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LUMS Law Journal

Volume 9, Issue 1, 2023

— Shaikh Ahmad Hassan School of Law —
LUMS

Aims and Scope

The LUMS Law Journal is a peer-reviewed journal of Shaikh Ahmad Hassan School of Law, LUMS. The primary aim of the Journal is to provide a forum for scholarly debates amongst law students, faculty, lawyers, judges, practitioners, and experts on important legal issues, which may lead to policy reforms. This Journal is an endeavour to foster a profound understanding of contemporary legal issues among its readers. While maintaining all the standards of academic legal scholarship and integrity, this journal seeks to inform public discourse by publishing articles that are intellectually rigorous and thought-provoking. It aims to provide its readers with a detailed, advanced, and an insightful legal analysis of various ongoing developments in the legal arena in Pakistan and abroad. It is intended to stimulate interest in all matters pertaining to law, with an emphasis on matters arising from the relationship of law to other disciplines.

For the realisation of its objectives, the Journal draws on the academic rigor and excellence of various students, faculty members, lawyers, judges, and practitioners by featuring their valuable contributions in the Journal. The Journal strives to uphold its vision of publishing challenging and useful legal scholarship of the highest academic quality, a vision that is true for all times.

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A Note from the Editors

For almost a decade now, LUMS Law Journal has been the leading platform for annually publishing pertinent legal scholarship in Pakistan. It retains its higher academic and research standards in welcoming entries on a wide range of legal issues from domestic to national and transnational ones. Continuing the tradition, this year, we are delighted to present the ninth volume of the LUMS Law Journal.

This volume contains five research articles, three case notes, and one book review, which provide research-based discussions on various domestic and global legal issues. Aman Rehan and Hammad Ali Kalhoro unpack the dangers of leaving Artificial Intelligence unregulated and the need to regularise its liability by making laws for various industries. Mahnoor Waqar, on the other hand, stresses upon the need of adopting Artificial Intelligence in outdated legal systems and argues for introducing technology in arbitral proceedings. Muhammad Anas Khan deconstructs the harmful and counterproductive effects of defamation laws in Pakistan, which being criminal in nature are more likely to silence the victims of sexual harassment, abuse or rape. Humna Sohail and Samina Bashir contemplate the balance between public and private interests under Intellectual Property rights in wake of COVID-19 and analyse the situations where restricting vaccine information can become an impediment to public welfare. Mustafa Khalid makes a compelling case for introducing Comprehensive Sex Education as a right under the Constitution of Pakistan by laying down the relevant grounds of constitutional, international, and Islamic law. Shanzay Javaid's case note on *Pakistan v Public at Large* provides a critical insight into the role of the Shariat Court in protecting the civil bureaucracy from arbitrary dismissals and treatment in a highly militarised environment. Muhammad Awais Alam pens down a case note on the S*hahab Saqib v Sadaf Rasheed* case and highlights the significant progress made in Muslim Personal Law with regards to the wife's right to maintenance. The judgment has made the wife's right to maintenance absolute, eliminating all previous pre-conditions attached to it. Muhammad Umer Ali Ranjha and Ariba Fatima's case note on *Safia Bano v Home Department, Government of Punjab* explains the unprecedented decision of the Court to ban the death penalty for mentally ill persons and discusses the rationale of rehabilitative justice behind doing so. Finally, Dr. Shahbaz Ahmad Cheema pens a review on the book "*Rights of the Child in Islam: Theory, Mechanisms, Practices and Convention on the Rights of the Child*" written by Dr. Muhammad Munir.

We thank this year's contributors for their valuable submissions to this volume of the LUMS Law Journal. We appreciate their patience and consistent cooperation during the long rounds of reviews. We express our deepest gratitude to Dr. Zubair Abbasi, our Chief Editor, and Ms. Marva Khan, our Co-Editor, for their unwavering support and oversight, which have been instrumental in ensuring the timely completion of our work. More importantly, we are grateful to the members of the Editorial Committee of the LUMS Law Journal, especially Bilquees Bano Vardag, Amna Sohaib Naqvi, Arooba Mansoor, Iman Agha, Marha Fatima, Maryam Asad, Muhammad Mohad Zulfiqar, Haanya Channa, Hareem Godil, Kehar Khan Hyder, Laiba Tariq, Rabia Iftikhar, Sameen Ahmed, Syed Qasim Abbas,

Syeda Eimaan Gardezi, and Usama Zafar whose untiring diligence, perseverance, and commitment to producing quality legal scholarship made this volume publishable.

The LUMS Law Journal strives to produce rigorous and well-researched legal scholarship on topics that are pertinent, engaging, relevant to existing legal debates, and that hold the potential of challenging clichéd ideas. In this regard, we welcome feedback, suggestions, and recommendations. Please write to us at submissions.llj@lums.edu.pk.

Student Editors

Alina Arif, Muhammad Awais Alam, Muhammad Mohsin Masood, Muhammad Usman Mumtaz, and Yahya Assad Rana

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Articles

Living in the Present, Anticipating the Future: Ascribing Liability for Artificial Intelligence

Aman Rehan and Hammad Ali Kalhoro*

Abstract

For any legal system, determining how liability will be ascribed to a particular person is a difficult task. However, a recently popularised conundrum in legal literature considers the question of legal liability for artificially intelligent computer systems. With the advent of COVID-19, the adoption of new technologies is accelerating, and the role of AI in our lives is only going to increase. What is often overlooked is that such technologies are usually premised on the "deep learning" system, creating uncertainty in decision making, experience-based learning, and reactions to events. Considering the issue of ascribing liability for harms caused by AI, this paper scrutinises these shortcomings. It highlights how legal systems have the propensity to do more in the promulgation of industry-wide standards relating to AI products. With rapid development of AI technology and the increasing reliance on it by humans, a failure to promulgate and adopt such standards may have catastrophic consequences.

Introduction

In 1842 Ada Lovelace,[1] an aspiring computer scientist, showcased an anomalistic combination of several abilities, including a proper appreciation of the scope, capability, and future of computer science and technology. She perceived human beings to have become too comfortable maintaining the traditional way of doing things – the "comfort" in question refers to the notion of stagnation of the development of humanity. Therefore, in a then inconsequential event, her penning down of the first algorithm for a computing engine would forever alter the way we would interact with each other, and more importantly with machines. Since then, the constantly evolving world of technology has created significant legal challenges which can easily be mistaken for "anomalies".

The world of Artificial Intelligence ("AI") is but one stream of this transformative technology expected to have an everlasting influence on the world of robotics, transportation, manufacturing, cybersecurity, and even medicine.[2] The benefits are clear,

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[1] Eugene E. Kim and Betty A. Toole, 'Ada & The First Computer' (1999) Scientific American 76, 78 <http://www.cs.virginia.edu/~robins/Ada_and_the_First_Computer.pdf> accessed 13th November 2019.

[2] Yudong Zhang and others, 'Artificial Intelligence and its Applications' (2014) 10 Mathematical Problems in Engineering 1, 7 <

however, the use of AI to complete tasks also involves an undertaking of a certain degree of risk for error. Given the sheer number of products and services that rely on AI, there will naturally be instances in which AI does not produce desirable results. While the majority of these failures will be benign, the law must adequately cover situations wherein the failure of AI can directly cause tangible harm to both people and property.[3] This conundrum has led to an increased advocacy for re-evaluating consumer liability laws around the globe.

Considering this perplexing legal challenge, this paper aims to explore the potential of product liability laws as an effective mechanism for addressing AI harms. The following legal questions will be explored in detail: firstly, are algorithms and products similar, and if so, what metric can be used to establish their similarity? Secondly, can certain algorithms be compartmentalised as "products" using the metric described? If so, what kind of liability regime will be applicable to them? Thirdly, do the existing legal instruments adequately protect AI consumers? Fourthly, what can be done to overcome the shortcomings of existing legal instruments? And finally, if liability can be ascribed to robots, should rights be granted to them as well? A systematic scrutinization of these questions will help uncover the extent to which work needs to be done to protect consumers from the potential dangers of AI.

Definition of Artificial Intelligence

Before grappling with these questions, it is prudent to delve into a brief exposition of both the history and definition of AI, because AI as we know today is a product of historical developments rooted in religion, mythology, literature, and even pop-culture. Robert M. Geraci highlights the ways in which technologists have derived inspiration regarding AI from stories found in scriptures and popular culture: "*to understand robots, we must understand how the history of religion and the history of science have twined around each other, quite often working towards the same ends and quite often influencing another's methods and objectives*."[4] The history of AI is commonly traced back to Charles Babbage and Ada Lovelace, who are deemed to have not only predicted the advent of AI but also put together designs of machines which were geared towards carrying out "intelligent

https://www.researchgate.net/publication/261548333_Artificial_Intelligence_and_Its_Applications/link/00463537d95b102743000000/download > accessed 14th November 2019.

[3] Dr. Saleemi Amershi, 'Embracing AI Failure' (2009) *CSCW University of Texas* 1, 2 <https://sites.utexas.edu/goodsystemscscw/files/2019/10/GoodSystemsCSCW2019WorkshopPapers.pdf> accessed 2nd January 2020.

[4] Robert M. Geraci, *Apocalyptic AI: Visions of Heaven in Robotics, Artificial Intelligence, and Virtual Reality* (Oxford University Press 2010) 147.

tasks".[5] However, AI is not a child of the modern era; and the concept of intelligent beings being created from inanimate objects can be traced back to ancient texts.[6] Along with scriptures, AI has also been explored in literature and the arts,[7] as well as pop culture.[8]

While religion and popular culture alike have provided insight into the development of AI, the myriad of representations and portrayals have led to misleading impressions in people's minds. However, legislation or regulation based on such impressions is not acceptable in any developed legal system. This principle is also expounded by legal theorist Lon L. Fuller, who defined eight formal requirements for a legal system to function in conjunction with a set of moral norms which allows humans the opportunity to not only engage with the law but also amend their actions accordingly. One of these requirements is that the citizens under a legal system must know of the standards which are applicable to them, implying that the laws should be comprehensible.[9] Therefore, without a proper definition, the application of a regulatory mechanism to something as omnipotent, rapidly changing, and fluid as AI is a Herculean task. The definition to be used for this paper is the one proposed by Jacob Turner in his book *Robot Rules: Regulating Artificial Intelligence:* "*Artificial Intelligence is the ability of a non-natural entity to make choices by an evaluative process*".[10]

Within this definition, it is implied that the ability to make choices confers a certain level of autonomy, albeit not absolute autonomy. An artificially intelligent entity will be able to make an autonomous choice even if there is human input at any stage. As this paper focuses specifically on algorithms, this paper will follow Jack Balkin's classifications which treat both robots and algorithms as being part of the "algorithmic

[5] Christopher D. Green, Thomas Teo, and Marlene Shore (ed), *The Transformation of Psychology* (American Psychological Association Press 2001), 133; Ada Lovelace, 'Notes by the Translator' reprinted in R.A. Hyman (ed), *Science and Reform: Selected Works of Charles Babbage* (Cambridge University Press 1989) 268–310.

[6] Chinese mythology and ancient Sumerian myths have alluded to the creation of mankind from "clay and blood" and while Chinese myths present humankind being made from "the yellow earth," holy scriptures such as the Quran also allude to the creation of man from "a clot of congealed blood." *See* T. Abusch, "Blood in Israel and Mesopotamia", *Emanuel: Studies in the Hebrew Bible, the Septuagint, and the Dead Sea Scrolls in Honor of Emanuel Tov* (Brill 2003) 673; ——,'Nuwa,' <http://www.newworldencyclopedia.org/entry/Nuwa> accessed 3 Feb 2020; Al- Quran 96:2.

[7] From Mary Shelly's *Frankenstein*, in which the author warns about the human ambitions of creating intelligence, to Homer's *Iliad*, in which a blacksmith had "servant maids" which he made from gold. *See* Jordan (tr), Homer, *The Iliad* (University of Oklahoma Press, 2008) 1, 352.

[8] Popular cinema has also advanced the advent of AI - this can be seen from the rather innocent "C-3PO" from the Star Wars franchise to more complex conceptions of robots with a moral compass such as "Robocop" or "Terminator."

[9] Lon L. Fuller, *The Morality of Law* (Yale University Press 1969).

[10] Jacob Turner, *Robot Rules: Regulating Artificial Intelligence* (Palgrave Macmillan 2019) 27-33.

society".[11] In an "algorithmic society", societal organisation revolves around social and economic decision-making through algorithms. The algorithms not only make the decisions but also carry them out in some cases. In this sense, robots and AI merely become a "special case of the Algorithmic society".[12] Additionally, the "algorithms" referred to in this paper are those which are computerised. These algorithms can cause damage without any physical embodiment (other than computer hardware) or human intervention.

The limitations which come with functional definitions, however, apply to any legislative effort. Hence, while it is important to define AI for conferring certainty into the law, it is also imperative to avoid precise boundaries and ossify the law. This is also logical given the rapid developments which are made in this field. In this paper, algorithms will be compartmentalised into the larger ambit of machine learning and adaptation, which occurs whenever a machine can alter its data, structure or program in a way that its performance in the future is expected to improve.[13] The term "machine learning" was first defined by Arthur Samuel as computers being given the "ability to learn without being explicitly programmed."[14] This categorisation results from AI being capable of "independent development" i.e. the ability to learn from data sets in a manner which is unforeseen by its designers.[15]

Relevance

Since this paper lies in an intersection of law and technology, it might be deemed too futuristic by some. Often, one is not even aware of the leaps being made in the field of technology. Indeed, it is common for companies to produce new technologies through upgrades and software patches; while these changes may be unnoticeable at first, they are cumulatively quite significant. An example of this is the changing user interface of social media platforms such as Facebook and Instagram. The tendency to ignore incremental changes may lead to undesirable yet avoidable consequences. McKinsey and Co., an international management consultancy company, has provided research which estimates that the technological revolution is "*happening ten times faster and at 300 times the scale,*

[11] Jack M. Balkin, 'The Three Laws of Robotics in the Age of Big Data' (2017) 78 Ohio State University Law Journal.
[12] Ibid 11.
[13] Nils J. Nilsson, *Introduction to Machine Learning: An Early Draft of a Proposed Textbook* (Department of Computer Science, Stanford University 1998) 1 <https://ai.stanford.edu/~nilsson/MLBOOK.pdf> accessed 1 June 2018.
[14] Andres Munoz, 'Machine Learning and Optimization' (2015) Courant Institute of Mathematical Sciences New York University 1 <https://cims.nyu.edu/~munoz/files/ml_optimization.pdf> accessed 1 June 2018.
[15] Turner (n 10) 7.

or roughly 3000 times the impact."[16] Verily, urgency in this case is not only justified via the magnitude of change but also consolidated by a sharp increase in the number of aggrieved people around the globe.

The culmination of all the fears related to AI was the horrific death of Elaine Herzberg on 18 March 2018, which played a significant role in bringing AI technology to the forefront of both the local and international media. Herzberg, a 49-year-old resident of Arizona, was immediately declared dead after being struck by a Volvo SUV. The vehicle was said to have been cruising at a speed of 80 kph at night in Tempe. The horrifying incident was directly attributed to the AI lacking "the capability to classify an object as a pedestrian unless that object was near a crosswalk," as was affirmed by the National Traffic Safety Board, or NTSB in Arizona[17]. As a direct consequence of this shortcoming, it could not correctly predict her path and concluded that it needed to brake just 1.3 seconds before it struck her as she wheeled her bicycle across the street a little before 10 p.m.[18] For critics, the *laissez-faire* attitude adopted by the state of Arizona was particularly problematic. Many went as far as to question the rationale behind introducing such nascent technology to the state, specifically without giving much forethought to its potential dangers. A fate similar to Elaine's was also suffered by Joshua Brown, a 40-year-old resident of Ohio, after he placed his newly purchased Tesla Model S in its self-driving "autopilot" mode. A malfunction of the AI at the heart of Tesla's autopilot mode resulted in its failure to distinguish a large white 18-wheel truck from a trailer. Resultantly, the car attempted to drive at full speed under the trailer, amounting to the fatality.[19] An example closer to home, within Pakistan, can be that of the machine-learning algorithm guiding the U.S. drone program. It is argued, in a report published by Ars Technica, that 'SKYNET' (the algorithm at the heart of the planes) may have wrongly targeted thousands of innocent civilians, leading to many unnecessary deaths.[20] It was also found that the algorithm performed well strictly in terms of the outcomes it was

[16] Richard Dobbs, James Manyika, and Jonathan Woetzel, 'No Ordinary Disruption: The Four Global Forces Breaking All the Trends' (*McKinsey Global Institute*, 2015) <https://www.mckinsey.com/mgi/no-ordinary-disruption#> accessed 12 February 2020.

[17] DeArman, 'The Wild Wild West: A Case Study Of Self Driving Vehicle Testing In Arizona' (2019) 61 Arizona Law Review 991.

[18] Ibid.

[19] Megan McArdle, 'How safe are driverless cars? Unfortunately, it's too soon to tell' *The Washington Post* (20 March 2015) <https://www.washingtonpost.com/opinions/no-driverless-cars-arent-far-safer-than-human-drivers/2018/03/20/5dc77f42-2ba9-11e8-8ad6-fbc50284fce8_story.html> accessed 12 February 2020.

[20] Christian Grothoff and J.M Proup, 'The NSA's SKYNET program may be killing thousands of innocent people' (*Ars Technica*, 16 February 2016) < https://amp.theguardian.com/science/the-lay-scientist/2016/feb/18/has-a-rampaging-ai-algorithm-really-killed-thousands-in-pakistan> accessed 13 September 2021.

trained for – with 0.008% of the targets being wrongly classified.[21] However, if this data were viewed not as mere numbers, around 15,000 innocent people were killed. All these cases highlight AI's propensity to cause physical harm; however, such harms may not always be physical.

For instance, in late 2013, IBM teamed up with the University of Texas's Cancer Center in the hope of developing a new "Oncology Expert Advisor" system. The first line of their launch press release stated the following: "*MD Anderson is using the IBM Watson cognitive computing system for its mission to eradicate cancer*."[22] Five years following the press release, a review of the internal IBM documents uncovered how their AI system was giving not only erroneous, but quite dangerous, cancer treatment advice. Ultimately, the entire venture failed to achieve IBM's ambition, while simultaneously costing them $62 million.[23] Thankfully, the AI system was trained on hypothetical patient data, resulting in only monetary loss rather than loss of life.

Another product that proves the potential for non-physical harm through AI reliance is that of the new Apple iPhone X.[24] A well marketed feature of the new phone was its "Face ID" technology which allows its owner to unlock their phone by simply showing their face to the front camera. Apple described this mechanism as being 10 times more secure than the traditional fingerprint mechanism. One year after the release of the phone, hackers successfully attempted to utilise 3D printed masks as a loophole to the system. A Vietnam-based security firm, Bkav, affirmed these claims and further stipulated that at a mere cost of $200, people could access the personal data of anyone who relied on the Face ID technology.[25] The work of Bkav provides a fascinating glimpse into the

[21] Martin Robbins, 'Has a rampaging AI algorithm really killed thousands in Pakistan?' (*The Guardian*, 18 February 2016) <https://amp.theguardian.com/science/the-lay-scientist/2016/feb/18/has-a-rampaging-ai-algorithm-really-killed-thousands-in-pakistan> accessed 13 September 2021.

[22] MD Anderson News Release, 'MD Anderson Taps IBM Watson to Power "Moon Shots" Mission' (*MD Anderson Cancer Centre*, 18 October 2013) <https://www.mdanderson.org/newsroom/md-anderson--ibm-watson-work-together-to-fight-cancer.h00-158833590.html?fbclid=IwAR0FxQEG4txoo5ldUuqeNeFTv6mt9cGVqSkE7tL0-VVxHTSRNdblV9QpAuM> accessed 8 August 2021.

[23] Mathew Herper, 'MD Anderson Benches IBM Watson In Setback For Artificial Intelligence In Medicine' (*Forbes*, 19 February 2017) <https://www.forbes.com/sites/matthewherper/2017/02/19/md-anderson-benches-ibm-watson-in-setback-for-artificial-intelligence-in-medicine/?sh=78cb92163774&fbclid=IwAR2tQq2YYFR6POVWe1qJ7Fta2TmtqHYLYNvKJeJlX0FYDLT4tnjMqim2Bu > accessed 8 August 2020.

[24] Garofalo, Rimmer and Van Hamme, 'Fishy Faces: Crafting Adversarial Images to Poison Face Authentication' (2014) *KU Leuven* 4 <https://www.usenix.org/sites/default/files/conference/protected-files/woot18_slides_garofalo.pdf> accessed 2 March 2020.

[25] Webster, Kwon, Clarizio, 'Anthony & Scheirer, Visual Psychophysics for Making Face Recognition Algorithms More Explainable' (2018) *Arxiv Cornell Tech* 6 <https://arxiv.org/pdf/1803.07140.pdf> accessed 2 March 2020.

shortcomings of AI. More importantly, it shows that the rise of technology coincides with an increase in our reliance on algorithms to regulate our daily lives. The resultant risk to privacy and data security is a consequence that can be linked directly or indirectly to AI, as data-dependency is a fundamental characteristic of algorithms.

The legal implications become further pronounced when one delves into contracts involving AI. Members of the public enter contractual arrangements daily, through a tap on their smart phone. Ideally, such an arrangement should involve both parties being fully aware of the obligations which bind them. In reality, mobile app users generally gloss over the "Terms and Conditions" or the "End User License Agreement" before clicking the "accept" box. Such quasi-hidden contracts are a feature of many of the free utilities which users enjoy-from mapping services to photo-editing applications. A significant manifestation of the use of data acquired through these quasi-hidden contracts occurred in 2016 when Cambridge Analytica, a data- analysis firm, used the psychological profiles of millions of American Facebook users for the Trump campaign in the US elections.[26] It is clear, therefore, that more must be done to determine the important legal questions raised at the helm of ascribing liability, especially when we fail algorithms or when algorithms fail us.

Are Algorithms and Products Similar?

In ancient Rome, there was debate on whether liability could be ascribed to a horse, which was characterised as a "semi-intelligent entity".[27] Although there was a view that the horse should pay for its actions, the more popular view was to extend the liability to its human owner. The US Judge Frank Easterbrook elaborated on this example while opposing the idea of a separate regime for cyber law, stating that doing so is as futile as asking for a "Law of the Horse".[28] Instead, he advocated for general rules to be studied in order to approach specialised areas of the law—otherwise, "*the Law of the Horse is doomed to be shallow and to miss unifying principles*."[29] Keeping this principle in mind, this paper will approach the idea of creating a product liability regime for algorithms by extrapolating from already established legal principles.

It is undoubted that the positive benefits of AI are immense: they can eliminate

[26] Nicholas Confessor, 'Cambridge Analytica and Facebook: The Scandal and the Fallout So Far' (*The New York Times*, 4th April 2020) <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html> accessed 8 April 2021.
[27] D.I.C. Ashton-Cross, 'Liability in Roman Law for Damage Caused by Animals' (1953) 11 (3) The Cambridge Law Journal 395–403.
[28] Frank H. Easterbrook, 'Cyberspace and the Law of the Horse' (1996) *University of Chicago Legal Forum* 207–215, 207.
[29] Ibid.

human error by making decisions which are more consistent, efficient, objective, and reliable. However, as mentioned before, even AI is susceptible to mistakes; in the event of an AI error, aggrieved humans will seek compensation and turn to liability regimes already in place. The questions of attribution which arise at this point include how the fault in the algorithm should be organised, who should be held liable in the event of an AI error, and what type of approach should be taken towards relief and remedy. To approach these questions, one must create a comparison between algorithms and products, as the existing product liability framework needs to accommodate the advances being made in technology.

Firstly, it is pertinent to define a "product." A product is simply defined as "*something that is made to be sold, usually something that is produced by an industrial process*."[30] While this definition does not immediately clarify the distinction between a "product" and an "algorithm", as an algorithm can be made for sale, but algorithms have a specific quality which distinguish them from the typical washing machine or television: an inherent decision-making process. For instance, algorithms have the unique ability to not only perform complex actions and take intricate decisions, but they do it at a level which goes beyond computations—an example being the e-commerce industry and the predicted omnipotence of algorithmic agents which will eventually bypass most human decisions.[31]

Algorithms can also make decisions of a moral character, i.e., making choices which would be considered as moral or immoral if made by a human. Germany has the unique distinction of introducing a set of ethical guidelines which must be followed by autonomous vehicles. For example, the "Ethical Rules for Automated and Connected Vehicular Traffic" include that the "protection of individuals takes precedence over all utilitarian considerations."[32] Another instance of this was when a medical algorithm was found to prefer white patients over black patients.[33] The algorithm was aimed at predicting which patients would benefit more from extra caregiving. Even though the algorithm itself was not intended to be racist i.e., the way it categorised data did not factor in a patient's

[30]'Product meaning in The Cambridge English Dictionary' (*Dictionary.cambridge.org*, 2020) <https://dictionary.cambridge.org/ dictionary/english/product> accessed 5 April 2020.
[31] Michal S. Gal and Niva Elkin-Koren, 'Algorithmic Consumers' (2017) 30 (2) *Harvard Journal of Law & Technology*, 310-311.
[32] Ethics Commission at the German Ministry of Transport and Digital Infrastructure, *Automated and Connected Driving* (Report 2017) <https://www.bmvi.de/SharedDocs/EN/Documents/G/ethic-commissionreport.pdf? blob=publicationFile> accessed 11 December 2019.
[33] Carolyn Y. Johnson, 'Racial Bias in a medical algorithm favors white patients over sicker black patients' (*The Washington Post*, 24 October 2019) <https://www.washingtonpost.com/health/2019/10/24/racial-bias-medical-algorithm-favors-white-patients-over-sicker-black-patients/> accessed 5 April 2020.

race, yet it had prioritised patients in terms of how much the person chosen would cost the healthcare system in the future. Costs incurred by black patients were around $1800 less than white patients with the same chronic conditions.[34] It should be noted that costs incurred by an individual is not a race-neutral metric as it depends on, among many other things the person's capabilities to afford healthcare and the healthcare facilities available. As a result, the algorithm scored both white patients and black patients as having an equal risk of health problems in the future, even though black patients had many more health problems. In instances such as this, one may conclude that the same laws which apply to human moral choices should also apply to algorithms carrying out tasks of a moral character. However, the decision making of the algorithm was again based on the information, which was being provided to it, so there was a degree of human input as well. This is where AI takes a departure from the traditional confines of the product liability regime.

Algorithms also differ from products in the sense that these are capable of learning from datasets, even in manners not perceived by their manufacturers. While this point was amply underlined by the medical algorithm mentioned above, another example from daily life is Instagram. Being a social networking site, Instagram allows users to upload pictures and videos, using algorithms which learn user preferences, filter out spam, and carry out targeted advertising.[35] It contains an in-built test analytics algorithm called DeepText which not only understands the context of language with human-like accuracy, but also helps in combatting cyberbullying and harassment.[36] The ability to adapt and improve an AI system in manners not "predetermined by its designer"[37] has implications when it comes to ascribing liability: harm caused by a product may be traced back to the manufacturer, but legal concepts may be challenged if the resultant algorithm does not operate in a way intended by the manufacturer. Foreseeability is one of these legal concepts. As demonstrated, there is a key difference between products and algorithms: the latter involves less human foreseeability in its use.

In order to determine a conclusive metric for differentiating algorithms from products, it is prudent to further categorise machine learning into "supervised", "unsupervised", and "reinforcement" learning. These categorisations may be used to determine the level of autonomy an algorithm has. While the terms "autonomous decision-

[34] Ibid.
[35] Bernard Marr, 'The Amazing Ways Instagram Uses Big Data And Artificial Intelligence' (*Forbes*, 16 March 2020) <https://www.forbes.com/sites/bernardmarr/2018/03/16/the-amazing-ways-instagram-uses-big-data-and-artificial-intelligence/#359411265ca6> accessed 5 April 2020.
[36] Ibid.
[37] 'The Amazing Ways Instagram Uses Big Data And Artificial Intelligence' (*Forbes*, 2020) accessed 1 April 2020; See also Pei Wang, *Rigid Flexibility: The Logic of Intelligence* (New York: Springer 2006).

maker" and "autonomous algorithm" are used to a great extent—and often interchangeably—they differ in meaning.[38] On one hand, autonomy can refer to whether an algorithm has the required authorisation to perform a specific task, without human input or permission.[39] On the other hand, in a different context, autonomy could signify a characteristic of the algorithm itself i.e., its ability to "teach" itself certain tasks or "understand" its actions and their implications.[40] In essence, the level of autonomy depends on the type of algorithms i.e., whether its learning is supervised, unsupervised, or reinforced.

While there are several ways to categorise autonomy, this article will now delve into the algorithm's ability to "self-learn" and carry out tasks not foreseen by its programmer or manufacturer.

Autonomy and the Type of Algorithms

Within the context of this paper, a discussion of autonomy and algorithm types is important as autonomy remains one of the core differentials between AI and a product. The autonomous nature of AI makes it impossible for a manufacturer to envisage all potential actions carried out by the AI. The three types of algorithms help us identify which AI products have a higher propensity to be autonomous in the future, and in turn are more distinct than products.

In Supervised Learning, the algorithm is trained with data, such as a "training set," and is used to derive "good" predictors for a required value.[41] In such algorithms, it is not sufficient to merely provide feedback that the system was erroneous; rather, specific messages which highlight the error are required for proper functioning. The feedback allows the system to hypothesise ways to categorise data which may be unlabelled in the future—data which is also updated based on the feedback the algorithm is provided.[42] While there is some level of human input involved, which may allow one to ascribe liability easily, it should be noted that the hypotheses regarding the data as well as the improvements made with each feedback turn the algorithm into a version which was not programmed by its manufacturers.

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[38] Thomas B. Sheridan and William L. Verplank, *Human and Computer Control of Underseateleoperators* (Defense Technical Information Service 1978) <http://www.dtic.mil/dtic/tr/ fulltext/u2/a057655.pdf.> 1-3.
[39] Ibid.
[40] Ibid 1.
[41] Andrew Ng, 'CS229 Lecture Notes: Supervised Learning' (2018) *Studylib*, <https://studylib.net/doc/14126957/cs229-lecture-notes-supervised-learning-andrew-ng> accessed 1 January 2020.
[42] Amir Gandomi and Murtaza Haider, 'Beyond the Hype: Big Data Concepts, Methods and Analytics' (2015) 35 (2) *International Journal of Information Management* 137, 144.

In Unsupervised Systems, the algorithm is not trained with data but carries out the task of deciphering patterns in the information that may lead to the correct answer for a particular example.[43] The degree of autonomy enjoyed by unsupervised system is greater than supervised systems. The Chief Scientist of Uber, Zoubin Ghahramani, has described unsupervised learning as "finding patterns in the data above and beyond what would be considered pure unstructured noise."[44] However, both these systems involve development to a stage which was not pre-programmed at the time of manufacture.

In Reinforced Learning, the algorithm is not pre-programmed to take specific actions; it has to map out situations and actions through machine learning in order to yield the maximum reward. Essentially, it tries different options until it achieves a certain goal because it is not taught the process to achieve a certain goal.[45] Reinforcement Learning has been particularly successful in games such as chess, which was shown by the program AlphaGo. The CEO of DeepMind has described this program as neither a human, nor a program, but "almost alien."[46] Along with games, recent research has shown the possibilities of reinforcement learning in the field of medicine as well.[47] This also sets algorithms apart from products, as algorithms may reach a point whereby, they can function without human input.

Liability Regimes

Before ascribing a liability regime, it is pertinent to first delve into the different liability regimes which may be applicable to the law on AI and algorithms. Legal systems are mostly two tiered: with civil law and criminal law. AI in general, and algorithms, can lead to challenges in both these regimes. Civil law, also referred to as private law, essentially governs the legal relationship between private parties, and is used to either create, remove, or alter rights. Civil law liability arising from tort or contract may not have effects which are as harsh as those arising from criminal liability.

Criminal law, on the other hand, is mostly enforced by the state and can be invoked

[43] Avigdor Gal, 'It's A Feature, Not A Bug: On Learning Algorithms and What They Teach Us' (2017) Organisation for Economic Co-operation and Development <https://one.oecd.org/document/DAF/COMP/WD%282017%2950/en/pdf> accessed 29th January 2020; Harry Surden, 'Machine Learning and Law' (2014) 89 (1) Washington Law Review 87.

[44] Margaret Boden, *AI: Its Nature and Future* (Oxford University Press 2016) 47; See also Zoubin Ghahramani, 'Unsupervised Learning' (2004) Gatsby Computational Neuroscience Unit 3.

[45] Richard S. Sutton and Andrew G. Barto, 'Reinforcement Learning: An Introduction' (1998) 1 (1) Massachusetts Institute of Technology Press 4.

[46] Will Knight, 'Alpha Zero's "Alien" Chess Shows the Power, and the Peculiarity, of AI' (*MIT Technology Review*, 8 December 2017) <https://www.technologyreview.com/2017/12/08/147199/alpha-zeros-alien-chess-shows-the-power-and-the-peculiarity-of-ai/>accessed 13 February 2020.

[47] Anders Jonsson, 'Deep Reinforcement Learning In Medicine' (2018) *Karger Journals* 21.

even if the criminals have not agreed to be bound by them. To designate an act as a crime is society's way of denouncing conduct in the harshest way possible. Ergo, the burden of proof required to prove someone guilty is higher in criminal law as compared to private law.

Civil Law Liability Regimes

When it comes to private law, there are basically two sources which may relate to the ways in which algorithms may be governed: obligations through contract and obligations arising out of civil wrongs.[48] Within civil wrongs, there are several categories which may provide a liability regime. These are negligence, strict and product liability, and vicarious liability.

The application of these regimes to AI is problematic for several reasons. Firstly, upon examining key legal questions relating to the tort of negligence, one may arrive at the conclusion that the duty of care will not always fall on the owner of the AI. Rather, it can extend to the designer of the AI or an intermediary party who may have taught, trained, or added to it. This complexity of tracing liability across the supply chain can result in inconsistent application of the law. Secondly, the central concern in negligence cases is whether the defendant was acting in the same way an ordinary and reasonable person would act in a similar situation. A problem arises when this notion is being applied to humans relying on an algorithm or algorithms themselves. One option could be to deduce what the user of the algorithm or the reasonable designer of the AI might have done if faced with the same circumstances.[49] For instance, to avoid instances such as the death of Elaine Herzberg,[50] it may be reasonable to design a car in such a way that it enters a fully autonomous mode only when there is a relatively clear motorway, rather than in a crowded street.[51] This solution, however, runs into problems in situations where there is no human input in any functions of the AI, which raises the question of whom the liability can be imposed upon.

Similarly, applying strict liability may lead to certain drawbacks for the technology industry. For the victim, the advantages of strict liability are obvious: it does

[48] Lord Justice Jackson, 'Concurrent Liability: Where Have Things Gone Wrong?' (Lecture to the Technology & Construction Bar Association and the Society of Construction Law in 2014) <https://www.judiciary.uk/wp-content/uploads/2014/10/tecbarpaper.pdf> accessed 23 April 2020.
[49] Ryan Abbot, 'The Reasonable Computer: Disrupting the Paradigm of Tort Liability' (2017) 86(1) The George Washington Law Review 101, 138–139.
[50]'Self-Driving Uber In Fatal Crash Had Safety Flaws' *BBC News* (6 November 2019) <https://www.bbc.com/news/business-50312340> accessed 28 April 2020.
[51] F. Patrick Hubbard, 'Sophisticated Robots: Balancing Liability, Regulation, and Innovation' (2015) 66. Florida Law Review 1803, 1861–1862.

not require them to prove causation between the harm caused and the loss suffered by the victim.[52] This liability regime only expects the victim to prove that the risk posed by the technology surfaced by causing them harm. It should be noted, however, that strict liability alone would result in an increased risk of liability of those in the technology industry or those who benefit from the technology.[53] To counterbalance this effect, restrictions and liability caps may be used. However, such caps are justified with the view that the risk becomes insurable, given that strict liability statues usually prescribe insurance for liability risks. Naturally, such a regime is deemed to have a negative effect on the advancement of technology, as manufacturers and companies may see strict liability as a deterrent to promote technological research, which in the 21st century is an important economic and social goal for many countries across the globe.

Criminal Law Liability Regime

In addition to civil law liability regimes, instruments within the ambit of criminal law have also been used to play an increasingly relevant role in the context of AI. The notion of exclusively utilising criminal liability for AI entities is challenging for many reasons. For example, in situations wherein an AI entity is successfully incarcerated for one year, how may the implementation of such a sentence manifest itself? This conundrum is extenuated in cases wherein the AI software is not part of something physical (such as a robot or a machine), which essentially makes it impossible for an arrest to take place. Similarly, in more critical cases involving sentences of capital punishment, the lack of a physical body to arrest and incarcerate may make such liability impractical.[54] These issues are not just restricted to physical sentences, but also extend to monetary punishments, particularly fines. Most sentenced AI entities will lack the abilities to manage their own finances, such as own a bank account, thus making the notion of fining an AI entity unrealistic.[55] These challenges greatly undermine the inherent foundational aims of imposing criminal liability in the first place: retribution, deterrence, rehabilitation, and incapacitation. Therefore, imposing liability based on a criminal liability system may

[52] Ibid.

[53] Expert Group on Liability and New Technologies – New Technology Formation, 'Liability For Artificial Intelligence And Other Emerging Digital Technologies' (*European Union*, 2019) <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=36608> accessed 10 April 2020.

[54] Aleš Završnik, 'Criminal justice, Artificial Intelligence Systems, and Human rights' (2020) SpringerLink <https://link.springer.com/article/10.1007/ s12027-020-00602-0> accessed 28 May 2020.

[55] Francesca Lagioia and Giovanni Sartor, 'AI Systems Under Criminal Law: a Legal Analysis and a Regulatory Perspective' (2019) Springer Link <https://link.springer.com/article/10.1007/s13347-019-00362-x#Abs1> accessed 29 April 2020

prove to be counterintuitive in terms of limiting harms that may arise from the failures of AI.

Ascribing Liability

Considering these challenges and the discussion above, utilising a product liability regime, which on its own, entails an intricate mix of both contract and tort law, seems most fitting for AI.[56] Product liability deals with establishing liability in the event that a product causes harm. The party deemed responsible for the harm caused can either be the producer of the product or the intermediate suppliers as well.[57] The defect in a product is given more importance than the fault of an individual. For Product liability laws to apply to algorithms, harm caused by any AI can be redressed if the affected party brings a claim against the producer or any supplier at any stage of the supply chain.

