

## **Land-locked: An Examination of Some of the Inefficiencies Affecting Transactions Involving Immovable Property**

AHMAD RAFAY ALAM

### **INTRODUCTION**

In the study of law and economics, the Coase Theorem posits that an efficient allocation of resources will result when transactions costs are zero.<sup>1</sup> These “transaction costs” may be viewed as impediments to an efficient allocation of resources and can take many forms. For example, long distances between a prospective vendor and purchaser of property and a lack of communication facilities between them would impede even the best of intentions to enter into a bargain. Similarly, the cost of mobilising labour and materials might impede a property developer from pursuing a tender for civil works. In some cases, a high rate of Stamp Duty on transactions can result in the parties reconsidering their decision to enter into such bargains. To the extent this author can claim knowledge of economics, the Coase Theorem also suggests that transaction costs and inefficiencies hamper the natural flow of bargains, result in inefficient allocation of resources and thus impact the economy.

Some transaction costs are small enough to ignore whereas some, imposed, for example, by the law, are unavoidable. In such cases, a mutual understanding between the parties may see the burden of these transaction costs shared or, in others, avoided altogether. For example, the statutory requirements that all leases purporting to grant a term in excess of one year or which reserve an annual rent must be registered and stamped<sup>2</sup> often results, in owners of residential property granting indefinitely renewable leases of 11 months and thus avoiding such requirements.

Another inefficiency is the uncertainty in determining interests which affect immovable property. To elaborate on the perpetually renewable 11 month lease example given above, not registering the lease agreement precludes the tenant from having an

Ahmad Rafay Alam is a practising advocate at the High Courts, a member of the adjunct faculty of the Law and Policy Department of the School of Social Sciences, Lahore University of Management Sciences, Lahore, and Visiting Lecturer at University College Lahore.

*Author's Note:* The author would like to thank Dr Nadeem Ul Haque, Director, Pakistan Institute of Development Economics, Islamabad, Mr Osama Siddique, Head, Department of Law and Policy, Lahore University of Management Sciences, Lahore, and Ms Foqia Khan, Visiting Fellow, Pakistan Institute of Development Economics, Islamabad, for their encouragement, support, and assistance. The author is also grateful to Ms Aysha Raja, advocate, for her advice and contribution.

<sup>1</sup>Cooter, R. and Ulen, T. “Law and Economics” 4th edn. (2004), Pearson Education, New Delhi, p. 89.

<sup>2</sup>See s. 107 Transfer of Property Act, 1882, s. 17(d) Registration Act, 1908 and Item 35 Schedule I Stamp Act, 1899.

entry of his interest in that immovable property made in the record of rights maintained under the Land Revenue Act, 1967 or some other, similar law, bye-law or regulation. As such, his lease will be invisible to any person carrying out a search of the record of rights of that property. This is one of the reasons prospective purchasers of immovable property tend to conduct site visits to personally determine whether any interests existing outside the record of rights bind or affect immovable property; it is also an example of parties to a bargain finding a common ground to overcome inefficiencies to their transaction. Lack of notice of rights existing outside the record of rights is also an argument used to defend claims against, for instance, lessors who have disposed their remainder interest in the immovable property to a third party free from the lessee's interest.

The purpose of this paper is to identify some of the transaction costs and inefficiencies which exist and affect transactions of immovable property under Pakistani law. It will also attempt to explain the rationale behind the existence of such laws. Lastly, it will recommend some proposals to reform the law so as to make it more efficient in its allocation of resources. It is hoped that, by doing so, this paper will be of some use to economists and others interested in changing the laws relating to immovable property so as to make them more efficient for the purposes of allocating resources.

## STATUTORY TRANSACTION COSTS AND FORMALITIES

### (1) Stamp Duty

The Stamp Act, 1899 is a fiscal statute which imposes a duty on certain instruments.<sup>3</sup> The types of instruments chargeable with duty and the amount of duty chargeable thereon are indicated in Schedule I of the Stamp Act. With respect to the transaction of immovable property, the following instruments and transactions, *inter alia*, have been deemed chargeable with duty:

- an agreement or a memorandum of an agreement relating to immovable property;
- agreement to lease;
- assignment;
- conveyance;<sup>4</sup>
- deposit of title deeds or any agreement relating to the deposit of title deeds;
- an instrument of exchange of property;
- an instrument of further charge (any instrument creating a further charge on mortgaged property);
- an instrument of Gift;
- lease;<sup>5</sup>

<sup>3</sup>Section 3 Stamp Act, 1899.

<sup>4</sup>Defined by s. 2(10) Stamp Act, 1899 as including “a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred *inter vivos* and which is not otherwise provided for by Schedule I.”

<sup>5</sup>Defined by s. 2(16) Stamp Act, 1899 as “a lease of immovable property and includes also –

- (a) a patta;
- (b) a kabullyat or other undertaking, not being a counterpart of a lease, to occupy or pay or deliver rent for, immovable property;
- (c) any instrument by which tolls of any description are let;
- (d) any writing on an application for a lease intended to signify that the application is granted”.

- mortgage deed;<sup>6</sup>
- mortgage of a crop;
- an instrument of partition;
- re-conveyance of mortgaged property;
- transfer, not being a transfer of shares in a company or body corporate, debentures, any interest secured by a bond or a mortgage deed; and
- transfer of a lease by way of assignment.

The amount of duty chargeable on such instruments and transactions is either fixed or *ad volarem*. In some cases, duty on an instrument is made equivalent to the duty chargeable on another instrument or transaction. For instance, the amount of duty chargeable on a mortgage deed when possession of the property is agreed to be given by the mortgagor is equivalent to a conveyance for a consideration equal to the amount secured by such deed.<sup>7</sup> Further, the amount of duty chargeable is determined by the Provincial Governments individually. What may be the duty in the NWFP may not be duty chargeable elsewhere, and this is the reason the present study has not attempted to list exactly the amount of duty chargeable on any of the instruments mentioned.

Needless to say, the “consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of duty with which it is chargeable, shall be fully and *truly* set forth [in the document].”<sup>8</sup> Such forced honesty has also been imposed on parties to certain transactions in the urban areas of the Punjab. By virtue of the Punjab Finance Act, 1986, section 27-A Stamp Act, 1899 now provides that the valuation of any conveyance or exchange of immovable property in an urban area shall be calculated according to the valuation table notified by the District Officer (Revenue) in respect of the area or locality concerned. The cross-reference of property prices acts as an incentive for the parties to declare, as close as possible to its real market value, the value of such conveyance or exchange.

Section 29 of the Stamp Act, 1899 spells out who is responsible for the payment of duty. Thus, whereas payment of stamp on a mortgage deed is the duty of “the person drawing, making or executing such instrument,” the duty chargeable on an instrument of partition is payable “by the parties thereto in the proportion of their respective shares in the whole property partitioned . . . .”

