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Juridical Possibilities of ADR through 'Plea Bargaining' of Compoundable Offences: Potentials and Perils under the Current Socio-Legal Context of Bangladesh

Dr Jamila A. Chowdhury[1]
Nushera Tazrin Darin[2]

Research on access to justice in Bangladesh identifies Alternative Dispute Resolution (ADR) as a promising way for speedy disposal of cases. This informal non-adjudicative dispute resolution process enhances access to justice delivered to all – particularly for the disadvantaged. While ADR has some commendable successes in extending low-cost fair justice for the disadvantaged, it is not a panacea of all inequities. Further, initiatives of ADR largely deal with the backlog in civil courts, while criminal cases are kept outside the purview of any significant discussion on ADR. Although provision for 'compounding' of offences is available in the Penal Code of Bangladesh, it is limited to victim-offender negotiation and may not have adequate judicial intervention. Hence, as a means of ADR in criminal cases with appropriate judicial intervention, this article aims to establish a positive outlook for juridical possibilities of applying 'plea bargaining' in the socio-legal context of Bangladesh. This article further embraces the socio-cultural barriers that may be paradoxical for its efficient performance. Finally, informed suggestions are included for policymakers to trounce the perils in implementing an effective 'plea bargaining' mechanism in Bangladesh.

Introduction

Legal entitlements in the courts is limited by an enormous case backlog, delays in the disposal of cases and high litigation costs for the poor and disadvantaged to formal access to justice in Bangladesh. It is not surprising that fees for lawyers, travel costs, forgone daily wages, costs of

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collecting evidence, and various court fees are overwhelming for the poor[3]. Sometimes even accessible alternatives are not feasible or adequate for them. For instance, one such alternative to enhance access to litigation is to provide legal aid, but the scarce supply of funds makes it economically impracticable to make legal aid accessible to the poor in need.[4] Thus, feasible and *'adequately accessible alternatives'* that provide access to justice for the poor is indispensably required in Bangladesh. The Alternative Dispute Resolution (ADR)[5] is an accessible alternative means that provides scope for informal non-adjudicative dispute resolution process and enhances access to justice delivered to all[6]. It developed as complementary to the adversarial system of law for speedy disposal of disputes. Since the Reformed ADR Movement in 2000, the provision of resolution through various modes of ADR has been widely incorporated in different laws of Bangladesh. The primary purpose of such extensive inclusion was to attain a quick resolution of the dispute and thereby reduce the backlog of cases in courts. However, almost all of these inclusive initiatives of ADR deal with the backlog in civil courts, while criminal cases are kept outside the purview of any significant discussion on ADR.

In the present criminal justice system of Bangladesh, criminal ADR can be practiced through the *'compounding'* of offences – not in the form of *'plea bargaining.'* In a criminal case, 'compounding' means a victim complies not to report the occurrence of a crime or not to prosecute an alleged offender in exchange for *'other consideration.'* The other consideration may consist of anything of positive value, such as money, property, or a promise of monetary gain. However, in the context of Bangladesh, the notion of 'other consideration' may include a negative value. For instance, it is possible that a locally influential criminal caused damage to one's house and threatened to cause even more damage if the criminal incidence is reported to the police. The victim house owner may *'compound the offence'* and not inform the police to save his property from even greater harm. Hence, a practice of *'compounding'* in a society with substantial power disparity and feeble prosecution may lead to the decriminalisation of violence[7]. Decriminalisation of offences is a reason why many western scholars vehemently

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3 Stephen Golub, "Non lawyers as legal resources" in Many roads to Justice: The law-related work of Ford Foundation grantees around the world eds. *Mary McClymond and Stephen Golub* (USA: Ford Foundation, 2000), 297, 313. See also Nusrat Ameen, "Dispensing justice to the poor: The village court, arbitration council vis-a-vis NGO," *Dhaka University Law Journal* 16, no.2 (2005): 103-22; Mohammod Shah Alam, "A possible way out of backlog in our judiciary," *The Daily Star*, April 16, 2000.

4 Nusrat Ameen, "The Legal Aid Act, 2000: Implementation of government legal aid versus NGO legal aid," *Dhaka University Law Journal* 15, no.2 (2004): 59-82.

5 ADR means the resolution of disputes by using any mode of amicable settlement, including negotiation, mediation or arbitration, conducted either outside or inside the courtroom.

6 Jamila A Chowdhury, *Gender, Power, and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2012).

7 Jamila A. Chowdhury, "Women's access to fair justice in Bangladesh: Is family mediation a virtue or vice?" (Unpublished PhD thesis, the University of Sydney, 2011).

oppose the use of different methods of ADR in resolving criminal cases.[8] Hence, in many common law countries, even the agreement of compounding between an aggressor causing misdemeanour and the aggrieved is considered contrary to public policy and so remain unenforceable through courts. Thus, if any of the parties fails to perform his/her obligation following the agreement, the court will not assist the aggrieved party to enforce the agreement.

On the other hand, plea bargaining is an agreement between prosecution and defendant based on concession from prosecution. However, scholars sometimes warn against indiscriminate use of plea bargaining without considering the power dynamics of society. Due to the power disparity in the society, we may limit the use of plea bargaining only for reducing the backlog of less critical criminal cases and assist everybody affiliated with the criminal justice delivery system to manage the crucial cases accurately. Hence, to reduce unnecessary delay in dispensing justice against selective less grievous criminal offences, plea bargaining could be an effective mechanism. This article focuses on the potentials for *'plea bargaining of compoundable offences'* under Sec 345 of the Criminal Procedure Code (CrPC), 1898. However, while highlighting the potential of plea bargaining, this article also attempts to bring forth the perils in using plea bargaining for the expedited disposal of criminal cases in Bangladesh. Accordingly, based on the experience of other countries, several recommendations are made for possible incorporation of plea bargaining of compoundable offences in the criminal justice system of Bangladesh.

Conceptualising the Notion and Types of 'Plea Bargaining'

The notion of 'plea bargaining'

The practice of plea-bargaining dates back to the seventeenth century when the old English common law courts used to grant pardons to accomplices in felony cases upon the defendant's conviction, or execution upon the defendant's acquittal. This prosecutorial tool was used only episodically before the 19th century to seek pardons from the aggrieved party in the presence of the authority dealing with the conviction.[9] A plea bargaining or plea deal is a process whereby the accused and the prosecution in a criminal case negotiate a mutually acceptable disposition of the case. This negotiation leads to an agreement by settling the case against the accused. In a

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8 Western writers also use the term 'Decriminalization of Offence' to indicate an even broader concept of other white color offences, such as bribes or speed money are considered less offensive by the society. See, Larry Siegel, *Essentials of criminal justice* (Wadsworth, Belmont, 2011), 19; John Scheb, *Criminal law & procedure* (Wadsworth, Belmont, 2011), 161.

9 Monjur Kader, "Plea Bargain: An overview of the practices of alternative criminal trial and its prospects in the Criminal Justice Administration of Bangladesh," *Dhaka University Law Journal* 18, no. 1 (2007): 131- 132.

plea bargain or plea deal, the accused agrees to enter a guilty pea in exchange for some concession from the prosecutor. This concession can include a reducing of charges or limiting the punishments that the court may impose on the accused. Sometimes in a plea bargain process, the accused reveals information, such as the location of stolen goods, names of co-accused or admission of other crimes. Also, plea deals can, and often are, conditioned upon the defendants' agreement to certain conditions including, co-operating in an investigation, giving testimony for the prosecution against another accused and refraining from further violation of the law.[10] Black's law dictionary defines 'plea bargaining' as:

> *"The process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offence or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge."*[11]

Further, in *Siganto v The Queen* (1998) 194 CLR 656 at 22, Gleeson, CJ, Gummow, Hayne and Callinan JJ indicated that:

> *"A plea of guilty is ordinarily a matter to be taken into account in mitigation; first because it is usually evidence of some remorse on the part of the offender, and second on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case."*

To get benefited through plea bargaining, a defendant may apply to the court, stating his/her guilt in a case and his/her intention to participate in a plea bargaining. After receiving such an application, a court *may* require the applicant to confess before a camera to determine whether the applicant has voluntarily made such an application or not. Once assured about the voluntary nature of the petition, a court *may* examine the prosecution to conduct a plea bargaining for the disposition of the case. While taking into consideration the application of plea of guilt by the accused, the court shall consider the following issues:

- the fact of the guilty plea by the offender
- the intention of the offender to plea guilt

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[10] Ibid.,133.

[11] Bryan A. Garner, *Black's Law Dictionary*, USA: West Group, (1999).

- the time of the plea (e.g. whether it is pleaded as soon as it is practicable from the commission of the offence or is pleaded just before the trial proceeding)
- the gravity and nature of the offence committed by the offender

A plea bargaining, therefore, can be defined as a process whereby the accused may bargain with the prosecution for a lesser charge or punishment. Simply, it is bargaining or a deal done by the accused of a non-severe offence, with authority for a lighter punishment instead of a full-fledged trial.

Types of plea bargaining

As mentioned earlier, plea bargaining is an agreement between the accused and the prosecution regarding a criminal charge alleged by the prosecution against the accused.[12] Plea bargaining can be of the following three types:

- Fact bargaining
- Charge bargaining
- Sentence bargaining

Fact bargaining

In 'Fact bargaining,'[13] a defendant bargains with the prosecution to change his or her plea from 'not guilty' to 'guilty' on the assurance that the prosecution will present the facts of the case in a less impeaching way.[14] This is advantageous for the prosecutors as they obtain a guilty plea without having to take the risk of conducting a full trial. Presumably, the defendant would also benefit from a reduced sentence in exchange for his or her guilty plea.[15] One of the significant concerns about fact bargaining is the lack of checks it has in place. For example, if the prosecutor presents facts concerning a defendant's involvement in a crime in a harsh way, then defence counsel would oppose. However, if the prosecution were to present facts in a way that

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12 Apurva Pathak, "Plea Bargaining: A New Chapter in Indian Legal System," *International Journal of Research in Humanities & Social Sciences* 3, no. 1 (2015): 53

13 Fact bargaining is a form of plea bargaining where a prosecutor agrees not to contest a defendant's version of the facts or agrees not to reveal aggravating factual circumstances to the court. This form of bargaining is likely to occur when proof of an aggravating circumstance would lead to a mandatory minimum sentence or to a more severe sentence under sentencing guidelines, "Definition and Types of Bargaining", Guilty Plea: Plea Bargaining accessed July 25, 2019, https://law.jrank.org/pages/1283/Guilty-Plea-Plea-Bargaining-Definition-types-bargaining.html.

14 Shivani Pal, "Issues and Controversies Surrounding the Use of Plea Bargaining in International Criminal Tribunals," (PhD thesis, University of Central Lancashire, 2013), 55.

15 Micah Schwartzbach, "What Are the Different Kinds of Plea Bargaining?" accessed July 25, 2019, www.nolo.com/legal encyclopedia/what-the-different-kinds-plea-bargains.html .

was disproportionately flattering to the defendant, then the opportunity of the defence counsel to challenge automatically get reduced. However, the issue would result in an unfair bias towards the defendant as it would place them in a stronger position. In turn, this might give the impression that the victim has lost their 'voice' in the proceedings.[16]

Charge bargaining

Unlike fact bargaining, charge bargaining involves a negotiation of the specific charges of crimes that the defendant will face in the trial.[17] It is an exchange of concessions by both the sides, which may mean that the defendant confesses his/her guilt and pleads to a lesser charge. There are two kinds of situations where charge bargaining may be used. The first is where the defendant is charged with two or more crimes. Here, the prosecution can drop one or more of the charges in return for a guilty plea for the remaining charge(s). The other situation is when the defendant has been charged with a severe offence. [18] Here, the prosecution might drop this charge in exchange for a guilty plea to a less severe offence.

Sentence bargaining is the more appropriate mode of plea bargaining for Bangladesh

Sentence bargaining is a negotiation between prosecution and defence to reduce his/her sentences. It involves an agreement to a plea of guilty in return for a lighter sentence. Here, the accused pleas for reducing his/her sentence in exchange for 'other consideration.' Sometimes the result is probation for the offender, and sometimes it is a less than a maximum sentence in a penal institution.[19] For example, a sentence bargain allows the prosecutor to obtain a conviction in a less severe charge, assuring that the accused will not be convicted with the maximum penalty allowed by law for the offence committed by him/her.[20] Typically, a sentence bargain can only be granted if a trial judge approves it.

From another perspective, sentence bargaining is a comparatively appropriate mode of plea bargaining in a country like Bangladesh where the criminal justice system of Bangladesh is overburdened with procedural difficulties in different stages such as in inquiry, investigation and trial stages. As a result, the courts are overburdened with pending cases. In this circumstance, sentence bargaining saves the prosecution time by not having to prove the

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16 Pathak, "Plea Bargaining," 55.

17 K.V.K. Santhy, "Plea Bargaining In US And Indian Criminal Law Confessions for Concessions," *Nalsar Law Review* 7, no. 1 (2013): 85.

18 Pathak, "Plea Bargaining,"56.

19 Jerry C. Jolley, "Plea Bargaining and Plea Negotiation in the Judicial System," *The Kansas Journal of Sociology* 8, no.1 (1972): 65.

20 Ridoan Karim, "Introduction of Alternative Dispute Resolution in Criminal Justice System of Bangladesh," *Journal of Asian and African Social Science and Humanities* 1, no. 2 (2015): 106.

defendant's guilt at trial. In exchange, the defendant also gets benefit by not having to serve as much time in jail and the fines the defendant may be required to pay can be reduced. We know that the criminal justice delivery system is being delayed mainly for two reasons, i.e. such as delay in the investigation stage and delay in the trial stage. However, these obstacles may be reduced to a considerable extent by introducing sentence bargaining in criminal trial procedure, as this process not only disposes of the cases quickly but also mitigates the burden of courts. A later discussion in this article further reinforces why 'sentence bargaining' rather than 'charge bargaining' would be a more appropriate form of plea bargaining for Bangladesh.

Plea Bargaining of Criminal Offences in Bangladesh: Juridical Possibilities under the Compoundable Offences in the Penal Code, 1860

Section 345 of the Code of the Criminal Procedure (CrPC), 1898 allows 'compounding' of certain offences as stipulated under sub-section (1) and (2) of the section. Section 345(1) takes a more generous approach in compounding an offence by stipulating 'without the permission of the court', whereas section 345(2) includes compounding of an offence 'with the permission of the court'. Consequently, offences can be compounded at any stage of the proceedings:

- If a settlement is reached before the framing of the formal charge, the court may release the accused.
- If a settlement is reached after the trial has started, then the accused is regarded as having been acquitted (i.e. found not guilty).
- However, the permission of the Court is required in both cases.

This process is known as 'compounding', and it allows criminal cases to be finalised without taking up the court's time. It could be a line up with restorative justice in that the victim is compensated rather than having the accused pay a fine or go to jail. As such, it is usually encouraged.[21]

Section 345 of CrPC provides a list of offences that are punishable under the Penal Code 1860. Two different types of compounding are suggested in CrPC under two different lists. The first one suggests offences, like uttering words with deliberate intent to wound the religious feelings of any person, causing hurt on provocation, wrongful retainment or confinement, and forced labour, as compoundable with the intent of the aggrieved person. In fact, the first list mostly consists of minor offences punishable with maximum one-year imprisonment and/or fine. The second set of compoundable offences includes more grievous offences, like rioting with a

[21] Greg Moran, *Criminal Justice in Bangladesh - A best practice Handbook for members of the criminal justice system,* (Dhaka: Justice Sector Facility, 2015), 68-69.

deadly weapon, voluntarily causing grievous hurt, act endangering the personal safety of others, and assault or criminal force to women with intent to outrage her modesty. Punishment for these offences varies from two to seven years along with fine. These offences are also compoundable by the aggrieved person but only with the permission of a court. Therefore, the clause requiring permission from court acts as a 'safety clause' against any possibility of forced compounding that might happen in the case of compounding *'without'* the permission of the court.[22]

Potential Benefits of Plea Bargaining: Following the good practice of plea bargaining around the globe, if the mechanism of plea bargaining is appropriately applied in the criminal justice system of Bangladesh, it may have many benefits.

Efficiency in the criminal justice system

One of the most significant reasons for adopting the notion of plea bargaining is that it allows for efficient case handling.[23] Plea bargaining can reduce the need for innumerable court appearances, hearings, and the days spent in the trial. It is an established maxim that *'Justice delayed, justice denied'* which is evident in a trial process where the defendants and victims are waiting for years for their "day in court," particularly in less severe cases. If each case can be heard more quickly by using the plea bargaining system, it can reduce overall court backlogs of the country. People are more likely to respect and use a justice system when they know their case will be resolved quickly.[24] Further, increasing court efficiency can enhance human rights practice. Congested courts can create serious human rights problems, particularly in countries without developed bail systems or other procedures to release defendants from custody during the trial.[25] From another point of view, it can be said that plea bargaining can play an essential role in the criminal justice system by reducing excessive detention, lightening the load on overburdened prison systems, and reducing the time defendants spend awaiting for trials. Thus, plea bargaining can reduce the strain on the criminal justice system and contribute to increased access to justice and increase public trust in the legal system.[26]

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22 Dr. Jamila A Chowdhury, "Introduction of ADR in Criminal Cases," *The Daily Star*, March 9, 2013, accessed June 21, 2019, https://www.thedailystar.net/news/introduction-of-adr-in-criminal-cases

23 Cynthia Alkon and Ena Dion, "Introducing Plea Bargaining into Post-Conflict Legal Systems" (Research Memorandum, INPROL, 2014), 7.

24 Ibid., 8.

25 Jonathan L. Hafetz, "Pretrial Detention, Human Rights and Judicial Reform in Latin America," *Fordham International Law Journal* 26, no.6 (2002): 1745.

26 Karim, "Introduction of Alternative Dispute Resolution," 108.

Avoiding the uncertainty of trial

In Bangladesh, thousands of cases are pending in the Courts at the moment, which will perhaps take years to reach a decision. However, resorting to the plea bargaining process can provide a relatively quick and efficient method of handling such large caseloads. Plea bargaining permits a prompt resolution of criminal proceedings with all the benefits that result from the final disposition and avoids delay and the uncertainties of trial and appeal.[27] Some commentators suggest that the Court often justifies the process of plea bargaining as an essential component of the administration of justice, which leads to the prompt and disposition of most criminal cases.[28]

Plea bargaining may have another justification which allows the defendant to admit their guilt and to assume responsibility for their conduct. Supporters of this system contend that in pleading guilty, defendants can forgo *"the anxieties and uncertainties of a trial"*.[29] In the criminal justice system of Bangladesh, there is always a chance that the court will find the defendant not guilty. It is immaterial how strong the prosecution case appears from the evidence for the defendant is presumed innocent as long as a trial is pending.[30] Thus, agreeing to a plea bargain avoids uncertainty in securing for a conviction.

Other benefits of plea bargaining

Benefit to the prosecutors

In the process of plea bargaining, the prosecutor is relieved of the long process of proof, and complexity of legal formalities. By using plea bargaining, the prosecution can save time and evade the uncertainty of the result of a trial.[31] Plea bargaining allows the prosecutor to take into consideration equitable factor/s in a particular case so that he or she can *"tailor punishment to the crime"* and the person.[32] One of the essential benefits of plea bargaining to a prosecutor is

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27 Abdul Halim, *ADR In Bangladesh: Issues and Challenges* (Dhaka: CCB Foundation, 2013), 203.
28 Santobello v. New York, 404 U.S. 260, 61(1971).
29 Douglas D. Guidorizzi, "Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics," *Emory Law Journal* 47, (1998): 753.
30 Kader, "Plea Bargain,"136.
31 Halim, ADR in Bangladesh, 27.
32 Jeff Palmer, "Abolishing Plea Bargaining: An End to the Same Old Song and Dance," *American Journal of Criminal Law* 26, no. 3 (1999): 515- 516.

that it allows him/her to gain co-operation from the accused in capturing and compiling the evidence against more towering criminal figures.[33]

A prosecutor usually is overburdened with cases. They are reluctant to try cases where they may not be able to meet their burden of proving each element of the charged offence beyond reasonable doubt. Without plea bargaining, prosecutors would be forced to conduct trials in nearly all criminal cases. Hence, prosecutors have a high interest to offer plea bargaining to defendants to focus their efforts on more severe cases and to reduce the strain on their schedule.[34]

Benefit to the accused

Introducing plea bargaining in the criminal justice system is also beneficial for the accused. It ensures the accused that they will not receive the maximum sentence for their crimes. Infect, most of the accused receive a lighter sentence than what might result from taking the case to trial. Another advantage that the accused gets is that they can save a considerable amount of money which they might otherwise spend on lawyers. Plea bargaining system speeds up the process for the accused on a limited budget and lets them get on with their life.[35] In other words, the accused is saved the anxiety of the uncertainties relating to the trial process and the cost of defending the case on the assurance of a lesser sentence to be suffered by him.[36]

Benefit to the victims

In the plea bargaining process, the victims of the case do not need to go to the court for giving evidence, which could be a distressing experience for them depending on the nature of the case. Under the present criminal justice system of Bangladesh, through a protracted and exhausting trial procedure in the courts, the accused comes out with an acquittal in almost 90-95 percent criminal cases, which shatters every languishing hope of the victim, and very often, he or she does not rely on the justice system itself. Given this situation, the victim will get a sense of justice at least by applying for a plea bargaining process.[37]

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33 Vincent M. Creta, "The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statue and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia," *Houston Journal of International Law* 20, no. 2 (1998): 407.

34 Wallin and Klarich, "Who Benefits More from Plea Bargaining, the Prosecution or the Defense?", December 28, 2011, accessed June 18, 2019, www.southerncaliforniadefenseblog.com/2011/12/who_benefits_more_from_plea_ba.html

35 Mark S. Rubinstain, "Why Do Prosecutors Offer Plea Bargains?", November 6, 2017, accessed June 18, 2019. https://rubinsteinlawoffices.com/prosecutors-offer-plea-bargains/

36 Kazi Ebadul Haque, "Plea Bargaining and Criminal Workload," *Bangladesh Journal of Law* 7 (2003): 87

37 Halim, "ADR in Bangladesh," 203.

In the plea bargaining process, the victim of the crime might also be benefited by getting compensation. Further, plea bargaining allows the victim to be shielded from the emotional stress and sensationalism of trial.[38]

Other economic incentives

The total cost of crime includes expenses on police, prosecution, legal aid, courts, and prisons.[39] Plea bargain mitigates the expenditures. By reducing the length of the trial, it alleviates the workload of prosecutors, reduces the pressure on judicial resources, and decreases all other expenses necessary for trial. For the poor, it is not easy to appoint a good lawyer to defend his/her case for the whole trial; rather if he/she accepts the plea bargain, the case will be quickly resolved and consequently, legal costs will be reduced. The essential aspect regarding the economic incentive of plea bargaining is that it reduces enforcement costs for both parties and allows the prosecutor to concentrate on more important cases.[40] Further, another justification for the efficiency of plea bargaining is that it allows the prosecutor to allocate resources more effectively.[41]

Cultural Adaptability of the Concept of Plea Bargaining of Compoundable Offences in Bangladesh

Bangladesh has inherited a system of administration of justice from the British colonial rule. Still now, criminal cases are regulated by the Code of Criminal Procedure, which was enacted by British rulers in 1898. Over time, some amendments have been made, and some special laws have also been enacted. However, the provisions made by the British rulers continue to dominate. Although there is no express provision in the criminal jurisprudence on plea bargaining, there is a guiding light from the Appellate Division of the Supreme Court of Bangladesh on this concept. The Appellate Division, in a case[42], considering the nature of section 345, observed that the criminal administration of justice encourages compromise of some of the cases. It states, *"the law encourages settlement of disputes either by Panchayet or by Arbitration or by way of compromise or others."* That is to say, the word "others" refers to

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38 Adewale and Sikiru Akinpelu, "Plea Bargaining In Criminal Prosecution," 23, accessed July 3, 2019 https://www.academia.edu/35563178/PLEA_BARGAINING_IN_CRIMINAL_PROSECUTION

39 Potrebic and Milica Piccinato, "*Plea Bargaining,*" (Ottawa: The International Cooperation Group-Department of Justice of Canada, 2004), 1.

40 Frank Easterbrook, "Criminal Procedure as a Market System," *Journal of Legal Studies* 12, (1983): 289- 332.

41 Gene M. Grossman and Michael L. Katz, "Plea Bargaining and Social Welfare," *American Economic Review* 73, (1983): 749-757; see also Markel, Dan, Jennifer M. Collins, and Ethan J. Leib, "Privilege or Punish: Criminal Justice and the Challenge of Family Ties," *University of Illinois Law Review* (2007):1148-1228

42 Md. Joynal and others vs. Mohammed Rustum Ali Miah and others, 36 DLR (AD), 240, 245; See also, Abbdus Satter and others vs. The State and other, 38 DLR (AD), 38, 40.

some possible alternatives so that justice can be more efficiently served to its seekers and such possible alternatives can be the mechanism of "Plea Bargaining" by which negotiation can be conducted for the resolution of a criminal case without a trial.

Compromise – A cultural heritage in administering criminal justice in Bangladesh

As observed by Jain (1999) guilty plea before a village forum was a regular practice in ancient India.[43] When village elders (popularly known as *Panchayet*) hear both the parties, *"there was no question of telling lies as everyone knows everyone else since their birth and they live together till their death in the tiny villages of 100-500 families".*[44] Although the social context has changed much due to the more extensive interaction between an enormous number of people hardly known to each other, still there is a social preference in favour of a guilty plea and restorative justice through compromise. However, corruption has become prevalent after taking power from the hands of local indigenous institutions and bestowing it on more formal judicial institutions

Custodial torture – A common trend to marginalise the voice of offenders in Bangladesh

Torture in remand and police custody is an ongoing phenomenon in Bangladesh. We must consider the possibility of a confession by a convict under force or fear. Even if the intention of the defendant to plead guilty may be expressed in the camera, after such confession, a convict may have to return to police custody and remain there until the case is settled. This was observed by Chowdhury as a problem for implementing plea bargaining in the current socio-legal context of Bangladesh[45]. As described in the case reported in 4 MLR (HCD) 87, it was stated that *"the common law adversarial system in our criminal administration of justice is not working well.* "The usual tendency of the prosecution is to overcharge the accused at the start of the case.[46] The offer of decreased charges or sentencing under the plea bargain system may be enough to convince the innocent accused to plead guilty in order to avoid the risk of a substantially harsher punishment after trial. Also, where prosecutors offer a deal in return for cooperation, the accused may offer false information to get a better plea agreement.

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43 Mahabir P Jain, *Outline of Indian Legal History* (Bombay: Tripathy, 1999).

44 Shiva M Jaamdar, "Restorative justice in India: Old and New" in Restorative Justice in India: Traditional Practices and Contemporary Applications eds. *R. Thilagaraj and Jianhong Liu* , (Spring 2017).