There are certain advantages of the product liability regime. Firstly, a sense of certainty is attached to this regime in identifying the party to be held responsible; the aggrieved party will not have to seek out different parties in the supply chain and ask for their relative contribution to determine their relative fault. Instead, upon locating the supplier or producer of the algorithm, the party can claim the entire amount from them. The burden of proof will lie on the relevant producer or supplier, who may deflect liability to other parties if necessary. In contrast to a fault-based liability regime, a strict liability regime would not entail the courts determining the level of duty of care accrued in the process of manufacturing and selling AI, as this is a difficult exercise keeping in view the heterogeneous nature of AI. Moreover, strict product liability also encourages developers of algorithms to ensure that the products containing them have control and safety mechanisms intact. An example of this was the announcement made by Volvo that it would assume complete liability for the actions of its autonomous vehicles.[58] This placed pressure on its competitors to meet the same standards to ensure that self-driving cars become safe to use in everyday circumstances. Additionally, even if an algorithm develops and acts in unforeseeable ways, the producer or designer of the algorithm itself will be looked upon as the person best equipped to control and understand the associated risks.[59] An example of this are the prompt and sophisticated measures taken by Google in the wake of an

[56] John Villasenor, 'Products liability law as a way to address AI harms' (*Brookings*, 31 Oct 2019) <https://www.brookings.edu/research/products-liability-law-as-a-way-to-address-ai-harms/> accessed 20 February 2020.
[57] Horst Eidenmüller, 'The Rise of Robots and the Law of Humans' (2017) 8 Oxford Legal Studies Research Paper No. 27/2017.
[58] Kirsten Korosec, 'Volvo CEO: We Will Accept All Liability When Our Cars Are In Autonomous Mode' (*Fortune*, 8 Oct 2015) <https://fortune.com/2015/10/07/volvo-liability-self-driving-cars/> accessed 11 January 2021.
[59] Ibid.

accident caused by one of its self-driving cars. Google took cognizance of the causes of the accident, stated the ways in which the scenario was similar to normal interactions and expectations between human drivers, and also took responsibility by improving its software further.[60]

Considering these advantages, the product liability approach makes sense as opposed to strict liability for a multitude of reasons. Firstly, within the broad ambit of both contract and tort law, there are various theories of liability that can be asserted. These include breach of warranty, misrepresentation, negligence, design defects, failure to warn, manufacturing defects and more.[61] As mentioned before, the majority of AI is mostly comprised of decision-assistance tools, and it makes sense to turn to negligence law in case the usage of such a tool result in harm. Therefore, to ensure a maximum coverage of a multitude of claims, it is more fitting to impose a product liability system. Secondly, applying product liability laws will resultantly force the courts to fall back on the reasonableness standard, which in turn should ensure a greater access to justice while bringing down trial costs.[62]The reasonableness standard is ideal as it involves adopting a holistic mechanism of scrutiny when coming to a decision. In instances of product liability, the courts will therein be able to look at factors including but not limited to the actual harm caused, the circumstances surrounding the harm and the decision-making process adopted by both the parties which in turn, should lead to fairer decisions. Thirdly, a relatively lenient reasonableness standard will not come at the cost of computer innovation and a reduction in the usage of machines. This is important for several reasons, as innovation is an important aim for many countries into the future. For instance, the UAE in its vision for 2030 highlights innovation as an important aim for its foreseeable future. It has taken many steps, such as setting up special economic zones to promote startups, launching accelerators, such as the Ghaddan 21 and offering subsidies, support, and funding to innovative companies. For countries like this, any legislative instrument governing machines cannot hamper innovation, otherwise they will be disincentivised to adopt it. Lastly, in lieu of deterrence, a rule of no-fault liability might not be as effective

[60]Jon Fingas, Google self-driving car crashes into a bus (update: statement), (*Engadget*, 29 February 2016) <https://www.engadget.com/2016-02-29-google-self-driving-car-accident.html> accessed 11 January 2021.

[61] Ruben Graaf, 'Concurrent Claims in Contract and Tort: A Comparative Perspective' (2019) Research Gate 713 <https://www.researchgate.net/publication/319701592_Concurrent_Claims_in_Contract_and_Tort_A_Comparative_Perspective> accessed 12th February 2020.

[62] John W. Ely et al., 'Determining the Standard of Care in Medical Malpractice: The Physician's Perspective' (2002) 37 Wake Forest Law Review 861, 864-865, 869-873.

as the reasonableness standard.[63]For instance, within the parameters of a no-fault liability regime, "normal risks" of using technology and machines could be actively excluded from meriting compensation. Therefore, not many organisations will be discouraged from adopting unsafe practices. In a regime falling back on the foundations of the reasonable standard, "normal risks" would not exist. Conversely, every judgment will be premised on the factors listed above (decision making, harm, etc.) making it a better fit for ascribing liabilities to algorithms and their creators.

Consequently, the utilisation of product liability laws will prove to be a viable solution to the question of ascribing liability posed at the onset of this paper. In this light, the compatibility conundrum must also be scrutinised. Thankfully, products liability has been one of the most dynamic fields of law since the mid-twentieth century. This is in part due to the new technologies that have emerged over this period, leading courts to tackle a continuing series of initially novel products liability questions. Courts have generally proven quite capable of addressing these questions. There are a number of strategies that can be used to make the transition to this liability regime easier. Primarily, inquiries into AI-based systems and their faults must be informed by the rationale that alleged harms are made by the intelligence software; however, their decisions can be traced to choices made by companies, programmers, and users. If harm is caused, liability must be placed accordingly. The three classifications of algorithms discussed in the section above are pertinent to this discussion i.e., Supervised Learning, Unsupervised Learning, and Reinforced Learning.[64] By utilising these three classifications, the level of autonomy of the algorithm can be determined, and the liability of the companies/manufacturers can subsequently be ascertained. For instance, the level of human input required in supervised systems is much greater than that required in unsupervised systems, whereas reinforcement systems, have no human input whatsoever. These differentiators are pertinent to the determination of liability. For the courts, the case-by-case determinations of liability for the specific algorithm can be made by utilising expert testimony of industry specialists.

Another approach for this transition is the development of risk utility tests[65] in

[63] Alan Marco & Casey Salvietti, 'What Does Tort Law Deter? Precaution and Activity Levels in No-Fault Automobile Insurance' (2019) Research Gate <https://www.researchgate.net/publication/228141345_What_Does_Tort_Law_Deter_Precaution_and_Activity_Levels_in_No- Fault_Automobile_Insurance> accessed 01 March 2020.

[64] *See* discussion under 'Autonomy and the type of Algorithms'.

[65] William Beatty, 'The Illinois Supreme Court Examines the Risk-Utility Test in Design Defect Cases' (*Johnson & Bell*, 2011) <http://johnsonandbell.com/alerts-blog/product-liability/the-illinois-supreme-court-examines-risk-utility-test-in-design-defect- cases-2/> accessed 2nd March 2020.

relation to AI.[66] These tests have actively been employed in AI liability lawsuits to ascertain whether alleged defects in design could have been avoided "through the use of an alternative solution that would not have impaired the utility of the product or unnecessarily increased its cost".[67] However, the mechanism of application will need to take into account not only the human-designed portions of an algorithm, but the post-sale design decisions and substitutes available to the system as it is able to update automatically. Additionally, it has been discussed that all three types of algorithms on the autonomy scale may lead to a stage of development that was not anticipated by its manufacturers, which must also be considered.

It must be recognised that it will take many years to develop a substantial body of case law and statutory law specific to the intersection of AI and product liability, while judiciary will not be consistent in its decisions in each case. However, over time, adoption in lieu of the intricacies of AI will be considered by product liability legislation, particularly in terms of emerging technologies. One way to streamline this process is through the utilisation of law reform agencies and voluntary frameworks. For example, the American Law Institute (ALI), is a respected organisation that produces "scholarly work to clarify, modernise, and otherwise improve the law".[68] If the ALI or a similar organisation were to develop and publish model principles of law and/or legislation specific to AI products liability, this could help promote greater certainty, predictability, and uniformity in state-level approaches to AI law.

Should Robots Have Rights?

So far, this paper has delved into ascribing liability to AI by developing a liability regime which builds on established legal principles. However, if it is conceded that there are different types of AI with varying degrees of autonomy, then should the varying degree of liability associated with a robot's decision making be accompanied with rights as well? This question, which may seem bizarre at first, has been brought up at many instances, as rights and liabilities are often conceptualised as co-existing concepts. In 2015, Victor Collins was found dead in the hot tub of James Bates. James Bates was charged with murder and his Amazon Echo, a home speaker device which incorporated an AI virtual

[66] Sunghyo Kim, 'Crashed Software: assessing Product Liability for Software Defects in Automated Vehicles' (2019) 16 Duke Law & Technology Review 315 < https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1322&context=dltr> accessed 1st March 2020.

[67] John Villasenor, 'Products Liability and Driverless Cars: Issues and Guiding Principles for Legislation' *Brookings institution* 9 < https://www.brookings.edu/wp-content/uploads/2016/06/Products_Liability_and_Driverless_Cars.pdf.> accessed 8 August 2021.

[68] 'About ALI' (*American Law Institute,* 2021) <https://www.ali.org/about-ali/> accessed 19 January 2021.

assistant, was the "key witness" to the alleged crime. While the Arkansas police asked for a divulsion of data from the period relevant to the murder, it was in 2017 that Amazon argued that the human voice commands and the device's responses are capable of protection under the US First Amendment. While this argument was not agreed with, it raised important questions as to whether AI has a right to protection of its speech.[69] Another example is that of a robot called "Random Darknet Shopper," that purchased ecstasy and a fake Hungarian passport on the dark web. This robot was part of an art installation in Switzerland. It should be noted that it was the robot, not the artist or another human, that was arrested by the St. Gallen police for the unlawful transactions. While the Swiss authorities took cognizance of the artistic value of the robot, the occurrence opened up a debate on the measures to be taken if a robot does cause harm, and whether such liability should also be accompanied by rights being accrued to robots.[70]

While ascribing liability is a key component of protecting consumers from AI harm, the standalone imposition of liability under an effective regime may raise questions about a state's moral duty towards new technology and AI. All in all, it might lead one to ponder whether robots can and should have rights.[71] These questions stem from the debate in the European Union Parliament in 2017, where concrete recommendations were made to the Commission on Civil Law Rules on Robotics. Section 59(f) laid out the notion of corporate personhood as a model of robot rights:[72]

> Creating a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons responsible for making good any damage they may cause, and possibly applying electronic personality to cases where robots make autonomous decisions or otherwise interact with third parties independently.[73]

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[69] *State of Arkansas v James A. Bates* CR-2016-370-2; Rich McCormick, 'Amazon Gives up Fight for Alexa's First Amendment Rights After Defendant Hands Over Data' (*The Verge*, 7 March 2017) <https://www.theverge. com/ 2017/3/7/14839684/amazon-alexa-firstamendment-case> accessed 23 May 2020.

[70] Daniel Rivero, 'That Robot Who Bought Ecstasy And A Fake Passport Online Is Finally Out Of Prison' (*Splinter*, 17 April 2015) <https://splinternews.com/that-robot-who-bought-ecstasy-and-a-fake-passport-onlin-1793847213> accessed 11 January 2021.

[71] David J. Gunkel, 'The Other Question: Can and Should Robots Have Rights?' (2018) Researchgate 1-2 <https://www.researchgate.net/publication/320463916_The_other_question_can_and_should_robots_have_rights> accessed 7 May 2020.

[72] Nathalie Nevejans, 'European Civil Law Rules In Robotics: A Study For The JURI Committee' (2016) European Union <https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571379/IPOL_STU(2016)571379_EN.pdf > accessed 3 May 2020.

[73] Ibid.

On the surface, this idea may seem inherently problematic for the establishment of a liability regime as it gives manufacturers a way to escape responsibility for defects that can directly be attributed to them. However, this notion of various entities being characterised within the ambit of "legal personhood" is not as recent as one might assume. For example, the seminal case of *Santa Clara County v Southern Pacific Railroad Co*.[74] expanded the ambit of the Fourteenth Amendment to the US Constitution to corporations and established the base for personhood to such entities as well.[75] Indeed, corporations are some of the most common and oldest examples of non-human entities who have been granted legal personhood. It should be noted, however, that it is an abstraction which "has no mind of its own any more than it has a body of its own."[76] While it can be said that corporations can perform actions independent of their directors, owners, and employees, in reality, it is humans who take decisions on the company's behalf.

Otto von Gierke, a legal scholar from the nineteenth century, argued that companies are real "group-persons" and cannot be categorised as mere fictions.[77] This argument can account for the decision-making processes of companies, which, barring sole proprietorships, may not comprise of opinions of a single person but rather the collective will of the company that may be expressed by procedures such as board meetings. Considering the human input involved in companies, it is difficult to make a case for AI personhood based on the same logic.

Considering the discussion above, it is still unclear whether robots should be granted rights. Rights may vary depending upon the liability regime that is established. However, wherein rights are granted, they may be contingent on the realisation of a future where robots may exhibit further functional similarities to humans, meriting a change in legal standards. As of now, violence against machines is not seen as a criminal wrongdoing. Legal systems throughout the globe offer no rights to robots despite them becoming more advanced and being developed with higher levels of AI. In an attempt to remedy this, some have suggested that the right for a robot to not be shut down against its will and the right to not have its source code manipulated against its will should form part of a set of rights for robots in the future.[78] It is futile to offer such summations of potential

[74] *Santa Clara County v Southern Pacific Railroad Company* 118 U.S. 394 6 S. Ct. 1132; 1886 U.S. LEXIS 1942.
[75] Kurt Marko, 'Robot rights - a Legal Necessity or Ethical Absurdity?' (*Diginomica,* 03 January 2019) <https://diginomica.com/robot-rights-a-legal-necessity-or-ethical- absurdity> accessed 1 May 2020.
[76] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 713.
[77] David Nicholls, *The Pluralist State* (St Martin's Press in association with St Antony's College 1994) 56.
[78] Mark Fishel, 'Why Robots Should Be Given Rights' (*Good Audience*, 17 September 2018) <https://blog.goodaudience.com/5-reasons-why-robots-should-have- rights-4e62e8698571> accessed 12 May 2020.

rights a robot could be given, especially wherein the technology in question has not yet evolved to its fullest potential.[79] This waiting period is the first obstacle towards protection, especially when such rights should be universal.

Similarly, another issue with granting rights to robots is articulating them in the first place. While certain machines have the propensity to "think" rationally in the twenty first century, the notion of rationality for a machine will differ vastly from that of a human. Machines are input with statistics, situations, and moral principles from which the machine distinguishes between "right" and "wrong". Even though the conceptions of rationality are slowly merging due to the advent of deep learning and its popularisation, this interdependence means that machines still have a long way to go before they can be independently rational and therefore require legal protection in the form of rights.

Lastly, the parallel between animals and machines, especially in the context of rights, poses a relevant and interesting obstacle. One might argue that machines do not deserve rights protection over animals. Indeed, the discourse on animal rights has only recently gained momentum.[80] From a utilitarian perspective, however, it is pertinent to provide a certain set of rights within the short term to AI entities and algorithms. It may not be desirable in the long-term to keep AI entities devoid of rights; thus, certain work must be done to provide a specific set of rights to AI entities.

Therefore, it remains reasonable to state that robot rights are neither a moral absurdity nor a legal urgency. It must be noted, however, that no matter how similar the treatment of robots may be to humans nowadays, there are many years from when robots may be capable of actions forcing us to confront issues as to their rights. Verily, as of now, Section 56's approach to AI rights might make sense seem plausible, namely via establishing laws of accountability and damage mitigation structures (like insurance) that reflect the differences between autonomous, adaptive, "intelligent" robots, and the algorithms that power them, and traditional machines.[81] However, we must make sure that this approach is complemented through legal instruments that outline ownership of any intellectual property that such machines might create in their normal functioning that may

[79] Kenneth Kernaghan, 'The Rights and Wrongs of Robotics: Ethics and Robots in Public Organizations' (2014) Wiley Online Library <https://onlinelibrary.wiley.com/doi/abs/10.1111/capa.12093> accessed 23rd April 2020

[80] Gary Francione, 'Animal Rights Theory and Utilitarianism: Relative Normative Guidance'(1997) Lewis & Clark Law School <https://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1054&context=bts> accessed 2 May 2020.

[81] Mathias Risse, 'Human Rights and Artificial Intelligence: An Urgently Needed Agenda' (2018) Harvard Kennedy School Working Paper No. RWP18-015 <https://carrcenter.hks.harvard.edu/files/cchr/files/humanrightsai_designed.pdf> accessed 2nd May 2020.

be explicitly distinct from the underlying algorithms controlling them. In a few years, more heed can be given to future protections as the technology behind AI progresses to the extent where it is seamlessly integrated into every aspect of human life and is thus subjective to extensive liability. Currently, it remains more morally pertinent to focus on the protection of historically non-human exploited groups, such as animals and plants.

Conclusion

The paper uses several distinguishing factors to conclude that algorithms certainly differ from products. Some of the most prominent differences is AI's ability to make decisions of a moral character, as well as the ability to learn from a data set in a manner which could not be anticipated by its manufacturers. However, the fact that there are certain factors which differentiate products from algorithms does not mean that AI should have a different legal regime altogether. Rather, the existing legal framework of product liability law which contains a mix of both tort and contract law, would be most feasible in addressing the legal questions posed by AI. The compatibility conundrum between existing product liability laws and AI can hence be resolved when the "autonomy classifications" proposed in this paper is employed to determine the extent to which liability can be traced to the manufacturer/company in case a harm occurs. Lastly, this paper argues that a system recognising the rights of robots is not conceivable in the near future as humankind has a long way to go before robots make completely autonomous decisions with no human input.

AI can make decisions without human input and is characterised by a great degree of autonomy. More specifically, AI is different from products because the manufacturer may not have envisioned a potential action carried out by AI. This happens due to machine learning and the potential for AI to morph into something completely different than what it was at conception. The paper displayed this by highlighting three kinds of algorithms: supervised, unsupervised, and reinforced.

A product liability regime needs to be enforced; however, it should be adapted to the novel nature of AI. Two reasons were highlighted for this: the first being the technological leaps being taken in this field and the growing influence of AI in our lives. Indeed, we have seen an upsurge of digital solutions during 2020 itself due to the advent of COVID-19, and our interaction with AI increased manifold consequently. The second reason is that if the product liability framework does not advance and a holistic framework is not developed, there will be haphazard regulation and conflicting legislation. In this regard, the best practices of the EU may be instructive. Naturally, a multilateral framework will be required to address such an all-encompassing technological phenomenon which knows no bounds.

This paper grappled with the question of imposing liability if an algorithm causes harm and has attempted to propose a system of ascribing liability through an expansion of the existing product liability framework, rather than introducing a different area of law altogether. Additionally, this paper delved into possibility of granting robots' rights akin to human beings, concluding that it may not be a legal necessity facing us today. The concept of AI, being mentioned by scriptures thousands of years ago, may not be as visibly frightening as the creature in Frankenstein, nor as threatening as the Terminator. However, it is capable of racial discrimination, breach of privacy, and fatal accidents. The liability framework, hence, needs to account for the potential undesirable actions of AI, because at this juncture of history, it is a concept that is continuously advancing and evolving.

The Use of Artificial Intelligence in Arbitral Proceedings

Mahnoor Waqar*

Abstract

This research paper aims to explore, a concept once considered alien, the usage of artificial intelligence ("AI") in arbitral proceedings. The sphere of arbitration has, to date, been deemed inherently conservative, where change and development have been slow. However, this paper aims to illustrate that the new wave of the technological revolution has now made it difficult for arbitration to stay far behind or follow obsolete practices. Although, this is not without its challenges, which is why this article seeks to strike a balance between the advantages and disadvantages of AI in arbitration, without undermining its very essence. Resultantly, it is argued that its usage needs to be slowly phased in. The discipline referred to in this paper mainly pertains to the realm of International Commercial Arbitration.

Introduction

"Everything has been said, and one comes too late since Men, for more than seven thousand years, exist and think."[1]

Pierre Lalive muses that this famous sentence can be applied to the field of international commercial arbitration, where nearly everything seems to have been said.[2] Admittedly, while perusal of prevailing texts on the subject matter seems to give the impression that much has been said about the potential involvement of AI in arbitration, it is noted that most of the literature is scattered and speculative.[3]

The use of AI has immense importance in our day-to-day living. It is used to filter spam emails, write newspaper articles, and provide medical diagnoses.[4] More relatable/ relevant to readers may be the algorithms used by social media applications such as Facebook and Instagram, which display content and advertisement that is personalised and caters to each individual user according to their preferences. More specifically, within the legal sphere and in international commercial arbitration, though in its primitive stages,

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[1] Lalive in his article quotes the great French writer and moralist, La Bruyère. *See* Pierre Lalive, 'Irresponsibility in International Commercial Arbitration' (1999) 7(2) A.P.L.R. 161.

[2] Ibid.

[3] The author refers to some of these sources throughout the essay.

[4] Maxi Scherer, 'AI and Legal Decision-Making: The Wide Open?' (2019) 36(5) Journal of International Arbitration 539.

the usage of AI in arbitration has already commenced, as will be illustrated in this paper, and is no more the far-off prospect that was subjected to dismissal and scepticism. Furthermore, it provides many advantages for speedy, efficient, effective, and arguably fair hearings. AI in arbitration, in its current stages is not without implications, however. This is so because arbitration by AI can pose challenges relating to risk of bias, lack of empathy, unemotional and unreasoned awards.

This paper is divided into several parts. Firstly, Part I endeavours to espouse AI and arbitration by defining the two and explaining their potential interaction with one another. Furthermore, Part II focuses on various scenarios in which AI may be potentially involved in the process of arbitration; each scenario illustrates a greater degree of involvement of AI within the arbitral process. Subsequently, Part III addresses the implications that are likely to arise with this increased use of AI, owing to the unique characteristics of the process of arbitration as an alternative to traditional dispute resolution i.e., the court structure of every state. These implications are not without solutions, however, and the paper will attempt to reconcile them. In Part IV, the author will suggest reforms that can be instated to make the transition of AI into arbitration as smooth as possible. Finally, the author will argue that the use of AI in arbitral proceedings should be introduced gradually to allow both lawyers and parties opting for arbitration to become accustomed to this new development. Additionally, there needs to be greater initiative by the states to regulate the data entered the algorithms in order to ensure a fair and just arbitral process. Since the prevalent use of AI is seen in cases of International Commercial Arbitration, the essay will focus on this discipline only.

The Interaction between Arbitration and AI

AI was the term coined by John McCarthy, in 1956, who defined it as ‘making a machine behave in ways that would be called intelligent if a human were so behaving’.[5] Furthermore, Kathleen Paisley and Edna Sussman’s definition serves as a useful guideline in illustrating how AI operates. They define it as a process where a large amount of data is combined with processing systems, allowing the software to “learn automatically from patterns or features in the data”.[6] However, Paisley and Sussman concede that the term AI is often used loosely and encompasses many subjects including machine learning, and also natural language processing. Ultimately, they conclude that AI is the software’s

[5] J. McCarthy, M.L. Minsky, and N. Rochester, ‘A Proposal for the Dartmouth Research Project on AI’(1995) <http://jmc.stanford.edu/articles/dartmouth/dartmouth.pdf> accessed 10 August 2021.
[6] Kathleen Paisley and Edna Sussman, ‘AI Challenges and Opportunities for International Arbitration’ (2018) 11 NYSBA New York Dispute Resolution Lawyer < https://sussmanadr.com/wp-content/uploads/2018/12/artificial-intelligence-in-arbitration-NYSBA-spring-2018-Sussman.pdf> accessed 10 July 2019.

ability to learn automatically from patterns or features in the data, thereby making it "intelligent".[7] The ability to develop its own 'thinking patterns' is a starting point in understanding the significance of AI, and why it would be pivotal to the development of more effective arbitrations.

The distinction between different types of AI models is illustrated by Jacob Turner, who finetunes the difference between automated and autonomous systems. "Autonomous systems are those which can take decisions themselves without being explicitly programmed, whereas automated systems must follow a predetermined set of instructions with no discretion as to how they are to be followed."[8] Therefore, the difference between automated and autonomous systems is the degree of human intervention in the process. For example, an automated car would not possess the same level of intelligence or independence as an autonomous car, which would not only be driverless, but would also have the ability to self-navigate and decide its destination and route.[9] The fact that the autonomous system has the ability to make decisions proves to be crucial when it comes to establishing legal and ethical rules. Furthermore, the distinction between autonomous and automated systems is also important because other forms of technology are deterministic i.e., they execute pre-programmed instructions from a human.[10] Autonomous systems will be discussed with relation to the great possible intervention of AI in arbitration i.e., the distinct possibility of a machine, or 'robot' arbitrator in the future. Automated systems, on the other hand, will be discussed in relation to scenarios (1) and (2) which may be termed as the introduction or 'easing in' of AI in arbitral proceedings.

Nowadays, AI is a unique phenomenon that is being widely discussed, especially in the legal sector. An example of the dynamic and novel independent action that may be taken by AI is illustrated by the 2017 victory of AlphaGo—a machine learning system-against the masters of the game Go. The interesting aspect of the defeat was the manner in which the program defeated the Go champion. Essentially, AlphaGo came up with a new technique of playing the game, which no human in history had ever done. This was hailed as a revolutionary development within the realm of AI.[11] The game dates back

[7] Ibid.
[8] Personal correspondence with Jacob Turner, Barrister, Fountain Court Chambers.
[9] David Levinson, 'On the Differences Between Autonomous, Automated, Self-driving, and Driverless Cars' (*Transportist*, 29 June 2017) <https://transportist.org/2017/06/29/on-the-differences-between-autonomous-automated-self-driving-and-driverless-cars/> accessed 29 July 2019.
[10] Turner (n 8).
[11] Jason Roell, 'Why AlphaGo is a bigger game changer for AI than many realize' (*Medium*, 30 Sept 2017) <https://medium.com/@roelljr/why-alpha-go-is-a-bigger-game-changer-for-artificial-intelligence-than-many-realize-64b00f54a0> accessed 25 June 2019.

around 3000 years and is widely accepted as the most challenging strategy game that exists. Children, especially in South Korea and China, are sent to private schools specifically to learn how to play the game at an expert level. The taxing and strenuous nature of this game is further illustrated by the fact that mastering it takes years of playing for several hours daily.[12] This ability of AI to take independent action is not merely limited to games but extends to every sector, principally the legal sector.[13]

Coming to arbitration, according to Nigel Blackaby and Constantine Partasides, it is essentially a "simple method" of resolving disputes.[14] In arbitration, each party submits their case to the decision-maker, whose judgment they are prepared to trust, known as the "arbitrator". The arbitrator considers the facts, hears the arguments of the opposing parties, peruses, and applies the applicable laws, and ultimately reaches to a conclusive decision, known as the "award". The award is final and binding on the parties because the parties have agreed that it should be, rather than because of the coercive power of any state.[15] Arbitration, therefore, is an effective way of obtaining a final and binding decision on a dispute, or series of disputes, without reference to a court of law (although, due to the national laws and international treaties such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[16] arbitral awards are enforceable by a court of law if the losing party fails to implement them voluntarily).[17]

Previously, AI was considered outside the purview of dispute resolution, more notably in arbitration. This may be attributed to the reluctance of the arbitral community to introduce new procedures for the fear that it could lead to challenges in public courts at the enforcement stage.[18] This is further elaborated upon by Lucas Bento, who argues that the reason for this hesitance is the utilisation of judgment in advocacy, which

[12] Ibid.
[13] Jacob Turner, 'Ep 71: Robot Rules - Jacob turner' (*Audioboom*, 4 Mar 2019) <https://audioboom.com/posts/7191406-ep-71-robot-rules-jacob-turner> accessed 19 July 2019.
[14] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015).
[15] Ibid.
[16] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, ("New York Convention") art III, V.
[17] Blackaby (n 14).
[18] Philippe Billiet and Filip Nordlund, 'A New Beginning – Artificial Intelligence and Arbitration' Korean Arbitration Review < http://webcache.googleusercontent.com/search?q=cache:gCS6gxIA9TkJ:www.kcab.or.kr/jsp/comm_jsp/BasicDownload.jsp%3FFilePath%3Darbitration%252Ff_0.14014003481139126152153647155 6%26orgName%3D04.%2BA%2Bnew%2Bbeginning%2B%2526%25238211%253B%2Bartificial%2Bintelligence%2Band%2Barbitration%2B%2528Philippe%2BBilliet%252C%2BFilip%2BNordlund%2529.pdf+&cd=1&hl=en&ct=clnk&gl=uk > accessed 10 June 2019.

machines (previously) lacked.[19] It is submitted that these reservations seem outdated in today's time with the advent of the New York Convention and its pro-enforcement bias. The pro-enforcement bias now imposes a duty on state courts to give maximum effect to the award, subject to the reservations encapsulated under Article V of the New York Convention. Furthermore, the plight of COVID-19 has left the world scrambling to adapt to new routines and new work regimes. AI in arbitration proves to be a worthy addition especially since more and more of the arbitral process is becoming virtualised and digital; the next logical step would most certainly be the incorporation of AI based technology into the process. Therefore, the words of David Gauke seem to have aged very well since his speech at the AI Summit,[20] London in 2019: "Technological revolution is no longer on the horizon—it is here."[21] This technological revolution has increased technology usage in almost every profession, and the legal sector has proven to be no exception. The use of AI in arbitral proceedings would resultantly present "synergistic opportunities".[22]

The Practicalities

I. Scenario I: Present Day

The use of technology in the arbitral community has proven to be slow but incremental, more so evidenced by Nappert and Cohen's observation that technology is still being used in a relatively simplistic manner, which is neither novel nor does it break new ground.[23] They list examples of the ways in which technology is being used in arbitral proceedings, for example, communications between the parties are electronic, and arguments in hearings are transcribed. Admittedly, these concepts do not seem to be either revolutionary or radical.[24] Currently, therefore, AI in arbitration is in primitive stages. It is limited to and dependent upon the quality of the data processed, and the algorithm applied.[25] A potential illustration of the same is that data would be fed into the machine system, which would then generate useful information for the parties wishing to resort to arbitration. The "useful information" may be, for example, the provision of a database.

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[19] Lucas Bento, 'International Arbitration and AI: Time to Tango?' (*Kluwer Arbitration Blog*, 23 Feb 2018) <http://arbitrationblog.kluwerarbitration.com/2018/02/23/international-arbitration-artificial-intelligence-time-tango/> accessed 18 July 2019.
[20] The Artificial Intelligence in Legal Services Summit, London, held on 4 June 2019.
[21] David Gauke, Statement at the 'AI in Legal Services Summit' (See Appendix).
[22] Bento (n 19).
[23] Paul Cohen and Sophie Nappert, 'The march of the robots' (*GAR*, 15 Feb 2017) <https://globalarbitrationreview.com/article/1080951/the-march-of-the-robots> accessed 23 July 2019.
[24] Ibid.
[25] Professor Burkard Schafer, Professor of Computational Legal Theory, The University of Edinburgh (see Appendix).

For example, Dispute Resolution Data is a US start-up that provides a global database pertaining to international commercial arbitration and mediation.[26] The information covers industry type, claim amount, location, cost, duration, and outcomes i.e., whether the case is settled, withdrawn, or a final award is issued, etc. The data is collated from a number of renowned arbitral institutions such as the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR) and the Centre for Effective Dispute Resolution (CEDR).[27] Another example is Arbitrator Intelligence, a non-profit initiative that aims to increase access to information about arbitrators and their decision making through post-award questionnaires sent to participants.[28] This initiative also maintains the confidentiality aspect of arbitration and allows there to be a reliable body of data without the need for the decisions to be published. These examples illustrate the fact that the current situation in arbitration is, for now, merely limited to the provision of information by using AI.

II. Scenario II: Increased usage

In the AI in Legal Services Summit,[29] Sir William Blair narrated an interesting anecdote where one is greeted by a robot in the China International Court in Shenzhen- the Chinese equivalent of Silicon Valley. The sole function of the robot is to direct visitors how to reach their desired floor. If one imagines a more refined situation than the one above, in this scenario, the arbitral world, having fully accepted that AI may be used as a tool for the provision of information, the usage must increase a step further. The automated system, in this scenario would act as an "instructor". Once again, the instructions are delivered through the datasets and the algorithms that are created for the system, and the system delivers instruction as output. The use of automated systems in arbitration in Scenario II would be the same as in Scenario I- instructional, rather than a method of decision making.[30]

An example of the same would be introduction of AI systems which uses Natural Language Processing ("NLP"), as this would significantly reduce the tasks of a lawyer

[26] 'About DRD' (*Dispute Resolution Data*) <http://www.disputeresolutiondata.com/about_drd> accessed 17 July 2019.
[27] 'The future of arbitration in the world of Big Data' (*Norton Rose Fulbright*, 2017). <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/c93235b5/the-future-of-arbitration-in-the-world-of-big-data> accessed 20 June 2019.
[28] Ben Roe (Baker McKenzie), 'The Year Ahead - Innovation: A new generation of legal analysis tools is emerging' (L*exology*, 21 Jan 2019) < https://www.lexology.com/library/detail.aspx?g=fa0aa71b-8a55-4701-b4c6-95ab94aee4e2> accessed 18 June 2019.
[29] AI Summit (n 20).
[30] Sir William Blair, Professor of Financial Law and Ethics at the Centre for Commercial Law Studies, QMUL and Associate Member at 3VB (See Appendix).

engaging in arbitration. NLP involves the usage of a special type of software that has the ability to read "natural language" i.e., the ordinary human language. The attribute of NLP lies in its ability to contextualise the language, and resultantly provide accurate results for analysis of legal texts. The utility of NLP is increasingly necessary in arbitration, where lawyers are paid by the hour and clients are reluctant to pay for mundane administrative work. Consequently, there has been a surge in law firms scrambling to make their practices as efficient as possible. NLP could be used to read a contract and identify the existence of an arbitration clause, deciphering the *lex arbitri* and the *lex loci arbitri*, the last two being the bone of contention in many cases where both parties fail to specify the same.

Furthermore, the task of translating documents takes up an enormous amount of time in international commercial arbitration, as it is notorious for its huge number of documents and bundles. Often, parties will communicate in different languages, or the arbitral agreement itself is in a different language, or the place where the enforcement of the award is sought may again require a translation of the documents into the official language of that state.[31] Allowing an automated system to translate hundreds and thousands of documents would lead to greater efficacy and an overall reduction in the time of the average arbitral proceeding.

Admittedly, NLP has yet to reach the stage where the translation of documents can be done at the precise accuracy that is required of legal texts, especially in arbitration where the arbitration clause – if not drafted properly – can be open to many interpretations.[32] NLP service providers warn users with a caveat that their services may not be perfect for word-to-word precision of the translation and that some words may be lost in translation. This holds true for most languages as contextual analysis is necessary, and a literal translation does not always provide the desired outcome. For example, in recent international arbitration proceedings in which the author was involved, the parties to the arbitration stipulated that the arbitrator be well-versed with the Urdu language. This was because many of the contractual documents, written submissions and evidence were in Urdu. The Urdu language is heavily influenced by the Hindi, Arabic, and Persian languages; many words are derivations of these languages. An unsophisticated NLP processor would consequently have difficulty in ascertaining the legal context of the

[31] The New York Convention (n 16), art IV (2): If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.
[32] Ellen Falci, 'Debunking NLP: Translation' (*Clarabridge*, 17 Aug 2017) <https://www.clarabridge.com/blog/debunking-nlp-translation> accessed 20 July 2019.

words. Therefore, for translation of legal documents, especially those in multiple languages, NLP needs a higher level of sophistication. It is uncertain when this level of sophistication would be attainable, however one can expect that it will become better and more influential for businesses in times to come.[33]

Moreover, AI at this stage could also be used to draft boilerplate terms of the award. Generally, arbitrators are put to task to extract information for the award such as the information regarding parties, procedural history, facts, and details about the arbitration clause which takes a considerable amount of time. The length of time taken to render an award would arguably be shortened if AI software was able to extract the relevant content from the voluminous documents effectively with the help of an algorithm.

III. Scenario III: The Robot Arbitrator

A perusal of journal articles and blogs even two to three years old illustrate the dismissive approach taken with regard to the possibility of introduction of non-human or mechanic arbitrators. For example, Ibrahim Shehata writes that the possibility of having robotic arbitrators is a discussion of the "unknown unknown" and the arbitration community would be better off focusing its efforts upon the "known knowns."[34] One cannot help but disagree. Indeed, Cohen and Nappert, even then ahead of the curve, urged us to comprehend that "this is not the idle speculation of science fiction."[35]

The impetus demands discussion of relevant social, legal, and philosophical implications on possible scenarios that involve the use of AI in arbitration, as perhaps we are not at all far away from such a possibility. After all, Kira Systems was established in 2011, [36] but it is only in the past three years that the recent boom has resulted in many of the London firms using this software.[37] Furthermore, in Canada, a robot mediator was used for the first time in the history of mediation. The online tool used algorithms in place

[33] Bernard Marr, '5 Amazing Examples Of Natural Language Processing (NLP) In Practice' (*Forbes*, 3 June 2019) <https://www.forbes.com/sites/bernardmarr/2019/06/03/5-amazing-examples-of-natural-language-processing-nlp-in-practice/?sh=526e06541b30> accessed 08 September 2021.
[34] Ibrahim Nour Shehata, 'The Marriage of AI & Blockchain in International Arbitration: A Peak into the Near Future' (*Kluwer Arbitration Blog*, 12 Nov 2018) <http://arbitrationblog.kluwerarbitration.com/2018/11/12/the-marriage-of-artificial-intelligence-blockchain-in-international-arbitration-a-peak-into-the-near-future/> accessed 9 July 2019.
[35] Cohen and Nappert (n 23).
[36] Kira Systems is a machine learning software that identifies, extracts, and analyses text in contracts and other documents. It provides contract review and analysis software. The company was founded by Alexander Hudek and Noah Waisberg in 2010. It is used by major law firms in London such as Allen and Ovary, Freshfields and DLA Piper and Latham and Watkins. <https://www.crunchbase.com/organization/kira> accessed 19 June 2019.
[37] Allen and Overy, Linklaters, DLA Piper, and Freshfields are amongst these firms.

of a human mediator and settled a three-month long dispute in less than an hour.[38] This indicates that autonomous AI systems will occupy a significant place in arbitration in the not-too-distant future. The foregoing view is further fortified by the fact that there is already talk of replacing tribunal secretaries with AI to assist with legal research and summarising legal submissions or evidence.[39]

A machine arbitrator would eventually operate as an autonomous system as described by Jacob Turner as discussed above. He theorised that the AI system would be able to make decisions autonomously, through its own cognitive and analytical processes without external programming. The arbitral proceedings would therefore be conducted by a non-human arbitrator.