It is pertinent to note that the non-payment or evasion of duty does not affect transactions. Section 62 Stamp Act, 1899 imposes a liability of a maximum of Rs 500 on any person executing an instrument not duly stamped. Section 33 Stamp Act, 1899 spells out the steps to be taken in the event an instrument is not duly stamped: the instrument is impounded, examined and charged with duty and a fine may be imposed by way of penalty. Nothing in the Stamp Act, 1899, however, invalidates the transaction envisaged in the instrument chargeable with duty.<sup>9</sup>

<sup>6</sup>Defined in s. 2(17) *Ibid.*, to include “every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to, or in favour of, another, a right over or in respect of specified property.”

<sup>7</sup>Item 40(a) Schedule I *Ibid.*

<sup>8</sup>Section 27 *Ibid.* (emphasis added).

<sup>9</sup>Note that s. 35 *Ibid.* provides that certain unstamped instruments cannot be admitted into evidence unless and until the omission is not rectified under s. 33.

The fact that non-payment of duty does not affect transactions would imply that such duty is not a “transaction cost” affecting the efficiency of the bargain. This is so, and in practice, parties tend to pay duty to either as a formality or when the instrument is also bound to be registered under the Registration Act, 1908. When the cost of the formality becomes too high, parties tend to forego it. However, in the latter scenario, the payment of Stamp Duty is inescapable and, as will be shown, becomes a formidable transaction cost.

To the extent that Stamp Duty is compulsorily payable on account of the provisions of the Registration Act, 1908 it acts as an impediment to efficient bargains. For example, consider the execution of a 24 month lease<sup>10</sup> of a residential building in Punjab at a rent of Rs 10,000 per month. Item 35(a)(ii) of Schedule I, Stamp Act, 1899 fixes the duty chargeable on such a transaction as the same duty as on a bond for the amount of value of the average annual rent reserved. The corresponding duty is *ad volarem*, amounts to 4 percent of the average annual rent and comes to Rs 4,800. While such an amount may be within the budget of the parties, as rents for residential accommodation rise, it is not surprising that the transacting parties’ desire to observe the formality of duty withers.

## (2) Registration Fee

The objectives of the Registration Act, 1908 include the conservation of evidence, assurance of title, publicity of documents and prevention of fraud.<sup>11</sup> Accordingly, s.17 of the Registration Act, 1908 makes the registration of the certain documents compulsory. With respect to transactions of immovable property,<sup>12</sup> these documents are:

- Instruments of gift of such immovable property;
- Non-testamentary instruments which have the affect of creating, declaring, assigning, limiting, or extinguishing any rights, title, or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in such immovable property (including instruments which dispose of a decree or order of a Court creating, declaring, assigning, limiting or extinguishing such rights, title or interests);
- Non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such rights, title or interest; and
- Leases of such immovable property from year to year, or for any term exceeding one year or reserving yearly rent;

Non registration of a document liable to be registered postpones the operation of that document till such time it is properly registered.<sup>13</sup> According to s. 49 Registration Act, 1908, “[No] document required to be registered . . . shall . . . operate to create, declare, assign, limit or extinguish whether in present or in future, any right, title or interest whether vested or contingent, to or in immovable property . . . .” In other words,

<sup>10</sup>Registerable under s. 107 Transfer of Property Act, 1882 and s. 17 Registration Act, 1908.

<sup>11</sup>AIR 1936 All 239.

<sup>12</sup>Subject to the exceptions contained in s. 17(2) Registration Act, 1908.

<sup>13</sup>Section 47 *Ibid*.

non-registration of a registerable document strikes at the transaction envisaged in such a document.

The registration of documents under the Registration Act, 1908 not only allows the operation of the transaction or bargain envisioned therein. As long as the execution of such registered documents is neither disputed nor denied, they are also deemed to be “public documents”, and a certified copy of a registered document obtained from the registration office is presumed, by virtue of Art. 90 of the Qanun-e-Shahadat Order, 1984 to be genuine and may be used as proof of their contents without the recording of any further evidence.<sup>14</sup>

Compulsorily registerable documents must be presented to the proper officer within four months of the date of their execution.<sup>15</sup> Presentation is usually done through the office of the Sub-Registrar of a Sub-District as appointed and notified by the Provincial Government within whose Sub-District the whole or some portion of the property to which the documents relate is situated.<sup>16</sup> Such documents are also required to be presented by either person executing or claiming under the document, or by the representatives or duly authorised agents of such persons.<sup>17</sup> The registering officer has the statutory powers of enquiry<sup>18</sup> and enforcing attendance<sup>19</sup> which he may exercise, for example, by satisfying himself as to the identity of the persons appearing before him and the fact of the execution of the document.

Additionally, s. 78 of the Registration Act, 1908 permits the Provincial Governments to fix fees payable for, *inter alia*, the registration of documents. For the Province of Punjab, these fees are set out *ad-volarem* in Appendix C Registration Act, 1908<sup>20</sup> but are capped at one percent of the value of the immovable property conveyed.<sup>21</sup>

In practice, the procedure and requirements of the Registration Act, 1908 prove to be a transaction cost affecting the efficiency of bargain. Parties to transactions relating to immovable property are affected by the mandatory nature of registration and by the corresponding registration fee. They may also be affected by the procedure for registration or the enquiry of the registering officer who may, in addition to enquiring into their identity, for instance, require them to satisfy him as to the requirements of stamp duty. It is at this point that stamp duties can be seen to be the “formidable” transaction costs mentioned earlier.

The registering officer may also refuse registration if the document has not complied with any other legal formality. For example, Article 17(2)(a) Qanun-e-Shahadat Order, 1984 requires documents relating to financial or future obligations to be witnessed by two men or by one man and one woman and the registering officer may

<sup>14</sup>Article 88 Qanun-e-Shahadat Order, 1984.

<sup>15</sup>Section 23 *Ibid.*

<sup>16</sup>Section 28 *Ibid.*, but see s. 19 in relation to other documents.

<sup>17</sup>Section 32 *Ibid.*

<sup>18</sup>Section 34 *Ibid.*

<sup>19</sup>Section 36 *Ibid.*

<sup>20</sup>As amended by Notification No. 2818-73/2031-St. 1 dated 28.06.1973 issued by the Government of Punjab.

<sup>21</sup>Section 78(a) Registration Act, 1908. It is also interesting to note that the minimum value of an interest the disposition of which is caught by s. 17 remains the same Rs 100 as set at the time of the enactment of this legislation over a century ago. It appears no effort has been made to increase this minimum value to reflect the practicalities of today.

reject a document presented for registration if it does not comply with the requirements of this provision.

