 2018), 1.

[13] Muhammad Ashfaq et al., "Basmati–Rice a Class Apart (a Review)," *Rice Research: Open Access* 03, no. 04 (2015): 1, https://doi.org/10.4172/2375-4338.1000156.

[14] Muhammad Ashfaq et al., "Basmati–Rice a Class Apart (a Review)," *Rice Research: Open Access* 03, no. 04 (2015): 1, https://doi.org/10.4172/2375-4338.1000156.

rice can only be cultivated in some particular regions of the world. Therefore, it is essential to preserve this unique traditional heritage as a GI.

3. Major Basmati Rice Producing Countries

Pakistan and India are considered to be the world's chief producers of Basmati rice. Basmati rice is geographically exclusive to both countries. In other words, Pakistan and India have registered Basmati rice as a GI under their respective GI laws.

3.1 Pakistan

After cotton, the second most vital cash crop of Pakistan is rice which covers around 11% of the entire agricultural land. In the international rice trade, Pakistan's share by value is around 9.10%. In terms of foreign exchange from 2022 to 2023, rice is said to earn more than 2.5 billion US dollars, which is considered to be the highest foreign exchange. In the international market, Basmati rice, during the same period, was responsible for fetching about 1000 US dollars per ton as compared to coarse rice, which earned only 450 US dollars per ton.[15]

Nowadays, the Rice Research Institute Kala Shah Kaku is the first in the development of aromatic, delicious, and extra-long rice called Basmati 370. It has developed thirty-two different varieties of rice. More than 90% of the whole horticultural rice land in Punjab is covered by the rice varieties developed by this institute.[16] The effect of research pertaining to rice is quite evident from a variety called Super Basmati. As a developed variety of the institute, it benefits the economy of Punjab by adding 20 to 30 billion Rupees annually.[17] Basmati rice in Punjab is registered as a GI product.

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[15] Ayub Agricultural Research Institute, "Rice," *Ayub Agricultural Research Institute*, accessed September 1, 2023, https://aari.punjab.gov.pk/crop_varities_rice.

[16] Ibid.

[17] Ibid.

There are various varieties of Basmati rice that are grown in different recognized areas of Punjab, Pakistan. Some of the most famous varieties of Basmati rice in Pakistan are Basmati-370, Basmati Pak, Basmati-198, *Shaheen* Basmati, Basmati-515, Punjab Basmati and Super Basmati-2019. The scientists of the institute have also cultivated some new and improved varieties of Basmati rice, like *Sona* Super Basmati, Vital Super Basmati, etc.

3.2 India

Globally, India holds the top position in terms of producing and exporting cereal products. During 2022-23, the exports of Indian cereals generated a revenue of 13,857.95 million USD. During the same period, 80% of the total Indian cereal exports were occupied by distinct rice varieties in terms of value. At the same time, the other cereal types represented only a 20% share of the total Indian cereal exports including wheat.[18] India is the main producer of Basmati rice in the global market as the country's exports pertaining to Basmati rice amounted to 3540.40 million USD for 3948,161.03 MT during the year 2021-22.[19] There are some specific states in India that produce exclusive Basmati rice varieties.[20] The Agricultural and Processed Food Products Export Development Authority (APEDA) has established the Basmati Export Development Foundation (BEDF) which is registered as a society under the Societies Registration Act, 1860.[21]

There are various Basmati rice varieties in India that are cultivated in distinct recognized locations of its states. Some of the most popular

[18] Agricultural and Processed Food Products Export Development Authority, "Cereals," *APEDA*, accessed September 2, 2023, https://apeda.gov.in/apedawebsite/six_head_product/cereal.htm.

[19] AgriXchange, "Basmati Rice," *agriXchange*, APEDA, accessed September 2, 2023, https://agriexchange.apeda.gov.in/product_profile/prodintro/Basmati_Rice.aspx.

[20] Ibid.

[21] Agricultural and Processed Food Products Development Authority, "Basmati Export Development Foundation," *APEDA*, accessed September 2, 2023, https://apeda.gov.in/apedawebsite/about_apeda/bas_ex_dev_found.htm.

strains of Indian Basmati rice are Basmati-217, *Kasturi* Basmati rice, *Pusa* Basmati-1121, *Pusa* Basmati-1728, *Pusa* Basmati-1637 and *Pusa* Basmati-1718. In 2021, the scientists of the ICAR-IARI, New Delhi have also developed some newly improved cultivars of Basmati rice, such as *Pusa* Basmati-1847 and *Pusa* Basmati-1885, etc.

The use of GIs enhances the economic growth of a country as it helps in the recognition of a product in international trade, increases tourism, aids in the progress of a business, and prevents others from the unauthorized use of the product associated with a GI. Thus, preserving Basmati rice as a GI in international trade is crucial to garner economic benefits for both Pakistan and India.

4. Importance of Basmati Rice in the Global Markets

Rice is amongst the top traded cereals in the world, and the demand for it is continuously rising internationally. Around 510.25 million MT of rice was globally consumed in 2021-2022. The world's consumption of rice has grown by 87% in the past ten years. Due to the increase in global demand, rice exports have reached up to 26.5 billion US dollars in the international market.[22]As per the statistics given by the Food and Agriculture Organization (FAO), the total rice produced globally in 2022 is almost 520 million MT.[23] Basmati has a particular status in rice cultivation. It has certain characteristics like delicious taste, distinct flavor, intense aroma, and extra-long thin grains that double in length when cooked, resulting in a fluffy and soft appearance. It is a unique cultivar of rice in contrast to the

[22] Iqra Ilyas et al., *Exploring Potential of Rice Exports from Pakistan, 02/2022* (Karachi: TDAP-Agro & Food Division Research Wing, February 2022), https://tdap.gov.pk/wp-content/uploads/2022/08/Rice-Report_FINAL-DRAFT_compressed.pdf.

[23] Ibid.

other aromatic long-grain rice cultivars.[24] Basmati rice is becoming increasingly popular across consumer groups due to its superior quality, taste, and aroma.[25] In the international market, Basmati rice as a premium commodity makes around 1000 US dollars per ton in comparison to 450 US dollars per ton of coarse rice.[26]

In Europe, rice varieties are mainly from the *japonica* group, which is initially associated with the medium-long to round grains that instantly become sticky upon cooking. Indigenous specialty varieties of rice are in high demand in European local markets. However, the demand for exotic specialty rice like Basmati and Jasmine along with *indica*-type grains and other organic rice, also keeps on growing in Europe with an increase in the consumption of rice by 6% per year.[27] *Thai* Jasmine rice and the Basmati rice varieties from Pakistan and India are usually consumed by ethnic Asians, but these varieties are also increasingly appreciated by the general population of America.[28] Hence, Basmati rice is a vital cereal crop consumed worldwide. Protecting it as a GI in international trade is necessary to maintain its quality and authenticity.

5. Basmati Rice as a Shared Exportable Commodity of Pakistan and India

Pakistan and India are the leading producers of Basmati, or the aromatic group of rice varieties.[29] Basmati rice is the traditional cuisine of the South

[24] JM Baxi Group, "Indian Basmati Rice – 'the Scented Pearl,'" *Tidings- Issue XXXV- December 2021*, accessed September 2, 2023, 20, https://www.jmbaxi.com/newsletter.html.

[25] Ibid, 21.

[26] Syed Sultan Ali, "Rice Research Institute, Kala Shah Kaku," *REAP Journal* (September 2022): 17, https://reap.com.pk/uploads/downloads_area/REAP%20Journal%202022.pdf.

[27] Global Rice Science Partnership (GRISP), *Rice Almanac: Source Book for One of the Most Important Economic Activities on Earth*, 4th Edition (Philippines: IRRI, 2013), 103.

[28] Ibid, 98.

[29] Ibid, 10.

Asian subcontinent. It has a history of cultivation as the farmers from these countries in the subcontinent have a lot of experience in producing decent lines of Basmati rice.[30] Due to the improved methods of cultivation and favorable weather conditions in the major rice-producing countries of the subcontinent, Basmati rice from these countries can meet the international consumer demands today. Pakistan and India have certain policies to aid the indigenous exporters and production of Basmati rice.[31] Basmati rice is a premium quality, high-grade product that is valued for its specific aroma. Being the largest producers of Basmati rice, Pakistan and India together have a huge share of global Basmati rice exports. Internationally, India is the chief exporter of Basmati rice, while Pakistan is the second major producer of Basmati rice. A major portion of Basmati rice in Pakistan is domestically consumed despite the increase in its global demand.[32] Middle Eastern countries are the top importers of Basmati rice, as it is considered to be a famous staple food. KSA, UAE, Iran, and Iraq are considered to be the major markets of Basmati rice.[33]

In the global market, Pakistan's Basmati rice variety is famous for its premium quality and high grade, particularly in the Middle East and the EU. The non-Basmati variety of rice holds the major portion of Pakistan's total rice exports, but the rate of Basmati rice is twofold higher than that of the non-Basmati rice. During FY18 to FY22, the proceeds from the exports of Basmati rice in Pakistan stood at 0.7 million MT, while in FY22 alone, the recorded exports of Basmati rice in Pakistan were around 0.8mln MT.[34]

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[30] Camila Nguyen, "Basmati Rice Exporters: How to Pick the Right One?," *K-Agriculture (blog)*, accessed September 4, 2023, https://k-agriculture.com/basmati-rice-exporters/.

[31] Ibid.

[32] Saniya Tauseef and Ayesha Wajih, *Rice Sector Study* (Lahore: PACRA, October 2022), 16, https://www.pacra.com/sector_research/Rice%20Sector%20-%20PACRA%20Research%20-%20Oct'22-1_1666978573.pdf.

[33] Ibid, 8.

[34] Ibid, 14.

The largest consumer markets for Pakistan's Basmati rice are the Middle Eastern countries in which UAE has the largest share of around 26% of the total Basmati rice exports, followed by KSA with 12% share, Oman with 8% share, and Kenya with 6% share.[35] Meanwhile, India fetched 4.8 billion dollars[36] from the export of around 4.5 million MT of Basmati rice in 2022. USA, UAE, KSA, Iraq, Iran, and Yemen were among the primary buyers of Indian Basmati rice.[37]

Basmati rice holds significant cultural and economic value for Pakistan and India. As the primary producers, these countries co-own Basmati rice as a GI product. Consequently, protecting it in international markets is essential by all possible means.

6. International Instruments for the Protection of Geographical Indications

The first attempts to protect GIs globally began when the multilateral accords were negotiated at the end of the nineteenth century.[38]

6.1 Paris Convention for the Protection of Industrial Property (Paris Convention-1883)

This treaty was the first multilateral treaty which was adopted on 20th March 1883 in Paris. It was the first accord to include Appellations of

[35] Ibid, 15.

[36] PTI, "Government Decides Not to Allow Basmati Rice Exports below $1,200 per Tonne," *BQ Prime powered by Bloomberg*, August 27, 2023, https://www.bqprime.com/economy-finance/government-decides-not-to-allow-basmati-rice-exports-below-1200-pe-tonne.

[37] Rajendra Jadhav, "India Basmati Rice Exporters Get Requests for Early Shipments," *Reuters*, July 31, 2023, sec. Commodities, https://www.reuters.com/markets/commodities/india-basmati-rice-exporters-get-requests-early-shipments-2023-07-31/.

[38] Luisa Menapace, "Geographical Indications and Quality Promotion in Food and Agricultural Markets: Domestic and International Issues" (PhD Dissertation, Iowa State University, 2010), 8, https://doi.org/10.31274/etd-180810-1271.

Origin (AO) and Indication of Source. These two terms were incorporated under Article 1(2).[39] This article provides:

> The protection of industrial property is concerned with patents, utility models, industrial designs, trademarks, service marks, trade names, and indications of source or appellations of origin, and the repression of unfair competition.[40]

One of the key objectives of the convention is to safeguard against deceptive indications and unfair competition. The provisions in the convention are divided into three major parts: national treatment, right of priority, and common rules.[41] This treaty, therefore, provided the basis for the formulation of international instruments pertaining to the conservation of GIs.

6.2 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (Madrid Agreement-1891)

This instrument was signed on 14th April 1891 in Madrid, Spain. The primary aim of this instrument is to prohibit the commodification of those goods that bear false or deceptive indications pertaining to their source. It prevents the use with regards to the display, offering or sale of any goods, of all indications in the nature of publicity that have the potential to deceive the masses regarding the source of the goods. The provision of the agreement also applies to invoices, advertisements, signs, business papers or letters, or any other commercial communication with the potential of

[39] The World Intellectual Property Organization and the Egyptian Association for the Protection of Industrial Property, *WIPO/AEPPI International Symposium on Intellectual Property Protection in the 21st Century: Challenges and Opportunities for Developing Countries* (Cairo: WIPO, 2003).