Such technological advancement would pose many questions and issues pertaining to legal theory. According to Daniel B. Rodriguez, we need to encourage legal philosophers to think about this new technology and the legal philosophy underpinning it, thereby making these discussions fundamental to future jurisprudential precedent.[40]

Implications

In general, the legal community is sceptic about the lack of human element in decision making which poses moral as well as ethical dilemmas. Moreover, one of the preliminary issues likely to arise is how comfortable parties would be with an automated system determining their liberty. It may be assumed that parties trust a human arbitrator because the arbitrator possesses emotional intelligence, i.e., the ability to sympathise, empathise, and rationalise. It is difficult to prophesise the conclusion reached by a machine arbitrator in case of a moral dilemma because, for the time being, empathy cannot be translated into an algorithmic code. However, in 2018, renowned international arbitrator Sophie Nappert, in her humorously titled speech "Disruption is the New Black," opined that the ability of parties to choose the adjudicator of their disputes is an underlying and inherent thread of international commercial arbitration.[41] Despite the possibility of a machine arbitrator being able to eliminate the risk of human error and unpredictability, the ability to select

[38] Nick Hilborne, 'Robot mediator settles first ever court case' (*Legal* Futures, 19 Feb 2019). <https://www.legalfutures.co.uk/latest-news/robot-mediator-settles-first-ever-court-case> accessed 7 June 2019.
[39] James Kwan, James Ng, and Brigitte Kiu, 'The use of AI in international arbitration: where are we right now?' (2019) 22(1) Int. A.L.R. 19.
[40] Daniel B. Rodriguez, Professor of Law, and Former Dean, Northwestern Pritzker School of Law (See Appendix).
[41]Sophie Nappert, 'The Proskauer Lecture 2018: Disruption is the New Black' (2018) <https://www.researchgate.net/publication/326920940_THE_PROSKAUER_LECTURE_2018_DISRUPTION_IS_THE_NEW_BLACK#fullTextFileContent> accessed 10 September 2021.

the decision makers in one's dispute is what makes arbitration appealing at a basic and emotional level.[42] However, Nappert warned the audience that scientists and suppliers of algorithms "are currently warning litigation and arbitration users that human decision-making as we exercise it on a daily basis is no better than a lottery. In addition to being costly, time-consuming, and resource-depleting, it is unpredictable and inevitably subject to bias."[43] After all, one is aware of the famous saying that "justice is what the judge ate for breakfast," which implies that decision making is influenced by the inherent biases, beliefs, and morals of the adjudicator.

Furthermore, since arbitration is heavily dependent on party autonomy, parties would need convincing that the option to choose a machine arbitrator would result in more just and fair decisions, and awards that are less likely to be challenged. And while the individualistic nature of commercial arbitration makes it difficult to conceive why parties would be on board if it does not directly affect their case, there would be a need to implement initiatives by arbitral institutions to encourage the same. This could be done by carrying out "test arbitrations" or requesting volunteer parties to be the pioneers of change. Additionally, compelling research and data in favour of the AI system would need to be presented to parties to incentivise the use of AI in their arbitral proceedings. The incremental growth could therefore prove beneficial to the sphere of international commercial arbitration in the longer run.

However, the problem that arises with test arbitrations is that the confidentiality of the arbitral process (more specifically the arbitral award), which is one of the hallmarks of arbitration and arguably why parties prefer arbitration over litigation, is undermined. Additionally, international commercial arbitration awards are generally not published owing to the obligation of confidentiality upon arbitral institutions. Therefore, a foreseeable issue with test arbitrations is that parties would be reluctant to provide access to their awards. This would pose a significant hindrance to the efficacy of the AI model as AI programs require access to data.[44] This holds true especially for machine learning models which are based on probabilistic inferences and are dependent on data for their operation. The higher the volume of sample data, the more accurate the model's predictive value.[45] However, Scherer urges not to despair as there are existing initiatives that publish

[42] Sara Higgins, 'Identifying the Blind Spots: Self Reflection in the Field of International Commercial Arbitration' (*CPR Speaks*, 28 June 2018) < https://blog.cpradr.org/2018/06/28/identifying-the-blind-spots-self-reflection-in-the-field-of-international-arbitration/> accessed 13 July 2019.
[43] Proskauer Lecture n (42).
[44] Scherer (n 4).
[45] Ibid.

commercial awards on a regular basis, typically in a redacted format.[46] Furthermore, she states that in any event, institutions could, without publishing, collect confidential awards and make them available for the purpose of building AI models.[47]

Second, it is important to note that most national laws are silent on the appointment of a machine arbitrator. A notable exception is France, where only a "natural person having full capacity to exercise their rights may act as an arbitrator."[48] Thus, the introduction of AI in arbitration in France would raise obvious implications. One would counter this with the argument that France is famous (and often notorious) for being one of the most arbitration-friendly jurisdictions in the world. It seems incomprehensible that this piece of legislation would not be interpreted in an arbitration-friendly manner by the courts. It may even carry the possibility of revocation, keeping in line with the country's pro-arbitration image.

Under English law and as per the English Arbitration Act ("Arbitration Act"), the objective of arbitration is to obtain a "fair resolution of disputes by an impartial tribunal without unnecessary delay or expense."[49] The parties are free to agree on how their disputes are resolved, subject only to such safeguards as are necessary for the public interest.[50] While there is no explicit permission nor prohibition of machine arbitrators, a foreseeable problem may be the issue of "public interest" under English law.[51] Although often construed narrowly, this may be an instance where the public interest exception to the review of an arbitral award by a machine arbitrator may be relevant. This is so especially since there is a lack of explicit standards that algorithms abide by: algorithms are often designed in such a manner that, while the outcome is provided, the reasoning behind the same is not.[52] This becomes all the more problematic considering that the merits of the arbitral award are not reviewed, save in accordance with Section 69 exceptions provided under the English law.[53] Ultimately, this becomes an issue of democratic importance as it is difficult to imagine a scenario under which both parties would consent to the machine arbitrator delivering its award and not knowing how the

[46] Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration, paras 42–43.
[47] Scherer (n 4).
[48] French Decree No.2011-48 of 13 January 2011, Reforming the law governing arbitration, art 1450.
[49] English Arbitration Act 1996 ("EAA"), s 1(a).
[50] Ibid s 1(b).
[51] The New York Convention (n 16), art V (2)(b): Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country.
[52] Philip J. McConnaughay, 'Risks and Virtues of Lawlessness: A Second Look at International Commercial Arbitration' (1999) 93 Nw. U. L. Rev. 453.
[53] EAA (n 49) s 69.

arbitrator reached its conclusion. Moreover, the lack of reasoning in an award generally makes the award susceptible to challenge in many countries.

Additionally, arbitral institutions are also generally silent on the use of technology in international arbitration. An exception to this is the Hong Kong International Arbitration Centre ("HKIAC")'s Administered Arbitration Rules (in force 1 November 2018). They are the first set of rules in Asia to mandate the use of technology by the arbitral tribunal in adopting "suitable procedures."[54] Technology is also mentioned in the ICDR Rules of 2014.[55] However, given the contractual freedom in arbitration to choose the procedure to be followed, it is safe to presume that institutional frameworks will not operate as a bar. Article 19 of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration explicitly provides that the parties are free to agree on the procedure to be followed.[56]

Third, what must be redressed is what the author refers to as the two C's: "Complacency" and "Lack of Confidence". Professor Burkhard Schafer, in his discussion at the AI Summit, mused whether there is a possibility of lawyers losing the intuition and knowledge that they attain from reviewing bundles and bundles of documents and whether the ability to examine a large volume of documents with a fine-tooth comb may be lost.[57] This may pose a threat to the training of lawyers in international commercial arbitration where trainees are acquainted with the process by initially reviewing, tying, and bundling volumes of documents. This may be countered by the fact that the introduction of AI would result in trainee lawyers being acquainted with the actual dispute resolution proceedings *ab initio*, giving them greater opportunity and responsibility, and leaving painstaking administrative tasks to the AI systems. The prospect of greater efficiency arguably outweighs all other considerations.

The other foreseeable problem is the prospect of lawyers lacking the confidence to challenge the decision of the machine arbitrator owing to the blind trust in the algorithm. The risk of the AI system giving an erroneous decision must be kept in check. The resolution lies in the retention of human control over the arbitral proceedings, at least initially. While the machine arbitrator may be used in arbitral proceedings, the ultimate decision ought to lie in the hands of human arbitrators. An odd number of arbitrators, with

[54] Hong Kong International Arbitration Centre Administered Arbitration Rules 2018, art. 13.1: The arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense, having regard to the complexity of the issues, and the amount in dispute and the effective use of technology.
[55] International Centre for Dispute Resolution Rules 2014, art 20.2.
[56] United Nations Commission on International Trade Law, art 19.
[57] Schafer (n 25).

the ratio of two humans to one machine, affords AI system the opportunity of giving a novel outcome. The human arbitrators may then *choose* to adopt the decision of the machine arbitrator, either in whole or in part, if they believe that the outcome reached by the autonomous system is better suited to the dispute than their own is.

Fourth, there is a tendency for arbitral institutions to grant full or absolute immunity to arbitrators. An example is the ICC Rules,[58] where Article 41 gives immunity not only to the arbitrators, but also extends this immunity to other employees of the ICC, save to the extent that such limitation of liability is prohibited by applicable law.[59] This problem also arises England where the Arbitration Act allows for complete immunity of the arbitrator unless the act or omission is shown to have been in bad faith. This is problematic because if a human arbitrator repeatedly delivers erroneous judgments, the said arbitrator would be liable for removal from that case and would not be made a choice for further adjudication. On the other hand, accountability of a machine arbitrator presents a unique dilemma of attributing responsibility. Does culpability lie with the creator of the algorithm, the person who entered or "fed" the data in the algorithm, or the intrinsic self-learning processes of the machine itself? Furthermore, given the absolute immunity afforded to the arbitrator, what would the consequence of an erroneous judgment be? Charlie Morgan proposes that in such a scenario, states must ensure that there is a system of reverting back to national courts.[60] A logical question that arises is whether this would entail de-characterising the very nature of international commercial arbitration, which limits access to courts (hence a form of "alternative" dispute resolution)? Perhaps not. About the involvement of domestic courts in the arbitral process, Julian Lew says: "National court involvement in international arbitration is a fact of life as prevalent as the weather."[61] In the four characteristics he lists of international commercial arbitration, he explicitly states that arbitration does not operate through the relinquishment of jurisdictional control by states. Lew, concedes, however, that the access to the "autonomous domain"[62] of international arbitration is obtained through contract between parties that leads to relinquishment of rights by national courts. This may be countered by the notion that this "relinquishment" of rights by the national courts is limited to certain situations where the role of courts is curtailed, such as competence-competence, i.e., the ability of the arbitral tribunal to ascertain its own jurisdiction, the merits of the arbitral

[58] International Chamber of Commerce Rules of Arbitration of the International Chamber of Commerce ('ICC Rules') 2017.
[59] Ibid art 41.
[60] Conversation with Charlie Morgan at the AI Summit.
[61] Julian D M Lew 'Does National Court Involvement Undermine the International Arbitration Processes?' (2009) AUILR 489.
[62] Ibid.

award, and the arbitral proceedings themselves. It may also be noted that the principle of competence-competence is applied differently in different states, and most national courts prefer to retain some sort of supervisory jurisdiction over the arbitral process.[63]

Finally, it is both an attribute and a shortcoming of AI that the data which is produced by the system is dependent on the type and quality of the data fed into it. The driver of change (or a lack thereof) is, therefore, the data that is being produced. According to Duncan C. Card,[64] the algorithm can be developed according to prevalent standards and it can thus be customised and "attacked," making the arbitral system more transparent, neutral, and just. However, it is virtually impossible to cater to a situation where the system is completely neutral. This is because AI currently hinges on the data fed into the system: the producer of the data will inexorably incorporate some of their own biases into the system regardless of how hard they try to maintain neutrality. Thus, AI, at least in its early stages, is susceptible to creating the perfect storm. This holds especially true in the case of arbitration and arbitral bias. If the data fed into the system is such that racial, cultural, and religious biases are predominant in it, a just and fair conclusion is unlikely to result. One of the most controversial examples of algorithmic bias is the system developed by the Durham Constabulary in the United Kingdom. The Durham Constabulary and computer science academics developed the Harm Risk Assessment Tool ("HART system"). This AI system was designed to predict whether suspects were at a low, moderate, or high risk of committing crimes in the foreseeable future, and used 104,000 histories of people previously arrested and processed in Durham custody.[65] In 2017, the HART system incorporated new data, the purpose of which was to reduce reliance on postcode predictors as an indicator of whether a previous suspect was likely to commit a crime based on their neighbourhood. A dataset called "Mosaic," developed by a company called Experian, was used. Mosaic, assembled using data gathered from public sources including the internet, was based on the profiles of all 50 million adult residents in the UK. Mosaic used offensive stereotypes to brand people and defined categories, for instance, by reference to age group or ethnicity (e.g., "disconnected youth," "dependent greys," "large extended families in neighbourhoods with a strong South Asian tradition," and "Asian heritage"). Due to outcry by the public and the NGO "Big Brother Watch", Durham Police stated that it worked with Experian to improve its understanding

[63] *Dallah v Government of Pakistan* [2010] UKSC 46. The UK Supreme Court sets out a detailed analysis of the principle of competence-competence.
[64] Duncan C. Card, Senior Partner, Co-Chair Technology Law Practice, Bennett Jones LLP (see Appendix).
[65] 'Helping police make custody decisions using artificial intelligence' (*University of Cambridge*) <https://www.cam.ac.uk/research/features/helping-police-make-custody-decisions-using-artificial-intelligence> accessed on 10 August 2021.

of local communities, and in 2018, it stopped using Mosaic.[66] This seemingly Orwellian algorithm serves to illustrate the bias (in terms of nationality, race, caste, etc.) that may come with a robot arbitrator. "Intellectual corruption," as Karen Mills terms it, is already a prevalent issue in arbitration where the arbitrator's opinions are tainted with prejudice or racial bias. This is so especially in cases where western arbitrators sit to adjudicate disputes between western and "Third World" parties. Mills argues that intellectual corruption may range from simple cultural misunderstandings to cultural bias to actual racism. A western arbitrator may attribute greater credence to a western witness than to an Asian one. She urges against falling into this ethnocentric trap.[67]

The question then to be posed is how realistic it would be to expect global standards for algorithms?[68] Hurly[69] argues that the difference in cultures all around the world means that there is no way of coming up with a one-size-fits-all standard.[70] The attractiveness of arbitration stems from its flexibility: parties can choose or not choose to apply law, use a combination of both, or adopt internationally recognised principles such as *lex mercatoria, ex aquo et bono,* and religious law etc. One would argue that the method chosen by the parties to resolve their dispute is ultimately reflective of the legal culture of their home states.

Recommendations and Looking Ahead

First, states ought to invest their resources into discerning how algorithms work in practice and how they come up with conclusions. The focus needs to shift from the implications of AI to the actual technology itself. AI acquainted lawyers are virtually unheard of and are often treated as oxymorons. Indeed, one author has fated them to be as "rare as vegan butchers."[71] The introduction of AI, therefore, would require an overhaul of the current legal regime, where lawyers are familiar with the mechanics of AI. While this is arguably an expensive task, the initiative by the United Kingdom's Ministry of Justice to provide £2 million to support lawtech is indicative of the fact that states are now willing to delve

[66] Council of Europe Committee on Legal Affairs and Human Rights, 'Justice by algorithm-the role of AI in policing and criminal justice systems' (2020) <https://assembly.coe.int/LifeRay/JUR/Pdf/DocsAndDecs/2020/AS-JUR-2020-22-EN.pdf> accessed on 10 June 2021.

[67] Karen Gordon Mills, 'Corruption and Other Illegality in the Formation and Performance Of Contracts and in the Conduct of Arbitration Relating Thereto', in Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions, ICCA Congress Series*, (Volume 11, Kluwer law international 2003).

[68] Indeed, this question was posed in the AI summit in the debate 'The ethics of algorithms'.

[69] Noel Hurly, VP Strategy, AR (See Appendix).

[70] Ibid.

[71] Marc Lauritsen, 'Towards a Phenomenology of Machine-Assisted Legal Work' (2018) 1(2) Journal of Robotics, Artificial Intelligence & Law. 67, 79.

deeper into the exploration of this area.[72] Whether or not these funds will be used for arbitration is a different matter as it does not neatly fit within the conservative and traditional legal model. However, with England being one of the friendliest arbitration states in the world, even if the £2 million is not to be utilised on the discovery of AI in arbitration, it is only a matter of time that resources will be allocated towards this task.

Furthermore, regulation of AI in arbitration is essential, and can be done at two levels. In Scenario II, for example, there would be a need for regulation of the algorithm itself. It would have to be certified and accredited, and the credibility of the algorithm would ultimately be dependent upon the reputation of the algorithm in the market. It is suggested that just as the parties to the arbitration are allowed to agree upon the choice of law to govern their dispute, this inherently consent-based system of dispute resolution should allow the parties to choose different types of algorithms to govern their dispute. The Law Society Technology and Law Policy Commission's recommendation of keeping a national register of algorithms that are logged into the book would be a welcome proposal, with a separate section for the algorithms to be used in arbitration.[73] Moreover, in the case of a machine arbitrator, the decision of the machine arbitrator would already be, as discussed above, subject to necessary checks and balances owing to the fact that there would be two other arbitrators on the panel. It would be their prerogative whether to accept the decision of the machine. Interestingly enough, Nappert and Cohen have suggested the converse. They suggest that AI could be used to correct the biases of a human arbitrator and one could compare the decision of the human arbitrator with that of the robot to cross-check the impartiality and independence of the arbitrator.[74] This is indicative of the utility of machine arbitration for different purposes, i.e., to render an award or to correct or cross check the outcome of the human arbitrator.

Lastly, the seminal text on international commercial arbitration is undeniably the New York Convention of 1958. At the time when the Convention was drafted, the possibility of AI in arbitration would not have been envisioned by the drafters. Even now, the full scope of AI in arbitration cannot be envisaged. However, the next decade will surely witness a change in the way arbitration operates. It is suggested that both arbitral institutions and states draft guidelines and rules for regulation of AI systems. UNCITRAL could serve as the forerunner of the same, with the introduction of a new protocol or as a

[72] Neil Rose, 'Gauke announces more financial backing for lawtech' (*Legal Futures*, 4 June 2019) < https://www.legalfutures.co.uk/latest-news/gauke-announces-more-financial-backing-for-lawtech> (accessed 12 June 2019).
[73] The Law Society Technology and Law Policy Commission 'Algorithm use in the criminal justice system' (2019) <https://www.lawsociety.org.uk/support-services/research-trends/algorithm-use-in-the-criminal-justice-system-report/> (accessed 15 June 2019).
[74] Cohen and Nappert (n 23).

schedule within the existing Model Law. The draft ought to set out the definition of AI in arbitration, list accredited and certified algorithms, and address problems of accountability and consequences. A useful starting point may be the European Union's High-Level Group Expert Report published in 2019 on guidelines for "Trustworthy AI."[75] According to the Guidelines, "Trustworthy" AI should be: "1) Lawful—respecting all applicable laws and regulations; 2) Ethical—respecting ethical principles and values; and 3) Robust—both from a technical perspective while taking into account its social environment." Guideline (1) is especially relevant for arbitration. It is of utmost importance to the enforceability of the arbitral award that it is rooted in the mandatory laws of the place where the award is rendered and the place where the enforcement of the award is sought. As a result, the arbitral community must therefore ensure that the AI systems being used do not conflict with mandatory laws. The upcoming years will be a testament to legislative restraints and different approaches by different states on the regulation of such. This may even result in a different sort of regulatory arbitrage, where more relaxed rules on AI may increase in popularity of parties choosing the state as their seat of arbitration.

The Feasibility of AI in Pakistan

The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitration Awards) Act 2011 ("REA") is the current legislative scheme in Pakistan with regards to the incorporation of the New York Convention into the domestic legal sphere. REA itself is sparse and limited, with ten sections that mainly aim to set out the fundamental powers of the courts in relation to arbitral proceedings, and lay down grounds relating to recognition and enforcement of a foreign award, whereas the Schedule to this Act fully incorporates the New York Convention into its domestic regime.[76] Therefore, while it is uncertain how AI would fit into the existing legal framework of Pakistan. Perhaps cue can be taken from the New York Convention itself, which, by virtue of being attached as a Schedule with REA, directly forms part of Pakistani law. As stated above, the New York Convention was brought into force more than sixty years ago when at that time, the use of AI could not possibly have been envisaged. Resultantly, where the formalities of the Convention have been complied with, it seems unlikely that the award would be rendered unenforceable under Pakistani law due to the involvement of AI in the arbitral proceedings in any form.

[75]European Commission 'Ethics guidelines for trustworthy AI' (2019) <https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai> accessed 23 July 2019.
[76]The Recognition of Enforcement (Arbitration and Foreign Arbitral Awards) Act 2011.

However, an interesting situation may arise where the Arbitration and Conciliation Bill—which was brought into the Senate of Pakistan as the "Arbitration and Conciliation Act 2015"—is brought into force.[77] The Bill itself is loosely premised on UNCITRAL Model Law on International Commercial Arbitration 2006. UNCITRAL operates as a framework and guideline for states who wish to adopt arbitration friendly legislation into their own national law. Throughout the Bill, the 'nationality' of an arbitrator is referred to, one example being Section 11 of the Bill, which states that a person of "*any nationality*" may be appointed as an arbitrator. One's interest is indeed piqued when considering whether or not an autonomous "robot" arbitrator would be of a single nationality, or whether it would have any nationality at all, considering the fact that it is not a natural person. Therefore, were this Bill to come into force, there may be implications for the future of the arbitration regime in Pakistan, with the rise of AI in the legal sphere globally. It must be submitted, however, that the Bill itself was introduced in 2016, and five years down the line it is yet to be passed. As a result, REA remains the operative legislative regime regarding international commercial arbitration, which does not seem to explicitly accept, reject or even envision the possibility of AI in arbitration in Pakistan.

Conclusion

These are crucial times for the evolution of arbitration from a conservative sphere into one that is in line with today's legal world. Recently developments in the field have been slow; however, the advent of COVID-19, and with it, the new wave of technology in the legal sector will ensure that arbitration catches up. The use of AI in arbitration would make the process smoother, speedier, and arguably more just. It is, however, necessary that the use of AI be phased in gradually and incrementally. Therefore, the implications need to be dealt with in order for the process to be streamlined and regulated. It remains the duty of the states to ensure that they are prepared to face the upcoming challenges and come up with adequate responses to that effect.

Furthermore, as far as the outcomes of AI assisted arbitration are concerned, the determinants of its success would ultimately be the quality of data input and the accuracy of the algorithm itself. Therefore, attention is merited for the quality control of the data input and an examination of the construct of the algorithms.

Lastly, it must be cautioned that the introduction of these new technological processes does not aim to devalue or undermine the conventional nature of the arbitral

[77]The Arbitration and Conciliation Bill 2015 <http://www.senate.gov.pk/uploads/documents/1453277461_862.pdf> accessed 11 October 2020.

process but rather, aims to supplement it by enhancing its capabilities with the appropriate use of technology. AI in arbitration is coming into itself as an essential assistive tool, which has tremendous potential for further development and application.

Appendix

The 'AI in Legal Services Summit was held in London on 4th June 2019. It covered a variety of debates ranging from the ethics of AI to the use of AI in Law to the impact on a lawyer's job with the introduction of AI. The speakers were from all over the world. More information can be found here on their website:

<http://www.cityandfinancialconferences.com/events/the-artificial-intelligence-in-legal-services-summit/event-summary-a2f772e53254474ea5d85a621086a4f8.aspx>

List of Speakers (in alphabetical order of last name)

- Sir William Blair, Professor of Financial Law and Ethics at the Centre for Commercial Law Studies, QMUL and Associate Member at 3VB, Keynote Panel I 'Algorithms in the justice System – current state of play and the future outlook'.
- Duncan C. Card, Senior Partner, Co-Chair Technology Law Practice, Bennett Jones LLP, Keynote Panel II 'Wider societal impacts of Al and its future.'
- The Rt Hon. David Gauke MP, Lord Chancellor and Secretary of State for Justice.
- Noel Hurly, VP Strategy, AR, Interactive debate 'The ethics of algorithms'.
- Dr Hannah Knox, Associate Professor of Anthropology, UCL, Keynote Panel II 'Wider societal impacts of AI and its future'.
- Charlie Morgan, Senior Associate Dispute Resolution at Herbert Smith Freehills, Keynote panel I 'Algorithms in the justice System – current state of play and the future outlook'.
- Daniel B. Rodriguez, Professor of Law, and Former Dean, Northwestern Pritzker School of Law, Keynote Panel III 'Future skills and job requirements for the professions with a focus on law, banking and accountancy'.
- Professor Burkhard Schafer, Professor of Computational Legal Theory, The University of Edinburgh, Keynote Panel I 'Algorithms in the justice System – current state of play and the future outlook'

Criminal Defamation Laws in Pakistan and Their Use to Silence Victims of Sexual Harassment, Abuse, or Rape

Muhammad Anas Khan*

Abstract

In Pakistan, the discourse around defamation laws in the context of sexual harassment and abuse cases is underdeveloped. With the #MeToo movement on a rise, several victims of sexual harassment and abuse have used social media to disclose their horrific stories. These claims are generally met with counterclaims of defamation by the alleged perpetrator or their supporters, which creates further hindrance for these victims trying to speak up. The victim, while fighting their case of harassment, has to simultaneously defend themself against the defamation charges. This problem seems to be exacerbated through criminal defamation laws where a First Information Report can also be registered against the victim under Sections 499 and 500 of the Penal Code of Pakistan 1860 ("Penal Code") and under Section 20 and 21 of the Prevention of Electronic Crimes Act 2016 ("PECA") for speaking up. Therefore, it is imperative to revisit criminal defamation laws in Pakistan to analyse their misuse in such claims. This paper aims to distinguish between civil and criminal defamation laws in Pakistan: the Defamation Ordinance 2002 ("2002 Ordinance"), the Penal Code, and PECA. It analyses cases of harassment and defamation, both inside and outside of the courtrooms. However, since the jurisprudence is underdeveloped, case law alone might not be an adequate source to formulate a definitive argument. For this purpose, the paper includes interviews with lawyers, social activists, and law enforcement personnel to gauge their understanding and views on the topic. Based on these interviews, this paper attempts to analyse the jurisprudential and practical lapses in the system that cause impediments in dispensation of justice. Thus, it will also look at criminal and civil defamation laws to determine whether they hinder sexual harassment claims and violate constitutional rights to freedom of speech and expression.

Introduction

Globally, feminist movements campaigning for equal rights have gained momentum over the last few decades. In Pakistan, despite several efforts of providing equal opportunities to women and curbing discrimination, public debate and legislation on tabooed crimes including sexual harassment, psychological and physical abuse, and rape remain elusive. Moreover, a trend has recently emerged where if a victim speaks up about their abuse or harassment, the alleged perpetrator counterclaims by using defamation laws to exert undue pressure on the alleged victim. In August 2019, the Women's Action Forum ("WAF"), a Pakistan-based social organisation, released a statement where they reported

an alarming rise in the registration of defamation cases against individuals speaking about or reporting incidents of harassment, assault, and rape.[1] WAF also stated that this violates the fundamental right to free speech and called for the repeal of Pakistan's criminal defamation laws. In light of this statement, this paper will analyse whether criminal defamation laws in Pakistan are being misused to silence victims of sexual harassment, abuse, or rape who seek redressal from the country's justice system.

A UK-based NGO published a paper on defamation and its remedies. The paper concluded that in cases of harassment, criminal defamation is violative of free speech; therefore, legal principles on defamation need to be updated to facilitate free speech and reflect legal and political developments that have taken place over the last fifteen years to balance these rights.[2] The primary purpose of criminal defamation law, it seems, is to enable citizens to take immediate criminal action when a defamatory statement is made against them. However, numerous activist organisations such as WAF, Bolo Bhi, and the Digital Rights Foundation ("DRF") have raised concerns about Pakistan's criminal defamation laws, and their alleged misuse as a deterrent against women seeking relief.

Defamation Laws in Pakistan

There are three pieces of legislation in Pakistan that cover the offence of defamation. The offence of defamation can be categorised into civil and criminal defamation. Civil defamation is defined under Section 3 of the Defamation Ordinance 2002 ("2002 Ordinance") which defines it as follows:

> Any wrongful act or publication or circulation of a false statement or representation made orally or in written or visual form which injuries the reputation of a person, tends to lower him in the estimation of others or tends to reduce him to ridicule, unjust criticism, dislike contempt or hatred shall be actionable as defamation.[3]

On the other hand, criminal defamation is defined under Section 499 of the Penal Code. It states:

> Whoever by words either spoken or intended to be read, or by sign or by visible representations, makes or publishes any imputation concerning any person intending

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[1] Editorial, 'WAF Decries 'Misuse of Defamation Laws to Silence Rape, Harassment Victims' *The News* (2019) <https://www.thenews.com.pk/print/518300-waf-decries-misuse-of-defamation-laws-to-silence-rape-harassment-victims> accessed 23 December 2019.

[2] 'Revised Defining Defamation Principles: Background Paper' (2016) Article 19 <https://www.article19.org/data/files/medialibrary/38362/Defamation-Principles-Background-paper.pdf> accessed 25 December 2019.

[3] Defamation Ordinance 2002, s 3.

> to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.[4]

Defamation is also criminalised in the Prevention of Electronic Crimes Act ("PECA"). Defamation under PECA is discussed in detail in the next chapter. In this section, the paper distinguishes between civil and criminal defamation under the 2002 Ordinance and the Penal Code, and the repercussions that follow the commission of the offence. Broadly, defamation has two essential elements that can be derived from case law. First, there must be words either spoken or intended to be read or by signs or by visible representation that aim to harm the repute of a natural person.[5] Second, intention or *mens rea* is a precondition for the offence of defamation.[6]

Distinction Between Criminal and Civil Defamation in Pakistan

In the case of *Dr Aijaz Hassan Qureshi v District Magistrate Lahore*, the Lahore High Court emphasised the three exceptions under Section 499 of the Penal Code:

> **First Exception.** It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.
>
> **Second Exception.** It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.
>
> **Third Exception.** It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct and no further.[7]

In *Khondkar Abu Taleb v the State*, a three-member bench of the Supreme Court ruled that the burden of proof in defamation cases lies on the prosecution.[8] The Court in this case also laid down the necessary ingredients needed to prove criminal defamation.

[4] Pakistan Penal Code 1860, s 499.
[5] 1993 PCr.LJ 764.
[6] PLD 2017 Isl 370.
[7] PLD 1976 Lah 314, [6].
[8] PLD 1967 SC 32.

The Court stipulated that the prosecution must satisfy the Court on three counts for the charge of criminal defamation: first, the accused party should be accountable for the publication; second, the imputation made in the publication should not be true; and third, the imputation should have been made with *mens rea* or knowledge to harm the reputation of the person against whom the publication is made.[9] Unlike civil defamation, criminal defamation may be brought against a group, class, or race if it causes a breach of peace among the general public.[10]

In *Shariq Saeed v Mansoob Ali Khan*,[11] the Court relied on Lord Denning's speech in *Plato Films Ltd v Speidal* where it was established that in a civil defamation case, a defendant may mitigate damages by proving through evidence that the plaintiff is generally someone of bad reputation and the alleged offence does not harm their repute in the society.[12] On the other hand, the plaintiff may rebut such a claim by producing witnesses who can attest to the fact that the plaintiff does in fact enjoy a good reputation in the society.[13] Moreover, in the case of *Dr Mukhtar Ahmed v Mst. Shamim Hashmi*, the Court held:

> Under the criminal law all benefit of doubt is to be granted to an accused and the prosecution must establish its case beyond a reasonable doubt. In a suit for damages under civil law, however, a very strong burden of proving a statement false is to be discharged by the plaintiff and the mere fact that it could not be proved does not necessarily show that it was false.[14]

Therefore, the primary distinction between civil and criminal defamation is that it is only under the former that damages can be sought by the aggrieved party. There is no such relief available in criminal defamation. In Pakistan, criminal trials are generally considered more expeditious compared to civil trials which is why many people resort to seeking a criminal remedy. However, there exists no substantial difference between the two other than the fact that damages can only be sought under a civil suit and not under criminal proceedings.

Prevention Of Electronic Crimes Act 2016 (PECA)

PECA is a federal legislation enacted to combat cybercrime in Pakistan. The purpose of the Act was defined in *Muhammad Azam Davi v the State*, wherein the Court stated that

[9] Ibid.
[10] Ibid.
[11] 2010 YLR 1647.
[12] [1961] A.C. 1090.
[13] *Shariq* (n 11), 1655.
[14] 2007 CLC 941.

it was promulgated to prevent unauthorised acts concerning information systems and to provide a mechanism for investigation, prosecution, trial, and international cooperation in respect of offences relating to electronic crimes.[15] The Act aims to criminalise harassment, hate speech, unauthorised access to information, and data transmission on the internet. However, the Act has faced heavy criticism for violating fundamental rights because it confers arbitrary and blanket powers to regulatory agencies, including the Federal Investigation Authority ("FIA") and the Pakistan Telecommunication Agency ("PTA").[16] Lawyers and social activists are sceptical about this law since it allows perpetrators of harassment to file criminal defamation suits against their victims who open up about their harassment experience on online forums, and hence violates the fundamental right to free speech.[17] Apart from this, PECA has also been criticised by media groups which allege that it gives blanket powers to PTA to regulate content and to charge journalists with "electronic crimes."[18] Although PECA does not have any explicit provisions on defamation, certain sections can be construed as criminalising defamation of a person. Section 20(l) of the Act states:

> Offences against dignity of a natural person-(l) Whoever intentionally and publicly exhibits or displays or transmits any information through any information system, which he knows to be false, and intimidates or harms the reputation or privacy of a natural person, shall be punished with imprisonment for a term which may extend to three years or with fine which may extend one million rupees or with both.[19]

This offence is non-cognizable, bailable, and compoundable. Thus, law enforcement agencies cannot arrest the accused without a warrant.[20] Similarly, Section 21 of the PECA states:

> Offences against modesty of a natural person and minor. - (1) Whoever intentionally and publicly exhibits …any information which, …(c) intimidates a natural person with any sexual act, or any sexually explicit

[15] 2017 PCrLJ 1715.
[16] An example of the arbitrary powers given to law enforcement agencies would be section 37 of PECA which gives PTA the authority to interpret electronic content, apply restrictions and block the content from reaching the public.
[17] Gathered as observation during the research for this paper. These claims are explained and analysed later in the paper.
[18] Editorial, 'Pakistan Journalists Face Charges for Criticizing Military: DW: 18.01.2021' *Deutsche Welle* <https://www.dw.com/en/pakistan-journalists-military-press-freedom/a-56265949> accessed 11 September 2021.
[19] Prevention of Electronic Crimes Act 2016, s 20.
[20] Ibid s 43.

> image or video of a natural person; or (d) cultivate, entices or induces a natural person to engage in a sexually explicit act, through an information system lo harm a natural person or his reputation, or to take revenge or to create hatred or blackmail, shall be punished with imprisonment for a term which may extend to five years or with fine.[21]

This offence is cognizable, non-bailable, and non-compoundable.[22] Judicial precedent shows that in most cases where Section 20 of the PECA is attracted, Section 21 is also invoked. The procedure followed for an offence committed under Section 21 of the PECA is laid out in Section 497 of Criminal Procedure Code 1898 ("CrPC"). Although this is a special law, Section 29 of the PECA states that the law enforcement agency empowered under this Act would carry out its duties and functions according to the procedure detailed in the CrPC unless explicitly stated otherwise in the Act.[23]

The investigation procedure under the PECA is laid down in Sections 30, 43, 44, and 50 of the Act. Moreover, the PECA Rules state that there shall be a circle in-charge with whom the complaint shall be filed. The FIA cannot start an investigation independently; thus, it is essential to file a complaint to start the investigation. In case of a non-cognizable offence, the circle in-charge must seek the competent court's permission for investigation under Section 155 of the CrPC.[24] Thus, only the circle in-charge is empowered to seek the court's approval for such investigations. However, in the case of cognizable offences under the PECA, the FIA exercises power to investigate upon receiving an order from the Magistrate.

Harassers try to pressurise their victims into silence by filing defamation complaints under Section 20 and 21 of the PECA. If a victim of sexual harassment shares their story online, the alleged harasser could press defamation charges under the PECA, and the FIA could then summon the victim for preliminary investigation. This law puts victims of sexual harassment at a disadvantage; they have to defend their harassment allegations and also defend themselves against the FIA's investigation for the defamation charges. However, recent judgments from the lower courts have revealed that the courts scrutinising defamation allegations are inclined to favour the victim if they believe that the defamation charges are vexatious in nature. A case decided by a Judicial Magistrate in Lahore and published by the DRF on their website reads:

[21] Ibid s 21.
[22] Ibid.
[23] Ibid s 29.
[24] Ibid.

> In an important decision, a Judicial Magistrate of Lahore convicted an offender under PECA.[25] This has come about as a result of a criminal case filed, under sections 20, 21 and 24 of PECA as well as section 420 of the PPC, with the Cyber Crime Circle FIA by complainant whose wife became the victim of cyber harassment at the hands of convict.[26]

Though numerous cases expand upon claims that constitute defamation, very few deal with criminal defamation against sexual harassment claims in Pakistan. Since only the Supreme Court and the High Court cases are reported in law journals, one can only get a limited view of what happens generally in courtrooms. However, activists still argue that the existence of criminal defamation laws do extend a defence to the person accused of a sexual crime. The case law is not sufficient to clearly state that the courts do not accept defamation as a defence in a case of harassment or abuse. Interestingly, from what one sees at the appellate level, it can be said that the High Courts often side with the victims and do not accept defamation as a valid defence.