Parties to transactions involving immovable property seeking to avoid *ad-valorem* stamp duty and registration fees may try to do so by fraudulently quoting the value of the immovable property or the transaction as less than actually agreed upon. Indeed, the value of the consideration exchanged in registerable documents is not a question which the registration officer is competent to ask.<sup>22</sup> However, valuation tables or “DC rates” and other revenue records as well as the logistical and practical difficulties of having registration refused make such fraudulent misquotation impractical. And with a penalty of imprisonment of up to seven years facing any person, including the registering officer or persons employed by him, for causing injury to anyone as a result of an act done under the Registration Act, 1908, fraudulent misquotation is extremely difficult.<sup>23</sup>

### (3) Mutation

Section 42(1) of the Land Revenue Act, 1967 requires “Any person acquiring by inheritance, purchase, mortgage, gift or otherwise, any right in an estate as land-owner, or tenant for a fixed term exceeding one year” to report his acquisition to the *Patwari* of that estate. Where the *Patwari* “has reason to believe” the acquisition has taken place, he is under an obligation to record such report in his *roznamcha* and record of mutations.<sup>24</sup>

The requirements of satisfying the *Patwari*’s jurisdiction to enquire about the legality of the acquisition being reported are not as watered down as on first sight. Section 47(1) Land Revenue Act, 1967 places every person whose rights are required to be or have been entered into any record of rights under an obligation to furnish or produce “all such information and documents needed for the correct compilation or revision thereof as may be within his knowledge or in his possession or power.” Such information and documents would include, in so far as the transaction pertains to immovable property, proof of payment of stamp duty and registration of registerable documents. It is the requirement of these formalities, over and above the formality of mutation, which act as transaction costs and hamper the efficiency with which parties may effect a bargain.

Another transaction cost affecting the mutation of the record of rights is the fee, prescribed by the Board of Revenue, for effecting mutations.<sup>25</sup> This fee is payable by the person in whose favour the entry is made.<sup>26</sup> The penalty for breaching the mandatory requirement to report acquisitions is negligible. Section 48 of the Land Revenue Act, 1967 fixes penalties for non-compliance at no more than Rs 25.

Mutations and entries in the register of rights act, *inter alia*, as notice of interests and rights which bind immovable property. The record of such entries is of use to purchasers or others interested in immovable property as it is meant to reflect the interests existing on the land. However, because of the summary nature of the *Patwari*’s

<sup>22</sup>See, for example, *Khaled Parvaiz Khan Tareen v. Deputy Commissioner/Registrar, Quetta* PLD 1994 Quetta 9.

<sup>23</sup>Section 81-82 Registration Act, 1908.

<sup>24</sup>Section 24 Land Revenue Act, 1967.

<sup>25</sup>Under the power conferred by virtue of s. 46(1) *Ibid.*

<sup>26</sup>Section 46(2) *Ibid.*

jurisdiction to determine the legality of reports of acquisitions of immovable property made to him, the law has never accepted entries in records of rights maintained under the Land Revenue Act, 1967 as evidence of rights in and title to such property.<sup>27</sup> In practice, such entries are treated as supporting evidence of the contents of the register of rights but not as evidence of the legality of the transaction itself.

This lack of tangible benefits arising from registration coupled with the formality of submitting information and documents to the *Patwari* (and thereby opening up the issue of registration of documents and the payment of stamp duty) are all transaction costs which act as disincentives for parties to a transaction to comply with the provisions of the law.

## INEFFICIENCIES

Before listing what elements of the law relating to immovable property act as factors contributing to the inefficient allocation of resources, an elaboration is needed. Transaction costs, as have been dealt with above, act as legally binding but somewhat avoidable costs and formalities involved in transactions involving immovable property. In contrast, inefficiencies can be seen as factors which affect the outcome of the transaction in a manner which makes them uncertain. Indeed, it would be difficult to buy and sell immovable property if the legal system did not provide for certainty of transactions. Laws and legal principles which permit inefficiencies to exist and to affect the certainty of transaction are therefore also factors which determine the efficient allocation of resources.

### (1) Oral Gifts

Gifts are defined by s. 122 Transfer of Property Act, 1882 as “the transfer of certain moveable or immovable properties made voluntarily and without consideration . . . and accepted by or on behalf of the donee”. To make gifts of immovable property, s. 123 Transfer of Property Act, 1882 stipulates that “the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.” In other words, in order for gifts to convey an interest in immovable property, the Transfer of Property Act, 1882 requires such gifts to be made in writing.

Instruments of gift of immovable property are compulsorily registerable in terms of s. 17(1)(a) Registration Act, 1908 and are also chargeable with *ad-volarem* stamp duty assessed as a percentage of the value of the immovable property gifted. Donees are also under an obligation to report their acquisition to their local *Patwari* in terms of s. 42 Land Revenue Act, 1967 for the purposes of entry into the register or rights.

The ingredients of the concept of *hiba* in Islamic law differs slightly from the ingredients of a gift. According to Mulla, “A *hiba* or [Islamic] gift is a transfer of property, made immediately and without any exchange, by one person to another and accepted by or on behalf of the latter”<sup>28</sup>. Section 129 Transfer of Property Act does away with these differing ingredients by providing that “Nothing in this Chapter . . . shall be deemed to affect any rule of Muhammadan Law”.

<sup>27</sup>See, for example, 1984 CLC 3279.

<sup>28</sup>Mannan, M.A., “D.F. Mulla’s Principles of Mohamadan Law” Pakistan Edition (1995, PLD Publishers, Lahore), para 138 at p. 205.

For our purposes, the main differing ingredient between a gift as defined by the Transfer of Property Act, 1882 and *hiba* or the Islamic concept of a gift is the requirement of reducing the transaction to writing. Islamic law does not require gifts to be documented, and it is now settled law<sup>29</sup> that gifts of immovable property effect the transfer of title in immovable property even if made without documentation, without attestation and without the consequent formalities of registration and the payment of stamp duty.<sup>30</sup>

The practice of the law is, therefore, not unfamiliar with circumstances in which an immovable property is transferred by way of undocumented *hiba* but then subsequently sold to some third party.<sup>31</sup> In such circumstances, the donee of the *hiba* is never sure his title is free from dispute and, as the *hiba* transaction is undocumented and unregistered and also may not be recorded in the record or rights a vendor of the same immovable property has no legal means of ensuring the strength of the title being sold to him. Disputes arising out of such lack of documentation, if not resolved by the parties themselves, must be adjudicated by the Courts, making the parties to the transaction subject to the delays of litigation.

The uncertainties of rights created by Islamic oral gifts in transactions involving immovable property and delays in the consequent adjudication thereof are thus factors affecting the efficient allocation of resources.

## (2) Irregular Sales

Section 54 Transfer of Property Act, 1882 defines a sale as “a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.” In the case of tangible immovable property of the value of more than Rs 100, or of the reversion or other intangible thing,<sup>32</sup> the sale can only be made by a registered instrument.<sup>33</sup> Further, sales of immovable property of a value in excess of Rs 100 are also compulsorily registerable in terms of s. 17(b) Registration Act, 1908. Being “conveyances” for the purposes of the Stamp Act, 1899,<sup>34</sup> sales are also chargeable with an *ad-volarem* duty assessed on the consideration agreed upon. Thus, a sale of immovable property will require registration of the instrument of sale and, as the payment of stamp duty and the observance of other formalities are *sine qua non* registration, these transaction costs and formalities will also have to be borne and performed.