[40] Ibid.

[41] World Intellectual Property Organization, "Summary of the Paris Convention for the Protection of Industrial Property (1883)," *WIPO*, accessed November 21, 2024, https://www.wipo.int/treaties/en/ip/paris/summary_paris.html.

deceiving the public as to the source of goods.[42] This treaty also paved the way for the development in the preservation of GIs, especially when it comes to the protection of Basmati rice, as it prohibits or prevents the use of false or deceptive indications of source on goods.

6.3 Lisbon Agreement for the Protection of Appellations of Origin (Lisbon Agreement-1958)

The Lisbon Agreement was signed on 31st October 1958 in Lisbon, Portugal. The Lisbon System provided by this agreement is a cost-efficient and practical resolve for the global registration of AOs and GIs.[43] Article 2(1) elucidates an AO as:

> The geographical denomination of a locality, region, or country which serves to depute a product deriving therein and the features or qualities of which are essentially and exclusively due to the geographical environment inclusive of human and natural factors.[44]

This interpretation of AO in the agreement paved the way for the preservation of GIs as it provides protection against imitation and misleading practices. It is also vital for the preservation of Basmati rice as a GI, as it ensures the authenticity, quality, and traceability of the product. Major Basmati rice-producing countries can enjoy more robust legal protection for their Basmati rice brands in the international markets.

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[42] LegaCarta, "Madrid Agreement for Repression of False or Deceptive Indications of Source on Goods," *International Trade Centre (ITC),* accessed November 21, 2024, https://legacarta.intracen.org/instrument/820493-madrid-agreement-repression-false-deceptive-indications-source-goods/.

[43] World Intellectual Property Organization, "Lisbon – The International System of Appellations of Origin and Geographical Indications," *WIPO,* accessed November 21, 2024, https://www.wipo.int/lisbon/en/#:~:text=Sound%20international%20protection,internationally%20registered%20AOs%20and%20GIs.

[44] Geneva, Switzerland, World Intellectual Property Organization (WIPO), *Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration 1958,* art. 2(1).

6.4 Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS-1995)

It is the most extensive multilateral agreement on IP, which was signed in Marrakesh, Morocco, on 15th April 1994 and adopted on 1st January 1995. It covers five main areas, which include the provision of the guidelines for the administration of the fundamental principles and provisions of the international trading system to the international IP, setting of the minimal levels for the preservation of IP, aiding the members in identifying the suitable procedures for the implementation of Intellectual Property Rights (IPRs) in their own territories, settling of the IP related disputes between the members, and the appropriate transitional arrangements for the exercise of the provisions of the agreement. [45]

This agreement is regulated by the WTO and sets minimal levels for the regulation of the distinct types of IP.[46] Generally, IP is described as an intangible property that is the result of original imagination. Commonly, rights do not encircle the idea of an intangible entity. Instead, the domination of expression of notions or physical indications is controlled by IPRs. The rights to ideas are secured by IP by protecting the rights to control the physical manifestations and production of those ideas.[47]In a broad spectrum, the rights that emerge from the intellectual activity pertaining to literary, artistic, scientific, and industrial works are referred to as IPRs. There are two main reasons why countries around the globe protect IP. Firstly, to dispense legal protection to the economic and moral rights of the creators concerning their inventions and the rights of the public accessing

[45] World Trade Organization, "Intellectual property: protection and enforcement," *WTO*, accessed November 21, 2024, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm#mfn.

[46] Ibid.

[47] Adam D. Moore and Kenneth Einar Himma, "Intellectual Property," *Stanford Encyclopedia of Philosophy* (2011), https://ssrn.com/abstract=1980917.

those inventions.[48] Secondly, to endorse fair trading, which would result in the contribution to social and economic development and foster as an intended act of the government policy, innovation, and administration of its outcomes. The rights that pertain to the loose array of legal principles that manage the utilization of different kinds of insignias and ideas are denoted as IP. These rights are given over the non-physical object of the individual who made it with a mental effort.[49] The rights protected by IP include inventions, goods, services, films, marks, designs, computer programs, artistic works, literary works, and so on. There are various distinct areas or forms of laws establishing rights that all at once create an IP. These laws include geographical indications, copyrights, patents, design rights, registered designs, trademarks, the law of confidence, right in performance and passing off, etc.[50]

GIs have assumed greater significance in international trade when they were included in the TRIPS Agreement. GIs are names of regions or places utilized to specify merchandise with a unique geographic implication.[51] This agreement not only defines a GI under Article 22(1) but also sets a minimum level for its preservation by the member countries of WTO under Articles 22-24 when it comes to international trade.[52] GIs are stipulated under Article 22(1) as:

> Indications which recognize a product originating from a particular territory, region, locality of a Member State and

[48] Rahul Chakraborty, "Growth of Intellectual Property Law and Trade Marks," *SSRN Electronic Journal* (2009): 2, https://doi.org/10.2139/ssrn.1335874.

[49] Ibid.

[50] Ibid.

[51] Menapace, "Geographical indications and quality promotion," 1.

[52] Justin Malbon, Charles L Lawson, and Mark J Davison, *The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights: A Commentary* (Cheltenham: Edward Elgar, Cop, 2014).

> the given reputation, quality, or other characteristic of that product is due to its geographical provenance.[53]

The TRIPS Agreement provides proper guidelines for adequately preserving GIs around the globe. Basmati rice is one of the most famous rice varieties, which is in huge demand in international markets. It is a type of rice famous for its long, slender-grained structure, taste, and aroma. Basmati rice is geographically exclusive to Pakistan and India due to its unique quality, reputation and other characteristics. Therefore, it is also safeguarded by the provisions of the TRIPS Agreement.

6.5 The Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (Geneva Act 2015)

The Geneva Act was adopted on 20th May 2015. It updates and strengthens the current global registration system of preservation provided by its predecessors pertaining to names that identify the geographic provenance of goods. This Act is different from the Lisbon Agreement, 1958 because the Lisbon Agreement, 1958 was only limited to AOs, whereas this Act covers both AOs and GIs.[54] The Act defines a GI under Article 2(1)(ii) as:

> Any indication protected in the Contracting State of provenance or any indication known to be connected to such area, which identifies a product as deriving in that geographical area, where a given reputation, quality or other characteristic of the product is fundamentally ascribable to its geographical provenance.[55]

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[53] Morocco, World Trade Organization (WTO), *Trade-Related Aspects of Intellectual Property Rights Agreement, 1995*, art. 22 (1).

[54] Gargi Chakrabarti, "Unanimous Approach to Protection of Geographical Indications for All: The Geneva Act," *WIPO-WTO Colloquium Papers* 12 (2021): 126, https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2021/wipo_wto_colloquium_2021_e.pdf.

[55] Geneva, World Intellectual Property Organization (WIPO), *Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications 2015*, art. 2(1)(ii).

Thus, this act provides a broader protection than its predecessors as it extends its protection to GIs.

Globally, there are distinct ways available to safeguard GIs. These include certification marks, collective marks, sui generis law, laws regarding passing off, and unfair competition.[56] For ages, Basmati rice has been cultivated at the foothills of the Himalayas. Internationally, due to its exclusive aroma, taste, and benefits, it is an important import/export commodity. For the advantage of both consumers and producers, international instruments work hand in hand to preserve the authenticity and heritage of Basmati rice. Overall, international instruments offer legal mechanisms to preserve GIs in global trade. They facilitate economic progress, protect cultural identities, and encourage sustainable practices while safeguarding the stakes of both consumers and producers.

7. India-Us Basmati Rice Dispute

Basmati rice is a traditional commodity of Pakistan and India. The issue became controversial in 1997 when a Texas-based private American company Rice Tec Inc. claimed to have constituted a novel variety of aromatic rice as American Basmati by interbreeding another variety of rice with Basmati rice. Rice Tec Inc. had branded its purported new variety as *Texmati* and *Kasmati* for gaining access in the international Basmati rice market.[57] In 1997, soon after the introduction of the TRIPS Agreement, an application was filed before the United States Patent and Trademark Office (USPTO) by Rice Tec Inc., to acquire a patent for its new Basmati rice grains and lines. Resultantly, on 2nd September 1997, Patent No. 5663484 was issued to Rice Tec Inc. on its newly developed rice grains and lines.[58]

[56] Bernard O'Connor, *The Law of Geographical Indications* (England: Cameron May, International Law Publishers, 2004), 67.

[57] Utsav Mukherjee, "A Study of the Basmati Case (India-US Basmati Rice Dispute): The Geographical Indication Perspective," *SSRN Electronic Journal* (June 10, 2008), http://dx.doi.org/10.2139/ssrn.1143209.

[58] Ibid.

In the patent, the company had raised twenty claims. Claims from one to fourteen out of these twenty claims were related to the generic features of the rice produced in North, South, and Central America, and claims from fifteen to seventeen were related to those varieties of rice that were not linked to any geographical area or region. The new procedure used in the development of a novel variety of rice was mentioned in the claims from eighteen to twenty of the patent.[59] All of these twenty claims made by Rice Tec Inc. were related to the cross-bred grain development and rice varieties. Claims from fifteen to seventeen made by Rice Tec Inc. were particularly damaging to India's export market as they were associated with the specific features of Basmati rice grain.[60]

In the year 2000, as the features of Basmati rice were similar to that of the American Basmati, the Indian government through APEDA had challenged the patent on American Basmati issued to Rice Tec Inc. by filing an application before the USPTO for re-examination of the patent. The government of India had particularly opposed the claims from fifteen to seventeen due to their harmfulness to the Indian Basmati rice exporters.[61] The cultivation of Basmati rice has a historical socio-cultural significance even before the British rule in India, Pakistan, and Bangladesh. The grounds taken by the Indian attorney to challenge the patent were that Basmati rice is consumed as a basic food in Pakistan and India, and grains and plant varieties are already present in these countries.[62] He also mentioned that

[59] Kishan Bansal, "Case Study of Rice Tech (India - US Dispute) and Transformation of India from Trademark Act to Sui Generis System," *International Journal of Law Management and Humanities* 4, no. 2 (2021): 2457, http://doi.one/10.1732/IJLMH.26536.

[60] Kranti Mulik and John M. Crespi, "Geographical Indications and the Trade Related Intellectual Property Rights Agreement (TRIPS): A Case Study of Basmati Rice Exports," *Journal of Agricultural & Food Industrial Organization* 9, no. 1 (January 25, 2011): 3, https://doi.org/10.2202/1542-0485.1336.

[61] Ibid, 4.

[62] Bhagat Vibha S, "Intellectual Property Right - Patent: General Review," *Paripex - Indian Journal of Research* 11, no. 06 (June 2022): 29,

using the name Basmati in the patent and marketing of rice by the company is against the regulations. Furthermore, he said that because of the diverse climatic conditions, imported rice cannot be cultivated in the USA. Therefore, the USPTO issued a re-examination certificate on 29/01/2002, canceling claims 1-7, 10, and 14-20 in response to the objection filed by the Indian government. Resultantly, Rice Tec Inc. agreed to withdraw these fifteen objected claims.[63]

Therefore, it is essential to understand the implications of this case for Pakistan and India, as it paved the way for the establishment of GI laws in these countries. This case is particularly significant for the preservation of Basmati rice as a GI in international trade.

8. Legislations in the Major Basmati Rice Producing Countries for the Protection of Geographical Indications

Internationally, Pakistan and India are the leading producers and exporters of Basmati rice. Both countries have registered Basmati rice as a GI product as per their indigenous GI laws. These laws are governed by the respective GI Acts and their associated rules within these countries.

8.1 Legislation in Pakistan

In Pakistan, the laws pertaining to GIs are administered by the Geographical Indication (Registration and Protection) Act, 2020, and the rules based on it. The GIRPA, 20, came into force on 31st March, 2020. Pakistan had enacted this act in pursuance of its treaty liabilities under article 22 of the TRIPS Agreement.[64] A GI that identifies a product deriving in Pakistan is

https://www.worldwidejournals.com/paripex/fileview/intellectual-property-right--patent-general-review_June_2022_8456385513_8603837.pdf.

[63] Ibid.