45 Jamila A. Chowdhury, "ADR in Criminal Cases and Decriminalization of Violence: A Gender Perspective" *Indian Journal of Law and Justice* (2016).

46 Guidorizzi, "Should We Really Ban," 771.

Silence against some sexual offences and domestic violence – A generic trend to marginalise the voice of women in Bangladesh

Women living in extended families often face sexual harassment and sexual coercion from their male in-laws, especially when their husbands are absent from the house. Nonetheless, as society generally sticks to a victim-blaming strategy in the case of sexual harassment, women usually stifle these incidents to maintain the reputation of their family and to remove any other stringent social sanctions that may follow such incidents[47]. According to Khair,[48] it is about the exploitation of the gender advantage and institutional power that results in the loss of dignity and self-esteem of the victim. It provides *"perpetrators the sordid opportunity to seek sexual gratification."* All this leads to the under-reporting of family violence in the country and the consequent lack of reliable statistical data.

In Bangladesh, there is a broad perception that family violence is a private issue, and so women should neither discuss it in open forums nor report it to others. In a survey of 1,691 women, 72 per cent admitted they had endured severe battery by their husbands, while only 11 per cent of them filed cases against the perpetrator.[49] As exemplified in this section, social attitudes may also restrain others from becoming involved directly in family violence issues. For example, two-thirds of the female respondents in the ICDDRB study never shared their experience of family violence with others.[50] Also, law enforcement agencies may be reluctant to involve themselves in family violence because it is an issue that they consider highly personal.[51] Couples who allow their neighbours to know about their marital disputes and battery are considered immodest.[52]

Western scholars have identified other reasons why women may keep "silent" about past family violence inflicted on them. As explained by Astor,[53] in Australia, sometimes women keep silent because if they expose the violence that they have encountered in their marital life, there is a possibility that they will be screened out from mediation and have to go through the time

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47 Bangladesh National Women Lawyers' Association (BNWLA),Violence against women in Bangladesh 2004 (Dhaka: BNWLA, 2005).

48 Sumaiya Khair, "Understanding sexual harassment in Bangladesh: Dynamics of male control and female subordination" *Dhaka University Law Journal* 9, no. 1, (1998): 87- 95.

49 Hamida A. Begum, "Combating domestic violence through changing knowledge and attitude of males: An experimental study in three villages of Bangladesh," *Empowerment* 12, no. 1 (2005): 53-69.

50 International Centre for Diarrheal Disease Research Centre, Bangladesh (icddr, b), "Domestic violence against women in Bangladesh," *Health and Science Bulletin* 4, no. 2 (2006): 1-6.

51 Roushan Jahan, *Hidden danger: Women and family violence in Bangladesh* (Dhaka: Women for Women, 1994), 42

52 Ibid., 23.

53 Hilary Astor, "Violence and family mediation policy," *Australian Journal of Family Law* 8, no.1 (1994): 3- 14.

consuming and costly trial processes. It is also relevant that women may be too poor to bear the expenses for litigation, and so they may prefer to resolve their disputes quickly and at minimum cost through mediation.[54] Thus, in Australia, abused women who want to resolve their dispute quickly through ADR may not have any other option but to conceal past violence, as according to the *Family Law Act 1975* (Cth.) family disputes involving violence are referred back to a formal trial.[55] Further, the presence of "control" and "fear" in women with regards to their husbands could be one reason that women suppress information about past family violence and remain silent in meditation. It is argued that target women may become frightened of experiencing further violence from their husbands if information about past violence is revealed to others.[56]

In Bangladesh, the *Domestic Violence Act 2000* and several other special laws are providing women against such hidden gratifications. However, the inclusion of such offences under compounding may provide an extra edge to the perpetrator of such crimes. Therefore, as discussed in the next section, following the plea bargaining provisions of India, it is desirable to address this kind of silent offences committed against women but severe offences including domestic violence, marital rape, sexual harassment should be kept out of the purview of plea bargaining.

Recommendations for a Plea Bargaining of Compoundable Offences with Greater Interests for Victims

Plea bargaining of compoundable offences – mere compounding of offence is not preferred under the current socio-economic conditions of Bangladesh

If we compare the process of plea bargaining with the compounding of criminal cases, plea bargaining should be preferred rather than compounding because plea bargaining involves the formal agreement of a plea of guilty before the court in return for a lighter sentence. However, compounding offences allows the accused to be free from certain criminal charges without any formal agreement. In Bangladesh, as long as the offender is under the purview of section 345 of CrPC, no one can be declared convicted in '*compounding process*,[57] whereas, at least a

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54 Hilary Astor, "Swimming against the tide: Keeping violent men out of mediation" in Women, male violence and the law, ed. *Julie Stubbs*, (Sydney: Institute of Criminology,1994).

55 Family Law Rules (Family Courts of Australia) Order 25A, r 5

56 Lesley Laing, *Domestic violence and Family Law* (Australian Domestic and Family Violence Clearinghouse, 2003), 7; see also, Felicity Kaganas and Christine Piper, "Domestic violence and divorce mediation," *Journal of Social Welfare and Family Law* 16, no.3 (1994): 265-272.

57 The Code of Criminal Procedure, s 345(6) (1898).

punishment, though *lesser* in form, is awarded in plea bargaining for not fully contesting the case. However, an accused can *only* have this benefit of getting *lesser* punishment by going through a formal process before the court.[58] Thus, if we promote the system of plea bargaining, then no accused will be able to avoid the punishment, and by promoting so, we will be able to establish justice for the victim. In order to realise the justness for the plea bargaining system, one must be able to fix the premises regarding the useful application of plea bargaining.

In fact, some proponents of plea bargaining argue that the system bring about the same consequence of the trial system but at a lower cost. [59] Other scholars indicate that the process of plea bargaining brings the result for defendants that are fairer than the results of the trial process[60].

Sentence bargaining is the more appropriate mode of plea bargaining for Bangladesh

Although plea bargaining may be of three types, fact bargaining, as explained earlier, is not appropriate under the current socio-economic context of Bangladesh. Therefore, we have only two available options for plea bargaining that we need to investigate further. These are charge bargaining and sentence bargaining. The point is which is the preferred and more appropriate mode of plea bargaining in the context of Bangladesh? As mentioned earlier, charge bargaining involves a negotiation of the specific charges or crimes that the defendants will face at trial. Usually, in return for a plea of 'guilty' to a *'lesser charge'*, a prosecutor will dismiss the higher or other charge/s. For example, a defendant charged with rioting with deadly weapon under section 148 of the Penal Code may be offered the opportunity to plead guilty only riot under section 146 – a lesser charge than that of s.148. On the other hand, sentence bargaining implies the agreement to a plea of guilty for the stated charge rather than a reduced charge, in return for a lighter sentence.[61] Thus, it provides the defendant with an opportunity for a lighter sentence only when the prosecution goes through trial and proves the case.

Therefore, if we prefer charge bargaining, then we shall pave the way for the defendant to be free from certain criminal charges, which he had committed – even before the initiation of the trial process. Consequently, it shall be seen that the defendant will get an opportunity to avoid specific charge/s easily, *which will be an injustice to the victim*, and the *notion of 'decriminalisation'* will be promoted. Conversely, in case of sentence bargaining, *the defendant gets punishment but a lower or discounted sentence*. Hence, if we promote sentence bargaining,

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58 Eti Basaniwal, "Compounding of Offences: Origin and Rationale for this practice," July 6, 2017, accessed July 22, 2019, https://www.cimplyfive.com/compounding-of-offences-origin-and-rationale-for-this-practice/ ,

59 Fred C. Zacharias, "Justice in Plea Bargaining," *William and Mary Law Review* 39, no. 4 (1998): 1136

60 Ibid.

61 Suman Rai, *Law relating to Plea bargaining* (Delhi:Orient Publishing Company, 2007), 7

then no defendant will go unpunished, and by promoting so, we will be able to establish justice to the victim.

Plea bargaining should exclude habitual offenders and serious crimes

If the accused was previously convicted of a similar offence by any court, then he/she should not be entitled to plea bargaining. The plea-bargaining option should not be available for habitual offenders who might dilute the socio-economic stability of the country. Also, plea-bargaining should not be available for an offence committed against a woman or a child below fourteen years of age. The opportunity of plea bargaining is not acceptable for an accused in severe crimes including murder and rape. It does not apply to severe cases where the punishment is death or life imprisonment or a term exceeding seven years.

In pursuance of the provisions/principles of plea bargaining, new chapter/sections may be incorporated in the Code of Criminal Procedure 1898 (Act V of 1898) separately. For instance, in Australia, separate part and sections, namely ss. 22(1), 21A (3) (k) have been inserted under the *Crimes (Sentencing Procedure) Act, 1999. Further, section 25D (2) stipulates a fixed percentage while discounting the offence depending on its gravity and circumstances. For example, a 25 percent per cent discount is available, only if the offender pleads guilty as soon as practicable and it was accepted in committal proceedings; 10 percent discount is available if offenders plead at least 14 days prior to the first day of trial; 5 per cent in any other cases. It* categorically allows the notion of plea bargaining in mitigation of a sentence. Further, it elaborates the procedure under s 207 of the *Criminal Procedure Act 1986*. It states:

- *At any time after a conviction has been made against the accused person, he/she may apply to the court to change his/her plea from guilty to not guilty*
- *The court may set aside the conviction made against the accused person and proceed to determine the matter based on the plea of not guilty.*

However, such discretion of discounting the offence by the court should not be unfettered.[62] The notion of plea bargaining should *not* extend to crimes of serious nature as stipulated in the *Justice Legislation Amendment (Committals and Guilty Pleas) Act, 2017* of Australia [e.g. Commonwealth offences under section 25A(1)(a), a sentence of life imprisonment under section 25F(9)].

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[62] Kate Stith, "The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion," *Yale Law Journal* 117, (2008):1420-97; See also Ryan W. Scott, "Inter-Judge Sentencing Disparity after Booker: A First Look.," *Stanford Law Review* 63, (2012):1-66.

Similar to Australia, India has also limited the scope of plea bargaining in their newly introduced Chapter XXI A of the Criminal Procedure Code, 1973. In India, three categories of offences have been excluded from the capacity of plea bargaining:

(i) Offences affecting socio-economic conditions;

(ii) Offences committed against women;

(iii) Offences committed against children below the age of 14. The opportunity of plea bargaining will also not be available to the habitual offenders as per the Code.

In consistence with the provision of plea bargaining of the said two countries, in Bangladesh, the provision of plea bargaining should not be introduced for all offences.

Informed consent is required

The offences listed under section 345 of the CrPC (Compoundable with the Consent of the court & compoundable without the consent of the court) must be brought into consideration in this regard. Whenever any person decides to plead guilty, he/she has to be made fully aware of the consequences. The Court concerned should be invested with the duty to inform the accused and victim that if he/she follows/allows the procedure of plea bargaining, he/she will lose some legal rights, such as the right to a trial, right to confront and cross-examine witnesses against him, right to appeal and so on.

Plea bargaining should be backed by the pro-active role of judiciary with a transparent and monitored court process

The court should play a dominant role in plea bargaining by monitoring the entire process. The trial court should be invested with the duty to ensure the voluntariness of adopting this procedure by the accused. The court must be satisfied that the accused resorted to plea bargaining voluntarily and not under any threat or coercion. If it is found that plea bargaining is involuntary, the court may reject the petition for plea bargaining. Further, if the petition for plea bargaining is rejected, the proceedings cannot be used as evidence. At the same time, the court should promote *'sentence bargaining'*, rather than *'charge bargaining'*. By doing so, we can avert the possibility of *'decriminalisation of offence'* and at the same time, the victim would get a sense of justice when a minimum/lower sentence is provided for the offence committed by the

accused. In such a case, the court must deliver the judgment in open court according to the terms of the mutually agreed disposition, including victim compensation.

Conclusion

In order to get rid of its enormous volume of case backlog at present, there is an indispensable need for a change in the criminal justice mechanism of Bangladesh. Plea bargaining may be one of those welcoming changes to reduce the burden on courts and allowing them to concentrate on more severe crimes while ensuring a swift and inexpensive resolution of other less severe criminal cases. Since the notion of plea bargaining has benefits for both justice seekers and the accused, we have tried to adapt it better for dispensing an effective criminal justice system in Bangladesh. Accordingly, it has been emphasised to implement the plea bargaining process for the ends of justice throughout this article, rather than its exclusion from the criminal justice system. Hence, informed recommendations based on practices in other countries (e.g. adding a separate chapter/section in the CrPC on plea bargaining), have been summarised in this article. Further, a pro-active role of the court is required to achieve the quick resolution of compoundable offences through plea bargaining – without reducing the quality or confidence of justice seekers on the criminal justice system of Bangladesh. Eventually, *'proper'* implementation of the notion of plea bargaining can contribute to a robust criminal justice system and better access to justice in Bangladesh.

2

Crime and Punishment: Reflections on the Application of Death Penalty in Nigeria and Beyond

Dr. Abiodun Odusote[1]

The debates and controversies on the application of death penalty in Nigeria are ongoing. The scope of the application of death penalty has recently been expanded in some Nigerian states to cover cattle rustling and cultism. This article explores the law and practice of death penalty in Nigeria. The analysis addresses the nature, weakness, ineffectiveness, discriminatory and arbitrariness of the Nigerian criminal justice system and in particular, paying attention to how death penalty is being applied to non heinous crimes in Nigeria in defiance to Nigerian obligations under the international legal regime. The findings of this article reveal that the application and pronouncement of death penalty had dwindled across the globe because people have recognized that innocent people remain on death row across the globe. Death penalty is on the decline and a significant reduction in execution is noted. In Sub Saharan Africa, more than a few countries have either abolished death penalty or put an end to the mandatory application of death penalty. After a critical analysis of the Nigerian legislative framework, case law and the administration of the criminal justice system in Nigeria, this article calls for the abolition of the death penalty in Nigeria because of its injustices against the lowly and the poor, arbitrariness, continuing expanded scope and irreversibility.

1. Introduction

The discourse on the continued application of death penalty Nigeria varies between groups. Some have argued that the application of death penalty should be retained[2] and extended to cover new and emerging crimes such as cyber crime, kidnapping and banditry, while others

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2 Nzeribe Ejimnkeonye Abangwu Adekunbi, "Death Penalty in Nigeria: To Be or Not To Be: The Controversy Continues," *Arabian Journal of Business and Management Review* (OMAN Chapter) 3, no.3; 2013, 10.

have argued that death penalty should be abolished.[3] The former group argues that death penalty has the benefits of deterrence and correcting the wrongs perpetuated by the wrong doers while the abolitionists argue that global trends favour the abolition of death penalty. They argue that death penalty violates the right to dignity and right to life of the wrong doer. The abolitionists further argue that death penalty has failed as a deterrent[4].

The application of death penalty as punishment for wrongdoing in Nigeria dates back to pre-colonial days in Nigerian traditional societies and applied on conviction for offences such as murder and witchcraft and treating the gods with irreverence[5]. In those days, death penalty was hardly applied because the alternative of banishment was considered more humane and effective. Death penalty is historically reserved for heinous crimes long before the creation of court systems. As civilization progressed, different societies incorporated capital punishment into their legal codes.[6] In Nigeria, section 21(10) of the 1960 constitution of Nigeria provides:

> *No person shall be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law…*[7]

Section 36(12) of the 1999 Constitution as amended provides:

> *Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.*

The above constitutional intervention puts to end the concept of customary criminal law in Nigeria. For an act or omission to constitute a crime in Nigeria, it must specifically be regarded as a crime in a written[8] and valid law.

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3 Nicholas K., "When We Kill: Everything you think you know about the death penalty is wrong," *New York Times,* https://www.nytimes.com/2019/06/14/opinion/sunday/death-penalty.html

4 'The death penalty does little to serve victims or deter crime.' António Guterres, UN Secretary-General, remarks at Panel on "Transparency and the death penalty", October 10, 2017, www.un.org/sg/en/content/sg/statement/2017-10-10/secretary-generals-remarks-panel-%E2%80%9Ctransparencyand-death-penalty%E2%80%9D

5 Dundas K., "The Organisation and Laws of some Bantu Tribes in East Africa," *Journal of Royal Anthropology Institute* 45, (1915): 258-259.

6 Ezedike E. U., "Violent Crimes, Economic Development and The Morality of Capital Punishment in Nigeria: A Retentionist Perspective" *JORIND* 9, no.1, (2011): 447.

7 This Constitution has since been repealed. However, the provision is retained in § 36(12) of the constitution of Nigeria, (1999) (as amended).

8 Agaba, J., Practical Approach to Criminal Litigation in Nigeria (Ibadan: Emerald Publishers, 2015)3.

While some have call for the abolition of the death penalty, others call for its retention[9], and some others question the constitutionality or otherwise[10] of the death penalty. This article explores the law and practice of death penalty in Nigeria. The first part of this article gives a brief background while the second part examines the nature of application of death penalty in Nigeria. The Third part explores the global trends on death penalty, while reflecting on the application of death penalty in Nigeria. This article concludes that death penalty be abolished in Nigeria because it is not being applied to the most heinous of offences and particularly because of the many challenges confronting the Nigerian criminal justice system. The article adopts the library-based research methodology.

1.1 Relevant Theories on Death penalty

It is generally agreed and acknowledged by scholars and criminologists that offenders must be punished but there is huge divergence of views on the objectives of the punishment and how the punishment should be applied.[11] There are three major different schools of thought on these divergent opinions: the deterrent, the retributive and the reformative. Deterrence theory is premised on the presumption that punishment sends a strong message to the society that the severity of the punishment deters individuals from getting involved in crimes, having witnessed the awful consequences of committing a crime[12]. However, in capital punishment the question often arises as to when the message is sent: is it at sentencing or during execution? The answer to this question is significant in jurisdiction where capital sentence is only imposed without execution[13]. This theory is based on the Mosaic law of an eye for an eye and a tooth for a tooth[14]. Retribution is to publicly stand by fairness and justice. Sentencing is pronounced in public to signal government's recognition of the seriousness of the crime, the harm the crime has caused, and the state's duty to respond to it.[15]This theory seeks to rectify past wrongs and seeks benefits for the future by doing so. Proponents of this position argue that if justice is to be done in cases of murder and violent crime, only the death penalty should be the recourse given

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9 Nzeribe Ejimnkeonye Abangwu Adekunbi, "Death Penalty in Nigeria: To Be or Not To Be: The Controversy Continues," *Arabian Journal of Business and Management Review* (OMAN Chapter) 3, no.3, (2013).

10 Onyekachi Duru, "The Constitutionality of Death Penalty under Nigerian Law," September 6, 2012. SSRN: https://ssrn.com/abstract=2142981 or http://dx.doi.org/10.2139/ssrn.2142981

11 Taylor D., "Capital Punishment in Theory and Practice," in Crime, Policing and Punishment in England, 1750–1914, Social History in Perspective (London: Palgrave, 1998).

12 Bouffard J. A., Nicole Niebuhr, and Lyn Exum M., "Examining Specific Deterrence Effects on DWI Among Serious Offenders," *Crime and Delinquency* 63, no. 14 (2017).

13 Bandes S.A, "All Bathwater, No Baby: Expressive Theories of Punishment and the Death Penalty," *Michigan Law Review* 116, no. 6(2018): 916.

14 Exodus 22:24.

15 Ibid.

by law. According to the Reformative theory, punishment should not be imposed as a means for the benefit of others. Punishment should be given to educate or reform the offender himself. The crime committed by the criminal is an end, not a means as in the Deterrent theory. This theory has been criticized for lacking punitive element and hence, contrary to the basic principle of sentencing that necessitates infliction of harm on the offender.

2. Application of Death Penalty in Nigeria

Nigeria is a federation with 36 states and a Federal Capital Territory (FCT) Abuja. There are three principal enactments that are relevant to criminal litigation and proceedings in Nigeria: The Criminal Procedure Act, CPA[16] which is applicable to the Southern region,[17] The Criminal Procedure Code which applies to criminal proceedings in the Northern region[18] and the Administration of Criminal Justice Act (ACJA) 2015 which has repealed the applicability of CPA and the CPC in the federal courts and High courts in the Federal Capital Territory[19]. ACJA applies to all criminal causes emanating from offences created by the Act of National Assembly. In addition to the primary enactment, there is Criminal Code of Law in states in the Southern region, Penal Code in the states in the Northern region and the Penal Code Act for the FCT. All the secondary enactments are related to substantive criminal law. These legal instruments have various provisions prescribing death penalty for the violations of certain offences, some of which are to be discussed later in this article.

2.1 Statutory Framework

In *Adeniji* v. *State*[20], the Court held that death penalty is expressly recognized by the Nigerian Constitution. In addition, section 33(1) of Constitution of Federal Republic of Nigeria 1999 as amended provides:

> Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.

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16 Cap c41 Laws of the Federation of Nigeria (2004).

17 Except for Lagos State that has enacted the Administration of Criminal Justice Law of Lagos State, ACJL (2007) and Ekiti State that has enacted the Administration of Criminal Justice Law of Ekiti State, ACJL (2014).

18 Cap 30, Laws of Northern Nigeria, (1963) now re-enacted as State Laws of the states of the former Northern Nigeria.

19 Eleven states in Nigeria have passed the equivalent of the ACJA in their various jurisdictions. These states are: Ondo, Kaduna, Ekiti, Akwa-Ibom, Oyo, Rivers, Anambra, Abuja, Cross-River, Enugu and Lagos.

20 Adeniji v. State, 645 NWLR 356 (2000).

In *Kalu* v. *State*[21] HURILAWS litigated the constitutionality of the death penalty in a bid to abolish the death penalty in Nigeria. The Supreme Court held that the death penalty is permitted by the Nigerian Constitution. However, the court recommended that the National Assembly can take steps to remedy the issues surrounding the practice and application of the death penalty in Nigeria. Nevertheless, the Court refrained from pronouncing on whether remaining on death row for a significant amount of time might amount to a procedural rights violation.

In *Peter Nemi* v *The State*[22] the appellants were convicted of armed robbery and conspiracy to commit armed robbery. They were sentenced to death. They commenced this suit to challenge their non execution for a prolonged period. They further challenged the dehumanizing conditions under which they were kept. The Court of Appeal held "prisoners have enforceable rights as citizens and suggested that prolonged incarceration of convicted prisoners could constitute breach of their right to dignified and humane treatment"[23].

In *Nasiru Bello* v *The State*[24] the Supreme Court awarded reparation to the family of the deceased who was executed by the Oyo State government while his appeal was pending at the Court of Appeal. The Court further held that the execution of a convicted prisoner is the last act, in a series of acts beginning from his arrest; his trial and conviction, his appeals, and even after the appeals, the Governor of a State still has to consider the Report of the trial judge sent pursuant to the Criminal Procedure Law and finally, the report of the Committee for the Prerogative of Mercy. It is after all these have been exhausted that the Appellant goes under the hangman's noose or (as in the instant case) faces the firing squad.

In condemning the hasty execution of the death sentence, Chukwudifu Oputa JSC (as he then was) held that the premature killing of Nasiru Bello in the surrounding circumstances of this case was both unlawful and illegal. He stated that it was also wrongful in the sense that it was injurious to the rights primarily of Bello to life and secondarily of his dependents who by his death lost their bread-winner; it was needless in the sense that it was premature and unconstitutional; it was unjust in the sense that Nasiru Bello was not allowed a just determination of his appeal by the Federal Court of Appeal; it was reckless in the sense that it was done in complete disregard of all the constitutional rights of the deceased, Nasiru Bello"

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21 Kalu v. State, 13 NWLR (Pt.583)531(1998).

22 Peter Nemi v. The State, 6 NWLR (PT 452) (1996).

23 Human Rights Law Service, "Public Interest Litigation." Accessed September 3, 2019, https://hurilaws.org/public-interest-litigation/

24 Nasiru Bello v The State, 2 N.S.C.C. 1257 (1986).

In *James Ajulu & Ors* v *Attorney-General of Lagos State*[25] the Lagos High Court (Per Olokoba J.) held that while the death penalty is not unconstitutional, the execution of the applicant (condemned prisoners) by firing squad or hanging is unconstitutional as it violates the fundamental right of the applicants to dignity guaranteed by Section 34 of the Constitution: *"every individual is entitled to respect for the dignity of his person, and accordingly, no person shall be subject to torture or to inhuman or degrading treatment; no person shall be held in slavery or servitude; and no person shall be required to perform forced of compulsory labour".*

From the above constitutional provisions and jurisprudence, it is abundantly clear that the Nigerian courts are appropriately mandated to apply the death penalty. There are more than a few capital offences carrying death penalty in Nigeria and the list appears to be growing by the day. The offences that carry death penalty in Nigeria include: Murder,[26] under the Criminal Code Act, killing someone unintentionally while committing another unlawful act is deemed murder and carries the mandatory death penalty.[27] In states applying the Shariah law, an act of terrorizing people for the purpose of robbery or other purposes (hirabah) is punished with mandatory death penalty when resulting in death,[28] house trespassing resulting in death, any act of witchcraft or *juju* that results in death carries the mandatory death penalty,[29] rape committed by a married person carries the mandatory death penalty by stoning.[30] Armed robbery resulting or not resulting in death of the victim carries the mandatory death penalty[31]. Armed robbery or robbery resulting in harm is also punishable with the mandatory death penalty pursuant to the Criminal Law of Lagos State of 2011.[32] Under Shariah law, applied in 12 Northern states, a married person who commits adultery shall receive a mandatory death sentence by stoning.[33] Also in those 12 Northern States applying Sharia Law, homosexual consensual sex carries the mandatory death sentence by stoning.[34] Across the federation, treason, conspiring to wage war against Nigeria, and treachery are punishable by death[35]. Abetment of suicide of a child or an

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25 Suit No. ID/76M/2008.
26 Criminal Code, §319.
27 Criminal Code, § 316, 319.
28 Center for Islamic Legal Studies of Ahmadu Bello University, Harmonised Sharia Penal Code Annotated, (Zaria: Center for Islamic Legal Studies of Ahmadu Bello University, Mar.2002), ch. VIII, § 152(c)(d).
29 Ibid., § 330(2), "Juju" includes the worship or invocation of any object or being other than Allah. Bello University, Sharia Penal Code, § 408.
30 Bello University, Sharia Penal Code, § 128(b). Zamfara State Shari'ah Penal Code, § 129(b), Jan. 2000.
31 § Criminal Code Act of Nigeria; § 1(2)(3),Robbery and Firearms (Special Provisions) Act.
32 Criminal Law of Lagos State, § 295(2) (2011).
33 Bello University, Sharia Penal Code, 126 (b), Zamfara State Shari'a Penal Code, §126, Jan. (2000).
34 Bello University, Sharia Penal Code, § 130, Zamfara State Shari'a Penal Code, § 130, Jan. (2000).
35 Criminal Code Act of Nigeria, §§ 37–38, 49A.

insane person giving false evidence on account of which an innocent person dies is punishable with death.[36] A person inside or outside Nigeria who knowingly commits, attempts, assists, or is an accessory to any act of terrorism resulting in death is liable to be sentenced to death.[37] While in Rivers State, conviction for cultism now attracts a death sentence[38], and in Katsina State death penalty is now the punishment for cattle rustling.[39].