While the ingredients of a sale as defined in Islamic law differ slightly from the requirements of the Transfer or Property Act, it has been observed that the rules of Muhammadan law are not expressed to prevail over the provisions of s. 54 Transfer of

<sup>29</sup>For an elaboration of the legal principles in support of this proposition, see *Abdul Sattar Dadabhoy v. Secretary*, PECHS PLD 1998 Kar 298.

<sup>30</sup>It is pointed out that, in the event any part of a *hiba* is documented, such document immediately becomes subject to the requirements of registration, attestation and, thereby, also stamp duty.

<sup>31</sup>See, by way of typical example, the facts of *Imam Sain v. Dr Shahid Mehmood* 2006 YLR 1102.

<sup>32</sup>For instance, the sale by a landlord of his remainder interest in the leased property.

<sup>33</sup>Section 54 Transfer of Property Act, 1882. Note that, in the case of tangible immovable property of a value of less than Rs 100, the sale can be made either by a registered instrument or by delivery of possession of the property.

<sup>34</sup>See s. 2(10) Stamp Act, 1899 and note 4, *ante*.



Property Act, 1882.<sup>35</sup> However, just like the differences between a gift and *hiba* being statutorily resolved by s. 129 of the Transfer of Property Act, 1882, s. 4 of the Punjab Pre-Emption Act, 1991 stipulates that its provisions “shall have effect notwithstanding anything in any other law for the time being in force.”<sup>36</sup>

The differences between the definition of “sale” in the Transfer of Property Act, 1882 and the notion of “sale” in Islamic law is most starkly brought to light in the case of the law relating to pre-emption.<sup>37</sup> For example, under the Punjab Pre-Emption Act, 1991,<sup>38</sup> the “sale” of immovable property means the “permanent transfer of ownership . . . in exchange for a valuable consideration and includes transfer of immovable property by way of *hiba bil-iwaz*<sup>39</sup> or *hiba bas hart-ul-iwaz*<sup>40</sup> . . .” As in the case of oral gift, the Islamic definition differs from the definition in the Transfer of Property Act, 1882 and the sale of property may be effected without documentation and, therefore, without the *sine qua non* requirements of registration and stamp duty. Note that, just as in the case of Islamic oral gifts, if some part of the otherwise undocumented Islamic sale transaction is reduced to writing, such a document will be bound to be registered and charged with duty.<sup>41</sup>

Thus there exists a category of sale transaction involving immovable property which can exist and operate to transfer ownership without being bound by the requirements of the Transfer of Property Act, 1882 or the Registration Act, 1908 in that they do not need to otherwise documented. Indeed, For instance, in *Muhammad Saeed v. Nook Bai*,<sup>42</sup> it was observed by Mr. Justice Ajmal Mian, J. (as he was then) that the act of simply effecting a mutation in the record of rights without any corresponding documentation was a “sale” for the purposes of Islamic law (and a frequently practiced method of conveyance in the rural areas) as well as s. 3(5) of the Punjab Pre-Emption Act, 1913. As such, it was held to fall outside the documentary requirements of s. 54 of the Transfer of Property Act, 1882.

To the extent that the transfer of ownership of immovable property can be effected without the requirements of the Transfer of Property Act, 1882 or the Registration Act, 1908, such transfers may be referred to as “irregular” sales.

Just as *hiba* transactions are not required to be reduced to writing to have legal effect, irregular sales need not be documented. And just as in the case of the uncertainties in *hiba* transactions, the purchase of immovable property effected without

<sup>35</sup>See, for example, *Mohammad Saeed v. Nook Bai* 1983 CLC 1883.

<sup>36</sup>*In pari materia* s. 4 NWFP Pre-Emption Act, 1987.

<sup>37</sup>“It is a fact that in the Holy Quran there is no mention express or implied of a right of pre-emption Islamic or customary,” *Government of NWFP v. Said Kamal Shah* PLD 1986 SC 360, per Muhammad Afzal Zullah, Chairman). Indeed, pre-emption can be exercised by Muslims against non-Muslims and *vice versa* (see s. 18 Punjab Pre-Emption Act, 1991). However, the law can be said to have been co-opted by Islamic legal concepts (see *Gobind Dayal v. Inayatullah* (7 ILR All 775) as quoted in *Allah Bux v. Jano* PLD 1962 (WP) Kar 317).

<sup>38</sup>This legislation is, more or less, *in pari materia* to NWFP Pre-Emption Act, 1987. The definition is sale in the two legislation is identical except that s. 2 of the latter does not include “the creation of any occupancy tenancy by a landlord whether for consideration or otherwise”.

<sup>39</sup>Islamic gift with exchange, see Mulla’s Principles of Mohamadan Law, *Ibid.*, para 168.

<sup>40</sup>Islamic gift made with stipulation to return, see Mulla’s Principle’s of Mohamadan Law, *Ibid.*, para 169.

<sup>41</sup>See note 31, *ante*.

<sup>42</sup>1983 CLC 1883

documentation also leaves the rights of a purchaser of such immovable property unprotected. Equally, a prospective purchaser of immovable property acquired by the vendor through a sale executed through simple mutation of the record of rights<sup>43</sup> has no means of relying on the record of rights as, by established law, they are not considered to be documents of title. And just like the cases of disputes arising from a *hiba* transaction, disputes relating to undocumented sales of immovable property, if not resolved by the parties themselves, are subject to the jurisdiction of the Courts. This, over and above the inefficiencies engendered by “irregular” sales—that is, sales of immovable property which may be legally effected without complying with the formalities of s. 54 Transfer of Property Act—parties to such transactions are also subject to the delays of litigation.

The uncertainties of rights created by irregular sales in transactions involving immovable property and the consequent delays of adjudication thereof are thus factors affecting the efficient allocation of resources.

### UNCERTAINTIES

The cumulative affect of statutory the transaction costs, formalities and inefficiencies listed above is an uncertainty in transactions involving immovable property. For instance, as has been mentioned above, the transaction costs associated with the payment of stamp duty and registration and mutation fees may result in parties desirous to, for example, execute a lease of a residential building resort to the execution of an 11 month renewable lease deed. Such a document is not compulsorily registerable and, since the penalties for non-payment of duty or non-reporting of the acquisition of the interest to the local *Patwari* do not affect the transaction, the parties are free, therefore, to pay or not to pay the duty chargeable on it or to have a mutation entered in the relevant records of rights. From a purchaser interested in acquitting immovable property, an examination of the record of rights, therefore, is no guarantee that interests exist or continue to exist that effect the immovable property.

Equally, perspective purchasers of immovable property do not have any means of determining whether the title of immovable property they are desirous to acquire has already been alienated from the purported vendor by means of a undocumented oral gift or irregular sale.

It is now time to understand the legal foundations upon which some of the uncertainties caused by these transaction costs, formalities and inefficiencies are allowed to persist.