[64] Faisal Daudpota, "Geographical Indications Law of Pakistan – an Overview," *SSRN Electronic Journal* (2020): 1, http://dx.doi.org/10.2139/ssrn.3609010.

defined under the GIRPA, 20, as Pakistan Geographical Indication.[65] There are various GIs in both the producing and cultivation divisions, as Pakistan's areas are wealthy in culture. Basmati rice, *Kinnow* (Oranges), and *Sindhri* mango are some of the excellent farming outcomes in Pakistan. These potential GIs in Pakistan are worth billions of dollars. Furthermore, *Himalayan* Pink Salt is also a unique commodity that is famous around the globe.[66] There were no particular laws or rules for GIs in Pakistan like Bangladesh and India before the year 2020. The Intellectual Property Organization of Pakistan (IPO-Pakistan) has put a great effort into the construction of Pakistan's indigenous GI law. The traditional products originating from Pakistan could not be registered as GIs internationally unless or until they are registered as GIs in Pakistan first because it is mandatory to primarily register the products of origin as GIs under the law of the country before applying for international registration.[67] The GI Act is accompanied by the GI rules in Pakistan.

The aim of the GIRPA, 20, is to safeguard and promote the economic interests of consumers and producers by ensuring the proper registration of origin-based products. This act offers a legal structure for the preservation, registration, and implementation of GIs in Pakistan. The GI Act in Pakistan also provides security to the registered GIs against imitation, unauthorized use, or any other action that has the capacity to mislead the user about the provenance of the products in Pakistan. The development of the GIRPA, 20, is a significant move for protecting the cultural heritage and traditional knowledge linked with the rendering of services and production

[65] Pakistan, *Geographical Indication (Registration and Protection) Act, 2020 (GIRPA'20)*, sec. 2(xviii).

[66] Omar Abdullah, Sobia Bashir, and Rafia Naz Ali, "The Potential Geographical Indications in Pakistan," *Journal of Social Sciences Review* 3, no. 1 (February 25, 2023): 340, https://doi.org/10.54183/jssr.v3i1.154.

[67] Ibid.

of goods in particular areas of Pakistan.[68] This act provides for the development of a Registry for the management of the process of registering GIs and maintaining their register in Pakistan. For the hearing of appeals against the decisions of the Registry, it also stipulates the setup of the Geographical Indication Appellate Board. The objectives of the GIRPA, 20, are to protect the reputation and specific qualities of the merchandise emerging from particular areas, promote economic progress in these areas, and safeguard the GIs in Pakistan.[69]

A person can initiate civil and criminal proceedings for the protection of registered GIs in Pakistan as per the GIRPA, 20. In case of an infringement of a registered GI, legal proceedings can be initiated by either an authorized person or a registrant.[70] Civil suits include injunction, damages, and accounts (for profits).[71] Moreover, it is provided under the GIRPA, 20, that the legal proceedings regarding a registered GI must commence before the IP Tribunals established under the IPO Act (IPOPA, 20).[72] In line with the GIRPA, 20, the IP Tribunal and High Court have the jurisdiction to hear the proceedings regarding the protection of GIs. As per s. 41 of the GIRPA, 20, the acts pertaining to the application of false GIs are criminalized, and the punishment for such acts is imprisonment between 6 months to 3 years or with a fine of 10 Lakh PKR.[73] Similarly, the acts of false representation of GIs also attract punishment of imprisonment between 3-6 months or with a fine of 5 Lakh PKR.[74]

According to the Executive Director of the IPO-Pakistan, Basmati

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[68] Josh and Mark International, "Intellectual Property Registration and Protection of Geographical Indications in Pakistan," *Josh and Mark International*, accessed September 9, 2023, https://joshandmakinternational.com/what-is-pakistans-geographical-indications-registration-and-protection-act-2020/.

[69] Ibid.

[70] GIRPA'20, sec. 32.

[71] Ibid.

[72] Pakistan, Intellectual Property Organization of Pakistan Act, 2012 (IPOPA'12).

[73] GIRPA'20, sec. 41.

[74] GIRPA'20, sec. 42.

rice is the first ever registered GI of Pakistan.[75] Basmati rice from Pakistan is the most sought-after kind of rice due to its aroma and long grain size. KSA, UAE, Iran, Canada, Yemen, Jordan, and Kuwait are the main importers of Basmati rice from Pakistan. Furthermore, Pakistan received a GI tag for its Basmati rice under the GIRPA, 20, in 2021, which opened the doors for the establishment of a local registry for the rice strain. This has also proven to aid in the development of an international case in the EU against India's move to register its Basmati rice as a GI commodity. [76]

8.2 Legislation in India

In India, the laws regarding GIs are administered by the Geographical Indications of Goods (Registration and Protection) Act, 1999, and the rules based on it. It came into force on 15th September 2003. Through registration, this act safeguards GIs by providing them the required protection against any sort of infringements, misuses, or imitations that pollute or harm the product's true origins. The GI Registry of India holds the authority to issue GI tags to specific products. Some of the famous GI tags in India are *Mysore* silk of *Karnataka*, Darjeeling tea, Lucknow *Chikankari* crafts, *Kota Doria* of Rajasthan, *Nagpur* oranges,[77] and Basmati rice. The Geographical Indications of Products (Registration and

[75] Abdullah, Bashir, and Ali, "The Potential Geographical Indications in Pakistan," 341.

[76] Afshan Uroos et al., *Annual Trade Report, June-July 2022- Pakistan Trade Prospective* (Karachi: Trade Development Authority of Pakistan, Ministry of Commerce, September 2022), 18, https://tdap.gov.pk/wp-content/uploads/2022/12/Annual-trade-review-11-December-2022.pdf.

[77] Joanna Jacob, "GI of Kota Doria & Blue Pottery of Rajasthan: An Insight into Its Regional Identification, Authenticity, Significance and Protection against Its Infringement," *Intellectualis-Geographical Indications: Realising the Goal of Community Benefits & Ownership* 5, 3rd ed. 2022-23 (2022): 34.

Protection) Rules, 2002 are a set of rules for the preservation of GIs in India[78] and these rules are based on the GI Act, 1999.

The goal of the GI Act, 1999, is divided into three main objectives. Firstly, to preserve the stakes of the producers of products. Secondly, to stop unaccredited persons from misusing GIs and safeguard consumers from deceptive and fraudulent practices. Thirdly, to promote the products with Indian indications in the global market.[79] In India, it is not mandatory to register a GI; however, it provides certain benefits to the IP holder, like the prosperity of the producers and growth of the economy in a particular locale, prohibition of unauthorized utilization of GIs by outsiders, and assurance of its safety for the IP holder, provision of legal protection to the IP holder in the event of any infringement of a GI, and increased export of the registered goods as a result of identification and media coverage. The producer must present an application to the GI registrar in order to acquire a GI tag for his product.[80] The application must contain details like quality, process of manufacture, reputation, and other unique characteristic features pertaining to the specific product associated with a particular area. If the application is accepted, it will be advertised in the GI journal. Moreover, it will be given a GI tag in case of no opposition.[81]

Remedies available for the protection of GI laws in India can be civil and criminal. Criminal remedies are available to the producers under the GI Act, 1999, in cases related to offense. There is a punishment of imprisonment that ranges from 6 months to 3 years or a fine of Rs. 50

[78] Prarrthana Gopi, "Comparing India's Position on Geographical Indications with the Corresponding Laws in Japan," *Intellectualis-Geographical Indications: Realising the Goal of Community Benefits & Ownership* 5, 3rd ed. 2022-23 (2022): 33.

[79] Swaroopa Parthasarathi, "Incorporating Germany's Progressive GI Laws in India's Current Legislation: A Comparative Analysis," *Intellectualis-Geographical Indications: Realising the Goal of Community Benefits & Ownership* 5, 3rd ed. 2022-23 (2022): 50.

[80] Ibid.

[81] Ibid, 50-51.

thousand to 2 lakh INR as per ss. 39 and 60 of the GI Act, 1999.[82] Meanwhile, civil remedies in case of any infringement of the registered GIs are also available under the same GI Act in the form of damages, injunctions, and accounts of profit.[83] A civil suit against an infringement can be instituted in district courts.[84] The APEDA registered Basmati rice as a GI product in 2016[85] under the GI Act, 1999. Internationally, India is the prime exporter of Basmati rice. There are almost thirty-four registered Basmati rice varieties in the country as per the Seeds Act, 1966. In 2022, major export destinations for Indian Basmati rice were Iran, Iraq, KSA, UAE and Yemen.[86]

Pakistan's first officially recognized GI was Basmati rice, registered in 2021. Whereas, **t**he Darjeeling Tea was the first ever registered GI product of India, which was registered in 2004-05 and owned by the Tea Board India.[87] The GI law applies only to goods, not services. The landmark case *Tea Board India v. ITC Ltd* illustrates this fundamental principle.[88] In 2010, Tea Board India, as an Appellant, filed an application against a leading industrial house, namely ITC Ltd., which runs various top-ranking hotels across India. In Calcutta, ITC Ltd. had named a part of its popular luxury hotel, The Darjeeling Lounge, and applied for its trademark.[89] The Tea Board India came to know about this when the application was

[82] Ibid, 51.

[83] India, Geographical Indications of Goods (Registration and Protection) Act, 1999, sec. 67.

[84] Geographical Indications of Goods (Registration and Protection) Act, 1999, sec. 66.

[85] Shailesh Tiwari, "Basmati Rice- Production, Cultivation & Certification," *Agriculture Wale*, May 9, 2023, https://www.agriculturewale.com/basmati-rice/.

[86] Ibid.

[87] VLex, "A Closer Look at Tea Board, India v. ITC Limited Dispute," *VLex*, accessed September 16, 2023, https://vlex.com/vid/closer-look-at-tea-777711649.

[88] Tea Board v. ITC Limited, C.S. No. 250 (2010).

[89] Anirudh Chandrashekhar, "Indian Law Relating to Geographical Indications: Making New Inroads? -A Comment on Tea Board India v. ITC Limited," *Nalsar Student Law Review* (2019): 70, https://nslr.in/wp-content/uploads/2019/03/NSLR-Vol-7-No-4.pdf.

published in the Trademarks Journal. The Tea Board India claimed that the utilization of the word "Darjeeling" as a trademark by ITC Ltd. is an infringement of its GI mark. The Board also claimed that it had registered the certification trademark, and the action of ITC Ltd. is a clear violation of its certification trademark, which results in the act of *passing-off* regarding unwarranted and unfair competition. It further contended that the commercial activities carried out by ITC Ltd. under the name The Darjeeling Lounge amounted to an action 'dilution' of their Darjeeling Tea brand.[90]

Meanwhile, the Respondent ITC Ltd. maintained that the stipulations under the GI Act of India are only concerned with goods. According to them, The Darjeeling Lounge is only related to the provision of services. Along similar lines, it contended that the provisions regarding the protection of certification trademarks pertaining to goods under the GI Act are not applicable to services and only limited to goods.[91] The major claim that was brought up by ITC Ltd. was related to the issue of time-barred. It held that the Tea Board India had been aware of the lounge in question since 2005, but they filed an application in 2010 with a delay of five years.[92] In its judgment, the High Court of Calcutta held that the suit brought by the Tea Board India was time-barred. The Court also held that there is no infringement of any of the provisions of the GI Act of India as the lounge of the Respondent is only related to the services and not goods.[93] The Court also opined that the word "Darjeeling" is only used as a GI and cannot be considered a trademark. The law related to GIs is only limited to goods. The Court further held that there is no unfair competition as the

[90] Ibid, 71.
[91] Ibid.
[92] Ibid, 72.
[93] Rohan Dalbehera, "Case Study: Tea Board of India v. ITC Ltd. - Trademark - India," *Mondaq*, February 27, 2019, https://www.mondaq.com/india/trademark/785150/case-study-tea-board-of-india-vs-itc-ltd.

business of the Respondent is totally different than that of the Appellant. The Appellant had only registered the name "Darjeeling" as a certification trademark as per s. 2(e) of the Trademarks Act, 1999, which, according to the High Court, could not be considered a registered trademark. Moreover, the Court held that the allegations made by the Appellant were baseless and dismissed the suit for INR 10 lakhs.[94]

Basmati rice is a famous agricultural product that is grown in Pakistan, India, Nepal, and some other countries, but it is an exclusive product of Pakistan and India because both countries have registered it as a GI product in accordance with their national GI laws. Pakistan and India are the prime world producers of Basmati rice. It has been given a GI due to its specific origin and exclusivity. It is, therefore, necessary for Pakistan and India to strengthen their indigenous laws safeguarding Basmati rice as a GI.

9. Registration of Basmati Rice as a GI Product in Pakistan and India

As Basmati rice is an agricultural product, the application for its registration as a GI product in India was filed by the APEDA on 26 /11/ 2008. The product was certified as a GI on 15/02/2016.[95] The application was filed before the GI registry of India. Meanwhile, the federal government of Pakistan designated the Trade Development Authority of Pakistan (TDAP) as the registrant of Basmati Rice in Pakistan. The TDAP with the assistance of the Rice Research Institute Kala Shah Kaku and The Rice Exporters Association of Pakistan (REAP) had filed an application to the IPO-Pakistan for the registration of Basmati rice. It was announced by the REAP that Pakistan received the GI tag for its Basmati rice on 26 January 2021.[96]

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[94] Ibid.