In *Farhan Kirmani v the State*, a woman claimed to have been sexually harassed online.[27] The accused was alleged to have established a fake Facebook identity of the complainant to post doctored pictures of her. To defend himself, the accused tried to bring a claim for defamation against the complainant under Sections 20 and 21 of the PECA. The accused claimed that the complainant attempted to blackmail him by planting incriminating material against him. However, the Court, while noting that it seemed very far-fetched that a married woman with four kids would post her own superimposed photos to blackmail the accused, held:

> The accused has apparently gone to grotesque lengths to humiliate the complainant online, which may cause a detrimental effect on her…the impact of uploading on internet the superimposed porn photographs of a woman is more than the shame and shock that one might feel when she discovers herself to be the victim of this crime.[28]

Thus, the Court refused to grant relief to the accused and ruled in favour of the complainant. The accused's actions demonstrate how Section 20 of the PECA can be misused to counter allegations of harassment by using the threat of defamation to deter

[25] 'Man Convicted In The First Judgment Under The Prevention Of Electronic Crimes Act (PECA)' (*Digital Rights Foundation*, 2019) <https://digitalrightsfoundation.pk/man-convicted-in-the-first-judgement-under-the-prevention-of-electronic-crimes-act-peca/> accessed 12 December 2019.
[26] There is limited reported case law available on PECA since the first trial takes place in lower courts. Cases filed under PECA are only published in law journals if they are appealed before the superior courts.
[27] 2018 YLR 329.
[28] Ibid.

victims from speaking up. Despite the use of defamation as a counter, some courts realise the issue and often lean towards the victim. Similarly, in another case, the victim's sexual conduct was raised as a defence by the accused and it was argued that the victim was attempting to defame him, while he had solicited favours, both monetary and carnal, by disseminating her obscene pictures.[29] The Court, while dismissing defamatory grounds taken up by the accused, argued that the victim's naïve volitional intimacy cannot be pleaded as a defence for a most grievous misconduct based upon a criminal betrayal resulting into unmitigated intrusion into a woman's privacy.[30]

In *Usman Bin Mehmood v the State*, the complainant filed an FIR under Sections 20, 21, and 24 of the PECA against the accused. It was alleged that the accused had an affair with the complainant's wife and subsequently disseminated intimate pictures and videos through his email. The prosecution argued that the accused coerced the complainant to pronounce divorce upon his wife. The accused petitioned to get bail, but the Court sided with the complainant and dismissed the bail petition by reasoning:

> In the present case, allegation against the petitioner, supported by technical evidence is that he by betraying the trust reposed by the prosecutrix exposed her on the Internet and shared indecent images not only with her better half but with others as well; it is a flagrant intrusion into privacy that brings a young lady into perennial embarrassment and ridicule within and outside family fold.[31]

In *Muhammad Ashraf v the State*, the petitioner sought post-arrest bail in a case registered under Sections 20, 21, and 24 of the PECA read with Sections 420, 500, and 109 of the PPC. According to the complainant, her daughter was allured into an intimate liaison with the accused. The accused had captured the prosecutrix's graphic exposure and subsequently disseminated it through a fake Facebook identity to blackmail the girl.[32] The Court rejected the request for bail and held:

> Prosecutrix's naive volitional intimacy cannot be pleaded as a defence for a most grievous misconduct based upon a criminal betrayal resulting into unmitigated intrusion into a woman's privacy. Similarly, petitioner cannot

[29] *Muhammad Ashraf v the State* 2018 PCrLJ 1667.
[30] Ibid.
[31] 2018 PCrLJ 408.
[32] *Ashraf* (n 29).

> claim bail as of right merely on the ground that offences complained do not fall within the prohibitory clause of section 497 of the CPC.[33]

These judgments can be deemed as a win for victims because on the face of it, it seems that the courts understand that criminal defamation charges are generally vexatious and a deliberate attempt to squash the other proceeding. However, it is pertinent to mention here that the aforementioned judgements constitute just a small chunk of the total number of litigated cases since only very few judgements end up getting reported in law journals. Many cases go unreported, and many do not even reach the appellate level. Furthermore, countless cases are mediated by the law enforcement agencies and are never litigated. The jurisprudence regarding criminal defamation under the PECA has not developed to the extent where conclusive arguments can be drawn on this subject. However, from the few reported cases, it can be seen that the courts are diligent and have, in some cases, discarded claims of defamation against victims of online harassment. Moreover, it is important to keep in mind that the case law discussed in this paper is primarily from the Lahore High Court. The High Courts of Peshawar, Sindh, and Balochistan do not have reported cases on this issue. Furthermore, since this Act is very recent, it cannot be stated conclusively that the PECA does not violate the fundamental right of free speech in sexual harassment claims made online.

The criminal courts and the law enforcement agencies in Pakistan are notoriously patriarchal, something which might possibly be a reason why countless women do not even file a case of harassment. Several cases in Pakistan go unreported because of the tedious processes in the justice system. Pursuing a case of harassment can become a daunting and intimidating process for a woman in Pakistan, who has to fight against social stigmatisation and patriarchal hierarchies all at the same time. Many victims do not find the strength to endure this long and tedious journey to seek justice; and the defence of criminal defamation available to the accused makes registration and following up on harassment cases even harder.

Current Instances of Harassment and Defamation

I. Ali Zafar and Meesha Shafi case

In April 2018, singer Meesha Shafi posted a tweet where she claimed that singer Ali Zafar had sexually harassed her.[34] This led to Zafar sending a legal notice to Shafi for defamation under the 2002 Ordinance. Shafi retaliated by filing a complaint at the

[33] Ibid.
[34] Editorial, 'A Timeline Of The Meesha Shafi-Ali Zafar Controversy' *Images* (12 May 2018) <https://images.dawn.com/news/1179925> accessed 31 December 2019.

Ombudsperson office. However, her complaint was rejected on technical grounds, and it was held that the provisions of the Protection Against Harassment of Women at Workplace Act 2010 were not attracted since Shafi and Zafar "did not have an employer-employee relationship."[35] While the Lahore High Court did hear Shafi's petition against the Ombudsperson's decision, it ended up dismissing her petition.

Meanwhile, Zafar filed a suit for damages worth one billion Pakistani rupees against Shafi in the Sessions Court, Lahore for accusing him of sexual harassment.[36] In response, Shafi filed a countersuit for damages worth two billion Pakistani rupees for mental torture and agony, along with loss of reputation and goodwill.[37] Furthermore, she asked the Court to pass a decree to declare Zafar's statements regarding her as "false, malicious and defamatory" and "made to injure the reputation of the plaintiff."[38] However, the case was suspended after Shafi and her witnesses failed to appear before the Court.[39] Later, both the Supreme Court and the Lahore High Court dismissed Shafi's petition on the basis that it lacked merit and that the witnesses were aware and had reasonable time to prepare for cross-examination.[40] In Pakistan, witnesses try to avoid legal proceedings when they do not want to upset the opposing party if the said party has social status and power.

Although Zafar did not pursue criminal remedy against Shafi's allegations, he did file a civil defamation suit. This case shows that the first defence of any accused in cases of harassment is defamation. Therefore, the state needs to restrict this remedy to only civil courts so that the remedy is not used to pressurise the victim.

II. Allegations against a famous videographer

A famous social media influencer and vlogger was accused of harassing multiple women on different occasions:

[35] Rana Bilal, 'Meesha Shafi Appeals To LHC Against Punjab Governor's Dismissal Of Complaint Against Ali Zafar' *Dawn* (2 Aug 2018) <https://www.dawn.com/news/1424471> accessed 31 December 2019.

[36] Editorial, 'Ali Zafar Files Rs1bn Damages Suit Against Meesha' *Dawn* (24 Jun 2018) <https://www.dawn.com/news/1415699/ali-zafar-files-rs1bn-damages-suit-against-meesha> accessed 31 December 2019.

[37] Rana Bilal, 'Meesha Shafi Files Rs2bn Damages Suit Against Ali Zafar' *Dawn* (18 Sep 2019) <https://www.dawn.com/news/1505901> accessed 31 December 2019.

[38] Ibid.

[39] Editorial, 'Meesha Case Adjourned' *The News* (8 Oct 2019) <https://www.thenews.com.pk/print/538047-meesha-case-adjourned> accessed 31 December 2019.

[40] Haseeb Bhatti, 'SC Takes Up Meesha Shafi's Appeal In Defamation Case Filed By Ali Zafar' *Dawn* (9 May 2019) <https://www.dawn.com/news/1481246> accessed 31 December 2019.

> Multiple women came forward with their claims against the influencer, alleging that he harassed them and acted inappropriately. There were several screenshots of the conversations between the vlogger and other girls that were offered as evidence, wherein the influencer was seen asking women for bold pictures and sending unsolicited ones of himself.[41]

However, the influencer denied the allegations against him on social media and made a YouTube video in his defence. The video also had an interview with the Additional Director ("AD") FIA, Chaudry Asif Iqbal, and there appeared to be a clear bias on the part of the FIA official in favour of the influencer as he dismissed all claims against him.

The influencer decided to file a defamation case under Section 20 of the PECA against one of the women. Interestingly, the influencer resided in Lahore whereas the woman was a resident of Karachi, but he filed the FIR against the woman in Gujranwala. "The FIR claims that following an inquiry by FIA Cyber Crime Reporting Centre Gujranwala, it had been registered on the complaint of the influencer."[42] While interviewing AD Iqbal for this paper, the influencer was also present but only commented on certain things. When specifically asked for the reason for filing the FIR in Gujranwala, none of them seemed to have an answer. "This FIR has been lodged after due investigation by the FIA," was all that AD Iqbal had to say.[43] The actual reason for filing the FIR in a city where neither of the parties resides remains unknown. It can only be speculated that this was done to pressurise the woman to drop the charges.

Furthermore, during this interview, the influencer and AD Iqbal negated all claims raised by social activists regarding criminal defamation being a hindrance to sexual harassment claims. They reiterated that if a person tries to defame someone on social media (by accusing them of harassment or abuse), strict action must be taken against them. AD Iqbal acknowledged that criminal remedies are comparatively quicker than civil remedies, so they are often relied upon in defamation cases.

III. Rape allegations by Jami Moor

In October 2019, filmmaker Jami Moor revealed on Twitter that he had been raped thirteen years ago by a powerful and influential media personality who was his friend and

[41] Editorial, 'Vlogger Ukhano Accused of Sexual Harassment, Releases Public Statement in Response' *Express Tribune* (18 July 2019) <https://tribune.com.pk/story/2016103/4-vlogger-ukano-responds-sexual-harassment-allegations/> accessed 31 December 2019.
[42] Editorial, 'Ukhano Registers FIR In Response To 'False' Allegations of Harassment, Abusive Behavior' *Express Tribune* (18 July 2019) <https://tribune.com.pk/story/2016103/4-vlogger-ukano-responds-sexual-harassment-allegations/> accessed 31 December 2019.
[43] Interview with Chaudry Asif Iqbal, Additional Director, FIA (Lahore, 2 Dec 2019).

client. Moor lamented that the loopholes within the system suppress the voices of the people who want to speak up against their oppressors. He believed that he had zero means to fight a legal battle against the alleged rapist and that if he filed a suit, the alleged rapist would respond with a defamation suit. And since the alleged rapist was an influential media tycoon, Moor continued, he holds more power. In an interview with Gulf News, Moor said that his friends in journalism did not help him because they themselves were afraid of the alleged rapist.[44] Lately, Moor disclosed the alleged rapist's name, who happened to be the CEO of Dawn News, Hameed Haroon. As rightly feared by Moor, Haroon denied the accusation and decided to file a defamation suit against him.[45]

With the #MeToo movement's rise, many women spoke up on social media about their experiences of being harassed, abused, or raped. There have been many cases in which the allegations of harassment were not brought before a court of law. Social activists blame the weak judicial system, dubious laws, patriarchal society, and infamous criminal defamation laws for this. It is believed that these factors put women at a disadvantage in comparison to men. It can be seen through the cases discussed above that filing harassment suits is not easy for women, let alone going through a criminal trial and reliving the trauma during the stressful and intimidating proceedings. As Jami Moor clearly stated in his interview, he could not file his case in a court because he feared that a defamation suit might follow and make it more difficult to pursue his rape case.

Analysis

As explained above, not many defamation cases are reported in law journals. Hence, it is difficult to establish a conclusive argument about legal jurisprudence on this topic. Mr. Ahmed Pansota was Misha Shafi's attorney during her trial against Ali Zafar. He believes that defamation laws are not, in themselves, a deterrent; instead, the problem is premised on the public's perception of the law.[46] Criminal proceedings are considered more expeditious than their civil counterparts, but in Pakistan, they are also more stressful and tiresome. Pansota humorously remarked that if his office were to receive a criminal notice, the whole office would panic.

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[44] Mehr Tarar, 'Pakistani Filmmaker Jamshed Mehmood Recounts The Day He Was Raped And The Aftermath' *Gulf News* (10 Nov 2019) <https://gulfnews.com/world/asia/pakistan/pakistani-filmmaker-jamshed-mehmood-recounts-the-day-he-was-raped-and-the-aftermath-1.1573378236204> accessed 31 December 2019.

[45] Editorial, 'Dawn CEO Hameed Haroon Responds To Jami's Allegations' *The Nation* (30 Dec 2019) <https://nation.com.pk/30-Dec-2019/dawn-ceo-hameed-haroon-responds-to-jami-s-allegations> accessed 30 December 2019.

[46] Interview with Barrister Ahmed Pansota, Advocate of the Supreme Court of Pakistan (Mall Road Lahore, 10 Oct 2019).

Criminal proceedings can be intimidating for women wanting to fight harassment cases due to various social factors. Since sexual harassment is a taboo topic in Pakistan, women are often frightened to speak up. If they choose to come forward and fight their harasser, they have to weigh in a lot of factors to determine whether the trial is worth the uphill battle. Pansota supported this paper's claim that there is no concrete jurisprudence developed under this topic in Pakistan. He claims that typically when a victim files a harassment case and the alleged harasser brings a countersuit of defamation, then the FIA or the Police coerce a settlement between the parties. Pansota stated that since many of these cases result in settlements, they are thus never reported and never get to see the light of day.

Pansota also believed that criminal defamation laws have the potential of being used in favour of women. Since it is an expeditious process, it can prove effective for women trying to seek immediate relief when perpetrators invade their privacy by disseminating private content online. This appears to be somewhat accurate as witnessed in the cases of *Farhan Kirmani v the State* and *Usman Bin Mehmood v the State*.[47] However, the timeline of the trial and its effectiveness cannot be accurately measured.

Pansota claims that in Shafi's case, the FIA summoned the witnesses, who were meant to appear before the court in Shafi's defence because they were supporting her on social media. He added that the FIA asked them random and meaningless questions. He drew parallels with a practice in place ten to fifteen years ago where a person who had accused someone of a negligible harm done to them would then be met with an FIR for dacoity or theft filed by the accused party. He called defamation suits filed as revenge for harassment accusations the modern version of this practice. While Pansota leaned towards decriminalising defamation, he also insisted that this law could prove beneficial for women given its effectiveness in terms of expediency and pressure.

Another lawyer, Mr. Abuzar Salman Khan Niazi, believes that the use of criminal defamation is a more expeditious, result-oriented, and effective means in comparison to a civil suit.[48] He however asserts that civil defamation provides a recourse for punitive damages whereas criminal defamation does not. Hence, it can be argued that the existence of criminal defamation is of no use if damages can only be sought under civil defamation. The entire point of a defamation suit is to seek relief for the harm or damage caused to a person due to defamatory content. This can either be done through specific performance

[47] *Farhan* (n 27); *Usman* (n 31).
[48] Interview with Mr. Abuzar Salman Khan Niazi, Advocate of the Supreme Court of Pakistan. (Lahore, 10 Oct 2019).

or by awarding damages. Imprisonment does not provide any sort of monetary compensation to loss of reputation and hence, it seems to be a pointless remedy.

Niazi also elaborated on another difference between civil and criminal defamation. In a civil case, one has to cross the threshold of the balance of probabilities to prove that the crime occurred; however, in a criminal case, the crime has to be proved beyond reasonable doubt. Thus, while it is easier to prove liability under a civil suit, it can be a lengthy process. On the other hand, in criminal cases, it is harder to prove the crime; however, the process is more effective because after a complaint is handed over to the police, the fear of incarceration forces the parties to sit together and settle the dispute. This is the reason why many defamation cases are tried under criminal law. For a social media influencer (as seen in the videographer case) who could lose fans over harassment allegations, only a civil suit can help him recover the loss incurred. The argument that only criminal law can provide effective and instantaneous justice is not valid because the same relief (i.e., barring the person from further disseminating defamatory content) also exists in civil defamation under interim injunctions.

Ms. Shmyla Khan, an attorney working at the DRF, believes that the working of the FIA as an institution is flawed.[49] She listed instances where lapses can be observed in FIA investigation proceedings. Also, in the videographer's case, the FIA sent two notices to Dua Asif asking her to appear before them in Gujranwala. Asif requested to transfer the proceedings to Karachi, where she resided. When Asif did not comply with the summons served on her and refused to appear before the FIA in Gujranwala, the FIA filed an FIR against her in Gujranwala, making the situation harder for her. Shmyla speculates that this was a tactic employed by the videographer to pressurise her into dropping the case.

Shmyla argues that there is no need for criminal defamation laws in Pakistan because gender inequality is still a very big issue. She believes that Pansota's argument that these laws might be used as an effective remedy in favour of women is flawed since there is no practical evidence supporting it. She believes that since women in Pakistan are already at a disadvantage because of the patriarchal structure of the society and the ineffective criminal justice system, it is more often used to pressurise women to withdraw their cases. If a law adversely affects one party more than the other, then generally, that legislation should be reviewed. Khan stated:

[49] Interview with Shmyla Khan, Researcher, Digital Rights Foundation (Garden Town Lahore, 11 Nov 2019).

> Journalists are also caught up in this for defaming institutions like the military. The general principle is that when it should affect a fundamental right under the constitution, it should be read narrowly. The criminal law is loosely worded which makes room for misuse and restriction of free speech.[50]

Barrister Jannat Ali, a lawyer and social activist, explained the procedural loopholes in the videographer's case: the defendant resided in Karachi and was being summoned in Gujranwala which patently was a tactic by the videographer to make her drop the case.[51] These procedural lapses on part of the law enforcement agencies make it even harder for women to pursue justice. She referred to a case which came under her office's observation where a 12-year-old girl had a defamation case filed against her after she had posted a comment about her teacher on a closed Facebook account. When her teacher found out, he filed a defamation case against the girl. The father of the girl was threatened by the FIA and hence they had no option but to seek settlement outside of court. "This is an example where free speech is curtailed because of defamation."[52]

Jannat reasoned that the FIA charged Shafi's witness, Leena Ghani, with defamation to pressurize her into not giving her statement to the court. This action of the FIA violated Ghani's right to free speech.[53] Jannat blames the patriarchal attitudes prevalent in government institutions and the society at large for these issues, and believes that it is pertinent for the public to be sensitised on the issue. The lack of importance given to sensitising people can be seen in government institutions, including law enforcement agencies and the judiciary. Jannat believes that the judge in Shafi's case should have taken a more purposive approach instead of dismissing the case on a mere technicality. However, AD FIA Iqbal believed that there was nothing wrong with criminal defamation laws and that they function as an effective remedy.[54] He negated all concerns raised by the DRF and believed that there was nothing which suggested that the right to free speech was being violated.

I. Abuse of Power by FIA

AD Iqbal argued that FIA's investigations are better and more comprehensive than those conducted by the Police, and that FIA is very flexible and accommodating during

[50] Ibid (n 46).
[51] Interview with Ms. Jannat Ali Kalyar, Legal Officer, Digital Rights Foundation (Garden Town Lahore, 11 Nov 2019).
[52] Ibid.
[53] Ibid.
[54] Ibid(n 41).

investigations. However, claims such as Leena Ghani's suggest otherwise. Farieha Aziz, a lawyer working on defamation laws, submitted a note for the Senate Functional Committee on Human Rights under the topic "Use of Section 20 of PECA and Abuse of Power by the FIA."[55] In her note, she listed three ways in which the FIA abuses its power. First the FIA does not, in practice, take permission from the court to investigate non-cognizable offences where it is required by law to do so. This procedural lapse on part of the FIA raises several red flags since this violates several fundamental rights guaranteed under the Constitution. Second, they often seize devices without a warrant and thereby breach the law. This again is a violation of fundamental rights, and it has a very adverse impact on people who are unaware of their basic rights (especially women, children, and minorities). Lastly, the FIA often does not respect the privacy of the parties and compromises the confidentiality of the cases.[56] This impacts women more in comparison to men because of societal pressures and cultural definitions of female modesty; and any woman who defies the cultural norms might have to pay a hefty price (as seen in the Qandeel Baloch murder case[57]). Since honour killings are prevalent in South Asia, instances of compromised confidentiality can wreak havoc for a woman and might put her life in danger.

II. Ambiguity of the term "Human Dignity" in Section 20 of PECA

Section 20 of the PECA vaguely defines defamation since it uses the term "offences against dignity of a person." Although "human dignity" is mentioned in local and international laws, the term does not have a unified legal definition. Rinie Steinmann writes that it is difficult to define human dignity in a legal context as the concept is not even defined in the first international legal instrument which recognised dignity as an inherent virtue: the United Nations Universal Declaration of Human Rights.[58] Legal philosophers have argued that the law needs to have certainty in order for it to be effective.[59] It needs to be transparent and predictable; otherwise, as a result of it being vague, compliance of the law becomes difficult. Section 20 uses a vague term which can lend itself to misuse. It can be broadly read as defamation, but the law does not explicitly use the word "defamation."

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[55] Farieha Aziz, 'Note For Senate Functional Committee On Human Rights On: Use Of Section 20 Of PECA & The Abuse Of Power By The FIA' (Digital Rights Foundation, 2019).
[56] Ibid.
[57] BBC, 'Viewpoint: Qandeel Baloch Was Killed for Making Lives 'Difficult'' *BBC News* (30 Sep 2019) <https://www.bbc.com/news/world-asia-49874994> accessed 13 September 2021.
[58] Rinie Steinman "The Core Meaning of Human Dignity" (2016) Potchefstroom Electronic Law Journal 19 <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812016000100023>
[59] Zipursky BC, 'The Inner Morality of Private Law' (2013) 58 The Fordham Law Archive of Scholarship and History 27.

III. Vagueness in the law

The other problem with Section 20 of the PECA is that it provides a criminal remedy to alleged sexual harassers, who can use it against their victims by threatening criminal proceedings. Jami Moor stated that he did not file a case against his alleged rapist because he knew that the latter would file a defamation case. And since the alleged rapist was a powerful media tycoon, he had the means to defeat Moor in a legal battle.[60] Social activists in Pakistan argue that the Moor case is just one example, and there are many other cases as well where there exists this deep-rooted fear.

Furthermore, the language of Section 20 is problematic in the sense that privacy is normally breached or violated when true information is disclosed or leaked. Moreover, reputation cannot be intimidated as such; "intimidation" is a concept distinct from the harm that may arise from the dissemination or disclosure of false or true information. Thus, this section is unclear since it seeks to cover too much ground. It endeavours to deal with too many "different kinds of privacy wrongs" under one broad heading.[61]

A publication by the DRF suggests that the language of Section 20 of the PECA should be amended to narrow its scope by introducing "a knowledge requirement in relation to false information and a more affirmative requirement that such information should cause 'harm' or 'intimidate' the reputation or privacy of natural persons."[62]It has also been suggested by several human rights activists that the publication of sensitive and private information or its misuse should be treated as a civil wrong and not as a criminal one.[63] Since this is a tortuous claim, damages should be sought as a recourse to the false allegation. It makes no sense to try defamation under criminal law since the recourse for damages is not available.

IV. Defamation and its effects on free speech

Section 20 of the PECA punishes those who intentionally and publicly exhibit or display or transmit any information which they know to be false and intimidate and harm the reputation and privacy of an individual with criminal sanction.[64] Under criminal law, the

[60] Haseeb (n 40).
[61] 'The Prevention Of Electronic Crimes Bill 2015 - An Analysis' (2016) *Article 19* <https://www.article19.org/data/files/medialibrary/38416/PECB-Analysis-June-2016.pdf> accessed 22 December 2019.
[62] Ibid.
[63] Ibid (n 2).
[64] Ibid.

vagueness doctrine is generally used to test the vagueness and technicality of provisions.[65] The doctrine demands that criminal laws must explicitly state the criterion used to determine what amounts to a punishable offence. Therefore, a law which fails to clearly and emphatically meet this criterion must be struck down for its vagueness.[66] Thus, for all intents and purposes, Section 20 of the Act can be deemed as ultra vires to the Constitution.

There is another issue with the language of Section 20(2) of the PECA.[67] This provision provides for a new remedy for aggrieved persons to file for injunctions that order the removal, destruction, or blocking of access to material in breach of sub-section (1). Even though such attempts at protecting the privacy and upholding the dignity of citizens should be lauded, the relief afforded by sub-section (2) is ineffective for achieving the purpose of Section 20. In blocking access to online material, there is the risk of PTA restricting legitimate and useful information. The lack of any clarity gives PTA unbridled discretion to issue additional rules that would exacerbate various problems, especially those relating to the curtailment of free speech. There have been several instances where PTA has used its unbridled discretion to stop free speech and crack down on journalists, activists, and political workers. Hence, the provision can be misused to curtail free speech under the guise of safeguarding human dignity. This is the primary argument made by many social activists in the country.[68]

V. International Trend in Decriminalising Defamation

Countries like the UK have decriminalised defamation because of the repercussions it has on freedom of speech. These steps have been hailed by social activists.[69] Similarly, in India, a bill was introduced in the Lok Sabha to decriminalise defamation because of its incompatibility with free speech.[70] In both the countries, similar arguments have been made in support of decriminalising defamation: that it hinders free speech, thereby rendering the law of criminal defamation dangerous and risky. A Karachi based lawyer,

[65]Faisal Daudpota, 'An Examination of Pakistan's Cybercrime Law' (2016) <https://poseidon01.ssrn.com/delivery.php?ID=532027087100110107001087026088104028126078127&EXT=pdf> accessed 22 December 2019.
[66] Ibid.
[67]Ibid (n 19), s 20(2).
[68] Sara Malkani, 'Criminal Defamation' *Dawn* (21 Sep 2019) <https://www.dawn.com/news/1506467/criminal-defamation> accessed 31 December 2019.
[69] 'UK: Defamation Decriminalized - Human Rights House Foundation' (*Human Rights House Foundation*, 17 Nov 2019) <https://humanrightshouse.org/articles/uk-defamation-decriminalized/> accessed 11 December 2019.
[70] Shreeja Sen, 'Bill Seeking To Decriminalize Defamation Introduced In Lok Sabha' (*Mint*, 11 Mar 2017) <https://www.livemint.com/Politics/fIW8n4Y3DRK88vCT9X16CN/Bill-seeking-to-decriminalize-defamation-introduced-in-Lok-S.html> accessed 3 December 2019.

Sara Malkani, who researches on this topic, argues in support of this argument. She believes that such laws tend to be used in retaliation for raising issues of public concern, that the threat of prosecution under criminal law deters open debate and expression, and that this contributes to stifling free speech.[71]

The United Nations Special Rapporteur on the Promotion and Protection of the Right to Free Speech has declared that criminal defamation laws should be abolished as they unjustifiably impinge on the freedom of expression.[72] Malkani also reports that other organisations, such as the Organization for Security and Cooperation ("OSCE") in Europe, have also condemned criminal defamation.[73] The OSCE representative on the freedom of media has noted that mere existence of these laws poses a threat to press freedom and violates the right to free expression even where they are rarely used. The European Court of Human Rights has asserted on numerous occasions that states may not impose prison sentences for defamation on matters of public or political concern.[74]

Conclusion

Although the law is not in itself a hindrance to any legal remedy, its practice is very different on ground, especially in countries like Pakistan where the judicial system is still developing. Criminal defamation laws are used, as witnessed in videographer's and Jami Moor's cases, to threaten and pressurise the victims speaking up about their stories. Criminal defamation not only deters victims of abuse or harassment from speaking up, but it also stands in violation of the fundamental right to free speech guaranteed under the Constitution. The fear of a defamation trial is always one of the primary concerns for a victim trying to speak up.

In a society marred with gender inequality, it is the responsibility of the legislature to enact laws that facilitate the marginalized groups in society. The language of the law is vague and requires re-evaluation. Free speech is a fundamental right and must be guaranteed under all circumstances. This paper has attempted to establish that when a certain legislation collides with constitutional principles, then the said law needs to be amended. Construing free speech as a fundamental right ensures a fair democratic society. Criminal defamation laws in the PPC and the PECA are violative of Article 19 of the Constitution and must be revoked or amended. Criminal remedy only poses the fear of

[71] Ibid (n 68).
[72] 'Report Of The Special Rapporteur On The Promotion And Protection Of The Right To Freedom Of Opinion And Expression' (2014) Mission to Montenegro (11–17 June 2013) United Nations General Assembly, Human Rights Council.
[73] Sara (n 68).
[74] Ibid (n 72).

imprisonment; on the other hand, a proper remedy of damages can only be sought in civil courts. Therefore, in the presence of such a remedy, there appears to be no reasonable argument for a criminal remedy. Hence, it is suggested that criminal defamation laws as contained in Sections 499 to 502 of the PPC and in Sections 20 and 21 of the PECA should be repealed, and reviewed and clarified, respectively.

The Clash Between Public Interest and Private Interest: A Critical Analysis of Intellectual Property Rights in the Vaccine Context

Humna Sohail and Samina Bashir*

Abstract

The underdeveloped states are facing bitter health outcomes. The social and economic systems are on the verge of breaking down. Even working at full exhaustion, the health care facilities have failed to fulfil the surging demands. The "global" pandemic calls for "global" action as each passing day is costing precious human lives. The deteriorating situation begs for humane and selfless action. This study highlights the inadequacies of the present-day intellectual property legal framework that has negated equitable access to vaccines. Public health concerns beg the waiver of intellectual property rights as the flexibilities offered by relevant law are symbolic when it comes to vaccine manufacturing. It is high time for world leaders to sit and formulate a viable solution and, till such time, intellectual property rights should be waived.

Introduction

The central issue in the fight against the COVID pandemic is an unrestricted demand for immunisation.[1] Seth Berkley, the CEO of Global Vaccine Alliance ("Gavi"),[2] expressed his concern about the inadequate supply of COVID vaccines to the underdeveloped world at the time when the outbreak was declared a public health emergency and not a global epidemic. He remarked: "The thing we have to think about now that's different is, how do we produce vaccines specifically for the developing world if this is a truly global epidemic."[3]

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[1] As quicker the substantial world populace gets immune, the better it will be to stop further spreading. For better understanding read, Gypsyamber D'Souza; David Dowdy, 'What is Herd Immunity and How Can We Achieve It With COVID-19?' (*Johns Hopkins Bloomberg School of Public Health Expert Insights*, last updated 6 April 2021) <https://www.jhsph.edu/covid-19/articles/achieving-herd-immunity-with-covid19.html> accessed 7 July 2021.

[2] A public-private partnership, GAVI was established on the onset of the twenty first century with the aim of facilitating the access to crucial vaccine to (with an aim to facilitate access to) poorer nations as per the innovative model by supporting funds pooling and prioritizing national immunization efforts.

[3] Michael Igoe, 'Will vaccines reach low-income countries during a global pandemic?' *Devex* (Washington, 26 February 2020) <https://www.devex.com/news/will-vaccines-reach-low-income-countries-during-a-global-pandemic-96635> accessed 7 July 2021.

The present study first explains the internationally accepted innovation protection mechanisms that are relevant to vaccine development: patents and trade secrets. This is followed by an analysis of the shortcomings of the flexibility of compulsory licencing in the vaccine context which is argued by the opponents of waiver as being sufficient. Next, the foreseeable practice of the pharmaceutical industry, accounting for substantial vaccine development against the deadly pandemic if the current protection regime remains intact, is discussed.

The current pattern of vaccine agreements with pharmaceutical giants has ignited a debate over the consequential inequity resulting from unequal distribution.[4] On the one hand, giant economies have bound prominent pharmaceutical companies to supply vaccines on a priority basis to states which have already vaccinated half of their population. In contrast, there are states which have yet to report a case of vaccine administration. Such unequal distribution of vaccines will adversely affect the pace at which the world recovers from the COVID pandemic.[5]

The crucial issue attached to it is the mutations in the genetic makeup of the virus responsible for this communicable disease.[6] Mutations make even those vaccinated for one variant vulnerable to other variants, therefore making an end to pandemic unforeseeable.[7] The prevailing situation demands herd immunity at the international level, which, researchers believe is the only viable solution to get rid of this pandemic.[8] It is

[4] A recent book comprising the compilation of essays by various writers is a comprehensive study on the debate over the nexus between the IP regime and public health emergency. Srividhya Ragavan, Amaka Vanni (eds.), *Intellectual Property Law and Access to Medicines: TRIPS Agreement, Health, and Pharmaceuticals* (1st edn, Routledge 2021).

[5] The countries opposing the patent waiver are steady in vaccinating their populations. For example, the statistics of vaccinated persons (minimum of one dosage) per 100 persons for some of the waiver opponents are: UK= 119.6; Germany= 100.5; China= 98.28; European Union= 93.56; Canada=116.2; Switzerland=93.98. On the other hand, the statistics of some patent waiver proponents are: South Africa=7.65; India=28.36; Pakistan= 9.54; Afghanistan= 2.63; Bangladesh=6.14; Iran= 7.77. The disparity in the number of individuals vaccinated with the minimum of one dose per 100 persons in the countries quoted above highlights the shortcomings of the current distribution pattern. Source: *Our World in Data*: Statistics and Research – Coronavirus (Covid-19) Vaccinations, as updated on July 14, 2021.

[6] The vulnerabilities of administered vaccines to the viral mutations are highlighted in number of recent studies. See for example, Jiahui Chen; Kaifu Gao; Rui Wang; Guo-Wei Wei, 'Prediction and mitigation of mutation threats to COVID-19 vaccines and antibody therapies' (2021) 12(20) Chemical Science 6929.

[7] Studies suggests that the alpha variant proved to be less threatening than the currently rapidly spreading delta variant and research is underway for assessing the efficacy of the vaccines against it. The role of booster administration is also relevant here as is discussed by WHO in 'The effects of virus variants on COVID-19 vaccines' – A part of WHO's Vaccines Explained Series.

[8] In reaching the desired immunisation of eighty per cent of the world population the challenges involved are systematically highlighted by Roy M Anderson; Carolin Vegvari; James Truscott; Benjamin S Collyer, 'Challenges in creating herd immunity to SARS-CoV-2 infection by mass vaccination' (2020) 396 The Lancet, 1614-1616.

achievable when all the states, from developed economies to underdeveloped states (with or without the capacity to produce the vaccination), have equal access to the vaccines, leading to vaccine-induced herd immunity. Higher demand for vaccines by the world's largest economies has negated the supply to poorer states in practical terms.[9]

These correlated issues stem from the lack of bargaining powers held by poor economies, vaccine nationalism, and the inability of rampant vaccine production steered by the World Health Organisation ("WHO"). The Trade-Related Aspects of Intellectual Property Agreement ("TRIPS Agreement") is argued by majority states as a major clog to the equitable and expeditious access to vaccines.[10] The pharmaceutical giants have the patent protection under the said agreement that runs for twenty years,[11] within which they potentially make an exorbitant amount of profits on the actual investments spent on their first-time production.[12] The proponents of patent waiver argue that waiting twenty years for production to start at optimal levels, engaging all the producers to counter global demands of vaccines, is humiliating in the given situation where each passing day is crucial to the survival of human lives. One clear manifestation is India, which can cater to the substantial world demand for vaccines, as is called the pharmacy for the developing

[9] Romesh Vaitilingam, 'Vaccines for developing countries: the costs and benefits of waiving patents' *LSC Business Review* (London, 20 May 2021) <https://blogs.lse.ac.uk/businessreview/2021/05/20/vaccines-for-developing-countries-the-costs-and-benefits-of-waiving-patents/> accessed 22 June 2021; OECD, 'Coronavirus (COVID-19)vaccines for developing countries: An equal shot at recovery,' (4 February 2021) <https://read.oecd-ilibrary.org/view/?ref=1060_1060300-enj5o5xnwj&title=Coronavirus-COVID-19-vaccines-for-developing-countries-An-equal-shot-at-recovery&_ga=2.32886398.1780262466.1634965783-636226196.1634965783> accessed 25 June 2021.

[10] The proposal before WTO to waive some of the provisions of TRIPS Agreement was laid down by India and South Africa primarily and till date, more than 100 states have backed the waiver proposal. The recent US shift from anti-waiver to the pro-waiver state under Biden's administration is seen by many as an optimistic sign. Max Bearak; Emily Rauhala, 'Hopes surge for boosted vaccine supply after U.S. voices support for waiving patents, even as uncertainty remains' *Washington Post* (Washington, 6 May 2021) <https://www.washingtonpost.com/world/2021/05/06/vaccine-intellectual-property-world-reaction/> accessed 8 July 2021. The said pro-patent move is credited, to certain extent, to the joint effort of former world leaders and other eminent personalities who urged the Biden government to change its stance because they knew that the US stance is definitely going to impact the outcome of WTO Ministerial meetings. Less than a month later the US announced its support for waiver. Rebecca Trager, 'US urged to waive Covid-19 vaccine patents' *Chemistry World* (London, 22 April 2021) <https://www.chemistryworld.com/news/us-urged-to-waive-covid-19-vaccine-patents/4013574.article> accessed 9 July 2021.

[11] TRIPS Agreement 1995, art 33.

[12] For the want of the intrinsic motivation, the patent incentive has led to civic damage. Finding a solution for good of all is negated by the patent regime in the public health crises. Julia Kollewe, 'From Pfizer to Moderna: who's making billions from Covid-19 vaccines?' *The Guardian* (London, 6 March 2021) <https://www.theguardian.com/business/2021/mar/06/from-pfizer-to-moderna-whos-making-billions-from-covid-vaccines> accessed 9 July 2021.

countries.[13] Nevertheless, India is incapable of playing the role and one reason for its incapacity is the patent restriction (except for some like the SERUM Institute agreement with AstraZeneca, but with the licensor controlling the recipients). India is miserably affected by the lack of a sufficient number of vaccines since vaccine centres have to shut their doors for the public after every few days for want of more vaccines.

Thus, this sparks a debate amongst members of the World Trade Organisation ("WTO") to waive the intellectual property ("IP") rights during the emergency whereby developing states would be able to produce generic versions of vaccines in their domestic markets without fear of reprisal from patent owners. Unanimous approval is needed from one hundred and sixty-four WTO members whereby every member state will be allowed to play the role they are capable off but to date are cuffed by the IP system. The waiver demand has the backing of international organisations like Médecins Sans Frontieres, that are stressing the need to take steps which allow rapid mass production of COVID vaccines for catering to global demand.[14]

"It is about saving lives at the end, not protecting systems."

Dr Maria Guevara – Doctors without borders

There are different protective mechanisms for innovations under the TRIPS Agreement. The most debatable in terms of COVID vaccine manufacturing are patents, data exclusivity, and trade secrets. The patent is a monopoly granted to the inventor for the invention for twenty years.[15] The trade secrets are, unlike patents, not made public due to their nature and include the know-how of the invention, which the owner intends to keep a secret. Such protection is permanent (unless disclosed) and is carried out usually by non-disclosure agreements.[16] Though the debate mostly surrounds the patent waiver, yet the writer believes the disclosure of otherwise protected trade secrets is essential for getting the intended benefits from patent waiver. It is not possible to cook something without knowing the ingredients or recipe. To avoid reverse-engineering which can be done easily to form replicas, patents play a key role. However, where the good is manufactured in a way that the reversal is not enough to understand the method of

13 Lahariya, C., 'A brief history of vaccines & vaccination in India' ([2014]) 139(4), 491-511, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4078488/ accessed 25 September 2023.