#### (1) The Land Revenue System

It is settled law that entries in the records of rights maintained under the Land Revenue Act, 1967 are not evidence of title. It has also been explained how, in circumstances where payment of transaction costs can be avoided or where the non-registration or non-compliance of formalities involved in the transfer of immovable property does not affect the transaction, parties to bargains need not have their acquisitions recorded by entries in the record of rights. Thus it can be argued that the record of rights is actually a misnomer, as it may not be a complete record of the rights

<sup>43</sup> See *Muhammad Saeed v. Nook Bai* *Ibid.*

and interests which affect and bind immovable property. And by virtue of the three month period within which acquisitions of interests are to be reported to the relevant *Patwari*,<sup>44</sup> the record of rights cannot be said to be an up-to-date record of such rights and interests either.

To understand the manner in which the record of rights is maintained requires an understanding of the land revenue system. This system, as it is embodied in the Land Revenue Act, 1967 is directly related to the settlements of land carried out by the Colonial English for the purposes of assessing the land revenue due from agricultural and other lands.<sup>45</sup> But “[a] settlement which merely determined the revenue to be paid, without at the same time recording who should be responsible for its payment, would obviously be a futile operation.”<sup>46</sup> As such, “[it] became necessary to determine who were in *possession* of such permanent rights in the soil so as to entitle them to engage [for the payment of revenue].”<sup>47</sup> Note that the primary motivation to record rights in land was not to determine the owner of property, but to determine who was liable to be assessed for the payment of land revenue.

Moreover, the early settlement officers shared a distrust of the civil courts and a weariness of the vicissitudes of litigation. These sentiments prompted the Colonial Government to grant settlement officers summary powers for the purposes of quick adjudication. Some protection was afforded to persons with an interest in immovable property by allowing them to resort to a civil court (and thereby to a forum that can declare rights in property), but the overall policy of sacrificing certainty at the altar of expediency is clear.<sup>48</sup> In Douie’s words: “[no] doubt the result was not perfectly uniform or even in all cases perfectly equitable, but the vital end was secured of settling titles in land on a stable basis [for the purposes of assessing land revenue].”<sup>49</sup>

Quite simply put, if the record of rights cannot guarantee title to immovable property, there is little incentive, other than the words of s. 42 Land Revenue Act, 1976, for persons acquiring a reportable interest in immovable property to record their acquisitions.<sup>50</sup> And for this reason, the record of rights cannot be a certain means of determining the rights and interests which bind immovable property. As long as this state of affairs persists, it is submitted that there will be an inefficient allocation of resources from bargains involving the transaction of immovable property.

## (2) Conflict in Legal Theory

The exceptions to the general policy of documentation and registration of transactions involving immovable property have been set above. The fact that principles

<sup>44</sup>Section 42(1) Land Revenue Act, 1967.

<sup>45</sup>Douie, J.M., “The Settlement Manual” 6<sup>th</sup> edn. (Mansoor Book House, Lahore), para 5, at p. 3, and see, more generally, Powel, BHB, “The Land Systems of British India” Vol I, Chapter V (1988, Crown Publishing, New Delhi), at pp. 241-373 and Moreland, W.H., “The Agrarian System of Moslem India” (Central Book Depot, Allahabad), pp. 1-20.

<sup>46</sup>*Ibid.*, para 98 at p. 77.

<sup>47</sup>*Ibid.*, para 100 at p. 77 (emphasis added).

<sup>48</sup>*Ibid.*, para 101-102 at pp. 77-78.

<sup>49</sup>*Ibid.*, para 102 at p. 78.

<sup>50</sup>In the Punjab, there is even less incentive on account of the Punjab Land Revenue (Abolition) Act, 1967 which abolishes the collection of land revenue and, thereby, the penalties for non-payment of land revenue (which acted as a deterrent against non-compliance) as set out in the Land Revenue Act, 1967.

of Islamic law are argued in aid of these exceptions points to a conflict between the policy of the “secular” laws relating to immovable property and Islamic law. Indeed, this debate can be seen in other areas of law relating to the ownership of property.

In the *Qazalbash Waqf* case<sup>51</sup>, the Shariat Appellate Bench of the Supreme Court of Pakistan held some of the ceilings to the ownership of immovable property prescribed by the Land Reforms Regulations, 1972 and the Land Reforms Act, 1977 were repugnant to the Injunctions of Islam. In *Maqbool Ahmad v. Government of Pakistan*<sup>52</sup> the Shariat Appellate Bench declared s. 28 Limitation Act, 1908<sup>53</sup> as repugnant to the injunctions of Islam. In both cases, the questions before the Court revolved around the Islamic concept of ownership of immovable property and the systems of redistribution of wealth.

At first examination, the principles of undocumented oral gifts and irregular sales seem unconnected with the issues adjudicated upon in the two cases mentioned above. However, to the extent that the Islamic law provides exceptions to the “secular” laws relating to immovable property, these exceptions form part of the overall debate on the concept of ownership of and the role of Islam in transactions relating to immovable property. There is, it is submitted, at this stage, little conceptual clarity of the intellectual foundations of laws relating to conveyancing in general. Until and unless this conceptual clarity is reached, there will always exist uncertainties in transactions relating to immovable property.

## RECOMMENDATIONS

It has been shown that statutory transaction costs and the formalities involved in the documentation, presentation, registration and stamping of transactions involving immovable property result in as much evasion of the requirements of procedure as will not affect the validity of the transaction itself. The lack of formality and documentation, in turn, results in inefficiencies in a bargain in so much as the ideal allocation of resources is hampered. The examination of these inefficiencies has revealed the legal system relating to the transaction of immovable property to be fraught with uncertainty. These uncertainties, in turn, can be seen to be the result of two major issues facing the legal system today: the land revenue system of maintaining the record of rights and a conflict in the basic understanding of the system which drives the law.

In as much as this paper can claim to make suggestions for reform, they appear to be no simpler than merely reversing the analysis so far. The recommendations for reform are:

### (i) Decide the Economic Basis of the Law Relating to the Transaction of Immovable Property

At present the debate in relation to undocumented oral gifts and irregular sales of immovable property revolves on the role of Islam and the principles of Islamic law in our jurisprudence and practice. However, such debate need not remain one-dimensional. The inefficiencies engendered by paperless transactions of immovable property, inasmuch as they affect the efficient allocation of resources, is another debate which has

<sup>51</sup>*Qazalbash Waqf and others v. Chief Land Commissioner, Punjab* PLD 1990 SC 99.

<sup>52</sup>1991 SCMR 2063.