[95] Tanya Sharma, "Basmati: Geographical Indication (GI) Tag of Delhi and Haryana," *IP Press*, September 28, 2021, https://www.theippress.com/2021/09/28/basmati-geographical-indication-gi-tag-of-delhi-and-haryana/.

[96] Express Tribune, "Pakistan Receives GI Tag for Basmati," *Express Tribune*, January 27, 2021, https://tribune.com.pk/story/2281611/pakistan-receives-gi-tag-for-basmati.

In Pakistan, Basmati rice is cultivated as a GI commodity only in the specific areas of the Punjab Province.[97] Whereas it is geographically exclusive to the specific regions in eight states of India, namely Punjab, Himachal Pradesh, Haryana, Delhi, Western Uttar Pradesh, Uttarakhand,[98] and the disputed territory of Jammu and Kashmir.

Therefore, Pakistan and India have indigenously registered their distinct Basmati rice varieties as GIs according to their respective laws. This has opened the doors for the preservation of Basmati rice in the domestic and global markets. When a product with a particular geographical provenance is registered with a GI, it receives legal protection that prevents others, including unauthorized manufacturers or users, from misusing the name or identity of that product. Furthermore, registering a product deriving from a particular location as a GI at the domestic level is a primary step in seeking international protection, validation, and recognition.

10. Regulations and Systems Utilized by the European Union for Protecting Geographical Indications

Regulation number 1152/2012 of the EU safeguards various sorts of GIs against infringement. Previously, Regulation number 510/2006 allowed the registration of products in the EU by producers from other countries. This regulation was replaced by the Regulation number 1152/2012 of the EU.[99] The Regulation in its full form is known as the Regulation (EU) No. 1152/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs.[100]

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[97] Salman Khan, *India -Pakistan Battle for Biryani* (Johannesburg: Academia, June 20, 2021), https://www.academia.edu/49328072/India_Pakistan_Battle_for_Biryani.

[98] Ibid.

[99] Parthasarathi, "Incorporating Germany's Progressive GI Laws in India's Current Legislation," 51.

[100] EUR-Lex, "Document 32012R1151," *Europa.eu*, EUR-Lex, November 21, 2012, https://eur-lex.europa.eu/eli/reg/2012/1151/oj.

A *sui generis* system is utilized by the EU, which includes a central system of registry. GIs for products regarding agriculture are mainly protected in this system with the help of the Protected Designation of Origin (PDO) and Protected Geographical Indication (PGI). These two types of systems were developed by the EC in an attempt to provide extended protection.[101] GIs acquire more robust protection by the utilization of these methods, which is similar to the protection provided by trademarks. In order to handle GIs, the European Communities Trademark Association (ECTA) has constituted a special committee due to the increase in legal issues that originate as a result of the correlation between GIs and trademarks. The ECTA's stance on the utilization of trademarks for GIs is based on the system of trademarks and the *sui generis* system.[102]

GIs provide IPRs for specific products whose qualities are closely linked to their geographical area. The case of *Carl Kühne GmbH & Co. KG and Others v Jütro Konservenfabrik GmbH & Co. KG* underscores the significance of accurately identifying the geographical area associated with these products.[103] The brief facts of the case were that Jütro established a production facility and registered office in a town called Jüterbog, which was outside the geographical region of the PGI *Spreewälder Gurken*. Jütro produces pickled gherkins known as *Jütro Gurkenfäßchen* along with other things. The gherkins are distributed under the designation of *Spreewälder Art* (Spreewald style).[104] Kühne and Others, as the producers of gherkins, were competing with Jütro and initiated legal proceedings in the Landgericht Hamburg against Jütro in an attempt to prohibit it from

[101] Gregory Maust, "Arguments over Geographical Indications: Spreading the Trademark System through the Korean-U.S. Free Trade Agreement," *Drake Journal of Agricultural Law* 19 (2014): 224.

[102] Ibid, 225.

[103] *Carl Kühne GmbH & Co. KG, Rich. Hengstenberg GmbH & Co., Ernst Nowka GmbH & Co. KG v Jütro Konservenfabrik GmbH & Co. KG*, European Court of Justice, C-269/99 (December 6, 2001).

[104] Ibid, I - 9551.

utilizing the designation *Spreewälder Art* for its gherkins. Kühne and Others did not meet the conditions for the utilization of the designation *Spreewälder Gurken*.[105] They brought an action against Jütro in the Landgericht Hamburg on the grounds that as per Article 13 (l) (b) of Regulation No. 2081/92, the use of the designation Spreewälder Art is no longer legal since the designation *Spreewälder Gurken* is registered as a PGI. Jütro, in its defense, maintained that Regulation No. 590/1999 is invalid in so far as the designation *Spreewälder Gurken* is registered in it.[106] The Landgericht Hamburg, in its order for reference, held that numerous problems are arising due to the registration of the designation *Spreewälder Gurken*, which raises doubts regarding the legitimacy of the registration. Under these conditions, the Landgericht Hamburg stayed the proceedings and referred a legal question regarding the same issue to the ECJ for the preliminary judgment.[107] The Court of Justice, in answer to the question referred to by the Landgericht Hamburg, held that it is important to rely on the checks enforced in each member state by the qualified national institutions. If the decision is without a clear error, then the Commission can adequately register the name associated with the particular location.[108] In other words, even if the raw materials were produced in a distinct area, the designation *Spreewälder Gurken* could still be registered as a PGI as the appropriate authorities of Germany deemed that the product came within that particular category by nature.[109]

Thus, various legal acts (regulations) in the EU protect GIs, depending on the sort of product in question. Protection is given to agricultural products and foodstuffs, spirits or wines, and industrial goods

[105] Ibid.
[106] Ibid.
[107] Ibid, I - 9552.
[108] O'Connor, *The Law of Geographical Indications*, 135.
[109] Ingrid Lidgard, "Geographical Indications: A Result of European Protectionism?" (Master Thesis, University of Lund, 2009), 30, https://lup.lub.lu.se/student-papers/search/publication/1559567.

or handicrafts. As an agricultural product, Basmati rice can be registered in the EU as a PGI by adhering to established guidelines and specifications.

11. Legal Battle Between Pakistan and India Over the Protected Geographical Indication Status for Basmati Rice in the European Union

Basmati rice is an aromatic, long, slender-grained rice that is geographically exclusive to certain areas, regions, or districts of India and Pakistan. It is eaten as a popular essential cuisine around the world. Back in 2008, both Pakistan and India decided to file a joint application for the registration of Basmati rice as a GI in the EU. Unfortunately, the plan was later dropped[110] due to some political reasons.

In the month of July 2018, India filed an application to the European Union's Council on Quality Schemes for Agricultural Products and Foodstuffs for the PGI status of its Basmati rice without informing Pakistan.[111] Both Pakistan and India are the sole exporters of geographically exclusive Basmati rice. For years, zero tariffs have been applied by the EU on rice, which is authenticated as original Basmati by either India or Pakistan.[112] The application by India was published in the Official Journal of the European Union (OJEU) in September 2020. Before its publication in the journal, it was subjected to a preliminary examination by utilizing the proper methods in accordance with the control procedures.[113] The main grounds taken by India in the application were that the reputation and origin of Basmati as a long-grain, aromatic rice from Indo-Gangetic Plains exists

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[110] Febin P, "Basmati Rice: The Tug of War," *Intepat*, May 9, 2023, https://www.intepat.com/blog/basmati-rice-the-tug-of-war/.

[111] Mahwish Hafeez, *Issue Brief on Basmati Rice: A New Tug-of-War between India and Pakistan*, (Islamabad: Institute of Strategic Studies Islamabad (ISSI), September 28, 2021), 1, https://issi.org.pk/wp-content/uploads/2021/09/IB_Mahwish_Sept_28_2021.pdf.

[112] Ibid.

[113] Siddhant Biswakarma, "Who Owns Basmati Rice? India and Pakistan Battle for GI Rights," *IPWatchdog*, July 6, 2021, https://ipwatchdog.com/2021/07/06/owns-basmati-rice-india-pakistan-battle-gi-rights/.

in folklore, tradition, political-historical records, culinary and scientific literature. India did not claim in the application submitted before the EC that it is the sole nation that has the capacity to cultivate Basmati rice. Furthermore, the application filed by India was according to Article 7(1) of the Regulation (EU) No. 1151/2012 of the European Parliament and of the Council.[114] This article is concerned with product specification criteria. It is also stipulated under Regulation No. 1151/2012 that after the claim to GI is published in the OJEU, the countries can oppose the same claim by filing an opposition within three months of its publication in the journal. In late 2020, being the second largest exporter of Basmati rice, Pakistan filed a notice of opposition against India's claim over Basmati rice.[115]

Pakistan opposed India's claim in its main grounds of opposition by mentioning that both India and Pakistan produce Basmati rice, and for this very reason, it is a shared commodity of both countries. As per the regulations of the EU, the product due for registration as a GI in the international market has to be preserved by the country's indigenous GI laws first.[116] Both Pakistan and India have registered Basmati rice in their respective GI laws. India domestically got the GI status for its Basmati rice in 2016, while Pakistan registered its Basmati rice as a GI product in 2021. It was suggested by the EC that Pakistan and India should resolve the matter through talks, but no solution has been reached so far, and the matter is still pending resolution.[117] Recently, India's application for exclusive rights to Basmati rice was rejected by the Government of Australia because India is not the only producer of Basmati rice. However, India filed an appeal against the decision in the Australian federal courts.[118] Meanwhile, Pakistan

[114] Ibid.
[115] Ibid.
[116] Febin P, "Basmati Rice: The Tug of War," *Intepat*, May 9, 2023, https://www.intepat.com/blog/basmati-rice-the-tug-of-war/.
[117] Ibid.
[118] Ibid.

is also seeking an opportunity to acquire a joint GI tag for Basmati rice.[119] The matter of acquiring a PGI status for Basmati rice in the EU is still underway.

Hence, non-EU countries can also register their GIs in the EU by first registering their products as GIs under their national laws. Basmati rice is a cross-border GI, and registering it as a PGI in the EU will have substantial economic benefits for Pakistan and India. It will allow these countries to promote and sell their authentic Basmati rice varieties at premium prices in European and international markets.

12. Conclusion

GIs are basically IPRs that serve to protect the traditionally significant products deriving from a specific geographical area or region. It is necessary to safeguard GI products in global trade to secure the reputation of the product's provenance and prevent the unauthorized use of the same. Numerous GIs are related to food and agricultural products. The volume of food products exported to international markets has increased significantly in recent years. Consumers from all around the world are showing a keen interest in authentic traditional cuisines, especially those that are based on cultural heritage. In other words, consumers' interest in the product's identity, quality, and characteristics is increasingly growing, and they demand specific information regarding the product before making a purchase in the international markets. Basmati rice is a popular agricultural commodity that is highly demanded and consumed as a staple food across the globe. It is traditionally cultivated in the specific regions of Pakistan and India, and both countries have registered it as a GI product as per their indigenous GI laws. This paper sheds light on some of the most important

[119] Dipanjan Roy Chaudhury, "Australia's Decision to Deny GI Tag to Basmati Rice Could Be Result of Pakistani Lobbying," *Economic Times*, April 21, 2023, https://economictimes.indiatimes.com/news/economy/foreign-trade/australias-decision-to-deny-gi-tag-to-basmati-rice-could-be-result-of-pakistani-lobbying/articleshow/99669521.cms?from=mdr.

issues concerning the preservation of Basmati rice as a GI in international trade.

Unfortunately, with the growth of international trade, enforcement of laws to protect GIs is also becoming increasingly complex, especially in the case of valuable agricultural crops. Therefore, this paper not only examines the international instruments pertaining to the preservation of GIs but also compares the current legal frameworks of the main Basmati rice-producing countries. Although a lot of research has been conducted on the subject of GIs, there are only a few scholarly works available that deal with the significance of preserving Basmati rice as a GI product in international trade. Furthermore, Basmati rice is a shared heritage of Pakistan and India, but most of the work in this regard is region or country-specific. Moreover, Pakistan has many products that can be considered geographically exclusive due to their specific origin, but most of them are currently unregistered, as the GI Act in the country was enacted in 2020. Similarly, in 2021, Basmati rice was registered as the first GI in Pakistan. Most of the research in this regard was done prior to the enactment of the same GI Act. Therefore, this paper comprehensively investigates these issues in the light of the most updated national and international regulatory frameworks.