[14] Global solidarity as has been so often declared during current pandemic must be delivered on as is asserted in a press release by Médecins Sans Frontières, 'Countries obstructing COVID-19 patent waiver must allow negotiations to start' (*MSF*, 9 Mar 2021) <https://www.msf.org/countries-obstructing-covid-19-patent-waiver-must-allow-negotiations> accessed 10 July 2021.

[15] TRIPS Agreement 1995, art 33. The member states are debarred from refusing the registration of covid-19 related patents under Article 27 of said agreement.

[16] TRIPS Agreement 1995, art 39.

manufacturing, then trade secrets best serve the purpose whereby the essential know-how remains within few hands and is not made public.[17] Confidentiality pledge by key employees is one mode of maintaining such secrets. Trade-secret protection generally lasts longer than patent protection. These protections are obstacles during emergencies, as the world is witnessing today. Solely waiving the patent will not work as is evident from the 2020 Moderna decision not to enforce vaccine patent, as without technological transfer and share of know-how, such non-enforcement of the patent is futile.[18] This exhibits its symbolic and nominal empathy of not enforcing the patent.[19] The need is the waiver of both patent and trade secrets essential for scaling up COVID vaccine production.

Waiving Intellectual Property Rights: A Step in the Right Direction

The world is in dire crisis with the current terrible pandemic. Emergencies and unprecedented situations demand innovative solutions as old methods do not suffice. The current IP provisions in the TRIPS agreement have caused an "artificial scarcity" of vaccines for two main reasons: either the states cannot afford the prices at which they are sold (as the charitable initiatives are not sufficient) or the production of vaccines is slow compared to their exponential demand. Suspending IP rights is unusual but justified in accounting for the inadequate and inequitable supplies of vaccines to the developing and underdeveloped nations. Waving IP rights would enable countries around the globe to use patented invention in the making of generic bio-products without the fear of being sued by the pharmaceutical companies which own such patents.

Although waiving patent rights directly benefit the less privileged nations; it undoubtedly has an indirect benefit for even the richer states. This benefit is because when of the world population (eighty percent) is immunised, this will help achieve global herd immunity—the only way out from the novel pandemic situation that knows no boundaries.[20] Besides being the right thing to do, making vaccines available to poorer

[17] Michael Risch, 'Why Do We Have Trade Secrets?' (2007) 11(1) Marquette Intellectual Property Law Review.
[18] Zachary Brennan, 'Moderna CEO brushes off US support for IP waiver, eyes more than $19B in Covid-19 vaccine sales in 2021' *ENDPOINTS* (6 May 2021) <https://endpts.com/moderna-ceo-brushes-off-us-support-for-ip-waiver-eyes-more-than-19b-in-covid-19-vaccine-sales-in-2021/> accessed 14 July 2021.
[19] Carl O'donnell; Manas Mishra, 'Moderna sees no impact on COVID-19 vaccine from potential patent waiver' *Reuters* (London, 6 May 2021) <https://www.reuters.com/business/healthcare-pharmaceuticals/moderna-raises-2021-sales-forecast-covid-19-vaccine-192-bln-2021-05-06/> accessed 13 July 2021.
[20] Suneel Prajapati; Narasimha Kumar GV, 'Assumption of Herd Immunity against COVID-19: A Plausibility and Hope or a Terrible Thought in Modern-Day to Save the Life' (2020) 6(24) Journal of Infectious Diseases and Epidemiology 147.

countries is in the self-interest of First World countries. Furthermore, improving the manufacturing capacity of the developing world is another point of debate.

Extreme situations require extraordinary measures. It is also a fact that not enough vaccines are manufactured to cope with the surging demand,[21] and to waive vaccine-related IP rights is one step amongst many that should be taken to bring mankind out of the pandemic. Other measures include rectifying supply chains,[22] establishing complex bio-manufacturing facilities, transferring technology from companies, and so on. All these steps need to be cumulatively taken as a global collaboration to make it possible for all individuals around the world to get vaccinated in the fastest possible time.

There is an obvious tendency that states will prioritize looking after their own citizens who have elected them. Yet, humanity demands a collective fight against the deadly COVID pandemic. Viruses do not respect borders. Man cannot live in isolation in this increasingly interconnected and tightly knit world. With the contagious viruses, no one is protected unless and until the majority gets vaccinated.[23] The immunisation of the majority should be done, within the given time frame, to curb the mutating virus that potentially escapes the effect of a vaccine manufactured for a particular genetic sequence.

Five major COVID vaccine producers account for over ninety per cent of all vaccines produced globally.[24] Waiver proponents assert that production needs to happen faster for tackling mutating viruses. During emergencies like the COVID pandemic, IP rights should not be enforced, even under the TRIPS Agreement. The demand for waiving IP rights is to make sure that countries around the globe can increase production and manufacture enough supply to meet the ever-increasing demand.[25] Furthermore, more

[21] Rebecca Forman, Soleil Shah, Patrick Jeurissen, Mark Jit, Elias Mossialos, 'COVID-19 vaccine challenges: What have we learned so far and what remains to be done?' (2021) 125 Health Policy 553.
[22] Hannah Schofield; Lavan Thasarathakumar, 'Blockchain, COVID-19 and the Pharmaceutical Supply Chain' (*PharmExec*, 12 May 2021) <https://www.pharmexec.com/view/blockchain-covid-19-and-the-pharmaceutical-supply-chain> accessed 11 July 2021.
[23] The said need was emphasised by the President of European Commission Ursula von der Leyen at Brussels State of the Union conference of the European University Institute on 6 May 2021 (available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_2284) but his speech was essentially restrictive in a sense that it was unresponsive of the global effort needed.
[24] The supplies from pharmaceutical giants are limited for over-promised and under-delivered doses. The rich economies have dominantly been the recipient of such doses leaving poor nations to face the threats posed by ruthless virus. Mark Eccleston-Turner; Harry Upton, "International Collaboration to Ensure Equitable Access to Vaccines for COVID-19: The ACT-Accelerator and the COVAX Facility" (2021) 99(2) Milbank Quarterly 426, 428.
[25] The first and the foremost reason for the vaccine scarcity is the under production. Mario Gaviria; Burcu Kilic, 'BioNTech and Pfizer's BNT162 Vaccine Patent Landscape' (*Public Citizen*, 16 Nov 2020) <https://www.citizen.org/article/biontech-and-pfizers-bnt162-vaccine-patent-landscape/> accessed 11 July

manufacturers in more countries could drive prices down, though some manufacturers like AstraZeneca and Jonson & Johnson have vowed to provide vaccines on a non-profit basis during the pandemic. As of the time of this writing, some hundred countries, mainly led by India and South Africa, have demanded WTO to suspend certain patent rules contained in the TRIPS Agreement. [26] Such a waiver would overcome legal barriers that prevent manufacturers from producing generic versions of vaccines. The waiver can act as a stimulus for making availability of vaccines more equitable. More than eighty percent of vaccines produced go to rich and middle-income countries, leading to predictions that mass vaccination in underdeveloped countries may not occur until 2024 or later if the same distribution patterns continue.[27] The richer countries that have the capacity of bulk buying vaccines and even booking them in advance are the ones opposing the waiver. One of the reasons for the opposition is that these states are housing some giant pharmaceutical companies.

Shortcoming of the Existing Intellectual Property Legal Framework

The TRIPS Agreement came into force in 1995.[28] It was established after developed countries negotiated with developing and underdeveloped states to reach an agreement that allowed for the monetization of intellectual property rights.[29] Over time, as the provisions become clearer in their application, it faced criticism which it is still facing.

2021. For immunising majority of world citizens, the demand is of 11 billion doses while currently the capacity stands at less than 4 billion doses. Ellen't Hoen, 'Covid shows the world it needs new rules to deal with pandemics' (*Big Issue North*, 25 May 2021) <https://www.bigissuenorth.com/features/2021/05/covid-shows-the-world-it-needs-new-rules-to-deal-with-pandemics/#close> accessed 12 July 2021.

[26] WTO Council for Trade-Related Aspects of Intellectual Property Rights, 'Waiver from certain provisions of the Trips Agreement for the Prevention, Containment and Treatment of Covid-19 Communication from India and South Africa' IP/C/W/669 – (WTO, 2 Oct 2020) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True>. Later on an amended proposal was put forward by number of states on 21 May 2021 (available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669R1.pdf&Open=True>. The later proposal acknowledged that patent waiver is not sufficient unless the essential know-how is transferred.

[27] Saeed Shah; Drew Hinshaw; Gabriele Steinhauser, 'Covid-19 Vaccine Patent Waivers Could Take Months to Benefit Developing Nations' (2021) The Wall Street Journal <https://www.wsj.com/articles/covid-19-vaccine-patent-waivers-could-take-months-to-benefit-developing-nations-11620332442> accessed 10 July 2021.

[28] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

[29] The objective of TRIPS Agreement as laid down in Article 7 states "The promotion and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

The Doha Declaration of 2001 was a victory for the developing states and organisations that secured certain flexibilities in the TRIPS Agreement in the public health sector. Utilisation of patents was allowed to the states under certain conditions even where patent holders did not permit its usage - the compulsory licencing. Yet the scope of said mode is limited which will be discussed later in the article. The debate on the incompatibility between the TRIPS Agreement provisions and public health is old. Ban Ki-Moon, General Secretary of the United Nations, highlighted in his report of 2016 the disagreement between the public health policy and the practical application of innovation protection laws. The debate on the said agreement has once again ignited in the backdrop of a deadly pandemic as a compact IP web protects the vaccine and the vaccine-producing platforms.[30]

I. Limitations Imposed by Patents

The normative construction of the patent protection under the TRIPS Agreement does account for the disclosure of protected innovation, but its mechanism is insufficient and inadequate. The information disclosed in the patent application is, first, not technical enough to provide any assistance.[31] Secondly, such information is placed at the public disposal for "usage" in public health crisis once the patent life expires. The said limitation undermines the essence of the patent protection regime and undermines the intention of the Uruguay Round negotiators.

Moreover, once the patent is granted, no further revelation of adequate knowledge is demanded whereby the manufacturing process has improved. This inadequacy of the information disclosed is a clog to the COVID vaccine production. The problem is further aggravated by the gap between the filing of a patent application and the grant of a patent, during which time the public is unaware even of such inadequate knowledge. The manufacturers further employ different tactics to prolong the patent protection, such as modifying the original patent application with slight changes and filing modified applications from time to time, thus enjoying protection thereunder.[32] This makes the

[30] Mario Gaviria; Burcu Kilic, 'A network analysis of COVID-19 mRNA vaccine patents' (2021) 39 Nature Biotechnology 546.

[31] The practice suggests that the patent law is indifferent to enabling knowledge that is useful in actual production as is asserted in H. Samuel Frost, 'The Unique Problem of Inventions Which Are Fully Enabled and Fully Described, But Not Fully Understood (Merrell Dow's Terfenadine Revisited)' (2007) Intellectual Property Journal <https://www.bereskinparr.com/files/file/docs/PatentTerfenadineFrost.pdf> accessed 16 July 2021.

[32] For instance, 165 patent applications are associated with the cancer treating drug Imbruvica by AbbVie covering the identical essential content thereby exaggerating the duration of patent protection well beyond the twenty years. For details see, I-Mak, 'Overpatented, Overpriced Imbruvica's Patent Wall' (*I-Mak*. last

time-duration of patent protection doubtful for the competitors, especially in vaccine development which then becomes less attractive to them (though some other reasons are also responsible for making the vaccine market less attractive for investors).[33] Shortly, the extension of patent protection beyond the fixed timeframe and inadequacy of knowledge shared in patent application[34] hinders the COVID vaccine's swift development. This limits the capacity of capable manufacturers in a time where resources must be employed to their full exhaustion to defeat the pandemic that has miserably affected humanity.[35]

II. Disclosure of Know-How and Trade Secrets Inevitable

Vaccines are unique in comparison to medicines, and mere patent information does not suffice in their production.[36] Undisclosed information includes vaccine know-how, trade secrets, and clinical trial data, which the investor intends to hide from the outside world. It is essentially aimed at avoiding free riding on the energy, time, and money invested by the inventor in the research and development of the invention from scratch. If disclosed, this will tend to lower the cost of production for others. Unlike patents, the undisclosed information, as the term indicates, is not opened to the public at all. Such disclosure is the biggest concern in the rapid COVID vaccine development.[37] The reports suggest that

revised July 2020) <https://www.i-mak.org/wp-content/uploads/2020/08/I-MAK-Imbruvica-Patent-Wall-2020-07-42F.pdf> accessed 17 July 2021. Mark A. Lemley; Carl Shapiro, 'Probabilistic Patents' (2005) 19(2) Journal of Economic Perspectives 75.

[33] Olga Gurgula, 'Strategic Accumulation of Patents in the Pharmaceutical Industry and Patent Thickets in Complex Technologies – Two Different Concepts Sharing Similar Features' (2017) 48 IIC - International Review of Intellectual Property and Competition Law 385.

[34] The debate over inadequacy problem linked to knowledge enclosed in patent application is old as is any other relevant issue that have surfaced again in the pandemic situation. Dan L. Burk, 'The Role of Patent Law in Knowledge Codification' (2014) 23(3) Berkeley Technology Law Journal 1009.

[35] The capable manufacturing states include India, Canada, Brazil, South Africa, Bangladesh, United Arab Emirates, Indonesia, Turkey, Ghana etc. as per Chelsea Clinton; Achal Prabhala, 'Biden Has the Power to Vaccinate the World' *The Atlantic* (Boston, 5 May 2021) <https://www.theatlantic.com/ideas/archive/2021/05/biden-has-power-vaccinate-world/618802/> accessed 17 July 2021. The said article was published before the announcement of Biden's Administration as to his support for patent waiver which will be a leverage for a pro-waiver stance in the upcoming WTO Ministerial Meeting. Biolyse, an Ontario based pharmaceutical company has attempted to obtain licence from J&J for producing generic version of its COVID vaccine comprising of single jab. Biolyse claims that it has the capacity to produce 2 million doses a month. The company has filed an application for compulsory licensing under the Canadian Access to Medicine Regime. Such efforts at national level will determine the state practice concerning compulsory licensing at this point of global public health crises. Arianna Schouten, 'Canada based Biolyse Pharma Seeks to Manufacture COVID-19 Vaccines for Low-Income Countries, may test Canada's compulsory licensing for export law' (*Knowledge Ecology International,* 12 March 2021) <https://www.keionline.org/35587> accessed 17 July 2021.

[36] Mark Eccleston-Turner, 'Beyond patents: Scientific knowledge, and access to vaccine' (2017) 3(1) Ethics, Medicine and Public Health 64-73.

[37] A suggestion is made to pool up financial resources for buying the know-how to scale up vaccine mass

pharmaceuticals manufacturing vaccines have entered into confidentiality agreements that also halt their participation in global voluntary initiatives of pooling technology and know-how as a collective action (most notably COVID Technology Access Pool[38] and technology transfer hub).[39]

As discussed earlier, two main IP protections and their vitality in the construction of pharmaceutical companies need to be brought in conformity with public health policies. The said highlighting of shortcomings should not be construed to mean that the writer backs the non-waiver of IP rights claim, rather, it should be included as part and parcel of the overall bigger package, including technology share, know-how disclosure, and non-exclusionary policies at both the international and domestic level. The said package would allow manufacturers from around the world to freely engage in vaccine production, especially free from fear of the stopping of vaccines to their countries as a penalty for infringing IP protections.

The waiver proposal led by South Africa and India is a positive sign that even if the result is not the waiver, this will lead to the controlled voluntary licencing by pharmaceuticals. The absence of consensus on waiver within a reasonable time would compel joint action by WTO and WHO to address the problem that is worsening day by day.

Compulsory Licencing: An Insufficient Flexibility in a Vaccine Context

The capable producers are permitted to manufacture the product patented under the licence issued by the respective government. Compulsory licencing has been crucial in biomedical history when access to life saving "medicines" came under the limelight. The grounds for issuing such licence are not exhaustively listed in the TRIPS Agreement and are in the logical discretion of the member states. For instance, compulsory licence can

production. James Love, 'Buying Know-How to Scale Vaccine Manufacturing' (20 Mar 2021) <https://jamie-love.medium.com/buying-know-how-to-scale-vaccine-manufacturing-586bdb304a36> accessed 19 July 2021.

[38] Absence of collaboration from the manufacturers and technologically equipped countries led to the miserable failure of C-TAP. Henrique Zeferino de Menezes, 'The TRIPS waiver proposal: an urgent measure to expand access to the COVID-19 vaccines' (2021) 129 Research Papers 7 <https://www.southcentre.int/wp-content/uploads/2021/03/RP-129.pdf> accessed 17 July 2021. Ellen't Hoen, 'The elephant in the room at the WHO Executive Board' (*Medicines Law and Policy*, 22 Jan 2021) <https://medicineslawandpolicy.org/2021/01/the-elephant-in-the-room-at-the-who-executive-board/> accessed 20 July 2021.

[39] WTO, 'Establishment of a COVID-19 mRNA vaccine technology transfer hub to scale up global manufacturing' (16 Apr 2021) <https://www.who.int/news-room/articles-detail/establishment-of-a-covid-19-mrna-vaccine-technology-transfer-hub-to-scale-up-global-manufacturing> accessed 20 July 2021.

be issued for grave emergencies, where protecting the public interest is essential. Besides it, other factors can also trigger the application of compulsory licencing.[40]

TRIPS Agreement provides for resorting to compulsory licencing in situations of a grave emergency, but before that, an attempt to negotiate a voluntary licence agreement is a must. [41] Absence whereof, in the national interest, the government can issue a compulsory licence. But the layer and fragmentations of IP protections render the flexibility of compulsory licencing less suitable to vaccine development. There are other reasons as well that demand more than the mere compulsory licencing as its application limits in the context of rapid vaccine development. The overall procedure of vaccine development is not restricted to a single territory, and it is not possible to issue a blanket or an all-inclusive compulsory licence. Therefore, the said issuance needs to be country by country, and case by case, to be more impactful.[42]

The choice to impose additional requirements and criteria for compulsory licencing in domestic legislation can make the two-fold criteria more cumbersome. States are hesitant to issue compulsory licenses due to the fear of facing severe trade sanctions, as it has happened in the past. Additional protections at the regional and domestic level, such as exclusivity of clinical trial data, further obstruct vaccine development. This further prolongs the timeframe of protection.

Where a compulsory licence is issued, the inventor/manufacturer should be reimbursed adequately. It is unclear what constitutes adequate compensation in the context of vaccines. The licenced goods were, before the 2001 amendment in pursuance of the Doha Declaration, to be essential for domestic demands, yet, following the addition of Section 31 (b) in the TRIPS Agreement, the goods produced under compulsory licencing can be exported to member countries of WTO. Although reservations can be made for the said amendment, certain countries, such as the EU member states, have opted out of it.

The resort to compulsory licencing has rarely been made, for instance, when Rwanda obtained access to vaccines for AIDS, and Canadian companies exported it.

[40] MSF has very technically analysed the claims of EU as to the sufficiency of compulsory license flexibility instead of the need of COVID vaccine patent waiver and concluded that the said flexibility for number of reasons is insufficient to address the issue of mass scaling and EU should consent to patent waiver (document available at <https://msfaccess.org/sites/default/files/2021-05/COVID_TechBrief_MSF-AC_EU_CL_briefing-doc_ENG_May2021.pdf>.

[41] Article 31 of TRIPS Agreement.

[42] Siva Thambisetty and others, 'The TRIPS Intellectual Property Waiver Proposal: Creating the Right Incentives in Patent Law and Politics to end he covid 19 pandemic' (Law Society Economy Working Papers, June 2021) <https://ssrn.com/abstract=3851737> accessed 15 July 2021.

However, it is a burdensome and time-consuming step,[43] and is in no way suited to the present-day crises where each passing day is costing lives. The issue of transparency of patent protections has made it more difficult to assess the scope of applications seeking the issuance of compulsory licences. The one hope that the TRIPS Agreement waiver proposal has given is that the states are easing their domestic compulsory licencing regulations to make a case against waiver. Though it will help in the availability of diagnostic and therapeutic products, its role is limited in vaccine development. The present study suggests that compulsory licencing should not be employed as a substitution to the TRIPS Agreement waiver in addition to the waiver itself. There is no denying that in the containment of viral speed, sole compulsory licencing is insufficient, and that the advantage offered by the TRIPS Agreement waiver is multi-fold as compared to the compulsory licencing, which is limited in the ever-advancing field of technology.

Foreseeable Pharma Giants' Practices with Intact IP Protections

The goal to diminish the COVID pandemic with the least loss of lives is undermined by the monetary benefits yielded from the monopoly market. The issue is not as simple as it might appear. The wait for mass inoculation in under-developing countries might be prolonged even after the richer economies have fully vaccinated their populations because there are cases reported around the world where even vaccine administered individuals are ailing. Some are dying due to the transmission of the mutated virus that can suppress the effect of the administered vaccine. Here, the role of boosters comes into play. Some countries have even announced the booster shots administration starting from health care workers (for instance, Thailand).[44]

The foreseeable situation would be that, on the one hand, fully vaccinated will be given dosages of boosters and on the other extreme, the citizens of poorer nations will be dying for want of dosage of the vaccine in the first instance. If the IP waiver does not take place now, the world would probably see a decline in the manufacturing of COVID vaccines once their demand by prosperous economies is fulfilled. Waiving IP then would be the denial of equal human rights, especially when each passing day is critical. In the absence of any incentive from the poorer nations, the powerful pharmaceutical companies

[43] Holger P. Hestermeyer, 'Canadian-made Drugs for Rwanda: The First Application of the WTO Waiver on Patents and Medicines' (2007) 11(28) ASIL Insights <https://www.asil.org/insights/volume/11/issue/28/canadian-made-drugs-rwanda-first-application-wto-waiver-patents-and> accessed 17 July 2021.

[44] In people with low immune response to Sinopharm vaccine (manufactured by China), UAE has offered a booster dose already. Sui-Lee Wee, 'The U.A.E. offers a third dose of Chinese vaccine to some with low immune response' *The New York Times* (New York, 22 Mar 2021 <https://www.nytimes.com/2021/03/22/world/the-uae-offers-a-third-dose-of-chinese-vaccine-to-some-with-low-immune-response.html> accessed 22 July 2021.

would then turn to the race of booster manufacturing by agreeing with giant bargaining powers.[45]

"To deny people their human rights are to challenge their very humanity."

Nelson Mandela

Impact of Waiver on Future Innovations: A Negation to Claims of Waiver Opponents

There is a dichotomy of expert opinions on the impact of the IP waiver. On one side, the opponents of waiver see it as a hindrance to future research and industrial development in vaccine production.[46] Placing advanced technologies in the public domain will undermine potential developments. While the other side argues that a temporary waiver is an ideal solution to convert the pandemic to an endemic without having many repercussions for pharmaceuticals.

Arguments for incentive-based innovation find little to no support from the existing literature. Even if one admits that innovation stems from the hope of profit, then the same cannot be said for COVID vaccines owing to the way they have developed. There is substantial public funding that has been invested into the research and development ("R&D") of COVID vaccines, and breakthroughs have taken place in universities and national health institutes.[47] This weakens the case for patenting the vaccines and the trade secrets specialised for vaccines manufactured on public subsidies. The specialization of COVID vaccines is not justified where there are zero risks for

[45] Nicky Phillips, 'The coronavirus is here to stay — here's what that means' (*Nature*, 16 Feb 2021) <https://www.nature.com/articles/d41586-021-00396-2> accessed 21 July 2021.

[46] Human Rights Watch (HRW) has come up with the reasons that why the claims of European Union, the major waiver opponent, are false. HRW argues that IP does clog rapid vaccine manufacturing, the patent serves as a stimulus for technology transfer, COVAX initiative or dose-sharing insufficient to meet global demand, a tentative waiver is not a clog on future invention and compulsory licensing is welcoming but not sufficient. Human Rights Watch, 'Seven Reasons the EU is Wrong to Oppose the TRIPS Waiver' (*HRW*, 3 June 2021) <https://www.hrw.org/news/2021/06/03/seven-reasons-eu-wrong-oppose-trips-waiver> accessed 24 July 2021.

[47] For instance, more than 2.5 billion dollars is funded to Moderna by US government and thus US "has unique leverage" with it. James Krellenstein; Christian Urrutia, 'Hit Hard Hit Fast Hit Globally a Model for Global Vaccine Access' (*PrEP4All*, 2021) <https://static1.squarespace.com/static/5e937afbfd7a75746167b39c/t/6054fdd855fb270753f4b0c9/1616182745295/P4A+-+Hit+Hard+Hit+Fast+Hit+Globally+Report.pdf> accessed 25 July 2021.

incentives and profits are attached to development as the governments have entered into advance agreements.[48] The COVAX initiative further secures the return on investments.

Monopoly is created by patent protection for a specified time, that prohibits any competition during such time. This implies choice as to the fixation of price and the dissipation of the technology shared with the patent owners, assuming dominance. Thus, the production of commodified goods can be restricted during the life of a patent. This is troublesome for public health policies. Pharmaceuticals are constructed on this patent protection system, and the outcomes of such basis are evident in the prevailing COVID crises.[49] The fact that the majority of WHO-approved vaccines had substantial reliance on public fundraising[50] makes a stronger case for the availability of the vaccine to the world population and that the manufacturers have no right to monopolise over what has not been economically afforded by them. The breakthrough in the duration in which these vaccines are made available for use is accredited to the integral role played by public sectors. The products are still specialised, which has adversely impacted the proportionate distribution of vaccines to every corner of the globe.

Therefore, the present time calls for treating the pandemic as exceptional, and its impact should not be underscored. The current pandemic is unique and unprecedented and thus should be handled extraordinarily. The TRIPS Agreement failed to acknowledge the varying socio-economic conditions of states in pragmatic terms. Under any circumstances, the vaccine market is less attractive than the medicine market due to their relatively lower demand in higher-income countries. Vaccines are produced to combat diseases in lower and middle-income countries and are often distributed on a non-profit basis. There were instances from the past when there was a sole need to deliver vaccines

[48] Even much before the clearance of final clinical trials richer countries had secured billions of doses. Some 3.7 billion doses, as declared by pharmaceuticals in the West, have been agreed to be provided to UK, Japan, USA and EU. Saeed Shah, 'In Race to Secure Covid-19 Vaccines, World's Poorest Countries Lag Behind' (2020) The Wall Street Journal <https://www.wsj.com/articles/in-race-to-secure-covid-19-vaccines-worlds-poorest-countries-lag-behind-11598998776?mod=article_inline> accessed 15 July 2021.

[49] Duncan Matthews; Olga Gurgula, 'Patent Strategies and Competition Law in the Pharmaceutical Sector: Implications for Access to Medicines' (2016) European Intellectual Property Review < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2779014> accessed 15 July 2021.

[50] A significant study undertaken in this regard substantiates that covid vaccines are made possible only by international collaboration and public investment. Samuel Cross and others, 'Who funded the research behind the Oxford-AstraZeneca COVID-19 vaccine?' (*medRxiv*, 10 April 2021) (preprint version), <https://www.theguardian.com/science/2021/apr/15/oxfordastrazeneca-covid-vaccine-research-was-97-publicly-funded> accessed 26 July 2021. Another study suggests a very practical solution to the investment-based claim that both private and public actors have contributed in covid vaccine development therefore the innovation policy in public health sector should be seen as co-shaping the markets actively and not the intervening or a regulating one. Mariana Mazzucato; Victor Roy, 'Rethinking value in health innovation: from mystifications towards prescriptions' (2012) 22(2) Journal of Economic Policy Reform 101.

to poorer economies. The markets have often failed, especially against an effort for containing the Ebola virus. It is the best time to devise a solution to the IP framework to tackle prevailing crises and prepare a plan to combat future inequity in vaccines and medicines.

Currently, very few markets are involved in COVID vaccine production, which impedes rapid production, and even the offers made by potential manufacturers for voluntary licencing are rejected.[51] Another step that can help mitigate the scarcity of vaccines is to introduce incentive-based global policies to allow the entry of competitors into the vaccine market, which would reduce the monopoly and will account for the demand for increased production.[52] Price fixation and lack of government seeking shares in private profits from vaccines as public commodities, as discussed before, have aggravated the issue for poorer economies, which are reported to have been charged higher than others. Pfizer is charging, as the researchers suggest, six percent of the unit production cost and justifies it by saying that this would have been exponentially high had there not been a pandemic environment.[53] The poor economies do not even have the negotiation power for that. AstraZeneca is selling at the production cost, but again the issue is that the company has contractual obligations towards the richer economies. Then there are reports revealing that despite claiming no profit, Astra Zeneca is selling its vaccines at higher costs to lower and middle-income countries than to the richer due to disparity in demand.[54] All in all, the manufacturers' powers to decide the production

[51] Voluntary licensing, even where granted by pharmaceuticals, are inherently restrictive in a sense that the manufactures control autonomy over the agreed terms and conditions.

[52] Burak Kazaz; Scott Webster; Prashant Yadav, 'Incentivizing COVID-19 Vaccine Developers to Expand Manufacturing Capacity' (*Center for Global Development,* 2021) <https://www.cgdev.org/sites/default/files/incentivizing-covid-19-vaccine-developers-expand-manufacturing-capacity.pdf> accessed 24 July 2021. Subhashini Chandrasekharan and others, 'Intellectual property rights and challenges for development of affordable human papillomavirus, rotavirus and pneumococcal vaccines: Patent landscaping and perspectives of developing country vaccine manufacturers' 33 Vaccine 6366-6370.

[53] Pfizer vaccine is mRNA vaccine the production cost of which is less than $3 and selling it at $19.5 during the public health emergency and yet intending to raise prices further once the acute phase of viral spread is over. Christopher Rowland, 'Pfizer coronavirus vaccine revenue is projected to hit $26 billion in 2021 with production surge' *The Washington Post* (Washington, 4 May 2021) <https://www.washingtonpost.com/business/2021/05/04/pfizer-covid-vaccine-revenue/> accessed 21 July 2021.

[54] Nick Dearden, 'AstraZeneca must justify 'unequal' vaccine pricing after bumper profit' (*Global Justice Now*, 11 February 2021) <https://www.globaljustice.org.uk/news/astrazeneca-must-justify-unequal-vaccine-pricing-after-bumper-profits/> accessed 2 July 2021. In the words of Director of GJN: "AstraZeneca's bumper profits today show the company can easily afford to provide its Covid-19 vaccine at cost price during the pandemic and beyond. But despite this pledge, it has yet to address the question of why lower-income countries like South Africa and Uganda are paying several times more per dose than the

matters, price fixation, and endemic declaration for purposes of aggravating prices when deemed suited, are less likely to solve the grave concern of vaccine equitable distribution.

It is high time to move on to think about *lex feranda* instead of continuing and defending the existing legal framework (*lex lata*) that has always been debated for its inadequacies in a public health crisis. The need of formulating alternative policies as a solution to current public health concerns and as preparedness for future public health crises is inevitable. The argument that the waiver would not be effective for want of capacity requirement is baseless as there are demands for licences by governments that do have manufacturing capacity, but the innovation protection mechanism renders the specialization of such capacity a failure. The First World countries are under the obligation to specialize the technology transfer to developing states.[55] Any reluctance, thereof, is in direct conflict with the very spirit of the TRIPS Agreement.

Burden sharing is the need of the hour, and this is not possible without a TRIPS Agreement waiver.[56] The doubtful quality of prospective generic versions of COVID vaccines, if allowed, is falsely debated by waiver opponents to be connected with IP waiver. There is no nexus between the two independent issues, and it is just being employed as a scapegoat for waiver.[57] The TRIPS Agreement waiver should also negotiate on waiving protection over raw materials necessary for vaccine production as it will then be a challenge once vaccine patents and trade secrets are removed. There is a dire need to reformulate the IP framework connected with public health emergencies in WTO, but till such time, the waiver is essential.

Resolving the issue of inequitable and inadequate distribution of COVID vaccine is essential. Besides being a public health concern, the gap in supply and demand increases the room for corrupt practices – the crimes committed in the dark – which is another challenge to tackle due to the complex processes involved down till the distribution phase.

European Union. This is not the "equitable access" AstraZeneca has been trumpeting in its press releases." South Africa is reported to be paying per dose $5.25, Uganda $7 as compared to EU $2.16.

[55] The term "shall" is used in article 66 clause 2 of TRIPS Agreement thus the provision is mandatory in character. Jayashree Watal; Leticia Caminero, 'Least-developed countries, transfer of technology and the TRIPS Agreement' *WTO Economic Research and Statistics Division* (22 February 2018) Staff Working Paper ERSD-2018-01.

[56] India is called the pharmacy for third world countries, but the facts dictate that to survive against the deadly pandemic poor nations' reliance on the generic versions of vaccines produced by Serum Institute does not suffice. Achal Prabhala; Leena Menghaney, 'The world's poorest countries are at India's mercy for vaccines. It's unsustainable' *The Guardian* (London, last updated on 23 Apr 2021) <https://www.theguardian.com/commentisfree/2021/apr/02/india-in-charge-of-developing-world-covid-vaccine-supply-unsustainable> accessed 22 July 2021.

[57] For example, successful production of Remdesivir of exportable quality in India despite the prior speculations on to the quality of it.

The secrecy of the terms and conditions of the agreement relevant to the procurement of COVID vaccines and conflicting interests are some of the aggravating factors for the risk of corrupt practices that undermine the effective implementation of emergency policies, as is reminded by the United Nations Office on Drugs and Crimes.[58] This includes, but is not limited to, the misuse of public funding that has given in huge amounts to the development of a vaccine, counterfeited vaccines, nepotism, and favouritism. The dismissal of Zimbabwean top governmental medical officials on similar grounds has heightened the risks.[59] While writing this, news from Pakistan surfaced on the detention of some suspects for allegedly plundering Pfizer vaccines from governmental stock with the aid of a vaccine administrator employed by the government and selling it for financial gains.[60] This further aggravates the artificial scarcity of the COVID vaccines. There are risks involved in the entire chain from procurement to the distribution of COVID vaccines.[61] Time is of much essence when these risks are highest because the supply is substantially low compared to the demand. The alleged corruption undermines public confidence in governmental efforts during public health emergencies.[62] Mitigating corruption risks, both at an international and domestic level, is another challenge in the equitable access to the vaccine. Transparency in the agreements over COVID vaccines is achievable through open contracts, which will minimize the corruption risk in the procurement stage.[63] At the domestic level, the viable proposal is that specialised

[58] United Nations Office on Drugs and Crime, 'Covid-19 Vaccines And Corruption Risks: Preventing Corruption In The Manufacture, Allocation And Distribution Of Vaccines' (*UNDOC Policy Papers*) <https://www.unodc.org/documents/corruption/COVID-19/Policy_paper_on_COVID19_vaccines_and_corruption_risks.pdf> accessed 27 July 2021.

[59] Matt Smith, 'The Global Vaccine Rollout Means Heightened Corruption Risk. Here's What to Know' *Barron's* (New York, 27 Mar 2021) <https://www.barrons.com/articles/the-global-vaccine-rollout-means-heightened-corruption-risk-heres-what-to-know-51616796521> accessed 27 July 2021. Zimbabwe is just one example; many other states or state individuals are targeting the vulnerabilities in the vaccine chain. Corruption is the gateway to other evils that destroys the socio-political and economic makeup of a country.

[60] Naeem Sahoutara, '3 suspects, including ex-army officer, remanded to police custody in 'illegal' Covid vaccination case' *DAWN* (Karachi, 29 July 2021) <https://www.dawn.com/news/1637619/3-suspects-including-ex-army-officer-remanded-to-police-custody-in-illegal-covid-vaccination-case> accessed 29 July 2021.

[61] J. C. Kohler; Deirdre Dimancesco, 'The risk of corruption in public pharmaceutical procurement: How anti-corruption, transparency and accountability measures may reduce this risk' (2020) 12(1) Global Health Action. The study divides the procurement system in to three phases viz pre-biding, bidding and post-bidding phase for systematically analysing the possible room form corruption in each stage.

[62] Taryn Vian, 'Review of corruption in the health sector: theory, methods and interventions' (2008) 23(2) Health Policy and Planning, 83-94.

[63] For further reference see, UNDOC, 'Guidebook on anti-corruption in public procurement and the management of public finances: Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption' (*United Nations,* September 2013) <https://www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anticorruption_in_public_procurement_and_the_management_of_public_finances.pdf> accessed 29 July 2021.

committees should be established for monitoring the entire distribution and deployment process.[64] Several guidelines have already been issued in this regard.[65] To address the scourge of corruption globally, especially during a public health emergency, United Nations Convention Against Corruption (entry into force 2005) demands international cooperation in the fight against corruption.[66] Furthermore, it is high time to strengthen the anti-corruption national legislation and fill in the gaps in the laws to mitigate any chances of manipulating the law for personal gains.

Conclusion

The world is indulged in a race to accumulate as many COVID vaccines as they can.[67] This has led to the inequitable distribution of vaccines through advance purchase agreements. One big reason is the IP protection that prevents the capable manufacturers from producing their domestic versions of vaccines which is the need of the hour as depicted by the facts. The relevant stakeholders are not serious about a consensual resolution to the problem. Therefore, mandatory action is a must to address the grave issue of the pandemic.[68] End to COVID is not just a public health concern but a socio-economic and moral concern too.[69] Demand for a patent waiver does not tantamount to asking for charity, rather it asks for an entitlement to manufacture the local vaccines without being

[64] United Nations Office on Drugs and Crime, 'Accountability and the prevention of corruption in the allocation and distribution of emergency economic rescue packages in the context and aftermath of the COVID-19 pandemic' (*United Nations*, accessed 29 July 2021) <https://www.unodc.org/documents/Advocacy-Section/COVID-19_and_Anti-Corruption-2.pdf>.

[65] For instance, UNDOC's Good Practices Compendium on Combating Corruption in the Response to COVID-19 prepared on October 16, 2020, in the G20 Saudi Arabia 2020 Riyadh Summit.

[66] The said Convention is further complemented by the United Nations Convention Against Transnational Organised Crimes enforced in 2003.

[67] Stockpiling is another grave concern as the states are entering into agreement for increasing their vaccine intake more than what is need to vaccine whole of their population amid uncertainty as to the duration of immunity and the potential escape of variant from the protective immune response. Zain Rizvi, 'Not Enough: Six Reasons Why COVID-19 Vaccine Manufacturing Must Be Rapidly Scaled-Up' *Public Citizen* (Washington, 13 May 2021) <https://www.citizen.org/article/not-enough-six-reasons-why-covid-19-vaccine-manufacturing-must-be-rapidly scaled-up/> accessed 29 July 2021.

[68] The pharmaceuticals are not interested in voluntary licensing in the first place and in the rare circumstances agreements under free licensing have led to complex issues especially when the licensee state (as India) had to divert the intended distribution of vaccine produced under such license to meet its own national demand amid the spike in viral spread.