Methods of Execution

The pronouncement of death penalty is often carried out by hanging in Nigeria. Hanging is the most preferred execution method,[40] and shooting by firing squad is permissible under section 1(2) of the Robbery and Firearms (Special Provisions) Act[41]. It is significant to note however, that the High Court of Lagos in *Ajulu* v *Attorney General of Lagos State*[42], declared that execution by hanging or firing squad is unconstitutional as it violates the prisoner's rights to dignity of the human person and to be free from torture and inhumane or degrading treatment under Section 34(1)(a) of the Constitution. Under Shariah law, applied in some northern Nigerian states, executions can be carried out by firing squad and beheading for certain types of offenses.[43] Stoning (rajm) is a Shariah punishment applied in some northern Nigerian states and reserved for Muslims.[44] The punishment applies for zina (adultery),[45] rape (if the offender is married),[46] incest (if the offender is unmarried), [47]and homosexual sodomy.[48] Lethal injection is a permitted method of execution pursuant to section 402(1) of the Administration of Criminal Justice Act.

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36 Penal Code, S. 159 (2).

37 Terrorism (Prevention) Act of Nigeria, §. 4(2), (2011); Act. No. 10 of (2011), Jun. 2, (2011), as amended by Terrorism (Prevention) (Amendment) Act of Nigeria, §. 2(c), Feb. 21, (2013).

38 Amnesty Intl., Death Sentences and Executions in 2018, 43, accessed April 10, 2019, ACT 50/9870/2019.

39 Abdur Rahman Alfa Shaban, "Nigeria's Katsina state legislates death penalty for kidnappers, rustlers,"*African News*, May 25, 2019,https://www.africanews.com/2019/05/25/nigeria-s-katsina-state-legislates-death-penalty-for-kidnappers-rustlers//, "Masari Approves Death Penalty For Cattle Rustlers, Kidnappers In Katsina," *Sahara Reporters*, May 24, 2019, http://saharareporters.com/2019/05/24/masari-approves-death-penalty-cattle-rustlers-kidnappers-katsina.

40 CPA, § 367(1), CPC, § 273 and ACJL, S. 301.

41 Robbery and Firearms (Special Provisions) Act, Cap. 398 LFN (1990).

42 Ajulu v Attorney General of Lagos State, Suit No. ID/76M/2008.

43 Center for Islamic Legal Studies of Ahmadu Bello University, Zaria, Harmonised Sharia Criminal Procedure Code Annotated, sec. 241(a), Oct. 2005.

44 Bello University, Criminal Procedure Code §. 44.

45 Bello University, Sharia Penal Code, ch. VIII, §. 126.

46 Ibid., ch. VIII, §. 128(b).

47 Ibid., ch. VIII, §. 132(b).

48 Ibid ch. VIII, § 130.

2.2 Analysis of Relevant Case Law on Armed robbery

The aim of this segment is to show that to be convicted of armed robbery, the convict need not to have been in possession of lethal weapons that are capable of producing significant bodily harm or death. In *Emmanuel Ekpulor* v *The State,*[49] the appellant was among a gang of armed robbers that gained entrance by force into the premises of a fishing company; the appellant made a confessional statement that he was not armed and he only stood by the gate of the factory while other gang members went inside. One of the other gang members that went inside was armed with a gun but was able to escape police arrest; the appellant was convicted for armed robbery and sentenced to death by firing. The Supreme Court upheld the conviction of the appellant for murder.

In *Patrick Ikemson & Ors* v *The State,*[50] Karibi-Whte JSC stated:

> *"The contention that if there was robbery, the court should hold that the Appellant was not armed will take the appellant's nowhere. Once it was established by the prosecution that appellant was among the robbers and they armed with offensive weapons…the appellant is guilty of armed robbery. In law, it matters not that the appellant does not carry weapon. Once it was established that the appellant was among the robbers not as a casual onlooker, but a full participant and his accomplices now at large not only carried firearms but actually engaged the police, who challenged them in cross fire, the appellant was guilty of the offence of armed robbery."*[51]

Offensive weapon has been interpreted to include a toy gun and any weapon that may put the victim in fear of violence[52]. A horsewhip laced with sharp blades has been interpreted by the court as an offensive weapon.[53]

2.3 Exceptions

2.3.1 Juvenile

An infant, a child or a young person is not subject to the pronouncement of death penalty in Nigeria. Where such a person has committed a capital offence punishable with death, such a person shall not be sentenced to death. In *Modupe* v *State*[54] the Supreme Court held that:

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49 Emmanuel Ekpulor v The State, 12 SCNJ 71 76(1990).
50 Patrick Ikemson & Ors v The State, 1 CLRN 23 (1989).
51 Ibid.
52 Cpl. Andrew Emwenya v Attorney General Bendel State, 6 NWLR part 297, 29 36 (1993).
53 Abubakar Ibrahim v The State, 5 SCNJ 129 138 Wali JCA (1991).
54 Modupe v State, 4 NWLR 9 SC pt. 87 130 (1988).

> *If at the time the offence was committed, an accused charged with capital offence has not attained the age of 17 years, it will be wrong for any court not only to sentence him to death, but also to even pronounce or record such sentence*[55].

Section 368 (3) Criminal Procedure Act[56] prescribes that death penalty shall not apply to anyone who has not attained the age of 17 years at the time of the offence neither shall sentence of death be recorded rather, such a person can be detained during the pleasure of the President. However it is significant to note that under section 405 of the ACJA, a death sentence cannot be pronounced upon anyone who has not attained the age of 18 years.[57] Such a person can only be sentenced to life imprisonment or to any such other term as the court deems appropriate.

Nigeria being a party to the ICCPR, the Convention on the Rights of the Child (this Act however, is only enforceable in the Federal Capital Territory of Abuja and in states that have explicitly enacted it[58]), and the African Charter on the Rights and Welfare of the Child, is obliged under international law to exclude persons below 18 years of age from capital punishment.[59] Nevertheless, Nigeria's multiple legal systems have differing definitions of legal juvenility, and there have been reports that Nigeria has sentenced people under 18 years to death.[60] Finally, in the 12 northern states that operate Shariah law, persons under the age of puberty (taklif) or "the age of attaining legal and religious responsibility" cannot be executed.[61]

2.3.2 Mentally retarded

Section 28 of the Criminal Code which is applicable in Southern Nigeria with the exception of Lagos State, provides that an individual is excluded from criminal liability if at the time of the crime, the individual is in "*such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or*

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55 Such a juvenile offender may only be detained until the pleasure of the Governor.

56 Criminal Procedure Act, ch 80, Laws of the Federation of Nigeria 1990.

57 See also § 221, 277 of the Child Right Act and § 302 (3) of the ACJL.

58 Child Rights International Network, Inhuman Sentencing of Children in Nigeria,1 Mar. 2013., https://archive.crin.org/en/docs/Nigeria_UPR_CRIN_FINAL.

59 Status, Declarations, and Reservations, ICCPR, 999 U.N.T.S. 171, Dec. 16, 1966, accessed June 10, 2019, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en,. Status, Declaration, and Reservations, Convention on the Rights of the Child, 1577 U.N.T.S. 3, Nov. 20, 1989, July 30, 2018,https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en,. African Commission on Human and Peoples' Rights, Ratification Table: African Charter on the Rights and Welfare of the Child, http://www.achpr.org/instruments/child/ratification.

60 Amnesty International., "Death Sentences and Executions in 2016," 6; April 11, 2017 ACT 50/5740/2017. Amnesty Intl., "Death Sentences and Executions in 2015," 8; April 6, 2016 ACT 50/3487/2016.

61 Criminal Code Act of Nigeria, § 319(2).

of capacity to know that he ought not to do the act or make the omission."[62] In *R* v *Grumah*[63] the WACA defined delusion as "*a symptom of mental disturbance and a false belief which is unshakable by facts."*[64] Under section 278(1) ACJA, a person may not be able to stand trial if his mental capacity is in doubt or if such an individual is dwelling in a state of delusion. The court is obliged to order a medical examination to determine the fitness of such an individual to stand trial. In the case of *Popoola* v *The State*,[65] the Supreme Court held that the onus of establishing insanity is on the defendant. It is generally established that because the onus of proving mental illness is on the defendant, majority of whom are illiterate, poor and of humble background, without legal or adequate legal representation, there are many cases where mentally impaired persons in Nigeria are tried without adequate support or defense.[66] In few instances where individuals are found to be suffering from mental illness, they are not adequately treated or sent to medical facilitates where their mental health is likely to be evaluated or treated but sent to prison where their mental health deteriorates.

2.3.3 Pregnant Women

A pregnant woman is exempted from the death penalty under s. 368 (2) Criminal Procedure Act. Where a pregnant woman is found guilty of capital offence under the provisions of s 376, she will be sentenced to life imprisonment.[67] However, under section 404 of the Administration of the Criminal Justice Act, a death sentence may be passed on a pregnant woman but may be suspended until the child is delivered and weaned, and thereafter, execution might take place.

3. Global Trends on the Application of Death Penalty

Recently, there has been a shift in favour of abolition of death penalty globally.[68] "*Only an isolated minority of countries continue to resort to executions. Just four countries were responsible for 84% of all recorded executions in 2017."*[69] There has been a significant decrease in the number of executions globally and particularly in the sub-Saharan Africa region.

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62 Ezediufu v the State, 17 NWLR (pt.741) 82 (2001).

63 R v Grumah, WALR 225 (1957).

64 Ibid.

65 Vol. 222 LRCN (Pt. 2) 8(2013); see also Edoho V.State ,F.W.L.R. pt530 1262 SC(2010).

66 The Human Rights Law Service (HURILAWS), "Death Penalty and Mental Health in Nigeria," accessed June 13, 2019, http://www.hurilaws.org/publications/articles/91-death-penalty-and-mental-health-in-nigeria

67 See equivalent provisions of Criminal Procedure Code, §§ 270 and 272 (3).

68 106 countries had abolished the death penalty for all crimes and 142 countries had abolished the death penalty in law or practice-Amnesty International, "Global Report on Death Sentences and Executions 2017" https://www.amnestyusa.org/wp-content/uploads/2018/04/Death-Penalty-REPORT.pdf

69 Ibid., 5.

For example, Guinea has abolished the application of death penalty for all crimes, while Kenya abolished the mandatory death penalty for murder[70].

In *Francis Karioko Muruatetu & another* v. *Republic,*[71] the legality of death penalty was challenged at the Kenyan Supreme Court**;** the Court declared that the mandatory nature of the death sentence is unconstitutional**.** The Court further held that the mandatory death penalty is "*out of sync with the progressive Bill of Rights" in Kenya's 2010 Constitution*[72] *and an affront to the rule of law**.** The Court relied on global death penalty jurisprudence to find the mandatory death sentence "harsh, unjust and unfair".*[73]

In *Makwayane S v Makwanyane and Another*[74] which was a landmark judgment in South Africa, the Constitutional Court held that the death penalty was inconsistent with South Africa's commitment to human rights expressed in the Interim Constitution. The court invalidated section 277(1)(a) of the Criminal Procedure Act 51 of 1977, which had provided for use of the death penalty, along with any similar provisions in any other law in force in South Africa

Chaskalson P, held that:

> *the death sentence destroys life, which is protected without reservation under section 9 of our Constitution, it annihilates human dignity which is protected under section 10, elements of arbitrariness are present in its enforcement and it is irremediable [...]. I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment. "*[75]

The Court further held that at every stage of criminal prosecution there is an element of chance and uncertainty. The sanctity of human life cannot be left to chance and uncertainty because:

> *The outcome may be dependent upon factors such as the way the case is investigated by the police, the way the case is presented by the prosecutor, how effectively the accused is defended, the personality and particular attitude to capital punishment of the trial judge and, if the matter goes on*

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70 Ibid., 5.

71 Francis Karioko Muruatetu & another v. Republic, Petition No. 15 of 2015 as consolidated with Petition No. 16 of 2015, Supreme Ct. of Kenya, Dec. 14, (2017).

72 Ibid., para. 64.

73 Ibid., para. 48.

74 S v Makwanyane and Another, ZACC 3(3) S.A. 391 151 (1995).

75 S v Makwanyane, 95

> *appeal, the particular judges who are selected to hear the case. Race and poverty are also alleged to be factors*[76].

In striking down the application of death penalty in South Africa[77], the court condemned the arbitrary and capricious nature of its application and in addition, the court opined that the application of death penalty has not been shown to be more effective than a life imprisonment.[78]

4. Reflections on the Application of death penalty in Nigeria

Nigeria's death row of at least 2,000 inmates is reputed to be the largest in Sub-Saharan Africa.[79] The death penalty is meant to punish "the worst of the worst," as Justice David Souter stated in 2006, but it does not. Religion, race, class, wealth, corruption, gender and the effectiveness of the defendant's lawyer plays a more significant role in determining punishment than does the heinousness of the crime. The Constitution of Kenya like the Nigerian Constitution provides for the right to life of every person save in the execution of the sentence of a court in respect of a criminal offence of which a person would have been convicted.[80] Unlike Nigeria however, the death sentence is limited to the offences of treason, murder and robbery with violence and is non mandatory for the Court to impose death penalty.[81] Likewise, in the case of *Makwayane S v Makwanyane and Another* discussed above, the Constitutional Court of South Africa struck down the application of death penalty in South Africa for good reasons. In addition to the reasons canvassed by the courts in these cases, it is noted that:

a. Death sentence is Irreversible when applied

It is beyond doubt that once the pronouncement of death penalty is made and execution carried out, the action is irreversible and the executed is forever gone. The globally acceptable justice standard is that the guilt of an accused must be established by credible evidence and proved beyond reasonable doubt, leaving no room for credible alternative narration. Despite that, there

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76 S v Makwanyane, 48.

77 Other African countries that have abolished death sentence are Cape Verde, Cote d'Ivoire, Liberia, Senegal and Togo.

78 See also Article 4 of the African Charter on Human and Peoples' Rights which provides for the right to life; The Second Optional Protocol to the International Covenant on Civil and Political Rights (1989) aiming at abolition of the death penalty, which entered into force in 1991, has been ratified by 57 countries: the statutes of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) as well as the Rome Statute of the International Criminal Court (ICC) and the Sierra Leone Special Court, which prosecute the most serious crimes against humanity, exclude the death penalty.

79 Amnesty Intenational., "Death Sentences and Executions in 2018," 41, 43, April 10, 2019, ACT 50/9870/2019

80 Constitution of Kenya, 71 (1).

81 S v Makwanyane and Another ZACC 3 at 151(1995), (3) S.A. 391 (1995).

has been human errors recorded in the past that have occasioned grave miscarriage of justice. The US death penalty information Center has a record of 165 individuals who were innocent but wrongfully convicted and sentenced to death in the US since 1973.[82] The wrongful convictions were occasioned by a combination of factors ranging from coerced confessions, race, mistaken identity, incompetent defense and perjured identification. If these individuals had been executed, the loss to their families would have been irreversible. The risk of wrongful conviction in Nigeria is far higher than the US. However, there are no available statistics of those wrongful convictions records in Nigeria. Nevertheless, the case of *Nasiru Bello* v *Oyo State* shows the accused was hastily executed before he had the opportunity to exhaust his appeal. Bello was executed and the wrongful execution can never be reversed.

b. Death sentence is mandatory in Nigeria

Under the Nigerian legal framework, where the death penalty is specified for an offence and the court has found the defendant culpable, the judge must mandatorily apply the death penalty[83]. The judge's discretion is statutorily fettered. The judge has no discretion but to impose a mandatory punishment of death. Rhodes-Vivour JSC in *State* v *John*[84] emphasized this point by stating that:

"*Once a judge finds an accused person guilty of culpable homicide punishable with death…the only sentence he can impose is death. A judge has no jurisdiction to listen to allocutus and no discretion to reduce death sentence to a term of years"*[85] No judge is permitted to give a lesser sentence as no discretion exists to be exercised in the matter.

c. Fair trial is not guaranteed

The Constitution of the Federal Republic of Nigeria 1999, as amended guaranteed fair hearing and trial to everyone. In Nigeria, the death penalty has been imposed after proceedings that did not meet international fair trial standards. For example, individual and mitigating circumstances of the accused are hardly taken into consideration. People from particularly less privileged families, poor and uneducated continues to be sentenced to death for crimes that at most times did not involve killing. The Nigerian criminal justice framework therefore could not be said to

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82 Death Penalty Information Center "Innocence by the Numbers" https://deathpenaltyinfo.org/policy-issues/innocence/description-of-innocence-cases.

83 Criminal Code, §§ 316, 319; CPA § 367(1), § CPC 273 and § ACJL 301. State v John, 12 NWLR pt 1368 337(2013).

84 State v John, 12 NWLR pt 1368 337 (2013).

85 Ibid., In 2017, the Senate passed a bill prescribing the death penalty for abduction- Amnesty Intl., "Nigeria: Still No Accountability for Human Rights Violations," 1; March 1, 2018, AFR 44/8529/2018

have met the international threshold of "most serious crimes", as prescribed by Article 6 of the International Covenant on Civil and Political Rights. Mandatory death sentences are being imposed on offences such as armed robbery that does not result in death. Some state assemblies have expanded the scope of the death penalty by adopting new laws that would impose the death penalty for cattle rustling and cultism. In these instances, the application of the death penalty does not seem to be proportionate to the gravity of the crime. It has also been noted that despite the exception of juvenile from the imposition of death penalty, some juveniles have been convicted based on coerced confessions extracted by the police.[86]

Amnesty International reported that juvenile offenders remained on death row in Nigeria.[87] In 2010, there were 40 death row inmates believed to have been under the age of 18 at the time of the offense.[88] In *Abdulmumini* v. *Federal Republic of Nigeria, Kastina State Government*, and *the Nigerian Prisons Service*[89] it was the ECOWAS regional Court that saved Maimuna who had been sentence to death at age 13 by a Nigerian Sharia Court. The ECOWAS Court held that the death sentence of Maimuna Abdulmumini, who was convicted of murdering her husband at the age of 13, was a violation of international law and the African Charter on the Rights and Welfare of the Child.[90] The Court also held that imposing the death sentence on a juvenile was a violation of the Charter on the Rights and Welfare of the Child. The Court ordered a stay of execution and awarded Maimuna damages.[91]

d. Death penalty may be abused and applied for religious and political gains

Sani Yakubu Rodi, a cleric, was recently convicted and sentenced to death by a Shariah Court in Kano state by hanging for blasphemy.[92] Sani Yakubu was executed after being convicted for murder by a Shariah Court. He was hanged in Kaduna prison in 2002 at age 21.[93] Ken Saro Wiwa and the Ogoni nine were accused by the Abacha led Military Government of killing some Ogoni Chiefs and acting against the then Government: they were tried by the Special

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86 Legal Defence and Assistance Project (LEDAP), "Two Juveniles on Death Row in Lagos," March 11, 2015 http://ledapnigeria.org/two-juveniles-on-death-row-in-lagos-finally-free/#

87 Amnesty International., "Death Sentences and Executions in 2016,"2017, 6, ACT 50/5740/2017, Apr. 11, 2017.

88 U.N. Committee on the Rights of the Child, Concluding Observations: Nigeria, para. 33, U.N. Doc June 11, 2010, CRC/C/NGA/CO/3-4

89 Community Ct. of Justice, ECOWAS, §§ 1–8; June. 10, 2014, ECW/CCJ/jud/14/14.

90 Ibid

91 Ibid

92 "Nigeria court in Kano sentences cleric to death for blasphemy," *BBC*; January 6, 2016, https://www.bbc.com/news/world-africa-35241608.

93 "Nigeria: First Execution under Sharia Condemned," *Human Rights Watch;* January 8, 2002, https://www.hrw.org/news/2002/01/08/nigeria-first-execution-under-sharia-condemned.

Military Court, sentenced to death and hanged for a crime they did not commit and deprived of the opportunity to appeal their convictions.[94]

e. Death penalty does not necessarily deter crime

The deterrence theory and the proponents of the death penalty are of the opinion that it has a deterrent effect on crime in society. It has however been established that there is no proven and credible correlation between the death penalty and deterrence of crimes. In jurisdictions that still maintain the death penalty in their statutes, it is yet to be scientifically confirmed that there has been a downturn in crime due to the application of the death penalty**.** In a research conducted by the UN in 1998 and updated in 2002 the findings revealed no correlation between the death penalty and homicide rates[95]. In line with restorative justice theory, scholars have called for alternative response to crime and social order[96]. State should not only focus on punishing the wrong doers but must also promote inclusiveness and tolerance.[97]

The principal goal of any criminal justice system should be reform and rehabilitation of offenders. The application of the death penalty negates the principle of rehabilitation of offenders. The justice system must focus on the prevention of crime and reparation of harm as a measure of efficacy, rather than the harshness of a penalty imposed on an offender. The objective of the justice system should be to integrate the offender back into the system, instead of dehumanizing and making a monster out of the offender. In the customary African justice system, the notion of punishment was centered more on reconciliation and compensation than retribution. Alternative punishments such as expulsion, ostracisation and banishment were applied, death sentence was rarely used.

5. Conclusion

The Human Rights Committee had expressed concern about the high number of death sentences passed in Nigeria, particularly without the safeguard of fair trials.[98]The Committee also noted

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94 "Nigeria's Military Leaders Hang Playwright and 8 Other Activists," *Deseret News Publishing Company*, accessed June 12, 2019, Deseretnews.com.

95 'There is no conclusive evidence of the deterrent value of the death penalty.' United Nations General Assembly, UNGA Resolution 65/206

96 Agaba, J., Practical, 1013.

97 Handbook on Restorative Justice Programs, (Vienna: United Nations Office on Drugs and Crime, Criminal Justice Handbook Services, 2006) 5,U.N. Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Nigeria, para. 16, July, 24,1996U.N. Doc. CCPR/C/79/Add.65,

98 U.N. Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Nigeria, para. 16, U.N. Doc. CCPR/C/79/Add. 65, Jul. 24, 1996.

that the death penalty could be imposed for offenses that do not meet the most serious crimes standard.[99] Finally, the Committee observed that public executions are incompatible with human dignity. It has also been observed by Azu[100] "*most persons who have been sentenced to death are unable to challenge their convictions on appeal due to the exorbitant costs of appeals at both the Court of Appeal and the Supreme Court systems."*

It has been shown above that historically death penalty was applied to the commission of the most heinous crimes but in contemporary Nigeria death penalty applies to both heinous crimes and other crimes that are not so heinous. Research findings have shown above that the efficacy of the application of death penalty as deterrence to the commission of crime is doubtful. In addition, Nigerian courts have expressed reservations on the practice and application of death penalty in Nigeria in the cases of *Kalu* v *State*[101] and *Peter Nemi* v *State,*[102] though the courts claimed their hands were tied as the application of death penalty is permissible under the Nigerian Constitution. This article reveals the progressive and more pragmatic approach adopted by the Lagos High Court judgment in James Ajulu's case,[103] by declaring that though the application of the death penalty is not unconstitutional, the mode of execution by firing squad or hanging is unconstitutional.

In addition, lessons from other countries, in particularly, Guinea, Kenya, and South Africa have shown that only isolated countries still continue to apply the death penalty. Analysis of these jurisdictions have also revealed that death sentence terminates and destroys lives and sometimes, livelihoods of the offender and his dependants. In addition, death penalty violates the dignity of human beings; hence its continued application is unconstitutional. This article has also discussed that in the event of wrongful execution, as noted in the case of *Nasiru Bello,*[104] reversal is impossible and the error of occasioning death by wrongful execution could not be redeemed. Despite the continued application of death penalty and the expansion of its scope, crimes and criminals abound in Nigeria. Discussion on theories of death penalty above reveals that reformation of the offender is more beneficial to humanity, the society, the victim and the

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99 Ibid.

100 John Chuks Azu, "Experts divided over 2,194 death row prison inmates," November 7, 2017, https://www.dailytrust.com.ng/experts-divided-over-2-194-death-row-prison-inmates.html,

101 Eleven states in Nigeria have passed the equivalent of the ACJA in their various jurisdictions. These states are: Ondo, Kaduna, Ekiti, Akwa-Ibom, Oyo, Rivers, Anambra, Abuja, Cross-River, Enugu and Lagos.

102 Adeniji v. State, 645 NWLR 356 (2000).

103 Peter Nemi v. The State 6 NWLR pt 452 (1996).

104 Kalu v. State, 13 NWLR pt.583 531 (1998).

offender. Offenders are human beings and they should be reformed to be useful to the society as the offenders are themselves victims of their backgrounds, upbringing and the society.

In considering the analysis of the Nigerian criminal adjudicatory system's peculiar circumstances, its obligations under international treaties and the global trends as discussed above, Nigerian governments through the National Assembly[105] should take immediate steps to fully abolish the death penalty in law and practice. Life sentences should be imposed for the most serious offences. Current death sentences should be commuted to life sentences. The National Assembly and the state Assemblies should amend all laws that currently permit the death penalty in Nigeria. In particular, the Constitution of the Federal Republic of Nigeria should be amended to prohibit the application of death penalty in the country.

[105] Ibid., the Court recommended that the National Assembly can take steps to remedy the issues surrounding the practice and application of the death penalty in Nigeria.

3

Dworkin's Integrity as a Political Value: A Critique

Asif Salahuddin[1]

Ronald Dworkin in his much-celebrated work, Law's Empire (1986), put forth a number of diverse ideas on law's inner morality including some ground-breaking and thought-provoking notions on jurisprudence. He predominantly used American examples such as the Congress and its procedures in law-making in the hypothetical scenarios he chose to make the readers comprehend the components and values that shape the law and its structure. Dworkin propagated his idea, political integrity, in this seminal work asserting that a state is more legitimate if it holds integrity as a political virtue as opposed to the one that does not; meanwhile he rejected the social contract theory and all forms of contractarianism promulgated by classical liberal theorists. Instead, he put forth the argument that political obligation is form of associative obligation which is owed to family, friends and neighbours. He promulgated that legislative integrity as a principle should override other factors while enacting laws, but also admitted the impossibility of bringing about all diverse set of laws under a single scheme of principle. He further enquired why checkerboard laws are rejected although there is no argument of justice against them. This article will thoroughly analyse and critically evaluate the values within Dworkin's political integrity and its justifications, if any, while prudently considering the academic debate surrounding the theory.

Introduction

The American philosopher and constitutional law intellectual, Ronald Dworkin, is a liberal whose work ranges widely from legal and political theory to commentary on major political issues.[2] Dworkin developed his much discussed and well-known theory of integrity in his book *Law's Empire*. Integrity, according to Dworkin, has two aspects – political integrity and integrity in adjudication. Since the purpose of this article is to examine the political theory of Ronald Dworkin, discussion of integrity will be centered on political integrity.

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2 Michael DA Freeman, *Lloyd's Introduction to Jurisprudence* (London: Sweet and Maxwell, 8th Edition 2010), 717.