The paper also discusses the significance of Basmati rice for both Pakistan and India, as well as its impact on the indigenous and international markets. Currently, Pakistan and India are in a tug of war to acquire an exclusive PGI status for Basmati rice in the EU in order to sell their specific variety of Basmati rice as an exclusive product in the European markets. Acquiring a PGI status for Basmati rice will have a considerable impact on the economic growth of a producing country and will also increase the consumers' trust in international markets. Thus, it is the need of the hour to preserve GIs in international trade, especially when it comes to the protection of Basmati rice as a GI.

12.1 Recommendations

1. Developing countries today face various problems regarding the conservation of GIs in global trade due to the complexity of trade agreements, distinct legal frameworks of countries, and disputes that arise among them. It also impacts the protection and export of Basmati rice as a GI commodity in the international markets. Therefore, it is suggested that developing countries should establish some sort of cooperation in order to protect GIs against these problems. It is also suggested that developed countries should cooperate with developing countries to adequately safeguard the international legal framework pertaining to the preservation of GIs.
2. It is recommended that Pakistan should also join the Lisbon Agreement (1958) after the enactment of the GIRPA, 20. As a result, the protection of Pakistan-based GIs will be enhanced internationally. The international system of protection and registration of AOs was established due to the provisions of the Lisbon Agreement (1958). This agreement not only protects AOs in a contracting state of origin but also automatically enables the protection of the same in the other contracting states.
3. Pakistan and India are the main producers and exporters of Basmati rice globally. Therefore, both countries should broaden the spectrum of exports of Basmati rice as a GI product by exporting it to the developing global markets, such as Central Asia and Africa, in order to boost trade and local economic development.
4. Pakistan and India are developing economies, and most of the people in these countries are related to the field of agriculture. Basmati rice is geographically exclusive to both Pakistan and India. Therefore, the governments of both countries are suggested to educate the traders and farmers about the non-tariff measures and

regulatory requirements imposed by the importing countries in order to ease the international trade of Basmati rice. The governments of both countries should also train and educate the farmers regarding Basmati rice in order to increase yields and reduce unnecessary wastage.

5. In order to establish an adequate mechanism for the preservation of Basmati rice as a GI product in Pakistan and India, it is suggested that the governments in these countries should also take all the necessary steps to expedite and educate the local consumers and producers about the significance of protecting GIs both nationally and internationally.
6. Basmati rice is a popular staple food which is consumed globally. In an attempt to boost the trade of Basmati rice in international markets as an exclusive product of origin, the major Basmati rice-producing countries should also work for the development of exclusive Basmati rice-based value-added products such as Basmati rice bran oil, puffed Basmati rice, and Basmati rice wax, etc.
7. It is suggested that governments in the major Basmati rice-producing countries should make plans and strategies to attract more investments and funds for R&D in the domestic rice sectors. This will allow the scientists to develop new strains of Basmati rice with extra-long grains, intense taste, and aroma, increased health benefits, and immunity against Basmati rice-related diseases. As far as the rice sector in Pakistan is concerned, a lot of research still needs to be carried out in order to meet international standards.
8. The matter regarding the PGI status for Basmati rice between Pakistan and India is pending before the EC. Both countries should resolve the matter through a proper dialogue as per the suggestions

of the EC. Otherwise, the matter could remain unresolved for a long period of time.

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The Judiciary during Benazir Bhutto's Second Term (1993-1996): An Analytical Study

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Tauqir Ahmad Khan**

Abstract

This paper explores Benazir Bhutto's deep resentment and hatred against the judiciary, stemming from the execution of her father in April 1979. Benazir considered it to be a judicial murder and believed that the judiciary was responsible for it. These feelings further deepened over judiciary silence in the face of human rights abuses during the eleven-year long tenure of Zia-ul-Haq's regime. During this time, Benazir, along with other PPP leaders and workers remained behind bars for several years on political grounds but hardly obtained any relief from the judiciary. Subsequently, during her first term, the judiciary was largely hostile to her government and declined to restore it when it was dismissed in 1990. Against this backdrop, during second term in 1993, Benazir attempted to assert influence over the judiciary by packing it with like-minded judges which led to a confrontation between her government and the judiciary. This study will help in understanding the efforts made by political leaders to influence the judiciary, as well as the challenges they face in doing so. Utilising a qualitative methodology, this study conducts a comprehensive analysis of primary and secondary sources, including government documents, judicial rulings, law books, autobiographies and contemporary news reports. The findings indicate that the judiciary's resistance to Benazir's attempts to influence it significantly undermined her political authority and contributed to the broader challenges faced by the PPP in the political landscape of Pakistan. The study also indicates that the judiciary has historically tended to exhibit

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submissiveness during military regimes, whereas civilian governments have often been unable to establish effective control over it. In the end, it became one of the major causes of the premature dismissal of her government.

Keywords: Bhutto, Judiciary, PPP, Supreme Court, High Courts, Sajjad Hussain, Constitution

1. Introduction

The judiciary in Pakistan has historically played an ambiguous and often controversial role, frequently lending support to military regimes and validating their unconstitutional manoeuvres.

[1] On multiple occasions, the judiciary has endorsed unlawful actions that undermine democratic institutions. For instance, the judiciary upheld Governor General Ghulam Muhammad's order of dissolution of the first constituent assembly in 1954. Similarly, it validated the martial law put forth by Iskander Mirza on October 07, 1958, the coup d'état of General Muhammad Ayub Khan in the same year, the martial law of General Agha Muhammad Yahya Khan on March 25, 1969, of General Zia-ul-Haq on July 5, 1977 and emergency provisions of Pervaiz Musharraf on October 12, 1999.[2] The judiciary largely remained indifferent to the abrogation or suspension of constitutions and the curtailment of the fundamental rights under the military dictators.[3] At the onset of each martial law, the judiciary had often turned down petitions challenging the validity of military regime

[1] Oldenburg, Philip, "The Judiciary as a Political Actor," *in Pakistan at the Crossroads: Domestic Dynamics and External Pressure*, ed. Christophe Jeffrelot (Gurgaon: Random House India, 2016), 89.

[2] Stephen Philip Cohen, *The Idea of Pakistan* (Lahore: Vanguard, 2005), 58; Tahir Kamran, *Democracy and Governance in Pakistan* (Lahore: South Asia Partnership Pakistan, 2008), 2-3.

[3] Waris Hussain, *The Judicialization of Politics in Pakistan: A Comparative Study of Judicial Restraint and Its Development in India, the US and Pakistan* (London: Routledge, 2018), 72.

or the curtailment of fundamental rights. [4]

It does not imply, however, that all the judges capitulated to the military regimes. Few made efforts in their individual capacity to stand before the military regimes and perform their constitutional duties, but military regimes cunningly removed them from the scene. The military dictators were aware of the constitutional power of the judiciary; therefore, it always remained their priority to control the judiciary. In this way, military rulers had often purged the judiciary of those judges who were threats to their regimes. For instance, during the regime of Zia-ul-Haq, some judges of the Supreme Court did not align themselves with the establishment. The three of the seven judges' bench, who were hearing the petition of Zulfikar Ali Bhutto (hereafter ZA Bhutto), issued the verdict in his favour explicitly stating in their judgment that he was not involved in the alleged murder and should be acquitted.[5] The Sindh and Balochistan High Courts, too, were not in a mood to cooperate with the regime and give relief to its political opponents. Thus, Zia-ul-Haq promulgated the Provisional Constitutional Order (PCO) in 1981 and fired those judges who were hostile to the regime.[6] According to Benazir 25 per cent of the judges were laid off by the regime.[7] Only those judges were permitted to take oath who were either considered right-wing leanings or sympathisers to Zia's programme of Islamisation.[8] Meanwhile, the regime inducted those new judges who had ideological association with Jammat-e-Islami and believed

[4] Mohammad Waseem, *Political Conflicts in Pakistan* (London: Hurst Company, 2021), 293.

[5] Owen Benett Jones, *The Bhutto Dynasty*: *The Struggle for Power in Pakistan* (London: Yale University Press, 2020), 111; Dorab Patel, *Testament of a Liberal* (Karachi: Oxford University Press), 102.

[6] Hafeez Malik, *Pakistan: Founders' Aspirations' and Today's Realities* (Karachi: Oxford University Press, 2001), 46.

[7] Benazir Bhutto, *Daughter of the East* (London: Simon & Schuster, 2007), 148.

[8] Mariam Mufti, et al, *Pakistan's Political Parties: Surviving between Dictatorship and Democracy* (Washington DC: Georgetown University, 2020), 242.

in the building of an Islamic state.[9]

Benazir's interplay with the judiciary first started during her father's trial at Lahore High Court in 1977, followed by an appeal against the decision of Lahore High Court before the Supreme Court. It was a bitter experience because the Courts awarded the death penalty to ZA Bhutto which in the eyes of Benazir was politically motivated and unjust.[10] Moreover, the judiciary remained silent over human rights abuses and persecution of PPP workers during Zia-ul-Haq's regime. Even Benazir remained behind bars or solitary confinement for around five years during Zia-ul-Haq's regime but failed to achieve any remarkable relief from the judiciary. This nurtured the seed of hatred among the ranks and files of the PPP.

The judiciary, however, gave relief to the PPP in a few cases at the end of Zia's rule and shortly after his death. For example, the Supreme Court gave judgment against Zia-ul-Haq's decision to hold party-less elections and decreed that the elections would be held on party basis. The Court also ordered for allotment of symbols to political parties.[11] Meanwhile, the Supreme Court also declined to reinstate the government of former prime minister Muhammad Khan Junejo which was dismissed by Zia-ul-Haq on May 29, 1988. The non-restoration of Junejo's government paved the way for the 1988 general elections and subsequently for Benazir to become the Prime Minister.[12] However, this was a small effort to undo the injustices of eleven years, and it could hardly please Benazir and the PPP leadership.

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[9] Owen Bennett Jones, *Pakistan Eye of the Storm* (London: Yale University Press, 2002),17.

[10] Benazir Bhutto, *Daughter of the East*, 222.

[11] Ralph Braibanti, *Chief Justice Cornelius of Pakistan: An Analysis with Letters and Speeches* (Karachi: Oxford University Press, 1999), 340

[12] Government of Pakistan v. Muhammad Saifullah Khan, PLD 1988, SC 43.

In this backdrop when Benazir was elected as a Prime Minister in December 1988, her relations with the judiciary were not up to the mark. One of the reasons was that the judges in the superior courts were appointees of Zia-ul-Haq and most of them were influenced by Islamic dogma propagated by Zia during his rule. On the other hand, Benazir was left leaning and wanted to secularise the country while the judiciary at large wanted to make the country an Islamic one.[13] The judiciary, too, was under the influence of the establishment which had estranged relations with Benazir. The establishment made all efforts to keep Benazir out of power and only accepted her as prime minister when no other option was left for it. During her term in office, the judiciary with the support of the establishment remained hostile to Benazir and created problems for her government. Similarly, when her government was dismissed in August 1990, the order of dissolution was challenged in all four High Courts.[14] Except for the Peshawar High Court, the other three High Courts upheld the dismissal of the PPP government at the centre and in Sindh Province.[15] The Supreme Court, too, affirmed the dismissal despite its previous ruling in the *Haji Safiullah case* that the power of dissolution by the president could only be used in extraordinary situations.[16] On this ground, the Supreme Court restored the government of Nawaz Sharif when it was dismissed by the President in 1993.

[13] Yasser Kureshi, "Judicial Politics in a Hybrid Democracy: Pakistan's Judiciary and Political Parties," *in Pakistan's Political Parties: Surviving between Dictatorship and Democracy*, ed. Mariam Mufti et al (Washington DC: Georgetown University, 2020), 289.

[14] Jan Muhammad Dawood, *The Role of Superior Judiciary in the Politics of Pakistan* (Karachi: Royal Book Company, 1994), 87.

[15] Hamid Khan, *A History of the Judiciary in Pakistan 2nd ed.* (Karachi: Oxford University Press, 2023),208-209.

[16] Najam Sethi, *Pakistan Under Benazir Bhutto: Reportage, Comment, Analysis* (Lahore: Vanguard Publishers, 2021), 249. Government of Pakistan v Muhammad Saifullah Khan, PLD 1988, SC 43.