<sup>53</sup>Now repealed by virtue of Amending Act II of 1995.

yet to be tackled. Indeed, the economic system upon which the law relating to transactions of immovable property still lacks conceptual clarity.<sup>54</sup> It is recommended that bringing certainty to such transactions by requiring documentation should be a policy objective contemplated in such debates. Another recommendation, though out of place given the scope of this paper, is to rewire the framework of the law relating to transactions of immovable property by doing away with the distinction between moveable and immovable property and approaching the matter from the point of view of conveyancers.<sup>55</sup>

## (ii) Reform the Land Revenue System of Maintaining Records of Rights

The fact that the land revenue system of maintaining records of rights does not reflect title is at odds with the goals of any welfare state offering its citizens security of life and *property*. Other jurisdictions, like the United Kingdom, which have had experience with a similar title registry system, have taken the bold step of adopting the Torrens system of title registration as a means of guaranteeing title to their citizen.<sup>56</sup>

The Torrens system consists essentially of affirmations by the state of the ownership of interests in land, and a search about a parcel is an examination of the affirmation and, usually, the documents referred to in the affirmation.<sup>57</sup> In other words, registration of titles or interests under the Torrens system gives a state backed guarantee of authenticity. In a comparison of title registry systems and the Torrens system based on the criterion of reliability, cost, speed and capacity of improvement, Risk states “[the] result of the comparison is beyond reasonable debate: the Torrens system is preferable.”<sup>58</sup> Indeed, in research towards a paper for the Pakistan Institute of Development Economics, Khan also suggests the Torrens system as “[a] way out” of the legal problems facing property and the taxonomy of land records.<sup>59</sup>

In the absence of such a radical shift in the system of maintaining records of title, it is suggested that reform may also be brought about by amendments to the Land Revenue Act, 1967. Such amendments should seek to do away with the summary jurisdictions of *Patwaris* at the time of entering mutations in the records of rights which, as has been shown above, is an antiquated method inherited by Pakistan and designed by a colonial power for the purposes of expediency. Entries in the records of rights should

<sup>54</sup>The views of the Shariat Appellate Bench of the Supreme Court in the *Qazalbash Waqf case* (ante, note 52) and in *Maqbool Ahmad v. Government of Pakistan* (ante, note 53) appear to be at odds with the fundamental principle enshrined in Article 3 of the Constitution: “from each according to his ability to each according to his work.”

<sup>55</sup>Indeed, the object of bill which eventually reformed the English law of real property is instructive: “to make the title of land as nearly as circumstances permit to the title to stock, and to obtain the same advantages as would be secured under a good system of registration of title as may be derived from without the disadvantages incidental to a register of owners,” per MEP Wolstenholme, as quoted Johnson, JH “The Reform of Real Property Law in England” (1925) *Columbia Law Review*, Vol. 25, No. 5 at p.610.

<sup>56</sup>Torrens has also been adopted in Australia, New Zealand, the United States and Canada.

<sup>57</sup>Risk, RCB, “The Records of Title to Land: A Plea for Reform” (1971) *University of Toronto Law Journal*, Vol. 21, No. 4, p. 469.

<sup>58</sup>*Ibid.*, p. 477.

<sup>59</sup>Khan, SK “Property Law and the Taxonomy of Land Records” PIDE Seminar, Islamabad, 29 November 2006. The author wishes to extend his gratitude to Ms. Khan for sharing her research for the purposes of this paper.

be made after due consideration of the documents placed before a responsible revenue officer and after such enquiries as are deemed necessary. A more reliable record of rights will reduce the uncertainties inherent in transactions relating to immovable property.

It is also suggested that the scope of acquisitions registerable in the register of rights be widened to include such hidden rights as pre-emption and easements.<sup>60</sup> The more rights and interests that are reflected in the register of rights will mean that inspection thereof is a more certain means of determining the interests which bind immovable property.

### **(iii) Rationalise Duties and Fees on Transactions of Immovable Properties**

One of the main reasons parties to a bargain will, if permissible, arrange their transaction so as to avoid stamp duty and registration fees is that these transaction costs are prohibitive. Both the costs involved in stamping and registration must be considered together as registration cannot be affected without lawful stamp duty paid on the documents being registered. For instance, simply reducing the registration fee for documents will not act as an invitation to register unless the corresponding stamp duty is also reduced. In this regard, the approach of the law to registered documents must be somewhat altered.

In practice, registrations of transactions involving immovable property are carried out as proof of the transaction to the world. However, the fact that the presumption of genuineness of registered documents can so easily be challenged (by specific denial) means that, in practice, their evidentiary value has fallen to little above the value placed on unregistered documents: both will have to be proved in accordance with the rules of the Qanun-e-Shahdat.<sup>61</sup> In other words, it is submitted that the diminishing evidentiary value of registered documents has made the other object of registration seem more relevant: the charging of stamp duty.

The foundation of this submission lies in the unchanged minimum value of immovable property which is subject to the requirements of s. 54 Transfer of Property Act, 1882 and s. 17 Registration Act, 1908: Rs 100. This figure was set over a century ago and has not been revised to date. In practical terms, there is no minimum value on transactions involving immovable property as no immovable property worth transacting is less than this amount. Therefore, in practice, all transaction involving immovable property are, unless avoidable, chargeable with stamp duty. With stamp duty now clearly the main transaction cost affecting the efficiency of transactions involving immovable property, the law's approach to stamp duty must also be examined.

Though an elaboration of the nature of stamp duty is outside the scope of this paper, suffice to say that the charging of stamp should be approached less from a revenue collection point of view and more from a point to add incentive to the registering of transactions involving immovable property.

<sup>60</sup>Khan, *Ibid.* has also made a similar suggestion with regards pre-emption.

<sup>61</sup>See note 15, *ante.*, the presumption of genuineness, like all presumptions, is refutable.

## Comments

As not only an ardent advocate but also a committed practitioner of the interdisciplinary field of law and economics, I would like to preface my remarks today by commending both the organisers, the Pakistan Society of Development Economists (PSDE) and the Pakistan Institute of Development Economics (PIDE), for including this session on “Law and Economics”—the first in a national conference in Pakistan—in their annual proceedings. I am really pleased to see my objective of promoting this field in Pakistan being realised and I am personally grateful to Dr Nadeem-ul-Haque, Director PIDE, and President, PSDE, for his recognition of the importance of the role of law in economic development. One could not accept any less from an economist belonging to the Chicago school of economists!

I have been working in the field of law and economics in Pakistan since 1999, first as an Adviser to the Federal Minister of Finance and Revenue and later as Chairman of the Securities and Exchange Commission of Pakistan. In 2003, I formally developed the idea in the Ministry of Finance and added a section on Law and Economics on its website.<sup>1</sup> To strengthen the required linkage between law and economics in Pakistan, I further proposed the establishment of a Law and Economics Association of Pakistan (LEAP), which is presently in the process of being formed. This interdisciplinary dialogue is likely to give impetus to this process.

This year's theme of the PSDE Conference is “Governance.” Mindful of this, I consider it pertinent to focus my remarks on the papers presented by the panelists in the context of governance. I have reviewed the papers submitted by the four panelists today and congratulate them on the excellent quality of their papers. They have all researched their topics thoroughly and have done an incisive analysis of pertinent issues. My task is to synthesise their views and to comment on their conclusions.