[69] The term vaccine apartheid has also surfaced amid the unequal vaccine distribution, and "Vaccine for All" is the ultimate solution to covid vaccine and related technology hoarding. On invitation, 'Mariana Mazzucato, Jayati Ghosh; Els Torreele on waiving covid patents' *The Economist* (Washington, 20 April 2021) <https://www.economist.com/by-invitation/2021/04/20/mariana-mazzucato-jayati-ghosh-and-els-torreele-on-waiving-covid-patents> accessed 29 July 2021. Nancy S Jecker; Caesar A Atuire, 'What's yours is ours: waiving intellectual property protections for COVID-19 vaccines' (2021) Journal of Medical Ethics <https://jme.bmj.com/content/medethics/early/2021/07/06/medethics-2021-107555.full.pdf> accessed 30 July 2021.

sued by the patent owners. The pledge made by developed countries during the Uruguay Round Negotiations of 1994 to ensure the provision of benefits of technology transfer and capacity building at the disposal of developing economies has been sabotaged by their hoarding of COVID vaccines.[70] The race for buying vaccines and even booking future production has been termed by WHO director-general Tedros Adhanom Ghebreyesus as "catastrophic moral failure," which is self-defeating, not just economically but also epidemiologically,[71] and depicts that the pandemic has unveiled the inadequate provisions of the IP mechanism.

Currently, the capacity of global production of the COVID vaccine stands at 3.5 billion doses per annum. But the required capacity is 10 billion doses per annum to immunise seventy percent of the world population. Only radical expansion of the current production capacity can meet the demand. Countries housing pharmaceutical giants are the main opposition to the waiver which have entered into advance purchase agreements with richer economies having the bargaining power. Developing and under-developed states are left to wait for the supply of a limited number of vaccines under the COVAX scheme, which is insufficient in terms of roll-out and supply to cater to the surging vaccine demands there.[72] This is a do-or-die situation. As early as the world realises it, it will be better for this planet prone to critical survival challenges. It is high time to find plausible solutions to the clash between private monopolistic gains and public health interest. The lack of empirical study on the impacts of IP rights on vaccine production is a major obstacle in reaching a logical and reality-based decision on whether it is essential to waive COVID vaccine IP rights or not, which the writer believes will help the countries in substantiating their claims in WTO meetings.

In the event of failure of the agreement on waiver demand, aggrieved states can take collaborative action under Section 73 of the TRIPS Agreement as the last option. The richer economies, most notably the United States, now supporting the waiver should also join in. The exceptional situation of pandemic and the repercussions, thereof, fit into the said section and are equal in effect to waiver. However, invoking it may face

[70] Anne Orford, 'Broken Bargains' *London Review of Books* (London, 5 May 2021) <https://www.lrb.co.uk/blog/2021/may/broken-bargains> accessed 30 July 2021. This news article highlights the way historical negotiations led to the adoption of TRIPS Agreement despite a pre-TRIPS reluctance of rich economies like EU of enforcing patents.

[71] WHO, 'WHO Director-General's opening remarks at 148th session of the Executive Board' (WHO, 18 January 2021) <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-148th-session-of-the-executive-board> accessed 30 July 2021.

[72] As per UN press release the actual delivery predicted will be less than even half of the WHO intended 100 million doses by the end of 2021. Economic and Social Council, Special Meeting on Vaccine for All (ECOSOC/7039) (16 April 2021) <https://www.un.org/press/en/2021/ecosoc7039.doc.htm> accessed 30 July 2021.

challenges in resolving disputes, yet it is a strategy that merits consideration. Dr Tedros Adhanom Ghebreyesus, DG of WHO, has demanded states to be “on war footing” if they want to defeat this unprecedented pandemic. It is still not too late to take a step in the right direction of bringing global health imperatives within the sphere of international law.

Comprehensive Sex Education Should be a Right Under the Constitution of Pakistan 1973

Mustafa Khalid*

Abstract

The aim of this paper is to assert and support the idea that under Articles 9 (security of person), 14 (right to dignity), 25-A (right to education), and 35 (protection of the child) of the Constitution of Islamic Republic of Pakistan 1973 ("Constitution"), the state must be tasked with the positive obligation of providing children with free and safe Comprehensive Sex Education ("CSE") from an early age. The paper highlights judicial precedents wherein the above-mentioned provisions have been interpreted broadly to ensure the safety and well-being of the public-at-large. It juxtaposes such broad interpretations by the courts of Pakistan with the idea that provision of and access to CSE by all members of society is necessary to enable them to live safe and healthy lives, free from sexual coercion, abuse, sexually transmitted diseases, and early pregnancies. Additionally, national measures and international commitments have also been cited to display that while the Government of Pakistan realises the importance of CSE, it has taken few measures to ensure the elevation of CSE as a part of the educational curriculum. The paper also highlights direct quotations from the Quran and Hadith to dispel the false notion that sex education or any reference to sex in public discourse is against the injunctions of Islam. In conjunction with these, this paper has endeavoured to outline the risks and harms that adolescents in Pakistan are exposed to daily without the knowledge that CSE seeks to impart. Finally, the fundamental aim of the paper is to initiate a conversation in respect of the importance that CSE has in ensuring that young people lead safe, healthy, and fulfilling lives.

Background

On 9th January 2018, the dead body of eight-year-old Zainab was found at a garbage disposal site in Pakistan. She had been raped and brutally murdered by a man who later confessed to the rape and murder of at least seven other minor girls.[1] While the nation

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[1] Editorial, 'Justice For Zainab' *DAWN* (17 October 2018) <https://www.dawn.com/news/1439587/justice-for-zainab-timeline-of-the-kasur-rape-murder-case-that-gripped-the-nation> 19 accessed May 2020.

stood firm in its solidarity against the perpetrator and the Parliament passed strict legislation in the form of the Zainab Alert Bill 2020,[2] these were all merely reactionary measures. A long-term strategy with the objective of not just effectively apprehending and prosecuting such predators but also with the goal of preventing such crimes altogether is required in order to effectively tackle the issue. This is evidenced by the fact that in 2018, the Minister of Human Rights, Mumtaz Ahmad Tarar, revealed that as of late, 17,862 cases of child sex abuse had been reported in the country.[3] Unfortunately, this figure has seen an annual increase despite the punitive efforts by the government. A non-governmental organisation, *Sahil,* released a report in 2018 which depicted the miserable state of affairs in the country with over ten children facing abuse every day.[4]

The United Nations Educational, Scientific and Cultural Organization describes Comprehensive Sex Education as "a curriculum-based process of teaching and learning about the cognitive, emotional, physical, and social aspects of sexuality."[5] A problem as serious as the issue of rising sexual assault cases against children in Pakistan deserves to be countered by not just deterring potential predators with a swift and certain judicial system but also by arming the affected with knowledge and skills so that they may defend themselves if the need arises. One of the most effective ways this can be achieved is by mandating schools to impart free CSE to children. The population and government of Pakistan have historically remained resistant to adopting a pro-active approach with regards to the provision of sex education in schools, primarily because the subject is considered to be taboo as a topic of open discourse. This has mainly to do with the collective consciousness of the country's society that is wary and hesitant while engaging with issues related to sexual health and well-being. Added upon that, the widespread and heavily believed notion that sex education will eventually transform young children into promiscuous individuals augments the reluctance of adding the same to the school curriculum. The same issue was prevalent in India. Despite the efforts of multiple regimes for sex education across the country, the country's civil society chose sexual restraint and abstinence to be the primary solution.[6] However, a research which compared the

[2] Zainab Alert Bill 2020 <http://www.senate.gov.pk/uploads/documents/1578920479_225.pdf> accessed 11 September 2021.
[3] Naimatullah Gadhi, 'Sex Education' *The Nation* (2018) <https://nation.com.pk/06-May-2019/sex-education> accessed 19 May 2021.
[4] Zahid Imdad, 'Over 10 children abused every day in Pakistan in 2018: Sahil report' *DAWN* (3 April 2019) <https://www.dawn.com/news/1473645> accessed 19 May 2021.
[5] 'Why Comprehensive Sexuality Education Is Important' (*UNESCO* 19 June 2018) <https://en.unesco.org/news/why-comprehensive-sexuality-education-important> accessed 11 September 2021.
[6] S. Anandhi. 'Sex Education Conundrum.' (2007) 43(33) Economic and Political 3367 <http://www.jstor.org/stable/4419913> accessed 27 September 2021.

effectiveness of CSE with abstinence-until-marriage programs revealed that children provided with CSE were in a much better position to lead healthy lives before and after marriage than those who were part of the abstinence programs.[7] This entails that the well-being of young children is dependent upon them having received CSE and must not be overlooked in light of cultural agendas that demand that sex and all matters associated with it remain taboo.

The absurd notions that impede the provision of sex education in Pakistan subsequently create an atmosphere where adolescents are left in a state of ambiguity and confusion while experiencing bodily changes on account of puberty. This ambiguity prompts them to access information of their own accord and ability from sources or people whose veracity is uncertain.[8] The spread of this misinformation with regards to sex and sexuality on account of the absence of a formal channel of communication further reinforces the taboo notions that exist in society. Most adolescents are exposed to pornographic material for the first time out of curiosity. The CSE programs seek to answer their questions in a safe and reasonable manner.[9] As evidenced by the results of a research conducted by the Australian Institute of Family Studies, when children seek out guidance from the internet, polluted narratives of sexual relationships are perpetuated across their minds.[10] Due to the lack of any counter-narratives or information, they are led to believe the ideas depicted online without any accountability or fact-checking. Ms. Horvath, a professor of psychology at Middlesex University in London has stated, "One of our recommendations is that children should be taught about relationships and sex at a young age. If we start teaching kids about equality and respect when they are five or six years old, by the time they encounter porn in their teens, they will be able to pick out and see the lack of respect and emotion that porn gives us. They'll be better equipped to deal with what they are being presented with."[11]

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[7] Patrick Malone and Monica Rodriguez, 'Comprehensive Sex Education vs. Abstinence-Only-Until-Marriage Programs.' (2011) 38(2) Human Rights 5 <http://www.jstor.org/stable/23032415> accessed 27 September 2021.

[8] Maren van Treel and others, 'Pakistan Shows WHY Comprehensive Sex Education Would Improve Young People's Lives' (*D+C* 9 February 2021) <https://www.dandc.eu/en/article/pakistan-shows-why-comprehensive-sex-education-would-improve-young-peoples-lives> accessed 11 September 2021.

[9] Ibid.

[10] Antonio Quadara, Alissar El-Murr, and Joe Latham, 'The effects of pornography on children and young people: An evidence scan.' (2017) Australian Institute of Family Studies <https://aifs.gov.au/publications/effects-pornography-children-and-young-people-snapshot> accessed 26 September 2021.

[11] David Segal, 'Does Porn Hurt Children?' *The New York Times* (28 March 2014)<https://www.nytimes.com/2014/03/29/sunday-review/does-porn-hurt-children.html&gt> accessed 1 October 2021.

According to the United Nations Population Fund, the lack of proper and accurate means of sex education leaves individuals "vulnerable to coercion, sexually transmitted infections and unintended pregnancy."[12] Aside from including the right to education as a fundamental right in its Constitution, Pakistan has done little in recent years to influence a substantive change in the status quo. The aim of this paper is to assert and support the idea that under Articles 9, 14, 25-A, and 35 of the Constitution, the state must be tasked with the positive obligation of providing children with free and safe CSE from an early age.

Constitutional Support

I. Article 9 – Security of Person

The right to life and liberty is enshrined under Article 9 of the Constitution. It states that "no person shall be deprived of life or liberty save in accordance with law."[13] A bare reading of the text of this provision implies that it confers only a negative obligation upon the state to not interfere with a person's life or liberty unless a law permits and empowers it to do so. However, over the years, through various judgments, the courts have extended the interpretation of the provision in many different ways to include positive obligations upon the state. These positive obligations include any and all measures that must be undertaken to ensure that the citizens living within the jurisdiction of the government have unfettered access to a quality life, access to hygienic water, and a clean and unpolluted environment. The courts have reaffirmed the idea, multiple times, that while the word "life" does not have a specific definition under the Constitution, its use in Article 9 surely does not just constitute physiological existence of life in a vegetative state, but also means to protect the "quality of life". This has been clearly evidenced in the below-mentioned cases.

In the case of *Shehla Zia v WAPDA*, it was argued by the petitioners that high-voltage transmission lines connected with the power grid station being developed in their vicinity would pose as a serious health hazard and would, therefore, violate their constitutional right to life. The Supreme Court ("SC") decided the matter in favour of the petitioners by stating that the provision under Article 9 of the Constitution entitled the petitioners to be protected from exposure to health hazards being caused by developmental projects.[14] The Court's rationale clearly outlined that the potential impact to the health and lives of the citizens in the vicinity of the grid station owing to the station's

[12] 'Comprehensive Sexuality Education' (UNFPA) <https://www.unfpa.org/comprehensive-sexuality-education> accessed 11 September 2021.
[13] The Constitution of Islamic Republic of Pakistan 1973, Article 9.
[14] *Ms. Shehla Zia v WAPDA* PLD 1994 SC 693.

environmental impact, violated the citizens' right to a quality life. This principle was also used by the courts in *Anjuman Tajran Charam v The Commissioner* where the ancillary shops of a slaughterhouse that sold hides and skins were shifted to another location because the materials used by such shops were known to cause diseases and also because the pungent smell of the materials interfered with the nearby residents' right to quality of life guaranteed by the Constitution.[15] Additionally, in *Mohammad and Ahmad v Government of Pakistan* the Court held that a failure on the part of government hospitals in providing emergency medical treatment to the people in need of such treatment resulted in the violation of their constitutionally protected right to life.[16] The rule developed in this case is important to note as it does not directly deal with a health hazard but rather considers the state's inefficiency in responding to an emergency situation as a violation of the right to life.

As evidenced from the judicial precedent noted above, the right to life and liberty has been expansively interpreted by the courts of Pakistan to include a variety of other rights. The commonality being that all such rights affect one's right to enjoy a "quality life". The Lahore High Court ("LHC") has further clarified in a judgment that "Article 9 of the Constitution protected life of citizens and where life of a citizen was degraded, quality of life was adversely affected and health hazards were created affecting large number of people the same amounted to deprivation of life which was prohibited by Articles 9 and 14 of the Constitution."[17] The lack of CSE and sex awareness in Pakistan leads to multiple health risks; such as early pregnancies, which are neither safe for the mother nor the child, and sexually transmitted infections. For adolescents, specifically, a lack of CSE leaves them vulnerable to coercion and sexual exploitation at the hands of individuals who exercise control over them through a power dynamic. This is especially so since most of them are so young that they are unable to comprehend the fact that their rights are being violated and that they must speak up about such instances with a trusted adult. The threat to the enjoyment of the right to life in these cases is as real as that posed by the consumption of polluted water or exposure to electromagnetic radiation. With at least three thousand cases of child sex abuse being reported annually since 2017,[18] it must be realised that a lack of CSE leaves these children defenceless against sexual predators who use their victims' young age as an advantage. Equipped with even a basic idea of consent, these children will have a better chance of speaking up against such offenders and resisting their actions, thereby guarding their own right to a quality life. A study

[15] *Anjuman Tajran Charam v The Commissioner* 1997 CLC 1281.
[16] *Mohammad and Ahmad v Government of Pakistan* PLD 2007 Lah 346.
[17] *Syed Mansoor Ali Shah v Government of Punjab* 2007 CLD 533.
[18] Sahil, 'Cruel Numbers.' <http://sahil.org/wp-content/uploads/2020/03/Cruel-Numbers-2019-final.pdf> accessed 11 September 2021.

conducted in Shanghai depicted that the providence of sex education radically reduced the extent of vulnerability young children faced from sexually transmitted diseases and sexual coercion.[19] The lack of CSE exposes the youth and the population in general to health and safety risks that can, at the very least, be mitigated, if not entirely curbed by the provision of the same. A lack of CSE is thus hampering peoples' right to a quality life in Pakistan.

II. Article 25-A – Right to Education

As per Article 25-A, the Constitution states that "the State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law."[20] The insertion of this Article under the 18th Amendment to the Constitution elevated the status of the provision of education from merely a principle of policy to a fundamental right.[21] Furthermore, Article 38 (d) outlines the responsibility of the state to "provide basic necessities of life, such as food, clothing, housing, education and medical relief." Even prior to the transition influenced by the 18th Amendment, the right to life was expansively interpreted to include the right to education, since the latter impacted the quality of life that one could enjoy.

The importance that the right to education has been granted by the courts of Pakistan can be effectively witnessed by quoting relevant case law. In *Headmaster, Zia-ul-Aloom High School v Chairman (Canadian Labour Congress),* the LHC stated that the use of the word "life" in Article 9 of the Constitution included the right to education and "all such rights which were necessary for a leading proper and comfortable life, worthy of citizens of a free country."[22] The rationale used by the Court, in this case, may be used to justify and support the inclusion of CSE in school curriculums nationwide since it seeks to prepare young people to lead a "proper and comfortable life". Similarly, in *Ahmad Abdullah v Government of Punjab,* the Court associated the right to education with the right to dignity, by holding that a certain degree of education was imperative for a dignified existence and that the State must undertake positive action to ensure citizens' enjoyment of both these rights.[23] In *Rana Aamer Raza Ashfaq v Dr. Minhaj Ahmad Khan*, the SC determined that the right to education "ultimately affects quality of life which has nexus with other Fundamental Rights guaranteed under Articles 4 and 9 of the

[19] Bo Wang and others, 'The Potential of Comprehensive Sex Education in China: Findings from Suburban Shanghai.' (2005) 31(2) *International Family Planning Perspectives 63* <http://www.jstor.org/stable/3649481> accessed 30 September 2021.
[20] The Constitution (n 13) Article 25-A.
[21] The Constitution (Eighteenth Amendment) Act 2010, Section 9.
[22] *Headmaster, Zia-ul-Aloom High School v Chairman (Canadian Labour Congress)* 1996 CLC 1785.
[23] *Ahmad Abdullah v Government of Punjab* PLD 2003 Lah 752.

Constitution."[24] Furthermore, it was stated by the apex Court that "people cannot be free in real sense unless they are properly educated."[25] It must also be noted that pursuant to the laws of Pakistan, the right to education does not merely constitute the right to be taught a set curriculum in a specified period of time. The Court in *Akhtar Hussain Langove v Inspector General of Police, Balochistan,* clarified, "… education cannot be limited to the pursuit of academic knowledge alone. A complete education attends to a student's mind as well as body…"[26] This interpretation essentially broadens the meaning of the term "education" in the Constitution and decrees non-academic knowledge and activities to be a substantive part of education which is a constitutionally protected fundamental right of all citizens. The expansive interpretation of the right to education coupled with right to life makes room to argue that CSE must be made a part of school curriculum. CSE enables all children live a safe life. This safety is necessary to live a fulfilling life, the object of both rights.

To elaborate, it must be noted that contrary to popular belief, adolescents do not just require adequate sex education in order to prevent unplanned pregnancies and to protect them from contracting sexually transmitted infections. They deserve it simply on account of the fact that they are human beings, and human beings should rightfully be able to learn, access, and use the information, and skills they require in order to lead healthy and fulfilling lives. This ensures they are well-equipped to make informed decisions that have life-altering consequences. The nexus between the right to education and the right to CSE cannot be overlooked in light of the rationale adopted by the courts in emphasising the importance of the right to education. The right to CSE, therefore, finds its roots within the provisions of the Constitution of Pakistan and must therefore be provided for. Bearing this context in mind, advocacy groups such as the Right to Education Pakistan, Aahung, and Rutgers Pakistan must initiate and lead a discourse on the importance of CSE in order to influence governmental organs to do the same. A multi-tier effort that involves the nexus and cooperation of governmental and non-governmental entities is likely to at least address the problem effectively, if not solve it altogether.

III. Article 14 – Right to Dignity

The fundamental right to dignity is protected by Article 14 of the Constitution. It states that "the dignity of man and, subject to law, the privacy of home, shall be inviolable…."[27] A bare reading of this provision depicts that while the latter half of the provision can be

[24] *Rana Aamer Raza Ashfaq v Dr. Minhaj Ahmad Khan* 2012 SCMR 6.
[25] Ibid.
[26] *Akhtar Hussain Langove v Inspector General of Police, Balochistan* 2015 YLR 58.
[27] The Constitution (n 13) Article 14.

curtailed pursuant to appropriate legislation, the former part – the dignity of man – shall remain inviolable in any case. It is unfortunate to see this fundamental right being more frequently and grievously violated in Pakistan than any other right.[28] The instances of the violation of dignity often occur in private spaces and are not easily substantiated with evidence, therefore, filing a suit to obtain a remedy seems a far-fetched and overtly arduous task.

However, in the instances where issues regarding violation of the right to dignity have been brought before them, the Courts of Pakistan have interpreted the provision of law in its true spirit and granted appropriate remedies. *In Barrister Asfandyar Khan v Government of Punjab*,[29] the Court held that the use of words such as "disabled", "physically handicapped", and "mentally retarded" in a statute were violative of the right to dignity possessed by persons with different abilities. The words were subsequently struck out from the statute, and a reprint was ordered. This rationale was carried forward by the Court in *Mst. Beena v Raj Muhammad*.[30] In this case, the SC held that the mere fact that a mother is disabled does not deny her the custody of her child after the dissolution of marriage and that such an instance was violative of the right to dignity.

It must now be contended that if courts can exercise empathy and sensitivity in matters which violate the dignity of persons, they must also take measures to ensure that people can fully enjoy their right to dignity. The courts must understand that subjecting an individual to sexual abuse and coercion is one of the gravest violations of human dignity. Such an ordeal leaves the victim in trauma, despair, and mental agony for an indefinitely long period of time, if not their entire lives. In addition to this, the social stigma wrongfully attached with being considered a victim of sexual assault as opposed to being recognised as a survivor adds to the loss of dignity of the survivor on a cumulative basis, daily. However, in Pakistan, legal jurisprudence has largely focused on such crimes through the lens of criminal offences as opposed to considering them as violations of fundamental rights. CSE seeks to inform and teach young people about their bodies and sexuality so that they may guard themselves against violations of their right to dignity and security of person. The judicial economy and the government in general must, therefore, consider the provision of CSE as a protective measure that seeks to guard fundamental rights, including the right to dignity.

[28] Babar Sattar, 'The Right to Dignity' *The News* (21 September 2019) <https://www.thenews.com.pk/print/529583-the-right-to-dignity > accessed 19 May 2021.
[29] PLD 2018 Lahore 300.
[30] PLD 2020 SC 508.

IV. Article 35 – Protection of the Child

The Principles of Policy that support the idea that CSE should be provided to adolescents as a right are enshrined in Article 35 of the Constitution. Principles of Policy do not command the same level of authority as fundamental rights since they are not enforceable by right as opposed to the latter, which the government is obligated to provide for. However, this distinction does not mean that Principles of Policy are liable to be entirely ignored by the state; they form a substantive part of the Constitution and subject to governmental budget and limitations, must be provided for as well. This principle was reiterated multiple times by the apex Court of the country. The SC in the *Mst. Beena* case invoked the provisions of Article 29 of the Constitution to clarify the importance of Principles of Policy. It was held that "disregarding the Principles is contrary to the express language of the Constitution …"[31] and that the Principles "were given by the people to themselves through their chosen representatives when the Constitution was written."[32] The importance of Principles of Policy was specifically pointed out by the SC in *Benazir Bhutto v Federation of Pakistan*. It was held that they "…advance the cause of socio-economic principles and should be given a place of priority to mark the onward progress of democracy. These provisions become, in an indirect sense, enforceable by law and thus bring about a phenomenal change in the idea of co-relation of Fundamental Rights and directive principles of State Policy."[33] The authority granted to the Principles of Policy through judicial interpretation entails that these provisions must be the guiding doctrines for state machinery in the deliverance of their responsibilities and for upholding the fundamental rights.

Article 35 of the Constitution is protective towards the right of children. It states that "The State shall protect the marriage, the family, the mother and the child."[34] This Article was invoked in *Muhammad Naseer v District Police Officer, Sialkot.* In this case, the LHC used the provision to render the employment of a minor girl as a housemaid, unconstitutional.[35] It was also held that in light of other Principles of Policy and fundamental rights preserved in the Constitution, a minor child has the right to be educated and to not be forced into employment. In another case, *Muhammad Suleman v SHO,* the LHC shed light on the rationale behind outlawing child labour and servitude. It was held in the obiter dictum, "Child labor is condemned because it deprives children of their childhood, potential and dignity, and is harmful for their physical and mental

[31] Ibid.
[32] Ibid.
[33] *Benazir Bhutto v Federation of Pakistan* PLD 1988 SC 416.
[34] The Constitution (n 13) Article 35.
[35] *Muhammad Naseer v District Police Officer, Sialkot* 2017 LHC 3936.

development."[36] At this point, it must be noted that a lack of CSE leaves children defenceless against risks such as sexual coercion, physical abuse, and addiction to pornography which have at least the same, if not a greater impact on their dignity, development, and potential. In addition to imposing a negative obligation on citizens by outlawing child labour, the state must also issue positive obligations pursuant to the provision of fundamental rights and principles of policy to protect the interests of children in a holistic manner.

Persuasive Arguments

I. National Initiatives

In Pakistan, the provision of CSE finds at least some semblance of support from the National Education Policies. Since 2009, organisations such as Rutgers Pakistan and Aahung have initiated the discourse on providing young people with knowledge and skills via CSE. Both these organisations have termed their sex education programs as "Life Skills-Based Education" ("LSBE") to detach themselves from the stigma attached with the term "sex education" by religious, social, and political stakeholders.[37] So far, they have been successful in engaging over 1200 schools with their program. This figure, however, is towered by the number of schools and students who are not in any form or manner receiving sex education. The efforts made by such advocacy groups have substantially influenced the incorporation of provisions regarding LSBE in the National Education Policy of 2009 and the information about HIV/AIDS in the national curriculum for grades 9 and 10. Section 6.2 of the 2009 Policy states that "emerging trends and concepts such as…prevention education against HIV, Life Skills Based Education …., detection, and prevention of child abuse shall be infused in the curricula and awareness and training materials shall be developed for students and teachers in this context."[38] Similarly, in the consultation meetings conducted for the National Education Policy, 2016, the importance of the systematic development and provision of LSBE was highlighted by the government.[39] Multiple other legislations such as National Youth Policy, 2008, have had the same agenda. Clause 11 of the Youth Policy states the national objective of "providing necessary life skills for youth through university and school

[36] *Muhammad Suleman v SHO* 2020 LHC 200.

[37] Venkatraman Chandra-Mouli and others, 'Building support for adolescent sexuality and reproductive health education and responding to resistance in conservative contexts: cases from Pakistan' (2018) 6(1) *Glob Health Science and Practic.* 128 < https://doi.org/10.9745/GHSP-D-17-00285> accessed 11 September 2021.

[38] National Education Policy, 2009. <http://itacec.org/document/2015/7/National_Education_Policy_2009.pdf> accessed 11 September 2021.

[39] Consultation Meetings for National Education Policy 2016-Lahore. <http://itacec.org/document/2016/nep/Punjab_Report_NEP.pdf> accessed 11 September 2021.

curriculum and in the non-formal education sector to make youth capable of coping with their problems in the early years of marriage."[40] Similarly, the Punjab Youth Policy, 2012, also states the need to "increase availability of integrated sexual and reproductive health information and services for adolescents and youth …."[41]

The presence of these provisions in state legislation underscores the fact that the government is cognizant of the importance of sex education for the youth. While it is a positive step that the importance of sexual and reproductive health is being recognised through formal legislation, there are multiple lacunas in the system which can be mitigated via the provision of CSE as a right. The National Youth and Education Policies were enacted before the 18th Amendment to the Constitution which transferred the authority of legislation regarding the affairs of Education to the provincial assemblies. This shift in the legislative economy of the country and decelerated action on the part of the provinces have halted the progressive steps that were being taken to make LSBE a part of school curriculums nationwide. Quite recently, enforcement of PTI's Single National Curriculum initiative has started in Islamabad's schools. In this regard, religious scholars, appointed as members of the SNC Committee, are supervising the substance of textbooks in all subjects, including science. In the name of Islamic morality, they have cautioned publishers not to print any illustration or drawing in biology textbooks that show human figures "sans clothes".[42] Subject to the successful implementation of this Curriculum in Islamabad, the same is likely to be extended and applied to the education systems in the rest of the country. It is therefore, that the provision of CSE as a fundamental right at this point is a need of the hour to ensure that a school education is holistic in the true sense.

II. International Conventions and Precedents

In addition to national initiatives, Pakistan has also associated itself with multiple international conventions and forums which strongly advocate for the rightful provision of CSE to minors. The foremost of these is the Sustainable Development Goals ("SDG") adopted by the United Nations General Assembly and ratified by 193 countries, including Pakistan. Target 3.7 of the goals recommends nations to "ensure universal access to sexual and reproductive health-care services, including for family planning, information and education, and the integration of reproductive health into national strategies and programmes."[43] The fulfilment of several other development goals is indirectly related to

[40] National Youth Policy 2008.
[41] Punjab Youth Policy 2012.
[42] Pervez Hoodbhoy, 'Cost of enforced modesty' *Dawn* (19 June 2021) <https://www.dawn.com/news/1630231/cost-of-enforced-modesty> accessed 8 September 2021.
[43] Target 3.7, Sustainable Development Goals, 2030 <https://sdgs.un.org/goals/goal3> accessed 11 September 2021.

the provision of sex education to children. These include putting an end to the epidemic of AIDS (Goal 3) and elimination of violence against women and girls, including female genital mutilation (Goal 5). Additionally, Pakistan was also a participant in the International Conference on Population and Development, organised by United Nations Population Fund, which seeks to ensure, inter alia, the global provision of and access to sexual and reproductive health resources. Pakistan's verbal commitment to the cause is evidenced by the remarks of Dr Zafar Mirza, the former special advisor of the Prime Minister on Health. At the conference in 2019, he stated that "…it is critical to meaningfully advance towards achieving access to sexual and reproductive health as an integral part of Universal Health Coverage."[44] Furthermore, at the Sixth Asian and Pacific Population Conference in 2013, Pakistan further regurgitated the necessity for providing adolescents with "comprehensive sexuality education and access to comprehensive and integrated quality sexual and reproductive health services."[45]

The above mentioned are merely a few of the many international commitments that Pakistan has made vis a vis sexual and reproductive health. While it must be admitted that over the years efforts have been made to provide for such commitments, it is undeniable that these efforts have not had nearly as much impact as is required to ameliorate the dire situation in Pakistan. These international commitments, however, can be effectively used as persuasive arguments in a court of law which seeks to deliberate upon the provision of sex education as a right. It is for this reason that they have been added to this paper.

Counter Arguments and the Islamic Perspective

With due consideration to the fact that in Pakistan's socio-cultural setting, sex and sex education are treated as deeply private and taboo matters that should ideally not be referred to in public discourse, and it may be argued that school administration and parents would oppose the curricular addition of CSE to the educational system. Such resistance shall largely be supported by two fundamental misconceptions: (i) CSE shall inform children about sex and shall nudge them towards being sexually active before marriage; and (ii) religious clerics may oppose the notion of adding discussions about sex to public discourse.

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[44] Dr. Zafar Iqbal, 'International Conference on Population and Development' (*The News International: Latest News Breaking, Pakistan News*) <https://www.thenews.com.pk/magazine/money-matters/590561-international-conference-on-population-and-development> accessed 11 September 2021.

[45] 'Asian and Pacific Ministerial Declaration,' *Compendium of Recommendations on Population and Development*, II <https://www.un.org/en/development/desa/population/publications/pdf/policy/Compendium/Volume%20II/i_Chapter%204.pdf> accessed 11 September 2021.

Both these refutations fail to logically display a valid reason for not introducing CSE to the educational curriculum. A paper published in the American Sociological Review conducted empirical research which established that individuals in predominantly Muslim societies have the lowest report of engaging in premarital sex.[46] While it is admitted that in Pakistan, where a majority of the population is Muslim, the general public notion is to abstain from non-marital sex and refrain from discussing sex openly, however, empirical research has also depicted that in Pakistan, 11% of men reported to have participated in pre-marital sex and 29% reported having participated in non-marital sex.[47] The afore-quoted statistics suggest that despite the conservative mindset that discourages any and all references to sex education in a curricular capacity, a significant proportion of Pakistan's population indulges in non-matrimonial sex. The first counterargument that sex education shall nudge adolescents towards sex, thus, stands refuted by the fact that pre-marital sex is an existing reality of society. CSE primarily seeks to purge the taboo associated with sex. The idea that CSE shall promote more "child sex incidents" is a testament to the ideas perpetuated by this very taboo. Additionally, while adults are perpetrators in many sexual assault cases, often minors (teenagers) tend to be involved as well. The purpose of CSE is to inform people of all age groups regarding sexual interactions about the concept of consent. CSE not only seeks to deter cases of sexual assault by purging the taboo associated with sex but also seeks to inform young people about consent so that they may effectively observe, identify, and report situations in which their consent is being manipulated. Unlike Zainab's case, where it is still unclear as to whether there was prior history of sexual assault/molestation, many cases in Pakistan have a long history of molestation/assault on very young children due to continued access by the perpetrator (who in most cases is a close relative) to the child. If children are made aware of these ideas and notions at a young age through proper means (e.g., schools), they are more likely to raise hue-and-cry/report instances to some elder they trust, which can thus break the cycle.

The fact that religious seminaries may oppose it is not reason enough to discourage innovation and legal evolution through legislative change. There is neither a Hadith nor Quranic Ayat that outlaws sex education. In fact, the Quran and Hadith themselves at multiple instances openly inform the Ummah about the permissible, prohibited, and accepted practices viz sex, sexual hygiene etc. For instance, verse 222 of Al-Baqarah (Chapter 2) of the Holy Quran elaborates on the permissibility of sex during menstruation:

[46] Amy Adamczyk and Brittany E. Hayes, 'Religion and Sexual Behaviors: Understanding the Influence of Islamic Cultures and Religious Affiliation for Explaining Sex Outside of Marriage'. (2012) 77(5) *American Sociological Review* 723.

[47] Ali M Mir and others, 'Exploring urban male non-marital sexual behaviours in Pakistan' (2013) 10(1) *Reproductive Health* 22.

"They ask about the monthly course. Say, it is a state of impurity, so keep apart from woman during their monthly course and do not go near them until they are clean. When they have cleansed themselves, then you may go to them in the manner Allah has enjoined you."[48] Similarly, it may also be asserted that the Islamic notion of sex education does not only target adults, but it also intends to train the young to learn about sex from the very first instance they recognise it. In the Holy Quran, Allah said: "And when the children among you reach puberty, let them ask permission [at all times] as those before them have done. Thus does Allah make clear to you His verses; and Allah is Knowing and Wise."[49] Imam al-Daylami records a narration on the authority of Anas ibn Malik that the Messenger of Allah (Allah bless him & give him peace) is reported to have said: "Not one of you should fulfil one's (sexual) need from/fall upon his wife like an animal; but let there first be a messenger between you." "And what is that messenger?" they asked, and he replied: "Kisses and words."[50] In the afore-quoted Hadith, the Messenger of Allah (peace be upon him) is guiding his companions about foreplay in an educative manner, which serves as a valid religious precedent for CSE. Religious seminaries and clerics who may oppose the curricular provision of CSE are thus, in actuality, opposing a direct religious precedent that is reinforced and supported by both the Quran and the Hadith. At any rate, legally, the state's initiative of providing and ensuring the successful impart of CSE can only be challenged if the initiative is violative of the provisions of the constitution or the principles of Islam. In the latter case, a petition shall have to be filed in the Federal Shariat Court of Pakistan to strike down an initiative for the provision of CSE on account of its 'supposedly' irreconcilable nature with respect to the principles of Islam. The sources cited above, clearly entail that such a potential petition has opposition from the primary sources of Islamic Law – the Quran and Hadith – and finds little or no support to its credit.

Another counterargument is one which questions the ability of CSE programs to effectively tackle the problem of rising sexual assault cases and STIs. Multiple studies conducted by leading experts under the auspices of the Council of Europe conclude that "sensitising children, parents, teachers, police and local communities to the nature and extent of sexual violence, and giving permission to discuss it, are essential steps in tackling it."[51] These studies conclude that educational acquaintance with ideas such as

[48] Quran, 2:222.
[49] Ibid 24:59.
[50] Musnad al-Firdaws of Al-Daylami, 2/55.
[51] Peter Gordon, 'Sexuality Education and the Prevention of Sexual Assault', (2011) *PROTECTING CHILDREN FROM SEXUAL VIOLENCE—A COMPREHENSIVE APPROACH* 175 <https://www.coe.int/t/dg3/children/1in5/Source/PublicationSexualViolence/Gordon.pdf.> accessed 11 September 2021.

gender-based violence, dating violence as a violation of human rights, the responsibility to report sexual abuse, and gender-based violence is a necessary pre-cursor to any meaningful change and progress. A practical application of this conclusion can be witnessed in the United States, in the state of Georgia, where Senate Bill 401 by its state legislature officially added annual age-appropriate sexual abuse and awareness programs in grade 9, entailing that children will start learning these concepts at a younger age, starting in 2019.[52] "Even generally, while sex education varies in content across schools, studies have demonstrated that comprehensive sexuality education programs reduce the rates of sexual activity, sexual risk behaviours (e.g., number of partners and unprotected intercourse), STIs, and adolescent pregnancy".[53] Even international organisations such as UNESCO have expressed agreement on the positive impact of CSE in curbing instances of sexual assault:

> When delivered well, CSE responds to this demand, empowering young people to make informed decisions about relationships and sexuality and navigate a world where gender-based violence, gender inequality, early and unintended pregnancies, HIV and other sexually transmitted infections (STIs) still pose serious risks to their health and well-being.[54]

In light of the above, the positive impacts that CSE has upon the community overshadow the superficially religious argumentation against the provision of CSE and the needless opposition it may receive owing to the taboo attached with the word "sex".

Conclusion

This paper has attempted to weave a connection between the provision of CSE and Fundamental Rights. The jurisprudential discourse on the rights to life, dignity, and education has aimed to show that a lack of CSE for adolescents is impeding their enjoyment of those rights in a substantial manner. The history of broad judicial interpretation of the right to life by Pakistani courts to include any element which impacts a "quality life" has left substantial room for progressive growth. Additionally, the courts

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[52] Editorial, 'Sexual Abuse and Assault Awareness Frequently Asked Questions' *GEORGIA DEPARTMENT OF EDUCATION* (8 November 2018) <https://www.gadoe.org/Curriculum-Instruction-and-Assess-ment/Curriculum-and-Instruction/Documents/SB%20401%20FAQ_November%208%202018.pdf.> accessed 22 January 2022.

[53] Helen B Chin, 'The effectiveness of group-based comprehensive risk-reduction and abstinence education interventions to prevent or reduce the risk of adolescent pregnancy, human immunodeficiency virus, and sexually transmitted infections: two systematic reviews for the Guide to Community Preventive Services' (2012) 42(3) Am J Prev Med 272.