2. Judiciary During Benazir's Second Term

Benazir returned to power in November 1993. She was lucky enough that the then army chief General Abdul Waheed Kakar and the then Director of General Inter-Services Intelligence (DG-ISI) General Javaid Ashraf Qazi were apolitical and believed in civil supremacy. Benazir was on good terms with both of them.[17] She had no pressure from the military establishment in dealing with the judiciary. By learning from her experience, Benazir came to the conclusion that the assertion over the powerful institute of the judiciary was essential for the smooth running of the government. So, Benazir decided to assert over the judiciary by packing it with pro-PPP and like-minded judges. She withdrew all the names proposed by the caretaker government of Prime Minister Moeen Qureshi to fill the vacant posts of judges in the superior courts.[18]

At the time of her appointment, Justice Nasim Hassan Shah was the Chief Justice of the Supreme Court whom she did not like because he was among the four judges of the Supreme Court who upheld the death penalty of ZA Bhutto. Nasim Hassan's tenure, however, was a short stint as his retirement was due in mid-April 1994. However, Benazir tried to tease him and to humiliate him by sacking him from the position of the President of the Cricket Board. Nasim had deep passion for cricket, and he was appointed to that position at his request to former Prime Minister Nawaz Sharif.

Benazir's real tug of war with the judiciary started after the retirement of Nasim Hassan Shah on April 14, 1994. Benazir appointed Saad Saood Jan, the senior most judge of the Supreme Court as Acting Chief

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[17] Benazir Bhutto, Reconciliation: *Islam Democracy and the West* (London: Simon & Schuster, 2008), 258.

[18] Sartaj Aziz, *Between Dreams and Realities: Some Milestone in Pakistan's History* (Karachi: Oxford University Press, 2009), 152.

Justice. Benazir did not appoint him as a permanent judge apparently to keep him under pressure. It appears that in the beginning, Justice Saood tried to please the government. For example, on 25 February 1994, the President dismissed the government of Sabir Shah and imposed Governor rule in the NWFP (now Khyber Pakhtunkhwa).[19] Sabir Shah challenged the imposition of Governor rule in the Supreme Court and claimed that the dismissal of his government was based on mala fide. The Supreme Court heard the case and held by majority of seven to two that the president's proclamation had violated Article 234 of the 1973s Constitution.[20] However, Justice Saad did not agree to the majority view, presumably, to please the government.

The verdict in the Sabir Shah case further stimulated Benazir to fill the judiciary with like-minded judges. The government started packing the Supreme Court supposedly with pro-PPP Judges on an ad hoc basis. Initially, Justice Saad Sood Jan accepted the appointment of a few judges but finally, he decided to resist this move. When the federal government asked him to approve the names of two advocates and two retired judges of the Lahore High Court as the ad hoc judges of the Supreme Court, he declined to do so.[21] Observing that the Acting Chief Justice was non-cooperative at its length, Benazir decided to bypass him and elevated Justice Sajjad Ali Shah, a junior judge as Chief Justice on June 5, 1994.[22] It occurred for the first time that the seniority principle was ignored and a

[19] Sabir Shah was elected as the Chief Minister of NWFP after the election of 1993. He was heading a coalition government of Pakistan Muslim League (N) and Awami National Party.

[20] Sabir Shah v. Federation of Pakistan, PLD1994, SC 738.

[21] Hamid Khan, *A History of the Judiciary in Pakistan 2nd ed*, 208-209.

[22] He was junior to Justice Jan, Justice Ajmal Mian and Justice Abdul Qadeer Chaudhry. Justice Jan was the most senior judge of the Supreme Court at that time.

junior judge was appointed as Chief Justice in the Supreme Court.[23]

Sajjad's out of turn promotion was largely the result of his two dissent notes which he authored as a judge of the Supreme Court that went in favour of Benazir. In his first dissent note, he went against the majority of judges when they declined to restore Benazir's government in 1990. Sajjad Shah concluded that the motive behind this dissolution was to get rid of the government of the PPP. In his dissent note, he declared Ishaq Khan's order of dissolution as invalid.[24] Sajjad wrote his second dissent note at the time when the Supreme Court was hearing the dismissal case of Nawaz Sharif's government in 1993.[25] This time he was the only judge in the eleven-member full court bench who favoured the President's decision and declared that the president had rightly dismissed the government. Sajjad Shah criticised Nasim Shah for his controversial remark that the nation would soon hear great news, implicitly saying that the Court was going to restore the government.[26] He pointed out that when the governments of Benazir Bhutto and Muhammad Khan Junejo, the two prime ministers who hailed from Sindh were sacked, the Supreme Court refrained from restoring them, but when the turn of a Punjabi Prime Minister (Nawaz Sharif) approached, the court willingly restored the government.[27] In addition to these two dissent notes, he was among two dissent judges in the above mentioned Sabir Shah case.

[23] Ilhan Niaz, The Culture of Power and Governance of Pakistan; 1947-2008 (Karachi Oxford University Press, 2011),191; Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford University Press, 2016), 434.

[24] Muhammad Azem, *Law, State and Inequality in Pakistan: Explaining the Rise of the Judiciary* (Singapore: Springer nature, 2017), 169.

[25] General K.M. Arif, *Khaki Shadows: Pakistan 1947-1997* (Karachi: Oxford University Press, 2004), 311.

[26] Muhammad Nawaz Sharif v Federation of Pakistan, PLD1993, SC 473.

[27] Ibid.

2.1 Packing the Judiciary

The practice of influencing the judiciary and to bring it under the control of the government continued even after the appointment of Sajad Ali Shah.[28] The Government continued to induct the pro-PPP judges in the superior judiciary.[29] This practice, however, was not a novel one in Pakistan. Earlier, both the military and civilian rulers inducted judges in superior courts based on their anticipated loyalty to the government.[30] ZA Bhutto, the civilian ruler, had actively intervened in the appointments of the judges. When the judiciary began to give relief to ZA Bhutto's political opponents, he introduced the Fourth Amendment in the Constitution which prohibited the High Courts from issuing orders for preventive detention of a person or grant bail to anyone detained under such circumstances.[31] Similarly, military rulers also purged the judiciary from those judges who were not ready to follow the path carved by them. However, the case of Benazir was different because the PPP government was not as powerful as the military rulers had been. Neither, she had political strength equal to her father. Her party did not have a simple majority in the parliament and the opposition was strong. The opposition strongly objected to every move of Benazir to influence the judiciary which emboldened the judges to resist her government. Consequently, she had to face severe resistance from the judiciary when she tried to intervene in its internal affairs by packing it with like-minded judges.

The first major step that Benazir's government initiated to pack the judiciary was the induction of the Chief Justices of Sind and Punjab High Courts of its own choice. Justice Nasir Aslam Zahid was replaced with

[28] Hafeez Malik, *Pakistan: Founders 'Aspirations' and today's Realities*, 73.

[29] Ibid.

[30] Ayesha Jalal. *The Struggle for Pakistan: A Muslim Homeland and Global Politics* (Massachusetts: The Belknap Press of Harvard University Press, 2014), 211.

[31] Constitution (Fourth Amendment) Act, 1975, Act LXXI of 1975.*Central Status,*337.

supposedly pro PPP judge, Justice Abdul Hafiz Memon, as a Chief Justice of the Sindh High Court while Mian Mehboob Ahmad was replaced by Justice Muhammad Ilyas as Chief Justice of the Punjab High Court.[32] The foregoing judges were transferred to the Federal Shariat Court (FSC) without their consent which was against the judicial norms.[33] So, both judges demonstrated their displeasure over the transfers. Justice Mian Mehboob preferred to apply for early retirement instead of getting a new assignment.[34] The new appointees were the judges of the Supreme Court, and they were appointed as chief justices of their respective High Courts on ad hoc basis.

The case of Justice Abdul Hafiz Memon is very interesting. Memon was highly respected among the PPP circles because he was among one of the few judges who declined to take oath under Zia-ul-Haq's PCO in March 1981. When the PPP came into power in 1988, Memon was appointed as a Supreme Court judge, largely because of his refusal to cooperate with the military regime and his premature retirement. However, it was rumoured that he had a close association with the PPP. In 1991, considering him a pro-PPP judge, the successive government of Prime Minister Nawaz Sharif removed him on the grounds that his appointment had been made contrary to the law. [35] When Benazir again came into power, she appointed Memon as an Acting Chief Justice of the Sindh High Court. But his order of appointment was immediately withdrawn because Memon, this time had crossed the age of sixty-two which was a superannuation period for a judge

[32] Ardeshir Cowasjee, "*Dishonesty- from Day one*," Dawn (Karachi), 9 November 1997.

[33] Nasim Hasan Shah, "Judiciary in Pakistan: A Quest for Independence" in *Pakistan:1997* ed. Craig Baxter & Charles Kennedy (Colorado: Westview Press, 1998), 62.

[34] Hamid Khan, *Constitutional and Political History of Pakistan*,435.

[35] Sajjad Alī Shah. *Law Courts in a Glass House: An Autobiography*, (Karachi: Oxford University Press, 2001), 198.

of the High Court.[36] Consequently, the government issued another notification forthwith, this time appointing Memon as the judge of the Supreme Court where the retirement age was sixty-five years. Then he was immediately transferred to Sindh High Court.[37] Similarly, Justice Muhammad Ilyas was supposedly brought into the Punjab High Court because he had grievances against Mian Nawaz Sharif who did not appoint him as the Chief Justice of Punjab High Court and transferred him comparatively to a less important position of a judge of FSC. Ilyas was a judge of the FSC when Benazir was elected as Prime Minister. She first appointed Ilyas as the judge of the Supreme Court, after which, he was transferred to Punjab High Court. Besides the Sind and Punjab High Courts, the Peshawar High Court had already been run by an Acting Chief Justice. These appointments of Acting Chief Justices enabled the government to assert its authority over the judiciary.

The PPP government did not stop over the appointments of Chief Justices of Sindh and Punjab High Courts. Now, it began to appoint the puisne judges of the High Courts of its own choice. In mid-1994, in another move, the government appointed nine judges in the Sindh High Court.[38] The government had to face stiff resistance from the opposition political parties who accused that the appointments were made on political grounds and on favouritism.[39] But this did not stop Benazir's government. In its next move, the government inducted a bulk of twenty judges in the Punjab High Court in August, 1994. Some of the newly appointed judges were not practising lawyers and thereby did not have the required professional experience.[40]

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[36] Hamid Khan, *Constitutional and Political History of Pakistan*, 435.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Several appointees bypassed the standard recommendation process involving the Chief Justice and the Governor and lacked endorsement from a constitutional consultee. There are rumours that some names were quickly added, with the Prime Minister's Office sending them via fax to the Law Ministry for inclusion in the forthcoming notification.

The legal experts believed that the judges were appointed because of their close association with the PPP legislators and leaders.[41] These claims have some weightage. For example, Chaudhry Altaf Hussain, the then Governor of Punjab managed to appoint his younger brother Chaudhry Iftikhar Hussain as a judge.[42] Similarly, a son of the influential PPP-MNA and a friend of the Chief Minister of the Punjab were among the new appointees.[43]

The government wanted to strengthen its position by taking control of the Supreme Court. So, it began to induct like-minded judges on an ad hoc basis. The number of ad hoc judges at one time reached seven against the ten permanent judges. As Justice Memon and Ilyas were transferred to the High Courts, so virtually there were eight permanent and seven ad hoc judges in the role of the Supreme Court.[44] Sajjad Ali Shah was rarely consulted for the judicial appointments, yet he endorsed all these appointments because he was also a beneficiary of the system as promoted out of turn. In the beginning, Sajjad did not refrain from serving "Contempt of Court" notices to those who raised their objections on these appointments.[45]

But this mayhem lasted for a few months and soon differences arose between Benazir and Sajjad Ali Shah over the appointments of judges and certain other issues. It is said that the elevation of Agha Rafiq from the position of Session Court judge to the position of the Sindh High Court significantly annoyed Sajjad Hussain and he decided to resist the government. Agha Rafiq was amongst the most junior judges in the Sindh

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[41] Hassan Askari, *Military, State and Society in Pakistan* (Karachi: Oxford University Press, 2000), 223.

[42] Chaudhry Iftikhar Hussain later served as the Chief Justice of the Punjab High Court from 2002 to 2007.

[43] Hamid Khan, *Constitutional and Political History of Pakistan*, 435.

[44] Ibid.

[45] For example, the contempt of court notice was issued to renowned journalist Ardeshir Cowasjee who criticized the ad hoc appointments in his article published in Daily *Dawn*. A Notice was also issued to the editor of the Dawn.