Mr. Hilton L. Root, in his discourse on “Judicial Systems and Authoritarian Transitions” has tried to explore the idea as to whether better rule of law would generate economic growth and whether that would in turn build constituencies for democratic reforms. He has, in particular, examined the role that courts in authoritarian regimes have played in contributing to political liberalisation. He has reviewed at length the role of law in development under authoritarian regimes. He has specifically compared the economic role of courts under various political systems. He has sought to find solutions to various dilemmas faced by autocrats and determine linkages between political discipline and commercial law enforcement. He has finally focused on the role of law and judicial institutions in regime change before concluding that: “The links between the judicial institutions and liberalisation is ambiguous at best.” He notes that “Governments may

<sup>1</sup>See, <http://www.finance.gov.pk/law/home.htm>.

employ courts to improve contract enforcement, loan repayment and bureaucratic discipline and still not allow citizens the right to assemble, mobilise and organise for political purposes.” He suggests that “[a]utocrats may overlook or even encourage opacity, corruption, or inadequate capacity of the commercial law system to motivate investors to depend on government officials for the protection of their investments”.

While commenting on the change process, Mr Root notes that: “While the change process occurred at different rates, both France and England’s innovations in the institutions of participatory governance were driven by the fiscal necessity of the state. With the advent of the international financial institutions, domestic taxation is not the only option for securing government resources. Foreign debt has caused further rifts between rulers and citizens, as foreign policy concessions made by dictators are often granted by developing countries to donors in exchange for extended credit.” He reemphasises the point by stating that “many leaders today derive their fiscal capacity to rule from resources that are independent of the people who are being governed. Autocrats often survive because they have access to external resources and as noted base the stability of their regime on the support of the propertied and politically privileged groups, their political survival strategies differ fundamentally from democratically elected leaders. External processes triggered by the Cold War which provided external funding for compliant dictators, and the resource curse which put resources into the hands of government elites, all interfered with the emergence of strong and accountable national states. External resources, generally available only to the incumbent leadership, lessen the efficacy of domestic political challengers, reducing the incentives for incumbents to be concerned with structural reforms and institution building”. This is perhaps the most interesting observation made by Mr Root that negates the judicial reform programmes initiated by international financial institutions in many less developed countries including Pakistan—for example, the Access to Justice Programme being funded by the Asian Development Bank.

Mr Root has, among others, reviewed various jurisdictions in Asia such as Indonesia and China. But even though his submissions as a result of this review may be applicable to most less developed countries like Pakistan, the absence of discussion on Pakistan is quite conspicuous. It may be worthwhile for him to consider the extensive discussion on this specific subject by Paula R. Newberg in her book: *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge: Cambridge University Press, 1995).<sup>2</sup>

This book analyses the tensions between the executive- and centre-dominated “vice-regal” model of governance of colonial India and the liberal and representative tradition of the opposition to that colonial government. It points out that the courts have been made a “crucial vehicle” of legitimacy for the Pakistani state and have been put in a role in which they have “literally judged the state” on the most critical constitutional issues, deciding conflicts between heads of state and government resulting in the dissolution of legislatures (1954, 1988, 1990, 1993), the validation of a coup d’état (1958, 1977), efforts to restructure transitions between civil and military governance (1972,

<sup>2</sup>For other references on the subject, see Hamid Khan, *Constitutional and Political Development in Pakistan*. Oxford University Press (New York, 2001); Waseem, M. “Constitutionalism in Pakistan: The Changing Patterns of Dyarchy”, 53 *Diogenes* (No. 4) 102-115 (2006).



1986-88), and continuing attempts to define substantively and procedurally the meaning of politics, of constitutional governance, and occasionally, of democracy.<sup>3</sup>

These issues have now been updated and dealt with exhaustively by Mr Osama Siddique in his discourse on “The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and Its Discontents.” While reviewing the constitutions and martial laws in the historical context, he points out that: “The burden of having to define both the country’s legal as well as political frameworks, which created at times conflicting demands, proved onerous for the first Constituent Assembly. The challenges of constitution-making and law-making constantly encroached upon each other. Effective governance is a formidable task for any new legislative body, made more difficult in Pakistan’s case by increasing conflicts between the Constituent Assembly and the office of the Governor-General—two institutions drawing power from different governing laws, and distinct in their history, emphasis, and approach to governance.” He further points out that even after the eventual establishment of parliamentary democracy in the country, fluid political structures, governance inexperience, and power politics contributed to the inability of parliamentary democracy to govern the new country effectively.

Parliaments have been dissolved on several occasions ostensibly due to ineffective or autocratic civilian style of governance. Thus, as Mr Siddique observes: “Key deliberations and debates over the country’s political and constitutional ethos, structure, and mode of governance were not held in the nation’s legislature, but in the subtexts of the constitutional legal battles held in its courtrooms”. It is ironic to note that the Pakistan judiciary has often based its endorsement of successive military regimes on, *inter alia*, the pretext of ensuring economic stability and good governance. The resultant mandate assumed by different military dictators on account of judicial endorsements of the military rule has allowed these rulers to tinker with state structures and governance mechanisms to perpetuate their rule thus resulting in political setbacks and non-sustainable economic development from time to time.

It would have been useful if Mr Siddique had analysed or at least discussed the economic implications or rationale for the judgments endorsing successive parliamentary dissolutions but he was perhaps not able to focus on this aspect given his total concentration on the abuse of political process by repeated military interventions.

Mr Ahmad Rafay Alam aptly analysed legal and economic aspects of property transactions in his discourse on “Land-locked: An Examination of Some of the Inefficiencies Affecting Transactions Involving Immovable Property”. He suggests that the economic system upon which the law relating to transactions of immovable property is based still lacks conceptual clarity. He consequently seeks to identify some of the transaction costs and inefficiencies which exist and affect transactions of immovable property under Pakistani law. He observes that: “The examination of these inefficiencies has revealed the legal system relating to the transaction of immovable property to be fraught with uncertainty. These uncertainties, in turn, can be seen to be the result of two

<sup>3</sup>See, book review by C. Neal Tate in Vol. 6 *The Law and Politics* Book Review (No. 7) (July, 1996) pp. 109-112.

major issues facing the legal system today: the land revenue system of maintaining the record of rights and a conflict in the basic understanding of the system which drives the law.” His recommended reforms, therefore, include the basic requirement for determining the economic basis of the law relating to transaction of immovable property and the much awaited reformation of the land revenue system of maintaining records of rights.

Ms. Foqia Sadiq Khan has elaborated the issues regarding property rights and land records in her discourse on “Property Rights and Taxonomy of Land Records: A Case Study of Lahore.” She has, *inter alia*, very ably pointed out the ambiguities and problems in the laws and legal procedures and highlighted the element of political economy in the land ‘phenomenon.’ She has identified and analysed problem areas in land records and legal procedures with a view to providing a conceptual framework for reform. This constructive approach is followed by an interesting perspective on the political economy based on case analysis. Her assertion that the privileged and influential class will help establish property rights provides the missing link of how the reform process will work.

Benefiting from the valuable inputs from the panelists, I would like to add my general comments on the subject of governance and development in order to further elucidate the views of the panelists.

I believe governance, like snow, flows down from the top. In the absence of proper constitutional governance in the country, I think, it is not only academic but perhaps even hypocritical to some extent to talk about governance in the context of political or economic development. The legal foundation of any society rests upon the Constitution. Therefore, constitutional governance is a *sine qua non* for law to play an effective role in economic development. Let us examine the constitutional imperative for economic development in the context of Pakistan.