[54] UNESCO News, UNESCO, (2019) <https://en.unesco.org/news/why-comprehensive-sexuality-education-important> accessed 22 January 2022.

have also chosen to consider the word "education" to encompass more than just academic knowledge and skills. This interpretation entails the courts' potential affinity to consider CSE as a rightful constituent of the term "education" under the Constitution. It has also been depicted that the courts have considered the right to dignity as one which is inviolable under any circumstance. This interpretation was then connected with the sound assertion that a lack of CSE leaves children in circumstances where their right to dignity can be purged by others. In concurrence, several credible arguments were made by citing Principles of Policy, governmental legislation, and international precedents. In conjunction with these, this paper has endeavoured to outline the risks and harms that adolescents in Pakistan are exposed to daily without the knowledge that CSE seeks to impart. At the conclusion of this discussion, it seems reasonable to assert that pursuant to the fundamental rights and principles of policy enshrined in the constitution, CSE must be provided to adolescents as a right. With the country's government considering a complete overhaul of its educational curricula, through the Single National Curriculum initiative, the government must also fulfil its constitutional duties and international commitments by ensuring the provision of CSE throughout the country. Pakistan lives in a day and age where the mere statistical probability of harm in the form of contracting a globally spread virus has nudged the government to snub civil and commercial liberties via lockdowns to protect its people. This begs the question, why should the government not respond to the proverbial pandemic of sexual assault in Pakistan by fulfilling its positive obligations and keeping its people safe?

Shariat Court's Intrusion: Protection of Civil Bureaucracy Against Arbitrary Treatment

Pakistan v Public at Large

PLD 1987 SC 304

Shanzay Javaid*

Introduction

The Shariat Courts of Pakistan have asserted their jurisdiction and intruded in a wide range of areas, which can be construed as laws generally applicable to all Muslims.[1] However, it has seldom been noticed that these areas are often much broader than those which generally form the mainstream discourse; one such area is the civil bureaucracy. The applicability of the Civil Servants Act 1973 ("CSA") to all Muslims in the bureaucracy allows the Federal Shariat Court ("FSC") to actively review and interpret the law for its consistency with Islam.[2] Consequently, many of the appeals on such matters end up before the Shariat Appellate Bench of the Supreme Court ("SAB").[3]

Though there have been several decisions on the legal functioning of civil servants; the SAB's decision of 1987 in *Pakistan v Public at Large* is rather momentous.[4] Section 13(i) of the CSA allowed compulsory retirement of senior civil servants at the government's discretion and Section 13(ii) empowered removal of bureaucrats on completing service of twenty-five years or more – without any grounds of misconduct or notice.[5] By challenging the arbitrary removal of civil servants under these provisions of the CSA,[6] the SAB bolstered the inviolability of their fundamental rights: to be heard and to have honour and reputation protected.[7] This decision is particularly remarkable because it posed a significant challenge to the deeply entrenched military dominance at the time –

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[1] *Dr. Mahmood-ur-Rehman Faisal v Government of Pakistan* PLD 1994 SC 607: it was decided that the exclusion of Muslim Personal Law from the jurisdiction of the Federal Shariat Court, in Article 203B of the Constitution, only included those laws that applied 'personally' to specific sects and thus all other laws others fell within its jurisdiction.

[2] Civil Servants Act 1973 (Act No. LXXI of 1973) ["Civil Servants Act"].

[3] For instance: *Pakistan v Public at Large and others* PLD 1986 SC 240, *Pakistan and others v Public at Large and others* PLD 1987 SC 304, and *Pakistan v Public at Large* 1989 SCMR 1690.

[4] *Pakistan v Public at Large and others* PLD 1987 SC 304.

[5] Civil Servants Act, s 13(i)-(ii).

[6] Ibid.

[7] *Pakistan* (n 4).

even though the military rule ended a year later. [8] It also allowed the SAB to impose requirements of due process and fair trial through deductive reasoning and progressive interpretation, while enforcement of fundamental rights was suspended. The SAB thus produced significantly broad legal interpretations of Islamic sources for its reasoning.

Facts and Judgment

This case[9] came as an appeal filed by the Government from an earlier judgment of the FSC that had ordered a repeal of the impugned sub-sections in Section 13 in the CSA.[10] It is important to remember that this judgment was given at a time when President Zia ul-Haq's martial law was prevalent and the Constitution of 1973 had been temporarily suspended.[11] With no constitutional rights to rely on, laws could not be challenged for being *ultra vires*. The only recourse available to question the validity of laws was thus arguing for their repugnancy to the injunctions of Islam, as previously done in *Farishta v Federation of Pakistan*.[12] Accordingly, the Respondents in this case, representing the public at large, contended that Section 13 sub-sections (i) and (ii) of the CSA were against the principles of *Sharia* for being arbitrary. In contrast, the Appellants, constituting the government of Pakistan, asserted that the provision could not be found prohibited under *Sharia* Law.

While rendering the majority opinion, Justice Muhammad Afzal Zullah began by shedding light on the contents of Section 13 of the CSA. He noted that the first two sub-clauses in Section 13 intended to truncate the civil servant's tenure, without issuing show-cause, the right to a hearing, or even an "enquiry or reasons for the finding of public interest."[13] The third clause stipulated sixty years to be the ordinary age of retirement for civil servants.[14] The juxtaposition in the impact of both these aspects was the central point of controversy in this case.

The decision went on to rely on an earlier case, in which the Supreme Court had mandated the FSC to rely on both the Quran and Sunnah to ascertain the validity of laws.[15] It was elaborated that while examining a provision for its consistency with Islamic

[8] Moeen H. Cheema, 'Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law' (2012) 60(4) *American Journal of Comparative Law* 875, 906-907.
[9] *Ibid* (n 4).
[10] *Re: The Civil Servants Act (LXXI of 1973)* PLD 1984 FSC 34.
[11] L.A. Times Archives, 'Zia to Revive, Change 1973 Pakistan Constitution' *Los Angeles Times, (*1985) <https://www.latimes.com/archives/la-xpm-1985-03-03-mn-32770-story.html> accessed: 21 September 2021.
[12] Farishta v Federation of Pakistan PLD 1980 Peshawar 47.
[13] *Ibid* (n 4).
[14] Ibid.
[15] *Pakistan v Public at Large* PLD 1986 SC 240.

injunctions: first, the FSC had to highlight the relevant text from the Quran and/or Sunnah; second, if the precise text was not available, certain deductive principles from the *Sharia* could be sought to determine repugnancy.[16] The latter could be done through the various tools of interpretation: *Isthisan, Istidlal, Ijtihad, Ijma,* and *Qiyas.*

Once a principle had been derived, the impugned provision was to be analysed for its consonance with the established principle "on the touchstone of Islamic injunctions."[17] However, in the instant case, it was stressed that although the provisions of CSA directly found their basis in the Islamic text, the principles and deductions from other injunctions also needed to be considered for validity.

Justice Zullah delineated that in the contentious provision before him, there was an element of deliberate and premature retirement when a civil servant was precluded from completing his or her service until the stipulated age of sixty.[18] This resulted in the deprivation of one's right to work. It also exposed the individual to societal stigma whereby their dismissal was associated with some disgraceful situation, even if they had been removed without fault.[19]

Accordingly, the SAB referred to verse 93 of Surah 10 of the Qur'an: "Nor repulse the petitioner (unheard)."[20] It was acknowledged that this verse was generally interpreted to emphasise on being charitable;[21] however, the underlying reasoning was extended to confer a right to human dignity as well.[22] Perhaps the idea was that a person should not simply be turned away without first being given a chance to state their side of the story – much like one asking for charitable aid. In fact, the sudden removal of a civil servant on the basis of "public interest" without affording them the chance to be heard resulted in implications that would necessarily besmirch their reputation in society.[23]

Several provisions of the Qur'an and Sunnah were laid out to denote that protection of honour and reputation were inviolable rights in Islam. For instance, verse 70 of Surah 17 were brought to light, which stated:

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[16] Ibid.
[17] Ibid.
[18] Civil Servants Act, sSection 13.
[19] *Ibid* (n 4).
[20] Ibid.
[21] For context, other translations include: 'And as for the petitioner, do not repel [him]' (Sahih International), and 'Therefor[e] the beggar drive not away' (Muhammad Sarwar). <https://corpus.quran.com/translation.jsp?chapter=93&verse=10>
[22] Ibid.
[23] Ibid.

> [N]ow, indeed, we have conferred dignity on the children of Adam, and borne them over land and sea, and provided for them sustenance out of the good things of life, and favoured them far above most of Our creation. [24]

By placing reliance on such verses directly from the Quran, the judgment sought to strengthen its reasoning that these rights formed the essence of Islam and thus could not be negated.

Similarly, the aspect of due process has been heavily emphasized by Justice Zullah through numerous other injunctions of Islam.[25] These injunctions were derived from various commentaries and direct verses of the Quran, along with several illustrative cases decided by the Prophet (PBUH). Sunnah was directly interpreted to signify upon the principle of justice that is found to be in the spirit of Islam. [26] The arbitrary provisions in the Act were thus judged in accordance with the aforementioned "touchstone of Islamic injunctions."[27]

Additionally, it was reiterated that in interpreting Islamic injunctions, Quranic verses and Sunnah were meant to complement each other.[28] The SAB, therefore, delved into an abundance of examples from Islam, drawing heavily from juristic deduction and applying what it considered to be the "philosophy underlying Allah's justice."[29] The Court noted instances from the Quran – deducing from the examples of Hazrat Adam and Hazrat Dawood – and propounded that even on the Day of Judgment, man would be made aware of the accusations against them, offering them the opportunity to explain and make a plea of guilt or denial.[30] This example was rather compelling in response to the Government's argument that it should be exempted from the ordinary rules of justice as it represented Allah.

The SAB cited *Asma Jilani v The Government of the Punjab,*[31] wherein it was held that as sovereign representatives of the citizens, the government remains subject to the "law" and principles of justice.[32] In defining the meaning of "law", the SAB stated that

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[24] Ibid.
[25] Ibid: the SAB quoted from *Maqalat-e-Seerat (Part-I)* 9th National Seerat Conference 1984 and from the *Commentary of the Holy Qur'an* by A. Yusuf Ali, (S. 16 V-19) Note 21.
[26] Ibid.
[27] Ibid: After assessing the contents of the impugned Section 13, Justice Zullah proposed that: "The question arises whether such law is valid on the touchstone of the Islamic injunctions."
[28] Ibid: SAB relied on *Pakistan v Public at Large* (n 15) to assert that Quran and Sunnah were to be read together and consistently to bring forth Islamic injunctions.
[29] Ibid.
[30] Ibid.
[31] *Asma Jilani v The Government of the Punjab* PLD 1972 SC 139, 182.
[32] Ibid.

this had a "divine origin" as is found in Islam.[33] Accordingly, it was found that individual rights prevailed over public interest in Islam. Public interest is thus intertwined with discharging a duty of public trust, on behalf of the Government.

Furthermore, contrary to the Government's contention that it had a consensual contractual relationship with civil servants, the SAB suggested that in issuing retirements based on "public interest" there was no relevance of consent.[34] Such retirements had to be made on factual determinations and protecting civil servants against such arbitrary concerns was in line with Islam.[35] Justice Zullah further rejected the Government's reference to a master-servant relationship and the analogy to a husband pronouncing *talaq* without justifiable cause.[36] Firstly, these inferences could easily be distinguished from the case at hand: the present case concerned a public matter as opposed to a private interest. Secondly, if some similarities were to be drawn, even matters of unjust pronouncements of *talaq* were frowned upon. [37] Hence, arbitrary treatment was unacceptable in any event.

By laying out these arguments in conjuncture with the meticulously derived Islamic injunctions, the SAB held the provision in question – concerning removal of civil servants, without reason and without a chance of hearing – to be repugnant. It was ordered that minimum safeguards were to be provided through the issuance of show-cause notices, the affording of responding opportunities, or by making special provisions for permissible exceptional cases.[38] Similarly, this decision was also deemed applicable to Cantonment employees, invoking the importance of equal treatment and protection across the board – a striking aspect in itself.

Background and Prior Law

Just like most other laws and systems of Pakistan, the bureaucratic structure of civil services was also inherited from the colonial period. The influence of powerful civil and military bureaucratic dynamics has caused considerable political instability since Pakistan's inception.[39] Though there have been efforts to reform the structure, these have been slow and ineffective, while repeatedly being overshadowed by those in control.[40]

[33] Ibid 235.
[34] *Ibid* (n 4).
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Andrew Wilder, 'The Politics of Civil Service Reform in Pakistan', (2009) *Journal of International Affairs* 63(1) in *Pakistan & Afghanistan: Domestic Pressures and Regional Threats* (2009) 19-37, 20.
[40] Ibid.

The civil services of Pakistan thrived most during the "political vacuum" that followed the decade of 1948-1958: seven fragments of political parties struggled as the country saw nine unstable governments in the next few years.[41] Thereafter, the bureaucracy went through several periods of power struggle, each period affected by the political and military stakeholders of the time.

When General Ayub Khan seized the presidency from Iskander Mirza through a coup in 1958, he was quick to place his military officers in key civilian positions.[42] During this regime, the administration was proving to function without the civil bureaucracy's interference. Apprehending complete exclusion from the state's affairs, the bureaucracy allied itself with the military power to survive.[43] The civil servants temporarily accepted their new roles, and while their cooperation with the military made state functioning easier, it also paved the way back for the civil bureaucracy's influence.[44] After taking ample measures to remain extant, by 1962 the civil services of Pakistan had reinstated its place as an integral and elite state functionary.[45]

In 1971, after coming to power Prime Minister Zulfiqar Ali Bhutto promised to weaken the bureaucracy by giving elected representatives the power to regulate unelected representatives, thus causing the services' politicisation.[46] Within three months of taking control, Bhutto compulsorily retired 1,300 civil servants and then imposed extensive administrative reforms hoping to leave the elite state functionary enervated.[47] The Civil Servants Ordinance of 1973 ("CSO") was aimed at regulating the appointment of civil servants and removing the previous Constitutional protections against compulsory retirements, reduction of ranks and dismissals.[48] Through this law, Bhutto introduced a policy of "lateral recruitment."[49] Close relatives and associates of the new Prime Minister were then appointed to take over the services.[50]

Thereafter, the civil services went through a further phase of militarisation under Zia's regime, which prioritised military control over the civil bureaucracy.[51] Resultantly,

[41] Shahid J. Burki, 'Twenty Years of the Civil Service of Pakistan: A Reevaluation' (1969) University of California Press. 9(4) 239-254, 243.
[42] Ibid 247
[43] Ibid 248.
[44] Ibid.
[45] Ibid 251.
[46] Wilder (n 39) 21-23.
[47] Ibid 22.
[48] Found in the interim Constitutions of 1956, 1962, and 1972.
[49] Wilder (n 39) 22.
[50] Ibid.
[51] Ibid 23-25.

it is not surprising that those in power and those representing the state have heavily influenced the structure of civil services. It is significant to underline that the state controllers' measures were mainly focused on circumscribing the independence of the civil bureaucracy by reforming aspects of appointments, postings, tenure, retirement, and pensions.

The bureaucratic institution is heavily influenced by the political powers in play and this is precisely where the role of the judiciary becomes imperative. As noted earlier, *Pakistan v Public at Large* results from an appeal against one of the FSC's earlier judgments in *Re: The Civil Servants Act (LXXI of 1973).*[52] Similar to Justice Zullah, on behalf of the FSC, Chief Justice Aftab Hussain had laid out that Sections 13(i) and 13(ii) of the CSA were arbitrary and against the principles of *Sharia* with regards to equality and protection under the law.[53]

Interestingly, however, Chief Justice Hussain opined by first discussing the elevated treatment of civil servants and the protection they were owed in the *Sharia*.[54] He referred to the following tradition:

> [T]hey (your bond-men or servants) are your brothers. God has assigned them to your control. So, whoever has his brother under his control shall feed him from what he himself partakes and clothe him with what he himself wears and shall not impose on him a task harder than him (he can himself perform). If you impose such work on him, help him also in doing it.[55]

This reference is noticeable in the way it is interpreted to highlight the protection of bureaucratic employees in the name of public interest.

It was further propounded that such discretionary treatment of civil servants was blatantly against the express injunctions of Islam, which could not be interpreted as empowering a head of state to such unquestionable extents.[56] Chief Justice Hussain's opinion has much to do with accentuating the stature of bureaucratic employees and denoting their sheer importance. Therefore, while the significance ascribed to respecting equality before the law – as voiced through *Sharia* – is a characteristic shared by both

[52] *Ibid Act* (n 10).
[53] Ibid.
[54] Ibid.
[55] Ibid: FSC cited Bukhari (Urdu translation) Volume I, page 98.
[56] Ibid.

decisions,[57] a subtle difference can be drawn in the approach taken by both courts. The SAB denotes an implication for protection offered to a much broader range of employees.

Moreover, the Punjab Civil Servants Act of 1947[58] contained provisions similar to the CSA. The FSC reaffirmed its previous decision to declare these invalid as well.[59] Additionally, the FSC established that the test for categorizing employees requires a "reasonable classification" based on "intelligibility" that relates to the "object and purpose" of the legislation.[60] upholding this test, the SAB also noted that premature retirements were violative of the injunctions of Islam, when done so without due notice of action or without the opportunity of show cause against such action.[61]

In this sense, the Shariat Courts have reiterated the role of preserving the rights of civil servants while aiming to implement due process and a right to be heard. However, the SAB's approach in the use of the Quran and Sunnah in this instance may be independent of the precise traditions of jurisprudence and legal interpretation. Here, *Sharia* may have become integral simply to impose broad protection of a seemingly integral state institution with the underlying idea of emphasizing the SAB's role in public interest.

Analysis

As noted earlier, the SAB's holding in this case was similar to the one previously determined by the FSC.[62] However, in contrast to the later judgment, the prior decision seems to highlight additional aspects on limiting the Government's influence and strengthening the bureaucracy's independence and stature. On the other hand, while agreeing with the FSC's equality-based reasoning, the SAB went further to highlight the elements of "natural justice" and declared *Adl, Qist,* and *Ihsan* to be "components of complete justice in Islam."[63] This not only reflects equal treatment and protection against arbitrariness, but also indicates that such rights cannot simply be discarded at the discretion of the state or its dominant ruler.

[57] Ibid (n 10); and *Pakistan and others* (n 4).
[58] Punjab Civil Servants Act 1947, s 12.
[59] *Muhammad Ramzan Qureshi v Federal Government* PLD 1986 FSC 200.
[60] Ibid.
[61] Ibid (n 4).
[62] Ibid (n 10).
[63] Marin Lau, 'The Role of Islam in the Legal System of Pakistan' (Martinus Nijhoff Publishers 2006) 183 ["Lau"]: he highlights the Shariat Court's attempt at propounding on human rights and equality through such decisions); Ibid (n 4).

Martin Lau argues that the issue in both these cases was less about the right to equality and more about circumscribing the discretionary powers of the government.[64] He does, however, recognise that such cases illustrate how "the Islamic review of legislation could incorporate a constitutionally guaranteed fundamental right."[65]

Moreover, the FSC and SAB's later judgments can help refute the aforementioned argument made by Lau regarding the limited concern for the right to equality compared to controlling governmental influence. These judgments effectively demonstrated the Courts' inclination towards protecting civil servants and other types of employees when there was no military governance to fight against.

In the case of *Pakistan v Public at Large*,[66] the SAB was asked to review the FSC's decision which held a provision of the West Pakistan Water and Power Development Authority (WAPDA) Act, 1958 to be repugnant to Islamic injunctions. [67] The impugned provision laid out grounds for the removal of WAPDA employees at the hands of the Government, but did not provide for the issuance of a show-cause and subsequent hearing.[68] The SAB reiterated its 1987 decision to emphasize that the disclosure of any grounds for removal via show-cause notice was necessary to be in line with Islamic injunctions.[69] In this case, the SAB extended the right to be heard to employees of a semi-autonomous public authority and offered protection against the chairman of WAPDA, even after the military regime had ended.

Even in recent years, it seems that the FSC has leaned towards providing civil servants a generous level of protection. For instance, in the case of *Professor Kazim Hussain v Government of Pakistan*, the FSC stressed upon the equal treatment of the civil servants, specifically in the context of their benefits.[70] In this case, it was stated that even if two civil servants were married to each other, they would be given separate house-rent allowances in their individual capacities, as any other arrangement would be discriminatory.[71] This decision directly considered the question of equal treatment regardless of gender and guaranteed equal benefits to a female civil servant separate from her marriage to another civil servant.

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[64] Ibid 178-179; Ibid (n 4); *Re:* Ibid (n 10).
[65] Lau (n 63) 178-179.
[66] *Pakistan v Public at Large* 1989 SCMR 1690.
[67] Ibid; West Pakistan Water and Power Development Authority Act (XXXI of 1958), s 6.
[68] Ibid (n 66).
[69] Ibid [4].
[70] *Professor Kazim Hussain v Government of Pakistan* PLD 2013 FSC 18.
[71] Ibid (24).

More importantly, arguments for invoking "*Maslaha* in the context of *Maqasid al Sharia* [objectives of Sharia]" further support the progressive approach that serves to implement human rights principles.[72] This is evident from Justice Afzal acknowledging the "importance of the Supreme Court's previously approved "Rules of *Maslaha* and *Urf* amongst others."[73] *Maslaha* refers to the purpose of law, literally translated as "a cause or source of something good," and *Urf* generally refers to established principles or customs.[74] In this particular case, these rules were not applied because the issue was easily resolved by a direct reliance on the Quran and Sunnah.[75]

While such judgments can be praised for setting progressive trends, there is are concerns against the arbitrary overuse of *Sharia* and Islamic sources, which may result in vague interpretations. For instance, it has been noted that the FSC "often struggles to evolve a coherent and comprehensive framework for determining the 'injunctions of Islam,'" and the various conflicting judgments highlight inconsistencies in the use of jurisprudential traditions and legal interpretation.[76]

Conclusion

The irony of this judgment is worth noting: in hopes of carrying out an extensive Islamisation of laws in Pakistan in 1980, Zia established the FSC. Consequently, the same Court was intent on challenging his state of control. Moeen Cheema rightly asserts that the SAB's decision of 1987 is imperative for its firm stand against the suppression of fundamental rights and arbitrariness under the prevailing military regime.[77] He states:

> Shariat courts began to fill the vacuum even at that early stage and advanced a jurisprudence of Islamic rights, the right to hold the government and public officials accountable, the right of access to justice and an independent judiciary, the right to equality, and the establishment of due process rights.[78]

[72] Shannon Dunn, 'Islamic Law and Human Rights', *The Oxford Handbook of Islamic Law* (first published online in 2015) 9.
[73] *Pakistan* (n 4): Justice Zullah quoted from *Pakistan v Public at Large* (n 15).
[74] Felicitas Opwis, 'Maṣlaḥa in Contemporary Islamic Legal Theory.' (2005) *Islamic Law and Society* 12(2) 182–223; Ansari Yamamah, 'The Existence of Al-Urf (Social Tradition) in Islamic Law Theory' (2016) IOSR-JHSS 21(12) 43-48.
[75] Ibid.
[76] Shahbaz Ahmed Cheema, 'Non-Repugnancy Decisions of the Federal Shariat Court of Pakistan: An Analysis of Politico-legal Ramifications' *LUMS Law Journal* 2020 7(1) 48-73, 52.
[77] Moeen H. Cheema, 'Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law' (2012) 60(4) *American Journal of Comparative Law* 875, 906-907.
[78] Ibid.

Consequently, while the underlying implication might have been to challenge state power, the subsequent decisions, like the SAB's *Pakistan v Public at Large* and FSC's *Kazim Hussain v Government of Pakistan*, are a testament to the inviolability of human rights.[79] These rights can be construed through Islamic traditions, regardless of the political conditions.

However, there are several layers and connotations that can be derived from the Shariat Court's decisions on matters of civil servants. Perhaps the most crucial implication is that in certain instances, Islamic injunctions may be used to validate important principles of natural justice, like the principle '*audi alterum partem.* '[80] However, it is true that the urgency to protect the bureaucratic institution of the State is higher, and public interest is a significant factor in consideration. Nevertheless, it cannot be negated that these rights – accrued via principles of Islamic natural justice – should not be specific to a category of individuals. It is also pertinent to point out that with such a broad interpretation of Islamic traditions without following any set rules of legal interpretation in Islamic jurisprudence, an arbitrary use of *Sharia* for mere repugnancy decisions can become prevalent.

[79] *Pakistan v Public at Large* (n 66); *Professor Kazim Hussain* (n 70).
[80] Translated: "let the other side be heard as well."

The Wife's Right to Maintenance

Shahab Saqib v Sadaf Rasheed

2021 IHC 7

Muhammad Awais Alam*

Introduction

The recent judgment of the Islamabad High Court ("IHC") in *Shahab Saqib v Sadaf Rasheed*[1] marks a landmark development for women's rights in the jurisprudence of Muslim Personal Law in Pakistan. The judgment departed from the established legal position of considering the wife's right to maintenance as contingent upon various preconditions and made significant progress in re-understanding marriage as an equitable relationship for both husband and wife. By upholding the sovereignty of the legislature as well as the primacy of statutory laws, the judgment responded to the historical need to fully realize the objectives of state-led legislation for the benefit of women and helped discard the archaic colonial understanding of their rights in the sub-continent. Furthermore, it rejected the preconditions associated with the wife's right to maintenance, shed light on the actual intent of the legislature behind Section 9 of the Muslim Family Laws Ordinance 1961[2] ("MFLO"), and emphasized the role of the judiciary in relation to personal matters of faith. This case note lays down the facts and rulings of the judgment, provides a brief historical account of caselaw development related to the wife's right to maintenance, and analyses the reasoning and impact of this judgment for future jurisprudence.

Facts and Ruling

The case initially started with a family suit filed by the petitioner's wife before the Judge Family Court ("JFC"). The Family Court passed an *ex-parte* decree in favour of the petitioner's wife. The petitioner then filed an appeal against the decree before the Additional District Judge ("ADJ"). The ADJ allowed the appeal and passed the impugned judgment a few months later. The said petition came against that impugned judgment before the IHC. The petitioner pleaded before the IHC to render the judgment void due to the ADJ's inability to not remand the case to the JFC on grounds of breach of mandatory

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[1] *Shahab Saqib v Sadaf Rasheed* 2021 IHC 7.

[2] Muslim Family Laws Ordinance 1961, s 9.

procedure of due process prescribed under the West Pakistan Family Court Act 1964. The petitioner filed a writ petition against the order of the ADJ. In the order, the ADJ had upheld the *ex-parte* judgment given by the JFC and ordered the petitioner to pay monthly maintenance to his daughter, respondent No. 2., and the amount of dower to his former wife, respondent No. 1. In response to the ADJ's order, the petitioner pleaded that his wife should be disentitled from maintenance as they were separated. He also pleaded that the agreement to give his wife the amount of dower be considered a waiver of his obligation to pay maintenance. However, the respondent argued that the petitioner deliberately did not attend the proceedings and that an appeal could be considered a continuation of trial for giving a new decree. It was further contended that the petitioner was liable to pay the first half of the dower on demand and the other half was immediately payable, and that the petitioner did not deserve equitable relief because of his questionable conduct.

To deal with these issues, the Court framed the following four questions:

i- Did the impugned judgment suffer from any illegality as the ADJ did not remand the case to the JFC, and if it did, did it violate the petitioner's right to a fair trial and due process?

ii- Is the wife entitled to maintenance if she is working and not living with her husband?

iii- Did the ADJ wrongly hold that half of the dower was payable on demand?

iv- Is the petitioner entitled to discretionary equitable relief?

To address the first issue, the Court held that an appeal can now be considered an extension of the trial as far as the possibility of revelation of new facts or evidence exists.[3] It ruled that remanding the case should now be preferred in exceptional circumstances, especially when there is a possibility of "delayed justice" on one side and a threat to the due process rights of the opposing party under Article 10A of the Constitution on the other.[4] The Court ruled that they cannot give the petitioner the protection of his right to due process as he deliberately remained absent from the proceedings, and the right to due process, being relative, cannot be repeatedly ensured to one party at the expense of the other.[5] Moreover, the Court held that the petitioner could seek relief either through bringing a cross-appeal before the learned ADJ or by showing any new factual ground to make the remand of the case necessary.[6] However, since the petitioner did not take either

[3] *Shahab Saqib* (n 1).
[4] Ibid.
[5] Ibid.
[6] Ibid [9].

of these steps, the judgment passed by the ADJ did not suffer from any illegality, nor were his rights to a fair trial and due process violated under 10A.

The second issue constitutes a central part of the judgment, which the Court comprehensively adjudicated upon in light of the historical evolution of Muslim personal law, relevant caselaw, jurisprudence, and modes of statutory interpretation. First, in light of the caselaw and Quranic verses, the IHC clarified that the wife's maintenance is an obligation of the husband, which he cannot easily forego.[7] Second, according to the "unequivocal" language of Section 9 of the MFLO, the Court held that the wife is entitled to maintenance from the husband without having to fulfil any previously required preconditions.[8] The Court also noted that Section 9 simply provides that "if any husband fails to maintain his wife adequately," she can file an application for maintenance while is married. This means that in the absence of any ambiguity in the language of Section 9, the principles of Islamic Law and a personal understanding of the Quran and Sunnah cannot be "imported" to decipher its meaning.[9] As stated in Justice Benjamin N. Cardozo's principles of interpretation, "the rule that fits the case may be supplied by the Constitution or by statute. If that is so, the judge looks no further… In this sense, judge-made law is secondary and subordinate to the law that is made by legislators."[10]

Moreover, the Court held that Section 2 of the West Pakistan Muslim Personal Law (Shariat) Application Act 1962,[11] which makes the rules of Muslim Personal Law applicable only to various familial affairs, cannot be applied in maintenance cases. This is because Section 2 addresses marital issues and the word "maintenance" is not explicitly mentioned in it. According to precedent on maintenance law, the term "family relations" could not be broadly interpreted to include maintenance.[12] Hence, the IHC formed its decision based on the intent of the legislature by looking at the historical evolution of the law from the enactment of Section 488 of the Criminal Procedure Code 1898 ("CrPC"), Section 2 of the Muslim Personal Law (Shariat) Application Act 1937, and Section 9 of the MFLO, to the final revocation of Section 488 of the CrPC. The Court thus ruled that the omission of the term "maintenance" from Section 2 of the Act 1962 was intentional, which made it unnecessary to apply principles of Islamic law in interpreting the wife's entitlement to maintenance under Section 9 of the MFLO. On these grounds, it was held that "the respondent was entitled to maintenance for the entire period that she remained

[7] Ibid (14).
[8] Ibid (35).
[9] Ibid (34), (35).
[10] Ibid (23).
[11] West Pakistan Muslim Personal Law (Shariat) Application Act 1962, s 2.
[12] Ibid (16).

married to the petitioner unconditionally." There was no need to look at any preconditions before claiming the maintenance.[13]

Regarding the third issue, the IHC ruled that the ADJ rightly decreed the grant of a nondeferrable dower to respondent No.1, as the dower is a separate obligation on the husband, which he cannot bargain for the amount of maintenance he owes to his wife.[14] Therefore, it ruled that the petitioner was also obliged to pay maintenance alongside the payment of the dower.[15]

In line with this reasoning, the IHC further held on the fourth issue that the petitioner was not entitled to equitable relief given his unconscionable conduct of not giving anything in maintenance to his wife and daughter for the last thirteen years since the initial filing of the suit.[16] On these grounds, the Court eventually dismissed the petition.

Prior Caselaw

Prior caselaw on maintenance under Section 9 of the MFLO portrays an entirely different picture. The wife's right to maintenance has been construed as conditional on various factors, such as her faithfulness and obedience to the husband. Codified provisions such as Section 9 of the MFLO and Section 2 of the Act of 1962 have been continuously interpreted in light of uncodified principles of Islamic law by the Courts, keeping the wife's right to maintenance relative rather than absolute. The following caselaw gives a brief account of the evolution of preconditions that the wife had to fulfil before becoming eligible for maintenance.

Muhammad Ali v Mst. Ghulam Fatima, reported in AIR 1935 Lahore 902, is a seminal judgment dating back to the pre-partition era. The Court, in this case, held that the wife's right to maintenance was dependent on the conditions articulated under paragraph 277 of the Muhammadan Laws.[17] Paragraph 277 obliges husbands to pay maintenance to their wives if the wife meets two conditions: a) faithfulness in the marriage; and b) obedience to the husband.[18] These conditions could only be waived if their defiance is due to the husband's non-payment of dower or cruelty.[19] Otherwise, the wife had to fulfil these two conditions to seek maintenance before the court.

[13] Ibid (38).
[14] Ibid (39).
[15] Ibid.
[16] Ibid (40(.
[17] *Kashif Akram v Mst. Naila* 2011 MLD 571, (14).
[18] Sir Dinshah Fardunji Mulla, *Principles of Muhammadan Law* (Haryana, LexisNexis 2013) 351.
[19] Ibid.

Another condition of being "*nashizah*" or "rebellious" was gradually added to the two conditions mentioned above. In this regard, *Majida Khatun Bibi v Paghalu Muhammad* provides critical insight. In this case, the Court ruled that the *nashiza* woman is the one who leaves her husband's house and in doing so, she is not entitled to maintenance.[20] In addition to faithfulness and obedience, another condition related to a woman's character was constructed, and her obedience was linked with her living in her husband's house. Similarly, in another case, *Mukhtarul Hassan Siddique v Judge Family Court*, the Court defined a disobedient woman as one who is living away from her husband and the *nashizah* as one who is not only living away from her husband but also disallowing him to enter her house.[21] Hence, as the subjective interpretive project – comprising of both "uncodified personal law and constituted sources of law" – continued, the scope as well as the meaning of the preconditions associated with the maintenance kept evolving.[22]

In *Kashif Akram v Mst. Naila*, the condition of faithfulness was defined in more refined and restrictive terminologies such as "the willingness to perform conjugal rights and other marital obligations."[23] Thus, the Court held that a woman is not entitled to maintenance unless she wants to perform her conjugal rights and other marital obligations and the husband does not leave her without any lawful excuse.[24] Before the IHC judgment in *Shahab Saqib*, the jurisprudence regarding preconditions to maintenance had become significantly complex, comprising of the wife's faithfulness, obedience, and condition of living with her husband to the nature of the husband's excuse for not providing maintenance. A recent judgment from the High Court of Azad Jammu and Kashmir in *Majid Hussain v Farah Naz* encapsulates this fact. In the judgment, the Court ruled that the wife deserves maintenance only until she is faithful to her husband, lives with him, does not leave his house without lawful excuse, and is willing to perform her marital obligations[25].

Analysis

This judgment has made significant developments in various aspects regarding the subject matter, interpretation, and the purpose of pro-women legislation in Muslim Personal Law in Pakistan. First, this judgment is significant as it employs a feminist interpretation of family laws and suggests reforming the historically male-favoured rules of judicial

[20] *Majida Khatun Bibi v Paghalu Muhammad* PLD 1963 Dacca 583, 18.
[21] *Mukhtarul Hassan Siddique v Judge Family Court* 1994 CLC 1216, 8.
[22] *Shahab Saqib* (n 1) 30-32.
[23] *Kashif Akram* (n 17) 17.
[24] Ibid.
[25] *Majid Hussain v Farah Naz* 2019 MLD 1999, 10.

ruling.[26] In this regard, the judgment took a bold step forward in what has been described as the Women Protection Principle ("WPP") by Abbasi and Cheema.[27] Under this principle, courts intend to protect the interests of women whenever confusion arises around the interpretation of legal principles. This judgment made the wife's right to maintenance absolute, removing the possibility of the court passing judgments against the interests of women. Making the principle of maintenance absolute means that the only condition for the wife to get maintenance is that she should be in the marriage bond. Once proven, she can claim maintenance for the period she was married. Moreover, following the same premise, it might also potentially block the usage of common legal lacuna by the husbands of getting a decree for restitution of conjugal rights to avoid providing maintenance, especially when a claim for past maintenance is made. The right is now absolute, and a claim can now successfully be filed before the court, regardless of whether conjugal rights are restituted afterward.

Second, the literal-cum-purposive interpretation of Section 9 of the MFLO by the IHC established the objective standard for interpreting Muslim Personal Laws in the future. The Court not only interpreted the language of Section 9 literally, but also highlighted the legislative intent behind it by giving an account of the historical evolution of statutory laws regarding preconditions of maintenance. Such an articulation of the ruling gave credence to the literal interpretation by justifying it with legislative intent. It also showed a credible alternative to tone down the highly contested influence of uncodified Islamic law in the country's jurisprudence. The close-to-objective standard given by the court as a precedent is also instrumental in checking the dominance of any one school of Islamic thought in governing the legal interpretive regime and advocating for much-needed fairness for all communities based merely on the merits of the case.

Third, the ruling rightly responded to historically unmet objectives of state-led legislation behind the promulgation of the MFLO and establishment of the Family Court. The Pakistan Law Commission, which was formed in 1956 to make recommendations for the MFLO, had initially opined to give complete discretion to the court to decide upon matters of maintenance, irrespective of what any particular school of thought says.[28] Similarly, the purpose of promulgating MFLO and establishing a family court was to simplify the complex legal processes to provide speedy justice to the wife's claim to

[26] Ziba Mir-Hosseini, 'Muslim Legal Tradition and the Challenge of Gender Equality' in *Men in Charge: Rethinking Authority in Muslim Legal Tradition,* (Simon and Schuster, 2014) 43-44.
[27] Muhammad Zubair Abbasi and Shahbaz Ahmed Cheema, *Family Laws in Pakistan* (first addition, OUP 2018) 516.
[28] Barkat Ali and Muhammad Hassan, 'Law of wife's maintenance in Pakistan: Exploring the Missing Islamic Script' 22 *Research Journal Ulum-e-Islamia* 22 <https://iri.aiou.edu.pk/indexing/wp-content/uploads/2018/04/3.Dr-Barkat-Sab-Law-college.pdf> accessed 15 May 2021.

maintenance.[29] This judgment certainly meets that historical need of interpreting the wife's right to maintenance without being influenced by any one school of Islamic thought and simplifying the wife's access to maintenance by making the existence of marriage the only pre-condition. These grounds make it a landmark judgment in reenergizing the lost historical imperative made on the national level to protect and advance women's rights in Pakistani family law.