Session Court but got his way to the High Court purportedly due to the influence of Benazir's spouse.[46] Sajjad Ali raised objection to his appointment and pointed out that his name in seniority list stood at number thirty-six out of the total thirty-eight session judges of the Sindh, therefore he was not fit for the promotion to the High Court. Shah was unheard of and reminded of his own appointment ahead of three senior judges.[47] Another incident which widened the gulf between Benazir and Sajjad Hussain was the appointment of Justice Irshad Hassan Khan as the judge of the Supreme Court. Irshad was a close friend of General Khalid Mehmood Arif, the Voice Chief of Army Staff, in Zia regime. Irshad also worked as Federal Law Secretary under Zia's regime. Benazir was initially reluctant to appoint him as the judge of the Supreme Court, however, upon the insistence of Sajjad Shah, she eventually agreed. But later, she became suspicious when she was told Shah had developed a close relationship with Irshad and the latter had often been found in the chamber of the Chief Justice.[48]

2.2 Reaction of Judiciary

The PPP appointments within the judiciary was not liked in the legal circles and the civil society. Habib Wahab Al-Khairi, a member of the Supreme Court Bar, submitted a writ petition before the Lahore High Court contesting the appointments of the Acting Chief Justice of the Lahore High Court, and of twenty new judges and non-confirmation of six additional judges.[49] The Lahore High Court, however, on September 4, 1994, dismissed the petition, asserting that the government possessed arbitrary powers to make judicial appointments .[50] The decision of Lahore High

[46] Iqbal Akhund, *Trial and Error: The Advent and Eclipse of Benazir Bhutto* (Karachi: Oxford University Press, 2000), 195.

[47] Hamid Khan, *Constitutional and Political History of Pakistan*, 435.

[48] Sajjad Alī Shah. *Law Courts in a Glass House,* 201.

[49] Hafeez Malik, *Pakistan: Founders' Aspirations and today's Realities*, 73.

[50] Al-Jehad Trust v. Federation of Pakistan PLD 1996 S.C. 324; Nasim Hasan Shah, "*Judiciary in Pakistan*, 63.

Court was subsequently challenged before the Supreme Court, which heard the appeal and, on March 20, 1996, overturned the judgement of Lahore High Court.[51] In its judgement, the Supreme Court raised questions over the discretionary powers of the government regarding appointment of judges and held that consultation of permanent Chief Justices of respective High Courts and Supreme Court is mandatory for appointments and transfers.[52] The Court held that all appointments to the superior judiciary made without substantial consultation with the respective Chief Justices would be subject to review.[53] As a result of this judgment the PPP appointees in the Sindh and Punjab High Courts during the tenure of Acting Chief Justices, whose names were not approved by the successive permanent Chief Justices were declared invalid.[54] Moreover, the Supreme Court ruled that the Chief Justice of the Supreme Court and that of the High Courts shall be appointed on a seniority basis while induction of judges in the superior judiciary shall be made with the consent of the respective chief justices.[55] However, if the government did appoint chief justice of the superior courts ignoring the seniority list, or appointed any judge without the recommendation of the respective Chief justice of the Courts, it had to record cogent reason for this action.[56] The Court made it incumbent to take the assent of High Court judges before transferring them to the Federal Shariat Court.[57]

The Supreme Court judgement was not well received in the PPP circles as it curtailed the power of the executive in the appointment of the judiciary while the Chief Justices of the superior judiciary got more power

[51] Ibid.

[52] Roedad Khan, *Pakistan: A Dream Gone Sour* (Karachi: Oxford University Press, 1998), 151. Hassan Askari, *Military, State and Society in Pakistan*, 223.

[53] Al-Jehad Trust v. Federation of Pakistan PLD 1996 S.C. 324.

[54] Mian Ajmal, *A Judge Speaks Out*, 187.

[55] Al-Jehad Trust v. Federation of Pakistan PLD 1996 S.C. 324.

[56] Ibid.

[57] Al-Jehad Trust v. Federation of Pakistan PLD 1996 S.C. 324; Ian Talbot, *Pakistan: A Modern History* (London: C. Hurst & Co,2009), 348.

in appointment of the judges. Benazir considered that Sajjad Hussain, her handpicked Chief Justice, betrayed her. She mocked the judges by calling them the collaborator of the military establishment. She also criticised the judgement publicly and in her speeches before the National Assembly which was repeatedly telecast on state television.[58] She tantamounted it to rewriting the constitution.[59] Benazir argued in her speech before the National Assembly that the constitution did not even ask for advice from the Chief justice regarding appointments of judges.[60] However, the PPP government was not so powerful to stand before the judiciary and explicitly refused to implement the judgement. The pressure of the opposition political parties also compelled the government to implement the judgement. In an effort to avert charges of contempt of court, she implemented certain aspects of the judgment. The government appointed Permanent Chief Justices in all High Courts within 30 days after the judgement was announced, while ad hoc judges in the Supreme Court were also relieved. Moreover, the PPP government withdrew the appointments of a few judges in the High Courts whose appointment was made without following the due procedure.

In anticipation of the Supreme Court's forthcoming judgment, Benazir's government issued a notification on March 19, 1996, a day prior to the court's decision, confirming the permanent appointment of ten ad hoc judges of the Lahore High Court and seven ad hoc judges of the Sindh High Court.[61] However, Benazir's relationship with the judiciary went into the lowest ebb when the Chief Justices of the respective High Courts declined

[58] Nasim Hassan Shah, *Memoirs and Reflections*, 117

[59] Muhammad Ali Shaikh, *Benazir Bhutto: A Political Biography* (Karachi: Orient Books Publishing House, 2000), 224.

[60] Benazir Bhutto, *Taqareer-o- Bayanat*: *October 1993- November 1996* (Islamabad: Ministry of Information), 361.

[61] S.M. Zaffar, *Mere Mashoor Muqadmay* [Urdu] (Lahore: Bright Books, 2007), 648.

to accept these judges as permanent ones. The judiciary went further, dismissing twenty-four judges of the High Courts that were inducted by the Benazir government in 1994. The judiciary took the stance that these appointments were made without the consultation of the Chief Justices of the High Courts. In response, Benazir rejected the judiciary's ruling, insisting that she retained the authority to appoint judges. While addressing the District Bar Associations of Naseerabad and Jacobabad, Benazir made it clear that the constitution of 1973 grants arbitrary powers to the head of the executive regarding the appointment of judges. She could appoint the Chief Justices of the Supreme Court and High Courts at her own discretion. Furthermore, she stated that she could appoint any member of the bar as Chief Justice at her discretion.[62]

Benazir also accused the opposition political parties of using the judiciary for political manoeuvring. Benazir targeted Jamaat-e-Islami for its unconstitutional demands for the government's resignation and establishment of a caretaker set up under the judiciary.[63] Benazir claimed that the Supreme Court had crossed the limits of its authority in that judgement.[64] Sajjad Shah took the allegations put forth by Benazir seriously and issued a public statement through which he made it clear that the judiciary was in no mood to confront the government. Sajjad Shah called Benazir's allegations as an effort to ridicule the judiciary and warned her to be careful in future for issuing such careless statements, implicitly indicating that he could charge her with contempt of court over such remarks.[65]

Benazir was in no mood to subdue. On May 16, 1996, the

[62] Muhammad Azeem, *Law, State and Inequality in Pakistan*, 193.
[63] *Daily Dawn*, Islamabad, November 14, 1994.
[64] *The Muslim*, 17 April 1996.
[65] Robert LaPorte, Jr, "Pakistan in 1996: Starting Over Again," *Asian Survey* 37, no 2 (Feb 1997): 119.

government filed a Presidential Reference. One of the main objectives of filing reference was to embarrass Sajjad Shah whose appointment as Chief Justice and as a High Court judge was challenged and brought into question. When Shah was recommended as a judge of the Sindh High Court, the Court was headed by an Acting Chief Justice.[66] It was requested to constitute a full bench, and Shah should not be part of that bench. Sajjad refused to accept both conditions after which the government withdrew the reference.[67] The six-month tussle between the Government and the judiciary somehow decreased on September 30, 1996, when Benazir advised the President to notify the regularization of twenty-nine judges of the High Courts.

The judiciary began to give seemingly undue relief to the political opponents of Benazir. On September 5, 1995, the federal government dismissed the government of Manzoor Ahmad Watoo and imposed Governor rule in Punjab. Later, Benazir got Arif Nakai elected as the Chief minister of Punjab. However, the Lahore High Court ordered for the restoration of the Watoo government and declared that the election of Nakai was held without lawful authority.[68] Meanwhile several political opponents of Benazir were granted bails while few were released. For instance, the Court ordered the release of Sheikh Rasheed Ahmed, a close associate of Nawaz Sharif and a bitter critic of Benazir in March, 1996 who was sentenced by a lower court on the charges of illegal possession of an AK-47 gun (Kalashnikov).

The judiciary also indulged in differences with Benazir over the question of the independence of judiciary. The Constitution of 1973 stipulated in Article 175 that the judiciary would be progressively separated

[66] The News Karachi, 17 May 1996.
[67] Sajjad Ali Shah, *Law Courts in a Glass House*, 275.
[68] Manzoor Ahmad Watoo v. Federation of Pakistan PLD 1997 Lahore 38.

from the executive over a period of fourteen years.[69] Nevertheless, the period expired, and preceding governments never implemented this Article. Neither the constitution was amended to extend the period. Sharaf Faridi, the President of Sindh Bar Association, in this regard, filed a petition before the Sindh High Court during Nawaz Sharif's first tenure. The Court heard the appeal and directed that there should be distinction and a proper bifurcation of powers between the judicial and executive magistrates. The judicial magistrates were to remain under the administrative control of the High Court while the executive magistrates would be under control of the government. The government filed a petition for leave to appeal in the Supreme Court. The Court, however, dismissed the appeal and fixed March 23, 1994 as the target date for the separation of the judiciary from the executive at the provincial level.[70] The verdict, however, went deaf ear as the magistrates continued to exercise judicial powers alongside their executive functions. The separation of the judiciary from the executive branch was scheduled on 1 September 1995 at the federal level. Benazir however, delayed in implementation of the order as she wanted the separation at the Centre and provinces simultaneously. Later, the Supreme Court extended the deadline till March 23, 1996. The government again refrained from implementing the order. In Punjab, the government appointed candidates of District Management Group (DMG) as Session Court Judges which was a clear indication that it was in no mood to separate the judiciary from the executive. The government faced ongoing pressure and criticism from the judiciary but did not implement the ruling in true letter and spirit.

2.3 Dismissal of Government

Benazir's tussle with the judiciary gave an opportunity to opposition

[69] *The News*, Islamabad, January 07, 1994.
[70] The Province of Sindh v. Sharaf Faridi PLD 1994 SC 105.

political parties to malign her government and they began to build pressure on the government to implement the verdict of the superior judiciary. The conflict with the judiciary too, emboldened President Farooq Ahmad Khan Leghari who had several grievances with the government; the most important one was that he was not consulted on important matters. The brutal assassination of Mir Murtaza Bhutto, the younger brother of Benazir on September 20, 1996, by the security forces further weakened Benazir's government as many people began to believe that the spouse of the prime minister was behind this assassination. Seeing that the government was in trouble, Farooq Leghari on September 25, 1996, just five days after the assassination of Murtaza Bhutto, filed a reference before the Supreme Court, seeking its opinion that whether the Constitution of 1973 conferred upon him to appoint the judges of superior judiciary arbitrarily or the consultation of prime minister is binding on the president. Benazir alleged that there was a conspiracy between the president and Sajjad Shah because the Supreme Court was made open on September 25, 1996, which was a public holiday, to enable the president to file a reference.[71] But before the Supreme Court made any decision, Benazir's government was dismissed by the president on November 5, 1996. One of the reasons Farooq Leghari mentioned in the dissolution order was the non-compliance of the government with judicial orders.[72]

Benazir decided to challenge the dissolution order and filed a petition on November 13, 1996 before the Supreme Court against the Presidential Order of dissolution.[73] Sajjad Shah adopted an uncompromising and rude attitude. His intention seems to frustrate Benazir by delaying the case. Twice he returned the petition on procedural grounds.

[71] Sajjad Alī Shah, *Law Courts in a Glass House*, 286

[72] Hamid Yousuf, *Pakistan: A Study of Political Development 1947-97* (Lahore: Sang-E-Meel Publications:1999), 247.

[73] Sajjad Ali Shah, *Law Courts in a Glass House*, 296.

For example, once he returned the petition just because the language did not follow the court proceedings.[74] Sajjad Shah began to fix unnecessary pending constitutional petitions which were related to the 8th Amendment.[75] After much delay, the Supreme Court finally started hearing the petition on December 3, 1996. The Supreme Court clubbed the other petitions which challenged the dissolution order with this petition and a seven-member bench headed by the Chief Justice, heard the case.[76] The Supreme Court upheld the dissolution order of the President by a majority of six to one.[77] The decision was announced just four days before the commencement of general elections which put a negative effect on the PPP's performance. Although the PPP leadership had very little hope of gaining relief from the judiciary, yet it was ambivalent about running the elections with full momentum. That was one of the reasons that the PPP performed very poorly in the upcoming elections and the PML(N) managed to achieve a two-thirds majority in the National Assembly for the first time in the country's history.