Amongst the political philosophers, the issue of the origin and nature of political obligation – the obligation to obey the law, for example – has been a contentious subject of debate. The origin of political obligations are often sought in contract in the liberal tradition, but Dworkin's version is opposed to the contractual paradigm argument as established in the early social contract theory and the later theories as promoted by contemporaries such as Rawls.[3] To Dworkin, philosophers have acted erroneously by attempting to stem political legitimacy from ideas like justice.[4]

Dworkin also rejects Rawls' fair play theory suggesting that it allows too much given its presupposition that receipt of benefits can impose or incur obligations irrespective of whether such benefit was sought or not which leaves "benefits" as a term gravely obscure.[5] Dworkin wishes to avoid all forms of contractarianism and instead attempts to place his account emphasising social practices as no more than practices which helps citizens to ascertain the nature and scope of the political obligations through ordinary intuitive sense from communities in which they function.[6]

According to Dworkin, in order to uphold integrity, a government ought to speak in one voice coupled with acting toward all its citizens in a principled and coherent manner while applying the identical substantive standards of justice or fairness towards everyone[7] without allowing for special treatment for some. Dworkin attempts to assert that integrity is inherent in our community and the political arena like other ideals such as fairness, justice and procedural due process that exist in our community and politics. By the end of this article, it would appear that integrity is not an independent value of its own to begin with. It is rather an illusion which needs other values in its support to claim its existence. In this article Dworkin's claims regarding integrity will be assessed in light of other legal theories and surrounding academic literature.

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3 Sandra S Berns, "Dworkin's Account of Associative Obligations: New Clothes for an Old Theory?", *Western Australian Law Review* 21, (1991): 89.

4 Ibid.

5 Ibid.,90.

6 Ibid.,90.

7 Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986),165.

Rawls' Theory of Justice

Since Dworkin paid much attention to reject Rawls' theory, it is imperative to discuss Rawls' theory briefly at first. Central to Rawls' *A Theory of Justice* was the idea of "justice as fairness" which sets out substantively a version of democratic social justice. Rawls argues in favour of a more extensive state wherein the government is obliged to provide citizens with access to the needs that are basic to human life and also to look after the welfare of those who are least well off. This includes state provided welfare education and health services funded through taxation.[8] By "justice as fairness" Rawls means, the set of principles that would be selected by persons in the "original position"[9] from behind a "veil of ignorance"[10] to the basic structure of society. According to Rawls, two principles would be selected in the original position:

(a) Individual citizens are entitled to an equal right to the "most extensive scheme of basic liberties compatible with a similar scheme of liberties for others"; and

(b) "Social and economic inequalities are to be arranged so they are both –

(i) Reasonably expected to be to everyone's advantage; and

(ii) Attached to positions and offices open to all."

Rawls' proposition of justice as fairness is abstracted from the social contract theory which he defends as the most reasonable and preferable conception of justice. His main theme is distributive justice which is concerned with the manner goods and freedoms should be shared in society. To Rawls, a distribution is just "if everyone is entitled to the holding they possess under the distribution."[11] He suggests that it is sometimes justified to treat people unequally where unequal treatment results in improvements for everyone. Furthermore, Rawls defends the obligation to obey the laws and the legitimacy of the government with his justification of "fair play" which maintains that someone receiving benefit under the standing of a political organisation is obligated to bear its burden that includes the obligation to not refuse the

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8 Rachael Patterson, "The Minimal State v The Welfare State: A Critique of the Argument between Nozick and Rawls," *Southern Cross University Law Review* 9 (2005): 174.

9 The "original position" is a hypothetical situation in which rational but mutually disinterested individuals, mutually capable of sense of justice and concerned to further their interests, select, from behind a "veil of ignorance", principles of justice applicable to the basic structure of society.

10 The "veil of ignorance" means that persons in the hypothetical "original position" are unaware of such things as their wealth, intelligence, social standing or conception of good.

11 Patterson, *The Minimal State*, 178.

political decisions of the organisation irrespective of whether the benefits were solicited or unsolicited and without having the need to consent to bear the burdens.[12]

Clearly, Rawls' idea of state and political organisation calls for an extensive state as opposed to the minimal state promoted by Nozick,[13] for instance. In Rawls' extensive state, citizens might be offered some basic rights such as healthcare system and education funded by the state which would certainly have a positive impact on the lives of those living just above or under the borderline and those with an underprivileged and deprived background. However, it would come at the cost of being subjected to accept political decisions of the organisation perhaps without having a say on the matter. Rawls did not stop at that point though but indicated that once such benefits are received by citizens, the state does not require citizens' consent to impose any burden i.e. to accept all its political decisions. It may be argued that those living just above or under the borderline might be willing to accept the burden as they are receiving the benefit from the organisation, absence of which would not have allowed this section of citizens to have access to necessities and fundamental human rights such as access to healthcare and education.

On the contrary, the wealthy and well-off section of citizens of the same society might be opposed to the idea given they can effortlessly afford the necessities as aforementioned and would not want themselves to be subject to unsolicited burdens such as to accept all the political decisions of the organisation. It could also be that the wealthy would prefer private education and healthcare rather than the state funded services meaning that the political organisation lacks any sort of moral ground and perhaps legitimacy to impose their decisions or exert pressure on the wealthy. This is argued because the receipt of burden only came into place because of receiving the benefit. If a class of citizens are not receiving or decline to receive such benefit as offered by the political organisation, would it not be unconscionable for the organisation to impose any burden on them? Unfortunately, Rawls appears to have failed to address these competing issues.

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12 Dworkin, *Law's Empire*, 193-194.

13 Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974),113.

Dworkin's Political Integrity

Dworkin advocates for integrity in state action and claims that a state has a better case for legitimacy if it embraces integrity as a political virtue than the one which does not.[14] Integrity requires citizens to accept demands on them capable of reciprocally making demands on others which has the effect of "sharing and extending the moral dimension of any explicit political decisions."[15] Dworkin attempts to reject all forms of contractarianism such as the social contract theory propagated by the classical liberal theorists and the contemporaries like Rawls and Nozick. Dworkin is critical of Rawls' "original position" and its justification of "fair play" and questions why such an obligation is special. Besides, the explanation of Dworkin's account relies on community or fraternity.

According to Dworkin, political obligation is a type of "associative obligation"[16] by which he indicates some biological or social groups observing special responsibilities attached through social practices by virtue of their membership akin to the responsibilities of family, friends or neighbours.[17] To Dworkin, associative or fraternal obligations are special in that they are confined to members of the group, and non-consensual, because we do not choose the obligations we owe to friends or colleagues.

Similar to Rousseau, Dworkin recognises that if the concept of the "community personified" is to be a meaningful idea, providing the foundation for our political obligations cannot be confined to political community as such. Rather, Dworkin wishes to use "associative obligations" which, he suggests, arise within families and other biological and social groups as the foundation for his claim that certain sorts of political communities generate similar associative obligations.[18]

However, a community's social practices give rise to "genuine" obligations provided certain conditions are satisfied in that the community must be "true" rather than "bare." Dworkin argues that these obligations arise through social practices and a "bare" community turn into a "true" community provided four conditions are met: a) the members must regard the group's obligations as holding uniquely within the group; b) they must accept that these

[14] Ibid., 191- 192.
[15] Freeman, *Jurisprudence*, 729.
[16] Dworkin, *Law's Empire,* 196.
[17] Ibid.
[18] Berns, "Dworkin's Account," 92.

responsibilities bind member to member (that is, apply between themselves rather than to the group as a whole); c) they must perceive these responsibilities as linked to a concern for the well-being of each of the members; and d) the members must believe that the practices of the group show equal concern for all its members.[19]

If the aforementioned conditions are met, then the community is regarded as a "true" community rather than merely a "bare" community which is characterised by Dworkin as fraternal. He further relies on the notion of reciprocity to explain "associative obligations." In his words, "friend or family or neighbours need not agree in detail about the responsibilities attached to those forms of organisation," but they must show "roughly the same concern" for each other.[20] To Dworkin, political obligation is a form of "associative obligation" such that a nation state that imposes obligations upon its members including the obligation to obey the law by virtue of membership of that nation "group" is a bare community.[21] For the obligations to be regarded genuine, the community ought to hold the characteristics of a true community. Only a community that endorses the ideal of integrity which is regarded by Dworkin as "a community of principle"[22] can claim the authority of a genuine associative community. Provided these conditions above are met, the political organisation can claim moral legitimacy owing to the fact that obligations are not based on bare power in the name of fraternity but the result of collective decisions.[23]

Dworkin's Theory: A Critique

Dworkin emphasises that not only must the members show concern for the well-being of other members, but they must also believe that the practices of the group demonstrate equal concern for the welfare of each individual member. The exclusive emphasis upon equal concern marks a significant departure from Dworkin's earlier connection between equal concern and equal respect, both in the context of associative obligations and in the context of the responsibility of government generally.[24]

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19 Dworkin, *Law's Empire,*199- 200.
20 Ibid., 196.
21 Freeman, *Jurisprudence*, 731.
22 Dworkin, *Law's Empire*, 215.
23 Ibid.
24 Berns, "Dworkin's Account," 93.

The language used by Dworkin suggests than the beliefs of participants in the practice are critical in assessing the legitimacy of the obligations asserted and that these beliefs are open to critical evaluation from outside the practice itself. Dworkin himself admits that genuine communities fulfilling the conditions discussed above might still be unjust or promote injustice either with respect to the members of the group or with respect to non-members. If it occurs that the so-called genuine communities act unjustly or promote injustice, should the defective features be compatible with the practice as a whole?[25] Are the injustices so fundamental that the unjust obligations created by the practice are void, or do they continue to subsist despite the injustice wrought?[26]

Another commentator outlines, when Dworkin restricts self-governance in any way, one must ask whether he continues to respect the equally cherished individual. While majoritarianism may seem to run very much counter to the rights of minorities and individuals who are members of those minorities, Dworkin's particular rejection of majoritarian theory serves as a prime example of another problem.[27] Newman's point reminds Dworkin that democracy is not only government for the people, but of and by the people as well.[28] Under Dworkin's view, the ideal form of government would be a benign and even-handed trustee which would make all decisions in our interest showing equal concern to all and respect as a good trustee should.[29] This vision leaves something out: the idea of self-government or political liberty.[30]

As regards Dworkin's "special" or "true" community, several problems may be identified. In elaborating the fourth condition (that being equal concern) for being a "true" community, Dworkin himself discusses the examples in the context of the family of a culture that expects parents to choose husbands for their daughters but not wives for their sons. Critiques argue that shared assumptions in a patriarchal family appear only to be superficially attended by differential levels of protection and by paternalism which appears appropriate when applied to women and girls but inappropriate when applied to men and boys?[31] In our society the

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25 Ibid.

26 Ibid.

27 Dwight Newman, " Individual, Subnational, And International Identity: A Critique of Dworkin's Concept of Community", *Windsor Yearbook of Access to Justice* 17, (1999): 91, 92.

28 Ibid.

29 Ibid.

30 Ibid.

31 Berns, "Dworkin's Account," 93.

overall entitlements of women (and girls) remain less than equal precisely because of their familial roles and the economic inequalities attendant upon those roles.

Would it make a difference if Dworkin had, instead, imagined a family in which boys and young men were subject to stringent parental constraint upon the basis that due to the predisposition of young men to violent behaviour special protection was required until they were sufficiently mature to control their violent impulses? It is contended, that no existing families are organised upon this basis and that there is at least some empirical evidence to support the argument that men and boys are more likely to resort to violent behaviour and therefore such constraints, in our culture, might well appear wholly reasonable and grounded in empirical evidence.[32] Given the social sanctions against violent behaviour, such constraints might reasonably be supposed to demonstrate equal concern.[33]

Law-making and Political Legitimacy of the Government

Law-making and legitimacy of the government is already considered with associative obligation. Dworkin asserts, associative obligation is a form of political obligation and a community of principle that adheres to integrity has the best claim of legitimacy as a government and to deploy a monopoly of coercive force.[34] As Dworkin puts it, if the constitutional structure and practices of state are such that the duties it purports to impose through political decisions on citizens are general obligations of the latter to obey such decisions.[35]

Besides, regarding the creation of law, Dworkin articulates that integrity pertains to principle wherein simple form of consistency is not requisite. But, it is necessary to conform to legislative principle of integrity which requires the legislative to give maximum effort to provide protection to everyone in line with what is ascertained as the moral and political rights of citizens reflecting consistent arrangement and structure of justice and fairness.[36] Dworkin's statement could be refuted by yet another statement of his own in order to show how contradictory his theories are. At another place in *Law's Empire,* Dworkin conceded that it was impossible to bring about all the diverse rules and other standards

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32 Ibid., 94- 95.
33 Ibid.
34 Dworkin, *Law's Empire,* 191-192.
35 Ibid.
36 Ibid, 221.

enacted by the parliament under a single scheme of principle.[37] These contradictory statements of Dworkin are self-destructive in nature which would have the effect of extinguishing his already fragile and delusional theory.

However, Dworkin also admits that the legislature may decide to favour a particular group based not on the ideal of justice but only because benefitting that group happens to work for the general interest. Dworkin stresses, integrity is not violated if an individual or a group of people is given primacy over another for reasons of policy.[38] Does it not contradict the "equal concern" principle which he himself purport to have propagated? Furthermore, in case of policy-making Dworkin adopts the utilitarian concept that political decisions must be taken in a manner that advances or protects some collective goal of the community as a whole.[39] This notion once again contradicts his previous assertion that some individuals or groups could be given primacy over another.

Individual Rights as Trumps

Now the issue is whether Dworkin holds true to his promises to the individual, and the liberal commitment to the individual which amounts to a pledge that the individual is to be free to lead his or her life from the inside, based on his or her personal beliefs.[40] How is Dworkin going to justify these policies that may violate individual rights? What about his rights as "trumps" which serve to protect the individual against the encroachment measures which seeks to advance collective goals? Does Dworkin's utilitarian policy not contradict with his rights as "trumps?" In addition, Dworkin himself is conflicting his "community of principle" with his two other communities mentioned in *Law's Empire* namely – "de facto" and "rulebook" community as he is allowing others, i.e. legislatures to use some as means to meet certain ends. One could ask in what way is his "community of principle" adopting integrity better than the other two communities? Dworkin's theories appear to hold enough profundity to provide solution to the hypothetical situations as posed above and rather seem to be contradictory.

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37 Ibid., 217.
38 Ibid., 222.
39 Ibid.
40 Newman, " Individual," 93.

Nozick possibly has a better answer as regards individual autonomy and individual rights. In general, Nozick contends that people are born with fundamental individual rights.[41] These individual rights are paramount such that there is no need for a system to achieve moral equilibrium[42] while rejecting all end-result theories, i.e. distributive theories. Nozick rather adopts the 18th century philosopher Immanuel Kant's principle of "individual inviolability" that cannot be violated as a means to achieve particular ends, meaning the significance of each person's possessions of self-ownership is that people should not be used as resources or as a means to achieving some end.[43] According to Nozick, it is wrong to treat people as if they are merely of instrumental worth or to sacrifice one person for another.[44] He claims that the rights of others determine constrains on our actions.[45]

Value of Integrity in Legislation: A Critical Analysis

Dworkin's primary example in favour of the value of integrity in legislation concerns "checkerboard" laws that apply an arbitrary settlement to political disagreements.[46] He argues that integrity explains a current feature of our political practice – the rejection of chequer-board policies. Why, he enquires, do we not organise decision-making so that each competing viewpoint on any given issue is reflected in the rules produced according to the numbers supporting it? For example, why not allow access to abortion to women born in even years and deny it to women born in odd years if the population is evenly divided about the morality of abortion?[47]

Dworkin maintains that generally such solutions are rejected even though they are fairer and there is no argument of justice against them,[48] and integrity is needed to explain why. Dworkin argues that justice could condemn chequerboard policies only if it were likely that the

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41 Asif Salahuddin, " Robert Nozick's Entitlement Theory of Justice, Libertarian Rights and the Minimal State: A Critical Evaluation," *Journal of Civil and Legal Sciences* 7, no. 1 (2018): 1, 3.

42 Ibid.

43 Ibid; Patterson, "The Minimal state," 169.

44 Patterson, "The Minimal State,"169.

45 Salahuddin, "Entitlement Theory," 41; Patterson, "The Minimal State," 169.

46 Dworkin, above n. 7, at p. 179; Robert Westmoreland, "Dworkin and Legal Pragmatism," *Oxford Journal of Legal Studies* 11, no. 2 (1991): 174.

47 Dworkin, *Law's Empire*, 178.

48 Ibid., 179.

chequerboard would produce more instances of injustice than it would prevent.[49] If one believes that there is a right to access to abortion, the chequer-board approach will be preferable to a total denial of access and from the point of view of the outcome, it is better to allow some women to have abortions than none.[50]

A commentator argues that two questions need to be answered at this point; first, what is the reason behind politicians and activists not generally advocating for chequerboard policies.[51] Reaume believes, it can be explained by principles of justice without appeal to integrity, although it does not entirely eliminate chequerboard policies as a possibility.[52] Second, is there any other reason to reject checkerboard policies?[53] It is argued, to the extent that chequerboard policies are regarded with suspicion for reasons of justice and when these features are absent, chequerboard policies are not rejected.[54] Integrity, conceived of as independent of justice is not needed to explain this conundrum. Further arguments are not necessary to establish that it is integrity which requires the adoption of principles which is already achieved by a requirement to pursue justice. Indeed, activists must start from some position of principle, or they would have no basis for making a judgment about how to ensure the fewest instances of injustice.[55]

As regards Dworkin's illustration of the torture victims, in which a rescuer, knowing that it is impossible to save all the victims from torture, must decide what to do. Given this fixed choice between saving none and saving only some, under such circumstances, it is argued that it would of course be absurd to argue that justice requires saving none because no one has any greater claim than any of the others.[56] Ordinary politics does not usually embrace chequerboard solutions as a positive alternative, because both competing principles of justice are live options – or so it seems to their supporters. Each principle itself treats compromise as a second-best solution. The fact that circumstances render it impossible to ensure that no one

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49 Ibid, 180-181.

50 Ibid., 179.

51 Denise Reaume, " Is Integrity A Virtue? Dworkin's Theory of Legal Obligation," *University of Toronto Law Journal* 39, (1989): 396.

52 Ibid.

53 Ibid.

54 Ibid., 397.

55 Ibid.

56 Ibid., 397, 398.

is tortured does not mean there is no objection in justice to the fact that only some are saved.[57]

Conclusion

Dworkin's account of associative obligation is astoundingly sketchy given the importance attached to it and he has virtually conceded on this point.[58] One could rationally argue that, however convincing the account of associative obligations are in the contexts of friends, family, neighbours or colleagues (which seems unlikely), its place in explaining political obligations is not made-out. Ultimately political obligations rest on coercion – but in contrast neither family nor friendship does. It needs to be enquired whether Dworkin is of the view that a state which has to enforce its will upon recalcitrant citizens is not a "true" community? It would imply that a state which had to enforce laws by means of coercion was undercutting its own foundation, which rests on a relationship where there is obligation.

Moreover, in the context of family, do associative obligations really rest on reciprocity? Is this how members of a family or friends conceive of obligation? Can Dworkin explain the bonds that unite the Irish or Jews fund raising for Israel?[59] Are these bonds dependent on Dworkin's reciprocity principle? If Dworkin's ideal is so much based on reciprocity, then why does he complain of contractarianism and fair play? Why would not citizens be obliged to obey the law of a government and its institutions from which they have received benefits? Does reciprocity not mandate on the citizens that they obey such institutions from which they have received benefits?

Nonetheless, Reaume exposed Dworkin's arguments further asserting that integrity's existence depends on there being a reason of justice to reject compromise as a general strategy.[60] This argument establishes that integrity is an illusion and it is inconsistent with any particular principle of justice to accept a chequerboard alternative. It is safe to presume that everyone holds to at least some substantive principles of justice and that nobody generally endorses chequerboard approaches which reiterates that integrity.[61] Since Dworkin has to resort to some other ideals to answer a question regarding integrity, it can never claim to be an independent ideal. A suggested ideal that can always be outweighed by the

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57 Ibid.
58 Dworkin, *Law's Empire*, 197.
59 Freeman, *Jurisprudence*, 732.
60 Reaume, Integrity, 398.
61 Ibid.

existing ideals such as fairness, justice, political due process, and policy considerations among others both in politics and in adjudication as Dworkin concedes in *Law's Empire* on several occasions – a community would be better off without endorsing it. What sort of ideal is that which always needs to be justified and demonstrated by the standards of other existing ideals? The answer would unequivocally appear to be that integrity is not an independent ideal at all. Dworkin is rather attempting to assert nothing except for putting some new clothes on old theories.

4

Cryptocurrencies in the eyes of Shariah law and contemporary scholars: An Analysis

Muhammad Nazibur Rahman[1]

Blockchain Network based cryptocurrencies have become the concern of each and every corner of the world in recent years. The economic world is to some extent in a state of dilemma regarding these cryptographies based digital assets. However, some states are accepting it for their easy going, smooth and less cumbersome transaction facilities while others are rejecting it for its potential misuse. Similarly, Islamic financial world is not outside the purview of facing the reality of this revolutionary technological achievement. No decisive verdict on the legal status of cryptocurrency from any authoritative Sharia body has been provided as it is very new in the financial world. From Shari'ah perspective, though it qualifies as property (mal) after fulfilling some essential characteristics, difference of opinion regarding treating it as money prevails. Moreover, the issues of uncertainty (gharar) and ignorance (jahala) are required to be solved by proper state regulation, otherwise, there may be a chance of misuse including drug trafficking, money laundering and prejudice to weaker parties. Furthermore, the contemporary scholars express different views for Shari'ah compliant cryptocurrencies. This article will analyze all these factors and the way forward for the financial world.

1. Introduction

Cryptocurrencies have rapidly proliferated in recent years. It has attracted a significant amount of attention from a large number of people, though some remain skeptical and others oppose it. Proponents consider it to be a revolutionary technology that offers specific benefits to the financial world, such as speed, convenience and intermediary and regulation-free transactions. Opponents, on the other hand, are unconvinced and are concerned that it may lead to another *Tulipmania*[2] – a financial bubble that will burst anytime. Concerns have also been raised

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[2] Tulipmania is the first major financial bubble that occurred in the 17th century. For details, see A. Maurits van der Veen, "The Dutch Tulip Mania: The Social Foundations of a Financial Bubble," *Department of Government,*

regarding its potential misuse, which include facilitation of criminal activities such as money laundering.

New financial instruments in the Islamic financial world are always gauged against their compliance with *Shari'ah* law,[3] even though, only approximately 20% of financial activities in the Muslim world are regulated by *Shari'ah* principles. Many Muslims use conventional banking services due to convenience.[4] Nonetheless, the issue of *Shari'ah* compliance remains an instrumental factor since several influential Islamic funds and institutions are formally committed to following *Shari'ah* principles.[5] Moreover, the Islamic financial market is also rapidly growing, and some countries, such as the KSA and the UAE, have officially implemented *Shari'ah* law.

Since cryptocurrencies are relatively new, no authoritative *Shari'ah* body has yet produced any decisive verdict on their legal status. Although some individual scholars and independent bodies have expressed their opinions on the matter, scholars have yet to rule conclusively on whether cryptocurrencies are in fact currencies or a particular asset class. This is important for Islamic tax payments called zakat, and for inheritance.[6] Moreover, most of the opinions are also on a particular cryptocurrency, namely Bitcoin.[7] A guideline/protocol is also required that would suggest how cryptocurrencies possibly comply with the fundamental norms of Islamic law.

College of William and Mary, (2012), accessed July 13, 2019, <http://www.maurits.net/Research/TulipMania.pdf>

3 *Shari'ah* is the Islamic legal system. It derives from divine sources, i.e. Qur'an and *Sunnah*. Generally speaking, the divine sources provide a broad legal framework while its exact application is subject to human interpretation. Historically speaking, Islamic scholars who gained authority through popular acceptance derived Islamic laws from the Holy Scriptures by issuing rulings known as *fatwas* on particular issues. It creates a legal arbitrage when there is no consensus between the scholars. Resultantly, different Islamic countries have different interpretations of the Islamic law; GCE countries predominantly follow the interpretation of the *Hanbalite* school of thought, with the exceptions of Pakistan that follows the *Hanafi* school of thought and Malaysia that follows the *Shafi* school of thought. Therefore, as held in the case of Beximco Pharmaceuticals Ltd and others v Shamil Bank of Bahrain EC EWCA (2004) Civ 19, *Shari'ah* law cannot be understood as a conventional legal system since a unified version of it is not available. Having said that, several attempts have been made in modern times to produce unified fatwas, especially to deal with international Islamic financial affairs. AAOIFI is one of these initiatives; it is a body of prominent contemporary Islamic scholars that seeks to standardise *Shari'ah* rulings on financial affairs. Although it does not possess direct control over any governmental or financial institute, as mentioned, most of the prominent Islamic scholars of the current world are involved in the issuance of its standards; thus, it holds a certain degree of authority. There are some other bodies such as the Islamic *fiqh* academy, a project of the OIC and IDB, and the Islamic *fiqh* council, a fatwa issuing body of the World Muslim League that regularly publishes *fatwas* on contemporary issues. The Ottoman Empire also attempted to codify Islamic commercial law according to the Hanafi school of thought, which came to be known as *Majallah*.

4 "Islam and Cryptocurrency, Halal or Not Halal?," *Al Jazeera*, Doha, April 8, 2018, accessed July 13, 2019, <https://www.aljazeera.com/news/2018/04/islam-cryptocurrency-halal-halal-180408145004684.html>

5 ibid.

6 Ibid.

7 ibid.

This article will examine the legal validity of cryptocurrencies under Islamic law and provide an insight into how cryptocurrencies can possibly comply with its fundamental norms. This will be done by determining whether cryptocurrencies qualify as money or other asset class from an Islamic property law perspective. This article will further analyse the regulatory issues and the concerns of contemporary scholars associated with this new phenomenon.

Islamic property law: a brief overview

The concept of Mal

Mal is an Arabic word that refers to everything capable of being owned.[8] It can be defined as a thing that humans naturally desire and can be stored as a reserve for times of necessity.[9] It includes movables (*manqul*) such as *naqd* (money) and *árd* (commodity) and immovables (*ghayr manqul*) such as houses and land.[10] To classical jurists, all legal properties share five essential characteristics: (1) it is naturally desired by humans; (2) it can be owned and possessed; (3) it can be stored; (4) it is beneficial in the eyes of Islamic law and (5) the ownership of it is assignable and transferable.[11]

Unlike a majority of scholars, however, early Hanafi scholars stipulated that the property must be a physical one. Therefore, they do not generally consider usufruct (*manfa'ah*) as property.[12] Usmani, however, argues that the early Hanafi position was influenced by the perceptions of the people (*'urf*) of the time. According to him, it is one of the factors that determine what qualifies as property. He further argues that some modern Hanafi jurists consider electricity and gas as property despite these being intangible in nature. Therefore, to him, intangibles can be considered as property if they are desirable and retrievable.[13] The Islamic Fiqh Academy[14] in its 43rd resolution in 1988, recognised intangibles such as business and corporate names, trademarks, literary productions, inventions or discoveries as assets and rights that are protected under *Shari'ah*. AAOIFI has also recognised intangibles as property under standards 17, 35 and 42.[15]

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8 Majd al-Din Al-Firozabadi, "*Al-Qamus al-Muhit"* (Dar al-Hadith, 2008), 1565.