The architects of Pakistan envisaged a strong foundation of Pakistan based on fundamental rights and principles of policy grounded in an admixture of legal, social, economic and political justice. The Constituent Assembly of Pakistan resolved to frame a constitution for the country that, *inter alia*, “guaranteed fundamental rights including equality of status, of opportunity and before law, social, economic and political justice...”<sup>4</sup>

The framers of the current Pakistan Constitution of 1973 (Pakistan Constitution), while guaranteeing fundamental rights sought to achieve the principle of economic justice through State sponsored development based on socialist economic ideals. Resultantly, the economy became dependent on a dominant public sector that developed as a result of nationalisation in the 1970’s. But despite the recent reversal of economic direction through privatisation, the economy remains highly influenced by either what is still a dominant and pervasive public sector or the continuing over-regulation of the economy. And, even though there may have been a fundamental shift, consistent with the international trend, in the thinking of economic managers of successive governments in Pakistan to promote private sector development, economic development remains largely in the hands of public sector managers in the country.

<sup>4</sup>The Objectives Resolution, which now forms part of the Pakistan Constitution of 1973 pursuant to Art. 2A thereof. See, Annex, Pakistan Constitution.

The Constitution of Pakistan seeks to promote social and economic well-being of the people and protect economic life in Pakistan.<sup>5</sup> It confers fundamental rights, including economic rights, and protects these rights by declaring laws inconsistent with or in derogation of fundamental rights to be void. Any law, in so far as it is inconsistent with the rights conferred by the Constitution, is, to the extent of such inconsistency, void. The State is proscribed to make any law that takes away or abridges the rights conferred by the Constitution, and any law made in contravention thereof is, to the extent of such contravention, void.<sup>6</sup> Hence the need for constitutional deviation when economic rights are abridged in any way. The 1973 Constitution of Pakistan not only exempted Bhutto's economic reforms, which included nationalisation of various industries, but also gave constitutional protection to these as well.<sup>7</sup> Furthermore, consistent with the centrist economic thinking of its framers, the Pakistan Constitution allowed the Federation to legislate in matters relating to the development, management and administration of industries.<sup>8</sup>

Under the Principles of Policy enshrined in the Pakistan Constitution, the State is generally required to promote the social and economic well being of the people and, in particular, the educational and economic interests of backward classes or areas in the country with a view to promoting social justice.<sup>9</sup> It is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with those Principles in so far as they relate to the functions of the organ or authority. However, in so far as the observance of any particular Principle of Policy may be dependent upon resources being available for the purpose, the Principle is subject to the availability of resources.<sup>10</sup> Hence responsibility with respect to Principles of Policy is circumscribed. The validity of an action or of a law cannot be called in question on the ground that it is not in accordance with the Principles of Policy, and no action can lie against the State, any organ or authority of the State or any person on such ground.<sup>11</sup>

<sup>5</sup>See, e.g., Art. 38, Pakistan Constitution, which requires the State to promote the social and economic well-being of the people. The Federation of Pakistan has executive authority to give directions to a Province as to the manner in which the executive authority thereof is to be exercised for the purpose of preventing any grave menace to the peace or tranquility or economic life of Pakistan or any part thereof. Art. 149, Pakistan Constitution. The Federation is also empowered to give similar directions to the Provinces if the President of Pakistan has made a proclamation of financial emergency in case the economic life, financial stability or credit of Pakistan, or any part thereof, has been threatened. Art. 235, Pakistan Constitution.

<sup>6</sup>Art. 8, Pakistan Constitution.

<sup>7</sup>For example, Part I of the First Schedule to the Pakistan Constitution exempted certain Presidential Orders and Regulations such as the Economic Reforms Order, 1972 (P.O. No. 1 of 1972), and Economic Reforms (Protection of Industries) Regulation, 1972, and the West Pakistan Industrial Development Corporation (Revocation of Sale or Transfer) Regulation, 1972. Moreover, the Economic Reforms (Protection of Industries) Regulation, 1972 and the West Pakistan Industrial Development Corporation (Revocation of Sale or Transfer) Regulation, 1972 were granted additional protection. These cannot be altered, repealed or amended without the previous sanction of the President. See, Items 20 and 21, Sixth Schedule read with Art. 268(2), Pakistan Constitution.

<sup>8</sup>This subject is part of the concurrent legislative list. See, Item 3, Part II, Fourth Schedule read with Art. 70(4), Pakistan Constitution.

<sup>9</sup>Arts. 38 and 37, Pakistan Constitution.

<sup>10</sup>Art. 29, Pakistan Constitution.

<sup>11</sup>Art. 30, Pakistan Constitution.

National planning and national economic coordination is part of the federal legislative list.<sup>12</sup> The Pakistan Constitution provides for the establishment of a National Economic Council, comprising the Prime Minister and such other members as the President may determine with due regard to provincial representation, to review the overall economic condition of the country. The National Economic Council is mandated to formulate plans in respect of financial, commercial, social and economic policies for advising the Federal Government and the Provincial Governments. In formulating such plans, it is required to be guided by the Principles of Policy set out in the Constitution.<sup>13</sup>

There appears to be no cohesive or unified economic policy-making procedure in Pakistan. The authority to formulate or in some cases to prescribe policies is unevenly distributed, under the Government's Rules of Business, among various administrative units of the Government. The policy making process, therefore, lacks consistency and uniformity and as such hampers the over all management of the economy.

Managing the economy and managing finances are two separate things. Whereas the present Government may have managed its finances, particularly international finances, well it has apparently not managed the economy as well. Neither is the present or any future Government likely to succeed in managing the economy well unless it recognises the nexus between law and economics and learns to use law as an effective instrument for development.

Even though the Constitution provides the development goals and the law plays an important role in the process of development and even though economic managers often unwittingly use law as an instrument for prudential regulation of the economy, the need for a proper legal and regulatory framework for economic development is often ignored or not given the importance that it deserves. What is needed is a legal vision and strategy that is compatible with economic and social goals. Legal input should be made a part of the economic planning and policy-making function in order to develop a proper and effective legal infrastructure for economic development.

Just as the micro-economy depends on a macro-economic framework, micro-legal prescriptions and enforcement need a macro-legal framework. The legal profession in Pakistan has to be reoriented. Presently it thrives on dispute settlement. It has to be reoriented from conflict resolution to conflict avoidance. For this purpose investment in legal resources, especially legal education, is needed urgently.

While concluding, I would like you all to ponder over with my Churchillian belief. I believe that the economy is too important a matter to be left to the economists alone. I, therefore, suggest that we seek to nurture a new breed of development lawyers to bridge the gap between law and economics in Pakistan. This new breed of lawyers will most likely more effectively promote and protect the constitutional imperatives for governance and development in the country.

**Tariq Hassan**

Lahore.

<sup>12</sup>Item 32, Part I, Fourth Schedule read with Art. 70(4), Pakistan Constitution.

<sup>13</sup>Art. 156, Pakistan Constitution.