3. Conclusions

Benazir's interactions with the judiciary were marked by persistent challenges since the overthrow of her father's government. The judiciary, under the pressure of the military regime, awarded the death penalty to ZA Bhutto. Later, during the eleven years of Zia-ul-Haq's regime, it remained silent over the persecution and repression of the PPP leaders and workers. The situation did not change when Benazir came to power in 1988. Benazir got very minimal relief from the judiciary during her first term in office. Instead, the judiciary created problems for her government and somehow played an indirect role in the dismissal of her government. The judiciary's refusal to restore her government in 1990 further alienated Benazir. When

[74] Nasim Hasan Shah, *Memoirs and Reflections*, 118.
[75] Hamid Khan, *Constitutional and Political History of Pakistan*, 445.
[76] Nasim Hasan Shah, *Memoirs and Reflections*, 118.
[77] Benazir Bhutto v Farooq Ahmad Leghari, PLD 1998 SC.27.

she came into power a second time, she was committed to asserting her authority over the judiciary. In this regard, she appointed Justice Sajjad Hussain Shah, whom she considered her own man, as the Chief Justice of the Supreme Court. She packed the superior courts with pro-PPP and like-minded judges. But packing of the judiciary did not bring any relief to her government. It rather created a conflict between the federal government and the judiciary. Benazir's efforts to bring the judiciary under her control failed because the president, the military high brass and the opposition political parties stood in her way. They all encouraged the judiciary to stand firm against the government. This further intensified the confrontation between the judiciary and the government. Finally, when the president Farooq Leghari, dismissed Benazir's government in November 1996, the Supreme Court, led by Chief Justice Sajjad Hussain, upheld the decision and did not restore her government.

Book Review

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With international law's broad application and its deep analysis of state-to-state interactions, having a thorough reference that explores the nuances of teaching this field is essential. As beneficial as a qualified teacher can be, they are not enough in the absence of a trustworthy legal textbook. Books and the timeless wisdom they impart are eternal, but teachers are known to be ephemeral.

Many topics related to the field in question are covered in the recently released book "Teaching International Law," co-edited by Peter Hilpold and Giuseppe Nesi.[1] This extensive work explores the complexities of international law in a globalized context where new issues keep coming up, contradicting the common wisdom that nations are the only subjects of international law. In addition, it looks at instructional strategies that can help with the modern "Humboldtian dilemma,"[2] which aims to strike a careful balance between research and teaching while taking into consideration the

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[1] Peter Hilpold and Giuseppe Nesi, eds. Teaching International Law, (Leiden, The Netherlands: Brill | Nijhoff, 18 Dec. 2023).

[2] Peter Hilpold, "Teaching International Law in the 21st Century Opening the Hidden Room in the Palace of International Law," in Teaching International Law, ed. Hilpold and Nesi (Leiden, The Netherlands: Brill | Nijhoff, 2023), 28.

lean management systems or VUCA (vulnerability, unpredictability, complexity, and ambiguity)[3] teaching approaches in international law.

Since the world is changing so quickly these days, a lot of the problems that come up when teaching students need to be carefully considered and approached using a glocalized[4] approach, where the teacher is aware of the problem's local as well as global context. International law affects every element of our daily lives, including travelling, buying, watching television, enjoying holidays, and defending our fundamental right to free speech, The instrumental role of international law is to prepare students for VUCA situations, which increasingly characterise the reality of lawyers, now extending from the national legal system of a state to the local level. International law has become more substantial and more vertically advanced as a result of globalisation, and it now plays a key role in state domestic law.

The book delves deeply into the teaching of international law in the West, with a focus on universities in the Global North, which are mostly located in the USA and the UK. The book examines why international law isn't thought to be a particularly important subject to learn at the college level. It is mainly studied as an elective in undergraduate courses because the majority of students are enrolled in programmes that are career-oriented and pertinent to the legal market. This is due to the fact that there is no international law employment available in the local legal market, for obvious reasons that civil, criminal and corporate law cases are more contested in the local legal market. IL is considered more beneficial in

[3] Peter Hilpold, "Teaching International Law in the 21st Century Opening the Hidden Room in the Palace of International Law," in Teaching International Law, ed. Hilpold and Nesi (Leiden, The Netherlands: Brill | Nijhoff, 2023), 40.

[4] Adam Hayes, "Glocalization: What It Means, Advantages, and Examples," Investopedia, August 30, 2022, https://www.investopedia.com/terms/g/glocalization.asp.

postgraduate courses if the target demographic is predominantly made up of foreign students with prior experience working as diplomats, migrants, and employees of international organisations.

Barbara Marchetti discusses the rise of Global Administrative Law (GAL). While this method of studying international law is new, it is worthwhile for future research on the subject because, as society becomes more globalised and individual citizens increasingly dominate discussions of human rights law and other spheres of international law. it is critical that international law education emphasise the role that GAL people play in the creation of international law as quoted:

> Teaching global administrative law therefore means, first of all, to analyse and distinguish between the different global regulators, to know how to trace their origins and constitutive powers, to examine their public or private traits, to discover their tools and instruments of action, to understand their relationships with States or national regulators, and to know their sources of law and procedural rules.[5]

Teaching international law using a GAL method is an essential undertaking for international law educators since it can have major impacts on international law instruction.

The difficulties of teaching international law are also covered in the book. The book issues a warning, pointing out that since everything is viewed through a materialistic prism in universities these days, it might be challenging to teach international law, particularly from a human standpoint. This is because it's possible that international law isn't typically seen as a highly profitable subject by universities, which could cause

[5] Barbara Marchetti, "Teaching Global Administrative Law a New Domain for Administrative Law?" in Teaching International Law, n.d., 238.

international law teaching to become victimised by society's hyper marketization. Therefore, when teaching international law, it's critical to recognise human complexities.

The book also argues that a good international law teacher should be able to point students in the direction of relevant sources for their studies, help them find solutions to all of the world's problems, and help them understand the nuances of international law. The book also covered how the expertise of diplomats like Manfred Lachs and his understanding of international law may help promote peace and development on a worldwide scale.[6]

Since the EU has special status and may therefore manage concerns related to the single market, teaching international law from a European viewpoint is very informative. The European Union possesses noteworthy authority over the European legal system and has established a fascinating corpus of legal precedent through the European Court of Justice and the European Convention on Human Rights. Because of Brexit (the UK exit from the European Union is called as the Brexit) and the situation in Russia due to the Ukraine war, the European Union is currently at the forefront of international law.

Ernst- Ulrich Petersmann emphasises how crucial it is to teach international economic law (IEL) from a global viewpoint, contending that teaching IEL in the current world would be unfeasible without an understanding of its relationship to international human rights law and the Sustainable Development Goals framework. Since the WTO has not been able to address global trade problems, it is important and suggested that

[6] Bartłomiej Krzan, " Manfred Lachs and His ‘Teacher in International Law’: The Lessons He Gave Us". In Teaching International Law ed. Hilpold and Nesi (Leiden, The Netherlands: Brill | Nijhoff, n.d.)

international economic law be combined with human rights and sustainable development goals.[7]

The book examines interdisciplinarity, international law, and controversial ideas in international law, including fragmentation and indeterminacy, as well as the well-known criticism of International Law from Martti Koskennimi viewpoint.[8] But the book also makes the case that these challenges can be solved by comprehending the complexities of international law. After all, nobody ever talks about how there can be no criminal law if it is broken, so it is also too idealistic to talk about how there can be no international law if international law is broken. To solve the interdisciplinary problem in International Law, it is imperative that the academic community in international law teaching in academia should be diversified.

Understanding the complexity of how domestic legal standards are impacted by international law is crucial. Although international law has always followed a set process, it is currently quickly identifying and changing domestic law in order to keep up with the expansion of players in international law.

The book goes into considerable detail regarding the scope of teaching international law in Germany because it was origin in that region. Since Germany is a member of the EU, International law is recognised as a public law approach there; yet, the book also expresses worries on the risk that too aggressive managerialism could jeopardise international law education in Germany.

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[7] Ernst- Ulrich Petersmann, "Teaching International Economic Law in the 21st Century," in Teaching International Law, ed. Hilpold and Nesi (Leiden, The Netherlands: Brill | Nijhoff, n.d.)

[8] Jean-François Thibault. "Martti Koskenniemi: Indeterminacy." Critical Legal Thinking, October 21, 2022. https://criticallegalthinking.com/2017/12/08/martti-koskenniemi-indeterminacy/.

The contradictory standards inside international law makes it impossible to teach them in isolation, according to the book, which implies that international law education calls for a holistic approach.

Additionally, the book highlights the importance of mass media in the teaching of international law, noting that shows like Homeland Security and House of Cards have a wider viewership and explore the repercussions of international law, which can be very beneficial in assisting students in comprehending the intricacies of international law and the significance of nations upholding its norms.[9] In UN meetings and other international law venues, students can also learn how to lobby and promote international law while watching shows that are relevant to international law.

Composing an international law textbook is an extremely challenging task as well because it needs to be comprehensible and transparent for readers all around the world. The majority of materials used in international law classrooms have a repeated theme that covers the basic topics in international law but how make them understand to students so that they can make sense of international law is a challenging task in writing a good international law text book. Authors find it very challenging to write a good book, especially when they are also heavily involved in their teaching duties. Because universities today adopt a more management approach, not all of them will let their writers spend their writing time for writing. This makes it challenging to create a good book in international law. Writing a book on international law requires a great deal of precision and difficulty in the highly digitalized and complex world of today.

[9] Beham, Fink, and Janik, "Visualising International Law Movies and Image References in Teaching International Law," in Teaching International Law, ed. Hilpold and Giuseppe Nesi (Leiden, The Netherlands: Brill | Nijhoff, n.d.).

Social media and networking allow for large-scale instruction of international law. Since the book lists a number of effective international law courses that have been introduced at different European universities, international law ought to be taught extensively via Artificial Intelligence as well.

Ultimately, the book argues that it is never appropriate to ignore international law and that teaching it is crucial. The book has emphasised that because international law is the product of historical contestation and has been developing quickly, ignorance of it is not an excuse in today's increasingly globalised and complicated society. Ignorance of international law can also lead to poor domestic and international state jurisprudence.

All things considered, the book is a highly enjoyable read that should inspire all international law experts and educators to broaden their viewpoints, even though it lacks the perspective of the Global South. The book only offers instances from the perspective of the global north; it makes no mention of how educators in the global south may discuss the hegemony of international law and its inability to solve international issues and how to teach students about the failure of international law that is not able to solve due to hegemony of Global North mainly the USA exceptionalism in international law.

The book includes a brief discussion on social media's influence, but given the recent live broadcast of the International Court of Justice and the increased public focus on the Middle East conflict in Gaza, international law educators would be well advised to give this topic further thought. Information about international law has also been widely distributed by blogs on international law, although these topics are not thoroughly discussed in the book. Additionally, a significant portion of the growing

impact of Third World Approaches to International Law (TWAIL) is omitted from the book.

In today's globalised world, when no nation can survive in isolation, teaching international law is crucial. Law is a technique created by mankind to handle disputes in a civilised manner. Consequently, it is imperative that scholars embrace the difficulties posed by international law and impart it with honesty, rather than treating it as an afterthought within the broader context of legal studies. Since international law is a part of this complexity, this book aims to expand the scope of international law teaching and learning by promoting greater collaboration and capacity building among academics worldwide.

A section on teaching international law jurisprudence—developed by the International Court of Justice (ICJ), the International Criminal Court (ICC), and other international tribunals like the International Criminal Tribunal of Rwanda (ICTR), the World Trade Organization (WTO) was also missing from the book. In considering the criticism of Anthea Roberts,[10] who addressed the question of whether international law is truly international, what is the best approach to include these case laws into the course outline? In the general discussion of international law teaching, examples are primarily cited from the perspective of the global north, while the global south is ignored.

The pandemic and global climate change have made international law a part of every individual's life. An individual's actions, regardless of where they live in the world, have an impact on the entire planet, so teaching international law is essential in today's society. Everyone with a smartphone

[10] Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017).

and internet connectivity has a relationship with international law therefore, to fully comprehend its pervasiveness, international law should be taught correctly, as recommended in the book. Government officials and diplomats are no longer the only groups eligible to use international law.

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