9 Ali Haidar, *Durarul Hukkam fi Sharhe Mijallatil Ahkam*, (Dar al-Ilm al-kutub, 2003), 115.

10 ibid.

11 Muhammad Wohidul Islam, "Al-Mal: The Concept of Property in Islamic Legal Thought," *Arab Law Quarterly* 14, no. 4 (1999): 365.

12 ibid.

13 Muhammad Taqi Usmani, *Fiqh al Buyu'* (Maktabat Maárif al-Quran, vol 1, 2015), 25; and Muhammad Taqi Usmani, *Buhuth fil Qaday al Fiqh al Muasarah,* Dar al-Qalam, vol. 1, (2013), 94.

14 The Islamic Fiqh Academy is a project of the Organization of Islamic Cooperation (OIC). It comprises of the world's leading Islamic scholars and regularly publishes fatwas on important issues. Accessed July13, 2019, <http://www.iifa-aifi.org/>

15 Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), *Accounting, Auditing and Governance Standards*, Dar al-Maiman, (2015), 463, 865, 1040.

Naqd

Naqd refers to chattel.[16] The term has been used to refer to gold and silver coins in classical Islamic legal books such as the *Majallah,*[17] the civil law code of the Ottomans. Al Ghazali stated that God created gold and silver coins as equitable and just media of exchange[18]. They are desired and valuable not because they are beneficial as such but because they are a stable store of value and secure medium of exchange.[19] Similar to Al-Ghazali, many classical jurists[20] only considered gold and silver as money because the Holy Scriptures, among others,[21] only consider gold and silver as *naqd*.[22] However, Abd al-Barr argues that this was because the Muslims of the prophetic era only used Roman Dinars and Persian Dirhams as money.[23] Following this line of

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16 Firozabadi , "*Al-Qamus al-Muhit,"* 1640.

17 Haidar, Durarul Hukkam, 117.

18 ibid

19 Abu Hamid Al-Ghazali, *Ihya Ulum al-Din*, Beirut: Dar Ibn al-Hazm, (2005), 1433.

20 For example, among 'Hanafi scholars, Abu Hanifah and Abu Yusuf; past Maliki scholars such as Ibn Nafi', al-Adawi and Shaykh 'Alish, Mufti of the Maliki madhhab (school) in Egypt.., Shafi'i scholars such as al- Ghazali, al-Nawawi, al-Suyuti and al-Maqrizi; One of the two Hanbali schools; the views of some tabi'in (Followers) such as Mujahid and Nakha'i.' Muhammad Aslam Haneef and Emad Rafiq Barakat, "Must Money be Limited to Only Gold and Silver: A Survey of Fiqhi Opinions and some Implications," *JKAU: IE* 19, no.1 (2006): 21–34, 26.

21 Haneef and Barakat summarise the reasons in eleven points:
'1. Sunnah Taqririyyah, ie the Prophet approved the use of gold and silver in Makkah and Madinah. This according to their view makes gold and silver as money "hukm shar'i" and hence, only gold and silver can be used as money.
2. Mu'amalah and 'ibadah maliyyah is based on gold and silver. For example, calculation of zakah on money is based on gold and silver. Also diyah or blood money, hadd al-sariqah (theft punishment) and exchange transactions are based on gold and silver calculations.
3. Verses in al-Qur'an indicate that gold and silver are to be used as money. For example, al-Tawbah: 34 prohibits the hoarding of gold and silver which indicates that gold and silver function as money; Al-Imran: 75, 91 showing the function of gold as a store/measure of value; Yusuf: 20 indicating silver as a measure of value and medium of exchange; al-Kahf: 20 where silver is used as a medium of exchange.
4. Ijma' al-Sahabah (consensus of the companions of the Prophet) for example the guided caliphs (al-khulafa' al-rashidin) also accepted gold and silver as money.
5. Gold and silver are money by nature.
6. There is a hadith reported in Ibn Majah which prohibits the destruction of the monetary system of Muslims (interpreted as gold and silver).
7. Shafi'i and Maliki scholars limit the 'illah of thamaniyyah only to gold and silver, so other things cannot be money.
8. The fact that gold and silver are prohibited for certain other uses like ornaments for men indicate that its function is to be primarily as money.
9. In order to achieve justice (an objective of al-shari'ah) in the monetary system, you need a stable measure of value and since gold and silver are relatively stable, they must be used as money.
10. Zakah is imposed on gold and silver in whatever form and use (except some limited amounts for jewellery). In addition, hoarding of gold and silver (iktinaz) is also prohibited. The idea here is to keep gold and silver in circulation, hence, gold and silver perform the function of money.
11. Although fulus may have been used in a very limited amount during the time of the Prophet, peace be upon him, there is no hadith on riba applied to fulus. Also one cannot find a hadith which imposes zakah on fulus.' ibid.

22 'In addition to the above, we can find some contemporary scholars who limited money to only gold and silver such as Shaykh Ahmad al-Khatib, Shaykh 'Abd al- Rahman al-Sa'di (d1376A.H), Ibn Badran, Ahmad al-Husayni (d.1332/1914), Shaykh al-Muti'I, Shaykh Muhammad Amin al-Shanqiti (d.1393A.H), Taqi al-Din al-Nabhani, Muhammad Baqir al- Sadr, Muhammad Makhluf, Hassan Ayyub and Nasir Farid Wasil.' ibid 26.

23 Adam Faraz, "Bitcoin: Shariah Compliant?," Amanah Finance Consultancy, accessed July 13, 2019 <http://darulfiqh.com/wp-content/uploads/2017/08/Research-Paper-on-Bitcoin-Mufti-Faraz-Adam.pdf>.

argument, some jurists[24] argued that any material can be considered as money if it possesses the same characteristics of gold and silver coins. Al-Shafi further argued that the essential characteristics of money are public acceptance as a medium of exchange and possessing intrinsic value (*thamaniyyah*). However, for Ibn *Taymiyyah*, public acceptance is the only essential element of money. He argues that Umar, the second caliph of Islam, wanted to introduce camel skin as a medium of exchange.[25] To the Hanafi jurists, the essential elements of money are *Ta'amul* (common usage) and *Istilah* (common agreement).[26] Imam Ahmad bin Hanbal is also of the view that monetary value can also be attributed based on public acceptance.[27]

Naqd v árd

In Islamic law, trading in currencies is governed by special rules[28] that are not applicable for trading in commodities (*úrud*).[29] Therefore, it is necessary to distinguish *naqd* from *árd*. Usmani argues in his famous judgment[30] that money is different from commodity in the following three aspects: a) money has no intrinsic utility, whereas 'commodity can be utilised directly'; b) the price of a commodity may vary because of its condition but that is not applicable to currencies; for instance, an old dirty $100 bill has the same value as a brand new one, whereas an over ripened apple is not necessarily as valuable as a freshly picked one; c) a commodity is uniquely identifiable, whereas that is not possible or necessary for a currency; if a $100 bill is stolen, for example, the thief is not obliged to return the same bill. A substitute of the same amount would be legally acceptable, whereas a buyer can refuse to accept a car of the same description if the seller cannot give him the one he reserved.

Usmani further argues that because of these distinctions, currencies are treated differently from commodities in two ways: a) currencies itself, unlike commodities, should not be the subject matter of trading; b) even if currencies are exchanged in exceptional circumstances, 'the

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24 Among Tabiyin Laith ibn Sa'ad and Al-Zuhri; among the classical jurists al-Shaybani, al-Hattab, al-Wansharisi, Ibn Taymiyyah, Ibn Qayyim, Ibn Hazm; and the majority of contemporary scholars including Yusuf al-Qaradawi, Muhammad Taqi Usmani, Abd Allah Sulayman al-Mani as well as the views of contemporary *Fiqh* councils in the Muslim world. Haneef and Barakat, "money," 28.

25 However, he could not do so for the fear that it would cause a shortage of camels, Abdullah b. Sulayman b. Mani, "Al-Waraq al-Naqdi: Tarikhuhu, Haqiqatuhu, Qimatuhu, Hukmuhu," (1971), accessed July 13, 2019. <http://al-manee.com/old/upload/wa.pdf>

26 Shams al-Din Al-Sharakhsi, *Al-Mabsut* (Dar al-Maáref, vol. 12, 1989), 183.

27 Mani, "Al-Waraq al-Naqdi," 6.

28 Such as counter values must be exchanged on the spot; see the details of the rule of currency trading in *Shari'ah* standard no.1 of AAOIFI; AAOIFI, "Accounting," 47.

29 *Úrud* is the plural form of *árd*, which means commodity.

30 The judgment on interest delivered by the Supreme Court of Pakistan.

payment on both sides must be equal, so that it is not used for the purpose it is not meant'.[31] He concurs with Ludwig Von Mises and Kien's theory that 'money is neither a consumption good nor a production good; it is a medium of exchanges'.[32]

The Concept of Cryptocurrency

A generally accepted definition for the term 'cryptocurrency' is not available, but most policymakers consider it to be 'a subset or a form of virtual or digital currencies'.[33] Based on the definitions suggested by the World Bank and FATF, Houben defines cryptocurrency as

> *'[A] digital representation of value that (i) is intended to constitute a peer-to-peer ('P2P') alternative to government-issued legal tender, (ii) is used as a general-purpose medium of exchange (independent of any central bank), (iii) is secured by a mechanism known as cryptography and (iv) can be converted into legal tender and vice versa'.*[34]

The term 'cryptocurrencies' should be distinguished from both cryptographic tokens and crypto-securities. 'Cryptographic tokens offer functionality other than and beyond that of a general-purpose medium of exchange.'[35] On the other hand, crypto-securities refer to shared transactions secured by block-chain-based cryptography. Contrariwise, the sole purpose of a cryptocurrency is to exchange value and it has no functionality beyond that.[36] The only connection between these newly developed concepts of crypto-securities, crypto-tokens and cryptocurrencies is that they all utilize block-chain technology.

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31 See for details, para 136 to 146 of the judgment on Interest; See also, Muhammad Taqi Usmani, *The Historic Judgment on Interest: Delivered in the Supreme Court of Pakistan*, (Karachi: Idaratul-Ma'Arif, 2005).

32 ibid, para 144, 78.

33 Robby Houben," *Cryptocurrencies and Blockchain,"* (Brussels: European Parliament, 2018) 23; accessed July 13, 2019, <http://www.europarl.europa.eu/cmsdata/150761/TAX3%20Study%20on%20cryptocurrencies%20and%20blockchain.pdf>

34 ibid.

35 ibid.

36 Max Hillebrand, "*An Introduction to Initial Coin Offerings in Project Finance"* (Baden: Wuerttemberg Cooperative State University, 2017), accessed July 13, 2019, https://www.aparecium.de/app/download/5810645565/An+Introduction+to+Initial+Coin+Offerings+in+Project+Finance_V1.0.pdf>

One of the prominent questions related to cryptocurrencies is regarding their allocation to the traditional categories of property and personal rights. Another regulatory issue is whether it can be considered as a cash equivalent. Under English law, properties can be either real or personal. Personal properties can be further divided into choose in action and choose in possession. Both pure and documentary intangibles are categorised under chose in action.[37] Arguably, cryptocurrencies are pure intangibles. Therefore, English law tends to consider them as choose in action (*Your Response v Datateam*[38]).

However, it can be argued that unlike other pure intangibles, cryptocurrencies do not emerge out of a personal right. Furthermore, they are capable of being stored and are transferable from person to person. Therefore, they do not fit comfortably within the current property law framework. Suggestions have been made for their categorisation as other intangible properties, as indicated in the *Armstrong DLW GMBH v Winnington Networks Ltd*[39] case. At a global level, different countries have adopted different approaches. In Japan, although they are valid legal tender now, the court refused to consider them as property.[40] In the USA, the position is divided; they are considered as money in some states but regarded as commodities in others.[41] In Russia, the Court of Appeal has recently overturned the decision of a subordinate court and the civil law has been accordingly revised and recognises cryptocurrencies as assets.[42] Should they be considered as cash equivalents? There is no global consensus on this query either. In the UK, it is not considered as a legal tender or cash equivalent[43]; however, in Australia for instance, the position is different.[44] What would be the position of Islamic law given such ambiguity in nation-based legal systems? Will cryptocurrencies be considered as valid properties? Do they qualify as money? These issues will be discussed in due course.

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37 Joanna Perkins and Jennifer Enwezor, "The Legal Aspect of Virtual Currencies," *JIBFL* 31 (2016) 570.

38 Your Response v Datateam ,EWCA Civ 281, 13, 27 (2014).

39 Armstrong DLW GMBH v Winnington Networks Ltd. EWHC 10 (Ch) 61 (2012).

40 Dillon Collett, "Cryptocurrency Assets under Insolvency and Personal Property Security Law" Aird Berlis, February 15, 2018, <https://www.airdberlis.com/PDFGeneration/PrintablePublications/cryptocurrency-assets-under-insolvency-and-personal-property-security-law.pdf>.

41 Scott D. Hughes, "Cryptocurrency Regulations and Enforcement in the U.S.," *W.St.U.L.Rev.*45 (2017), Fall, accessed 13 July, 2019, <http://www.scotthugheslaw.com/documents/CRYPTOCURRENCY-REGULATIONS-AND-ENFORCEMENT-IN-THE-US-2.pdf>

42 Alexander Anichkin, "Russian Court Issued the First Ever Decree Recognising Cryptocurrency as Property," CliffordChance,(2018),accessed13July2019<https://www.cliffordchance.com/content/dam/cliffordchance/PDFDocuments/russian-court-issued-the-first-ever-decree-recognising-cryptocurrency-as-property.pdf>

43 HM Revenue & Customs, "Bitcoin and Other Cryptocurrencies" (HM Revenue & Customs Brief, 3 March 2014), accessed July 13, 2019, <https://www.gov.uk/government/publications/revenue-and-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies/revenue-and-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies>

44 The global directors of the law library of Congress, "Regulation of Cryptocurrency Around the World," The Law Library of Congress, June 2018, accessed July3,2019,<https://www.loc.gov/law/help/cryptocurrency/world-survey.php#australia>

Stablecoin

A stablecoin is a cryptocurrency that holds a stable value. The coin is attached to another stable asset such as gold or the U.S. dollar.[45] Each stablecoin has a unique set of mechanisms; however, they generally hold assets as collateral and incentivize the market to trade the coin at the exact value of the designated asset. Some cryptocurrencies, e.g. Tether or TrueUSD, hold actual assets and dollars in reserves that are redeemable in exchange for the token. However, some others, such as Dai have crypto assets in reserve and have a lending system.[46] The rationale behind the stable coin is that due to regulations and restrictions, it is not always easy to circulate dollars or other tangible assets. A substitute that is backed by a dollar or other assets in the form of cryptocurrencies, however, would be easy to circulate without compromising the stable nature of the asset it is substituting. Thus, stablecoins have all the benefits of a cryptocurrency but do not suffer from the volatile nature of typical cryptocurrencies.

Cryptocurrencies from the *Shari'ah* perspective

Does it qualify as money? As discussed above, money (*naqd*) is a type of *mal* under Islamic law. Therefore, it needs to be examined whether cryptocurrencies can qualify as *mal* first. Subsequently, their qualification as money under Islamic law shall be assessed.

Qualification as mal

As discussed, to most jurists, property has five essential characteristics; namely, humans naturally desire it; it can be owned and possessed; it can be stored; it is beneficial in the eyes of Islamic law; the ownership of it is assignable and transferable. Usmani argues that the '*urf* determines what would qualify as property. Cryptocurrencies are in demand, which indicates that it is desirable; they can be owned and virtually possessed and are stored in the block-chain. Moreover, since they are valuable, they are beneficial to people similar to paper money; furthermore, their ownership is assignable and transferable. Therefore, it can be argued that cryptocurrencies can be recognised as properties, provided that they are customarily recognised as property. As discussed initially, the law can dictate the customs ('*urf*). Therefore, if a cryptocurrency is recognised in a jurisdiction, that should qualify as property under Islamic law.

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[45] Dennis Sahlstrom, "What is a Stable Coin?," *Toshi Times*, 2019, accessed July18, 2019 <https://toshitimes.com/what-is-a-stablecoin/>.

[46] ibid.

Accordingly, for example, it qualifies as property since it is considered as property in Russia despite not being so in Iran, Algeria or Egypt.[47]

Qualify as money

As discussed earlier, to a majority of classical jurists, the only types of money were gold and silver. Even in modern times, some jurists argue that fiat money should only be considered as valid money if it is backed by gold or silver. However, to Hanafi scholars, anything can be regarded as money as long as it fulfils the conditions of *Ta'amul* (common usage) and *Istilah* (common agreement). To Ibn Taymiyyah, the condition is public acceptance. Some others further stipulate that it must hold some intrinsic/extrinsic value (*thamaniyyah*).

To modern jurists such as Usmani, these conditions can be settled by the authorities by enacting laws. Therefore, it can be argued that cryptocurrencies can be regarded as money in two ways – if it naturally gains public acceptance or if the concerned authorities recognise it as money. If cryptocurrency faces public demand, naturally, it will gain value and thus fulfil the conditions of *Thamaniyyah*. Otherwise, as discussed above, the relevant authority can impose extrinsic value to it.

Commodity v Currency

Cryptocurrencies, in the financial world, are commonly considered as a commodity rather than currency because it lacks price stability and is not typically used for day-to-day transactions. Its consideration as a commodity under Islamic law is a matter of argument. As discussed earlier and as argued by Usmani, there are three predominant differences between currencies and commodities. Considering these arguments and conditions, cryptocurrencies resemble currencies more than commodities. Therefore, cryptocurrency transactions should be subject to special rules of currency exchanges.[48] On the other hand, Kahf doubts whether it should be considered as an asset-class at all, let alone as commodity. He argues that though cryptocurrencies are capable of being a legal tender[49] subject to approval from a government, it

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47 The global directors of the law library of Congress, "Regulation of Cryptocurrency Around the World, "*The Law Library of Congress*, June 2018, accessed July 3, 2019, <https://www.loc.gov/law/help/cryptocurrency/world-survey.php#australia>

48 AAOIFI, "Accounting," 47.

49 The Bank of England states, 'Legal tender has a very narrow and technical meaning, which relates to settling debts. It means that if you are in debt to someone then you can't be sued for non-payment if you offer full payment of your debts in legal tender. What is classed as legal tender varies throughout the UK. In England and Wales, legal tender is Royal Mint coins and Bank of England notes. In Scotland and Northern Ireland only Royal Mint coins are legal tender…[Throughout the UK,] there are some restrictions when using the lower value coins as legal tender. For example, 1p and 2p coins only count as legal tender for any amount up to 20p. 'Bank of England,

cannot possibly be a valid other asset class since it is a fabricated asset. He draws an analogy between cryptocurrencies and indexes and options.

The Islamic Fiqh Academy declares that both indexes and options are not *Shari'ah*-compliant. They argue that although both are financial rights, they are fabricated assets and are not supported by any tangible asset that may generate real value/asset. To Kahf, 'cryptocurrencies are much lesser of assets than options and indexes as they are purely virtual and represent ownership of nothing.'[50] Moreover, cryptocurrencies have been created for transactions. It has no other use except transactions and one of the reasons for its high demand is its capacity to control free global transaction. Therefore, considering it as a commodity would undermine its relevance.

Issue of Gharar

Cryptocurrencies are complex intangibles and its exact nature is not easy to understand. Therefore, there is an issue of *jahalah*[51] here. Furthermore, as cryptocurrencies are exclusively digital and not backed by tangible assets, any technological failure would have disastrous consequences. A combination of these may arguably cause excessive *gharar*[52]. However, it can also be argued that these issues are not fatal since they can be adequately and effectively addressed. Furthermore, *jahalah* should not be an issue among experts but with the layperson. Therefore, *jahalah* does not make cryptocurrencies illegal assets as such; however, trading it with a layperson may be voidable. This is a regulatory issue, which will be discussed later.

Furthermore, *jahalah* is problematic because it potentially leads to the exploitation of vulnerable parties and causes market instability. As discussed earlier, widespread practice (*úrf*) or appropriate law/regulations of cryptocurrency may eradicate these issues and thereby solve the problem of *jahalah*.

"What is Legal Tender," accessed July 18, 2019, <http://edu.bankofengland.co.uk/knowledgebank/what-is-legal-tender/>

50 For details, see Monzer Kahf, "Fatawa Money, Currencies, Gold, Sarf," (2000–2017), accessed July 18, 2019, <http://monzer.kahf.com/fatawa/FATAWA_CURRENCIES_GOLD_COMMODITIES.pdf>

51 *Jahalah* means ignorance. Excessive ignorance in the essence of the contract renders it void. What would amount to excessive ignorance is determined by the practices ('*urf*) of that particular business of the community or jurisdiction; AAOIFI, "Accounting," 775.

52 *Gharar* refers to uncertainty and fraud. It refers to the uncertainty and ignorance of one or both parties regarding the substance, attributes or the object of sale. It also refers to doubt regarding the existence of the object at the time of sale. 'The difference between *gharar* and *jahalah* is that *jahalah* refers to [the] lack of knowledge about the details of something, in spite of knowledge about its occurrence. In this sense, *gharar* is more comprehensive than *jahalah*. Therefore, all things that are unknown involve *gharar*, whereas not all things that involve *gharar* are unknown.' AAOIFI, "Accounting," 786.

The Approach of Contemporary *Shari'ah* Scholars

Islamic scholars hold conflicting views regarding cryptocurrencies. Although several independent global bodies legitimize transactions in cryptocurrencies on certain conditions, no authoritative body has legitimized it as of now. On the other hand, some very influential figures such as the grand Mufti of Egypt has issued fatwas that the transactions in cryptocurrencies are not *Shari'ah*-compliant.[53] Many Muslim countries take an ambivalent stance and are worried about the potential for instability but are simultaneously unwilling to lose the opportunity of benefitting from the new technology. Saudi Arabia recently banned trading in cryptocurrencies.[54] The UAE has not banned it yet, but its central bank warned citizens about the risks associated with Bitcoin.[55] Kahf, a California-based academic, is among the first scholars to argue that Bitcoin could be considered as a legitimate medium of exchange despite it being exposed to manipulation.[56]

Some South Africa-based Islamic scholars have since argued in favour of cryptocurrencies because, in their view, it has gained social acceptance (*Islilah*) and is commonly used (*Taámul*).[57] In October 2017, however, the Durban-based organisation Darul Ihsan Centre refused to endorse cryptocurrencies due to suspicions of it being linked to pyramid schemes.[58] Some scholars in Saudi Arabia, Turkey, India and Britain also argue that trading in it should not be permissible.[59]

To summarise, contemporary scholars have approached the issue from three different perspectives – through the lens of strict property laws, through regulatory perspectives, and through the objectives of the *Shari'ah*. These approaches will be briefly analysed below.

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53 Al Jazeera, "Islam and Cryptocurrency,"

54 "Virtual Currencies Not Approved in Saudi Arabia, Government Committee Warns," *Arab News*, August 12 2018), accessed July 13, 2019, <http://www.arabnews.com/node/1355246/saudi-arabia>

55 Al Jazeera, "Islam and Cryptocurrency,"

56 He later modified his opinion and argued that unless it is a legal tender, it is not a permissible medium of exchange. He also argues that it is not a valid asset class. accessed July18, 2019, <http://monzer.kahf.com/fatawa/FATAWA_CURRENCIES_GOLD_COMMODITIES.pdf>

57 Mahomed Ziyaad and Mohamad Shamsher, "*Crypto Mania: The Shariah Verdicts,"* Centre for Islamic Asset and Wealth Management 3 (2017): 35, accessed July13, 2019, <https://www.inceif.org/archive/wp-content/uploads/2018/04/CIAWM-Vol-3_view-only.pdf>

58 Al Jazeera, "Islam and Cryptocurrency."

59 ibid.

The strict property law perspective

Those who argue that cryptocurrencies are a valid medium of exchange generally discuss the issue from a strict property law point of view. The Shariyah Review Bureau (SRB),[60] for example, argues that since cryptocurrencies are meant to serve as a p2p payment system and have been regarded by people as a payment system, they can be considered as currencies. Based on the Hanafi opinion, they argue that anything can be considered as currency as long as it possesses *taámul* and *istilah*. To them, 'the *Ta'amul* and *Istilah* among users of these coins is that of a currency and medium of exchange'.[61]

They further argue that cryptocurrencies that have wider acceptance should be regarded as currencies by virtue of *Úrf al-áam* (widespread custom), and those that are only accepted in their own networks are currencies by virtue of '*Urf al-Khas* (exclusive custom).[62] As discussed initially, according to Abu Hanifa and Abu Yousuf, exclusive custom is sufficient to establish *Ta'amul* and *Istilah*.

The regulatory perspective

As has already been discussed in detail, cryptocurrencies are a very sophisticated class of assets and few people can actually understand its complex mechanism. Therefore, there is an element of *gharar* and *jahala* in it. Some concerns are also raised about their misuses such as using those for money-laundering and drug trafficking.[63] Scholars such as Al-Hakim argue that such

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60 *Shariyah* Review Bureau ("SRB") is based out of Bahrain and licensed by the Central Bank of Bahrain. It is one of the leading *Shari'ah* Advisory service providers with presence in more than 12 countries, including US, Europe, Africa, GCC and Asia. It has been serving the Islamic financial market for over 13 years. Accessed July 19, 2019, <https://shariyah.com>

61 *Shariyah* Review Bureau, "The Shariah Factor in Cryptocurrencies and Tokens,"Shariyah Review Bureau, 2018), accessed July 18, 2019, <https://shariyah.com/wp-content/uploads/2019/05/The-Shariah-factors-in-Cryptocurrencies-and-Tokens.pdf>

62 '*Al-'Urf al-Khas* (exclusive custom) refers to a practice or understanding exclusive to specific people. This specificity can be a result of location, profession, membership or agreement among a group of people'. ibid.