However, despite these encouraging developments, the judgment has left a few critical issues unaddressed. The first challenge arises around the understanding of marriage as a civil contract in Islam. Marriage becomes complete when an offer is accepted by one of the parties. It thereby creates mutual rights and obligations between the parties like a civil contract.[30] As is understood under contract law, such a reciprocal relationship potentially demands the performance of obligations by both parties. Under this conceptual framework, giving women the absolute right to maintenance without any requirement from them to perform their part of the marital obligations becomes challenged. The judgment does not address this fundamental aspect. Second, it is pertinent to mention that maintenance is only one of the many marital affairs upon which the intent of the legislature is clear and for which this judgment gave an objective standard of interpretation. The imperative challenge to strip Muslim Personal Laws of subjective religious influences still exists in various other areas, such as divorce, inheritance of widows, and the status of surrogates, among others, where a clear legislative intent is yet to be found.

Conclusion

The *Shahab Saqib* case makes a commendable development on the issue of maintenance under Muslim Personal Law. It removes various preconditions associated with the wife's right to maintenance by making this right absolute. It introduces an objective standard of interpreting Muslim law and presents a viable alternative to subjective interpretive modes of Islamic schools. In addition to maintenance, it also provides a good precedent for adjudication in other family matters. Moreover, it rightly gives credence to legal initiatives taken by the state to expedite the wife's access to maintenance. This case note attempts to briefly discuss the developments mentioned above in light of the historical development of law and its future implications. It helps to develop a basic understanding of the issue, which is quite instrumental in generating a meaningful discussion in the

[29] Lucy Carroll, 'Maintenance Claim and The Family Courts: The Pakistan Experience' (1991) 33(3) *Indian Law Institute* 333 <https://www.jstor.org/stable/43951371> accessed 15 May 2021.
[30] Muhammad Zubair Abbasi and Shahbaz Ahmed Cheema, 'Marriage', *Family Laws in Pakistan*, (1st edn, OUP 2018) 37.

future and suggesting viable reforms to protect women's rights under family law in Pakistan.

The Death Penalty and Mental Illness in Pakistan's Courts: A Critical Analysis

Safia Bano v Home Department, Government of Punjab

PLD 2021 SC 488

Muhammad Umer Ali Ranjha and Ariba Fatima*

Introduction

Safia Bano v Home Department, Government of Punjab is a landmark judgment delivered by the Supreme Court of Pakistan that highlights the prohibition on the execution of a death sentence of an accused suffering from a mental illness.[1] Previously, the Court did not recognize mental illness as a factor that could render the death sentence unjust. This is evident in an earlier judgment of the Supreme Court, whereby it held that schizophrenia did not constitute a "permanent mental disorder," clearing the way for the execution of a mentally ill man convicted of murder.[2]

In this unprecedented decision, the apex court ruled that where a condemned prisoner is suffering from a recognized mental disorder that impairs their ability to comprehend the rationale and reason behind their punishment, carrying out the death sentence will not meet the ends of justice. Additionally, the verdict also dictates the institution of boards of medical professionals in all provinces to ascertain the mental health of prisoners. The case note begins by tracing the facts of the case and the arguments presented by the parties, followed by the *ratio* of the decision. It then analyses the court ruling by positing two theoretical claims, which entail that such sentencing is principally unfair and ineffective. Towards the end, the entire judgment is summed up by laying out the impact of this decision within the legal framework of Pakistan.

Facts

I. Imdad Ali's Case

The defendant (Imdad Ali) was indicted by the Sessions Court for committing the murder of Hafiz Muhammad Abdullah in 2001. In response to his framing of charge, the defence

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[1] PLD 2021 SC 488.

[2] *Safia Bano v Home Department, Government of Punjab* PLD 2017 SC 18.

counsel submitted an application under Section 465 Code of Criminal Procedure 1898 ("CrPC") to determine the competence of the accused to face trial, which was dismissed by both the trial court and High Court respectively.[3] His wife, Safia Bano appeared as Defence Witness (DW) 1 and stated before the trial court that the accused occasionally talked about "supernatural beings" and "metaphysical elements," but "symptoms of abnormality" became frequent a year prior to the occurrence of the murder. Nevertheless, Imdad Ali was convicted under Section 302 Pakistan Penal Code ("PPC") and sentenced to death.[4] An appeal was filed by him which was dismissed by the High Court, reinforcing his death sentence. As soon as his black warrants were issued, his wife unsuccessfully filed a constitutional petition in the High Court and later in the Supreme Court. She then filed a Civil Review Petition[5] alongside another petition filed by Inspector General Prisons, Punjab, for review of the judgment. Additionally, a criminal review petition was also filed by the State through Prosecutor General Punjab, praying the Court to convert the death sentence to life imprisonment on account of the accused's mental illness.

II. Kaneezan Bibi's Case

Kaneezan Bibi was sentenced to death on six counts under Section 302(b) and 34[6] of PPC for committing the murder of Maryam Bibi, Aslam, Shaukat, Liaqat, Razia and Safia in 1991. Her criminal appeal was dismissed by the Lahore High Court in 1994, upholding her death sentence. In 2010, she filed in the High Court for converting her punishment to life imprisonment on the grounds of mental ailment, which was dismissed. Subsequently, her execution was stayed for three weeks by the President of Pakistan, and she was referred to the Punjab Institute of Mental Health ("PIMH"), which revealed she was suffering from schizophrenia. It is important to note that neither during the trial nor before the learned High Court on appeal was the plea of mental ailment urged on her behalf. In 2018, the Chief Justice of Pakistan took suo-moto notice of her case and ordered it to be clubbed with Imdad Ali's case.

III. Ghulam Abbas's Case

In April 2005, the defendant, Ghulam Ali, was convicted and sentenced to death by the District Court Rawalpindi under Section 302(b), 449[7] and 324[8] of the PPC for committing the murder of Wajid Ali and for carrying out a murderous assault on his wife, Mst. Saima

[3] Code of Criminal Procedure 1898, s 465.
[4] Pakistan Penal Code 1860, s 302.
[5] C.R.P No. 420 of 2016.
[6] Pakistan Penal Code 1860, s 34.
[7] Pakistan Penal Code 1860, s 449.
[8] Pakistan Penal Code 1860, s 324.

Bibi. The Lahore High Court dismissed the defendant's criminal appeal in 2010, and subsequently, the Supreme Court did the same in 2016. As a last resort, Ghulam Ali sought a review petition and mercy petition in 2018 and 2019, respectively, both of which were rejected, resulting in the issuance of his black warrants for execution.

The petitioner filed a constitutional petition under Article 184(3)[9] of the Constitution of the Islamic Republic of Pakistan ("Constitution"), challenging the execution sentence on the grounds that the accused was suffering from intellectual disability, documented history of mental illness preceding his confinement, and that he was prescribed antipsychotic medication. While entertaining the petition, the Chief Justice of Pakistan stayed Ghulam Ali's execution, and the following issues were framed:

(i) How should the trial Court deal with the plea of an accused if he/she was suffering from a mental illness at the time of the commission of the offense;

(ii) How should the trial Court deal with the plea in case the accused is mentally incapable of making his/her defence; and

(iii) whether a mentally ill prisoner should be executed?

Pleadings and Court Ruling

The learned counsel for Ghulam Ali contended that he had been suffering from cognitive and intellectual impairment,[10] which prevented him from comprehending the procedure required under law before the execution. He relied on the Prison Rules 1978[11] and submitted that the death sentence should be commuted to life imprisonment due to the mitigating factor of mental illness. In addressing the issue of mental illness, both *amicus curie* stressed upon the stigmatization of mental disorders, noting that such disorders could only be diagnosed by a highly trained and professional psychiatrist or psychologist through a rigorous process.

They further observed that the impairment of the mental functioning of a prisoner would prevent them from understanding the rationale behind their execution and they would thereby fail to act as a deterrent for society at large or serve as a vehicle of retributive justice to the aggrieved party. However, such rationale applies only in cases where it is medically proven that the accused in question is suffering from a mental illness that substantially impairs their ability to understand the nature of their sentencing.

[9] The Constitution of Islamic Republic of Pakistan 1973, Article 184(3).
[10] *American Psychiatric Association* <https://www.psychiatry.org/patients-families/intellectual-disability/what-is-intellectual-disability> accessed 10 November 2021.
[11] Rule 443, 444, 445, 453 and 455, Pakistan Prison Rules 1978.

After hearing both sides in-depth, the Court firstly went on to define 'mental illness' and acknowledged the inclusion of the terms 'mental disorder,'[12] 'mental impairment,'[13] 'severe personality disorder,'[14] 'severe mental impairment,'[15] and 'mentally disordered prisoner'[16] in the provincial legislation.[17] The Court at this point examined the definitions used in various other jurisdictions such as the United Kingdom (UK) and India. Under the legal framework of the UK, a mental disorder is defined as "*any disorder or disability of the mind*."[18] Similarly, Section 2(1) of the Indian Mental Healthcare Act 2017 defines it as:

> A substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence.[19]

To add, Section 3(1), which follows the latest edition of the International Classification of Disease (ICD) of the World Health Organization ("**WHO**"), states that:

> Mental illness shall be determined in accordance with such nationally or internationally accepted mental standards (including the latest edition of the

[12] Ibid (n 1) 29. Mental disorder means 'mental illness, including mental impairment, severe personality disorder, severe mental impairment and any other disorder or disability of mind and "mentally disordered" shall be construed accordingly and explained hereunder'.

[13] Ibid (n 1) 29. Mental Health Ordinance 2001, s 2(m)(i) states that 'mental impairment' refers to a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning and is associated with abnormally and aggressive or seriously irresponsible conduct on the part of the person concerned.

[14] Ibid (n 1) 29. A persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned.

[15] Ibid (n 1) 29. A state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of person concerned and "severely mentally impaired" shall be construed accordingly.

[16] Ibid (n 1) 29. A person who is a prisoner for whose detention in or removal to a psychiatric facility or other place of safety, an order has been made in accordance with the provisions of Section 466 or Section 471 of Code of Criminal Procedure 1898, Section 30 of the Prisoners Act 1900, Section 130 of the Pakistan Army Act 1952, Section 143 of the Pakistan Air Force Act 1953, or Section 123 of the Pakistan Navy Ordinance 1961.

[17] Punjab Mental Health (Amendment) Act 2014.

[18] Mental Health Act 2007.

[19] Indian Mental Healthcare Act 2017, section 2(1)(s).

International Classification of Disease of the World Health Organization) as may be notified by the Central Government.[20]

The aforementioned definitions from various jurisdictions reveal that the terms 'mental illness' or 'mental disorder' are interchangeably used at various instances but collectively, both are used to refer to mental ailments. Taking into account the advanced and latest editions of the definitions used worldwide, one of the objections raised by the Court was the limited scope of meaning of the terms 'mental illness' and 'mental disorder'. Hence, they observed that each province shall update the definition as part of their provincial laws to conform to the evolving list of recognised mental health disorders as set out by the WHO. Similarly, the Court directed the substitution of redundant and discriminatory terms such as 'lunatic' and 'unsound mind' with more accurate terms.

In addressing the first issue, the Court drew an analogy between the accused's state of mind at the time of the commission of the offence and their mental condition prior to the commencement of their trial. The former will be dealt with under Section 84 of the PPC, while the latter that addresses the second issue raised was held to be governed by Sections 464 and 465 of the CrPC.[21] On this point, the Court stressed that Section 84 and its interpretation under *Khizar Hayat v The State*[22] entails that the defence of insanity can only be availed by the accused if they can prove that they were labouring under such defect that prevented them from knowing the nature and the consequence of the act.[23] Similarly, the onus to prove this is on the accused.[24]

This, in turn, leads us to the second issue to assess the procedure to be followed in situations where the mental functioning of the accused impairs them from pleading their defence. The Court, on this point, laid great emphasis on Sections 464 and 465 of the CrPC, which deal with the procedure to be followed in the trial court and Court of Sessions and High Courts, respectively. On a plain reading of both these sections, one can assert that if the court is of the opinion that the accused is of unsound mind and incapable of making their defence, further proceedings shall be postponed. The two steps involved in interpreting these sections are pertinent to note here. The first is that it must appear to the court that the accused is of unsound mind, and only then the second stage would follow,

[20] Indian Mental Healthcare Act 2017, section 3(1)(s).
[21] Pakistan Penal Code 1860, s 84;
[22] *Khizar Hayat v The State* 2006 SCMR 1755.
[23] *The State v Balahari Das Sutradhar* PLD 1962 Dacca 467.
[24] *Gholam Yousaf v The Crown* PLD 1953 Lah 213, whereby the Court held that in case of pleading Section 84 Pakistan Penal Code, the onus will be on the accused suffering from the defect.

requiring the judge to make an inquiry into the matter.[25] However, the question to ask is whether a subjective criterion would be sufficient to determine the outcome of the case without seeking the opinion of a professional medical expert. In this regard, reliance was placed on a plethora of cases involving different interpretations of the aforementioned sections.

Ata Muhammad v The State involved a criminal appeal case under Section 302 PPC.[26] The Lahore High Court observed that in interpreting Sections 464 and 465 of the CrPC, the Magistrate or the court is to follow the subjective view of the situation that arises before them followed by an inquiry.[27]

The Court further observed that this obligation to make an inquiry aims to ensure that their belief must not rest on mere speculation. Rather, it must fulfil its satisfaction. In any case, if and when such inquiry concludes that the mental functioning of the accused is such that they are prevented from making their defence or understanding the nature of the act, they will be acquitted.[28] However, such satisfaction can only suffice with medical evidence at hand and by carrying out an objective assessment of the material and information placed before the court. Furthermore, such medical opinion involves the accused being examined by an expert professional medical officer in the field of mental health, that is, a psychologist. On this foundation, the Court ruled that any subjective approach taken by them has to be supplemented by evidence and inquiry.

With respect to the issue of whether the accused suffering from mental illness can be executed, the Court acknowledged that there existed no explicit provision that places any express restriction on their execution. Despite that, Rule 107[29] of the Pakistan Prisons Rules 1978 does mention unsound prisoners awaiting execution.

In light of this, the Court referred to the jurisprudential development in this area in other jurisdictions, notably the United States (U.S.) and India. Under the U.S. legal

[25] On plain reading of Section 465 Code of Criminal Procedure (CrPC), it appears that it should be adhered to if any accused, before the Court of Sessions or High Court, appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the court shall determine the *unsoundness* and *incapacity* and only if such is proved, then proceed onto holding an inquiry as held in *Raja Aurangzeb v The State* 1968 PCr.LJ 1930 and affirmed in *Wali Dad Khan v The State* PLD 2011 Lah 153, [5].
[26] *Ata Muhammad v The State* PLD 1960 Lah 111, [12].
[27] *Sher Afzal v The State* PLD 1960 Pesh 66, [4].
[28] *Abdul Wahid v The State* 1994 SCMR 1517.
[29] The Pakistan Prisons Rules 1978, Rule 107(iv):
In case where the condemned prisoner takes plea of young or old age, *unsound mind or ill-health*, two copies of the medical report by the Medical Officer, of the prison shall also be submitted, stating therein the correct age, ailment, infirmity etc. as the case may be.

framework, this contention was solved in *Ford v Wainwright*,[30] which laid out that the Eighth Amendment prohibited the state from executing a person who is insane. The rationale behind this verdict was that executing one who is declared incapable of understanding their crime would be violative of the principles of humanity and serve no retributive justice. Similarly, in *Madison v Alabama*, Justice Powell stated that the death penalty's "retributive force depends on the defendant's awareness of the penalty's existence and purpose."[31]

Indian jurisprudence in the case of *Shatrughan Chauhan v Union of India*[32] also barred the execution of an insane person and accorded them protection by virtue of Article 21 of the Indian Constitution.[33] A similar approach was followed in *X v State of Maharashtra*, whereby the principles of proportionality were discussed, and the courts reaffirmed that the defense is only applicable where the offender is substantially impaired to such extent that they are unable to understand the nature and purpose behind their sentencing.[34] Disorders such as schizophrenia and its dissociative disorders would fall under this category.[35]

Reliance was also placed on various Conventions including the International Covenant on Civil and Political Rights,[36] the Convention on Rights of Persons with Disabilities[37], and the United Nations Rules[38] and Resolutions, all of which collectively urge states not to impose the death penalty or execute a person suffering from any form of mental disorder.

With respect to Imdad Ali's case, the Court stressed that the issue of his mental health was not appreciated by both the trial court and the High Court in terms of Section 465 CrPC. The report produced by the Medical Board constituted to examine the mental health of Imdad Ali clearly stated that it was likely that his mental illness had already

[30] *Ford v Wainwright* 477 U.S. 399 (1986).
[31] *Madison v Alabama* 586 U.S. 2 (2019).
[32] *Shatrughan Chauhan v Union of India* (2014) 3 SCC 1.
[33] The Constitution of India, art 32; In *Maneka Gandhi v Union of India* AIR 1978 SC 597, the Supreme Court of India held that right to life and personal liberty of a person can be deprived by law on the condition that the procedure prescribed by law is reasonable, fair and just.
[34] *X v State of Maharashtra* (2019) 7 SCC 1; (n 22) [60].
[35] Ibid.
[36] The International Covenant on Civil and Political Rights (ICCPR) was ratified by Pakistan on 23rd June 2010. article 7 ICCPR states 'No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.'
[37] Convention on Rights of Persons with Disabilities (CRPD), art 15.
[38] Rule 109(1) United Nations Rules for the Treatment of Prisoners urges State parties that people who are diagnosed with severe mental disabilities and/or health conditions shall not be detained in prisons and must be transferred to mental health facilities as soon as possible.

started at the time of the crime, and he might have committed murder under the delusional belief of persecutions. The medical records of 2000 – prior to the date of his crime – also reveal that Imdad Ali was examined by a Medical Officer in Lahore who was also of the view that he seemed to be suffering from schizophrenia.

Taking into account the documents available on record, the Court further observed sufficient reasons to warrant the conversion of the death sentence to life imprisonment. First and foremost, the trial court failed to consider the prosecution's motive due to lack of proper assistance which automatically qualifies as a ground for review and conversion of a death sentence to life imprisonment. Secondly, since the accused had spent more than 20 years behind bars, the principle of legitimate expectancy of life allows such conversion.[39] Thus, by drawing parlance from these two reasons, his conviction remained maintained with the death sentence being formally reduced to life imprisonment.

In Kaneezan Bibi's case, the medical reports received showed no indication of any psychotic illness at the time of examination and the medical board was of the view that she was not suffering from schizophrenia at the time the offense was committed. However, the Court observed the need for a re-examination and the resulting report revealed that she had been diagnosed with a severe lifelong mental illness – schizophrenia. The Court further observed that Kaneezan Bibi was behind bars for the past 32 years which fits a case for legitimate expectancy of life. Therefore, her conviction remained maintained but death sentence on six counts was reduced to life imprisonment.

Prior Case Law

The court's observation in this judgment deeply revolves around various mental health laws, predominantly the ones relating to insanity in the legal framework of Pakistan. Therefore, it is pertinent to assess the jurisprudential development on the said subject.

Any mental disorder severe enough to prevent a person from having a legal capacity and excuse the person from criminal or civil responsibility constitutes insanity.[40] The defence of insanity was first laid in the seminal case of M'Naghten which propounded the M'Naghten rule.[41] The Court in this case acquitted Mr. M'Naghten on the grounds of insanity by laying out a criterion such that the accused must be suffering from: i) a disease of mind; and ii) a defect of reason at the time of the commission of offence.[42] In addition, the Durham Rule extended the scope of the defence of insanity by adding that the accused

[39] *Sikandar Hayat v State* PLD 2020 SC 559.
[40] Black's Law Dictionary.
[41] *R v M'Naghten* (1843) 8 E. R. 718; (1843) 10 Cl. & F. 200.
[42] Ibid.

could not be convicted if it is proved that while committing the unlawful act, they were suffering from a mental disease or mental defect.[43]

Under the legal framework of Pakistan, insanity finds it place under Section 84 PPC.[44] In *Hafizan v Wali Muhammad*, the Supreme Court of Pakistan upheld the verdict of the High Court which reduced the death sentence of Wali Muhammad to transportation of life on grounds of suffering from schizophrenia a year prior to the date of occurrence of his crime.[45] Similarly, in *Muhammad Iqbal v State,* the defendant was convicted for the murder of his wife and sentenced to death.[46] In defence, the learned counsel argued that he was suffering from schizophrenia and was administered electric shock treatment to calm him down. The Court quashed his conviction by placing reliance on the case of *Abdullah v State* which held:

> [I]f the accused is able to prove substantial impairment to his mental responsibility due to even partial or border line insanity so as to affect his knowledge as provided in section 84 P.P.C. he would tie entitled to a favourable verdict on the plea of insanity. As to how he is to establish the above requirement, the answer is that the fact need not be proved as scientifically certain but can be established on the balance of probabilities and on proper resolution of doubts.[47]

The plethora of cases cited take the view of the instant case in supporting the verdict and reducing the death sentence to life imprisonment on account of the accused suffering from a mental condition.

In a recent judgment, the Supreme Court of Pakistan took a different view in ascertaining whether schizophrenia could constitute a permanent mental disorder. The case involved an earlier appeal of the instant case whereby the wife of Imdad Ali, the defendant, filed an appeal requesting the court to reduce his death sentence to life imprisonment on the grounds of insanity which she pleaded before all subordinate courts. The Court first went onto describe schizophrenia and observed that it was:

> [A] severe mental disorder (or group of disorders) characterized by a disintegration of the process of thinking, of contact with reality, and of emotional

[43] *Durham v United States* 214 F.2d 862.
[44] Pakistan Penal Code 1860, s 84.
> Nothing is an offence which is done by a person who at the time of doing by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he doing what is either wrong or contrary to law"
[45] *Hafizan v Wali Muhammad* 1968 SCMR 73.
[46] *Muhammad Iqbal v State* 1985 PCRLJ 2462.
[47] Ibid [6].

> responsiveness. Delusions and hallucinations (especially of voices) are usual features, and the patient usually feels that his thoughts, sensations, and actions are controlled by, or shared with, others. He becomes socially withdrawn and loses energy and initiative.[48]

It drew parlance from the case of *Smt. Rita Roy v Sitesh Chandra* which observed that each case of schizophrenia has to be considered on its own merits.[49] The Court further illustrated that schizophrenia was not a permanent mental disorder and is recoverable by drugs, vigorous psychological and social management, and rehabilitation. For these reasons, it fails to fall within the ambit of a 'mental disorder' as defined in the Mental Health Ordinance 2001.[50] However, it is important to distinguish this case from the instant one which ruled that schizophrenia falls within the ambit of a permanent mental health disorder. In doing so, the Supreme Court of Pakistan overruled the earlier judgment. [51]

Analysis

The following analysis has two theoretical aims. Firstly, it argues that the execution of mentally ill prisoners is an ineffective and unfair tool that is retributive rather than rehabilitative in nature. Secondly, it is posited that the execution of those who are mentally ill is principally unjust, such that it should be banned irrespective of whether it can act as a successful means by which to achieve retributive justice. Such analysis is put forward in support of the Supreme Court verdict, which ultimately redefines the pre-existing legal narrative in Pakistan to one that accommodates rather than alienates those suffering from mental illnesses.

With regard to the first strand of the analysis, it is firstly necessary to clarify the aims of both retributive and rehabilitative justice. As Daly notes, retributive justice uses state power to inflict punishment on wrongdoers, primarily through imposing "censure for past offences" on convicted criminals.[52] Meanwhile, rehabilitative justice is focused on exploring how we can deter criminal acts while encouraging law-abiding acts amongst the public.[53] Ultimately, if the Supreme Court had decided in *Safia Bano v Home Department, Government of Punjab* that the death penalty should be imposed on a mentally ill prisoner, it would have endorsed a purely retributive form of justice. Under such a model, punishment is "upheld for its own sake rather than for any particular

[48] Concise Medical Dictionary (Oxford Medical Publications, 1980) 566.
[49] AIR 1982 Cal. 138.
[50] (n 2) [10].
[51] (n 1) [77].
[52] Kathleen Daly, 'Restorative versus Retributive Justice' (2002) 4(1) *Punishment and Society* Sage Publications 55.
[53] Ibid.

benefit."[54] In this case, as acknowledged by the Supreme Court, there is little to no material benefit of imposing such a harsh criminal censure on a mentally ill prisoner. The extent to which they understood why their actions were wrong was limited due to their mental illness. Hence, the ability of the death penalty to awaken their moral conscience prior to execution as to the inherent wrongness of their acts is limited. While the aforementioned analysis could potentially be used to explain the non-desirability of the death penalty itself in a wider sense, such theoretical questions are beyond the scope of this article.

However, this case note goes beyond arguing that the Supreme Court's decision was correct because a retributive justice model is purely undesirable. Even if one was to concede that there is weight to the idea that executing mentally ill prisoners may fulfil certain utilitarian goals inherent in models of retributive justice – for example, by acting as a deterrent to wider society from committing criminal acts or restoring the moral balance in the eyes of victims who were wronged – it is still principally unjust to do so. The process of criminal censure on behalf of the state is not only concerned with attempting to punish crime in a clinical sense but in ensuring that defendants have fair trials, a principle that is considered a constitutionally protected right in Pakistan.[55] It is posited that the execution of the death sentence on mentally ill prisoners infringes this right as their ability to understand the charges against them or to comprehend the moral undesirability behind their actions is limited.

In addition, it is true that "justice must not only be done, but must also be seen to be done."[56] Criminal sanction is exclusively under the authority of the state, and imposing the irreversible penalty of execution on a mentally ill prisoner would threaten the legitimacy of judicially sanctioned punishments in Pakistan. The argument here is not that courts should refrain from issuing unpopular verdicts. Rather, it is that the lack of a normative justification underpinning the execution of mentally ill prisoners could have wider implications for the rule of law in Pakistan. Therefore, the Supreme Court's verdict, in this case, is welcomed.

However, it must be noted that the current state of the law is not without its problems. The burden of proof for establishing the existence of mental illness lies on the accused, which limits their ability to convince factfinders that the defence even applies to them. This is exacerbated by the fact that mentally ill prisoners may lack the legal advice

[54] David Lyons, 'Punishment as Retribution' <http://web.uncg.edu/dcl/courses/vicecrime/pdf/m7.pdf> accessed 02 November 2021.
[55] Constitution of Islamic Republic of Pakistan 1973, Article 10-A.
[56] *Rex v Sussex Justices* [1924] 1 KB 256, Lord Hewart.

and technical knowledge to understand that they are suffering from a certain mental illness and thereby work toward proving it. Given the lack of easily accessible and affordable psychiatric help in Pakistan, defendants are at a disadvantage not due to any fault of their own but due to the inadequacy of the federal healthcare infrastructure.[57] Ultimately, it is unreasonably and extremely difficult for defendants to be able to utilise this defence, which in turn highlights a gap in the fair application of the law.

Conclusion

It is clear that the verdict has opened a new chapter of progressive jurisprudence with regard to the treatment of mentally ill prisoners. In an unprecedented step, it accords protection to one of the most marginalized and stigmatized segments of society. The decision of the Supreme Court in this case is particularly important when we view it through the paradigm of rehabilitative justice, which can be distinguished from retributive justice in that it does not aim to inflict punishment as an end in itself. Despite this optimism, we are cautious not to overstate the implications of the verdict. The burden of proof remains with the accused, thereby potentially limiting the extent to which the case paves the way for a more rehabilitative and just framework for the justice system of Pakistan. This concern is compounded by the fact that mentally ill prisoners, like many suspects who go through the criminal justice system of Pakistan, are unlikely to have the means to be able to easily access the sophisticated legal advice necessary to successfully exercise this defence. This would imbibe a certain extent of arbitrariness within the application of the law, as those who lack the legal knowledge and advice to exercise this defence will be left without redress.

[57] Editorial, 'Pakistan's mental health-care system woefully deficient' *The News International* (Islamabad, 22 October 2021) <https://www.thenews.com.pk/print/902087-pakistan-s-mental-health-care-system-woefully-deficient> accessed 8 November 2021.

Rights of the Child in Islam: Theory, Mechanisms, Practices and Convention on the Rights of the Child – A Book Review

Dr. Shahbaz Ahmad Cheema*

Introduction

The book under review is authored by Dr. Muhammad Munir, who is a Professor of Law at International Islamic University, Islamabad. It was published by the Iqbal International Institute for Research and Dialogue ("**IRD**"), hosted by the same University. The book comprises of eight chapters, in addition to a well-crafted introduction and conclusion, along with recommendations at the end. The foreword of the book is written by Justice (R) Ali Nawaz Chowhan, who is presently heading the National Commission for Human Rights in Islamabad. Like well-organised, research-oriented books published under the auspices of good quality publishers, the book has an extensive bibliography, and a short but concise index. The author's grasp over Arabic – the original source of Islamic law – is manifested in the contents and bibliography of the book. This aspect lends it an aura of authenticity.

An Overview of The Book

The introduction provides the background that necessitates bringing forth such a book. Dr. Munir is of the view that a large number of books on the subject confine themselves to the rituals carried out on the birth of the child, and do not take into account the developments made in national and international legal frameworks on the rights of children.[1] This book, however, envisions the concept of rights in line with contemporary phraseology, and emphasizes affirmative as well as protective aspects. The mere provision of some facilities is not enough to ensure children's rights. Neglect and disregard towards them should also be prevented to maintain their well-being.[2] Another significant aspect is that the book does not standardise a monolithic understanding of a child as healthy, legitimate, and brought up in a dual-parent family. It also takes into account special, illegitimate, and stepchildren while underscoring the need for the fulfilment of their rights and even-handed treatment towards them. Though the book is well connected theoretically, it can be read in a non-linear manner, as pointed out by the author.[3]

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[1] Dr Muhammad Munir, *Rights of the Child in Islam: Theory, Mechanisms, Practices and Convention on the Rights of the Child* (1st edn, IRD 2017) 3, 6.

[2] Ibid (4).

[3] Ibid (9).

Chapter One of the book evaluates the existing literature on the subject and highlights its limited and constricted scope. Contemporary terminologies such as 'rights of the child' and 'protection of the child' are conspicuously absent, particularly from books written in Arabic.[4] The author appreciates the 13th century scholar, Mahmood B. Husain Astroshni's book, and rates it as "unique" because of its coverage of all transactions involving children in addition to its explanation of the role of courts and the Islamic state on the subject.[5] Dr. Munir is critical of those authors who have exclusively confined themselves to the perspective of their school of thought, such as Abi Bakr ibn-Qaiyam al-Jawaiyah and Khalid Dhorat.[6] Furthermore, he laments those books which have not dealt with the role of Muslim states and international law on children's rights. Consequently, a comparative and comprehensive approach on such aspects is reflected in his book.

Chapter Two of the book evolves a theoretical framework for the rights of children under Islamic law. This framework is inspired from *Maqasid al-Shariah*, commonly known as objectives of Islamic law. There are five basic interests that are protected and preserved under this approach: faith, life, progeny, intellect, and property.[7] Out of these five interests, the author highlights three, that is, life, progeny, and intellect. He then constructs a framework thereon.[8] It is not clear why the other two interests, faith and property, are not considered worthy to be part of the evolved framework. Moral and religious tutelage of children is meant to protect their faith, and there are specific commandments in the Quran that deal with the management of the property of orphaned children and minors.

In the same chapter, with reference to the concept of capacity under Islamic law, Dr. Munir rightly highlights that a fetus is endowed with restricted *ahliyat al-wujub*.[9] It is this sort of limited but beneficial capacity that entitles it to various rights, such as inheritance. The book briefly explicates the Islamic perspective on abortion by pointing out that it is prohibited after the fourth month of pregnancy.[10] Considering the controversy prevailing over this issue in our age, it would have been more appropriate had this issue been analysed in detail. The author, in the context of children's rights to health, emphasizes that they should be properly immunized against contagious diseases and that negligence in this regard is equivalent to the Quranic phrase of putting one's family into

[4] Ibid (11).
[5] Ibid (12).
[6] Ibid (15), (19).
[7] Ibid (30).
[8] Ibid (32).
[9] Ibid (39).
[10] Ibid (40).

self-destruction.[11] Dr. Munir also clarifies that the notion of knowledge under Islamic law is not confined to religious learning. Instead, it "encompasses all necessary worldly knowledge with all its types and branches".[12] All-inclusive and wide-ranging articulation of the notions of health and knowledge in the backdrop of a traditional society are well-timed and judicious.

Chapter Three of the book analyses various aspects relating to the parenting of children, such as rearing, fostering, suckling, loving, and disciplining. Dr. Munir emphasizes on the adoption of a balanced approach characterized by humanistic love and care on the one hand, and on the other meant to foreclose all possible avenues of spoiling and neglecting the well-being of children. Children should have ample access to recreational activities and games.[13] The author argues that children should be given the opportunity to express their opinions on matters pertaining to them, and that their perspective should be respectfully accommodated.[14] The author has crafted a subtitle for children's right to privacy, but unfortunately has not ventured further to explicate its nature and extent under Islamic law.[15] He has also explained in this chapter the rights of orphaned, step, and illegitimate children. The most remarkable feature of this part of the book is the clarification on the notion of adoption under Islamic law.[16] In contrast to the ill-founded but widely prevalent impression that adoption is prohibited under Islamic law, Dr Munir – being informed by *fiqh* literature on foundling – argues for "a principled inclusion of at least quasi-adoptive relationship within Islamic law."[17] Furthermore, an adoptive child may be benefitted under "mandatory testamentary dispositions."[18]

Chapter Four of the book critically analyses the legitimization claims of female genital mutilation ("**FGM**") from an Islamic perspective. Dr. Munir problematizes the argument that FGM is supported by the Quran.[19] The sayings of the Prophet Muhammad, as relied upon by the proponents of FGM, are weak and spurious.[20] Additionally, the claims of there being a consensus among Muslim jurists on the matter are not substantiated as we notice a divergence of opinion among various schools of thought on FGM.[21] The author concludes that FGM is founded on bad custom or culture without any

[11] Ibid (43).
[12] Ibid (51).
[13] Ibid (81).
[14] Ibid (82-83).
[15] Ibid.
[16] Ibid (67-69).
[17] Ibid (69).
[18] Ibid.
[19] Ibid (97-98).
[20] Ibid (98-102).
[21] Ibid (102-107).

sound foundation in Islamic law.[22] Hence, considering the cruel treatment meted out by FGM to females along with its consequences on the psychological and physical health of the victims, it should be unconditionally prohibited by Muslim states.

Chapter Five of the book argues for the prevention of violence, abuse, and exploitation of children. Children should not be physically punished, blamed for their mistakes, nor be cursed and abused as there are more appropriate disciplining measures for their upbringing. Under Islamic law, juvenile offenders have been treated more compassionately than their adult counterparts and have also been protected from the infliction of any sort of harm or injury during wars.[23] Dr. Munir argues against all forms of exploitations of children, including child labour and sexual exploitation. This last argument lands him into a tricky issue regarding the age of Aisha at the time of her marriage with Prophet Muhammad.[24] He treats it as one of the greatest myths in history and debunks it by establishing that she was never nine years of age at that time. Consequently, he shatters the sole ground considered to be readily available to the supporters of child marriages from within and outside the Islamic world.

Chapter Six of the book analyses the similarities and differences between the approaches of international law and Islamic law towards the rights of children. Dr. Munir dispels the impression that international law is secular in its nature. Hence, he encourages Muslim states to engage with it.[25] He argues that Muslim states could enter any international treaty provided it satisfies two conditions: first, it is not against the interests of Muslims, and second, it is not in violation of the injunctions of Islam.[26] With particular reference to the Convention on the Rights of the Child ("**CRC**"), the author is generally appreciative of the vast domain of convergence between international law and Islamic law, for example, the principle of the best interests of the child, the recognition of *Kafala* under the CRC, the elimination of all forms of exploitation, and the rights of refugee children. However, there are some areas where Dr. Munir notes divergences between both the systems, such as the notion of illegitimacy and lineage and the rights of the fetus under Islamic law, and freedom of religion when interpreted in absolute terms under CRC. The author aptly points out that the CRC confines itself to the provision of various rights to the children, but conspicuously keeps silent on the corresponding responsibilities of the children towards their parents which have found specific mention under Islamic law.[27]

[22] Ibid (114).
[23] Ibid (130–134), (127–128).
[24] Ibid (143–147).
[25] Ibid (152).
[26] Ibid (157).
[27] Ibid (160).

Muslim states have brought many reformations, legislative and otherwise, for realising the rights of children in line with international law, but still much is needed to be done. Dr. Munir concludes that it is not only the lack of necessary resources that hinder bringing about requisite transformations at institutional and structural levels by Muslim states, but also the lack of political will.[28]

Chapter Seven of the book deals with the concept of guardianship under Islamic law which is divided into *hadanah* and *wila yah*. Dr. Munir explains that the first is basically a female-oriented function that involves nursing and caring for a child physically and emotionally, and the second is a male-oriented task that is related to taking care of the personal affairs of a child, such as education and marriage.[29] This categorization assumes the preference of one gender over another for maintaining the immediate and long-term affairs of a child. There are some tasks which could only be performed by one gender, such as suckling, but sweeping many with the same stick echoes the gendered structure of Islamic law. This chapter further elucidates the detailed rules and differences among various schools of thoughts on the custody of children, their suckling and its compensation.

Chapter Eight of the book analyses the role of Pakistan and Jordan in the protection of children. It notes that various legislative measures have been adopted in both countries with an aim to protect the rights of children. However, both have yet to evolve the "ideal legislation for child protection based on Islamic law".[30] Pakistan has not yet synchronized the age of a child up to 18 years for males and females, and its criminal laws have an even lower yardstick for culpability.[31]There are many areas in which we find apparently effective legislative arrangements for the protection of children, such as child marriage, sexual exploitation, and child labour. However, such laws are not thoroughly implemented.[32] Dr. Munir extorts the Muslim states for the enactment of suitable legislative measures for children's protection and their efficacious implementation, in addition to encouraging NGOs to extend their helping hand for training and support.[33] The last part of the book is titled, "Conclusion and Recommendations" which summarises the main findings of all the previous chapters.

[28] Ibid (166).
[29] Ibid (167).
[30] Ibid (187).
[31] Ibid (179), (182).
[32] Ibid (186).
[33] Ibid (188).

Conclusion

Dr Munir's "Rights of the Child in Islam" is a noteworthy contribution to a field of knowledge that has not attracted the level of academic attention it deserves. Hopefully, this pioneering book would encourage many to conceive academic projects in this neglected field and contribute on topics that call for more rigorously focused studies such as the illegality of abortion and the rights and status of a fetus under Islamic law.

The book under review possesses many merits. It has jolted the parent-centric approach generally followed in Muslim states for the protection and promotion of children and brought states into centre stage by highlighting their responsibilities under domestic as well as international law. Such a shift is not only required under Islamic dispensation but is warranted by its foundational sources. Furthermore, the same is in line with international law. Another noteworthy feature of the book is its demystification of adoption under Islamic law, its clarification on the actual age of Aisha at the time of her marriage with the Prophet Muhammad, and the position of Islamic law on FGM. In short, this book will find its admirers among the legal fraternity, including lawyers, judges, and students, and all those interested in the interaction of Islamic law and international law in contemporary Muslim state dispensation.