63 'According to a study...approximately one-quarter of Bitcoin users and one-half of Bitcoin transactions are associated with illicit activity. … Moreover, a 2018 study…found a fivefold increase in the number of large-scale illegal operations working on the Bitcoin blockchain between 2013 and 2016. By analyzing the history of more than 500,000 Bitcoins, the organizations identified 102 criminal entities, which included dark-web marketplaces, ponzi schemes and ransomware/malware attackers', Rachel Wolfson, "Tracing Illegal Activity Through The Bitcoin Blockchain To Combat Cryptocurrency-Related Crimes" Forbes, November 26, 2018, accessed July 18, 2019, <https://www.forbes.com/sites/rachelwolfson/2018/11/26/tracing-illegal-activity-through-the-bitcoin-blockchain-to-combat-cryptocurrency-related-crimes/#7761104233a9 >. See also Sean Foley, Jonathan R. Karlsen and Tālis J. Putniņš, "Sex, Drugs, and Bitcoin: How Much Illegal Activity is Financed through Cryptocurrencies?," Review of Financial Studies, (2018), accessed July 19, 2019, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102645>

concerns render cryptocurrency illegal.[64] As mentioned above, the Grand Mufti of Egypt argues that cryptocurrency is illegal because it is not regulated by the authorities and hence is more likely to be used for illegal purposes. The Turkish religious authority (*Diyanet*) has expressed similar views.[65]

The *Shari'ah* perspective

As has been already discussed, the majority of the scholars of the classical era only considered gold and silver as money. Similarly, UK-based Saudi scholar Al-Haddad argues that only God has the right to create money; therefore, creating a new type of money out of nothing is not permissible.[66] He further argues that it also causes unfairness, as powerful institutions can manipulate and exploit the system and weaker parties would be unfairly prejudiced. He elaborates on the historical development of monetary systems and argues that fiat money was originally accepted because it represented gold. However, it was later forcefully changed by the Nixon shock.[67]

Currently, the fiat monitory system is at the mercy of powerful nations; the US government, for instance, can produce as much US Dollars as it wants without causing inflation while the weaker countries do not enjoy such freedom. He stated that even some secular scholars are critical of the current monetary system. To him, cryptocurrencies that are not backed by tangible assets are the next level of such unfairness. Therefore, it should not be permitted. However, he accepted that fiat money is permitted when it is a legal tender due to necessity. Similarly, if cryptocurrencies become legal tender, then it should be allowed for use. However, to him, the entire idea does not fit within the broader Islamic objectives of justice and fairness.[68]

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64 "Saudi Cleric Says Digital Currency Bitcoin is Haram in Islam," *Morocco World News*, Rabat, December 7, 2017, accessed August 18, 2019, < https://www.moroccoworldnews.com/2017/12/235779/assim-al-hakeem-digital-currency-bitcoin-haram-islam-cryptocurrencies/ >

65 Duncan Hooper, "Bitcoin 'not compatible with Islam', Turkey's religious authorities say" *EuroNews* ,Turkey, November 28 2017), accessed August 18, 2019, < http://www.euronews.com/2017/11/28/bitcoin-is-not-compatible-with-islam-turkeys-religious-authorities-say >

66 Haytham Al-Haddad, "Ruling on the Trading in Cryptocurrencies" *Al-Durar al-Sunnah*, January 24 2018, accessed June 16 2019<https://dorar.net/article/1982/حكم-التعامل-بالعملة-الإلكترونية-المشفرة:-البتكوين-وأخواتها>

67 In 1971, Nixon, the then president of the United States, unilaterally abolished the Bretton Woods System, where the US dollar had a fixed exchange rate against gold ($35 per ounce) and other currencies had a fixed exchange rate against the US dollar. See, for details, United States Department of State, "Nixon and the End of the Bretton Woods System, 1971–1973," *Office of the Historian*, accessed 19 July, 2019, <https://history.state.gov/milestones/1969-1976/nixon-shock>

68 Haddad, "Cryptocurrencies."

It is evident that those who recognise cryptocurrencies as a valid class of assets consider it from a strict property law point of view, whereas those who are not in favour of this argue from regulatory and moral points of view that are consistent with the objectives of *Shari'ah*. Proponents responded to the opponents by arguing that the *Shari'ah* position regarding worldly affairs is that everything is permissible except if it is proven to be *haram*.[69] Intangibles such as electricity, for example, are a new type of asset that was not known to the early jurists. Other intangible assets, such as trademarks and intellectual properties as previously discussed have been recognised as legal assets by modern jurists.

Abu-Bakar further argued that using something for an unlawful purpose does not make it unlawful as such; making alcohol from grapes is *haram* but production of grape is not *haram*.[70] He further argues that US dollars are the most widely used currency for illegal purposes but it is not forbidden to trade in US dollars. Furthermore, as Usmani pointed out, the critical factor in identifying an asset is custom (*úrf*). If something is considered as a valuable asset in society, it should be a valid asset in Islam. It can be argued that a similar principle should apply to cryptocurrencies.

The opposing view to this is that the potential abuse of a valid *mal* can render invalid its legality. Drugs are a prime example of this; they are tangible assets that are desired and valuable but are not permissible *mal* since they are harmful to the society under the *Shari'ah*. Similarly, as cryptocurrencies suffer from serious regulatory issues and do not align with the overall notion of justice in Islam, it can be argued that they are not a valid class of assets.

Moreover, a contemporary cryptocurrency is not comparable with a US dollar because the latter is a legal tender that is allowed for use due to necessity and the former has not attained that status yet.

Furthermore, as already discussed, cryptocurrencies are not capable of being traded as commodities since they are created as media of exchange and serve no other purpose. Therefore, trading them as commodities will resemble gambling since people will buy a useless token in the hope that its price will increase.

Moreover it can be argued that as financial technology, cryptocurrencies provide certain benefits, such as entirely digital, prompt and intermediary-free p2p transactions, distributed

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[69] Mufti Muhammad Abu-Bakar, "Shariah Analysis of Bitcoin, Cryptocurrency, and Blockchain," Blossom Finance, (2017), accessed July19, 2019, <https://www.thescanner.info/wp-content/uploads/2018/05/Shariah-Analysis-of-Bitcoin-cryptoeconomy.pdf>

[70] ibid.

ledger system and data protection. Arguably, it has valuable prospects with immense potential and can eventually be used by governments in the future. However, it is uncertain as to how long contemporary unregulated and non-governmental cryptocurrencies will survive in the financial market.

From an Islamic law perspective, cryptocurrencies may qualify as property (*mal*) if they possess specific essential characteristics - i.e. if they are naturally desired by human beings; if they can be owned, possessed and stored; if they are beneficial in the eyes of Islamic law; and if their ownership is assignable and transferable.

Some jurists argue that it is '*urf* that determines what would qualify as *mal*. Arguably cryptocurrencies possess all these characteristics, and furthermore, they are recognised as property in several jurisdictions. English law, for instance, considers them as property as it is a chose in action (being either pure intangibles or other intangibles). Some scholars are, however, of the view that cryptocurrencies are not intangibles like a trademark or a patent but a fabricated asset. That will not prevent them from being considered as money (*naqd*) – a particular type of *mal* – if they become a legal tender. However, they argue that cryptocurrencies cannot be considered as any other type of *mal*, e.g. a commodity.

Further it can be argued that cryptocurrencies may achieve the status of *naqd* either by gaining public acceptance or by being recognised as a legal tender or money by a concerned government. If public acceptance is achieved, cryptocurrencies will gain value naturally, thus fulfilling the essential condition of *Thamaniyyah*. Otherwise an extrinsic value may need to be imposed by a relevant state authority.

Conclusion

Cryptocurrencies, in the financial world, are commonly considered and traded as a commodity. However, under Islamic law, money and currencies differ from commodities; a special set of rules governs former's trading, eg currencies must be exchanged on the spot and no deferred exchange is allowed. As cryptocurrencies have characteristics similar to ordinary currencies, it can be argued that they cannot be traded like commodities; the rules of currency trading must be observed in cryptocurrency trading.

Cryptocurrencies are complex and not easily understandable. Therefore, there is an issue of *jahalah* here. Furthermore, cryptocurrencies are digital and not backed by tangible assets; these factors may arguably cause excessive *gharar*. However, it can also be argued that these issues are not fatal since they can be adequately and effectively addressed through regulations.

Asset-backed stablecoins can be considered as the digital certificate or bond of assets. If the underlying assets are *Shari'ah*-compliant, therefore, trading of those would be *Shari'ah*-compliant as well. Since most asset-backed stablecoins deal with gold and other fiat currencies, their protocols, ICOs and block-chains should meet the Islamic guidelines of currency exchange as prescribed by AAOIFI. Therefore, it can be argued that asset-backed stablecoins can be a way forward for the private sector until the standard cryptocurrencies become legal tenders through legislative measures.

5

Historical Basis of Modern Ombudsman: A Critical Inquiry

Azizun Nahar[1]

Contemporary practice of establishing Ombudsman in different public, private and social sectors to resolve individual grievances is increasing steadily. Critical appreciation of this fact ineludibly generates intellectual thirst to explore its origin. This article endeavours to accomplish such convoluted task in the historical panorama of multicultural grievance mechanisms conventionally perceived as precursors to Ombudsman. Critically dissecting those precursors, this article intends to demonstrate that the establishment of Swedish Hogste Ombudsmannen or the Highest Ombudsman by King Charles XII was influenced by the Ottoman office of Qadi-al-Qudat splendidly assuming the roles of the Islamic Institutions "Diwan-i-Mazalim" and "Hisbah", pioneered by Islam long ago. To advance arguments in support of this, this article has portrayed the locus, composition, powers, functions and evolution of these institutions in the variegated prism of historicity. More particularly, this article has critically elucidated the historical chronicles along with its trajectories in the intricate tapestry of Ottoman legal system leading Charles XII to establish Hogste Ombudsmannen. Further it is concluded that the very office of Qadi-ul-Qudat playing the roles of Mazalim and Muhtasib has invariably influenced Charles XII, during his exile in Ottoman Turkey, to recast the Ottoman model in Swedish mold.

Introduction

Pedantically appreciating the manifold mechanisms devised by different civilizations to prevent maladministration and to protect the rights of people from the administrative excess, it is not surprising to argue that the modern concept of 'Ombudsman' has multicultural roots. Historically, as an indigenous Swedish, Norwegian and Danish term, '*Ombudsmand*' is etymologically embedded in the very Old Norse word '*umboosmaor*' signifying

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"representative". In modern parlance, ombudsman, ombudsperson or ombud essentially investigates grievances of maladministration in public, private and social sectors though its origin is inextricably related with the investigation of maladministration by government official. Despite the diverse evidence of primordial and multicultural precursors to Ombudsman the very first official Ombudsman, the *Hogste Ombudsmannen* or the Highest Ombudsman was established in Sweden by warrior King Charles XII in 1713. Most importantly, the first formal Parliamentary Ombudsman also took its birth in Sweden in the year of 1809. A critical survey of historical chronicles regarding the establishment of *Hogste Ombudsmannen*, the predecessor of Parliamentary Ombudsman, reveals that King Charles XII lost the battle of Poltova against the Russian Czar, took refuge in Turkey and from there continued to rule Sweden, a country severely suffering from economic degeneration, administrative disarray, territorial clashes with neighbours and so on.

During his exile in Turkey, Charles XII came to learn about the overall functioning of *Qadi-al-Qudat* assuming the roles of *Diwan-al- Mazalim* and *Hisbah*. He was entrusted with the powers to prevent maladministration, remedy the infringements and resultant injuries inflicted upon individuals. Since Sweden was passing through an acute crisis, Charles staying thousands of miles away from his native land, introduced a series of wide-ranging policy and administrative reforms through a decree signed on October 26, 1713. One of the stunning reforms was the establishment of *Hogste Ombudsmannen*. Given this backdrop, this article intends to conduct a inquiry as to whether Charles XII was influenced by the functioning of the aforesaid institutions in establishing the office of Highest Ombudsman. In accomplishing this endeavor, this article will also critically elucidate the historical development of several prime multicultural precursors to Ombudsman especially "Islamic Institutions- *Diwan-al-Mazalim* and *Hisbah*", composition, powers and evolution of these Islamic institutions and to demystify the journey from these institutions to the establishment of the Highest Ombudsman.

Historical Basis of Modern Ombudsman- A Thorny Enigma

Undeniably each and every generation has, to a certain extent, contributed to the flourishment of different branches of knowledge. Transmission of knowledge from one generation to another has paved the path for further advancement. Meticulously observing this phenomenon containing both vertical and horizontal dimension, one author has rightly asserted:

> *AS THE SAYING GOES, there is nothing new under the sun. Since time immemorial, human beings have inherited existing knowledge from previous generations, improved upon it by adapting it to their present needs, and transmitted it to future generations. Besides this vertical transmission, the transfer of knowledge also occurs horizontally from one place or culture to another by the continual exchange of ideas. Human civilization has been built over a period of about seven millennia with its beginnings along the banks of Shatt al-Arab, the Nile, and the Indus. Knowledge has been gathered through patient observation, experience, as well as serendipity.*[2]

Scrupulously considering the historical chronicles and its trajectories, it can be articulated that smart ideas always find new avenues to flourish.[3] Unsurprisingly this historically proven thought found its recognition in the establishment of ombudsman in Sweden as well. The very concept of Ombudsman in its modern form, by and large, is of Scandinavian origin but it will probably be unwise to deny the existence of certain ancient as well as multicultural roots regarding the idea of having a body like Ombudsman.[4] One glaring instance can be cited from the Chinese "Ritual of Chou" extant during 3rd or 4th century B.C.

> *By means of the lung stone he gives an outlet to common people in distress. If anywhere, far or near, there is anyone without brothers or without children, old or young, who wants to report a grievance to the higher authorities, but his headman will not transmit the complaint, such a one is to stand upon the lung stone for three days, and any gentleman (shih) who hears his words must report them to the higher authorities and bring the blame home to the headman.*[5]

Grievance bells, a system for redressal of injustice, are reported to be in existence during 3rd and 4th centuries in China, in Japan in 647, in the Khitan or Liao Empire in 1039, writings of Islamic

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2 Dilnawaz A. Siddiqui, "Middle Eastern Origins of Modern Sciences," in *Muslim Contributions to World Civilization*, eds. M. Basheer Ahmed, Syed A. Ahsani, Dilnawaz A. Siddiqui, (Richmond: International Institute of Islamic Thought and Association of Muslim Social Scientists, 2005), 53.

3 Government of Islamic Republic of Pakistan, Wafaqi Mohtasib (Ombudsman)'s Secretariat, *Mohtasib(Ombudsman)'s Annual Report* (Islamabad: Wafaqi Mohtasib (Ombudsman)'s Secretariat, 1998), 2.

4 Edward A Kracke Jr., "Early Visions of Justice for the Humble in East and West," *Journal of the American Oriental Society* 96, no. 4 (1976): 492-498; J. R. Perry, "Justice for the Underprivileged: The Ombudsman Tradition of Iran," *Journal of Near Eastern Studies*, 37, no. 3, (1978): 203-215; Arthur Waley, "The Lucky Stone and the Lung Stone," *Bulletin of the School of Oriental and African Studies* 9, no. 3 (1938): 729-732.

5 Waley, "Lucky Stone," 729.

scholars in the 11th century [*though the origin of mazalim can evidently be traced back to the era of Prophet Muhammad (PBUH)*[6]], India in the 12th century and in Siam (Thailand) and Europe in the 13th century.[7] Another instance of grievance mechanism was documented in the Korean historical records which revealed that all citizens during the reign of Joseon dynasty especially under the leadership of King Taejong could advance the claims for justice for the infliction of injustice or warn the king of dangers by using this drum stationed near the palace.[8] Apart from the aforesaid chronicles, the Chinese Censorate and the Roman Tribune of the Plebs can also be cited as the antecedents having aspects regarding the concept of Ombudsman.[9] Prototypes for the Ombudsman were also found in the Middle Eastern civilizations and medieval Germanic tribes.[10] *Mazalim* sessions, as history revealed, were also found in the historical panorama of Persia, especially during the regime of Uzun Hasan who ruled Aqquyunlu in northwestern Iran and Eastern Anatolia from 1457 to 1478.

Pre-Islamic era of Arabia, historically popular as *Ayam-i-Jahiliya* (period of ignorance), did not develop any administrative institution. Rather that period witnessed ignorance, barbarism, fetishism, chaos and turmoil. After the advent of Islam, Prophet Muhammad (PBUH), with the hope and aspiration of establishing a just social order, started his humane mission. After migrating to Madina, he succeeded in establishing an Islamic state, which was essentially a state of ideological nature. When the message of Islam convinced the heart of people beyond this small city state, the natural consequence was the expansion of Islamic state. This development necessitated the appointment of state governors, judges, administrative officers, tax collectors etc. Accordingly, Prophet (PBUH) appointed the most competent persons to different posts who discharged their functions effectively. Apart from this, for the first time in history, a distinct type of institution was established in the state of Madina by Muhammad (PBUH), the Prophet of Islam, to defend and protect the rights of citizens against administrative arbitrariness.[11]

The Prophet (PBUH) himself inquired into grievances of Juthyma tribe against Commander Khalid ibn al-Walid due to his killing of few members of this tribe even after announcing their

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6 Muhammad Hashim Kamali, "Appellate Review and Judicial Independence in Islamic Law," *Islamic Studies*, 29, no. 3 (1990): 226.

7 Kracke, "Visions of Justice,"492-494.

8 Han, Woo-Keun, *The History of Korea* (Seoul: Eul= Yoo Publishing, 1970) quoted in C. McKenna Lang, "A Western King and an Ancient Notion: Reflections on the Origins of Ombudsing," *Journal of Conflictology* 2, no. 2 (2011): 57.

9 Lang, "Ombudsing," 57.

10 Ibid.

11 Abdun Noor, *Proshashonic Shechacharita Protirodhey Ombudsman(Protibidhayok)(in Bangla) (Ombudsman As a Safeguard Against Maladministration)*, (Chittagong: Islamic Administration Study Centre,2001), 9.

allegiance to Islam. The Prophet, after condemning this heinous act, sent Ali ibn Abi-Talib to recompense the tribe's human losses. The Prophet lifted up his hand and turned his face to the sky and said:

Oh Allah, I denounce Khalid's act.[12]

After Prophet (PBUH), his successors (*Caliphs)* used to hear appeals from all parts of Islamic territories and investigated into all types of complaints of the citizens. They, while dealing with the complaints fully endeavored to follow the parameters set before them by the Prophet (PBUH).[13]During the Caliphate of Umar, the second Caliph, a new institution called Hisbah was set up to monitor the adherence to religious principles and values by people in their daily life. He stringently dealt with the problems of citizens and was never hesitant to raise his voice against governors of different parts of the Islamic world. During his Caliphate he ordered Ibn Al-Aiham, the ruler of Ghassan, to reconcile with a Bedouin (tribal, nomad) as he inflicted hurt upon him; otherwise retaliation would be taken.[14] In the same manner, on one occasion he urged one Egyptian to retaliate upon Amr ibn Al-As's son as he whipped the former. Moreover, he ordered another Egyptian to take retaliation upon Amr ibn Al-As, the governor of Egypt, as the latter insulted the former. At this juncture, Umar remarked:

"Whence did you enslave people who were born free."[15]

Umar, in his address to the governors, said the following words:

> *Listen, verily I am not sending you as rulers and potentates; on the contrary, I am sending you as the leaders of guidance so that men may follow you. Render unto Muslims their rights; beat them not, lest you humiliate them; praise them not lest you make them undisciplined. Do not shut your doors against them, lest the strong amongst them devour the weak ones.*[16]

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12 Ibraheem Abu-sin Ahmad, *El-edarah fel Islam* (in Arabic) (Administration in Islam) (Dubai: el-Matba'ah el-Asrieh 1980), 35 quoted in Naim Nusair, "The Islamic External Critics of Public Administration: A Comparative Perspective" *The American Journal of Islamic Social Sciences*, 2, no. 1,(1985):109.

13 Nusair, "External Critics,"109.

14 Ibid.,109-110.

15 Ahmad, *El-edarah*, 35.

16 Imam Abu Yusuf, *Kitabul- Kharaj*, (in Arabic), (Bulag 1302 A.H), 66, quoted in S.A.Q. Husaini, *Arab Administration*, 6th edition (Lahore: Muhammad Ashraf, 1970), 21.

Hazrat Ali (RA) Ibn Abu Talib, the fourth Caliph of Islam in his administrative policy letter to Malik Ibn Haris Ashter, the Governor of Egypt, mentioned:

> *I have heard the Holy Prophet saying, "Those peoples and Governments cannot achieve salvation among whom the rights of the depressed, destitute and suppressed are not protected and cannot be recovered from the strong without fear and opposition."*[17]

Hazrat Ali (RA) also issued the following instructions:

> *Set apart some of your time for the needy and oppressed so that you may free yourself from other occupations and sit regularly in public audience to receive their complaints and hear their grievances against your Government. During this audience, for the sake of God, treat them with kindness, courtesy and respect. Do not allow your employees, the Army and sentry to be present during such audience, so that those who have complaints against your officers and Government may approach you freely and talk to you freely and without any embarrassment or fear of harassment.*[18]

Dissecting the "Islamic" Institutions Influencing the Establishment of Modern Ombudsman

The brisk expansion of the Islamic state required the emergence of formal effective institutions to deal with the grievances of the citizens against governors, administrative staffs, their relatives and so on.[19] Apart from the Qadi (known as judge) whose main function was to interpret the laws as well as to apply them case by case, two formal institutions were formed. Firstly, there was Diwan-i- Mazalim (The Board of Investigation of Grievances) which was presided over by the Caliph himself and worked as the highest administrative tribunal. Another institution was Hisbah (the office of Market Supervision) and Muhtasib. The market supervisor served as an

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17 Ali Ibn Abu Talib, *A Classic Administrative Policy Letter from Hazrat Ali (RA) (Fourth Caliph of the Muslims) To Malik Ibn Haris Ashter*, ed. Shamsul Alam, (Dhaka: Islamic Foundation Bangladesh, 1983), 22.

18 Ibid.

19 Nusair, "External Critics," 110.

agent of the Caliph and executed the judgments of the Qadi.[20] We will now focus on these institutions in detail.

(i) *Diwan-i-Mazalim*

The very word *mazalim* is the plural form of *mazlima* which means "extraction" or a "thing wrongfully taken" and the word "*mazlima*" has been derived from "*zulm*", usually translated as a "wrongdoing" or an "injustice".[21] From the perspective of terminology, it signifies a specific institution also known as *wilayat al-mazalim* or *al-nazar fi al-mazalim*, which was entrusted to adjudicate complaints regarding "injustices".[22] Regrettably, one of the prime challenges in appreciating this institution by the western scholarship is the non-existence of a modern legal institution of similar type as well as absence of any equivalent in Occidental languages.[23] Even no Arab author, as Emile Tyan states, ever ventures to offer a satisfactory definition of the word *Mazalim.*[24] The first as well as most detailed definition was provided by Al-Mawardi in his legendary work *"Al-Ahkam al-Sultaniyya*" in the middle of the eleventh century and premising on his definition, Amedroz defined *Mazalim* as "compelling those who would do each other wrong- *mutazalimun*- to mutual justice, and restraining litigants from repudiating claims by inspiring fear and awe in them".[25]

Following Mawardi, Tyan defined *Mazalim* as a "collegial institution intervening when ordinary justice dispensed by *qadis* was inefficient, mainly because of the power and social position of the defendant".[26] Given the intricacies involved in providing a positive definition of the *Mazalim,* Nielsen made recourse to exclusionary approach. He opined that any judicial case that was not adjudicated by the *qadi*, the *muhtasib* (the market supervisor), the *qadi al-'askar*

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20 Ibn Taymiyah, *el-Siyasatu' Shari'ayh* (in Arabic) [The Legitimate Policy] (Cairo, Egypt:Dar el- Katub el-Arabieh, 1979), 9, quoted in Nusair, "External Critics," 110.

21 "Mazalim" in *Arabic-English Lexicon* (8 vols.), ed. Edward William Lane, Williams & Norgate, 1863, 1921, 1923.

22 Mathieu Tillier, "The Mazalim in Historiography," in *The Oxford Handbook of Islamic Law*, eds. Anver M. Emon and Rumee Ahmed (Oxford: Oxford University Press, 2018) accessed January 05, 2020, http://www.academia.edu/download/40730752/Tillier-Mazalim_in_Historiography-Oxford_Handbook.pdf.

23 Ibid.

24 Emile Tyan, *Histoire de l'organisation judiciaire en pays d'Islam* (Paris: Librairie DU Recueil Sirey,1938), 145, quoted in Tillier, "Mazalim".

25 Henry Frederick Amedroz, "The Mazalim Jurisdiction in the Ahkam Sultaniyya of Mawardi," *The Journal of the Royal Asiatic Society of Great Britain and Ireland* (1911): 635.

26 Tyan, "Histoire,"145, quoted in Tillier, "Mazalim".

(military judge) or the non-Muslim Courts, but was placed under the direct sovereign authority of the head of the state must be viewed as a *mazalim* case.[27]

Islamic tradition, as one scholar discusses, considers the *Mazalim* as embedded in a pre-Islamic background.[28] This view predominantly refers the *hilf al fudul* (the Pact of the Virtuous), an alliance established by Prophet Muhammad (PBUH) [before Prophet-hood] with chiefs and members of different tribes during the 7th century. This alliance has a unique place in the history of Islam due to its special emphasis on the principles of justice and supporting the oppressed beyond all sorts of considerations, including kinship or power and more particularly its pledging to intervene in conflicts.[29] The origin of the *Mazalim*, can also be traced back to the era of Prophet Muhammad (PBUH) who appointed Rashid ibn Abd Allah to adjudge complaints against government officials.[30]

Since the assassination of Ali and the attempt on Muawiyah's life, the scenario changed and Caliph, due to security reasons, had become less accessible to the people at large. But the *Umayyad* rulers did not forget to set apart some time for hearing appeals and the investigation of complaints.[31] Abdul Malik, was the first Caliph to devote a special day for hearing and settling complaints.[32] Umar Ibn Abdul-Aziz followed the precedent set by his uncle with great passion and enthusiasm.[33] The Abbasids spontaneously and with great zeal continued this practice and successfully established a regular department which was the highest court of criminal appeal.[34] Skeptical scholars criticized this historicity.[35] As for instance, Amedroz seemed to distrust the existence of the *Mazalim* during Umayyad dynasty as put forward by Al-Mawardi characterizing Caliph Umar ibn Abd al Aziz, popularly known as Umar II as one of the earliest champions of the *Mazalim*.[36]

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27 Jųrgen S. Nielsen, *Secular Justice in an Islamic State: Maẓālim under the Baḥrī Mamlūks, 662/1264-789/1387*, (Leiden: Nederlands Historisch-Archaeologisch Instituut te Istanbul, 1985): 35.
28 Tillier, "Mazalim".
29 Tariq Ramadan, *The Messenger: The Meanings of the Life of Muhammad* (London: Penguin Books, 2008), 20-21.
30 Kamali, "Appellate Review," 226.
31 Ibn Taymiyah, "el-Siyasatu' Shari'ayh," 9.
32 Nusair, "External Critics,"110.
33 Husaini, *Arab Administration*,109.
34 Ibn'l-Athir, *Tariku'l- Kamil, vol. 1*, (In Arabic), (Leiden, 1851-76), 46, quoted in Nusair, "External Critics,"111.
35 Tillier, "Mazalim".
36 Amedroz, "Mazalim Jurisdiction,"656.

Tyan was the first advocate who criticized the delineation of Islamic sources openly.[37] Even he candidly negated to categorize pre-Umayyad and Umayyad Caliphs' verdict as *Mazalim* cases.[38] Moreover, he opined that the very institution *Mazalim* developed during Abbasid period was not a model *Mazalim* in the light of any Arabic models, but heavily relied on a similar Sassanid institution.[39] Joseph Schacht, a renowned orientalist, supported this stance and followed this accordingly.[40] Nielsen, however, has argued that Islamic *Mazalim* is moored in broader historical spectacle and apart from the Sassanid model, other pre-Islamic civilizations devised similar institutions to dispense justice e.g. Byzantine Egypt developed a mechanism to prefer appeal to the provincial governor (*dux*).[41] Defying Tyan, Christian Muller argued that justice administered by Andalusi *amirs* in earlier periods (i.e. even before the 10th century) were already a part of a *Mazalim* system.[42] Mathieu, Tillier in his research on Umayyad period conclusively asserted that the Marwanid Caliphs legal administration and royal justice could inevitably be blended in the *Mazalim*.[43]

It is also important to mention that the principal legal institutions of the Ottoman Caliphate were the *Shari'a* courts divided into judiciary districts and presided over by a judge (*kadı*) who was assisted by deputy-judges (*naib*s) in the areas of sub-districts.[44]

Most importantly, the Imperial Council (*Divan-ı Hümayun*), essentially the Ottoman version of the medieval *mazalim* courts and a parallel but superior judicial organ, was established to hear petitions, adjudge crucial cases of petitioners in its own court (*divan*) or send imperial orders to provincial governors and judges instructing them to resolve or adjudicate issues accordingly.[45] In fact, "Imperial Council as a legislative and executive court ran parallel to the *shari'a* courts and administered public order through imperial statutes and decrees which were codified in

37 Tillier, "Mazalim".
38 Tyan, "Histoire,"277, quoted in Tillier, "Mazalim".
39 Tyan, "Histoire,"278, quoted in Tillier, "Mazalim".
40 Joseph Schacht, *An Introduction to Islamic Law*, (New York: Oxford University Press,1982), 51.
41 Nielsen, "Secular Justice," 1-2.
42 Christian Muller, "Redressing Injustice. Maẓālim Jurisdictions at the Umayyad court of Córdoba (Eighth-Eleventh Centuries CE)" in *Court and Cultures in the Muslim World. Seventh to Nineteenth Centuries* eds. Albrecht Fuess and Jan-Peter Hartung (London: Routledge, 2011): 95.
43 Mathieu Tillier. "Califes, émirs et cadis: le droit califal et l'articulation de l'autorité judiciaire à l'époque umayyade," *Bulletin d'Etudes Orientales* 63 (2014): 154, quoted in Tillier,"Mazalim,".
44 E. D. Akarlı, "Islamic Law in the Ottoman Empire," in *The Oxford International Encyclopedia of Legal History*, ed. S. N. Katz (New York: Oxford, 2009) quoted in Başak Tuğ, "Protecting Honor in the Name of Justice" accessed March 28, 2020, https://cems.ceu.edu/sites/cems.ceu.edu/files/basic_page/field_attachment/bt-paper-1.pdf.
45 Başak Tuğ, "Honor".

sixteenth-century Ottoman legal practice in the form of "rescripts of justice" (*adaletname*s) or "law books" (*kanunname*s)".[46] The Caliph used to preside over the Council, but afterwards abandoned and delegated it to the grand vizier.[47] However, during the regime of Sultan Murad II the *kadi-i-'asker* was entrusted to administer royal justice.[48] He was, indeed, the chief judge in charge of the judicial affairs of the Council.[49] This *divan* maintained a common point with the earlier *mazalim* courts and that any person could bring his grievance through a petition irrespective of its significance[50] and get remedies thereby[51].

Subjects of the Caliphate used to explore this institution to advance complaint against the infringements committed by other individuals, government officials, tax collectors, *qadis* or governors[52]. Officially the petitions were addressed to the Sultan but in reality dealt with by the *divan* as a whole on behalf of the Sultan or by the grand vizier.[53] The methods invoked to submit petitions include courier to Istanbul or through a *qadi* who used to draw up a letter of grievance to the Sultan.[54] In case of urgency, the *qadi* used to send a spokesman to Istanbul. However, an individual could also submit their complaints as plaintiff or petitioner.[55]

Over the centuries, the institution of petitioning received a bureaucratic shape through a specific mode of petitioning and a record keeping system.[56] By the 17th Century, "Registers of Complaints" (*Sikayet Defterleri*) was developed to record copies of the *divan'*s responses and other crucial matters and in the 18th Century, a more advanced record-keeping system (*Sikayet Kalemi*) was established.[57] One scholar asserts that despite the absence of an official appellate

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46 Ibid.

47 Colin Imber, *The Ottoman Empire, 1300-1650: The Structure of Power* (New York: Palgrave Macmillan Press, 2002), 156.

48 Fodor Pál, "Sultan, Imperial Council, Grand Vizier: Changes in the Ottoman Ruling Elite and the Formation of the Grand Vizieral Telḫīṣ," *Acta Orientalia Academiae Scientiarum Hungaricae*, 47, no. 1/2 (1994): 72.

49 Honey Nasser El-Moghazi, "The Innovation in the Ottoman Legal Administration: The 16th Century Between Theory and Practice" (Master's Thesis, The American University in Cairo, 2017), 67.

50 Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed. V. L. Menage (Oxford: Clarendon Press, 1973): 226; Yossef Rapoport, "Royal Justice and Religious Law: Siyasah and Shariah under the Mamluks", *Mamluk Studies Review*, 16, no. 1 (2012): 81, 85; Halil Inalcik, State, Sovereignty and Law During the Reign of Suleyman," in *Suleyman the Second and His Time*, eds. Halil Inalcik and Cemal Kafadar (Istanbul: The Isis Press, 1993), 61.

51 Halil Inalcik, *The Ottoman Empire: The Classical Age 1300-1600*, trans. Norman Itzkowitz and Colin Imber, (New York: Praeger Publishers, 1973): 89.

52 James E. Baldwin, "Petitioning the Sultan in Ottoman Egypt", *Bulletin of the School of Oriental and African Studies* 75, no. 3 (2012): 499; Inalcik, *State*, 61; Ibid, 89.

53 Baldwin, "Petitioning," 510; Colin Imber, "Government, Administration and Law," in *The Cambridge History of Turkey, Volume 2: The Ottoman Empire as a World Power, 1453-1603*, eds. Suraiya N. Faroqhi and Kate Fleet, (New York: Cambridge University Press, 2013), 225.

54 Baldwin, "Petitioning," 511.

55 Inalcik, *Ottoman*, 91.

56 Baldwin, "Petitioning," 503.

57 El- Moghazi, *Innovation*, 77.

system, a scope existed to reassess the capital punishment by the Sultan or the *divan* if a petition is rendered before the execution of the sentence.[58]

Cancelling the Mamluk tradition of having a quadruple judicial system, the Ottomans substituted it with a single Hanafi Chief *qadi* (*qadi al-qudat*) who was required to be appointed by the Sultan.[59] Despite the abolition of the pluralistic system of the Mamluks, there existed deputy *qadis* (*na'ibs*) representing the four schools placed in each courthouse ordinarily serving for life.[60] One scholar contends that appointment to an important province functioned as a medium for the Chief *qadi* to secure higher positions in the future such as becoming *qadi-i-'asker*.[61]

Since the Ottoman Caliphate amalgamated "the functions of the mazalim and shari'a courts into one court under the qadi's jurisdiction, the qadi's role was broadened to include that of a "civil administrator" besides his role as an enforcer of the religious law".[62] This ensured the superiority of *Shariah* courts.[63] Apart from the administration of court, he was authorized to deal with criminal and secular matters not falling within the purview of *Sharia strictu sensu*.[64] The amplification of the functions and role of the *qadi* positioned him at the kernel of the judicial system, a unique Ottoman innovation.[65] Most strikingly, the *qadi*, as the representative of the Sultan remained first and foremost his subordinate to implement and enforce the sultanic decrees.[66] He was so powerful that he used to obtain authority and instructions directly from the sultan without the mediation of anybody.[67] In the 16th Century, Sultan Suleyman I's series of reforms empowered the *qadis* to examine the legality of the actions of government officials.[68] He was entrusted to supervise financial affairs, to collect local taxes and to hand them over to

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58 Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*, (Cambridge: Cambridge University Press, 2005), 91-92.

59 Nelly Hanna, "The Administration of Courts in Ottoman Cairo," in *The State and its Servants: Administration in Egypt from Ottoman Times to the Present*, ed. Nelly Hanna, (Cairo: The American University in Cairo Press,1995), 45.

60 Jane Hathaway and Karl K. Barbir, *The Arab Lands Under Ottoman Rule, 1516-1800*, (London: Pearson PLC, 2008), 117.

61 Hanna, "Administration," 45.

62 Maurits H. Van Den Boogert, *The Capitulations and The Ottoman Legal System*, (Leiden: Brill, 2005): 47; Heyd, *Criminal*, 225; Albert Howe Lybyer, *The Government of the Ottoman Empire in the Time of Suleiman the Magnificent*, (New York: Russell & Russell, 1966), 42.

63 Heyd, *Criminal*, 215.

64 Boogert, *Capitulations*, 42.

65 Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective*, (Albany: State University of New York Press, 1994), 77.

66 Inalcik, *Ottoman*, 118.

67 Heyd, *Criminal*, 220.

68 El- Moghazi, *Innovation*, 113.

the governor or to the military.[69] He, in fact, in discharging the financial activities assumed the role of *muhtasib*.

Composition, Powers and Functions of Diwan-i-Mazalim

Due to the expansion of state affairs, the Caliph appointed other persons as Mazalim. To be appointed as Mazalim, the persons had be just and trustworthy, possessor of adequate knowledge of the Qur'an, following authentic Sunnah of the Prophet (PBUH), and having knowledge of Islamic jurisprudence. Hazrat Ali (RA) in his administrative policy letter to Malik Ibn Haris Ashter clearly instructed that:

> *You should appoint honest and trustworthy persons to inspect, watch and guard over the activities of ... officers.*[70]

The extent of disagreement regarding the historical composition of *Diwan-i-Mazalim* is very meagre. This fact is evident from the research of Tyan, Sourdel and Nielsen. One scholar has epitomized their findings in the following way:

> *Abbasid caliphs presided over hearings until al Ma'mun (r. 198–218/813–833), and al-Muhtadi (r. 255–256/869–870) was the last one who did so. Viziers already played an important role in the mazalim process under al-Rashid (r. 170–193/786–809). During the mihna—an inquisition demanding qadis, witnesses, and scholars to adhere to the doctrine of the created Qur'an (c. 218– 234/833–848)—the chief qadi took over the supervision of mazalim. He was replaced by the vizier, who retained this function until the beginning of the Buyid period (334–447/945–1055), and reprised this role under the Fatimids (especially when the vizier belonged to the military) and the Seljuks. The vizier was succeeded by the na'ib under the Ayyubids and the early Mamlukss. The Buyids entrusted this task to the naqib al-ashraf, head of the 'Alid family. Under the Mamluks, the sultan often presided over*

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69 Ronald C. Jennings, "Kadi, Court, and Legal Procedure in 17th C. Ottoman Kayseri: The Kadi and the Legal System," *Studia Islamica*, no. 48 (1978):158.

70 Talib, "Letter,"15.

> *mazalim sessions, but this ceased in periods of troubles or political weakness.*[71]

To Syed Ameer Ali, during the Abbasid regime a separate investigation department named *Diwan-al-Nazr-fil-Mazalim* was established.[72] It used to include the following different groups:

(1) Protectors and Assistants who were responsible for disciplinary action against individuals who tended to use violence or escape from the law.

(2) Judges (Qadis) and arbitrators who were responsible for finding the best ways of giving back the rights of people with grievances.

(3) Jurists (faqih) to whom the judge referred in order to interpret judicial questions.

(4) Clerks who recorded the complaints or petitions of the people and stated their rights and duties.

(5) Witnesses who witnessed that the decision of the judge is not against truth or against justice.[73]

Shaikh Muhammad Abu Zahra, former Shaikh of Al-Azhar, after meticulously scrutinizing the nature and composition of the office of Diwan-i-Mazalim, opined that the investigation of grievances was not a mere judicial function; it was judicial as well as an executive function.[74] The cases of grievances included:[75] (1) official accesses, (2) excessive collections, (3) omission of names in the register, (4) misappropriation, (5) unjust confiscation of property, (6) non-payment of salaries, (7) withholding of conjugal rights, (8) non-compliance with the *Qadi's* (Judge) judgment, (9) non-performance of public prayers, and (10) improper behaviour in public.

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71 Tyan, "Histoire," 208–215; Dominique Sourdel, *Le Vizirat 'abbāside de* 749 à 936 (Damascus: IFEAD, 1959–60), 641–644; Nielsen, "Secular Justice," 4–7, quoted in Tillier, "Mazalim".

72 Syed Ameer Ali, *The Spirit of Islam* (London: Christophers, 1961), 284.

73 Nusair, "External Critics,"111.

74 Suleman Muhammad el-Tamawi, *Umar Ibn al Khatab Wa Uswole el-Seyasah Wal-edarah el-Hadithah*[Umar Ibn al Khatab and the principles of Modern Politics and Administration] (Cairo: Dar el-Eiker el-Arabi, 1967), 342, quoted in Nusair, "External Critics,"111.

75 Al-Mawardi, *el-Ahkamu's- Sultaniyeh* (Chapter VII) (In Arabic) (Cairo, Egypt, 1289, A.H.), quoted in Nusair, "External Critics,"111; Reuben Levy, *The Social Structure of Islam,* (Cambridge: Cambridge University Press, 1957), 348-49.

The duties of *Diwan-i-Mazalim* were not confined to hearing complaints and conducting investigations but also included executing decrees. It was so powerful that it could initiate investigation *suo motu* and take decision without having the complaints from the aggrieved regarding the aforesaid matters.[76] This significant feature has led Grunebaum to consider *Diwan-i-Mazalim* as Court.[77] Apart from these, *Mazalim* used to send regular reports to the Caliph or head of the state regarding his activities.[78]

The definite role played by the sovereign was also put under trial.[79] Though "the *mazalim* were supposed to represent his direct justice, the sovereign (the caliph, later the sultan) ceased presiding over hearings during long periods, across dynasties".[80] While Tyan, on the basis of the outward organization of the institution, claimed that Fatimid Caliphs played no active role in the *mazalim*[81], Stern argued that they were still dealing with petitions "when solicited during their administrative treatment, even though they did not preside over hearings"[82]. On the other hand, Nielsen remarked that the role of sultan at *mazalim* sessions was typically restricted to the signature of the decrees.[83]

Historians are also in agreement that *mazalim* lost its original vigour and soon lower officials were entrusted with the charge of *mazalim*.[84] Tyan pointed out that the title of *sahib al-mazalim*, an assistant of *mazalim* judge during the early Abbasid regime, assumed the role of a delegate judge in the tenth century.[85] Under the Fatimid dynasty, a *sahib al-bab* was in charge of *mazalim* and the vizier did not belong to the military.[86] The very title of *na'ib dar al- 'adl* as devised under the Ayyubids and the Mamluks along with the institution of *dar al-'adl* (house of justice) was working as the prime delegate of the Sultan and could be handed over to Scholars.[87] Challenging the stance of al- Maqrizi as advocated by Tyan regarding the disappearance of the title *sahib al-mazalim* under the Mamluks and passing of his functions to the *hajib*

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76 Noor, *Shechacharita,* 10.
77 G. E. Von-Grunebaum, *Islam: Essays in the Nature and Growth of a Cultural Tradition,*(London: Routledge,1969), 133.
78 Ameer, "The Spirit," 284; S.M. Imamuddin, *Arab Muslim Administration,* (Karachi: S.M. Khurshid Imam, 1976), 5-6.
79 Tillier, "Mazalim".
80 Tillier, "Mazalim".
81 Tyan, "Histoire," 213, quoted in Tillier, "Mazalim".
82 Samuel M. Stern, "Three Petitions of the Fatimid Period," *Oriens 15, no. 1* (1962):194.
83 Nielsen, "Secular Justice," 1-2.
84 Tillier, "Mazalim".
85 Tyan, "Histoire,"221-222, quoted in Tillier, "Mazalim".
86 Tyan, "Histoire,"233, Nielsen, "Secular Justice," 10, Stern, "Petitions," 197 quoted in Tillier, "Mazalim".
87 Nielsen, "Secular Justice," 14.

(chamberlain),[88] Nielsen argued that the *hajib* as a military judge was entrusted to settle the disputes between soldiers and had played no part in *mazalim* sessions.[89] Encapsulating the respective stances of the aforesaid researchers and critically dissecting them, one scholar has aptly remarked:

> …the *mazalim* organization in provincial cities could be different from that of the capital during the Abbasid period, and argued that *qadi*s were irregularly entrusted with this institution, on a temporary basis, in order to solve a particular crisis. In Baghdad, from the early Abbasid period onwards, *qadi*s often joined *mazalim* sessions held by rulers in order to provide decisions (sometimes political ones) with an aura of legitimacy.[90]

Diwan-i-Mazalim, as one interpretation submits, was in fact a powerful tribunal designed to accomplish "the dual function of a general administrative tribunal to hear disputes between the citizen and the state as well as to entertain appeals from decisions of the *Shariah* Courts"[91]. It was empowered "to hold public officials, including the chief executive, to strict legal accountability for their acts"[92]. Not surprisingly enough, the Caliph was not entitled to avail any preferential treatment.[93] The history of Islam bore the testimony that the ruling Caliph, on several occasions, was strictly ordered to appear in person before the court as a mere defendant.[94] However, the Court lacked the power to depose the Caliph.[95]

(ii) *Al-Hisbah* / Office of *Muhtasib* (Market Supervisor).[96]

Apart from *Diwan-i-Mazalim* another institution which was active to protect and ensure the interests of the citizen in Islamic administration was known as *al-hisbah*.[97] The very Arabic

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88 Tyan, "Histoire,"234, quoted in Tillier, "Mazalim".
89 Nielsen, "Secular Justice," 83-85.
90 Tillier, "Mazalim".
91 Shad Saleem Faruqi, "Constitutional Law, the Rule of Law and Systems of Governance in Islam," in *The Ummah at the Crossroads: The Role of the OIC*, eds. Ahmad Murad Merican, Ahmad Suhaimi Ismail, R. Jeevaratnam, Rahmat Mohamad, Rozita Hajar, Umminajah Salleh, Zaini Abdullah, (Selangor: Institute of Knowledge Advancement and Institute of Diplomacy and Foreign Relations Malaysia, 2005), 91.
92 Abdul Rashid Moten, *Political Science: An Islamic Perspective* (London: Macmillan Press Ltd. 1996), 117.
93 Ibid.
94 Ibid.
95 Ibid.
96 For a critical scholarly discussion on Hisbah and Muhtasib see Kristen Stilt and M. Safa Saracoglu, "Hisba and Muhtasib," in *The Oxford Handbook of Islamic Law*, eds. Anver M. Emon and Rumee Ahmed (Oxford: Oxford University Press, 2018).
97 Noor, *Shechacharita*, 10.

word "*hisbah*" has derived from the root "*h.s.b*" and connotes multifarious meanings namely calculation, sum, accountability, verification, reward, take into consideration etc.[98] From a technical perspective, it signifies the state institution designed to promote the proper conduct and to prohibit all sorts of evil deeds.[99] The eminent Islamic scholar and political thinker Abū al-Hasan 'Alī Ibn Muḥammad Ibn Habīb al-Māwardī defined *hisbah* as "commanding what is good when it is being neglected, and forbidding what is bad when it is being practised"[100]. In essence, *hisbah* is seen as "a collective effort in assisting the Muslim community"[101] as mandated by the Quranic injunction: "*help one another in furthering virtue and God consciousness, and do not help one another in furthering evil and enmity*[102]".[103] *Muhtasib*, the officer in charge of *hisbah*, was entrusted with a wide array of functions though the supervision of market transactions remained his pivotal responsibility.[104] Within the strict Islamic legal and administrative framework it is usually viewed as an obligation on the part of the chief executive to appoint qualified person/s as *muhtasib*.

An authentic exploration of historical chronicles revealed that during the reign of Fatimid rulers, the significance of *hisbah* became very evident in terms of enforcement of prescribed rules and regulations.[105] The scope of authorities and duties of *Muhtasib* had also been proliferated.[106] Even, in later stage of the Fatimid dynasty, enforcement officers' institutions like police force had been established to impose as well as enforce prescribed penalties among the wrongdoers.[107] Appallingly, the dignity of the institution of *hisbah* was lost its importance due to the weakening of the government during the Mamluk reign of Egypt in the early 16th

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98 Hamza Ateş, "A Pioneering Institution For Ombudsman: Hisbah," *Ombudsman Akademik* 6 (2017): 22.

99 Ates, "Hisbah," 21.

100 A. M. Al-Mawardi, *Al- Ahkam al – Sultaniyyah: The Laws of Islamic Governance*, trans. Asadullah Yate, (London: Ta-Ha Publishers Ltd. 1996), 337.

101 Mustapha Sidi Attahiru, Al-Hasan Al-Aidaros and Syarifah Binti Md Yusof, "Moderating Role of Hisbah Institution on the Relationship of Religiosity and Islamic culture to Islamic work Ethics in Nigeria," *International Review of Management and Marketing* 6, no. 8S (2016):127-128.

102 Qur'an 5:2, Muhammad Asad, *The Message of the Qur'an*, accessed December 16, 2019, http://www.muhammad-asad.com/Message-of-Quran.pdf.

103 Attahiru et al. "Hisbah Institution,"128.

104 Abubaker Aliu Gwandu, *Abdullahi b. fodio as a Muslim jurist*, Durham Theses, (Durham University, 1977). See also Abdul Azim Islahi, *Economic Concepts of Ibn Taymiyyah*, (Leicester: The Islamic Foundation, 1988) quoted in Chika Umar Aliyu, Abubakar Muhammad, and Muhammad Mu'azu Yusuf. "An Empirical Study of Roles of Hisbah and Zakah Institutions in Promoting Pro-poor Economic Growth in Kano State, Nigeria," *Journal of Islamic Philanthropy & Social Finance* 1, no. 1 (2017): 41.

105 Mohd Ab Malek bin Md Shah, Mohd Harun Shahudin, Sulaiman Mahzan, Rani Diana Othman, and Jeniwaty Mohd Jody, "The Institution of Hisbah: In the Purview of Its Significances and Development," *Global Journal of Business and Social Science Review* 1, no. 2 (2013), quoted in Ates, "Hisbah," 26.

106 Ibid, quoted in Ates, "Hisbah," 26.

107 Ibid, quoted in Ates, "Hisbah," 26.

century.[108] The situation became so bad that the office of *muhtasib* was obtained by bribe and therefore persons lacking qualifications held the office.[109]

It was the Ottomans who successfully reinstated the dignity of *hisbah* and amplified its jurisdiction.[110] Under Ottoman Caliphate's administration, the institution of *hisbah* (*ihtisab* in Ottoman official resources) was vested with the authority to levy dues and taxes on traders and artisans in addition to its traditional functions.[111] One of the most notable contributions the Ottoman Caliphate brought was the codification of the functions and duties of the *Muhtasib* through the adoption of the *Ihtisab Qanunnameleri* for the first time in the history of Islam. This codification commenced its gallant journey under the rule of Sultan Bayazid II (ruling period 1481-1512) and continued under the rules of succeeding Sultans. Commenting on the functions of *muhtasib* as embodied in the *Ihtisab Code*s one scholar asserted:

> *The ihtisab codes… regulated the operation and production of different trades, and determined the duty of the ihtisab agasi. The code of Istanbul dated 1501 served various functions such as, fixing the prices, regulating the provisions for the city population, describing the proper process of production for various trades, establishing covenants of guarantee for the products, regulating the distribution of raw materials, banning the malpractices among the esnaf and the men of muhtesib and inspecting the prices, as well as the classical hisbah practices.*[112]

The institution of *hisbah* underwent severe and drastic decline during the 18th century since most of the Muslim states were colonised.[113] However, emulating several functions of *hisbah* Ombudsman was established in the West.[114]

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108 Ates, "Hisbah," 27.
109 Ibid.
110 Ibid.
111 Ibid.
112 Ibid, 36.
113 Muhammad Akram Khan, *An Introduction to Islamic Economics* (Islamabad: International Institute of Islamic Thought and Institute of Policy Studies, 1994) , Monzer Kahf, "Principles, Objectives and Tools of Market Regulation in Islamic Perspective", (Seminar on Islamic Approach to Market Regulation and Economic Stability, Tehran, Iran, 2000) accessed November 15, 2019, http:// www.monzer.kahf.com/papers/english/market_regulation.pdf quoted in Ates, "Hisbah," 25.
114 Ibid.

Composition, Powers and Functions of Al-Hisbah

The officer appointed in accomplishing the job of *hisbah* was called *Muhtasib*. His position was between the offices of *Qadi* and *Mazalim* but his status and dignity was less than the offices of those two.[115] The office was formally created by Al-Mahdi, an Abbasid Caliph, and continued under his successors.[116]To Mawardi, market supervisors were of two kinds:

(1) volunteers and

(2) paid officials.[117]

Al-Muhtasib and/or his deputies as full judge (s) must enjoy high qualifications of being wise, astute, judicious mature, virtuous, well-poised, sane, free, empathic, far sighted and erudite scholar (*faqih*).[118] He usually requires to be well versed with the state affairs, law and Shariah in juxtaposition of in-depth knowledge of customs and usages of given society.[119]

The *Muhtasib* was fundamentally appointed for the preservation of law, especially the religious and moral. His duty was to monitor that the religious and moral precepts of Islam were duly complied with.[120] Islam prescribes a standard conduct for all individuals. Qur'anic injunction commands everyone whether he is a citizen or Caliph to enjoin good and forbid wrong. The Holy Qur'an says:

> *[well aware of] those who, [even] if We firmly establish them on earth, remain constant in prayer, and give in charity, and enjoin the doing of what is right and forbid the doing of what is wrong; but with God rests the final outcome of all events.*[121]

The office of *Muhtasib* requires to command good and forbid evil, which rests with the state authority in modern times.[122] Ibn Khaldun asserted the following duties of the *Muhtasib*:

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115 Husaini, "Arab Administration," trans. Md. Abdul Huq and Suraiya Zebunnessa, (Dhaka: Adhunik Prokashoni, 2008),122. Noor, *Shechacharita,* 10.
116 Nusair, "External Critics,"112.
117 Husaini, "Arab Administration," trans.,121.
118 Husaini, "Arab Administration," trans.,122. Noor, *Shechacharita,* 10.
119 Muhammad Akbar Khan, "The Role of Islamic State in Consumer Protection," *Pakistan Journal of Islamic Research* 8 (2011): 39.
120 Nusair, "External Critics,"112.
121 Quran 22:41..
122 Nusair, "External Critics,"112.

(1) he prohibited the obstruction of roads;(2)he forbade porters and boatmen to carry heavy loads;(3)he ordered the owners of the buildings threatening to collapse to tear them down and thus remove the possibility of danger to passersby;(4)he prevented teachers in schools and other places from beating young pupils too much;(5) and he had authority over everything relating to fraud and deception in connection with food and other things that do not require hearing of evidence or a legal verdict.

This is not the comprehensive or exhaustive list of the duties of *Muhtasib*. He is authorized to deal with any matters *suo motu* or anything reported to him.[123] In addition to the aforesaid matters, Al-Mawardi also enlisted the following duties of *Muhtasib*, the market supervisor:

(1) prevention of cruelty to servants and animals; (2)encouraging regular attendance at the mosque;(3) preventing public eating in the month of Ramadan; (4) enforcement of *al-iddat*[124];(5) encouragement of the marriage of unmarried girls;(6) preventing man consorting with women in public;(7) chastising anyone found in a state of drunkenness and supervision of games.[125]

During the reign of Caliph at-Muqtadi *Muhtasib* was empowered to prevent medical negligence[126] and environmental pollution specially the prevention of water pollution.[127]

Unveiling the Historical Journey from *Diwan-al-Mazalim* and *Hisbah* to Swedish Ombudsman

Since Sweden, during the regime of Charles XII, was regarded as a major power in Europe at the end of the 17th century, Denmark, Poland and Russia united in an alliance in 1700 to defeat Sweden. Unexpectedly Charles XII took the members of the alliance by surprise and he received the nick name 'the Swedish Meteor' due to this magnificent victory.[128] After this Charles XII soon started waging war known as the 'Great Northern War' in Europe which lasted eighteen years. One of the very first battle he fought was the Battle of Narva, in 1700 where he

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123 Ibn Khaldun, *The Mugaddimah:An Introduction to History*, trans. Franz Rosenthal, (Princeton: Princeton University Press, 1967),178-179.

124 The waiting period prescribed for widows and divorcee before remarriage.

125 Husaini, "Arab Administration," trans.,121-122.

126 Caroline Stone, "The Muhtasib," *Aramco World* 28, no. 5 (1977) accessed August 28, 2019, https://archive.aramcoworld.com/issue/197705/the.muhtasib.htm .

127 Ibid.

128 Jean Cooke, Ann Kramer, and Theodore Rowland-Entwistle, *History's timeline: a 40,000-Year Chronology of World Civilization* (Crescent, 1981), 144.

defeated Peter the Great.[129] Despite repeated requests by his allies to engage in or to conclude peace accord, Charles continued his battle with the declining resources of Sweden until decisively being defeated by Peter the Great at the Battle of Poltova in 1709.[130] This loss marked the downfall of the Swedish Empire[131] and the establishment of the Russian Empire.[132]

At the invitation of the Ottoman Empire, the injured Charles along with around 1000 *Caroleans* (Soldiers of Kings Charles XI and Charles XII) took refuge in the village of Varnitsa near Bender, a city part of the Ottoman Empire. His expenses during his long stay in Turkey were covered by the Ottoman State budget, as part of the fixed assets (*Demirbas* in Turkish) and for this reason he earned the nickname *Demirbas* Sarl (Fixed asset Charles) or 'Iron head Charles'.

Though Charles was cordially invited by Sultan Ahmet III of Ottoman Empire, their relationship in course of time got weakened due to the conduct of Charles himself. Since Charles XII started to provoke wars from within Turkey he was asked to leave but obstinately refused.[133]

Charles was put under house arrest at the castle of Timurtasch, "a stately and well-appointed old castle close to Pruth"[134], after fighting with and being defeated and captured by Turkish Army in a battle referred to as the Skirmish at Bender or popularly as the "Kalabalik" in the month of February, 1713. During this period Charles passed his time "in playing chess, reading romances, and dictating dispatches"[135]. Charles XII himself outwardly denoted this time as "our lazy dog days in Turkey"[136].

During the period of Charles exile in Turkey, Sweden was passing through an acute crisis fueled by different socio-economic, military and health reasons"[137]. Since Charles XII had been staying far away from Sweden and continuing to rule from abroad it was beyond his reach to appreciate the real theatre of problems engulfing his Empire and to unknot those enigmas appropriately.

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129 Lang, " Ombudsing," 58.
130 Lang, "Ombudsing," 58.
131 Kalevi J. Holsti, *Peace and War Armed Conflicts and International Order, 1648-1989* (Cambridge: Cambridge University Press, 1991), 69.
132 Dominic Lieven, ed., *The Cambridge History of Russia vol. 2 Imperial Russia, 1689-1917* (Cambridge: Cambridge University Press, 2006), 29.
133 Robert Nisbet Bain, *Charles XII and the Collapse of the Swedish Empire, 1682-1719* (London: GP Putnam's Sons, 1906), 210.
134 Ibid.
135 Bain, *Swedish Empire*, 220.
136 Ragnhild Marie Hatton, *Charles XII of Sweden* (London: Weidenfeld & Nicolson, 1968), 314.
137 Lang, "Ombudsing," 59.

Being cognizant of the deplorable condition of Sweden, Charles XII devised a series of substantial policy and executive reforms from Timurtasch. His massive reforms embraced, *inter alia*, six 'state expeditions' or departments. Of the six departments, two dealt with foreign affairs and three dealt with domestic affairs covering military, state economy and trade. The sixth department was a separate one and known as the 'revisions expedition'. Each of the five expedition was headed by an *ombudsrad* whose prime function was to: "[…] take the initiative and to lay before the King plans which would be for the service of His majesty and benefit of the State."[138] The sixth expedition was served by the 'Highest Ombudsman' as its head. He was entrusted to monitor the "proper, efficient and fair functioning of the administration"[139].

Focusing on the authority of this Ombudsman Bengt Wieslander, former member of the Swedish Justice of the Supreme Administrative Court and President of the Supreme Administrative Court critically stated:

> *This ombudsman had no political authority but was to ensure that laws and regulations were observed, and that officers of state discharged their duties. Should the Ombudsman find that this was not the case, he had the right to prosecute for negligence.*[140]

Elucidating the function of the Highest Ombudsman, former Swedish Ombudsman Against Ethnic Discrimination Frank Orton asserted:

> *The task of this Ombudsman was to ensure that the judges, military officers and civil servants in Sweden were observing the laws of the country and the rules laid down for them. Having at that time been away from Sweden since he felt thirteen years earlier on his campaign against Russia, the King obviously felt a need to have someone monitoring things in his home country on his behalf.*[141]

The position of *Hogste Ombudsmannen*, as one scholar argued, was labelled as a central authority:

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138 Hatton, *Charles XII*, 343.

139 Ibid.

140 Bengt Wieslander, *The Parliamentary Ombudsman in Sweden*, trans. David Jones, (Stockholm: Bank of Sweden Tercentenary Foundation & Gidlunds Bokforlag, 1999), 13.

141 Frank Orton, "The Birth of the Ombudsman" *Sarajevo: The Human Rights Ombudsman of Bosnia and Herzegovina*,(2001): 1 accessed June 23, 2011, http:europeandcis.undp.org/files/uploads/John/Ombuds_HISTORY.doc>.

> *...someone to see that orders and regulations were carried out not only by administration (that was the field of the Hogste Ombudsman) but also among the population at large. In 1718 a 'Hogste Ordningsmannen' was designated to be in charge of 'order' in the broadest senses in cooperation with local authorities.*[142]

Though the aforesaid administrative reforms were sent to Stockholm in 1713 those were not put into operation until the return of King Charles XII to Sweden in 1714. The success of the reforms as geared by the new administrators and trusted advisors had found its recognition in the pages of literature.[143]

After the death of Charles, monarchy grew weaker while the strength of Parliament increased considerably. In May 1719, the very *Hogste Ombudsmannen*, with the instrument of Government, was renamed as *Justitiekanslern*, the Chancellor of Justice[144] and thereby it became an institution of Parliament[145]. In pursuance of the recommendations of a Constitutional committee regarding the formation of a Parliamentary Ombudsman, relevant provision was embodied in Article 96 of the Instrument of Government, 1809 and the first Parliamentary Ombudsman was drawn up accordingly. After the establishment of first Parliamentary Ombudsman in Sweden in 1809 other states started to follow the same tradition through the establishment of this institution in their respective territories. For instance, Finland, Denmark, Norway, New Zealand and Great Britain established Ombudsman in 1919, 1953, 1962, 1962, 1967 respectively.[146]

Recognizing that intricacies exist regarding the exact origin of Ombudsman, one scholar claimed that King Charles XII might have been influenced by the Turkish culture since he met representatives from multifarious cultures, schooled in the classics and had the scope to be acquainted "with other cultural representations of intermediaries for the government".[147] Another scholar, however, doubted the influence of Turkish grievance mechanisms on Charles XII in establishing the institution of Swedish Ombudsman. He enumerated that though the

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142 Hatton, *Charles XII,* 440.
143 Ibid., 439-440.
144 Reka Friedery, "The Role of the European Ombudsman in Dispute Solving," *Acta Juridica Hungarica* 49, no. 4 (2008): 360-361.
145 Orton, "Ombudsman", 2.
146 For details see Stanely V. Anderson and Kent M. Weeks, *Ombudsman Papers: American Experience and Proposals* (Berkeley: Institute of Governmental Studies, University of California, 1969).
147 Lang, "Ombudsing," 61.

Record Book of Complaints evidenced the disputes, petitions and grievances of citizens along with their different sort of redressal mechanisms including *Mazalim,* these records dated post exile period of Charles XII.[148] Lamenting on the attitude of the Europe in underestimating the influence of Ottoman Empire in Europe one scholar aptly remarked:

> *…the early modern Ottoman Empire constituted an integral component of Europe and that neither the Ottoman polity nor Europe make a lot of sense without the other.*[149]

Mats Melin, former Swedish Chief Parliamentary Ombudsman also spoke of the influence of *Diwan-i-Mazalim* while reflecting on the election of Ombudsman for the first time by Swedish Parliament. He commented:

> *Even if the first of Ombudsmen was elected by the Swedish Parliament, the very essence of the idea of an Ombudsman – an independent official with the power to investigate complaints from members of the public and who can criticize illegal, unfair or improper actions by public authorities and make recommendations – is not unknown in other, even older cultures. Within the Islamic legal system, for example, during the era of the Abbasids, complaint handling agencies called Diwan al Mazalim were established.*[150]

The very fact of Charles' being attracted as well as influenced by the overall effective functioning of the *Diwan-al-Mazalim* extant in Turkey was quite evident. One report endeavoured to critically explore the inferences drawn by King Charles XII in this regard. It runs as follows:

> *if the grievances of people are attended to and redressed they will not be disgruntled or prone to rebel, nor any neighbour or enemies would be able to take advantage of the dissatisfaction or resentment.*[151]

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148 Michael Ursinus, *Grievance Administration (Sikayet) in an Ottoman Province: The Kaymakam of Rumelia's' Record Book of Complaints' of 1781-1783* (Oxfordshire: Routledge, 2005) quoted in Lang, "Ombudsing," 61.

149 Daniel Goffman, *The Ottoman Empire and Early Modern Europe* (Cambridge: Cambridge University Press, 2002) xiv.

150 M. Melin, "The Ombudsman and the Citizens-Lessons to be Learned from the Scandinavian Experience", *Speech to the Doha Democratic Forum*, (2006), quoted in Lang, "Ombudsing," 61.

151 Pakistan, *Mohtasib*, 3.

Even scholars like Al-Wahab[152] and Pickl[153] have gone so far to claim that there exists sufficient reasons to assume that the Islamic Legal system, to a greater extent, has invariably influenced the establishment of the first ombudsman in Sweden.[154] Ibrahim al-Wahab emphatically stresses:

> *Of course one could not draw definite conclusion regarding the origin of any institution anywhere .... But being aware of the history of complaint handling in the Islamic law system and the fact that during the time of King Charles XII in Turkey this system was existing, the influence seems to be evident.*[155]

EU Enlargement Commissioner Olli Rehn emphatically stated that Ombudsman was the brain child of Ottoman Empire and Charles XII, during his exile in Turkey, recognized the Ottoman institution and imported that idea to Sweden.[156] *Hisbah*, it can aptly be argued, pioneered the role of Consumer Ombudsman, Health Service Ombudsman, Tax Ombudsman are Business Ombudsman in modern times as well.

Depicting a Comparative Picture of Swedish *Hogste Ombudsmannen* and *Diwan-i-Mazalim* as well as *Hisbah*

Not surprisingly enough, the legal system of Ottoman Empire was interpreted in diverse ways. Amidst this diversified elucidation, it can be deduced that during the regime of Sultan Ahmet III of Ottoman Caliphate the *Quadi-ul-Qudat* (the judge of judges) used to preside over the session of *Diwan-al-Mazalim*.[157] He was authorized to ensure that Islamic law were complied with and applied by government officials including the Sultan (head of the Ottoman Caliphate) in maintaining the affairs of the people "in their relations with the state and among themselves".[158] The *Quadi-ul-Qudat* (the judge of judges or Chief Justice) was also mandated to play the role of *muhtasib*, as chief of the *Hisbah*, to regulate market practices and to ensure evasion of conflict

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152 Ibrahim Al-Wahab, *The Swedish Institution of Ombudsman-An Institution of Human Rights*, (Stockholm: LiberForlag, 1979).

153 V. Pickl, The Islamic Roots of Ombudsman Systems, *The Ombudsman Journal*, no. 6 (1987), 101-8.

154 Md. Nojibur Rahman, *Ombudsman in Bangladesh: A Step towards Good Governance*, (Dhaka: Hakkani Publishers, 2001), 18.

155 Government of Islamic Republic of Pakistan, Wafaqi Mohtasib (Ombudsman)'s Secretariat, *Mohtasib(Ombudsman)'s Annual Report* (Islamabad: Wafaqi Mohtasib (Ombudsman)'s Secretariat, 1990), 9-10.

156 The Ombudsman was a creation of the Ottoman Empire, October 19, 2008, https://merryabla64.wordpress.com/2008/10/19/the-ombudsman-was-a-creation-of-the-ottoman-empire/.

157 Pakistan, *Mohtasib*, 9.

158 Ibid.

in commercial dealings.[159] The Caliphate, as mentioned earlier, appointed *qadi* in district levels who were assisted by deputy judges in the sub-districts.

Due to the amalgamation of the *mazalim* and *Shariah* courts into one court under the *qadi'*s jurisdiction, the functions of *qadi* received wider shape and therefore played the role of a civil administrator and dealt with many issues not pertaining to its traditional jurisdiction. The *qadi* system including the Qadi ul Qudat worked as the representative of Sultan and received instructions from him and implemented Sultanic decrees accordingly. People could submit petitions to the Sultan against the violations by individuals, maladministration by government officials, tax collectors, injustice by *qadis* and governors. The Sultan earlier dealt with these complaints directly but afterwards by Imperial Council (*Divan-ı Hümayun*), an equivalent of medieval *mazalim* courts and more importantly *qadi-i-asker*, one of the members and chief judges of this *divan* dispensed royal justice since the regime of Sultan Murad II. Different methods were used to submit petitions namely courier to Istanbul, through a *qadi* and even by individuals directly. Despite these varied mechanisms, during the exile of Charles XII in Ottoman Turkey, he examined the role of *Qadi al Qudat* assuming the functions of *Diwan-i-Mazalim* as well as *Hisbah* and as the close representative of Sutlan and decided to cast it in Swedish mold.

After scrupulously observing the functioning of the affairs of *Diwan-i-Mazalim* and *Hisbah* in the topography of Ottoman Caliphate for 5 years, Charles XII established six 'state expeditions' or departments. Out of the six departments two were entrusted with foreign affairs and three were in charge of domestic affairs embracing military, state economy and trade. Each of the five departments was headed by an *ombudsrad* whose primary responsibility was to submit plans for the service of the King and welfare of the state. Most notable and crucial was the establishment of sixth expedition namely 'revision expedition' headed by the *Hogste Ombudsmannen* and his prime responsibility was to ensure that King's wishes and laws were complied with by the aforesaid expeditions and to play the role of a watchdog regarding their functioning. Though he was not endowed with any political authority, he had the right to send the report regarding maladministration to the King and to initiate legal proceedings against the accused for negligence. The office of the *Hogste Ombudsmannen* in fact, was not independent and reported directly to the Charles XII, an absolute monarch.

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[159] See Sodiq Omoola Olalekan and Nurah Sabahiah Mohamed, Ombudsman (*Muhtasib*) in Business Regulation: A Cross Cultural Analysis, *Journal of Islamic Thought and Civilization*, 7, no. 2 (2017): 18-40.

While the Ottoman model of Ombudsman held enormous and diversified power, the Swedish model possessed very little power and was relatively weak. The former enjoyed more independence than the latter. Since justice constituted the bedrock of Ottoman Caliphate, the Sultan could not interfere in the judicial administration and he himself was not above the law.[160] For instance, the Shaikh al- Islam, the Supreme Judge and highest Official Ebussuud Efendi objected to the orders of the Sultan and asserted: "If the customary law goes against ecclesiastical law, even the sultan's orders aren't valid."[161] On the contrary, the Highest Ombudsman did not enjoy this sort of independence. As an absolute monarch Charles XII enjoyed unfettered power as regards everything. The Ottoman model being a complex blend of legislative, administrative and judicial authorities discharged their mammoth functions magnificently but the Swedish model being a creature of monarchial order could only function within their narrow periphery in accordance with the wishes of King Charles XII.

Conclusion

The aforesaid discussion inevitably evidences that the very idea of having mechanisms to prevent maladministration and resolve grievances of individuals is firmly rooted in ancient, medieval and multicultural antecedents. Despite the existence of different types of precursors to modern ombudsman, this article has demonstrated that the very Ottoman office of *Qadi- al-Qudat* assuming the role of *Diwan-al-Mazalim* and *Hisbah* had substantively influenced Charles XII, exiled in the territory of Ottoman Caliphate, to establish the *Hogste Ombudsmannen*, predecessor of Parliamentary Ombudsman with the prime objective of saving his native land. Though institutions like *Hisbah* and *Mazalim* sessions had existence in other civilizations, Charles XII hatched his idea of establishing an ombudsman while staying in the Ottoman Caliphate and this fact necessarily geared the impression that he was probably influenced by the extant Ottoman office of *Qadi-al-Qudat* discharging the functions of *Diwan-al-Mazalim* and *Hisbah*". For Charles XII, the possibility of being familiar with other cultural representations was not impossible but the fact of being influenced by any or all of these cultures was definitely less probable in comparison with the aforesaid office.

King Charles XII while exiled in Ottoman territory had all the likelihoods to be aware of the functioning of the aforesaid office. Before being exiled in Turkey, Charles XII as a warrior king

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160 Erhan Afyoncu, "Justice for Everyone: The Ottoman Judicial System," *Daily Sabah*, January 19, 2018, https://www.dailysabah.com/feature/2018/01/19/justice-for-everyone-the-ottoman-judicial-system .

161 Ibid.

could not concentrate on the issue of administrative reforms except waging war against the foes of Sweden. He" finalized his decision to bring about massive administrative reforms including the establishment of the Highest Ombudsman while in exile. Further, the efficacy of the aforementioned office positively lured him to establish such type of office. Moreover, he unfailingly deciphered the strength of Ottoman Caliphate in juxtaposition of Ottoman administration and ultimately decreed the establishment of modern Ombudsman.

Further, no concrete and pragmatic evidence is found regarding the influence of other ancient and multicultural roots on Charles XII regarding the establishment Ombudsman. Since Sweden was plummeted into acute crisis during his exile in Turkey, it was not implausible that he painstakingly mused the working of the "Islamic Institutions" efficaciously discharging their duties just before him, remodeled his idea and decreed the establishment of the office of the Highest Ombudsman to "make (Swedish) government more efficient and just"[162].

[162] Hatton, *Charles XII*, 314.

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Book Review

Maintainability of Writ Petition: An Appraisal

(published by Universal Book House, March 2020)

Ehsan Siddiq[1]

It is not often that a Judge of the Supreme Court writes a book. The absence of publications by members of the higher judiciary has meant that the legal community has been unable to draw upon their experience and benefit from their views on legal issues on which they were perhaps unable to comment whilst in their robes. In 2020, Mr. Justice Moyeenul Islam Chowdhury added to the small collection of judicial publications with his own book, "Maintainability of Writ Petition: An Appraisal". This was a subject that the author was eminently suited to comment on. Prior to his retirement, Mr. Justice Chowdhury had presided over a Division Bench of the High Court Division which dealt with judicial review applications (known in Bangladesh and the rest of the sub-continent as writ petitions). His bench was one of the more revered benches of the High Court Division and over the course of his judicial career Mr. Justice Chowdhury delivered landmarks judgments on a number of important issues, including the constitutionality of the 16th Amendment. Mr. Justice Chowdhury was confirmed as a Judge of the High Court Division on 23 August 2006. He laid down his robes in January 2020. His departure from the bench has been widely considered as a great loss to the judiciary.

"Maintainability of Writ Petition: An Appraisal" was published in March 2020. The book, as the author informs us was in fact a lecture delivered at the Supreme Court Bar Association auditorium on 26 February 2019. The first chapter begins with a description of the position of the judiciary as one of the three co-equal organs of the state and the importance of the power of judicial review in this arrangement. However, as a book on maintainability of writs, it lacks a discussion of what judges and lawyers understand by the concept of maintainability. Over the years, the Courts have developed a vast array of rules which govern whether a writ petition may or may not be heard by the Court, i.e. its maintainability. Without being satisfied on the issue of maintainability, the Courts will not enter into the merits of a litigant's case. Yet, there is no account as to why the study of maintainability is so important as to warrant a book of its own or why the Courts have fashioned a set of rules or tests for determining which application for

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judicial remedy will be entertained. The rationale for limiting this extraordinary remedy is not discussed at all.

The book broadly covers most of the important areas of maintainability of judicial review applications. And as is expected Mr. Justice Chowdhury provides a thorough account of most of these areas. He begins rightly with the issue of locus standi and devotes a considerable number of pages to its importance in public interest litigation (PIL). Since there has been a proliferation of PILs in recent years, such a discussion is warranted. What is lacking however is his personal views on the subject – why and how have the courts have restricted the scope of PILs in recent times. A mere exposition of the existing laws without any commentary does little to encourage legal debate and develop the law.

The importance of the availability of an equally efficacious alternative remedy in determining maintainability has only been given perfunctory consideration by the author. There is no discussion as to the tests that the courts have developed to determine whether a remedy is equally efficacious. For instance, there could have been some discussion as to how the courts have developed case law whereby the imposition of a non-relaxable statutory precondition to preferring an appeal, renders the appeal not equally efficacious. A discussion could have been made in this context to the appeals under section 32(2) of the Waqf Ordinance, 1962 which are not treated as being equally efficacious.

Another important issue that ought to have been discussed was whether arbitration constitutes an alternative efficacious remedy. There are conflicting judgments of the Appellate Division on this issue. Although *PDB V. Md. Asaduzzaman Sikder* (reported in 8 MLR (AD) 241) appears to hold that arbitration is not an alternative efficacious remedy, this is contrary to the much better reasoned judgment of *Bangladesh Telecom (Pvt.) Ltd v. BTTB* (reported in 48 DLR (AD) 20). There are also conflicting decisions of the High Court Division on this point. It would have been both helpful and interesting to note Mr. Justice Chowdhury's views on these judgments. This book could also have dealt with the misconception of some benches that civil suits are an alternative efficacious remedy.

While discussing the maintainability of judicial review applications against private bodies, there is no discussion of the seminal cases of *Zakir Hossain Munshi v. Bangladesh* (reported in 55 DLR 130) where a writ petition was held to be maintainable against the mobile phone company, GrameenPhone as it was found to be performing sovereign functions. There is also no discussion of the case of *Abdus Sabur v. REB* (10 BLC 503) where a writ petition was held to be maintainable against a private power generation company, Rural Power Company Limited. The author does however discuss at length the recent case of *Moulana Md. Abdul Hakim v. Bangladesh* reported in 34 BLD 129 where a writ petition against an order issued by the

Chairman of the Managing Committee of a madrasah was found to be maintainable. The author explains that the High Court Division used a functional test to expand the scope of judicial review to cover actions of private bodies where it was performing a public function. However there was no discussion of the cases, where the Supreme Court has held that judicial review applications are not maintainable against 100% state owned companies (as in *New Dacca Industries v. Qumrul Huda* reported in 31 DLR (AD) 234, where the corporate character of the company was preserved despite the nationalisation). Further, there is no account of the criteria applied by the Courts to determine when a 100% state owned company could be described as an instrumentality of the state, so as to render it amenable to the writ jurisdiction (as in *Arif Sultan v. DESA* reported in 60 DLR 431(FB)).

The issue of martial law is discussed at length by Mr. Justice Chowdhury. It is now accepted that extra-constitutional take-overs and impositions of martial law are justiciable. Over the last decade, the Supreme Court has set aside many constitutional amendments and laws because they had been passed by martial law regimes. But these judgments were passed well after the martial law regimes had collapsed. In fact during the martial law regimes, relying explicitly or implicitly on Kelsen's doctrine of revolutionary legality and the judgment of *State v. Dosso* (reported in PLD 1958 SC 533) the courts had upheld the validity of these regimes. It is only after these regimes crumble however that the courts stridently proclaim the supremacy of the Constitution. This was an area on which Mr. Justice Chowdhury could have shared his views.

Other important areas not touched by the book include maintainability of writs challenging tenders and government contracts. The issue of maintainability of writ petitions in relation to government tenders is discussed in the decision of *PDB V. Md. Asaduzzaman Sikder* reported in 8 MLR (AD) 241 and is an important development that merited some discussion. Another area that the book could have touched upon is the issue of premature writs. Each year a large number of judicial review applications are rejected as they are not "final orders", i.e. because they were only a preliminary or an intermediate step in the decision making process. Also not discussed is the use of writ petitions to challenge criminal proceedings. Although the High Court Division made a promising start in this area with the case of *Jahangir Hossain Howlader v. CMM, Dhaka* reported in 58 DLR 106, the Courts have now unfortunately restricted the use of writ petitions in criminal proceedings solely where the vires of a law has been challenged. This position is now reflected in *Begum Khaleda Zia v. ACC* reported in 69 DLR (AD) 181.

The book provides a summary of the law relating to maintainability of writ petition. This will be helpful for practitioners as it will enable them to understand this important area of law which is often misunderstood.

Submission Guidelines

The editor welcomes the submission of articles which illuminates legal problems or issues currently confronted by governments, international organizations, private enterprises etc, by setting them within their legal, economic or political context. Of particulars interests will be articles which are inter-disciplinary in nature. Authors and reviewers are advised to follow the following guidelines while preparing or reviewing the manuscripts.

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